Central and East European Moot Court Competition 2012

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MOOT BUNDLE 2012

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Although the rules prevent competitors from citing authorities other than those in this bundle, should further background information be sought to prepare the case the following websites may be useful:
http://curia.europa.eu
http://www.amicuria.org

A. PRELIMINARIA

MOOT QUESTION 2012

ABDUL

Abdul was born in Syria, where as a politically active teenager he frequently took part in anti-government demonstrations and protest marches.

In January 2009, Abdul was obliged to leave Syria when his political activity started to raise the threat of reprisals due to his being targeted by the Syrian regime and went to live in Mulysa (an EU Member State located in the middle of the Mediterranean). There his family persuaded him to enter into an arranged married with Fadiyah, who is also of Syrian descent but with Mulysan nationality. Although Abdul was initially reluctant to marry in this way, both he and Fadiyah did not wish to go against their families' custom and wishes; and they duly married. In December 2009 Fadiyah gave birth to Zarif, their son, and for a while their home life seemed stable. Abdul began working in a factory on the same street as where they live and after work he spent as much time as possible with Zarif.

Abdul, however, becomes increasingly frustrated with Fadiyah's "western" political outlook and her indifference to the plight of those who live in Syria. He also remains critical of the Syrian government and continues to be actively involved in protests and demonstrations against the Syrian government. When the Arab Spring erupts and the Syrian government cracks down on political dissidents, Abdul's frustration at events in his homeland, combined with his anger at Fadiyah's political apathy, leads him to violence against her which culminates in police intervention followed by a domestic violence complaint and an order requiring Abdul to vacate the matrimonial home. At the same time Abdul is charged and convicted of the crime of assault, in respect of which he receives a fine.

Fadiyah simultaneously commences divorce proceedings against Abdul seeking sole custody of Zarif which, although bitterly contested by Abdul, she is eventually granted. Abdul is awarded weekly access rights but in view of the domestic violence concerns and Abdul's status as a foreign national, the court requires these access visits to take place under the supervision of the local social services. The social worker assigned to the case reports his satisfaction with the access visits, commenting on the very close ties that clearly exist between Abdul and his son. Abdul remains the sole provider for the family, paying child maintenance to support Fadiyah and Zarif.

In the interim, Abdul has become more actively involved as a member of the "Free Syria" group (the "FSG"), a Mulysa-based political group of ethnic Syrians who seek to encourage the overthrow of the existing Syrian government. The FSG has staged numerous protests outside the Syrian embassy in Mulysa. Abdul also acts as a spokesman for the group, participating in a number of televised interviews during which he not only calls upon the international community to support the rebel forces in Syria and to assist them in overthrowing the Syrian government but also calls upon all Mulysa-based Syrians to join the struggle for a free Syria, stating that this should be *"...by all means necessary, including armed force if required."* This last statement is particularly controversial, since it was made shortly after an FSG-organised protest which erupted into violence and multiple arrests. Abdul was not present at that protest.

The greater frequency of FSG-organised demonstrations and the regularity of Abdul's television appearances as an FSG spokesman increase his notoriety and he becomes a particularly detested opponent of the Syria government. This makes life very dangerous for his remaining family in Syria who, following encouragement from Abdul, decide to flee across the border into Turkey in January 2011. On their arrival in Turkey they are accommodated in a camp set up by a temporary UN agency (the UN Syrian Migration Unit – 'UNSMU') specifically set up to provide care for those who fled Syria during or after the Arab Spring. They then immediately contact Abdul who implores them to leave the UNSMU camp and persuades them to seek to join him in Mulysa (they duly do so – see below).

Six months later however, Abdul receives a notice from the Minister for the Mulysan Home Office (Border Agency) informing him that he is no longer eligible to remain in Mulysa and that, unless he leaves voluntarily, he will be deported within 60 days to Turkey under the terms of an agreement between Mulysa and Turkey (both being states signatory to the ECHR) that Turkey will accept, receive and assist refugees seeking asylum from the Syrian regime. Turkey has been recognised as a safe third country pursuant to Article 27 of Directive 2005/85 (minimum standards on procedures in Member States for granting and withdrawing refugee status – the 'Refugee Procedures Directive').

The reasons given by the Minister for the deportation decision are as follows:

(i) 'Following the dissolution of your marriage, you no longer have any right to stay in Mulysa. Moreover, you cannot claim any right to stay based upon Directive 2004/38 (the Citizens Rights Directive) as you are not the husband of a European citizen who has exercised her right of free movement;

(ii) 'Further or alternatively, I have concluded that you represent a genuine, present and sufficiently serious threat to Mulysa's public policy and public security. For that reason and regardless of any right to residence which he might otherwise enjoy, I am entitled to make an order for your deportation and have decided that it would be in the public interest to do so.'

The notice further informs Abdul that he has the right to appeal this decision before the Special Immigration Appeals Commission (SIAC) and that a State-funded lawyer will be provided to him for these purposes. At Abdul's suggestion, Fadiyah also consults the lawyer on behalf of Zarif and herself: she is concerned that Abdul's deportation would not only remove the family's only financial support but would also be detrimental for Zafir in that it would deprive Zarif of his father at a vital stage in his upbringing. The lawyer accordingly both a) appeals the deportation order and b) applies for an interim order to suspend enforcement of the Minister's decision, arguing that:

(i) The decision is discriminatory and contrary to the provisions of Articles 18 and/or 20 TFEU and Articles 9 and 10 of the *Charter of Fundamental Rights of the European Union* as it fails to take due account of Zarif's right to family life pursuant to Article 8 ECHR and the supporting jurisprudence of the European Court of Human Rights (in particular the case of ***Berrehab v. The Netherlands (1988)***)

(ii) The deportation of Abdul would deprive two EU citizens (Faddiyah and Zarif) of the genuine enjoyment of the substance of their EU citizenship rights, and so is contrary to Article 20 and / or Article 21 TFEU.

On his lawyer's advice, as an alternative route Abdul simultaneously lodges an application with the Mulysan Border Agency to be granted refugee status pursuant to *Directive 2004/83/EC* (minimum standards for the qualification and status of third country nationals or stateless persons as refugees (etc): the 'Refugees Directive'), on the basis that he is a Syrian national who, owing to a well-founded fear of being persecuted for reasons of political opinion or membership of a particular social group, is outside Syria and is unable or, owing to such fear, is unwilling to avail himself of the protection of Syria.

The Border Agency refuses his request for refugee status, stating that Abdul falls within the scope of *Article 12(1)(b)* of *Directive 2004/83/EC (*having been recognised as a spouse of an Mulysan national). Because he has been 'recognised by the competent authorities as having rights which are equivalent to those which are attached to the possession of [Mulysan] nationality', he is excluded from the status of refugee.

On the same day, Abdul is also advised that SIAC has upheld the deportation decision against him and has likewise upheld the order to deport him within 60 days.

Abdul now appeals to the Mulysan Court of Appeal on the grounds cited before – additionally, he argues that his case raises complex issues of EU law and that these should be referred to the Court of Justice of the European Union ('CJEU') for guidance as to their correct interpretation. The Court of Appeal decides to suspend the appeal proceedings and refer a number of questions to the CJEU under the preliminary ruling procedure contained in Article 267 TFEU.

The Mulysan government, knowing how politically sensitive these particular immigration issues are in Mulysa, is appalled at the Court of Appeal's decision. Moreover, it believes that the preliminary reference proceedings will force it to disclose detailed and confidential internal documents containing information about government policies and actions towards this particular category of migrants in order to argue its case competently before the CJEU. It knows that Abdul, as a party to the case, would have full access to its submissions and supporting material; and the government fears that these could be leaked to the media or made use of by FSG. It therefore seeks an injunction preventing Abdul from disclosing or making use of any materials to which he may be given access in the course of the Article 267 TFEU proceedings, in particular preventing his communicating or sharing any information received with the FSG or making use of it himself in his capacity as an FSG spokesman and activist.

The Court of Appeal agrees to exercise the discretion granted to it under the national Rules of Procedure and duly grants the requested injunction, basing its decision on public policy grounds, despite the energetic protest of both Abdul and his lawyer who argue that such an order is outside the powers of the national court. The Court of Appeal refuses to lift the injunction but does decide to add this issue as a further question to be referred to the CJEU.

PRELIMINARY REFERENCE: QUESTIONS RAISED BY COURT

Citizenship of the Union

1. *Is Article 20 and / or Article 21 TFEU to be interpreted as precluding a Member State from refusing to grant to a third country national – whose divorced spouse and minor children are Union citizens who have not as yet exercised rights of free movement within the European Union – residence in the Member State of residence of his divorced spouse and child, who are nationals of that Member State, where*
    a) *both the former spouse and child are financially dependent upon that third country national; and/ or*
    b) *the minor child would thereby be deprived of all contact and rights of weekly access with his father?*

2. *If either question 1 a) or b) is answered in the affirmative and a right of residence exists by virtue of European Union law, are the rights that follow subject to the principle of non-discrimination and so equated to the detailed rights set out in Directive 2004/38 (the Citizens' Rights Directive) thereby either*

   a) precluding a Member State from refusing equivalent status and rights to those available to a third country national divorced spouse of an EU citizen who has exercised rights of free movement as set out in Directive 2004/38, in particular rights of residence and continued access to his minor child (Article 13 thereof); and/ or

   b) precluding a Member State from removing that right of residence from a third country national divorced spouse save on grounds similar to those set out in Article 27 of the Citizens' Right Directive?

The Confidentiality injunction

3. *Is the national court of a Member State (which makes a preliminary reference to the Court of Justice of the European Union pursuant to Article 267 TFEU), precluded from making an order affecting the access to or use of documents disclosed to any party during the course of the reference proceedings?*

The Refugees Directive

4. *Was, or is, a person in the position of Abdul a person "recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those", so that he is excluded from refugee status by virtue of Article 12(1)(b) of Directive 2004/83 (the Refugees Directive)?*

ABDUL'S FAMILY (General)

As already indicated, Abdul's high media profile in Mulysa and his vocal criticism of the Syrian governmental regime caused his family to fear repression and to flee to Turkey where they stayed for one month under the protection of UNSMU. They found the conditions in the camp unsanitary (due to the overwhelming numbers of fleeing immigrants) and also did not feel safe so, at Abdul's suggestion, they left the camp on 10 January 2011 and applied for and were granted refugee status in Mulysa in February 2011.

At that time Mulysan domestic law (the *Refugee Act 2011*), was more generous in its definition of "refugee" than the minimum standards set by *Directive 2004/83* (or indeed by the Geneva Convention of 28 July1951 Relating to the Status of Refugees: 'the 1951 Convention'), inasmuch as it did not exclude from from its scope 'persons who are at present receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees' as permitted by *Article 12(1)(a)* of Directive 2004/83 and Article 1D of the 1951 Convention.

However, the Refugee Act 2011 contained no specific provisions concerning the granting of "subsidiary forms of protection" as mentioned in Article 2 (e) and (f) of Directive 2004/83.

Mulysa's initial response to the crisis in Syria was to grant refugee status to 100 Syrians, including Abdul's family ('the Syrian Immigrants Group'), and to issue them all with a 1-year residence permit. However, shortly afterwards, the FSG's campaign to draw the world's attention to the plight of Syria led to increased violence and arrests in Mulysa. As a result, Mulysan citizens ceased to sympathise with Syria refugees and started reacting negatively to the unrest created and the protests involving the resident Syrian population. This situation is not helped by a number of stories in the 'popular' national press which portray the newest Syrian refugees, and those Syrians previously resident in Mulysa, as a drain on the State budget; comparing them to rabbits reproducing courtesy of state benefits; itself a comment on the contrasting situation for native-born Mulysans whose birth rate is declining. The main opposition party in Mulysa begins to focus on the "overly favourable treatment of Syrian citizens at a time of economic crisis when charity should begin at home!"

With a general election looming, the "Syrian question" looks increasingly likely to have an important influence on Mulysan voters' political preferences. The Mulysan Prime Minister dismisses the Minister for Foreign Affairs, replacing him with a more ruthless colleague who promises to reverse the "softly-softly" approach of his predecessor. The government then amends the Refugee Act. The effect of that amendment is twofold: (i) the definition of those excluded from refugee status is aligned precisely with the various exclusions contained in Article 12 of the Refugees Directive (including, in particular, Article 12(1)(a)) and (ii) the earlier, more generous, definition of refugee is abolished retroactively with effect from 1 January 2011.

In June 2011 Mulysa not only applies this new, narrower, definition of refugee to new applicants but also informs the 100 persons who were earlier granted refugee status (i.e., the Syrian Immigrants Group) that their previous status is being revoked. All, including Abdul's family, are held to have voluntarily given up the protection offered by UNSMU by moving from Turkey to Mulysa and are

served with notices of deportation returning them to Turkey, which will become effective in 30 days.

The Syrian Immigrants Group appeal the decision allegedly revoking their status, arguing that

(i) Mulysa's attempt to apply a new definition of refugee retroactively is contrary to the spirit of the Geneva Convention, the Refugees Directive and general principles of EU law (such as, in particular, legitimate expectations);

(ii) some of the persons affected, including Abdul's father, have found employment during their short time in Mulysa and therefore raise no public policy concerns as to whether they are self-sufficient and able to support their dependents;

(iii) Some of the persons affected, including Abdul's father, did not (on a true interpretation of the facts) leave UNSMU protection 'voluntarily', and they should now therefore be afforded automatic refugee status in accordance with Article 12(1)(a) of the Refugees Directive;

(iv) a block deportation of this nature is contrary to the provisions of Articles 1, 4 and 18 of the *Charter of Fundamental Rights of the European Union*, as well as Article 19(1) thereof, which specifically prohibits collective expulsions.

They further argue that even if Mulysa is entitled to exclude them from the category of refugee pursuant to Article 12 (1) (a) of the Refugees Directive, they still fall within the definition of persons 'eligible for subsidiary protection' contained in Article 2(e) and (f) of that Directive; and (i) the original terms of the Refugee Act 2011 combined with (ii) the original decision by the Mulysan authorities to admit then and grant them both refugee status and a one year residence permit are express recognitions of that fact.

The Syrian Immigrants Group's case is referred to the Musylan Immigration Tribunal which, in an expedited hearing, upholds the original deportation decision. They appeal to the Mulysan Court of Appeal, which expedites the appeal and joins it to Abdul's appeal. Following legal advice and with the permission of the court, the Syrian Immigrants Group has added a claim for damages against the State to compensate them individually and collectively for the loss and distress caused.

The Mulysan Court of Appeal decides to add the following questions to those already being referred to the CJEU in Abdul's appeal:

5. Where a Member State has implemented a minimum standards directive (such as Directive 2004/83) in such a manner as to give a wider definition to the meaning of "refugee" (i.e. the Refugee Act 2011), is it precluded from amending that legislation shortly afterwards in such a manner as would narrow the scope of protection offered to the beneficiaries of such legislation albeit that, even following such amendment, the new definition of "refugee" is not more restrictive than that contained in the Directive?

6.a) If a Member State is not precluded from amending its legislation in the manner described in question 5, is it nevertheless precluded from revoking the status of refugee in respect of a person to whom that status has already been granted and to whom it has also granted a one year residence permit?
b) if the answer to question 6 is in the affirmative, is this restriction
(i) limited to the duration of the one year resident permit granted?
(ii) capable of retrospective application so as to benefit a person granted refugee status prior to the enactment of the amending legislation?
(iii) affected by the fact that the person concerned has, in the meantime, taken up employment under the terms of the resident permit granted?

7. Since the relevant Mulysan law makes no explicit reference to "subsidiary forms of protection", should the more generous definition of refugee (contained in the Refugee Act 2011 prior to amendment) be considered to encompass Mulysa's implementation of the definition of "persons eligible for subsidiary protection" contained in Articles 2(e) and (f) of Directive 2004/83; and, if so, was Mulysa's decision to grant refugee status to the applicants be treated as a recognition by the competent authorities of the Member State that such persons qualify for subsidiary protection and should not be returned to their home country if they would face a real risk of suffering serious harm as defined in Article 15 of Directive 2004/83?

8. If any/all of questions 5-7 are answered in the affirmative, does such wrongful implementation of Directive 2004/83 manifestly and gravely exceed the limits of the Member State's lawful discretion, such that it constitutes a "sufficiently serious breach" which would permit the applicants to succeed in a claim for damages against the State of Mulysa?

COMPETITION RULES 2012

1. Competition

This is the eighteenth year of this annual competition, this year to be held in Valetta, Malta.

This competition was originally designed to assist countries from the region which were associated with or trading with the European Union, to better understand its law and structure. In recognition of the enlargements in 2004 and 2007 the competition has widened its eligibility requirements. It will continue to include those countries who have joined the EU in 2004 and 2007 as well as those which are associated countries in the region of Central and Eastern Europe, but will be extended to allow entries from interested teams from Malta, Cyprus and Turkey.

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IMPORTANT: To be eligible to participate written registration and acknowledgement is required by e-mail to the British Centre on or before the 28th February 2012 and written pleadings are to be submitted by e-mail attachment on or before the 28th March 2012 (address and contact details at end)

A moot is an argument (and not a debate) between students acting as advocates representing different parties in a legal action (a case). The facts and history together with supporting material and authorities are given in advance to the students. The aim is to reproduce, as closely as possible, the discussion and argument of a genuine hearing in the Court of Justice to the European Union. The case is based upon an area of European Union Law and has been prepared by a writing committee of the organisers and external experts.

The organisers are aware that access of the competing teams to European Union law materials will vary greatly. Therefore a full bundle of supporting materials and authorities is included and encompasses all the authorities which teams are permitted to refer to in this case, to ensure that no unfair advantage is gained from those with less facilities.

2. Language

This official language of this competition shall be English

3. Participation

The competition is open to all students, nationals of Central and East European states including southern states who have applied for entry or have recently entered the EU (specifically Turkey, Cyprus and Malta) , who are enrolled on a course at a participating University and:

- are not older than 30 years
- are not practising as a lawyer and
- have not previously participated in the oral rounds of the competition.

Although it is possible for any university (with participants who are nationals from the regions mentioned) to enter more than one team (of 3-4 members accompanied by one academic/ coach) in the written round of the competition, only one team per University may be selected to proceed to the oral rounds. The choice of team will be based upon the best written pleading submitted. In cases of doubt, please e-mail the organizers directly at the address below.

4. The Case

This will be a problem based upon an area of European Union substantive and/or procedural law, containing a referral to the Court of Justice to the European Union from a Member State national court under Article 267 TFEU. Both written and oral pleadings on the part of applicant and respondent will be required from each competing team.

5. Scoring

The competition will be held over four rounds.

INITIAL ROUND

1. Submission of written pleadings

There are a maximum of 20 marks available from this round, where more than one team submits written pleadings then the team with the highest written pleading mark will be invited to participate in the oral round. Written pleadings should cover submissions on all questions unless teams are notified differently.

ORAL ROUNDS

First Round

In this round all teams will be invited to argue both the sides of the case. This will require members from the team to represent the appellant's case against another team arguing on behalf of the respondent and then represent the respondent's case against a different team arguing on behalf of the appellant. It is required that all members of the team speak as either respondent or applicant but it is not required that all members speak both as respondent and applicant during the first round. During this part of the competition, the courts will hear arguments on questions 5,6,7and 8 from those referred by the fictitious EU Member State for a ruling by the Court to the European Union under the Article 267 TFEU procedure, with the Applicant team representing Abdul and his family and the Respondents representing the State of Mulysa. Scores will be allocated at the conclusion of this round on the basis of both the written and oral pleadings.

The following scoring criteria will be applied throughout by the judges:-

Criteria	Maximum Points Awarded
Form and content of written pleadings (only in first round)	20
Style and quality of presentation in oral arguments	30
Effective and accurate use of provided materials	30
Team-work	10
Effectiveness of reply/rejoinder	20
Ability to respond effectively to judges' questions.	10
To this mark will be added the mark for the written pleadings	20

Second Round (Semi-Finals)

In this round, the best teams from the first round will be invited to plead both sides of the case against other teams. This round will focus on the remaining problem questions 1-4, referred by the fictitious EU Member State national court for ruling by the CJEU, with the Applicants representing Abdul and the Respondents representing Mulysa. Marks will be awarded for the same criteria as apply to the first round, with the exception that marks from written pleadings are no longer counted. During this round, it is necessary for all members of the team to speak both as applicant and respondent in the semi-finals.

Third Round (Final)

In the third round (final) each team will represent one side of the case (to be chosen by lot) and the judges will indicate which questions they wish to hear. Each member of the team is expected to speak in the final and so the team must be prepared to re-allocate those questions covered to ensure that each team member speaks. It is of course permissible for one member of the team to do the reply or rejoinder at this stage. The time allowed for the main argument of each party will be a maximum of 45 minutes and will not be extendable. Teams are expected at this stage to have the experience to ensure that their main arguments are fitted into the time allowed.

Three judges will sit in the first and second round. A plenary court will be convened for the final.

The decision of the judges will be conclusive in selecting the semi-finalists, finalists and eventual winning team and best speaker.
A special prize of a short stage in the CJEU at Luxembourg will be awarded to the individual deemed to be the best speaker to be selected only from persons whose teams have participated in the Second and Third Oral rounds (i.e. semi-finalists or finalists).

Individual speaker book prizes will also be awarded

Written and oral pleadings

Written pleadings

ALL participating teams must prepare written pleadings for both applicant and defendant. This should be an outline of your case for both applicant and defendant, not exceeding 10 typed sides of argument on A4 paper each for the applicant and respondent respectively (no specific requirements for font or spacing are prescribed and an attached list of authorities is not included in the 10 pages allowance). Arguments should be set out in numbered paragraphs, which should be supported and cross-referenced to a separate list of the authorities on which it is intended to rely (this may also be cross referenced to the relevant page of the bundle).

One copy of each of your written pleadings for the respondent and applicant must be submitted and received by the organisers prior to 22.00 on the 28th March 2012 and should be submitted to d.ashmore@uw.edu.pl. Due receipt of written pleadings will be confirmed by the organizers by 1st April 2012. No printed copies of the pleadings will be required.

The written pleadings should be accompanied by a completed copy of the team registration form as well as evidence of payment of the team registration fee of 150 euros.

ONLY teams lodging these pleadings in due time will be eligible to be invited to participate in the oral rounds of the competition.
In the event that more than one team sends written pleadings from one university, the team to participate will be that submitting the written pleadings awarded the highest mark.

A prize for the best written pleadings will be awarded by our main sponsors Clifford Chance.

Oral Argument

This argument need not be limited to the scope of the participant's written pleadings, but strict time limitations are to be maintained. Teams will be advised of the schedule of courts at registration on arrival in Malta.

The main argument of each party shall be presented within 20 minutes (in the final this will be 45 minutes)

The applicant then has 5 minutes to reply, but is limited in this reply to the matters raised in the defendant's oral pleadings.

The defendant then has 5 minutes to reply in rejoinder and is also limited to matters raised in the applicant's reply.

Permission must be sought of the President of the Court, if any time limit is to be exceeded. Only a further 5 minutes can be allowed at his/ her discretion.

6. Roles

Each team may have up to four members. Teams should be in a position to argue both sides and can divide in which manner they wish to achieve that either as a full group or by dividing their teams so not all members of the teams will speak on each side.

However the rules do require that the judges will have heard from each member of the team individually at least once during the first oral round of the competition.

In the second and third rounds of the competition however judges will expect to hear from each of the team members in their presentations on behalf of both the applicant and respondent.

Please note a guidance video on how to moot is available on request from the organisers with guidance tips from the CEEMC President AG Eleanor Sharpston.

7. Fees

Fees are split into two parts:-

1. A registration fee of 150 euros to be paid at the submission of the written pleadings.

This may only be paid by bank transfer, bank details are provided below.

2. Oral round participation fee of 550 euros.

Each participating team is responsible for their return travel and any administrative or visa charges to Malta (details of consulates for visa applications and teams requiring visas are available on website) and any additional costs incurred due to earlier arrival or later departures. Organisers are also happy to provide team invitations for both visa and any supporting sponsorship./ financial applications on request.

The oral round registration fee is required to participate in the first oral round in Malta.

This fee will allow the participation of a one team to include their accommodation and basic subsistence costs during the competition dates (a team may include up to 3/4 team members and one accompanying coach).

The oral round participation fee may be paid by bank transfer in which case it must be received by the organizers and confirmation of payment sent by e-mail no later than the 14th April 2012 (the original copy of the payment confirmation is to be produced at registration).

The oral round participation fee may also be paid by cash payment on the 4th May 2012 at the registration of the team in Malta.

PLEASE NOTE THAT ALL FEES DUE OR EXTRA MONIES PAYABLE MUST BE RECEIVED NO LATER THAN CLOSURE OF REGISTRATION ON 4th May 2012.

8. Bank Details

Account name:	Juris Angliae Scientia
Bank name and address:	Bank Handlowe w Warszawie S.A., Citibank, VII Oddzial w Warszawie, Ul Chalubinskiego 8, 00-950 Warsawa (Skr poczt 129) CITIPLPX
Account number:	PL58103016540000000031691028 (Euro currency)

9. Local Organiser in Malta

Name: James Bonnici
E-mail: james.bonnici@um.edu.mt

PRELIMINARY INFORMATION ON THE CJEU

The following is a short introductory guide to the role of the Court of Justice to the European Union (formerly – and still commonly – known as the European Court of Justice or ECJ) and its relationship with the national courts of the Member States.

- The CJEU's function is to rule upon the interpretation and application of the Treaties and on the interpretation, application and validity of secondary EU law. It is the supreme court on such issues, with no appeal to any higher judicial body.

- Cases may be brought directly before the CJEU on behalf of an EU institution (i.e. Commission, Council, European Parliament), by a Member State or by a national of a Member State.

- The Commission's power to bring actions against a Member State it suspects to be in breach of Community law stems from Article 258. The power of one Member State to bring an action against another Member State comes from Article 259 but such cases are rare. Institutions or Member States may also challenge secondary legislation adopted by institutions of the TFEU on the basis that it exceeds the competences granted under the treaties or fails to comply with procedural requirements thereof.

- Where an individual wishes the CJEU to rule upon a certain issue of European Union law, it is most common for such a case to begin in that person's national courts and for the national court to make an Article 267 reference to the CJEU asking for guidance on the interpretation, application or validity of an EU measure.

- The CJEU is assisted by Advocate-Generals, who produce reasoned opinions on a case before the CJEU rules on it. These opinions will discuss the applicable law and will recommend how the court should decide the case. Often these opinions are more detailed than the eventual judgment of the court. They are not binding on the CJEU but they are very influential and are often followed in practice.

- The CJEU is not bound by its own jurisprudence (case-law) and may depart from an earlier decision if it wishes. Although any court attempts to follow its earlier jurisprudence wherever possible, the CJEU has already been seen to have reversed its own jurisprudence on a number of occasions.

- National courts are bound to follow the CJEU's rulings on Union law but it is for the national court to apply that Union law to the facts of the case in front of it.

PROVISIONAL COMPETITION TIMETABLE*
[*NB. A final version of the timetable will be provided at the competition itself]

FRIDAY 4th May 2012

15.00-17.00	Registration of teams
18.00	Welcome Reception hosted by President of Malta

SATURDAY 5th May 2012

9.00	Opening words by Organising Committee and Judges

Round 1 of Competition

9.30 - 11.00	Group 1
11.15 - 12.45	Group 2
13.00 - 14.30	LUNCH
14.30-16.00	Group 3
16.00-17.30	Group 4
20.00	DINNER (Announcement of semi-finalists)

SUNDAY 6th May 2012
Round 2 of Competition

9.00 - 11.00	First semi-finals
11.15-13.15	Second semi-finals
13.30	LUNCH BREAK (Announcement of finalists)

Round 3 of Competition

15.00	FINAL
20.00	Celebration dinner
23.00	Party

MONDAY 7th May 2012
Departure of teams and time for sightseeing.

ACKNOWLEDGMENTS

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The Organising Committee also wish to offer special thanks to the Central and East European branches of Clifford Chance, the main financial sponsors of the moot court competition.

B. EU LEGISLATIVE MATERIALS
(Chronologically ordered and edited)

EXTRACTED ARTICLES FROM THE CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION (TEU)

TITLE I : COMMON PROVISIONS

Article 1 (ex Article 1 TEU)

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3 (ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Article 5 (ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

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

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

TITLE II : PROVISIONS ON DEMOCRATIC PRINCIPLES

Article 9

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 10

1. The functioning of the Union shall be founded on representative democracy.

2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union. [...]

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

TITLE V : GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION AND SPECIFIC PROVISIONS ON THE COMMON FOREIGN AND SECURITY POLICY

CHAPTER 1 : GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION

Article 21

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

(g) assist populations, countries and regions confronting natural or man-made disasters; and

(h) promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

EXTRACTED ARTICLES FROM THE CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS (1),

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,

and to this end HAVE DESIGNATED as their Plenipotentiaries:

WHO, having exchanged their full powers, found in good and due form, have agreed as follows.

TITLE I : CATEGORIES AND AREAS OF UNION COMPETENCE

Article 2

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.

4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Article 3

1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

(b) social policy, for the aspects defined in this Treaty;

(c) economic, social and territorial cohesion;

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

(f) consumer protection;

(g) transport;

(h) trans-European networks;

(i) energy;

(j) area of freedom, security and justice;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

3. The Union may take initiatives to ensure coordination of Member States' social policies.

TITLE II: PROVISIONS HAVING GENERAL APPLICATION

Article 7

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Article 8

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 9

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 15

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.

Article 16

1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

PART TWO : NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

Article 18 (ex Article 12 TEC)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 19 (ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 20 : (ex Article 17 TEC)

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

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

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

Article 21 (ex Article 18 TEC)

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

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

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

Article 22 (ex Article 19 TEC)

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 23 (ex Article 20 TEC)

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

Article 24 (ex Article 21 TEC)

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228.

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.

Article 25 (ex Article 22 TEC)

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

TITLE IV : FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1: WORKERS

Article 45 (ex Article 39 TEC)

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

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

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

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

Article 46 (ex Article 40 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

(a) by ensuring close cooperation between national employment services;

(b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

(c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;

(d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

TITLE V : AREA OF FREEDOM, SECURITY AND JUSTICE

CHAPTER 1: GENERAL PROVISIONS

Article 67 (ex Article 61 TEC and ex Article 29 TEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Article 68

The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.

Article 69

National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

Article 70

Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

Article 71

A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept informed of the proceedings.

Article 72

This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 73

It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.

Article 74

The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament.

Article 75

Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

Article 76

The acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted:

(a) on a proposal from the Commission, or

(b) on the initiative of a quarter of the Member States.

CHAPTER 2 : POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION

Article 77

1. The Union shall develop a policy with a view to:

(a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;

(b) carrying out checks on persons and efficient monitoring of the crossing of external borders;

(c) the gradual introduction of an integrated management system for external borders.

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

(a) the common policy on visas and other short-stay residence permits;

(b) the checks to which persons crossing external borders are subject;

(c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;

(d) any measure necessary for the gradual establishment of an integrated management system for external borders;

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure,

may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

Article 78

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

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

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

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

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

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

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

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

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

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

Article 79

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

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

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

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

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

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

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

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

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

Article 80

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

TITLE VI : THE UNION'S RELATIONS WITH INTERNATIONAL ORGANISATIONS AND THIRD COUNTRIES AND UNION DELEGATIONS

Article 220

1. The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development.

The Union shall also maintain such relations as are appropriate with other international organisations.

2. The High Representative of the Union for Foreign Affairs and Security Policy and the Commission shall implement this Article.

PART SIX: INSTITUTIONAL AND FINANCIAL PROVISIONS

TITLE I: INSTITUTIONAL PROVISIONS

CHAPTER 1: THE INSTITUTIONS

SECTION 5

THE COURT OF JUSTICE OF THE EUROPEAN UNION

Article 251 (ex Article 221 TEC)

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union. When provided for in the Statute, the Court of Justice may also sit as a full Court.

Article 252 (ex Article 222 TEC)

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Article 253 (ex Article 223 TEC)

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed.

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.

Article 258 (ex Article 226 TEC)

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 259 (ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Article 260 (ex Article 228 TEC)

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Article 263 (ex Article 230 TEC)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning

actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 264 (ex Article 231 TEC)

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Article 265 (ex Article 232 TEC)

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Article 266 (ex Article 233 TEC)

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

Article 267 (ex Article 234 TEC)

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

(a) the interpretation of the Treaties;

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

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 268 (ex Article 235 TEC)

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

Article 269

The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.

Article 281 (ex Article 245 TEC)

The Statute of the Court of Justice of the European Union shall be laid down in a separate Protocol.

CHAPTER 2: LEGAL ACTS OF THE UNION, ADOPTION PROCEDURES AND OTHER PROVISIONS

SECTION 1: THE LEGAL ACTS OF THE UNION

Article 288 (ex Article 249 TEC)

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

PART SEVEN GENERAL AND FINAL PROVISIONS

*Article 339 (*ex Article 287 TEC)

The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

Article 346 (ex Article 296 TEC)

1. The provisions of the Treaties shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

PROTOCOL (No 8)

RELATING TO ARTICLE 6(2) OF THE TREATY ON EUROPEAN UNION ON THE ACCESSION OF THE UNION TO THE EUROPEAN CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

THE HIGH CONTRACTING PARTIES,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;

(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

Article 2

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

Article 3

Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union.

DECLARATIONS ANNEXED TO THE FINAL ACT OF THE INTERGOVERNMENTAL CONFERENCE WHICH ADOPTED THE TREATY OF LISBON,

signed on 13 December 2007

A. DECLARATIONS CONCERNING PROVISIONS OF THE TREATIES

1. Declaration concerning the Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.

2. Declaration on Article 6(2) of the Treaty on European Union

The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION [Extracts]

(2010/C 83/02)

The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Preamble

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

TITLE I: DIGNITY

Article 1: Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2: Right to life

1. Everyone has the right to life.

2. No one shall be condemned to the death penalty, or executed.

Article 3: Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

(a) the free and informed consent of the person concerned, according to the procedures laid down by law;

(b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;

(c) the prohibition on making the human body and its parts as such a source of financial gain;

(d) the prohibition of the reproductive cloning of human beings.

Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. Trafficking in human beings is prohibited.

TITLE II: FREEDOMS

Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7: Respect for private and family life

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

Article 8: Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

Article 9: Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11: Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

Article 12: Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13: Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14: Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15: Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16: Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

Article 17: Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

Article 18: Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

Article 19: Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

TITLE III: EQUALITY

Article 20: Equality before the law

Everyone is equal before the law.

Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

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

Article 22: Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23: Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24: The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

TITLE V: CITIZENS' RIGHTS

Article 41: Right to good administration

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

2. This right includes:

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

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

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

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

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

Article 42: Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

TITLE VII: GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51: Field of application

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

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52: Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

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

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53: Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

The European Convention of Human Rights and Fundamental Freedoms (ECHR) 1950 [Extracts]

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 8 – Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 – Freedom of thought, conscience and religion

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State. [...]

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Statute of the Court of Justice of the European Union [Extracts]

THE HIGH CONTRACTING PARTIES,

DESIRING to lay down the Statute of the Court of Justice of the European Union provided for in Article 281 of the Treaty on the Functioning of the European Union,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community:

Article 1

The Court of Justice of the European Union shall be constituted and shall function in accordance with the provisions of the Treaties, of the Treaty establishing the European Atomic Energy Community (EAEC Treaty) and of this Statute.

TITLE I

JUDGES AND ADVOCATES-GENERAL

Article 2

Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

Article 3

The Judges shall be immune from legal proceedings. After they have ceased to hold office, they shall continue to enjoy immunity in respect of acts performed by them in their official capacity, including words spoken or written.

The Court of Justice, sitting as a full Court, may waive the immunity. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Where immunity has been waived and criminal proceedings are instituted against a Judge, he shall be tried, in any of the Member States, only by the court competent to judge the members of the highest national judiciary.

Articles 11 to 14 and Article 17 of the Protocol on the privileges and immunities of the European Union shall apply to the Judges, Advocates-General, Registrar and Assistant Rapporteurs of the Court of Justice of the European Union, without prejudice to the provisions relating to immunity from legal proceedings of Judges which are set out in the preceding paragraphs.

Article 4

The Judges may not hold any political or administrative office.

They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority.

When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

Any doubt on this point shall be settled by decision of the Court of Justice. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Article 5

Apart from normal replacement, or death, the duties of a Judge shall end when he resigns.

Where a Judge resigns, his letter of resignation shall be addressed to the President of the Court of Justice for transmission to the President of the Council. Upon this notification a vacancy shall arise on the bench.

Save where Article 6 applies, a Judge shall continue to hold office until his successor takes up his duties.

Article 6

A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfils the requisite conditions or meets

the obligations arising from his office. The Judge concerned shall not take part in any such deliberations. If the person concerned is a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

The Registrar of the Court shall communicate the decision of the Court to the President of the European Parliament and to the President of the Commission and shall notify it to the President of the Council.

In the case of a decision depriving a Judge of his office, a vacancy shall arise on the bench upon this latter notification.

Article 7

A Judge who is to replace a member of the Court whose term of office has not expired shall be appointed for the remainder of his predecessor's term.

Article 8

The provisions of Articles 2 to 7 shall apply to the Advocates-General.

TITLE II

ORGANISATION OF THE COURT OF JUSTICE

Article 9

When, every three years, the Judges are partially replaced, 14 and 13 Judges shall be replaced alternately.

When, every three years, the Advocates-General are partially replaced, four Advocates-General shall be replaced on each occasion.

Article 10

The Registrar shall take an oath before the Court of Justice to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court of Justice. [...]

Article 16

The Court of Justice shall form chambers consisting of three and five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

The Grand Chamber shall consist of 13 Judges. It shall be presided over by the President of the Court. The Presidents of the chambers of five Judges and other Judges appointed in accordance with the conditions laid down in the Rules of Procedure shall also form part of the Grand Chamber.

The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests.

The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union.

Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.

Article 18

No Judge or Advocate-General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.

If, for some special reason, any Judge or Advocate-General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate-General should not sit or make submissions in a particular case, he shall notify him accordingly.

Any difficulty arising as to the application of this Article shall be settled by decision of the Court of Justice.

A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.

TITLE III

PROCEDURE BEFORE THE COURT OF JUSTICE

Article 19

The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.

The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner.

Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.

Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.

As regards such advisers and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure.

University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers.

Article 20

The procedure before the Court of Justice shall consist of two parts: written and oral.

The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them.

Communications shall be made by the Registrar in the order and within the time laid down in the Rules of Procedure.

The oral procedure shall consist of the reading of the report presented by a Judge acting as Rapporteur, the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate-General, as well as the hearing, if any, of witnesses and experts.

Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.

Article 23

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority referred to in that Agreement which may, within two months of notification, where one of the fields of application of that Agreement is concerned, submit statements of case or written observations to the Court.

Where an agreement relating to a specific subject matter, concluded by the Council and one or more non-member States, provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement, the

decision of the national court or tribunal containing that question shall also be notified to the non-member States concerned. Within two months from such notification, those States may lodge at the Court statements of case or written observations.

Article 23a [*]

The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure.

Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period than that provided for by Article 23, and, in derogation from the fourth paragraph of Article 20, for the case to be determined without a submission from the Advocate General.

In addition, the urgent procedure may provide for restriction of the parties and other interested persons mentioned in Article 23, authorised to submit statements of case or written observations and, in cases of extreme urgency, for the written stage of the procedure to be omitted.

Article 24

The Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal.

The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings.

Article 25

The Court of Justice may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion.

Article 26

Witnesses may be heard under conditions laid down in the Rules of Procedure.

Article 27

With respect to defaulting witnesses the Court of Justice shall have the powers generally granted to courts and tribunals and may impose pecuniary penalties under conditions laid down in the Rules of Procedure.

Article 28

Witnesses and experts may be heard on oath taken in the form laid down in the Rules of Procedure or in the manner laid down by the law of the country of the witness or expert.

Article 29

The Court of Justice may order that a witness or expert be heard by the judicial authority of his place of permanent residence.

The order shall be sent for implementation to the competent judicial authority under conditions laid down in the Rules of Procedure. The documents drawn up in compliance with the letters rogatory shall be returned to the Court under the same conditions.

The Court shall defray the expenses, without prejudice to the right to charge them, where appropriate, to the parties.

Article 30

A Member State shall treat any violation of an oath by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the Court of Justice, the Member State concerned shall prosecute the offender before its competent court.

Article 31

The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.

Article 32

During the hearings the Court of Justice may examine the experts, the witnesses and the parties themselves. The latter, however, may address the Court of Justice only through their representatives.

Article 33

Minutes shall be made of each hearing and signed by the President and the Registrar.

Article 34

The case list shall be established by the President.

Article 35

The deliberations of the Court of Justice shall be and shall remain secret.

Article 36

Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.

Article 37

Judgments shall be signed by the President and the Registrar. They shall be read in open court.

Article 38

The Court of Justice shall adjudicate upon costs.

Article 39

The President of the Court of Justice may, by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Statute and which shall be laid down in the Rules of Procedure, adjudicate upon applications to suspend execution, as provided for in Article 278 of the Treaty on the Functioning of the European Union and Article 157 of the EAEC Treaty, or to prescribe interim measures pursuant to Article 279 of the Treaty on the Functioning of the European Union, or to suspend enforcement in accordance with the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or the third paragraph of Article 164 of the EAEC Treaty.

Should the President be prevented from attending, his place shall be taken by another Judge under conditions laid down in the Rules of Procedure.

The ruling of the President or of the Judge replacing him shall be provisional and shall in no way prejudice the decision of the Court on the substance of the case.

Article 40

Member States and institutions of the Union may intervene in cases before the Court of Justice.

The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.

Without prejudice to the second paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application of that Agreement is concerned.

An application to intervene shall be limited to supporting the form of order sought by one of the parties.

Article 41

Where the defending party, after having been duly summoned, fails to file written submissions in defence, judgment shall be given against that party by default. An objection may be lodged against the judgment within one month of it being notified. The objection shall not have the effect of staying enforcement of the judgment by default unless the Court of Justice decides otherwise.

Article 42

Member States, institutions, bodies, offices and agencies of the Union and any other natural or legal persons may, in cases and under conditions to be determined by the Rules of Procedure, institute third-party proceedings to contest a judgment rendered without their being heard, where the judgment is prejudicial to their rights.

Article 43

If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein.

Article 44

An application for revision of a judgment may be made to the Court of Justice only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision.

The revision shall be opened by a judgment of the Court expressly recording the existence of a new fact, recognising that it is of such a character as to lay the case open to revision and declaring the application admissible on this ground.

No application for revision may be made after the lapse of 10 years from the date of the judgment.

Article 45

Periods of grace based on considerations of distance shall be determined by the Rules of Procedure.

No right shall be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances or of force majeure.

Article 46

Proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union. In the latter event the proceedings must be instituted within the period of two months provided for in Article 263 of the Treaty on the Functioning of the European Union; the provisions of the second paragraph of Article 265 of the Treaty on the Functioning of the European Union shall apply where appropriate.

This Article shall also apply to proceedings against the European Central Bank regarding non-contractual liability.

Rules of Procedure of the Court of Justice [Extracts]

[...]

C h a p t e r 5: THE WORKING OF THE COURT

Article 27

1. The Court shall deliberate in closed session.

2. Only those Judges who were present at the oral proceedings and the Assistant Rapporteur, if any, entrusted with the consideration of the case may take part in the deliberations.

3. Every Judge taking part in the deliberations shall state his opinion and the reasons for it.

4. Any Judge may require that any questions be formulated in the language of his choice and communicated in writing to the Court before being put to the vote.

5. The conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court. Votes shall be cast in reverse order to the order of precedence laid down in Article 6 of these Rules.

6. Differences of view on the substance, wording or order of questions or on the interpretation of the voting shall be settled by decision of the Court.

7. Where the deliberations of the Court concern questions of its own administration, the Advocates General shall take part and have a vote. The Registrar shall be present, unless the Court decides to the contrary.

8. Where the Court sits without the Registrar being present it shall, if necessary, instruct the most junior Judge within the meaning of Article 6 of these Rules to draw up minutes. The minutes shall be signed by that Judge and by the President. [...]

C h a p t e r 7: RIGHTS AND OBLIGATIONS OF AGENTS, ADVISERS AND LAWYERS

Article 32

1. Agents, advisers and lawyers appearing before the Court or before any judicial authority to which the Court has addressed letters rogatory, shall enjoy immunity in respect of words spoken or written by them concerning the case or the parties.

2. Agents, advisers and lawyers shall enjoy the following further privileges and facilities:

(a) papers and documents relating to the proceedings shall be exempt from both search and seizure; in the event of a dispute the customs officials or police may seal those papers and documents; they shall then be immediately forwarded to the Court for inspection in the presence of the Registrar and of the person concerned;

(b) agents, advisers and lawyers shall be entitled to such allocation of foreign currency as may be necessary for the performance of their duties;

(c) agents, advisers and lawyers shall be entitled to travel in the course of duty without hindrance. [...]

Article 34

The privileges, immunities and facilities specified in Article 32 of these Rules are granted exclusively in the interests of the proper conduct of proceedings. The Court may waive the immunity where it considers that the proper conduct of proceedings will not be hindered thereby.

Article 35

1. If the Court considers that the conduct of an adviser or lawyer towards the Court, a Judge, an Advocate General or the Registrar is incompatible with the dignity of the Court or with the requirements of the proper administration of justice, or that such adviser or lawyer is using his rights for purposes other than those for which they were granted, it shall inform the person concerned. If the Court informs the competent authorities to whom the person concerned is answerable, a copy of the letter sent to those authorities shall be forwarded to the person concerned.

On the same grounds, the Court may at any time, having heard the person concerned and the Advocate General, exclude the person concerned from the proceedings by order. That order shall have immediate effect.

2. Where an adviser or lawyer is excluded from the proceedings, the proceedings shall be suspended for a period fixed by the President in order to allow the party concerned to appoint another adviser or lawyer.

3. Decisions taken under this Article may be rescinded. [...]

TITLE II: PROCEDURE

C h a p t e r 1: WRITTEN PROCEDURE

Article 37

1. The original of every pleading must be signed by the party's agent or lawyer. The original, accompanied by all annexes referred to therein, shall be lodged together with five copies for the Court and a copy for every other party to the proceedings. Copies shall be certified by the party lodging them.

2. Institutions shall in addition produce, within time-limits laid down by the Court, translations of all pleadings into the other languages provided for by Article 1 of Council Regulation No 1. The second subparagraph of paragraph 1 of this Article shall apply.

3. All pleadings shall bear a date. In the reckoning of time-limits for taking steps in proceedings, only the date of lodgment at the Registry shall be taken into account.

4. To every pleading there shall be annexed a file containing the documents relied on in support of it, together with a schedule listing them.

5. Where in view of the length of a document only extracts from it are annexed to the pleading, the whole document or a full copy of it shall be lodged at the Registry.

6. Without prejudice to the provisions of paragraphs 1 to 5, the date on which a copy of the signed original of a pleading, including the schedule of documents referred to in paragraph 4, is received at the Registry by telefax or other technical means of communication available to the Court shall be deemed to be the date of lodgment for the purposes of compliance with the time-limits for taking steps in proceedings, provided that the signed original of the pleading, accompanied by the annexes and copies referred to in the second subparagraph of paragraph 1 above, is lodged at the Registry no later than 10 days thereafter. Article 81(2) shall not be applicable to this period of 10 days.

7. Without prejudice to the first subparagraph of paragraph 1 or to paragraphs 2 to 5, the Court may by decision determine the criteria for a procedural document sent to the Registry by electronic means to be deemed to be the original of that document. That decision shall be published in the Official Journal of the European Union. [...]

Section 4 − Preparatory Measures

Article 54a

The Judge-Rapporteur and the Advocate General may request the parties to submit within a specified period all such information relating to the facts, and all such documents or other particulars, as they may consider relevant. The information and/or documents provided shall be communicated to the other parties.

ORAL PROCEDURE

Article 55

1. Subject to the priority of decisions provided for in Article 85 of these Rules, the Court shall deal with the cases before it in the order in which the preparatory inquiries in them have been completed. Where the preparatory inquiries in several cases are completed simultaneously, the order in which they are to be dealt with shall be determined by the dates of entry in the register of the applications initiating them respectively.

2. The President may in special circumstances order that a case be given priority over others.

The President may in special circumstances, after hearing the parties and the Advocate General, either on his own initiative or at the request of one of the parties, defer a case to be dealt with at a later date. On a joint application by the parties the President may order that a case be deferred.

Article 56

1. The proceedings shall be opened and directed by the President, who shall be responsible for the proper conduct of the hearing.

2. The oral proceedings in cases heard in camera shall not be published.

C h a p t e r 3 a: EXPEDITED PROCEDURES

Article 62a

1. On application by the applicant or the defendant, the President may exceptionally decide, on the basis of a recommendation by the Judge-Rapporteur and after hearing the other party and the Advocate General, that a case is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules, where the particular urgency of the case requires the Court to give its ruling with the minimum of delay.

An application for a case to be decided under an expedited procedure shall be made by a separate document lodged at the same time as the application initiating the proceedings or the defence, as the case may be.

2. Under the expedited procedure, the originating application and the defence may be supplemented by a reply and a rejoinder only if the President considers this to be necessary. An intervener may lodge a statement in intervention only if the President considers this to be necessary.

3. Once the defence has been lodged or, if the decision to adjudicate under an expedited procedure is not made until after that pleading has been lodged, once that decision has been taken, the President shall fix a date for the hearing, which shall be communicated forthwith to the parties. He may postpone the date of the hearing where the organisation of measures of inquiry or of other preparatory measures so requires. Without prejudice to Article 42, the parties may supplement their arguments and offer further evidence in the course of the oral procedure. They must, however, give reasons for the delay in offering such further evidence.

4. The Court shall give its ruling after hearing the Advocate General.

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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 12, 18, 40, 44 and 52 thereof,

Having regard to the proposal from the Commission

Having regard to the Opinion of the European Economic and Social Committee

Having regard to the Opinion of the Committee of the Regions

Acting in accordance with the procedure laid down in Article 251 of the Treaty

Whereas:

(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, and to repeal the following acts:

Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on

movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students.

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

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

(7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.

(8) With a view to facilitating the free movement of family members who are not nationals of a Member State, those who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries

whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement 1 or, where appropriate, of the applicable national legislation.

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

(11) The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.

(12) For periods of residence of longer than three months, Member States should have the possibility to require Union citizens to register with the competent authorities in the place of residence, attested by a registration certificate issued to that effect.

(13) The residence card requirement should be restricted to family members of Union citizens who are not nationals of a Member State for periods of residence of longer than three months.

(14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.

(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.

(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.

(19) Certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host Member State, should be maintained, as these constitute acquired rights, conferred by Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State 1 and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity.

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

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance

assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.

(22) The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health.

(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.

(25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.

(26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.

(27) In line with the case-law of the Court of Justice prohibiting Member States from issuing orders excluding for life persons covered by this Directive from their territory, the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three year period from enforcement of the final exclusion order, should be confirmed.

(28) To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.

(29) This Directive should not affect more favourable national provisions.

(30) With a view to examining how further to facilitate the exercise of the right of free movement and residence, a report should be prepared by the Commission in order to evaluate the opportunity to present any necessary proposals to this effect, notably on the extension of the period of residence with no conditions.

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I: General provisions

Article 1: Subject

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 2: Definitions

For the purposes of this Directive:

1) "Union citizen" means any person having the nationality of a Member State;

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3: Beneficiaries

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

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

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

CHAPTER II: Right of exit and entry

Article 4: Right of exit

1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

Article 5: Right of entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport. No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement. Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary

visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

CHAPTER III: Right of residence

Article 6: Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7: Right of residence for more than three months

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

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

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and

have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

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

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

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

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

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

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

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

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

partner.

Article 8: Administrative formalities for Union citizens

1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.

2. The deadline for registration may not be less than

three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. For the registration certificate to be issued, Member States may only require that – Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons;

– Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein;

– Union citizens to whom point (c) of Article 7(1) applies present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). Member States may not require this declaration to refer to any specific amount of resources.

4. Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

5. For the registration certificate to be issued to family members of Union citizens, who are themselves Union citizens, Member States may require the following documents to be presented:

(a) a valid identity card or passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 9: Administrative formalities for family members who are not nationals of a Member State

1. Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.

2. The deadline for submitting the residence card application may not be less than three months from the date of arrival.

3. Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory sanctions.

Article 10: Issue of residence cards

1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 11: Validity of the residence card

1. The residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years.

2. The validity of the residence card shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a

third country.

Article 12: Retention of the right of residence by family members in the event of death or departure of the Union citizen

1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State. Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

Article 13: Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4). Such family members shall retain their right of residence exclusively on personal basis.

Article 14: Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State. 4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment.

In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 15: Procedural safeguards

1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.

3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

CHAPTER IV: Right of permanent residence

Section I: Eligibility

Article 16: General rule for Union citizens and their family members

1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a

third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 17: Exemptions for persons no longer working in the host Member State and their family members

1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years. If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;

(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work.

If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;

(c) workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.

For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the host Member State.

Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.

2. The conditions as to length of residence and employment laid down in point (a) of paragraph 1 and the condition as to length of residence laid down in point (b) of paragraph 1 shall not apply if the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person.

3. Irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State on the basis of paragraph 1.

4. If, however, the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that:

(a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years; or

(b) the death resulted from an accident at work or an occupational disease; or

(c) the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person.

Article 18: Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State

Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

Section II: Administrative formalities

Article 19: Document certifying permanent residence for Union citizens

1. Upon application Member States shall issue Union citizens entitled to permanent residence, after having verified duration of residence, with a document certifying permanent residence.

2. The document certifying permanent residence shall be issued as soon as possible.

Article 20: Permanent residence card for family members who are not nationals of a Member State

1. Member States shall issue family members who are not nationals of a Member State entitled to permanent residence with a permanent residence card within six months of the submission of the application. The permanent residence card shall be renewable automatically every ten years.

2. The application for a permanent residence card shall be submitted before the residence card expires. Failure to comply with the requirement to apply for a permanent residence card may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. Interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card.

Article 21: Continuity of residence

For the purposes of this Directive, continuity of residence may be attested by any means of proof in use in the host Member State. Continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

CHAPTER V: Provisions common to the right of

residence and the right of permanent residence

Article 22: Territorial scope

The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.

Article 23: Related rights

Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.

Article 24: Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Article 25: General provisions concerning residence documents

1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.

Article 26: Checks

Member States may carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same requirement applies to their own nationals as regards their identity card.

In the event of failure to comply with this requirement, Member States may impose the same sanctions as those imposed on their own nationals for failure to carry their identity card.

CHAPTER VI: Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Article 27: General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be

made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 28: Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Article 29: Public health

1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.

3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

Article 30: Notification of decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31: Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

– where the expulsion decision is based on a previous judicial decision; or

– where the persons concerned have had previous access to judicial review; or

– where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but

they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

Article 32: Duration of exclusion orders

1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

The Member State concerned shall reach a decision on this application within six months of its submission.

2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.

Article 33: Expulsion as a penalty or legal consequence

1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.

2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

CHAPTER VII: Final provisions

Article 34: Publicity

Member States shall disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication.

Article 35: Abuse of rights

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Article 36: Sanctions

Member States shall lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of this Directive and shall take the measures required for their application. The sanctions laid down shall be effective and proportionate. Member States shall notify the Commission of these provisions not later than .....* and as promptly as possible in the case of any subsequent changes.

Article 37: More favourable national provisions

The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.

Article 38: Repeals

1. Articles 10 and 11 of Regulation (EEC) No 1612/68 shall be repealed with effect from … *.

2. Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC shall be repealed with effect from …. *.

* Two years from the date of entry into force of this Directive.

3. References made to the repealed provisions and Directives shall be construed as being made to this Directive.

Article 39: Report

No later than.....* the Commission shall submit a report on the application of this Directive to the European Parliament and the Council, together with any necessary proposals, notably on the opportunity to extend the period of time during which Union citizens and their family members may reside in the territory of the host Member State without any conditions. The Member States shall provide the Commission with the information needed to produce the report.

Article 40: Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ……**.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

* Four years from the date of entry into force of this Directive

** Two years from the date of entry into force of this Directive.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 41: Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 42: Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 29 April 2004.

For the European Parliament For the Council

The President The President

P. COX M. McDOWELL

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular points 1(c), 2(a) and 3(a) of Article 63 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Having regard to the opinion of the Committee of the Regions(4),

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951 (Geneva Convention), as supplemented by the New York Protocol of 31 January 1967 (Protocol), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.

(4) The Tampere conclusions provide that a Common European Asylum System should include, in the short term, the approximation of rules on the recognition of refugees and the content of refugee status.

(5) The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.

(6) The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.

(7) The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks.

(8) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection.

(9) Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.

(10) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

(11) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

(12) The «best interests of the child» should be a primary consideration of Member States when implementing this Directive.

(13) This Directive is without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty Establishing the European Community.

(14) The recognition of refugee status is a declaratory act.

(15) Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.

(16) Minimum standards for the definition and content of

refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.

(18) In particular, it is necessary to introduce common concepts of protection needs arising sur place; sources of harm and protection; internal protection; and persecution, including the reasons for persecution.

(19) Protection can be provided not only by the State but also by parties or organisations, including international organisations, meeting the conditions of this Directive, which control a region or a larger area within the territory of the State.

(20) It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution.

(21) It is equally necessary to introduce a common concept of the persecution ground «membership of a particular social group» .

(22) Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that «acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations» and that «knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations» .

(23) As referred to in Article 14, «status» can also include refugee status.

(24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.

(25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.

(27) Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.

(28) The notion of national security and public order also covers cases in which a third country national belongs to an association which supports international terrorism or supports such an association.

(29) While the benefits provided to family members of beneficiaries of subsidiary protection status do not necessarily have to be the same as those provided to the qualifying beneficiary, they need to be fair in comparison to those enjoyed by beneficiaries of subsidiary protection status.

(30) Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit.

(31) This Directive does not apply to financial benefits from the Member States which are granted to promote education and training.

(32) The practical difficulties encountered by beneficiaries of refugee or subsidiary protection status concerning the authentication of their foreign diplomas, certificates or other evidence of formal qualification should be taken into account.

(33) Especially to avoid social hardship, it is appropriate, for beneficiaries of refugee or subsidiary protection status, to provide without discrimination in the context of social assistance the adequate social welfare and means of subsistence.

(34) With regard to social assistance and health care, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting the benefits for beneficiaries of subsidiary protection status to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy and parental assistance, in so far as they are granted to nationals according to the legislation of the Member State concerned.

(35) Access to health care, including both physical and mental health care, should be ensured to beneficiaries of refugee or subsidiary protection status.

(36) The implementation of this Directive should be evaluated at regular intervals, taking into consideration in particular the evolution of the international obligations of Member States regarding non-refoulement, the evolution of the labour markets in the Member States as well as the development of common basic principles for integration.

(37) Since the objectives of the proposed Directive, namely to establish minimum standards for the granting of international protection to third country nationals and

stateless persons by Member States and the content of the protection granted, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(38) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom has notified, by letter of 28 January 2002 , its wish to take part in the adoption and application of this Directive.

(39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified, by letter of 13 February 2002 , its wish to take part in the adoption and application of this Directive.

(40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE,

CHAPTER I

GENERAL PROVISIONS

Article 1: Subject matter and scope

The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Article 2: Definitions

For the purposes of this Directive:

(a) «international protection» means the refugee and subsidiary protection status as defined in (d) and (f);

(b) «Geneva Convention» means the Convention relating to the status of refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967 ;

(c) «refugee» means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) «refugee status» means the recognition by a Member State of a third country national or a stateless person as a refugee;

(e) «person eligible for subsidiary protection» means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(f) «subsidiary protection status» means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection;

(g) «application for international protection» means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

(h) «family members» means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:

the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens,

the minor children of the couple referred to in the first indent or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

(i) «unaccompanied minors» means third-country nationals or stateless persons below the age of 18, who arrive on the territory of the Member States

unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;

(j) «residence permit» means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State's legislation, allowing a third country national or stateless person to reside on its territory;

(k) «country of origin» means the country or countries of nationality or, for stateless persons, of former habitual residence.

Article 3: More favourable standards

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.

CHAPTER II: ASSESSMENT OF APPLICATIONS FOR INTERNATIONAL PROTECTION

Article 4: Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.

4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his application;

(b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

(e) the general credibility of the applicant has been established.

Article 5: International protection needs arising sur place

1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.

2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

3. Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.

Article 6: Actors of persecution or serious harm

Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

Article 7: Actors of protection

1. Protection can be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.

2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia , by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts.

Article 8: Internal protection

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.

2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.

3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.

CHAPTER III: QUALIFICATION FOR BEING A REFUGEE

Article 9: Acts of persecution

1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

(f) acts of a gender-specific or child-specific nature.

3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

Article 10: Reasons for persecution

1. Member States shall take the following elements into account when assessing the reasons for persecution:

(a) the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or

mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) a group shall be considered to form a particular social group where in particular:

members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article;

(e) the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

Article 11: Cessation

1. A third country national or a stateless person shall cease to be a refugee, if he or she:

(a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or

(b) having lost his or her nationality, has voluntarily re-acquired it; or

(c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or

(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;

(f) being a stateless person with no nationality, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.

2. In considering points (e) and (f) of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

Article 12: Exclusion

1. A third country national or a stateless person is excluded from being a refugee, if:

(a) he or she falls within the scope of Article 1 D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive;

(b) he or she is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those.

2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who instigate or

otherwise participate in the commission of the crimes or acts mentioned therein.

CHAPTER IV: REFUGEE STATUS

Article 13: Granting of refugee status

Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.

Article 14: Revocation of, ending of or refusal to renew refugee status

1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with Article 11.

2. Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted refugee status, shall on an individual basis demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.

3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of refugee status.

4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.

6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Geneva Convention in so far as they are present in the Member State.

CHAPTER V: QUALIFICATION FOR SUBSIDIARY PROTECTION

Article 15: Serious harm

Serious harm consists of:

(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Article 16: Cessation

1. A third country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

2. In applying paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.

Article 17: Exclusion

1. A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious crime;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;

(d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

3. Member States may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions

resulting from these crimes.

CHAPTER VI: SUBSIDIARY PROTECTION STATUS

Article 18: Granting of subsidiary protection status

Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.

Article 19: Revocation of, ending of or refusal to renew subsidiary protection status

1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be eligible for subsidiary protection in accordance with Article 16.

2. Member States may revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if after having been granted subsidiary protection status, he or she should have been excluded from being eligible for subsidiary protection in accordance with Article 17(3).

3. Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person, if:

(a) he or she, after having been granted subsidiary protection status, should have been or is excluded from being eligible for subsidiary protection in accordance with Article 17(1) and (2);

(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of subsidiary protection status.

4. Without prejudice to the duty of the third country national or stateless person in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted the subsidiary protection status, shall on an individual basis demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection in accordance with paragraphs 1, 2 and 3 of this Article.

CHAPTER VII: CONTENT OF INTERNATIONAL PROTECTION

Article 20: General rules

1. This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.

2. This Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated.

3. When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

4. Paragraph 3 shall apply only to persons found to have special needs after an individual evaluation of their situation.

5. The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.

6. Within the limits set out by the Geneva Convention, Member States may reduce the benefits of this Chapter, granted to a refugee whose refugee status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee.

7. Within the limits set out by international obligations of Member States, Member States may reduce the benefits of this Chapter, granted to a person eligible for subsidiary protection, whose subsidiary protection status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a person eligible for subsidiary protection.

Article 21: Protection from refoulement

1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.

Article 22: Information

Member States shall provide persons recognised as being in need of international protection, as soon as possible after the respective protection status has been granted, with access to information, in a language likely to be understood by them, on the rights and obligations relating to that status.

Article 23: Maintaining family unity

1. Member States shall ensure that family unity can be maintained.

2. Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24 to 34, in accordance with national procedures and as far as it is compatible with the personal legal status of the family member.

In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.

In these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living.

3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from refugee or subsidiary protection status pursuant to Chapters III and V.

4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred therein for reasons of national security or public order.

5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of refugee or subsidiary protection status at that time.

Article 24: Residence permits

1. As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).

Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than three years and renewable.

2. As soon as possible after the status has been granted, Member States shall issue to beneficiaries of subsidiary protection status a residence permit which must be valid for at least one year and renewable, unless compelling reasons of national security or public order otherwise require.

Article 25: Travel document

1. Member States shall issue to beneficiaries of refugee status travel documents in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.

2. Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel, at least when serious humanitarian reasons arise that require their presence in another State, unless compelling reasons of national security or public order otherwise require.

Article 26: Access to employment

1. Member States shall authorise beneficiaries of refugee status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after the refugee status has been granted.

2. Member States shall ensure that activities such as employment-related education opportunities for adults, vocational training and practical workplace experience are offered to beneficiaries of refugee status, under equivalent conditions as nationals.

3. Member States shall authorise beneficiaries of subsidiary protection status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service immediately after the subsidiary protection status has been granted. The situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law. Member States shall ensure that the beneficiary of subsidiary protection status has access to a post for which the beneficiary has received an offer in accordance with national rules on prioritisation in the labour market.

4. Member States shall ensure that beneficiaries of subsidiary protection status have access to activities such as employment-related education opportunities for adults, vocational training and practical workplace experience, under conditions to be decided by the Member States.

5. The law in force in the Member States applicable to

remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.

Article 27: Access to education

1. Member States shall grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals.

2. Member States shall allow adults granted refugee or subsidiary protection status access to the general education system, further training or retraining, under the same conditions as third country nationals legally resident.

3. Member States shall ensure equal treatment between beneficiaries of refugee or subsidiary protection status and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications.

Article 28: Social welfare

1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status receive, in the Member State that has granted such statuses, the necessary social assistance, as provided to nationals of that Member State.

2. By exception to the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.

Article 29: Health care

1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to health care under the same eligibility conditions as nationals of the Member State that has granted such statuses.

2. By exception to the general rule laid down in paragraph 1, Member States may limit health care granted to beneficiaries of subsidiary protection to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.

3. Member States shall provide, under the same eligibility conditions as nationals of the Member State that has granted the status, adequate health care to beneficiaries of refugee or subsidiary protection status who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.

Article 30: Unaccompanied minors

1. As soon as possible after the granting of refugee or subsidiary protection status Member States shall take the necessary measures, to ensure the representation of unaccompanied minors by legal guardianship or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or Court order.

2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.

3. Member States shall ensure that unaccompanied minors are placed either:

(a) with adult relatives; or

(b) with a foster family; or

(c) in centres specialised in accommodation for minors; or

(d) in other accommodation suitable for minors.

In In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

5. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of the minor's family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

6. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs.

Article 31: Access to accommodation

The Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to accommodation under equivalent conditions as other third country nationals legally resident in their territories.

Article 32: Freedom of movement within the Member State

Member States shall allow freedom of movement within their territory to beneficiaries of refugee or subsidiary protection status, under the same conditions and restrictions as those provided for other third country nationals legally resident in their territories.

Article 33: Access to integration facilities

1. In order to facilitate the integration of refugees into society, Member States shall make provision for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes.

2. Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall be granted access to integration programmes.

Article 34: Repatriation

Member States may provide assistance to beneficiaries of refugee or subsidiary protection status who wish to repatriate.

CHAPTER VIII: ADMINISTRATIVE COOPERATION

Article 35: Cooperation

Member States shall each appoint a national contact point, whose address they shall communicate to the Commission, which shall communicate it to the other Member States.

Member States shall, in liaison with the Commission, take all appropriate measures to establish direct cooperation and an exchange of information between the competent authorities.

Article 36: Staff

Member States shall ensure that authorities and other organisations implementing this Directive have received the necessary training and shall be bound by the confidentiality principle, as defined in the national law, in relation to any information they obtain in the course of their work.

CHAPTER IX: FINAL PROVISIONS

Article 37: Reports

1. By 10 April 2008 , the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary. These proposals for amendments shall be made by way of priority in relation to Articles 15, 26 and 33. Member States shall send the Commission all the information that is appropriate for drawing up that report by 10 October 2007 .

2. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every five years.

Article 38: Transposition

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 10 October 2006 . They shall forthwith inform the Commission thereof.

When the Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 39: Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 40: Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Luxembourg, 29 April 2004 .

For the Council

The President

COUNCIL DIRECTIVE 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

SECTION II

Article 25: Inadmissible applications

1. In addition to cases in which an application is not examined in accordance with Regulation (EC) No 343/2003, Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83/EC where an application is considered inadmissible

pursuant to this Article.

2. Member States may consider an application for asylum as inadmissible pursuant to this Article if:

(a) another Member State has granted refugee status;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27;

(d) the applicant is allowed to remain in the Member State concerned on some other grounds and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of Directive 2004/83/EC;

(e) the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of status pursuant to point (d);

(f) the applicant has lodged an identical application after a final decision;

(g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant's situation, which justify a separate application.

Article 26: The concept of first country of asylum

A country can be considered to be a first country of asylum for a particular applicant for asylum if:

(a) he/she has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection; or

(b) he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of nonrefoulement; provided that he/she will be re-admitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum Member States may take into account Article 27(1).

Article 27: The safe third country concept

1. Member States may apply the safe third country concept

only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) the principle of non-refoulement in accordance with the Geneva Convention is respected;

(c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

2. The application of the safe third country concept shall be subject to rules laid down in national legislation, including:

(a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the

grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.

3. When implementing a decision solely based on this Article, Member States shall:

(a) inform the applicant accordingly; and

(b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

4. Where the third country does not permit the applicant for asylum to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

5. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article.

C. NON-EU LEGISLATIVE MATERIALS

(Geneva) 1951 Convention relating to the Status of Refugees

Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950

Entry into force: 22 April 1954, in accordance with article 43

Preamble

The High Contracting Parties ,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows :

Chapter I

GENERAL PROVISIONS

Article 1. - Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this

Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 2. - General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3. - Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4. - Religion

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

Article 5. - Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Article 6. - The term "in the same circumstances"

For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7. - Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8. - Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9. - Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10. - Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11. - Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

Chapter II

JURIDICAL STATUS

Article 12. - Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by

the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13. - Movable and immovable property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14. - Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting States, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15. - Right of association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16. - Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi .

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III

GAINFUL EMPLOYMENT

Article 17. - Wage-earning employment

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(a) He has completed three years' residence in the country;

(b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;

(c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18. - Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial

companies.

Article 19. - Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

Chapter IV

WELFARE

Article 20. - Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21. - Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22. - Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23. - Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24. - Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be

concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

Chapter V

ADMINISTRATIVE MEASURES

Article 25. - Administrative assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26. - Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.

Article 27. - Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28. - Travel documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

Article 29. - Fiscal charges

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30. - Transfer of assets

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31. - Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32. - Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33. - Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Article 34. - Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Chapter VI

EXECUTORY AND TRANSITORY PROVISIONS

Article 35. - Co-operation of the national authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(a) The condition of refugees,

(b) The implementation of this Convention, and

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 36. - Information on national legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37. - Relation to previous conventions

Without prejudice to article 28, paragraph 2, of this Convention, this Convention replaces, as between Parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

Chapter VII

FINAL CLAUSES

Article 38. - Settlement of disputes

Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 39. - Signature, ratification and accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40. - Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article 41. - Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 42. - Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 43. - Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 44. - Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

Article 45. - Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 46. - Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

(a) Of declarations and notifications in accordance with section B of article 1;

(b) Of signatures, ratifications and accessions in accordance with article 39;

(c) Of declarations and notifications in accordance with article 40;

(d) Of reservations and withdrawals in accordance with article 42;

(e) Of the date on which this Convention will come into force in accordance with article 43;

(f) Of denunciations and notifications in accordance with article 44;

(g) Of requests for revision in accordance with article 45.

In faith whereof the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

Done at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

D. ECJ JURISPRUDENCE
(Chronologically ordered and edited)

JUDGMENT OF THE COURT (Grand Chamber)

21 September 2010

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In Joined Cases C-514/07 P, C-528/07 P and C-532/07 P,

THREE APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 20 November 2007 (C-514/07 P) and on 27 November 2007 (C-528/07 P and C-532/07 P),

Kingdom of Sweden (C-514/07 P), represented by S. Johannesson, A. Falk, K. Wistrand and K. Petkovska, acting as Agents,

appellant,

supported by:

Kingdom of Denmark, represented by B. Weis Fogh, acting as Agent,

Republic of Finland, represented by J. Heliskoski, acting as Agent,

interveners in the appeal,

the other parties to the proceedings being:

Association de la presse internationale ASBL (API), established in Brussels (Belgium), represented by S. Völcker and J. Heithecker, Rechtsanwälte, F. Louis, avocat, and C. O'Daly, Solicitor,

applicant at first instance,

European Commission, represented by C. Docksey, V. Kreuschitz and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

and

Association de la presse internationale ASBL (API) (C-528/07 P), established in Brussels (Belgium), represented by S. Völcker, Rechtsanwalt, F. Louis, avocat, and C. O'Daly, Solicitor,

appellant,

the other party to the proceedings being:

European Commission, represented by C. Docksey, V. Kreuschitz and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson and S. Behzadi-Spencer, acting as Agents, and by J. Coppel, Barrister,

intervener in the appeal,

and

European Commission (C-532/07 P), represented by C. Docksey, V. Kreuschitz and P. Aalto, acting as Agents, with an address for service in Luxembourg,

appellant

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson and S. Behzadi-Spencer, acting as Agents, and by J. Coppel, Barrister,

intervener in the appeal,

the other party to the proceedings being:

Association de la presse internationale ASBL (API), established in Brussels (Belgium), represented by S. Völcker, Rechtsanwalt, F. Louis, avocat, and C. O'Daly, Solicitor,

applicant at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano (Rapporteur), J.N. Cunha Rodrigues, K. Lenaerts, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, A. Rosas, K. Schiemann, E. Juhász, T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: M. Poiares Maduro,

Registrars: H. von Holstein, Assistant Registrar, and B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2009,

after hearing the Opinion of the Advocate General at the sitting on 1 October 2009,

gives the following

Judgment

1 By their appeals, the Kingdom of Sweden, the Association de la presse internationale ASBL ('API') and the Commission of the European Communities seek the setting aside of the judgment in Case T-36/04 *API* v *Commission* [2007] ECR II-3201 ('the judgment under appeal'), by which the Court of First Instance of the European Communities (now 'the General Court') annulled in part the decision of the Commission of 20 November 2003 ('the contested decision') 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.

I – Legal context

2 Recitals 1, 2, 4 and 11 in the preamble to 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 (OJ 2001 L 145, p. 43) state as follows:

'(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

…

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

…

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.'

3 Article 1(a) of that regulation provides:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents'.

4 Under paragraphs 1 and 3 of Article 2 of that regulation:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

…

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.'

5 Paragraphs 2, 4 and 6 of Article 4 of Regulation No 1049/2001, concerning exceptions to the right of access, provide:

'2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

…

– court proceedings and legal advice,

– the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

…

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

…

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.'

6 Under Article 7(2) of Regulation No 1049/2001, '[i]n the event of a total or partial refusal [of his request for access], the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position'.

7 Article 8(1) of that regulation provides:

'A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. …'

8 Article 12(2) of Regulation No 1049/2001 provides:

'In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.'

II – Background to the dispute

9 By letter of 1 August 2003, API – a non-profit-making organisation of foreign journalists based in Belgium – applied to the Commission, in accordance with Article 6 of Regulation No 1049/2001, for access to the written pleadings lodged by the Commission before the General Court or the Court of Justice in the proceedings relating to the following cases:

– *Honeywell* v *Commission* (T-209/01) and *General Electric* v *Commission* (T-210/01);

– *MyTravel* v *Commission* (T-212/03);

– *Airtours* v *Commission* (T-342/99);

– *Commission* v *Austria* (C-203/03);

– *Commission* v *United Kingdom* (C-466/98); *Commission* v *Denmark* (C-467/98); *Commission* v *Sweden* (C-468/98); *Commission* v *Finland* (C-469/98); *Commission* v *Belgium* (C-471/98); *Commission* v *Luxembourg* (C-472/98); *Commission* v *Austria* (C-475/98); and *Commission* v *Germany* (C-476/98) (collectively, 'the *Open Skies* cases');

– *Köbler* (C-224/01); and

– *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00).

10 By letter of 17 September 2003, the Commission granted that application only in respect of the pleadings lodged in *Köbler* (C-224/01) and *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00), which concerned references for a preliminary ruling under Article 234 EC.

11 As regards the remainder, the Commission refused API's application and that refusal was confirmed, under Article 8(1) of Regulation No 1049/2001, by the contested decision.

12 The Commission, first of all, refused access to the pleadings lodged in *Honeywell* v *Commission* (T-209/01) and *General Electric* v *Commission* (T-210/01), essentially because those cases were pending at the time when the contested decision was adopted and, accordingly, the exception relating to the protection of court proceedings, provided for under the second indent of Article 4(2) of Regulation No 1049/2001, applied.

13 Next, on the basis of the same exception, the Commission refused access to the pleadings lodged in *Airtours* v *Commission* (T-342/99) because, whilst that case was closed, it was none the less closely connected with *MyTravel* v *Commission* (T-212/03), a case which was still pending when the contested decision was adopted. As regards the application for access to the pleadings lodged in the latter case, the Commission decided that it was premature, and API did not challenge that finding in its action.

14 In addition, the Commission refused API's application in respect of the *Open Skies* cases, finding that, although those cases were closed when the contested decision was adopted, they all concerned actions under Article 226 EC for failure to fulfil Treaty obligations ('infringement proceedings'), which meant that the exception relating to protection of the purpose of inspections, investigations and audits, provided for under the third indent of Article 4(2) of Regulation No 1049/2001, applied.

15 Lastly, the Commission refused API's application in respect of the documents lodged in *Commission* v *Austria* (C-203/03). It found that the exception relating to the protection of court proceedings applied to those documents, just as it did to those lodged in *Honeywell* v *Commission* (T-209/01) and *General Electric* v *Commission* (T-210/01). Even so, the Commission added that that application had also to be refused on the basis of the third indent of Article 4(2) of Regulation No 1049/2001, in so far as that provision excludes access to any document concerning infringement proceedings where its disclosure would undermine the protection of the purpose of the investigations, that purpose being to reach an amicable settlement of the dispute between the Commission and the Member State concerned.

16 As regards the application of the last line of Article 4(2) of Regulation No 1049/2001, the Commission found that there was no overriding public interest in disclosure, for the purposes of that provision, to justify allowing access to the documents applied for.

III – The judgment under appeal

17 API brought an action, which was upheld only in part by the General Court, for annulment of the contested decision.

18 In paragraphs 51 to 57 of the judgment under appeal, after recalling that the purpose of Regulation No 1049/2001 is to give the fullest possible effect to the right of public access to documents held by the institutions, the General Court stated that that right is none the less subject to certain limitations. In that regard, the regulation provides for exceptions which, as such, must be interpreted strictly and the application of which requires, as a rule, a specific case-by-case assessment of the content of the documents covered by the application for access, and the risk that the interest protected by each of those exceptions might be undermined cannot be purely hypothetical.

19 Nevertheless, the General Court added, in paragraph 58 of that judgment, that such an examination is not required in all circumstances. It may not be necessary where, owing to the particular circumstances of the individual case, it is obvious that access must be granted or that it must be refused. Such a situation could arise, for example, if certain documents are manifestly covered in their entirety by one of the exceptions provided for under that regulation.

20 In application of those principles, the General Court first examined the part of the contested decision concerning the pleadings lodged in *Honeywell* v *Commission* (T-209/01), *General Electric* v *Commission* (T-210/01) and *Commission* v *Austria* (C-203/03), all of which were pending cases.

21 According to the General Court, such documents are manifestly covered in their entirety by the exception relating to the protection of court proceedings and that remains the position until the proceedings in question have reached the hearing stage.

22 The reason for this is that, as was stated in paragraphs 78 to 81 of the judgment under appeal, it is vital to prevent disclosure of those documents before the hearing, in order to prevent the Commission's agents from being subjected to outside pressure, particularly from members of the public. Prevention of disclosure also makes it possible to prevent the criticism and objections which could be levelled against the arguments set out in those pleadings – by specialists and by the press and public opinion in general – from having the effect, in breach of the principle of equality of arms, of imposing an additional task on the Commission. The Commission might consider itself obliged to take account of them in the defence of its position before the court, whereas the parties to the proceedings – which are under no obligation to disclose their pleadings – can defend their interests free from all external influences.

23 Thus, according to the judgment under appeal, it is not until after the hearing that the Commission is required to undertake a specific examination, on a case-by-case basis, of any pleadings to which it has been asked to give access.

24 In that regard, the General Court added, first, in paragraphs 84 and 85 of the judgment under appeal, that that conclusion cannot be called into question by the fact that disclosure of procedural documents is possible in a number of Member States and that it is also provided for, as regards documents lodged with the European Court of Human Rights, in the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, since the Rules of Procedure of the European Union ('EU') Courts do not provide for a third-party right of access to procedural documents lodged at their registries by the parties.

25 Next, in paragraphs 86 to 89 of that judgment, the General Court held that the Commission cannot rely on the Rules of Procedure of the EU Courts, under which the pleadings of the parties are in principle confidential, in order to refuse access to those pleadings after the hearing as well. The Court of Justice has made it clear that those rules do not prevent the parties from disclosing their own written submissions.

26 Lastly, in paragraphs 90 and 91 of the judgment under appeal, the General Court added that non-disclosure of those pleadings before the hearing is justified, moreover, by the need to protect the '*effet utile*' (practical effect) of any decision by the Court hearing the matter to hold the hearing *in camera*.

27 The General Court accordingly held, in paragraph 92 of the judgment under appeal, that the Commission had in no way erred in law by not carrying out a concrete assessment of the pleadings relating to *Honeywell* v *Commission* (T-209/01), *General Electric* v *Commission* (T-210/01) or *Commission* v *Austria* (C-203/03), and that it had not made an error of assessment in finding that there was a public interest in the protection of those pleadings.

28 Lastly, the General Court held, in paragraph 100 of the judgment under appeal, that API had also failed to raise overriding public interests capable of justifying, under Article 4(2) of Regulation No 1049/2001, disclosure of the documents in question.

29 Secondly, as regards the application for access to the pleadings relating to *Airtours* v *Commission* (T-342/99), the General Court held, in paragraphs 105 to 107 of the judgment under appeal, that the Commission's refusal – on the basis of the close connection between that case and *MyTravel* v *Commission* (T-212/03), a case which was pending – was not justified. Case T-342/99 had already been closed by the judgment of the General Court of 6 June 2002 (ECR II-2585), which meant that the content of the pleadings had already been made public, not only at the hearing, but also in the very text of the judgment. Moreover, the nature of the risk of an adverse effect on the proceedings which are still pending in no way emerges from the mere fact that arguments already submitted before the Court in a closed case are likely also to be debated in a similar case.

30 Thirdly and lastly, the General Court held, in paragraphs 135 to 140 of the judgment under appeal, that the Commission's refusal of API's application for access to the pleadings lodged in the *Open Skies* cases could not be justified on the basis of the exception provided for under the third indent of Article 4(2) of Regulation No 1049/2001 concerning the protection of inspections, investigations and audits. The *Open Skies* cases had already been closed by a judgment, so that no investigation to prove the existence of the infringements in question could be jeopardised by disclosure of the documents requested.

31 Consequently, the General Court annulled the contested decision in so far as it refused access to the pleadings submitted by the Commission before the Court of Justice in the *Open Skies* cases and before the General Court in *Airtours* v *Commission* (T-342/99). Under paragraph 2 of the operative part of the judgment under appeal, the remainder of the action brought by API was dismissed.

IV – Procedure before the Court

32 By orders of the President of the Court of 23 April 2008 and 19 May 2008 respectively, the Kingdom of Denmark and the Republic of Finland were granted leave to intervene in Case C-514/07 P in support of the form of order sought by the Kingdom of Sweden.

33 By order of the President of the Court of 23 April 2008, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in Cases C-528/07 P and C-532/07 P in support of the forms of order sought by the Commission.

34 Lastly, by order of 7 January 2009, the President of the Court decided to join Cases C-514/07 P, C-528/07 P and C-532/07 P for the purposes of the oral procedure and of the judgment.

V – Forms of order sought

A – *In* Sweden and API *v* Commission *(C-514/07 P)*

35 The Kingdom of Sweden claims that the Court should set aside paragraph 2 of the operative part of the judgment under appeal; annul the contested decision in its entirety; and order the Commission to pay the costs.

36 API claims that the Court should:

– set aside the judgment under appeal in so far as the General Court confirmed that the Commission has a right not to disclose its pleadings in cases in which a hearing has yet to be held;

– annul the parts of the contested decision which were not previously annulled by the judgment under appeal or, in the alternative, refer the case back to the General Court for adjudication in the light of the judgment of the Court of Justice; and

– order the Commission to pay the costs incurred by API in responding to the appeal.

37 The Kingdom of Denmark claims that the Court should set aside paragraph 2 of the operative part of the judgment under appeal and annul the contested decision, in so far as 'the General Court erred in law by failing to impose an unconditional requirement that a specific examination be carried out of each document in respect of which access is requested in order to determine whether the exception provided for under Article 4(2) [of Regulation No 1049/2001] is applicable'.

38 The Republic of Finland requested the Court, at the hearing, to set aside paragraph 2 of the operative part of the judgment under appeal.

39 The Commission contends that the Court should:

– confirm the judgment under appeal in part in so far as it upheld the contested decision refusing access to the documents requested by API;

– order API to pay the costs incurred by the Commission both at first instance and in the appeal proceedings; and

– order the Kingdom of Sweden to pay the costs incurred by the Commission in the appeal proceedings.

B – *In* API *v* Commission *(C-528/07 P)*

40 API claims that the Court should:

– set aside the judgment under appeal in so far as the General Court confirmed that the Commission has a right not to disclose its pleadings in cases in which a hearing has yet to be held;

– annul the parts of the contested decision which were not previously annulled by the judgment under appeal or, in the alternative, refer the case back to the General Court for adjudication in the light of the judgment of the Court of Justice; and

– order the Commission to pay the costs.

41 The Commission contends that the Court should:

– confirm the judgment under appeal in part in so far as it upholds the contested decision refusing access to the documents requested by API;

– order API to pay the costs incurred by the Commission both at first instance and in the appeal proceedings; and

– order the Kingdom of Sweden to pay the costs incurred by the Commission in the appeal proceedings.

42 The United Kingdom contends that the Court should dismiss the appeal.

C – *In* Commission *v* API *(C-532/07 P)*

43 The Commission claims that the Court should:

– set aside the judgment under appeal in part in so far as it annulled the contested decision refusing access to documents requested by API as from the date of the hearing, concerning all actions save infringement proceedings;

– give final judgment in the matters that are the subject of this appeal; and

– order API to pay the costs incurred by the Commission in relation to Case T-36/04 and to the present appeal.

44 API contends that the Court should:

– declare part of the Commission's first plea inadmissible in so far as it does not indicate precisely the contested elements of the judgment under appeal which the Commission seeks to have set aside;

– declare the Commission's second plea inadmissible;

– in the alternative, dismiss the appeal in its entirety; and

– order the Commission to pay the costs incurred by API in responding to the appeal.

45 The United Kingdom claims that the Court should:

– state that the General Court erred in law in so far as it held, in paragraph 82 of the judgment under appeal, that, after the hearing has been held, the Commission is under an obligation to carry out a case-by-case assessment of each pleading in order to determine whether the exception relating to court proceedings, as provided for under the second indent of Article 4(2) of Regulation No 1049/2001, applies; and

– set aside the judgment under appeal to the extent that the General Court annulled the contested decision in so far as it refused API's application for access to the pleadings lodged by the Commission before the Court in the *Open Skies* cases.

VI – The appeals

46 It is appropriate first to consider the appeal in Case C-532/07 P and then to consider together the appeals in Cases C-514/07 P and C-528/07 P.

A – *The appeal brought by the Commission (Case C-532/07 P)*

47 In support of its appeal, the Commission puts forward three pleas in law, alleging infringements of the second and third indents of Article 4(2) of Regulation No 1049/2001.

1. The first plea in law

48 By its first plea, the Commission submits that the General Court erred in law by interpreting the exception relating to the protection of court proceedings as meaning that the institutions must examine on a case-by-case basis applications for access to pleadings lodged in proceedings other than infringement proceedings, and that they must do so as from the date of the hearing.

a) Arguments of the parties

49 In support of that plea, the Commission submits, first, that such an interpretation reveals a contradiction in the judgment under appeal. After recognising the existence of a general exception to the right of access, the General Court restricts the application of that exception to the period preceding the hearing, wrongly attributing a decisive importance to that stage in the procedure. In reality, the interests of the proper course of justice, as well as the need to avoid, as regards representatives of the Commission, any external influence – that is to say, the two considerations on which the General Court based its finding that the exception in question applies until the hearing – justify that exception being applicable throughout the proceedings, hence until delivery of the judgment.

50 Secondly, according to the Commission, the General Court did not take into account the interests of the sound administration of justice or the interests of the persons mentioned in the procedure other than the principal parties or interveners. In particular, it failed to take account of the practice developed by the Community Courts, according to which they may, of their own motion, omit the names of a party or of other persons who appear in the procedure, or other information relating to the case which would normally have to be published.

51 Thirdly, in the view of the Commission, the General Court failed, in particular, to have regard not only to Article 255 EC, which does not refer to the Court of Justice, but also to the relevant provisions of the Rules of Procedure of the Community Courts, from which it is apparent that the public does not have access to the documents in the case-file.

52 Fourthly, the General Court did not take into account the interests of parties to the procedure other than the Commission. Given the fact that, particularly in direct actions, the pleadings of one party necessarily refer to the content of the pleadings of the other parties, to which they are a response, if the Commission were under an obligation to disclose the content of its written submissions, that would inevitably have an impact on the right of the

other party to control the access, thus opened, to its own pleadings and arguments.

53 Fifthly, it is apparent from the *travaux préparatoires* for Regulation No 1049/2001 that the Community legislature did not wish totally to exclude from the scope of that regulation documents generated and held by the institutions solely for the purposes of court proceedings.

54 Sixthly and lastly, the Commission maintains that the approach ultimately adopted by the General Court runs counter to the case-law of the Court of Justice and, in particular, to Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, in which the Court held that, where the Commission has received an application for access to documents, it may find it necessary to consult the national court prior to any disclosure of those documents, since the above approach would mean that an institution must take a decision alone as to the disclosure of all documents relating to a pending case which are submitted to the Community Courts or generated by them. That would be incompatible with the institution's obligation to respect the rights of the other parties to defend their interests before the Community Courts, while at the same time complying with the Rules of Procedure of those Courts.

55 In support of the Commission's submissions, the United Kingdom adds, first of all, that the General Court ruled *ultra petita* when it held, in paragraph 82 of the judgment under appeal, that, 'after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceedings to which it relates'. It is apparent from paragraph 75 of that judgment that, by its action for annulment, API did not raise, for assessment by the General Court, the question of applications for access to pleadings submitted between the date of the hearing and the delivery of the judgment, given that, in each of the three cases in question – that is to say, *Honeywell* v *Commission* (T-209/01), *General Electric* v *Commission* (T-210/01) and *Commission* v *Austria* (C-203/03) – the hearing had not yet been held when API requested access to the Commission's pleadings.

56 The United Kingdom maintains, next, that the institutions must be able to rely on general presumptions applying to categories of documents and that the disclosure of pleadings is inherently different from the disclosure of an internal administrative document. Moreover, the truth of this is borne out by the provision made by the Community legislature with regard to documents relating to court proceedings, the special nature of which is reflected in the exception provided for under the second indent of Article 4(2) of Regulation No 1049/2001. Lastly, according to the United Kingdom, it is inappropriate and contrary to the sound administration of justice for court proceedings to be subject to external influences.

57 API responds to each of the arguments raised by the Commission in support of the first plea.

58 First, API maintains that any external influence on the representatives of the Commission is merely a consequence of the public nature of court proceedings and cannot provide justification for the approach adopted by the General Court. In any event, according to API, the argument based on that risk is incompatible with the need to interpret restrictively the exceptions to the right of access to documents and the approach adopted by the General Court is contrary to the principle of the widest possible access to documents of the institutions, in view of the fact that, given their incomplete nature, neither the Report for the Hearing nor the hearing itself is sufficient to ensure transparency.

59 Secondly, API maintains that neither the practice of the Court of Justice of omitting the names of applicants, or other persons mentioned in the procedure, nor the formal expression of that practice in Article 44(4) of the Rules of Procedure of the Civil Service Tribunal can justify a derogation from the obligations under Regulation No 1049/2001 since, in terms of the authority of its rules, the regulation is of a higher rank.

60 Thirdly, the documents to which API wishes to have access clearly fall within the scope of Article 255 EC, since they are documents held by the Commission and of which it is the author. In other words, API does not seek access to documents held by the Court of Justice, to which Article 255 EC does not refer anyway. In any event, the Commission's argument in that regard is, according to API, inadmissible, since it does not identify the elements of the judgment under appeal which the Commission is seeking to have set aside.

61 Fourthly, not only has the Commission failed to identify the third-party interests which could be harmed by the subsequent disclosure of the documents in question, but it does not take into account, in particular, either the possibility of granting partial access to those documents or the procedure expressly laid down in Article 4(4) of Regulation No 1049/2001 for the purposes of safeguarding the interests of third parties.

62 Fifthly, API agrees with the Commission that documents held by the institutions for the sole purpose of court proceedings are not excluded from the scope of Regulation No 1049/2001. In particular, with regard to the principle of equality of arms, API submits that a party to a dispute is not, in reality, placed at a disadvantage by the disclosure of its pleadings and that, to the extent that there is any asymmetry between the parties, this is merely the inevitable and necessary consequence of the very existence of Regulation No 1049/2001. In any event, partial access to the pleadings is always possible, and preferable to the outright refusal of such access.

63 Sixthly and lastly, the judgment in *Netherlands and van der Wal* v *Commission*, to which the Commission refers, is irrelevant in the present case because it is not a *locus classicus* enabling a blanket ban to be imposed on access to a particular category of documents.

b) Findings of the Court

64 It is appropriate to reject, at the outset, the complaint put forward by the United Kingdom to the effect that the General Court ruled *ultra petita* when it held, in paragraph 82 of the judgment under appeal, that, 'after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceedings to which it relates'.

65 In that regard, it should be borne in mind that, although the Court must rule only on the heads of claim put forward by the parties, whose role it is to define the framework of the dispute, the Court cannot confine itself to the arguments put forward by the parties in support of their claims, or it might be forced, in some circumstances, to base its decisions on erroneous legal considerations (order of 27 September 2004 in Case C-470/02 P *UER* v *M6 and Others*, paragraph 69).

66 In the case currently under consideration, it was solely on examining the arguments put forward by API in support of its plea at first instance, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001, that the General Court arrived at the finding set out in paragraph 82 of the judgment under appeal. It is thus clear that that paragraph does no more than expand upon the reasoning which led the General Court to reject the plea raised before it by API.

67 However, as the Court of Justice has consistently held, such reasoning by extension does not, of itself, support a finding that the General Court went outside the framework of the dispute and ruled *ultra petita* (see, to that effect, Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] ECR I-7421, paragraph 34, and the order in *UER* v *M6 and Others*, paragraph 74).

68 That said, it should be borne in mind in relation to the arguments raised by the Commission in support of the present plea, that, in accordance with recital 1 in the preamble to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 EU – inserted by the Treaty of Amsterdam – of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 in the preamble to Regulation No 1049/2001, the right of public access to documents of the institutions is related to the democratic nature of those institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 34).

69 To that end, Regulation No 1049/2001 is intended, as is apparent from recital 4 in its preamble and from Article 1, to give the fullest possible effect to the right of public access to documents of the institutions (see Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 61; Case C-64/05 P *Sweden* v *Commission* [2007] ECR I-11389, paragraph 53; *Sweden and Turco* v *Council*, paragraph 33; and Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-0000, paragraph 51).

70 However, that right is none the less subject to certain limitations based on grounds of public or private interest (*Sison* v *Council*, paragraph 62, and *Commission* v *Technische Glaswerke Ilmenau*, paragraph 53).

71 More specifically, and in reflection of recital 11 in the preamble thereto, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision.

72 Thus, if the Commission decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying (see, to that effect, *Sweden and Turco* v *Council*, paragraph 49, and *Commission* v *Technische Glaswerke Ilmenau*,

paragraph 53).

73 Of course, since they derogate from the principle of the widest possible public access to documents, those exceptions must be interpreted and applied strictly (*Sison* v *Council*, paragraph 63; *Sweden* v *Commission*, paragraph 66; and *Sweden and Turco* v *Council*, paragraph 36).

74 Nevertheless, contrary to the assertions made by API, it is clear from the case-law of the Court of Justice that the institution concerned may base its decisions in that regard on general presumptions which apply to certain categories of document, as considerations of a generally similar kind are likely to apply to applications for disclosure which relate to documents of the same nature (see *Sweden and Turco* v *Council*, paragraph 50, and *Commission* v *Technische Glaswerke Ilmenau*, paragraph 54).

75 As it is, in the present case, none of the parties has disputed the conclusion reached by the General Court in paragraph 75 of the judgment under appeal that the pleadings to which access was requested had been drawn up by the Commission in its capacity as a party in three direct actions which were still pending on the date of adoption of the contested decision and that, for that reason, each of those sets of pleadings could be regarded as falling within the same category of documents.

76 Accordingly, it must be determined whether general considerations supported a finding that the Commission was entitled to base its decision on the presumption that disclosure of those pleadings would undermine the court proceedings and that, in so doing, it was not under an obligation to carry out a specific assessment of the content of each of those documents.

77 First and foremost in that connection, it should be noted that pleadings lodged before the Court of Justice in court proceedings are wholly specific since they are inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission, those latter activities not requiring, moreover, the same breadth of access to documents as the legislative activities of an EU institution (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 60).

78 Those pleadings are drafted exclusively for the purposes of the court proceedings, in which they play the key role. It is by means of the application initiating proceedings that the applicant defines the parameters of the dispute and it is, in particular, during the written procedure – the oral procedure not being obligatory – that the parties provide the Court with the information on the basis of which it is to adjudicate.

79 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, established by those rules, of the right of access to documents.

80 As regards, first, the relevant provisions of the Treaties, 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.

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

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

83 For that matter, that interpretation is also borne out by the broad logic of Regulation No 1049/2001, the legal basis for which is Article 255 EC itself. Article 1(a) of Regulation No 1049/2001, which defines the scope of that regulation, makes no reference to the Court and, by dint of that omission, excludes it from the institutions subject to the obligations of transparency which it lays down, while Article 4 of that regulation devotes one of the exceptions to the right of access to the documents of the institutions precisely to the protection of court proceedings.

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

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

86 With regard, first, to equality of arms, it should be noted that – as the General Court pointed out, in substance, in paragraph 78 of the judgment under appeal – if the content of the Commission's pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts.

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

88 Furthermore, it should be borne in mind in that regard that the principle of equality of arms – together with, among others, the principle of *audi alteram partem* – is no more than a corollary of the very concept of a fair hearing (see, by analogy, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 31; Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-0000, paragraph 50; and Case C-197/09 RX-II *Réexamen M* v *EMEA* [2009] ECR I-0000, paragraphs 39 and 40).

89 As the Court has held, the principle of *audi alteram partem* must apply to all parties to proceedings before the EU Courts, whatever their legal status. It follows that the EU institutions may also rely on that principle when they are parties to such proceedings (see, to that effect, *Commission* v *Ireland and Others*, paragraph 53).

90 API is therefore incorrect in arguing that, being a public institution, the Commission cannot rely on a right to equality of arms because that right is available only to individuals.

91 Admittedly, as API contends, it is Regulation No 1049/2001 itself which imposes obligations of transparency only on the institutions which it lists. Nevertheless, the fact that such obligations are imposed only on the institutions concerned cannot, in the context of pending court proceedings, lead the procedural position of those institutions to be undermined vis-à-vis the principle of equality of arms.

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

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

94 It is therefore 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.

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

96 In addition, such a presumption is also justified in the light of the Statute of the Court of Justice of the European Union and the Rules of Procedure of the EU Courts (see, by analogy, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 55).

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

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

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

100 Account must be taken of that fact for the purposes of interpreting the exception provided for under the second indent

of Article 4(2) of Regulation No 1049/2001, for if third parties were able, on the basis of Regulation No 1049/2001, to obtain access to those pleadings, the system of procedural rules governing the court proceedings before the EU Courts would be called into question (see, by analogy, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 58).

101 In that regard, it should be noted that API is beside the point in arguing that other national legal systems have adopted different approaches, by providing, inter alia, that courts may permit access to pleadings lodged before them. As the Commission maintains, and as the General Court rightly held in paragraph 85 of the judgment under appeal, the Rules of Procedure of the EU Courts make no provision for a third-party right of access to procedural documents lodged at their registries by the parties.

102 On the contrary, it is precisely the existence of those Rules of Procedure, by which matters concerning the pleadings in question remain governed, and the fact that not only do they make no provision for a third-party right of access to the case-file but, in accordance with Article 31 of the Statute of the Court of Justice, they actually do provide that a hearing may be heard *in camera* or that certain information, such as the names of parties, may be kept confidential, which lend authority to the presumption that disclosure of those pleadings would undermine court proceedings (see, by analogy, *Commission* v *Technische Glaswerke Ilmenau*, paragraphs 56 to 58).

103 It is true that, as the Court has stated, such a general presumption does not exclude the right of an interested party to demonstrate that a given document, disclosure of which has been applied for, is not covered by that presumption (*Commission* v *Technische Glaswerke Ilmenau*, paragraph 62). The fact remains that, in the present case, it does not appear from the judgment under appeal that API availed itself of that right.

104 In the light of all the above considerations, it must be held that the General Court erred in law in holding that, in the absence of any evidence capable of rebutting that presumption, the Commission is under an obligation, after the hearing has taken place, to carry out a concrete assessment of each document requested in order to determine whether, given the specific content of that document, its disclosure would undermine the court proceedings to which it relates.

105 Nevertheless, it should be noted that – as was stated in paragraph 66 above – the considerations set out in paragraph 82 of the judgment under appeal are no more than an extension of the reasoning which led the General Court to reject the plea raised before it by API. However, the operative part of the judgment under appeal is in no way dependent upon that paragraph.

106 It follows that the setting aside of that part of the grounds of the judgment under appeal does not entail the setting aside of the operative part.

2. The second plea in law

107 By its second plea, the Commission, supported by the United Kingdom, submits that the General Court erred in law by holding that the exception relating to protection of the purpose of inspections, investigations and audits, provided for under the third indent of Article 4(2) of Regulation No 1049/2001, did not permit the Commission, after delivery of the judgment in the infringement proceedings under Article 226 EC, to refuse access to the pleadings lodged in those proceedings without first carrying out a specific examination of the content of those documents.

a) Arguments of the parties

108 According to the Commission, the General Court ignored the fact that enforcement procedures may continue after the judgment delivered in infringement proceedings and may lead not only to a further action under Article 228 EC but also to further discussions between the Commission and the Member State found to be in default, with a view to bringing the latter into conformity with EU law.

109 In that regard, the Commission submits that the arguments of the General Court to the effect that an action under Article 228 EC would have a different subject-matter and would depend on future and uncertain events are formalistic and take no account of the reality of the dialogue between the Commission and the Member States.

110 The Commission adds that, when it refused API access to the pleadings in question in the *Open Skies* cases, the Commission was confronted with an intractable question of principle, in relation to which it was obliged to represent the European Community in negotiations which it had to hold simultaneously with the Member States and with non-member States. The Commission explained at the hearing before the General Court that disclosure of its pleadings after delivery of the judgment in those cases would have endangered those negotiations, which concerned the conclusion of a new international agreement on air transport.

111 According to API, however, the appeal explains neither the reasons for which the 'reality of the dialogue' with the Member States would be compromised if the Commission disclosed its pleadings after the Court has given judgment, nor why its 'role as guardian of the Treaties' would be undermined by that disclosure. Unless the Commission can point to particular circumstances which justify the application of one of the exceptions to disclosure, the pleadings should be disclosed. In any event, that argument is inadmissible, since it merely repeats arguments which have already been submitted before the General Court.

b) Findings of the Court

112 By its second plea, which is in two parts, the Commission alleges, in substance, that the General Court erred in holding that documents relating to investigations carried out by the Commission in the context of infringement proceedings under Article 226 EC are no longer covered by the exception provided for under the third indent of Article 4(2) of Regulation No 1049/2001 after the Court of Justice has delivered its judgment closing those proceedings.

113 By the first part of that plea, the Commission submits that the reasons on the basis of which the General Court held, in paragraph 142 of the judgment under appeal, that the Commission had made an error of assessment by refusing access to the documents concerning the *Open Skies* cases are formalistic and take no account of the reality of the dialogue between the Commission and the Member States.

114 In essence, the Commission alleges that the General Court misconstrued the legal relationship between Article 226 EC and Article 228 EC, in that it underestimated the importance of the link between the procedures provided for in those two provisions in the context of two connected cases which follow one upon the other and which relate to the same infringement on the part of the same Member State.

115 Contrary to API's contention, the Commission does not merely repeat the arguments raised at first instance, but seeks to challenge the legal assessment made by the General Court.

116 Where the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (Case C-234/02 P *Ombudsman* v *Lamberts* [2004] ECR I-2803, paragraph 75).

117 It follows that the first part of the second plea is admissible.

118 With regard to the substance, it should be noted that although, admittedly, the procedures provided for under Articles 226 EC and 228 EC have the same purpose, that is to say, to ensure the effective application of EU law, the fact remains that they constitute two distinct procedures, each with its own subject-matter.

119 The procedure established under Article 226 EC is designed to obtain a declaration that the conduct of a Member State is in breach of EU law and to terminate that conduct (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 27, and Case C-456/05 *Commission* v *Germany* [2007] ECR I-10517, paragraph 25), while the procedure provided for under Article 228 EC has a much narrower ambit, being designed only to induce a defaulting Member State to comply with a judgment establishing a breach of obligations (Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 80).

120 It follows that, once the Court of Justice has held, by a judgment delivered on the basis of Article 226 EC, that a Member State has failed to fulfil its obligations, the continuation of negotiations between that Member State and the Commission is no longer designed to establish the existence of the infringement – which is precisely what the Court of Justice has found – but to determine whether the necessary conditions for the bringing of an action under Article 228 EC are met.

121 In addition, as regards the possibility that the infringement proceedings may lead to an amicable settlement, it is clear that, once the infringement has been found by judgment of the Court of Justice delivered on the basis of Article 226 EC, an amicable settlement is no longer possible in the case of that infringement.

122 Accordingly, it must be held that the General Court did not err in law by holding that it cannot be presumed that disclosure of pleadings lodged in a procedure which ultimately 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.

123 In the light of the above, the first part of the second plea must be rejected as unfounded.

124 By the second part of this plea, the Commission submits that disclosure of the documents relating to the *Open Skies*

cases, even after the Court of Justice has given judgment in those cases, would have endangered the negotiations for a new international agreement on air transport which, at the time when the contested decision was adopted, the Commission was conducting in the name of the Community with the Member States and with non-member States.

125 It is sufficient to note in that regard that, even though the Commission submits in its appeal that it had emphasised that fact at the hearing before the General Court, it is in no way apparent from the judgment under appeal – which the Commission has not challenged on that point – that the Commission had raised, either in the contested decision or before the General Court, the need to keep the documents in question confidential so as not to compromise the negotiations in which it was engaged with a view to concluding that agreement.

126 As it is, in accordance with settled case-law, to allow a party to put forward for the first time before the Court of Justice a plea and arguments which it did not raise before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the General Court (see Case C-266/97 P *VBA* v *VGB and Others* [2000] ECR I-2135, paragraph 79; and Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 114; and, to that effect, the order of 21 January 2010 in Case C-150/09 P *Iride and Iride Energia* v *Commission*, paragraphs 73 and 74).

127 Since, accordingly, this part of the plea must be held inadmissible, the second plea must be rejected as, in part, unfounded and, in part, inadmissible.

3. The third plea in law

a) Arguments of the parties

128 By its third plea, the Commission submits that the General Court erred in law by interpreting the exception relating to the protection of court proceedings as meaning that the institutions must examine, on a case-by-case basis, even applications for access to pleadings lodged in closed cases where those cases are connected to proceedings which are still pending. Since the General Court decided that the Commission could refuse disclosure of its pleadings so long as they had not been discussed at the hearing before the Court, it should have applied the same reasoning to applications for the disclosure of documents lodged in cases which were closed, but linked to cases still pending. That is justified a fortiori where the parties to the closed proceedings and those to the connected proceedings, which remain pending, are not the same.

129 In that regard, API contends that total or partial access to pleadings lodged in a closed case does not affect the Commission's ability to defend itself in a later case which is still pending, even if those two cases are connected.

b) Findings of the Court

130 It must be noted from the outset that, although, for the reasons set out in paragraphs 68 to 104 above, the disclosure of pleadings lodged in pending court proceedings is presumed to undermine the protection of those proceedings, because of the fact that the pleadings constitute the basis on which the Court carries out its judicial activities, that is not the case where the proceedings in question have been closed by a decision of the Court.

131 In the latter case, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court since those activities come to an end with the closure of the proceedings.

132 Admittedly, the possibility cannot be ruled out that – as the Commission alleges – disclosure of pleadings relating to court proceedings which are closed but connected to other proceedings which remain pending may create a risk that the later proceedings might be undermined, especially where the parties to the pending case are not the same as those to the case which has been closed. In such a situation, if the Commission were to use the same arguments in support of its legal position in both sets of proceedings, disclosure of its arguments in the pending proceedings could give rise to the risk that they might be undermined.

133 Nevertheless, such a risk depends on a number of factors, such as the degree of similarity between the arguments put forward in the two cases. If the Commission's pleadings are repeated only in part, partial disclosure could be sufficient to prevent any risk of undermining the pending proceedings.

134 Accordingly, only a specific examination of the documents to which access is requested, undertaken in accordance with the criteria referred to in paragraph 72 above, 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.

135 It follows that the General Court was fully entitled to hold, in substance, that the risk that a protected interest might be undermined – a condition for the application of that provision – cannot be presumed on the basis of a mere link between the two sets of court proceedings concerned.

136 Accordingly, since the third plea cannot be upheld, the Commission's appeal in Case C-532/07 P must be dismissed in its entirety.

B – *The appeals lodged by the Kingdom of Sweden (Case C-514/07 P) and by API (Case C-528/07 P)*

137 Whereas Case C-532/07 P concerns, on the one hand, access to pleadings lodged in court proceedings in which, at the time of the Commission's decision, a hearing has already been held and, on the other, access to pleadings lodged in closed court proceedings which are either infringement proceedings following which the defendant Member State has not yet complied with EU law, or which are closely connected to other proceedings, which remain pending, Cases C-514/07 P and C-528/07 P concern access to pleadings lodged in court proceedings in which, at the time of the Commission's decision, a hearing has not yet taken place.

138 The Kingdom of Sweden – supported by the Kingdom of Denmark and the Republic of Finland – and API base their respective appeals on the same two pleas in law, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001 and infringement of the last line of Article 4(2) of that regulation.

1. The first plea in law

a) Arguments of the parties

139 By this plea, the Kingdom of Sweden and API submit, in substance, that the General Court misinterpreted the second indent of Article 4(2) of Regulation No 1049/2001, providing for the exception relating to the protection of court proceedings, inasmuch as it held that, where an application is made for access to pleadings lodged by the Commission before the EU Courts in court proceedings which have not yet reached the stage of the hearing, the Commission is entitled to base its refusal of disclosure on that exception, without being under an obligation to undertake a specific examination of the content of each document to which access has been requested.

140 In support of that plea, the Kingdom of Sweden and API submit, first of all, that the General Court interpreted broadly an exception which, as such, must always be interpreted narrowly. The Swedish Government adds that such an interpretation is also incompatible with the objective of Regulation No 1049/2001, which is to ensure the widest possible public access to documents held by the EU institutions.

141 The Kingdom of Denmark additionally submits that the above argument put forward by the Swedish Government is especially persuasive in the light of *Sweden and Turco* v *Council*, in which the Court of Justice, setting out the criteria with which the institutions must comply when refusing access to documents on the basis of the exceptions provided for under Article 4 of Regulation No 1049/2001, stated in paragraph 35 that a specific examination of the documents to which access has been requested is always necessary.

142 Next, according to API, the General Court was wrong in holding that access to the Commission's pleadings gives rise to the risk that its agents – and not the representatives of the other parties to the proceedings – might be exposed to external 'criticism and objections'. In any event, the Commission – contrary to the statement made in paragraph 80 of the judgment under appeal – has no right to defend its interests 'independently of any external influence'. Furthermore, the General Court disregarded the importance of the fact that other legal systems permit access, at any stage of the proceedings, to pleadings lodged before their courts. Lastly, the General Court was wrong in referring to the need to protect the *effet utile* (practical effect) of any decision to hold the hearing *in camera*.

143 In response to those arguments, the Commission contends that Regulation No 1049/2001 does not provide for absolute transparency and that, accordingly, it is not contrary to the purpose of that regulation, which is to give the fullest possible effect to the right of public access, to pay due regard to general principles of law such as the protection of the proper conduct of court proceedings and the sound administration of justice.

144 According to the Commission, supported on this point by the United Kingdom, it is also contrary to that principle to require an institution to carry out a concrete and individual examination of each document to which it has been requested to provide access where it is clear that that document falls within the scope of one of the exceptions provided for under Regulation No 1049/2001, by virtue, in particular, of the nature of that document or the particular context in which it has been drawn up.

b) Findings of the Court

145 By this plea, the Kingdom of Sweden and API allege that the General Court erred in law in interpreting the second indent of Article 4(2) of Regulation No 1049/2001 as meaning that the institutions are entitled to refuse, without first undertaking a specific examination of each case, access to pleadings lodged in pending court proceedings which have not yet reached the hearing stage.

146 It is sufficient to note, in that regard, that, for the reasons set out in paragraphs 68 to 104 above, the Commission may base its response on the presumption that disclosure of pleadings lodged in pending court proceedings undermines those proceedings for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001 and that, accordingly, the Commission may, throughout such proceedings, refuse an application for access to such documents, without being under an obligation to undertake a specific examination.

147 It follows that, for the same reasons, the interpretation argued for by the Kingdom of Sweden and API in the context of this plea, to the effect that the above provision does not permit the Commission to issue such a refusal before the date of the hearing, is unfounded.

148 In consequence, the first plea raised in Cases C-514/07 P and C-528/07 P must be rejected as unfounded.

2. The second plea in law

a) Arguments of the parties

149 By this plea, the Kingdom of Sweden and API allege that the General Court infringed the last line of Article 4(2) of Regulation No 1049/2001 in holding that the general public interest in receiving information relating to pending court proceedings cannot constitute an overriding public interest for the purposes of that provision. In addition, API maintains that, in any event, the General Court did not – as it should have done – weigh that interest against the interest in protecting those proceedings. In that regard, the Kingdom of Sweden submits that, contrary to the findings of the General Court in paragraph 99 of the judgment under appeal, such a balancing exercise must always be undertaken by reference to the actual content of the documents disclosure of which has been requested.

150 However, according to the Commission, the General Court ruled in accordance with settled case-law by affirming that the overriding public interest, in consideration of which documents must be disclosed pursuant to that provision, is, in principle, distinct from the general principle of transparency which underlies Regulation No 1049/2001.

151 The United Kingdom adds that the present plea has its origins in an incorrect understanding of the judgment under appeal, given that it is apparent from paragraphs 97 to 99 of that judgment that, in reality, the General Court not only recognised that it was necessary to weigh the interests at stake, but also carried out that balancing exercise itself.

b) Findings of the Court

152 It should be noted, first of all, that, after stating that, in principle, the overriding public interest – as referred to in the last line of Article 4(2) of Regulation No 1049/2001 – must be distinct from the principle of transparency, the General Court went on to find in paragraph 97 of the judgment under appeal that the fact that a party requesting access does not invoke a public interest distinct from the principle of transparency does not automatically imply that it is unnecessary to weigh the interests at stake: according to the General Court, 'the invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question'.

153 Accordingly, the Kingdom of Sweden and API are incorrect in stating that the General Court ruled out the possibility that the interest in transparency could constitute an overriding public interest for the purposes of the above provision.

154 Next, as the Commission and the United Kingdom argue, the General Court – in paragraphs 98 and 99 of the judgment under appeal – weighed the interest in transparency against the interest relating to protection of the aim of preventing all external influences on the proper conduct of court proceedings.

155 Thus, API's argument that the General Court did not undertake that balancing exercise is also unfounded.

156 Lastly, as regards the argument of the Kingdom of Sweden to the effect that the General Court did not carry out that balancing exercise correctly in that it failed to take into account the content of the documents in question, it should be noted that, according to the General Court, it is only where the particular circumstances of the case substantiate a finding that the principle of transparency is especially pressing that that principle can constitute an overriding public interest capable of prevailing over the need for protection of the disputed documents and, accordingly, capable of justifying their disclosure in accordance with the last line of Article 4(2) of Regulation No 1049/2001.

157 As it is, even if it were possible to justify the disclosure of documents on that basis where it is presumed that disclosure will undermine one of the interests protected by the system of exceptions provided for under Article 4(2) of Regulation No 1049/2001, it must be held that it is apparent from paragraph 95 of the judgment under appeal that API merely claimed that the public's right to be informed about important issues of Community law, such as those concerning competition, and about issues which are of great political interest, which is true of the issues raised by infringement proceedings, prevails over the protection of the court proceedings.

158 Nevertheless, such vague considerations cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency was in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question.

159 In those circumstances, the General Court was fully entitled to find that the interest relied on by API was not such as to justify disclosure of the pleadings in question and that, accordingly, it was unnecessary to carry out a concrete examination of the content of those documents in those circumstances.

160 In the light of all the above, the second plea cannot be upheld either.

161 Accordingly, both the appeal lodged by the Kingdom of Sweden in Case C-514/07 P and the appeal brought by API in Case C-528/07 P must be dismissed in their entirety.

VII – Costs

162 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded the Court of Justice is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 69(4), the Member States and the institutions which intervene in the proceedings are to bear their own costs.

163 Since the Kingdom of Sweden was unsuccessful in its appeal in Case C-514/07 P, it must be ordered to pay the costs of that procedure, in accordance with the form of order sought by the Commission.

164 Since API was unsuccessful in its appeal in Case C-528/07 P, it must be ordered to pay the costs of that procedure, in accordance with the form of order sought by the Commission.

165 Since the Commission was unsuccessful in its appeal in Case C-532/07 P, it must be ordered to pay the costs of that procedure, in accordance with the forms of order sought by API.

166 The Member States which intervened in the appeal proceedings must bear their own costs in that connection.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the appeals;

2. Orders the Kingdom of Sweden to bear its own costs and to pay those incurred by the European Commission in connection with the appeal in Case C-514/07 P;

3. Orders the Association de la presse internationale ASBL (API) to bear its own costs and to pay those incurred by the European Commission in connection with the appeal in Case C-528/07 P;

4. Orders the European Commission to bear its own costs and to pay those incurred by the Association de la presse internationale ASBL (API) in connection with the appeal in Case C-532/07 P;

5. Orders the Kingdom of Denmark, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs in connection with the appeals.

OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 4 March 2010 (1)

Case C-31/09

Nawras Bolbol

v

Bevándorlási és Állampolgársági Hivatal

(Reference for a preliminary ruling from the Fővárosi Bíróság (Hungary))

(Minimum conditions to be fulfilled by persons from third countries or stateless persons in order to be able to claim refugee status – Stateless person of Palestinian origin – Conditions under which refugee status is accorded – Article 12(1)(a) of Directive 2004/83/EC)

1. The humanitarian challenge of how to care for persons who have lost home and livelihood as a result of conflict has been with us since men first learnt to make weapons and use them against their neighbours. Individuals and groups of individuals in that situation need and deserve assistance and protection. Unfortunately, particular forms of conflict generate very large numbers of such persons. More prosperous or stable countries to which they make their way to seek asylum cannot necessarily deal easily with the influx, particularly in the immediate aftermath of yet another conflagration, without potentially jeopardising their own prosperity and stability. Preferential treatment of any particular class or group of refugees, for whatever reason, will therefore – if not kept in proportion and balance – come at the expense of appropriate treatment for other persons who, from an objective humanitarian perspective, are equally deserving.

2. The international community has therefore laid down, in the Geneva Convention of 28 July 1951 Relating to the Status of Refugees, (2) binding rules of international humanitarian law that delineate who, in what circumstances, is to be treated as a refugee and how they are to be cared for. All EU Member States are signatories to that Convention. At EU level, their obligations are reflected in Directive 2004/83. (3)

3. The present reference from the Fővárosi Bíróság (Budapest Metropolitan Court) under the former Article 68 EC concerns the circumstances in which, under Directive 2004/83, a Member State can or must accord refugee status to a Palestinian who has sought asylum within that Member State.

International Law - *The 1951 Convention*

4. The preamble to the 1951 Convention recalls that the Charter of the United Nations and the Universal Declaration of Human Rights have affirmed the principle that all human beings are to enjoy fundamental rights and freedoms without discrimination, and notes that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms. At the same time, the preamble notes that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem whose international scope and nature the United Nations had recognised cannot be achieved without international co-operation. The preamble expresses the wish that all States, recognising the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States.

5. Article 1A of the 1951 Convention sets out the detailed criteria for assessing whether an individual should be granted refugee status:

'For the purposes of the present Convention, the term "refugee" shall apply to any person who:

…

(2) Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual

residence, is unable or, owing to such fear, is unwilling to return to it.

…' (4)

6. Article 1C provides for various circumstances in which the Convention ceases to apply to a person who qualified for refugee status under Article 1A – essentially, because he either no longer needs, or should no longer need, its protection.

7. Article 1D (whose interpretation is critical to the present reference) reads as follows:

'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.'

8. Article 38 provides that, at the request of a Party, the International Court of Justice (5) is to adjudicate on any dispute between Parties to the Convention as to its interpretation or application.

UN General Assembly Resolutions relating to the situation in Palestine (6)

9. In the aftermath of the events of World War II and specifically the Holocaust, the United Nations agreed to the proposals of the United Nations Special Committee on Palestine (7) to partition Palestine (Resolution 181 (II) of 29 November 1947). On 14 May 1948, the State of Israel was proclaimed. There immediately followed what subsequent UN resolutions describe as 'the 1948 conflict'. By Resolution 273 (III) of 11 May 1949, the United Nations admitted the State of Israel to membership of that organisation.

10. As a result of the 1948 conflict, many Palestinians became displaced persons. Resolution 212 (III) of 19 November 1948 set up the United Nations Relief for Palestinian Refugees to provide immediate temporary assistance for such persons. By General Assembly Resolution 302 (IV) of 8 December 1949, the United Nations established the United Nations Relief and Works Agency for Palestine Refugees in the Near East. (8)

11. UNRWA's mandate has been renewed every three years since its creation in 1949. Its current mandate is due to expire in 2011. (9) Its area of operations comprises five 'fields': Lebanon, the Syrian Arab Republic, Jordan, the West Bank (including East Jerusalem) and the Gaza Strip. (10)

The Consolidated Eligibility and Registration Instructions (CERI)

12. The CERI issued by UNRWA define 'persons who meet UNRWA's Palestine Refugee criteria' as 'persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict'. (11) Certain other persons, whilst not meeting UNRWA's Palestinian Refugee criteria, are also eligible to receive UNRWA's services. (12) UNRWA groups these two categories together as persons 'who are eligible to receive UNRWA's services upon being registered in the Agency's Registration System and obtaining an UNRWA Registration Card as proof of registration'. (13)

13. There are, moreover, certain other categories of person who are eligible to receive UNRWA services *without* being registered in UNRWA's Registration System. (14) These include 'non-registered persons displaced as a result of the 1967 and subsequent hostilities' (15) and 'non-registered persons who live in refugee camps and communities'. (16)

The Statute of the Office of the UNHCR

14. The Office of the United Nations High Commissioner for Refugees (17) was created on 14 December 1950 by Resolution 428 (V) of the United Nations General Assembly. The UNHCR is a subsidiary organ of the United Nations under Article 22 of the UN Charter. The functions of the Office of the UNHCR are defined in its Statute. (18)

15. Article 6 of the Statute sets out the scope of the UNHCR's competence. Under Article 7(c), however, that competence does not extend to a person who continues to receive from other organs of agencies of the United Nations protection or assistance.

UNHCR statements

16. The UNHCR occasionally makes statements which have persuasive, but not binding, force. (19) His Office has published various statements which relate to the interpretation of Article 1D of the 1951 Convention: a commentary in its Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol, a note published in 2002 (and revised in 2009) and a 2009 statement (also subsequently revised) which relates expressly to Ms Bolbol's case. I intend to treat this last as an unofficial *amicus curiae* brief.

The UNHCR Handbook

17. The Handbook defines Article 1D as a provision whereby persons otherwise having the characteristics of refugees are excluded from refugee status. It states that exclusion under this clause applies to any person who is in receipt of protection or assistance from UNRWA, observing that UNRWA operates only in certain areas of the Middle East, and that it is only there that its protection or assistance are given. (20) Thus, a refugee from Palestine who finds himself outside that area does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention. The Handbook then states that it should normally be sufficient to establish that the circumstances which originally qualified him for protection or assistance from UNRWA still persist and that the cessation and exclusion clauses (21) do not apply to him.

The 2002 note

18. In its 2002 note, (22) the UNHCR approaches the two sentences of Article 1D as alternative rather than cumulative. In its view, Article 1D applies to Palestinian refugees within the meaning of Resolution 194 (III) of 11 December 1948 or displaced persons within the meaning of Resolution 2252 (ES-V) of 4 July 1967. (23) Those living in the UNRWA zone who are either registered, or who are eligible to be registered, with the agency (24) should be considered to be receiving protection and assistance from UNRWA, and thus fall into the first sentence of Article 1D and outside the scope of the 1951 Convention.

19. The UNHCR regards the second sentence of Article 1D as giving automatic entitlement to the benefits of the 1951 Convention to persons who are outside the UNRWA zone, (25) but who are nonetheless Palestinian refugees within the meaning of Resolution 194 (III) of 11 December 1948 or displaced persons within the meaning of Resolution 2252 (ES-V) of 4 July 1967. This includes persons who have never resided in the UNRWA zone and who therefore fall within the competence of the UNHCR. (26) However, such persons can also return (or be returned) to the UNRWA zone. (27) If so, they will come within the first sentence of Article 1D.

The 2009 note

20. The 2009 note similarly takes as its starting point the wording of Resolutions 194 (III) and 2252 (ES-V). The UNHCR regards 'receiving' in the first sentence of Article 1D as including 'being eligible to receive' protection and assistance from UNRWA; and notes that to be in a position to receive such assistance, the persons concerned must be in the UNRWA zone. (28) As regards the second sentence of Article 1D, the UNHCR adds to the arguments in its 2002 note the observation that, in its view, 'ceased for any reason' includes circumstances where a particular person, previously registered with UNRWA, has travelled outside the UNRWA zone. (29)

European Union law

EC Treaty

21. Article 63 EC (30) provides that:

'The Council … shall … adopt:

1. measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties …

…'

Joint Position 96/196/JHA

22. Article 12 of the Joint Position (31) is entitled 'Article 1D of the Geneva Convention'. It reads as follows:

'Any person who deliberately removes himself from the protection and assistance found in Article 1D of the Geneva Convention is no longer automatically covered by that Convention. In such cases, refugee status is in principle to be determined in accordance with Article 1A.'

Directive 2004/83

23. The Tampere Council laid the foundations for the programme of European legislation relating to the area of freedom, security and justice in the EU known as the Hague Programme. Directive 2004/83 is part of that programme. It sets out minimum standards for the qualification and status of third country nationals or stateless persons, either as refugees or as persons entitled to a subsidiary form of protection (such as a non-*refoulement* order).

24. Recital 3 in the preamble to Directive 2004/83 notes that '[t]he Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees'. Recital 6 states that '[t]he main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States'.

25. Article 2(c) of the Directive mirrors the first paragraph of Article 1A(2) of the 1951 Convention. It defines 'refugee' as a 'third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply'.

26. Chapter III of the Directive deals with qualification for being a refugee. Article 12, found in that Chapter, reflects Article 1D of the 1951 Convention. More particularly, Article 12(1)(a) mirrors Article 1D of the Convention and reads as follows:

'A third country national or a stateless person is excluded from being a refugee, if:

(a) he or she falls within the scope of Article 1D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Directive'.

27. Article 13 of the Directive provides that refugee status is to be granted to 'a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II [assessment of applications for international protection] and III [qualification for being a refugee]'.

28. Chapters V and VI of the Directive deal, respectively, with qualification for, and the status of, subsidiary protection. In particular, Article 18 provides for the grant of subsidiary protection status to a third country national or stateless person eligible for subsidiary protection in accordance with Chapters II and V.

29. Article 38(1) provides that the Directive is to be transposed into national law before 10 October 2006. At the time of the facts giving rise to this reference, Article 12(1)(a) of the Directive had not been transposed into national law in Hungary, although the deadline for transposition has passed. The parties to the national proceedings both take the view that Article 12(1)(a) of the Directive is sufficiently clear, precise and unconditional to be relied on directly by an applicant as against the competent national authority.

Facts, procedure and questions referred

30. On 10 January 2007 Ms Bolbol, a stateless Palestinian, arrived in Hungary together with her spouse on a visa from the Gaza Strip. Upon arrival, she applied for and received a residence permit from the authority responsible for foreign nationals. On 21 June 2007 she applied to the Bevándorlási és Állampolgársági Hivatal (Immigration and Citizenship Office;

'the BAH') for refugee status because, in the event that the authority did not extend her residence permit, she did not want to return to the Gaza Strip, which she stated was unsafe on account of the conflict between Fatah and Hamas.

31. Ms Bolbol's application was made under the second paragraph of Article 1D of the 1951 Convention, on the basis that she is a Palestinian residing outside the UNRWA zone. Only her father remains in the Gaza Strip, where he works as a university lecturer. All her other family members have emigrated.

32. It is common ground that Ms Bolbol did not actually avail herself of UNRWA's protection or assistance whilst in the Gaza Strip. Her claim is based on her entitlement to such protection. She presented in support of her claim an UNRWA registration card issued to the family of her father's first cousin. However, the BAH disputes the existence of a family connection in the absence of any direct documentary evidence. UNRWA has not expressly confirmed whether she would be entitled to be registered. (32)

33. By decision of 14 September 2007 the BAH refused Ms Bolbol's application for refugee status. (33) At the same time it placed Ms Bolbol under the protection of a non-*refoulement* order, (34) on the grounds that the readmission of Palestinians is at the discretion of the Israeli authorities, and that Ms Bolbol would be exposed to the risk of torture or inhuman and degrading treatment in the Gaza Strip on account of the conditions there.

34. Ms Bolbol challenged the BAH's decision rejecting her claim for refugee status before the Fővárosi Bíróság, which stayed the proceedings and referred the following questions to the Court:

'For the purposes of Article 12(1)(a) of Council Directive 2004/83/EC:

1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact he is entitled to assistance or protection or is it also necessary for him actually to avail himself of that protection or assistance?

2. Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's protection or assistance or, possibly, an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?

3. Do the benefits of this directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, neither automatically but merely inclusion in the scope *ratione personae* of the directive?'

35. Written observations were submitted by Ms Bolbol, the Belgian, German, French, Hungarian and United Kingdom Governments and the Commission. All but the United Kingdom Government attended the hearing and presented oral argument on 20 October 2009.

Analysis

The Directive and the 1951 Convention

36. Although the European Union as such is not a signatory to the Convention, Article 63(1) EC expressly provides that the common policy on asylum must be adopted in accordance with the 1951 Convention and the 1967 Protocol. Directive 2004/83, whose legal base is Article 63(1) EC, describes the 1951 Convention in its preamble as a 'cornerstone' in the protection of refugees. The Directive is plainly intended to give effect, through common Community rules, to the Member States' international obligations. The provisions of the Directive must, therefore, be interpreted in a manner which is consistent with the 1951 Convention. (35)

37. The International Court of Justice has not yet ruled on the interpretation of Article 1D of the 1951 Convention, although the UNHCR has expressed its views on the subject. (36) A (non-exhaustive) examination of pertinent decisions by national courts of Member States shows a striking disparity, both in approach and in result (37) (reflected in the observations presented by the Member States that have intervened in these proceedings). None of these interpretations are, of course, binding on the Court.

38. In order to answer the questions referred by the national court, I find it both logical and helpful first to analyse Article 1D of the Convention, before returning to apply that analysis within EU law. (38)

39. It is also essential to be clear about the ambit of the present case. Both Article 12(1)(a) of Directive 2004/83 and Article 1D of the 1951 Convention refer, in general terms, to 'protection or assistance' from 'organs or agencies' of the UN.

However, Ms Bolbol's claim before the national court is based on her claim to be entitled to receive UNRWA assistance; and the observations of all parties before the Court have addressed the issues exclusively by reference to the role of UNRWA (rather than more generally). I shall therefore follow that approach in this Opinion.

40. I shall therefore look first at the historical background to the drafting of Article 1D of the 1951 Convention (together with the *travaux préparatoires*). (39) Next, I shall set out the guiding considerations that I believe to be applicable, before examining the specific points of interpretation that need to be addressed. Finally, I shall revert to Directive 2004/83 and deal, in sequence, with the questions referred.

The historical background and the travaux préparatoires

41. The drafting of the 1951 Convention took place against the background of recent conflict, devastation and displacement of population. World War II had left large numbers of displaced persons in Europe. A separate but related chain of events had led, with the participation of the international community, to the partition of Palestine, followed by the declaration of the State of Israel. In the regional conflict that both preceded and followed that event, a significant number of persons were displaced.

42. Since Article 1D is formulated in general terms, it is potentially applicable to *any* situation in which other 'organs or agencies' of the UN are providing 'protection or assistance' to persons who would otherwise fall within the scope *ratione personae* of the 1951 Convention. Indeed, the UN had recently started to provide specific assistance in conjunction with the conflict in Korea. (40) That said, the *travaux préparatoires* make it clear that the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (41) had the situation in Palestine uppermost in its mind when drafting Article 1D.

43. The minutes of the Conference of Plenipotentiaries appear to reflect three principal concerns: (42) first, the need to prevent a mass exodus from the geographical area that had been Palestine; (43) second, the desire of certain States to maintain the political visibility of persons displaced by the events of 1948; (44) and third, the need to avoid an overlap of competences between the UNHCR and UNRWA. (45) All those concerns focus (for historical reasons) on the consequences, in terms of displaced persons requiring assistance, of the situation in Palestine. In analysing Article 1D for the purposes of the present proceedings, I shall therefore take that to be the historical starting point.

44. The *travaux préparatoires* also appear to address the displacement of Palestinians as, essentially, an issue affecting a group of persons. (46) However, whilst it is the category of displaced Palestinians that historically formed the subject-matter of Article 1D, the provision itself must be read in a way that renders it intelligible and applicable to an individual. Such an approach reflects the fact that international law as a whole places a high value on the right to self-determination (a collective right for groups of persons), (47) but that, at the same time, international humanitarian law is founded on the principles of respect for the person and for the individuals within a group. (48)

45. The negotiated compromise that became Article 1D is one that singles out, in particular, displaced Palestinians for special consideration and, in some respects, special protection within the overall framework of international refugee law.

46. Although it is a short provision, Article 1D is replete with unanswered questions. At least four broad areas of opacity can be distinguished – two arising from the first sentence and two from the second – that must be resolved in order to answer the questions referred to the Court in the present proceedings. (49)

47. First, what is meant, in a geographical and/or temporal sense, by 'persons who are at present receiving … protection or assistance'? Second, do such persons have to be in actual receipt of protection or assistance, or does it suffice that they would be entitled to receive it? (As a sub-question, relevant specifically to the interpretation of the Directive and the proceedings before the national court: what is the effect of formal registration with UNRWA? Is it substantive, or merely evidentiary?) Third, in what circumstances should one consider that 'such protection or assistance has ceased for any reason'? Fourth, what meaning is to be attributed to the phrase 'these persons shall *ipso facto* be entitled to the benefits of this Convention'?

Guiding considerations

48. As the written and oral submissions to the Court have made clear, the actual text of Article 1D is capable of supporting a wide variety of different meanings. I therefore think it essential to set out, clearly and unambiguously, the principles that guide my thinking.

49. First, all genuine refugees deserve protection and assistance. An interpretation that would lead to a gap in protection for any such person is therefore, *a priori*, to be rejected.

50. Second, the historical intention behind Article 1D was clearly to give some form of *special treatment and consideration* to displaced Palestinians. (50)

51. Third, whatever the initial hopes of the General Assembly (as reflected in 1951 by the draftsmen of the Convention) that UNRWA would need to deal only with temporary provision of assistance, the problems associated with the situation in Palestine have proved intractable over the succeeding decades, as the successive renewals of UNRWA's mandate have demonstrated. The 1967 Protocol likewise reflects the unhappy reality that refugee problems requiring to be addressed under the 1951 Convention are not confined to those caused by events occurring before 1 January 1951. Thus, the original intention of the draftsmen of the Convention must be coloured by the reality of subsequent history.

52. Fourth, the Convention draftsman intended displaced Palestinians who were receiving the special treatment and consideration expressly put in place to care for them (assistance from UNRWA) not to be able to apply for refugee status under the Convention, as overseen by the UNHCR (hence the first sentence of Article 1D). Whilst they are being cared for by UNRWA, such persons are excluded *ratione personae* from the Convention.

53. Fifth, as a corollary to (or possibly by way of compensation for) that exclusion, under certain circumstances, displaced Palestinians falling within the second sentence of Article 1D are *ipso facto* entitled to the *benefits* of the Convention (and not merely to cease to be excluded from its scope on cessation of protection or assistance from UNRWA). The very presence of the second sentence implies a greater consequence than that, when its specific conditions are fulfilled, such persons merely join the queue with every other potential applicant for refugee status under Article 1A.

54. Sixth, the concept of 'cessation of protection or assistance' by a UN organ or agency other than the UNHCR (here, UNRWA) cannot be construed in a way that would result in such persons being, effectively, trapped in the UNRWA zone, unable (even if forcibly separated from UNRWA assistance) to leave and claim refugee status elsewhere until the situation in 'Palestine problem' is entirely resolved and UNRWA wound up. Such an outcome would be wholly unacceptable.

55. Seventh, because *all* genuine refugees should be able to obtain protection or assistance but the capacity of States to absorb refugees is not infinite, Article 1D cannot be interpreted either as entitling every displaced Palestinian, whether or not actually being or having been in receipt of UNRWA assistance, to leave the UNRWA zone voluntarily and claim automatic refugee status elsewhere. Such an interpretation would provide disproportionately favourable treatment for displaced Palestinians at the expense of other genuine applicants for refugee status displaced by other conflicts in the world.

56. Finally, the two sentences that comprise Article 1D are meant together to address the concern to provide special treatment and consideration for persons displaced by the situation in Palestine. Because the first sentence on its own was deemed insufficient, the second sentence was added. It therefore seems reasonable to read the two sentences (and hence their component elements) consecutively, not disjunctively; (51) and to seek a reading for the provision *as a whole* that strikes a reasonable balance between caring for displaced Palestinians (under Article 1D) and caring for other potential refugees (under the 1951 Convention as a whole).

57. I now turn to consider in detail the four points of interpretation (52) which are raised by the questions from the referring court.

(i) The meaning of 'persons who are at present receiving … protection or assistance'

58. The words 'at present receiving' are limitative in two senses. First, the practicalities of receiving protection or assistance from UNRWA suggest a limitation of place. (53) Second, the words 'at present' and the use of the present tense suggest a limitation in time. (54)

Limitation of place

59. In order to receive protection or assistance from a UN organ or agency other than the UNHCR, a person must be in a place where such protection and assistance is physically available. Assistance from UNRWA is obtainable only in the UNRWA zone. Consequently, as the UNHCR has stated, for present purposes a person will only come within the first sentence of Article 1D when he is resident in the UNRWA zone.

60. The Belgian Government suggests that, in consequence, the whole of Article 1D must be limited to persons who are within the UNRWA zone. It seems to me that, however, in law, neither of the two sentences that together comprise Article 1D

is limited geographically in any way. It is merely the practical realities of receiving UNRWA assistance that produce the apparent geographical limitation in the first sentence. It follows that an individual who leaves the UNRWA zone should, in certain circumstances, be able to invoke the specific rights conferred by the second sentence of Article 1D, wherever he may be.

61. I emphasise, furthermore, that the two sentences of Article 1D must be read consecutively. Thus, when an individual seeks to claim rights under the second sentence of Article 1D, it is necessary first to find out whether he was initially within the first sentence of that article. If he was not, he was not previously excluded *ratione personae* from the scope of the Convention. Rather, he – like any other potential refugee – can apply for individual assessment under Article 1A. (55)

Limitation in time

62. The United Kingdom argues that the use of the words 'at present' refers to 1951, when the Convention was drafted. It submits that the drafting parties had in mind only the group of persons identified as already receiving assistance and protection from UNRWA when the Convention came into force.

63. Ms Bolbol's position is to the effect that any person who has ever received (56) assistance from UNRWA falls within the exclusion clause in the first sentence of Article 1D. (57)

64. The Commission and Hungary interpret the words 'presently receiving' as meaning receiving at the time immediately preceding an application for refugee status under Article 1D.

65. In my view, the interpretation proposed by the United Kingdom is more rigid than the text will allow, particularly in the light of the 1967 Protocol and the repeated renewals of UNRWA's mandate.

66. I accept that in 1951 the drafting parties may have been thinking principally of persons who were, at that point, already receiving protection or assistance from other 'organs and agencies' of the United Nations (such as UNRWA). However, since then many additional persons (both the descendants of those originally displaced and new displaced persons) have been assisted and protected by that organisation. Indeed, the amendments to the Convention made by the 1967 Protocol clearly express the international community's recognition that situations giving rise to applications for refugee status did not, unfortunately, cease at a particular moment in history.

67. Applying that same logic here, it follows that the United Kingdom's restrictive reading of the first sentence of Article 1D cannot be correct. A restrictive reading is likewise difficult to reconcile with UNRWA's own guidelines (CERI), which offer assistance not only to persons displaced by the events of 1948, but (for example) to 'non-registered persons displaced as a result of the 1967 and subsequent hostilities'. (58)

68. Furthermore, Article 7 of the UNHCR's Statute excludes from UNHCR competence any 'person … who continues to receive from other organs or agencies of the United Nations protection or assistance …'. On the (not unreasonable) twin assumptions that (a) UNRWA is providing assistance to a greater number of persons now than in 1951 and that (b) many of those who received UNRWA assistance in 1951 have since died, it seems to me that a restrictive reading of the first sentence of Article 1D is likely to give a lower level of special treatment and consideration to displaced Palestinians than the United Nations intended.

69. However, in my own view the broad temporal scope of Ms Bolbol's approach goes too far the other way. Only those who are initially excluded from the scope of the Convention by the first sentence of Article 1D are potential beneficiaries of the special treatment envisaged by the second sentence of that provision. (59) A balanced approach to the interpretation of Article 1D as a whole thus requires one neither artificially to inflate the size of the excluded group defined by the first sentence (beyond those 'at present receiving' non-UNHCR protection or assistance) nor to be over-expansive as to the circumstances in which members of that group will qualify for the benefits conferred by the second sentence.

70. It follows that some limitation in time is necessary. I therefore read 'at present receiving' protection or assistance in the first sentence of Article 1D as meaning, at any particular point in time, 'persons who are currently receiving protection or assistance from UN organs or agencies other than the UNHCR'. Such persons are excluded from the Convention because they do not need its protection.

(ii) Actual or potential receipt?

71. The second point of interpretation is whether the person concerned must actually have benefited from assistance or

protection, or whether it suffices that he is potentially entitled so to benefit.

72. In my view, the first sentence of Article 1D covers only persons who have actually availed themselves of the protection or assistance of an organ or agency other than the UNHCR.

73. First, the wording of the first sentence uses the expression 'receiving' rather than 'is entitled to receive'. (60) Here, I agree with the United Kingdom that to read 'receiving' as 'entitled to receive' is to read in something which is plainly not in the text.

74. Second, the first sentence of Article 1D is a derogation from the general principle that the protection *rationepersonae* given by the Convention is universal, (61) inasmuch as it excludes a particular category of persons from the scope of the Convention. As such, it should presumably be interpreted strictly rather than expansively. (62)

75. Third, a strict reading also chimes in with the idea that such persons (who will subsequently, if necessary, be able to claim the special rights set out in Article 1D, second sentence) are not acting of their own volition, but are being swept along by events over which they have no control, (63) inasmuch as the decision whether to give assistance to any particular individual is dependent, directly or indirectly, on UNRWA. (64)

76. In disagreeing here with the interpretation put forward by the Office of the UNHCR I am guided primarily by the clear text of the provision, which has not been amended in over 50 years. In contrast, it seems to me that the UNHCR's reading has varied over time, (65) reflecting the intractable nature of the Palestine problem. Whilst its reading has the advantage of eliminating most evidentiary problems associated with the first sentence, it does so by excluding a much greater number of potential refugees from the scope of the 1951 Convention.

(iii) 'when such protection or assistance has ceased for any reason'

77. The written observations lodged with the Court suggest, between them, most shades of meaning for this phrase, from a total cessation of UNRWA activity (66) to a cessation of protection in respect of a particular individual. (67) Indeed, Ms Bolbol goes further and suggests that if *either* protection or assistance ceases, that triggers the second sentence of Article 1D. She points out that the United Nations Conciliation Commission for Palestine (68) has ceased effectively to operate (69) and concludes that Article 1D, second sentence, is already necessarily in operation for all those previously excluded from protection by the first sentence.

78. I do not accept that submission. The two sentences of Article 1D are to be read consecutively. The phrase 'protection or assistance' – used in both sentences – should therefore be read as meaning assistance or protection provided by any one of the 'organs or agencies of the United Nations' other than the UNHCR. If a person is 'at present receiving' from *any* such agency 'protection or assistance', he is excluded from the Convention (first sentence). I read 'ceases' as meaning that Article 1D, second sentence, is triggered if that same person is no longer able to benefit from protection or assistance from any such agency.

79. On the other hand, to read 'ceases' as requiring the total cessation of UNRWA's activities throughout the UNRWA zone would mean that, until then, no person who ceased to receive assistance from organs such as UNRWA would be able to derive any benefit from the second sentence of Article 1D or, arguably, from the Convention as a whole. Such a reading also sits oddly with the presence of the words 'for any reason' before the clause referring to the resolution of the underlying problem (displaced Palestinians), since the obvious reason for total cessation of UNRWA's activities would be that 'the position of such persons' had been definitively settled.

80. For that reason, I conclude that what matters is whether the individual concerned has ceased to receive protection or assistance.

81. Finally, I must address the question of whether the reason for the cessation of UNRWA assistance matters. Specifically, is the second sentence of Article 1D triggered if a person voluntarily removes himself from the geographical area in which UNRWA operates, thus making it impossible for him to continue to receive UNRWA's assistance? Or does 'cessation for any reason' mean simply 'whatever the reason why UNRWA has ceased to provide assistance to a particular person'? As I shall explain, I prefer the second reading.

82. In trying to unpick this Gordian knot, I think that one must look both at the consequences of any particular reading and at the underlying rationale behind the provision. My answer is therefore linked to the reading that I give to the final point of interpretation (as to the legal consequences of triggering the second sentence of Article 1D), (70) where my interpretation is more generous than some Member States have proposed. I would distinguish between persons who remove themselves

voluntarily from the UNRWA zone and thereby from UNRWA's assistance and those who find that external events beyond their control have meant that UNRWA ceases to continue to provide assistance to them. (71)

83. Individuals in the first category are no longer excluded from the scope of the Convention *ratione personae*, because they are not 'at present receiving ... protection or assistance', and are at liberty to ask for individual assessment with a view to obtaining refugee status under Article 1A. However, they may not claim to be *ipso facto* entitled to the benefits of the Convention. They have chosen to place themselves in a situation in which UNRWA's assistance is no longer available to them; but there has been no cessation in UNRWA's willingness to provide such assistance.

84. Individuals in the second category find involuntarily that their previous situation (in which, although excluded from the Convention by Article 1D, first sentence, they were being cared for by UNRWA) has been altered. UNRWA has ceased to provide such assistance to them. It seems to me that the special regime set out in Article 1D, second sentence, must – if it is to have any meaning – step in to address the needs of such persons.

(iv) 'Ipso facto ... entitled to the benefits of this convention'

85. The Belgian and United Kingdom Governments argue that entitlement to the benefits of the 1951 Convention means no more than the entitlement to be assessed under the criteria set out in Article 1A. To my mind, however, the wording of the second sentence of Article 1D makes it abundantly clear that someone who was previously excluded from the scope of the Convention by the article's first sentence but whose receipt of non-UNHCR protection or assistance has ceased within the meaning of the first part of the second sentence is then entitled to significantly more, namely automatic recognition as a refugee.

86. First, both the English and the French texts lend themselves to such a reading. Thus, the English has 'shall *ipso facto* be entitled to the benefits of this Convention' and the French 'bénéficieront de plein droit du régime de cette convention'. I find it difficult to see how merely being entitled to apply for assessment under Article 1A can be said to correspond to either formula.

87. Second, Article 1 is not – as such – a 'benefit' of the Convention. Rather, the benefits are contained in the succeeding articles. Article 1 defines who is, and who is not, to have access to those benefits. (72) It follows that *ipso facto* entitlement to benefits implies that one has already passed beyond Article 1.

88. Third, the rationale behind Article 1D is that displaced Palestinians should enjoy special treatment and consideration. I find it difficult to regard merely being allowed to join the queue for individual assessment of entitlement to refugee status as special treatment and consideration. That seems to me more the mere removal of a previous obstacle (being excluded from the Convention's scope).

89. I therefore conclude that *ipso facto* entitlement means the automatic grant of refugee status, without further individual assessment.

The results of this construction of Article 1D

90. The construction that I propose in dealing with each of the four points of interpretation involves reading the two sentences that together comprise Article 1D in a way that will generate the following set of outcomes:

(a) a displaced Palestinian who is not receiving UNRWA protection or assistance is not excluded *ratione personae* from the scope of the Convention: he is therefore to be treated like any other applicant for refugee status and to be assessed under Article 1A (avoidance of overlap between UNRWA and the UNHCR; application of the principle of universal protection);

(b) a displaced Palestinian who is receiving protection or assistance from UNRWA is excluded *ratione personae* from the scope of the Convention whilst he is in receipt of that protection or assistance (avoidance of overlap between UNRWA and the UNHCR);

(c) a displaced Palestinian who was receiving protection or assistance from UNRWA but who, for whatever reason, can no longer obtain protection or assistance from UNRWA ceases to be excluded *ratione personae* from the scope of the Convention (application of the principle of universal protection); however, whether he is then *ipso facto* entitled to the benefits of the Convention or not depends on why he can no longer obtain such protection or assistance;

(d) if such a displaced Palestinian can no longer benefit from UNRWA protection or assistance as a result of external

circumstances over which he had no control, he has an automatic right to refugee status (application of the principle of special treatment and consideration);

(e) if such a displaced Palestinian can no longer benefit from UNRWA protection or assistance as a result of his own actions, he cannot claim automatic refugee status; however, he is (naturally) entitled to have an application for refugee status assessed on its merits under Article 1A (application of the principle of universal protection and fair treatment for all genuine refugees; proportionate interpretation of the extent of special treatment and consideration to be afforded to displaced Palestinians).

Application mutatis mutandis to the Directive

91. Given that the wording of Article 12(1)(a) of the Directive directly reflects that of the 1951 Convention, it is now possible to deal relatively shortly with the actual questions referred. Once the Court has interpreted Article 12(1)(a), that provision is, in my view, capable of direct effect.

The first question

92. Article 12(1)(a) does not set out verbatim the exclusion condition 'at present receiving … protection or assistance'; but contents itself with referring directly back to Article 1D of the 1951 Convention. Nothing suggests that the exclusion condition in the Directive is intended to mean something different from Article 1D. On the contrary: every indication is that it should bear exactly the same meaning.

93. Applying the interpretation of Article 1D of the 1951 Convention that I have set out above, I therefore conclude that a person comes within the scope of the first sentence of Article 12(1)(a) of the Directive only if he has actually availed himself of protection or assistance provided by an organ or agency of the United Nations other than the UNHCR. Mere entitlement to such protection or assistance does not exclude such a person from being a refugee within the meaning of Article 2(c) of the Directive.

94. A subsidiary issue (which arises in the context of applying the Directive) is, what evidence must an applicant produce to demonstrate that he fell within the first sentence of Article 12(1)(a) of the Directive as a precursor to claiming special rights under the second sentence? On the basis of the interpretation that I set out above, it seems to me that an applicant must adduce evidence to show that he was actually receiving protection or assistance.

95. Here, it is essential to acknowledge both the State's legitimate interest in checking whether a particular individual is entitled to what he claims and the very real, practical problems that any displaced person seeking refugee status may face in proving his entitlement. Some applicants will not have a genuine claim to refugee status; and the State is entitled to probe their case. At the same time, the State may not lay down unrealistic standards for the evidence required. (73)

96. The question then arises as to what difference actual registration with UNRWA makes or should make.

97. Registration to my mind is a matter of evidence, not of substance.

98. UNRWA sometimes provides assistance without registering a person. (74) Sometimes, the administrative records may lag behind the event; or may themselves have been destroyed during hostilities. I therefore reject the French Government's submission that only actual proof of UNRWA registration will suffice.

99. That said, I would treat evidence of actual registration with UNRWA as raising an irrebuttable presumption that an applicant had been in actual receipt of assistance.

The second question

100. The second sentence of Article 12(1)(a) of the Directive directly mirrors that of the 1951 Convention and *a fortiori* should be interpreted in the same way.

101. My answer to the second question referred is therefore that 'cessation of the agency's protection or assistance' means that the person concerned has ceased, otherwise than of his own volition, to benefit from the protection or assistance that he enjoyed immediately previously.

102. I do not underestimate the evidentiary issues that will arise in conjunction with determining whether a particular person

left the UNRWA zone voluntarily or involuntarily. The problems range from fragmentary evidence (that bears out part of a narrative but not every single step) to the possibility of fabricated evidence (or genuine evidence obtained by bribing the right official). Here, as with demonstrating actual receipt of assistance, the State is entitled to insist on some evidence, but not on the best evidence that might be produced in an ideal world.

The third question

103. The third question referred cannot be answered by direct transposition of the earlier analysis. Here, the scheme of the Directive needs to be taken into account.

104. Article 2(c) of the Directive defines a refugee as a third country national who fulfils a specific set of criteria (modelled on Article 1A of the Convention) 'and to whom Article 12 does not apply'. Article 12 (entitled 'Exclusion') then excludes certain categories of persons (mirroring parts of Article 1 of the 1951 Convention) (75) 'from being a refugee'.

105. Does that mean that a person who comes within *any part* of Article 12(1)(a) (that is, the first and/or the second sentence) is permanently excluded from being a refugee? In my view it cannot.

106. First, the second sentence of Article 12(1)(a) clearly provides for the *benefits* of the Directive to be extended to persons who fell within the first sentence but who then satisfied the criteria set out in the second sentence. To reconcile that wording with the general definition of 'refugee' given by Article 2(c), it is necessary to construe the second sentence of Article 12(1)(a) as an exception to the disqualification clause contained in the first sentence of that provision, with its own specific consequences.

107. Second, Article 12 forms part of Chapter III of the Directive ('Qualification for being a refugee'). The placement of this article indicates, as Ms Bolbol, the Hungarian Government and the Commission have correctly argued, that this is a separate avenue from the procedure set out in Chapter II ('Assessment of applications for international protection') under which a person may qualify as a refugee and hence be entitled to the grant of refugee status under Article 13. (76)

108. Finally, in delineating who is and is not to be considered as a refugee, Articles 2(c), 11 and 12 reflect not only the wording but also the scheme of Article 1 of the 1951 Convention read as a whole. If the Directive contains a lacuna such that a person who fulfils both parts of Article 12(1)(a) is still excluded from being classified as a refugee, then the Directive fails correctly to transpose Member States' international law obligations under the Convention into European Union law. That must therefore be an erroneous reading of the Directive.

109. Applying the analysis of Article 1D of the Convention that I have set out earlier, I therefore conclude, in answer to the third question referred, that the words 'the benefits of this directive' mean qualification as a refugee and automatic entitlement to refugee status in accordance with Article 13 of the Directive. (77)

110. For the sake of completeness, I add that the availability of subsidiary protection (78) as a further option does not affect the interpretation of Article 12(1)(a). That option is relevant only to persons who are not granted refugee status automatically by virtue of Article 12(1)(a) but who are assessed in accordance with Chapter II and who qualify for subsidiary protection under Chapter V. Under the 1951 Convention, a person must fulfil the criteria in Article 1A in order to qualify for *any* protection. Under the Directive, a person who falls short of meeting the equivalent criteria (set out in Article 2(c) and further elaborated in Chapter II) may still be offered a (lesser) degree of protection.

Conclusion

111. In the light of the above, I suggest that in answer to the questions referred by the Fővárosi Bíróság the Court should rule as follows:

(1) A person comes within the scope of the first sentence of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 only if he has actually availed himself of the protection or assistance of a United Nations agency other than the UNHCR. Mere entitlement to such protection or assistance does not suffice to trigger that provision.

(2) The words 'cessation of the agency's protection or assistance' mean that the person concerned is no longer in the relevant geographical area and has ceased, otherwise than of his own volition, to benefit from the protection or assistance that he enjoyed immediately before leaving that geographical area.

(3) The words 'the benefits of this directive' mean recognition as a refugee and the automatic grant of refugee status.

1 – Original language: English.

2 – 'The 1951 Convention' or 'the Convention', which consolidated and replaced earlier instruments. It entered into force on 22 April 1954. The version applicable to the present proceedings is that which resulted from the adoption, in 1967, of the New York Protocol of 31 January 1967 Relating to the Status of Refugees ('the 1967 Protocol'). Directive 2004/83 refers to the 1951 Convention as 'the Geneva Convention', a shorthand term more commonly reserved for the four treaties and protocols thereto that together set the standards in international law for humanitarian treatment of the victims of war. For the sake of clarity, I shall therefore, save in direct citation, avoid 'Geneva Convention' in this Opinion.

3 – Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004 L 304, p. 12 ('Directive 2004/83' or 'the Directive').

4 – As amended by the Protocol added in 1967, in recognition of the fact that new refugee situations had arisen since the Convention was adopted and that all refugees should enjoy equal status.

5 – 'The ICJ'.

6 – The question whether resolutions of the UN General Assembly are in fact 'law' *strictu sensu* is one which has not yet been resolved (see, for example, the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons (ICJ Reports, 1996, p. 226) for a discussion of the normative value of resolutions). For the purposes of the present Opinion, however, this point does not require detailed analysis.

7 – 'The UNSCOP'.

8 – 'UNRWA'.

9 – See UN General Assembly Resolution 62/02.

10 – See CERI, point VII.E. For simplicity, I shall refer to UNRWA's area of operations in this Opinion as 'the UNRWA zone'.

11 – UNRWA's website: http://www.un.org/unrwa/overview/qa.html; CERI, point III.A.1. Point VII (glossary and definitions) repeats this definition (at point VII.J). It also contains the detailed definitions of certain other terms used later in this section of the Opinion.

12 – These are 'persons who at the time of original registration did not satisfy all of UNRWA's Palestinian Refugee criteria, but who were determined to have suffered significant loss and/or hardship for reasons related to the 1948 conflict in Palestine; they also include persons who belong to the families of Registered Persons' (CERI, point III.A.2). Such persons, although registered with UNRWA, are not counted as part of the official Registered Refugee population of the Agency. According to UNRWA's website, there are presently around 4.6 million persons registered with UNRWA.

13 – CERI, point III.A. Elsewhere UNRWA states that 'UNRWA's services are available to all those living in its area of operations who meet this definition, who are registered with the Agency and who need assistance' (www.un.org/unrwa/refugees/whois.html).

14 – CERI, point III.B. UNRWA states that its programmes 'keep due records' of such persons. Perhaps understandably, UNRWA does not, however, attempt to ascertain or confirm whether a particular person who is not registered and who has not actually received assistance is nevertheless *potentially* entitled to assistance (see further point 71 below).

15 – UNRWA makes its services available to persons in this category in accordance with established practice and/or host country agreement. In Resolution 2252 (ES-V) of 4 July 1967, the UN General Assembly endorsed UNRWA's efforts 'to provide humanitarian assistance, as far as practicable, on an emergency basis and as a temporary measure, to other persons in the area who are at present displaced and are in serious need of immediate assistance as a result of the recent hostilities'. That the need for such humanitarian assistance is not, alas, 'temporary' is well demonstrated by the fact that the terms of Resolution 2252 (ES-V) have been repeated in numerous General Assembly Resolutions since, most recently in Resolution 64/L.13 of 13 November 2009.

16 – 'These persons benefit from UNRWA services (e.g. sanitation and environmental health services) that are extended to refugee camps and communities as a whole' (CERI, point III.B).

17 – 'The UNHCR'.

18 – Annexed to that resolution.

19 – Recital 15 in the preamble to Directive 2004/83 states that 'consultations with the [UNHCR] may provide valuable guidance to Member States when determining refugee status'. For a further discussion of the value of statements of the UNHCR's office; see Hathaway, *The Right of Refugees under International Law* Cambridge University Press, 2005, pp. 112-118, in particular the distinctions in normative weight he draws between (a) Conclusions of the Executive Committee (the most authoritative), (b) the Handbook and (c) other statements issued for guidance. The UNHCR material referred to in this Opinion falls into categories (b) and (c).

20 – The Handbook notes that, although UNRWA is currently the only organ or agency other than the UNHCR that is providing protection or assistance under Article 1D, there was previously one other such body (the United Nations Korean Reconstruction Agency) and there could, potentially, be other

such bodies in the future.

21 – Articles 1C (cessation) and 1E and 1F (exclusion).

22 – The Office of the UNHCR issued, in 2009, a revised version of this note. I have noted the pertinent changes in the footnotes to this section.

23 – The 2009 revision makes it clearer that this includes their descendants.

24 – The 2009 revision omits this requirement, stating that the person concerned needs only to be inside the UNRWA zone to be deemed to be receiving protection and assistance.

25 – The 2009 revision states that such persons fall within the second sentence because they are 'not at present receiving' (rather than 'no longer receiving') protection or assistance and thus the protection or assistance has 'ceased'.

26 – The 2009 revision deletes 'and fall within the competence of the UNHCR' from this point.

27 – The 2009 revision does not discuss the concept of 'being returned'.

28 – The revised version of this note adopts the analysis of the revised 2002 note and adds that all persons falling within the wording of Resolutions 194 (III) and 2252 (ES-V), and their descendants, who are in the UNRWA zone, are 'at present receiving … protection or assistance' within the sense of Article 1D.

29 – The revised version does not analyse the meaning of 'ceased for any reason' but indicates simply that persons moving from inside to outside the UNRWA zone and then back again will move back and forth between paragraphs 1 and 2 of Article 1D, irrespective of the reasons for leaving or returning.

30 – Following the entry into force of the Lisbon Treaty, Article 63(1) and (2) EC is reproduced (with some alterations) in Article 78(1) and (2) TFEU. Most notably, the TFEU requires the European Parliament and Council to adopt measures for a common European asylum system, comprising, inter alia, a uniform status of asylum and of subsidiary protection for nationals of third countries. Article 63(3)(a) EC is reproduced (with some alterations) in Article 79(2)(a) TFEU.

31 – Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonised application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (OJ 1996 L 63, p. 2).

32 – See footnote 14 above (Ms Bolbol's legal representative had requested such confirmation). Even if Ms Bolbol were not eligible to be registered, she might nevertheless (if she were within the UNRWA zone) be entitled to receive assistance: see points 10 to 12 above.

33 – From the order for reference it appears that this decision was based on Article 3(1) of the Menedékjogról Szóló 1997. Évi CXXXIX. Törvény ('the Met').

34 – From the order for reference it appears that this was based on Article 38(2) of the Met and on Article 51(1) of the Harmadik Országbeli Állampolgárok Beutazásáról és Tartózkodásáról Szóló 2007. Évi II. Törvény.

35 – See the judgment of the Court in Joined Cases C-175, C-176, C-178 and C-179/08 *Salahadin Abdulla et alia* [2010] ECR I-0000, paragraphs 52 and 53.

36 – See the UNHCR Handbook and the two Notes referred to at points 18 and 20 above. The ICJ has exclusive jurisdiction, under Article 38, to give authoritative rulings as to the meaning of the 1951 Convention.

37 – Compare, for example, the approach taken by the UK Court of Appeal in *El-Ali* [2003] 1 WLR 95 with the conclusion reached by Belgium's Conseil du Contentieux des Etrangers in its decisions of 21 April 2009 and 14 May 2009 (Case numbers 26 112 and 27 366 respectively).

38 – That is particularly the case since Article 12(1)(a) is virtually a straight transposition of the concepts and wording that are found in Article 1D of the 1951 Convention. That said, the Court's actual ruling will, evidently, be authoritative only in respect of the Directive.

39 – While international law endeavours to give effect to the natural and ordinary meanings of a Treaty's provisions (under Article 31 of the Vienna Convention on the Law of Treaties ('VCLT')), there is scope in both the VCLT (under Article 32) and in the general principles of international law for referring to the *travaux préparatoires* of a Treaty and the circumstances of its conclusion in determining the meaning of a term when an interpretation based on the ordinary meaning of a provision, in the light of its object and purpose, would leave the meaning of that term ambiguous or obscure. For further discussion, see Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition, Manchester University Press, 1984, p. 141 et seq.

40 – See footnote 20 above.

41 – 'The Conference of Plenipotentiaries'.

42 – A number of international bodies have at times interpreted the provisions of a Treaty in the light of the contemporaneous common will of the drafting parties (see, for example, the judgment of the ICJ in *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports 2002, p. 303 at

paragraph 59, and the Decision on Delimitation of the Border between Eritrea and Ethiopia, delivered on 13 April 2002 by the Eritrea-Ethiopia Boundary Commission at paragraphs 3.3, 3.4 and 3.13, which refers to the decision of the arbitral tribunal in the *Argentina/Chile Frontier Case* ((1966) 38 ILR 10, p. 89).

43 – See the statements of the Italian and Iraqi representatives at the 19th, and the French representative at the 29th, meeting of the Conference of Plenipotentiaries.

44 – See the statements of the Egyptian representative at the 19th and 29th meeting of the Conference of Plenipotentiaries.

45 – See the statements of the Egyptian representative at the 19th, and the French representative at the 20th, meeting of the Conference of Plenipotentiaries.

46 – See, for example, the statements of the Conference's President at the 19th, the French representative at the 20th, and the US representative at the 21st, meeting of the Conference of Plenipotentiaries.

47 – See, for example, Article 1(2) of the UN Charter. The concept of self-determination evolved in tandem with the process of de-colonisation, and as such tends to have a strong territorial element (Shaw, *International Law*, 5th edition, Cambridge University Press, 2008). It is therefore difficult to apply to groups of refugees or stateless persons. The question of its applicability to displaced Palestinians is the subject of lively debate (see, *inter alia*, the Advisory Opinion of the ICJ on the Legal Consequences on the Construction of a Wall in the Occupied Territory (ICJ Reports 2004, p. 136)).

48 – See the preamble to, and Article 1(3) of, the UN Charter. This analysis is reflected in a central aspect of Article 1A of the Convention under which, in order to obtain refugee status, an individual must show a well-founded fear of persecution to himself as an individual within the parameters of a more general risk posed to a particular group of persons sharing the same characteristic.

49 – It seems from the *travaux préparatoires* that even the Egyptian delegation, at whose initiative the second sentence was added to the draft that became Article 1D, was not entirely clear as to the intended function of the sentence as a whole: see the statements of the Egyptian representative at the 19th and 20th meetings of the Conference of Plenipotentiaries.

50 – The German Government has queried whether this separate and distinct set of arrangement infringes the principle of equal treatment. Answering that question in the negative requires one to acknowledge that Article 1D was drafted so as to take account of the particular problems of a particular group of displaced people, whose situation was – at least in part – attributable to a decision taken by the international community (the partition of Palestine). That objective difference then provides the reason for (a degree of) special treatment. Whether the application of Article 1D to persons receiving protection or assistance from a body other than the UNHCR is a hypothetical situation *not* caused by a decision taken by the international community would violate the principle of equal treatment is a question beyond the scope of this Opinion.

51 – Here, I disagree with the line of interpretation proposed by the Office of the UNHCR, which states (in its 2002 note, and more clearly in the 2009 revision of that note) that all Palestinians (falling within the ambit of Resolution 194 (III) of 11 December 1948 and Resolution 2252 (ES-V) of 4 July 1967) who are outside the UNRWA zone are not at present receiving protection or assistance, and consequently that protection or assistance has ceased. This means assistance could theoretically 'cease' for someone who has never received it, which simply does not fit with the natural meaning of the word 'cease'. The original version of the UNHCR note relating to the present case stated that if someone has left the UNRWA zone, the protection and assistance have 'ceased' *for them* so that they *should* then automatically obtain the benefits of the Convention. I address this reasoning later (at point 81 et seq.).

52 – Summarised at point 47 above.

53 – I accept that a hypothetical future UN organ or agency operating within the meaning of Article 1D might not be so limited.

54 – I consider below, as the second issue of interpretation, whether 'receiving' means 'actually receiving' or 'entitled to receive'.

55 – Assuming, of course, that the individual in question is not excluded under Article 1C, 1E or 1F.

56 – Or who would be entitled to receive assistance: as to that, see point 71 et seq.

57 – She then argues for a correspondingly broad interpretation of the second sentence.

58 – See points 11 to 13 above.

59 – See point 85 et seq. below for the discussion of what that special treatment entails.

60 – The French text of Article 1D (which is the other authentic text, as mentioned in the final paragraph of the Convention) likewise has 'bénéficient actuellement' rather than 'sont éligibles à bénéficier'.

61 – The original temporal limitation ('as a result of events occurring before 1 January 1951') was removed by the 1967 Protocol; and most States have now elected, under Article 1B, to treat the Convention as applying to 'events occurring in Europe or elsewhere'. As of 2009, of the 147 States party to either the Convention or the Protocol, just four States had elected to treat the Convention as applying only to events occurring in Europe.

62 – Whilst the case-law relating to such clauses is less clearly marked than in European Union law (see, for examples, the Opinion of Advocate

General Kokott in Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, point 58 and the case-law cited there), international judicial and arbitrational bodies have, under the VCLT, developed their interpretive practices so as to construe treaties in a way which bears in mind the purpose and objects of those treaties (see, for example, the decision of the ICJ in *Territorial Dispute (Libyun Aruh Jamuhiriyu/Chad)*, ICJ Reports 1994, paragraph 41, and the decision of the arbitral tribunal in the *German External Debts Case*, 19 ILM 1980, p. 1377, paragraphs 28 and 30). These authorities suggest that a strict reading of the derogation may be viewed favourably by other international bodies.

63 – I return to the degree of control a refugee has over his fate later, at point 77 et seq.

64 – See points 11 to 13 above and the detailed footnotes thereto.

-65 – See points 18 and 19 above.

66 – The observations of the Belgian, French, and United Kingdom Governments.

67 – Ms Bolbol's observations and the 2009 note from the UNHCR. The Commission's approach also focuses on individuals. However, the Commission takes the view that persons who have left the UNRWA zone do not fall within Article 1D but instead come under the general rules, as their movements are not akin to a cessation of protection or assistance (which occurs independently of any action on the part of an individual).

68 – 'The UNCCP'.

69 – Ms Bolbol argues that UNRWA was created to assist displaced Palestinians, whilst the UNCCP was to protect them. She bases her argument on the cessation of the UNCCP's activities and the fact that UNRWA did not take over the UNCCP's functions.

70 – See below, point 85 et seq.

71 – This is, moreover, the interpretation earlier taken by the European legislature: see Joint Position 96/196, which states that persons who have deliberately removed themselves from the protection and assistance found in Article 1D of the 1951 Convention are no longer automatically covered by the Convention.

72 – The drafting of Article 1 of the 1967 Protocol supports this reading, inasmuch as it groups together Articles 2 to 34 of the 1951 Convention. The 2009 note from the Office of the UNHCR also states that 'the term "benefits of the 1951 Convention" refers to the standard of treatment that States Parties … are required to accord to refugees under Articles 2 to 34 of that Convention'.

73 – As applied to the Directive (as distinct from the Convention), this means that whilst Member States retain the right to lay down, under national law, the applicable rules of evidence, those rules must not make it impossible or virtually impossible for an applicant to claim rights guaranteed by EU law: see Case C-63/08 *Pontin* [2009] ECR I-0000, paragraph 43 and the case-law cited there.

74 – See point 13 above and footnotes 14 to 16. It seems likely that rather a large number of persons receiving assistance may not formally be registered, although there should usually be some record within UNRWA to show that it is at least likely that they were receiving assistance.

75 – The correlation is as follows (Directive article given before Convention article): Article 12(1)(a) for Article 1D; Article 12(1)(b) for Article 1E; Article 12(2)(a), (b) and (c) for Article 1F. Article 12(3) provides further clarification as to the interpretation of Article 12(2). The terms of Article 1C of the Convention are reflected in a separate provision of the Directive (Article 11: 'Cessation').

76 – 'Member States shall grant refugee status to a third country national or stateless person who qualifies as a refugee in accordance with Chapters II *and III*' (emphasis added). The wording of Article 12 of Joint Position 96/196 also suggests that persons falling within both sentences of Article 1D of the 1951 Convention are automatically entitled to refugee status, and do not need to be assessed under the criteria set out in Article 1A.

77 – The mandatory phrase 'shall grant refugee status' in Article 13 of the Directive (see previous footnote) can mean nothing else.

78 – Under Chapter VI, Articles 18 and 19 of the Directive.

JUDGMENT OF THE COURT (Grand Chamber)

17 June 2010 (*)

(Directive 2004/83/EC – Minimum standards for the qualification and status of third country nationals or stateless persons as refugees – Stateless person of Palestinian origin who has not sought protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) – Application for refugee status – Refusal based on a failure to meet the conditions laid down in Article 1A of the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 – Right of that stateless person to be recognised as a refugee on the basis of the second sentence of Article 12(1)(a) of Directive 2004/83)

In Case C-31/09,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Fővárosi Bíróság (Hungary), made by decision of 15 December 2008, received at the Court on 26 January 2009, in the proceedings

Nawras Bolbol

v

Bevándorlási és Állampolgársági Hivatal,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta, Presidents of Chambers, A. Rosas, P. Kūris, J.-J. Kasel and M. Safjan, Judges,

Advocate General: E. Sharpston,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 20 October 2009,

after considering the observations submitted on behalf of:

– Ms Bolbol, by G. Győző, ügyvéd,

– the Hungarian Government, by R. Somssich, M. Fehér and K. Borvölgyi, acting as Agents,

– the Belgian Government, by C. Pochet and T. Materne, acting as Agents,

– the German Government, by M. Lumma and N. Graf Vitzthum, acting as Agents,

– the French Government, by E. Belliard, G. de Bergues and B. Beaupère-Manokha, acting as Agents,

– the United Kingdom Government, by I. Rao, acting as Agent,

– the Commission of the European Communities, by B. Simon and M. Condou-Durande, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 March 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; 'the Directive').

2 The reference has been made in the course of proceedings between Ms Bolbol, a stateless person of Palestinian origin, and Bevándorlási és Állampolgársági Hivatal (Office for Immigration and Citizenship; 'BAH') concerning the refusal of BAH to grant Ms Bolbol's application for refugee status.

Legal context

International law

Convention relating to the Status of Refugees

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol relating to the Status of Refugees of 31 January 1967, which entered into force on 4 October 1967 ('the Geneva Convention').

4 The first subparagraph of Article 1A(2) of the Geneva Convention provides that the term 'refugee' is to apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

5 Article 1D of the Geneva Convention provides:

'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.'

United Nations Conciliation Commission for Palestine

6 The United Nations Conciliation Commission for Palestine (UNCCP) was established by United Nations General Assembly Resolution No 194 (III) of 11 December 1948. Under paragraph 11 of that resolution, the United Nations General Assembly:

'Resolves that the refugees wishing to return to their homes in peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible;

Instructs the [UNCCP] to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations.'

United Nations Relief and Works Agency for Palestine Refugees in the Near East

7 United Nations General Assembly Resolution No 302 (IV) of 8 December 1949 established the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Its mandate has been regularly renewed, and its current mandate expires on 30 June 2011. UNRWA's area of operation covers the Lebanon, the Syrian Arab Republic, Jordan, the West Bank (including East Jerusalem) and the Gaza Strip.

8 Under paragraph 20 of Resolution No 302 (IV), the United Nations General Assembly:

'*Directs* [UNRWA] to consult with [the UNCCP] in the best interests of their respective tasks, with particular reference to paragraph 11 of General Assembly resolution 194 (III) of 11 December 1948.'

9 In accordance with paragraph 6 of United Nations General Assembly Resolution No 2252 (ES-V) of 4 July 1967, the General Assembly:

'*Endorses* … the efforts of the Commissioner-General of [UNRWA] to provide humanitarian assistance, as far as practicable, on an emergency basis and as a temporary measure, to other persons in the area who are at present displaced and are in serious need of immediate assistance as a result of the recent hostilities.'

10 Under paragraphs 1 to 3 of United Nations General Assembly Resolution No 63/91 of 5 December 2008, the General Assembly:

'1. *Notes with regret* that repatriation or compensation of the refugees, as provided for in paragraph 11 of General Assembly resolution 194 (III), has not yet been effected, and that, therefore, the situation of the Palestine refugees continues to be a matter of grave concern and the Palestine refugees continue to require assistance to meet basic health, education and living needs;

2. *Also notes with regret* that the [UNCCP] has been unable to find a means of achieving progress in the implementation of paragraph 11 of General Assembly resolution 194 (III), and reiterates its request to the [UNCCP] to continue exerting efforts towards the implementation of that paragraph and to report to the Assembly as appropriate, but no later than 1 September 2009;

3. *Affirms* the necessity for the continuation of the work of [UNRWA] and the importance of its unimpeded operation and its provision of services for the well-being and human development of the Palestine refugees and for the stability of the region, pending the just resolution of the question of the Palestine refugees'.

The United Nations High Commissioner for Refugees

11 Under paragraph 7(c) of the annex to United Nations General Assembly Resolution No 428 (V), of 14 December 1950, on the Statute of the Office of the High Commissioner for Refugees (UNHRC), the mandate of the High Commissioner for Refugees, as defined in that statute, '… shall not extend to a person … who continues to receive from other organs or agencies of the United Nations protection or assistance'.

European Union legislation

12 Recitals 2 and 3 in the preamble to the Directive state:

'(2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention …, thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Geneva Convention … provide[s] the cornerstone of the international legal regime for the protection of refugees.'

13 Recital 6 in the preamble to the Directive states:

'The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.'

14 Under Recital 10 in the preamble to the Directive:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.'

15 Recitals 16 and 17 of the preamble to the Directive state:

'(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.'

16 Pursuant to Article 2(c) to (e) of the Directive, for the purposes of that directive:

'(c) "refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) "refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee;

(e) "person eligible for subsidiary protection" means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'.

17 Articles 13 and 18 of the Directive provide that the Member States are to grant refugee status or subsidiary protection status to third country nationals who qualify as refugees in accordance with Chapters II and III or Chapters II and V of that

directive respectively.

18 Chapter III of the Directive on qualification for being a refugee includes, under the heading 'Exclusion', Article 12(1)(a) which provides:

'A third country national or a stateless person is excluded from being a refugee, if:

(a) he or she falls within the scope of Article 1D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Directive'.

19 Article 13 of the Directive provides:

'Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.'

20 Chapter VII of the Directive, entitled 'Content of International Protection', includes Article 21(1) which provides:

'Member States shall respect the principle of non-refoulement in accordance with their international obligations.'

21 In accordance with Articles 38 and 39, the Directive entered into force on 20 October 2004 and had to be transposed by 10 October 2006 at the latest.

National legislation

22 Article 3(1) of Law No CXXXIX of 1997 on asylum (*Magyar Közlöny* 1997/112 (XII.15.); 'the Law on Asylum'), provides:

'Subject to the exception provided for in Article 4, the refugee authority shall, upon application, recognise as a refugee a foreigner who proves or provides prima facie evidence that the provisions of the Geneva Convention apply to him under Article 1A and B(1)(b) of the Geneva Convention, and Article 1(2) and (3) of the Protocol.'

23 Pursuant to Article 38(2) of the Law on Asylum, in a decision refusing an application for asylum, the competent authority is to confirm whether there is a prohibition against refoulement and/or expulsion.

24 Article 51(1) of Law No II of 2007 on the Entry and Stay of third country nationals (a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény, *Magyar Közlöny* 2007/1 (I.5.)) provides:

'Third country nationals may not be returned or expelled to the territory of a country that fails to satisfy the criterion of safe country of origin or safe third country in respect of the person in question, in particular where the third country national is likely to be persecuted for reasons of race, religion, nationality or membership of a particular social group, nor to the territory or border of a country where there is good reason to believe that the expelled third country national is likely to be subjected to torture or cruel, inhuman or degrading treatment or punishment.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

25 It is clear from the order for reference that Ms Bolbol, after having left the Gaza Strip in the company of her husband, arrived in Hungary with a visa on 10 January 2007. There, she subsequently obtained a residence permit from the immigration authority.

26 On 21 June 2007, in case her residence permit was not extended, she submitted an application for asylum to BAH, citing the unsafe situation in the Gaza Strip caused by the daily clashes between Fatah and Hamas. Ms Bolbol based her application on the second subparagraph of Article 1D of the Geneva Convention, pointing out that she was a Palestinian residing outside UNRWA's area of operations. Of her family members, only her father remained in the Gaza Strip.

27 According to the order for reference, Ms Bolbol has not availed herself of the protection or assistance of UNRWA. She claims however to be entitled to such protection and assistance, relying in support of that claim on a UNRWA registration card issued to the family of her father's cousins. In the absence of any documentary evidence, the defendant in the main proceedings disputes the family connection on which Ms Bolbol relies. In addition, despite the steps taken by Ms Bolbol at UNRWA, it has been unable to confirm her right to be registered on the basis of her family connections.

28 In its decision of 14 September 2007, the defendant in the main proceedings refused Ms Bolbol's application for asylum, but at the same time found that she could not be expelled.

29 The refusal of Ms Bolbol's application for asylum is based on Article 3(1) of the Law on Asylum. According to the grounds for refusal of the application, the second subparagraph of Article 1D of the Geneva Convention does not require unconditional recognition as a refugee but defines the category of persons to whom the provisions of the Geneva Convention apply. It follows that Palestinians must also be given access to the asylum procedure and that it is necessary to examine whether they meet the definition of 'refugee' for the purposes of Article 1A of that convention. According to that decision, it is not possible to grant Ms Bolbol refugee status because Article 1A of the Geneva Convention does not apply to her, since she did not leave her country of origin owing to persecution for reasons of race, religion, nationality or because of political persecution.

30 It is apparent from the order for reference that Ms Bolbol benefits from a prohibition on expulsion on the basis of Article 38 of the Law on Asylum and Article 51(1) of Law No II of 2007 on Entry and Stay, on the grounds that the readmission of Palestinians was at the discretion of the Israeli authorities and Ms Bolbol would be exposed to torture or inhuman and degrading treatment in the Gaza Strip on account of the critical conditions there.

31 Ms Bolbol has requested the referring court to vary BAH's decision and grant her refugee status pursuant to the second subparagraph of Article 1D of the Geneva Convention which, in her view, is a separate basis for recognition as a refugee. Since she meets the conditions laid down in that provision, she is entitled to recognition as a refugee irrespective of whether she qualifies as a refugee under Article 1A. According to Ms Bolbol, the purpose of Article 1D is to make clear that where a person registered or entitled to be registered with UNRWA resides, for any reason, outside UNRWA's area of operations and, for good reason, cannot be expected to return there, the States party to the Geneva Convention must automatically grant him refugee status. In view of the fact that, through her father, she is entitled to be registered with UNRWA, but resides in Hungary and therefore outside its area of operations, she should be recognised as a refugee without further examination.

32 The defendant in the main proceedings contends that the action should be dismissed, maintaining that Ms Bolbol's application for refugee status is unfounded since she did not leave her country for any of the reasons set out in Article 1A of the Geneva Convention, and that Article 1D does not automatically grant a basis for refugee status but is merely a provision concerning the Convention's scope *ratione personae*. Therefore, Palestinians are entitled to refugee status only where they meet the definition of 'refugee' within the meaning of Article 1A of the Geneva Convention, which must be determined on a case-by-case basis.

33 The referring court observes that the point of law raised in the main proceedings must be resolved in the light of Article 12(1)(a) of the Directive. As the originating application in the main proceedings was lodged on 21 June 2007, a date by which that provision had not yet been transposed into Hungarian domestic law, the provisions of European Union law should, in this instance, be applied directly.

34 According to the referring court, Article 1D of the Geneva Convention is open to a number of interpretations. In October 2002, the United Nations High Commissioner for Refugees issued a 'Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees'. However, that note fails to provide sufficiently clear and unequivocal guidance to guarantee consistent application of that provision with regard to Palestinians. As the Directive includes a reference to Article 1D of the Geneva Convention, the Court has jurisdiction to interpret the meaning of that article of the Convention.

35 In those circumstances, the Fővárosi Bíróság (Budapest Municipal Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'For the purposes of Article 12(1)(a) of Council Directive 2004/83/EC:

1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact that he is entitled to assistance or protection or is it also necessary for him actually to avail himself of that protection or assistance?

2. Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's protection or assistance or, possibly, an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?

3. Do the benefits of the directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, [does it mean] neither automatically but merely [lead to] inclusion [of the person concerned within] the scope *ratione personae* of the Directive?'

The questions referred for a preliminary ruling

Preliminary observations

36 The Directive was adopted on the basis of, inter alia, point (1)(c) of the first subparagraph of Article 63 EC which required the Council of the European Union to adopt measures on asylum, in accordance with the Geneva Convention and other relevant treaties, within the area of minimum standards with respect to the qualifications of nationals of third countries as refugees.

37 It is apparent from recitals 3, 16 and 17 in the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-0000, paragraph 52).

38 The provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties referred to in point (1) of the first subparagraph of Article 63 EC. Those provisions must also, as is apparent from recital 10 in the preamble to the Directive, be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter of Fundamental Rights of the European Union (*Salahadin Abdulla and Others*, paragraphs 53 and 54).

The first question

39 By its first question, the referring court asks whether, for the purposes of the first sentence of Article 12(1)(a) of the Directive, a person receives protection and assistance from an agency of the United Nations other than UNHCR by virtue of the mere fact that that person is entitled to that protection or assistance, or must that person have availed himself of that protection or assistance.

40 At the outset, it should be borne in mind that, in the context of a reference for a preliminary ruling, it is for the national court to establish the facts.

41 As was stated in paragraph 27 above, Ms Bolbol has not availed herself of the protection or assistance of UNRWA.

42 Chapter III of the Directive, on qualification for being a refugee, includes Article 12(1)(a) which states that a third country national or a stateless person is excluded from being a refugee, if 'he or she falls within the scope of Article 1D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the [UNHCR]'.

43 Article 1D of the Geneva Convention provides that it does not apply 'to persons who are at present receiving … protection or assistance' from such an organ or agency of the United Nations.

44 It is not in dispute that UNRWA constitutes one of the organs or agencies of the United Nations other than UNHCR which are referred to in Article 12(1)(a) of the Directive and in Article 1D of the Geneva Convention, since it was created in the light of the specific situation of Palestinian refugees receiving protection or assistance from UNRWA, as is apparent in particular from the proposal for a Council Directive presented by the Commission on 12 September 2001 (COM(2001) 510 final).

45 As the Advocate General observes at points 12 and 13 of her Opinion, it is clear from UNRWA's 'Consolidated Eligibility and Registration Instructions' ('CERI') – the currently applicable version of which was adopted during 2009 – that while the term 'Palestine Refugee' applies, for UNRWA's purposes, to 'persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict' (Point III.A.1 of CERI), other persons are also eligible to receive protection or assistance from UNRWA. They include 'non-registered persons displaced as a result of the 1967 and subsequent hostilities' (Point III.B of CERI; see also, inter alia, paragraph 6 of the United Nations General Assembly Resolution No 2252 (ES-V) of 4 July 1967).

46 In those circumstances, it cannot be ruled out *a priori* that a person such as Ms Bolbol, who is not registered with UNRWA, could nevertheless be among those persons coming within Article 1D of the Geneva Convention and, therefore, within the first sentence of Article 12(1)(a) of the Directive.

47 Contrary to the line of argument developed by the United Kingdom Government, it cannot be maintained, as an argument against including persons displaced following the 1967 hostilities within the scope of Article 1D of the Geneva Convention, that only those Palestinians who became refugees as a result of the 1948 conflict who were receiving protection

or assistance from UNRWA at the time when the original version of the Geneva Convention was concluded in 1951 are covered by Article 1D of that convention, and therefore, by Article 12(1)(a) of the Directive.

48 The Geneva Convention, in its original 1951 version, was amended by the Protocol on the Status of Refugees of 31 January 1967 specifically to allow the interpretation of that convention to adapt and to allow account to be taken of new categories of refugees, other than those who became refugees as a result of 'events occurring before 1 January 1951'.

49 Therefore, in order to determine whether a person such as Ms Bolbol comes within a situation envisaged by the first sentence of Article 12(1)(a) of the Directive, it must be ascertained, as the referring court asks, whether it suffices that such a person is eligible to receive the assistance provided by UNRWA or whether it must be established that he has availed himself of that assistance.

50 Article 1D of the Geneva Convention, to which Article 12(1)(a) of the Directive refers, merely excludes from the scope of that convention those persons who are 'at present receiving' protection or assistance from an organ or agency of the United Nations other than UNHCR.

51 It follows from the clear wording of Article 1D of the Geneva Convention that only those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status set out therein, which must, as such, be construed narrowly and cannot therefore also cover persons who are or have been eligible to receive protection or assistance from that agency.

52 While registration with UNRWA is sufficient proof of actually receiving assistance from it, it has been explained in paragraph 45 above that such assistance can be provided even in the absence of such registration, in which case the beneficiary must be permitted to adduce evidence of that assistance by other means.

53 In those circumstances, the answer to the first question referred is that, for the purposes of the first sentence of Article 12(1)(a) of Directive 2004/83, a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance.

54 It should be added that persons who have not actually availed themselves of protection or assistance from UNRWA, prior to their application for refugee status, may, in any event, have that application examined pursuant to Article 2(c) of the Directive.

The second and third questions

55 As has been pointed out in paragraph 41 above, Ms Bolbol has not availed herself of protection or assistance from UNRWA.

56 In those circumstances, and in the light of the reply to the first question, it is not necessary to reply to the other questions referred.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

For the purposes of the first sentence of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance.

JUDGMENT OF THE COURT (Grand Chamber)
8 March 2011 (*)

(Citizenship of the Union – Article 20 TFEU – Grant of right of residence under European Union law to a minor child on the territory of the Member State of which that child is a national, irrespective of the previous exercise by him of his right of free movement in the territory of the Member States – Grant, in the same circumstances, of a derived right of residence, to an ascendant relative, a third country national, upon whom the minor child is dependent – Consequences of the right of residence of the minor child on the employment law requirements to be fulfilled by the third-country national ascendant relative of that minor)

In Case C-34/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal du travail de Bruxelles (Belgium), made by decision of 19 December 2008, received at the Court on 26 January 2009, in the proceedings

Gerardo Ruiz Zambrano,
v
Office national de l'emploi (ONEm),

THE COURT (Grand Chamber),
composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, J.-C. Bonichot, Presidents of Chamber, A. Rosas, M. Ilešič, J. Malenovský, U. Lõhmus, E. Levits, A. Ó Caoimh, L. Bay Larsen and M. Berger, Judges,
Advocate General: E. Sharpston,
Registrar: A. Calot Escobar,
having regard to the written procedure and further to the hearing on 26 January 2010,
after considering the observations submitted on behalf of:
– Mr Ruiz Zambrano, by P. Robert, avocat,
– the Belgian Government, by C. Pochet, acting as Agent, assisted by F. Motulsky and K. de Haes, avocats,
– the Danish Government, by B. Weis Fogh, acting as Agent,
– the German Government, by M. Lumma and N. Graf Vitzthum, acting as Agents,
– Ireland, by D. O'Hagan, acting as Agent, assisted by D. Conlan Smyth, Barrister,
– the Greek Government, by S. Vodina, T. Papadopoulou and M. Michelogiannaki, acting as Agents,
– the Netherlands Government, by C. Wissels, M. de Grave and J. Langer, acting as Agents,
– the Austrian Government, by E. Riedl, acting as Agent,
– the Polish Government, by M. Dowgielewicz, and subsequently by M. Szpunar, acting as Agents,
– the European Commission, by D. Maidani and M. Wilderspin, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 30 September 2010,
gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 17 EC and 18 EC, and also Articles 21, 24 and 34 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights').
2 That reference was made in the context of proceedings between Mr Ruiz Zambrano, a Columbian national, and the Office national de l'emploi (National Employment Office) ('ONEm') concerning the refusal by the latter to grant him unemployment benefits under Belgian legislation.

Legal context

European Union law

3 Article 3(1) 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, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC,

75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), provides:

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

National law

The Belgian Nationality Code

4 Under Article 10(1) of the Belgian Nationality Code (*Moniteur belge*, 12 July 1984, p. 10095), in the version applicable at the time of the facts in the main proceedings (‘the Belgian Nationality Code’):

‘Any child born in Belgium who, at any time before reaching the age of 18 or being declared of full age, would be stateless if he or she did not have Belgian nationality, shall be Belgian.’

The Royal Decree of 25 November 1991

5 Article 30 of the Royal Decree of 25 November 1991 (*Moniteur belge* of 31 December 1991, p. 29888) concerning rules on unemployment provides as follows:

‘In order to be eligible for unemployment benefit, a full-time worker must have completed a qualifying period comprising the following number of working days:

…

2. 468 during the 27 months preceding the claim [for unemployment benefit], if the worker is more than 36 and less than 50 years of age,

…’

6 Article 43(1) of the Royal Decree states:

‘Without prejudice to the previous provisions, a foreign or stateless worker is entitled to unemployment benefit if he or she complies with the legislation relating to aliens and to the employment of foreign workers.

Work undertaken in Belgium is not taken into account unless it complies with the legislation relating to the employment of foreign workers.

…’

7 Under Article 69(1) of the Royal Decree:

‘In order to receive benefits, foreign and stateless unemployed persons must satisfy the legislation concerning aliens and that relating to the employment of foreign labour.’

The Decree-Law of 28 December 1944

8 Article 7(14) of the Decree-Law of 28 December 1944 on social security for workers (*Moniteur belge* of 30 December 1944), inserted by the Framework Law of 2 August 2002 (*Moniteur belge* of 29 August 2002, p. 38408), is worded as follows:

‘Foreign and stateless workers shall be eligible to receive benefits only if, at the time of applying for benefits, they satisfy the legislation concerning residency and that relating to the employment of foreign labour.

Work done in Belgium by a foreign or stateless worker shall be taken into account for the purpose of the qualifying period only if it was carried out in accordance with the legislation on the employment of foreign labour.

…’

The Law of 30 April 1999

9 Article 4(1) of the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 21 May 1999, p. 17800) provides:

‘An employer wishing to employ a foreign worker must obtain prior employment authorisation from the competent authority.

The employer may use the services of that worker only as provided for in that authorisation.

The King may provide for exceptions to the first paragraph herein, as He deems appropriate.’

10 Under Article 7 of that law:

‘The King may, by a decree debated in the Council of Ministers, exempt such categories of foreign workers as He shall determine from the requirement to obtain a work permit.

Employers of foreign workers referred to in the preceding paragraph shall be exempted from the obligation to obtain a work permit.’

The Royal Decree of 9 June 1999

11 Article 2(2) of the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 26 June 1999, p. 24162) provides:

‘The following shall not be required to obtain a work permit:

…

2. the spouse of a Belgian national, provided that s/he comes in order to settle, or does settle, with that national;

(a) descendants under 21 years of age or dependants of the Belgian national or his spouse;

(b) dependent ascendants of the Belgian national or his/her spouse;

(c) the spouse of the persons referred to in (a) or (b);

…’

The Law of 15 December 1980

12 Article 9 of the Law of 15 December 1980 on access to Belgian territory, residence, establishment and expulsion of foreign nationals (*Moniteur belge* du 31 December 1980, p. 14584), in the version thereof applicable to the main proceedings (‘the Law of 15 December 1980’), provides:

‘In order to be able to reside in the Kingdom beyond the term fixed in Article 6, a foreigner who is not covered by one of the cases provided for in Article 10 must be authorised by the Minister or his representative.

Save for exceptions provided for by international treaty, a law or royal decree, the foreigner must request that authorisation from the competent diplomatic mission or Belgian consul in his place of residence or stay abroad.

In exceptional circumstances, the foreigner may request that authorisation from the mayor of the municipality where he is residing, who will forward to the Minister or his representative. It will, in that case, be issued in Belgium.’

13 Article 40 of the same law provides:

‘1. Without prejudice to the provisions in the regulations of the Council [of the European Union] and the Commission of the European Communities and more favourable ones on which an EC foreign national might rely, the following provisions shall apply to him.

2. For the purposes of this Law, “EC foreign national” shall mean any national of a Member State of the European Communities who resides in or travels to the Kingdom and who:

(i) pursues or intends to pursue there an activity as an employed or self-employed person;

(ii) receives or intends to receive services there:

(iii) enjoys or intends to enjoy there a right to remain;

(iv) enjoys or intends to enjoy there a right of residence after ceasing a professional activity or occupation pursued in the Community;

(v) undergoes or intends to undergo there, as a principal pursuit, vocational training in an approved educational establishment; or

(vi) belongs to none of the categories under (i) to (v) above.

3. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(i), (ii) and (iii) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are under 21 years of age and dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

4. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(iv) and (vi) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

5. Subject to any contrary provisions of this Law, the spouse of an EC foreign national covered by paragraph 2(v) above and his children or those of his spouse who are dependent on them shall, whatever their nationality, be treated in the same way as the EC foreign national provided that they come in order to settle, or do settle, with him.

6. The spouse of a Belgian who comes in order to settle, or does settle, with him, and also their descendants who are under 21 years of age or dependent on them, their ascendants who are dependent on them and any spouse of those descendants or ascendants, who come to settle, or do settle, with them, shall also be treated in the same way as an EC foreign national.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 On 14 April 1999, Mr Ruiz Zambrano, who was in possession of a visa issued by the Belgian embassy in Bogotá (Colombia), applied for asylum in Belgium. In February 2000, his wife, also a Columbian national, likewise applied for refugee status in Belgium.

15 By decision of 11 September 2000, the Belgian authorities refused their applications and ordered them to leave Belgium. However, the order notified to them included a *non-refoulement* clause stating that they should not be sent back to Colombia in view of the civil war in that country.

16 On 20 October 2000, Mr Ruiz Zambrano applied to have his situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980. In his application, he referred to the absolute impossibility of returning to Colombia and the severe deterioration of the situation there, whilst emphasising his efforts to integrate into Belgian society, his learning of French and his child's attendance at pre-school, in addition to the risk, in the event of a return to Columbia, of a worsening of the significant post-traumatic syndrome he had suffered in 1999 as a result of his son, then aged 3, being abducted for a week.

17 By decision of 8 August 2001, that application was rejected. An action was brought for annulment and suspension of that decision before the Conseil d'État, which rejected the action for suspension by a judgment of 22 May 2003.

18 Since 18 April 2001, Mr Ruiz Zambrano and his wife have been registered in the municipality of Schaerbeek (Belgium). On 2 October 2001, although he did not hold a work permit, Mr Ruiz Zambrano signed an employment contract for an unlimited period to work full-time with the Plastoria company, with effect from 1 October 2001.

19 On 1 September 2003, Mr Ruiz Zambrano's wife gave birth to a second child, Diego, who acquired Belgian nationality pursuant to Article 10(1) of the Belgian Nationality Code, since Columbian law does not recognise Colombian nationality for children born outside the territory of Colombia where the parents do not take specific steps to have them so recognised.

20 The order for reference further indicates that, at the time of his second child's birth, Mr Ruiz Zambrano had sufficient resources from his working activities to provide for his family. His work was paid according to the various applicable scales, with statutory deductions made for social security and the payment of employer contributions.

21 On 9 April 2004, Mr and Mrs Ruiz Zambrano again applied to have their situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980, putting forward as a new factor the birth of their second child and relying on Article 3 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('ECHR'), which prevents that child from being required to leave the

territory of the State of which he is a national.

22 Following the birth of their third child, Jessica, on 26 August 2005, who, like her brother Diego, acquired Belgian nationality, on 2 September 2005 Mr and Mrs Ruiz Zambrano lodged an application to take up residence pursuant to Article 40 of the Law of 15 December 1980, in their capacity as ascendants of a Belgian national. On 13 September 2005, a registration certificate was issued to them provisionally covering their residence until 13 February 2006.

23 Mr Ruiz Zambrano's application to take up residence was rejected on 8 November 2005, on the ground that he '[could] not rely on Article 40 of the Law of 15 December 1980 because he had disregarded the laws of his country by not registering his child with the diplomatic or consular authorities, but had correctly followed the procedures available to him for acquiring Belgian nationality [for his child] and then trying on that basis to legalise his own residence'. On 26 January 2006, his wife's application to take up residence was rejected on the same ground.

24 Since the introduction of his action for review of the decision rejecting his application for residence in March 2006, Mr Ruiz Zambrano has held a special residence permit valid for the entire duration of that action.

25 In the meantime, on 10 October 2005, Mr Ruiz Zambrano's employment contract was temporarily suspended on economic grounds, which led him to lodge a first application for unemployment benefit, which was rejected by a decision notified to him on 20 February 2006. That decision was challenged before the referring court by application of 12 April 2006.

26 In the course of the inquiries in the action brought against that decision, the Office des Étrangers (Aliens' Office) confirmed that 'the applicant and his wife cannot pursue any employment, but no expulsion measure can be taken against them because their application for legalising their situation is still under consideration'.

27 In the course of an inspection carried out on 11 October 2006 by the Direction générale du contrôle des lois sociales (Directorate General, Supervision of Social Legislation) at the registered office of Mr Ruiz Zambrano's employer, he was found to be at work. He had to stop working immediately. The next day, Mr Ruiz Zambrano's employer terminated his contract of employment with immediate effect and without compensation.

28 The application lodged by Mr Ruiz Zambrano for full-time unemployment benefits as from 12 October 2006 was rejected by a decision of the ONEm (National Employment Office), which was notified on 20 November 2006. On 20 December 2006 an action was also brought against that decision before the referring court.

29 On 23 July 2007, Mr Ruiz Zambrano was notified of the decision of the Office des Étrangers rejecting his application of 9 April 2004 to regularise his situation. The action brought against that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) was declared to be devoid of purpose by a judgment of 8 January 2008, as the Office des Étrangers had withdrawn that decision.

30 By letter of 25 October 2007, the Office des Étrangers informed Mr Ruiz Zambrano that the action for review he had brought in March 2006 against the decision rejecting his application to take up residence of 2 September 2005 had to be reintroduced within 30 days of the notification of that letter, in the form of an action for annulment before the Conseil du contentieux des étrangers.

31 On 19 November 2007, Mr Ruiz Zambrano brought such an action for annulment, based, first, on the inexistence of the 'legal engineering' of which he had been charged in that decision, since the acquisition of Belgian nationality by his minor children was not the result of any steps taken by him, but rather of the application of the relevant Belgian legislation. Mr Ruiz Zambrano also alleges infringement of Articles 2 and 7 of Directive 2004/38, as well as infringement of Article 8 of the ECHR, and of Article 3(1) of Protocol No 4 thereto.

32 In its written observations lodged before the Court, the Belgian Government states that, since 30 April 2009, Mr Ruiz Zambrano has had a provisional and renewable residence permit, and should have a type C work permit, pursuant to the instructions of 26 March 2009 of the Minister for immigration and asylum policy relating to the application of the former third paragraph of Article 9 and Article 9a of the Law of 15 December 1980.

33 It is apparent from the order for reference that the two decisions which are the subject-matter of the main proceedings, by which the ONEm refused to recognise Mr Ruiz Zambrano's entitlement to unemployment benefit, first, during the periods of temporary unemployment from 10 October 2005 and then 12 October 2006, following the loss of his job, are based solely on the finding that the working days on which he relies for the purpose of completing the qualifying period for his age category, that is, 468 working days during the 27 months preceding his claim for unemployment benefit, were not completed as required by the legislation governing foreigners' residence and employment of foreign workers.

34 Mr Ruiz Zambrano challenges that argument before the referring court, stating inter alia that he enjoys a right of

residence directly by virtue of the EC Treaty or, at the very least, that he enjoys the derived right of residence, recognised in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 for the ascendants of a minor child who is a national of a Member State and that, therefore, he is exempt from the obligation to hold a work permit.

35 In those circumstances, the Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) (Belgium) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?

2. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognise, without discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognised by Community case-law [*Zhu and Chen*], and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?

3. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from the requirement to hold a work permit to the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child's right of residence is coupled with the useful effect recognised by Community case-law [*Zhu and Chen*] in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?'

The questions referred for a preliminary ruling

36 By its questions, which it is appropriate to consider together, the referring court asks, essentially, whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.

37 All governments which submitted observations to the Court and the European Commission argue that a situation such as that of Mr Ruiz Zambrano's second and third children, where those children reside in the Member State of which they are nationals and have never left the territory of that Member State, does not come within the situations envisaged by the freedoms of movement and residence guaranteed under European Union law. Therefore, the provisions of European Union law referred to by the national court are not applicable to the dispute in the main proceedings.

38 Mr Ruiz Zambrano argues in response that the reliance by his children Diego and Jessica on the provisions relating to European Union citizenship does not presuppose that they must move outside the Member State in question and that he, in his capacity as a family member, is entitled to a right of residence and is exempt from having to obtain a work permit in that Member State.

39 It should be observed at the outset that, under Article 3(1) of Directive 2004/38, entitled '[b]eneficiaries', that directive applies to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members …'. Therefore, that directive does not apply to a situation such as that at issue in the main proceedings.

40 Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State (see, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 27, and Case C-148/02 *Garcia Avello* [2003]

ECR I-11613, paragraph 21). Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down (see, to that effect, inter alia, Case C-135/08 *Rottmann* [2010] ECR I-0000, paragraph 39), they undeniably enjoy that status (see, to that effect, *Garcia Avello*, paragraph 21, and *Zhu and Chen*, paragraph 20).

41 As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; *Garcia Avello*, paragraph 22; *Zhu and Chen*, paragraph 25; and *Rottmann*, paragraph 43).

42 In those circumstances, 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 (see, to that effect, *Rottmann*, paragraph 42).

43 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, has such an effect.

44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

45 Accordingly, the answer to the questions referred is 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 a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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 a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

Germany v B and D (Joined cases C-57/09 and C-101/09)

JUDGMENT OF THE COURT (Grand Chamber)

9 November 2010 (*)

(Directive 2004/83/EC – Minimum standards for the grant of refugee status or of subsidiary protection – Article 12 – Exclusion from refugee status – Article 12(2)(b) and (c) – Notion of 'serious non-political crime' – Notion of 'acts contrary to the purposes and principles of the United Nations' – Membership of an organisation involved in terrorist acts – Subsequent inclusion of that organisation on the list of persons, groups and entities which forms the Annex to Common Position 2001/931/CFSP – Individual responsibility for part of the acts committed by that organisation – Conditions – Right of asylum by virtue of national constitutional law – Compatibility with Directive 2004/83/EC)

In Joined Cases C-57/09 and C-101/09,

REFERENCES for a preliminary ruling under Articles 68 EC and 234 EC from the Bundesverwaltungsgericht (Germany), made by decisions of 14 October and 25 November 2008, received by the Court on 10 February and 13 March 2009 respectively, in the proceedings

Bundesrepublik Deutschland
v
B (C-57/09),
D (C-101/09),
intervening parties:

Vertreter des Bundesinteresses beim Bundesverwaltungsgericht (C-57/09 and C-101/09),
Bundesbeauftragter für Asylangelegenheiten beim Bundesamt für Migration und Flüchtlinge (C-101/09),

THE COURT (Grand Chamber),
composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts and J.-C. Bonichot, Presidents of Chambers, A. Borg Barthet, M. Ilešič, U. Lõhmus and L. Bay Larsen (Rapporteur), Judges,
Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,
having regard to the written procedure and further to the hearing on 9 March 2010,
after considering the observations submitted on behalf of:

– B, by R. Meister, Rechtsanwalt,
– D, by H. Jacobi and H. Odendahl, Rechtsanwälte,
– the German Government, by M. Lumma, J. Möller and N. Graf Vitzthum, acting as Agents,
– the French Government, by G. de Bergues and B. Beaupère-Manokha, acting as Agents,
– the Netherlands Government, by C. Wissels, acting as Agent,
– the Swedish Government, by A. Falk and A. Engman, acting as Agents,
– the United Kingdom Government, by S. Ossowski, acting as Agent, and by T. Eicke, Barrister,
– the European Commission, by M. Condou-Durande and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 June 2010, gives the following
Judgment

1 These references for a preliminary ruling concern (i) the interpretation of Article 12(2)(b) and (c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; 'Directive 2004/83') and (ii) the interpretation of Article 3 of that directive.

2 The references have been made in proceedings between, on the one hand, the Federal Republic of Germany, represented by the Bundesministerium des Inneren (Federal Ministry of the Interior), in turn represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees; 'the Bundesamt'), and, on the other, B (C-57/09) and D (C-101/09), Turkish nationals of Kurdish origin. The proceedings concern the Bundesamt's rejection of B's application for asylum and recognition of refugee status and its revocation of D's refugee status and right of asylum.

Legal context: *International law*

The Convention Relating to the Status of Refugees

3 The Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 ('the 1951 Geneva Convention').

4 Article 1A of the 1951 Geneva Convention defines, inter alia, the term 'refugee' for the purposes of that act, and Article 1F states:

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: …

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.'

5 Article 33 of the 1951 Geneva Convention, entitled 'Prohibition of expulsion or return ("*refoulement*")', provides:

'1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'

The European Convention for the Protection of Human Rights and Fundamental Freedoms

6 Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Resolutions of the UN Security Council

7 On 28 September 2001, in response to the terrorist attacks committed on 11 September 2001 in New York, Washington and Pennsylvania, the UN Security Council adopted Resolution 1373 (2001) on the basis of Chapter VII of the Charter of the United Nations.

8 The preamble to Resolution 1373 (2001) reaffirms 'the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts'.

9 Under point 5 of that resolution, it is declared that 'acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and … knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.

10 On 12 November 2001, the UN Security Council adopted Resolution 1377 (2001), in which it '*[s]tresses* that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of [that Charter]'.

European Union ('EU') legislation

Directive 2004/83

11 Recital (3) in the preamble to Directive 2004/83 states that the 1951 Geneva Convention provides the cornerstone of the international legal regime for the protection of refugees.

12 Recital (6) to Directive 2004/83 states that the main objective of that directive is, on the one hand, to ensure that

Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States.

13 Recital (9) to Directive 2004/83 is worded as follows:

'Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.'

14 Recital (10) to Directive 2004/83 states that the directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights. In particular it seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum.

15 Recitals (16) and (17) to that directive are worded as follows:

'(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the [1951] Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the [1951] Geneva Convention.'

16 Recital (22) to Directive 2004/83 states:

'Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations" and that "knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations".'

17 In accordance with Article 1 of Directive 2004/83, the purpose of that directive is, inter alia, to lay down minimum standards in relation to the conditions which third country nationals or stateless persons must meet in order to receive international protection and in relation to the content of the protection granted.

18 Article 2 of Directive 2004/83 states that, for the purposes of that directive:

'(a) "international protection" means the refugee and subsidiary protection status as defined in (d) and (f); …

(c) "refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) "refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee; …

(g) "application for international protection" means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately; …'

19 Article 3 of Directive 2004/83 provides:

'Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.'

20 Paragraphs 2 and 3 of Article 12 of Directive 2004/83, which is entitled 'Exclusion' and forms part of Chapter III of the directive, itself entitled 'Qualification for being a refugee', provide:

'2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that: …

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel

actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.'

21 Articles 13 and 18 of Directive 2004/83 state that Member States are to grant refugee status or subsidiary protection status to a third country national who satisfies the conditions laid down in Chapters II and III or Chapters II and V, respectively, of that directive.

22 Article 14 of Directive 2004/83, which is entitled 'Revocation of, ending of or refusal to renew refugee status' and forms part of Chapter IV of the directive, itself entitled 'Refugee status', provides:

'1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with Article 11.

…

3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

…'

23 Paragraphs 1 and 2 of Article 21 of Directive 2004/83, which forms part of Chapter VII of the Directive, entitled 'Content of international protection', provide:

'1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.'

24 In accordance with Articles 38 and 39 of that directive, Directive 2004/83 entered into force on 9 November 2004 and had to be transposed into national law by 10 October 2006 at the latest.

Common Position 2001/931/CFSP

25 In order to implement Resolution 1373 (2001), the Council of the European Union adopted, on 27 December 2001, Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

26 Under Article 1(1) of Common Position 2001/931, that act applies to 'persons, groups and entities involved in terrorist acts' and listed in the Annex thereto.

27 Paragraphs 2 and 3 of Article 1 of Common Position 2001/931 provide that, for the purposes of that act:

'2. … "persons, groups and entities involved in terrorist acts" shall mean:

– persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts,

– groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.

3. … "terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the

aim of:

…

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:

…

(k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

…'

28 Common Position 2001/931 includes an Annex entitled 'First list of persons, groups and entities referred to in Article 1 …'. Initially, neither the DHKP/C nor the PKK were on that list.

29 The content of that annex was updated by Council Common Position 2002/340/CFSP of 2 May 2002 (OJ 2002 L 116, p. 75).

30 In that annex, as updated, the list set out in Section 2 ('Groups and entities') names as entries 9 and 19, respectively, the 'Kurdistan Workers' Party (PKK)' and the 'Revolutionary People's Liberation Army/Front/Party (DHKP/C), (a.k.a. Devrimci Sol (Revolutionary Left), Dev Sol)'. Those organisations have subsequently been retained on the list referred to in Article 1(1) and (6) of Common Position 2001/931 by subsequent Council Common Positions, and most recently by Council Decision 2010/386/CFSP of 12 July 2010 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931 (OJ 2010 L 178, p. 28).

Framework Decision 2002/475/JHA

31 Article 1 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ 2002 L 164, p. 3) requires Member States to take the necessary measures to ensure that the intentional acts referred to in that provision – which, given their nature or context, may seriously damage a country or an international organisation where committed with one of the aims also listed in that provision – are deemed to be terrorist offences.

32 Paragraph 2 of Article 2 of Framework Decision 2002/475, which is entitled 'Offences relating to a terrorist group', provides:

'Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:

…

(b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.'

National legislation

33 Article 16a(1) of the Grundgesetz (Basic Law) provides:

'Persons persecuted on political grounds shall have the right of asylum.'

34 Paragraph 1 of the German Law on asylum procedure (Asylverfahrensgesetz; 'the AsylVfG'), in the version published on 2 September 2008 (BGBl. 2008 I, p. 1798), states that that Law applies to foreigners who apply for protection from political persecution in accordance with Paragraph 16a(1) of the Basic Law, or for protection from persecution in accordance with the 1951 Geneva Convention.

35 Paragraph 2 of the AsylVfG provides that, in the Federal territory, persons entitled to asylum are to have the legal status defined by the 1951 Geneva Convention.

36 Refugee status was initially governed by Paragraph 51 of the Law on the entry and stay of foreigners on Federal territory (Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet; 'the Ausländergesetz').

37 The Law on combating international terrorism of 9 January 2002 (Gesetz zur Bekämpfung des internationalen

Terrorismus, BGBl. 2002 I, p. 361; 'the Terrorismusbekämpfungsgesetz') introduced, for the first time, in the second sentence of Paragraph 51(3) of the Ausländergesetz, with effect from 11 January 2002, grounds for exclusion reflecting those laid down in Article 1F of the 1951 Geneva Convention.

38 By the Law implementing European Union Directives on the right of residence and asylum of 19 August 2007 (Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, BGBl. 2007 I, p. 1970), which entered into force on 28 August 2007, the Federal Republic of Germany transposed Directive 2004/83, among others, into national law.

39 Currently, the conditions for being considered a refugee are laid down in Paragraph 3 of the AsylVfG. Under Paragraph 3(1) and (2) of the AsylVfG:

'1. A foreign national is a refugee within the meaning of [the 1951 Convention] if, in his State of nationality, he is exposed to threats within the meaning of Paragraph 60(1) of the [Law on the residence, work and integration of foreign nationals on Federal territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet; 'the Aufenthaltsgesetz')].

2. A foreign national shall not be accorded refugee status under subparagraph 1 if there are serious reasons for considering that:

…

(2) he has committed a serious non-political crime outside the Federal territory prior to his admission as a refugee, in particular a cruel action, even if committed with a purportedly political objective, or

(3) he has been guilty of acts contrary to the purposes and principles of the United Nations.

The first sentence shall apply also to foreign nationals who have instigated, or otherwise participated in, the commission of those crimes or acts.'

40 The grounds for exclusion listed in Paragraph 3(2) of the AsylVfG replaced, with effect from 28 August 2007, the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz, which had itself replaced the second sentence of Paragraph 51(3) of the Ausländergesetz.

41 Paragraph 60(1) of the Aufenthaltsgesetz, in the version published on 25 February 2008 (BGBl. 2008 I, p. 162), provides:

'Pursuant to the [1951 Geneva] Convention, a foreign national may not be deported to a State in which his life or liberty is under threat on account of his race, religion, nationality, membership of a certain social group or political convictions. …'

42 The first sentence of Paragraph 73(1) of the AsylVfG provides that '[r]ecognition of a right of asylum and of refugee status shall be revoked without delay if the conditions on which such recognition is based are no longer satisfied'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-57/09

43 Born in 1975, B entered Germany at the end of 2002, where he applied for asylum and for protection as a refugee and, in the alternative, for an order prohibiting his deportation to Turkey.

44 In support of his application, B stated, inter alia, that, in Turkey, he had been a sympathiser of Dev Sol (now DHKP/C) when still a schoolboy and that, from the end of 1993 until the beginning of 1995, he had supported armed guerrilla warfare in the mountains.

45 After being arrested in February 1995, he had been subjected to serious physical abuse and had been forced to give a statement under torture.

46 In December 1995, he had been sentenced to life imprisonment.

47 In 2001, while he was in custody, B had been given another life sentence after he had confessed to killing a fellow prisoner suspected of being an informant.

48 In December 2002, B took advantage of a six-month conditional release from custody on health grounds to leave Turkey and make his way to Germany.

49 By decision of 14 September 2004, the Bundesamt rejected B's application for asylum as unfounded and found that the conditions laid down in Paragraph 51(1) of the Ausländergesetz were not satisfied. The Bundesamt took the view that, since B had committed serious non-political crimes, he fell into the second exclusion category, laid down in the second sentence of Paragraph 51(3) of the Ausländergesetz (referred to subsequently in the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz, then in Paragraph 3(2)(2) of the AsylVfG).

50 In the same decision, the Bundesamt also held that there were no obstacles to B's deportation to Turkey under the applicable law and declared him liable to deportation to that country.

51 By judgment of 13 June 2006, the Verwaltungsgericht Gelsenkirchen (Administrative Court, Gelsenkirchen) annulled the decision of the Bundesamt and ordered that authority to grant B asylum and to declare that his deportation to Turkey was prohibited.

52 By judgment of 27 March 2007, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court of North Rhine-Westphalia) dismissed the appeal brought by the Bundesamt against the judgment of the Verwaltungsgericht Gelsenkirchen, on the view that B should be granted a right of asylum in accordance with Paragraph 16a of the Grundgesetz, together with refugee status.

53 The Oberverwaltungsgericht found, in particular, that the exclusion clause relied upon by the Bundesamt must be understood to the effect that it does not seek only to punish a serious non-political crime committed in the past, but also to forestall the danger which the applicant could pose to the host Member State, and that the application of that clause requires an overall assessment of the particular case in the light of the principle of proportionality.

54 The Bundesamt appealed against that judgment on a point of law ('Revision') before the Bundesverwaltungsgericht (Federal Administrative Court), relying on the second and third exclusion clauses laid down in the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz (and subsequently in Paragraph 3(2)(2) and (3) of the AsylVfG) and arguing that, contrary to the approach adopted by the appeal court, those two exclusion clauses do not imply that there must be a danger to the security of the Federal Republic of Germany; nor do they entail the need for an assessment of proportionality with regard to the particular case.

55 Furthermore, according to the Bundesamt, the exclusion clauses laid down in Article 12(2) of Directive 2004/83 are among those principles from which, by virtue of Article 3 of that directive, Member States cannot derogate.

Case C-101/09

56 Since May 2001, D, who was born in 1968, has resided in Germany where, on 11 May 2001, he applied for asylum.

57 In support of his application, he stated, inter alia, that, in 1990, he had fled to the mountains where he joined the PKK. He had been a guerrilla fighter for the PKK and one of its senior officials. At the end of 1988, the PKK had sent him to northern Iraq.

58 Because of political differences with its leadership, D had left the PKK in May 2000 and since then had been under threat. He had stayed on in northern Iraq for about one more year, but had not been safe there.

59 In May 2001, the Bundesamt granted D asylum and recognised his right to refugee status under the national law in force at that time.

60 Following the entry into force of the Terrorismusbekämpfungsgesetz, the Bundesamt initiated a revocation procedure and by decision of 6 May 2004, pursuant to Paragraph 73(1) of the AsylVfG, it revoked the decision granting D a right of asylum and refugee status. The Bundesamt found that there were serious reasons for considering that D had committed a serious non-political crime outside Germany before being admitted to its territory as a refugee and that he had been guilty of acts contrary to the purposes and principles of the United Nations.

61 By judgment of 29 November 2005, the Verwaltungsgericht Gelsenkirchen annulled that revocation decision.

62 The appeal brought by the Bundesamt was dismissed by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen by judgment of 27 March 2007. On grounds similar to those underpinning the judgment handed down on the same day in the case concerning B, the Oberverwaltungsgericht held that the exclusion clauses laid down in the German legislation did not apply in D's case either.

63 The Bundesamt appealed that judgment on a point of law ('Revision'), its grounds of appeal being, in substance,

analogous to those relied upon in support of the appeal in the case concerning B.

The questions referred and the procedure before the Court

64 The Bundesverwaltungsgericht points out that, according to the findings of the appeal court, by which it is bound, B and D would not, in the event of their return to their country of origin, be sufficiently safe from renewed persecution. The Bundesverwaltungsgericht infers from this that the positive conditions for being considered a refugee are satisfied in both cases. Nevertheless, B and D will not be able to have their refugee status recognised if one of the exclusion clauses laid down in Article 12(2) of Directive 2004/83 applies.

65 The Bundesverwaltungsgericht states that, if one of those exclusion clauses were to apply, B and D would be entitled to have their right of asylum recognised under Article 16a of the Grundgesetz, which does not exclude any category of persons from that right.

66 Lastly, the Bundesverwaltungsgericht points out that neither exclusion under Article 12 of Directive 2004/83 nor a finding that Article 16a of the Grundgesetz is incompatible with Directive 2004/83 would necessarily lead B and D to lose the right to remain in Germany.

67 It is against that background that the Bundesverwaltungsgericht decided to stay the proceedings and to refer, in each of the cases before it, the following five questions – the first and fifth of which differ slightly on account of the particular facts of each of those cases – to the Court for a preliminary ruling:

'(1) Does it constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) of [Directive 2004/83] if

– the person seeking asylum was a member of an organisation which is included in the list of persons, groups and entities annexed to the … Common Position [2001/931] and employs terrorist methods, and the appellant has actively supported that organisation's armed struggle? (Case C-57/09)

– a foreign national was for many years involved as a combatant and an official – including for a time as a member of its governing body – in an organisation (in this case, the PKK) which repeatedly employed terrorist methods in the armed struggle waged against the State (in this case, Turkey) and is included in the list of persons, groups and entities annexed to the … Common Position [2001/931], and the foreign national thereby actively supported its armed struggle in a prominent position? (Case C-101-09)

(2) If Question 1 is to be answered in the affirmative: does exclusion from recognition as a refugee under Article 12(2)(b) and (c) of [Directive 2004/83] … require that the foreign national continue to constitute a danger?

(3) If Question 2 is to be answered in the negative: does exclusion from recognition as a refugee under Article 12(2)(b) and (c) of [Directive 2004/83]… require that a proportionality test be undertaken in relation to the individual case?

(4) If Question 3 is to be answered in the affirmative:

(a) Is it to be taken into account in considering proportionality that the foreign national enjoys protection against deportation under Article 3 of the [ECHR] or under national rules?

(b) Is exclusion disproportionate only in exceptional cases having particular characteristics?

(5) Is it compatible with Directive 2004/83, for the purposes of Article 3 of [Directive 2004/83] …, if

– the appellant has a right to asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12(2) of the directive is satisfied? (Case C-57/09)

– the foreign national continues to be recognised as having a right of asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12(2) of the directive is satisfied and refugee status under Article 14(3) of the directive is revoked? (Case C-101/09)'

68 By order of the President of the Court of 4 May 2009, Cases C-57/09 and C-101/09 were joined for the purposes of the written and oral procedure and of the judgment.

Jurisdiction of the Court

69 In the cases before the referring court, the Bundesamt adopted the contested decisions on the basis of the legislation applicable before the entry into force of Directive 2004/83, that is to say, before 9 November 2004.

70 As a consequence, those decisions, which have given rise to the present references for a preliminary ruling in the present case, do not fall within the scope *ratione temporis* of Directive 2004/83.

71 It should nevertheless be borne in mind that where the questions referred by national courts concern the interpretation of a provision of Community law, the Court is in principle obliged to give a ruling. In particular, neither the wording of Articles 68 EC and 234 EC nor the aim of the procedure established by Article 234 EC indicates that those responsible for framing the EC Treaty intended to exclude from the jurisdiction of the Court references for a preliminary ruling on a directive in the specific case where the national law of a Member State refers to the content of provisions of an international agreement which have been re-stated in that directive, in order to determine the rules applicable to a situation which is purely internal to that State. In such a case, it is clearly in the interests of the European Union that, in order to forestall future differences of interpretation, the provisions of that international agreement which have been taken over by national law and by EU law should be given a uniform interpretation, irrespective of the circumstances in which they are to apply (see, by analogy, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-0000, paragraph 48).

72 The Bundesverwaltungsgericht points out, in the cases before it, that the Terrorismusbekämpfungsgesetz introduced into the national law grounds for excluding a person from refugee status which correspond in substance to those laid down in Article 1F of the 1951 Geneva Convention. Given that the grounds for exclusion laid down in Article 12(2) of Directive 2004/83 also correspond in substance to those laid down in Article 1F of that Convention, it follows that the exclusion clauses which were considered and applied by the Bundesamt in both the decisions at issue before the referring court, which were adopted before Directive 2004/83 entered into force, correspond in substance to the exclusion clauses subsequently inserted in the directive.

73 Moreover, as regards the decision of the Bundesamt to revoke the decision according refugee status to D, it should be noted that Article 14(3)(a) of Directive 2004/83 requires the competent authorities of a Member State to revoke refugee status if ever they establish, after according that status, that the person 'should have been or is excluded' from being a refugee, in accordance with Article 12 of the directive.

74 In contrast with the ground for revocation laid down in Article 14(1) of Directive 2004/83, the ground laid down in Article 14(3)(a) is not subject to transitional arrangements and cannot be limited to applications made or decisions taken after the directive entered into force. Nor is its application discretionary, like the grounds for revocation laid down in Article 14(4).

75 Accordingly, the questions referred for a preliminary ruling must be answered.

Consideration of the questions referred: Preliminary observations

76 One of the legal bases for Directive 2004/83 was point (1)(c) of the first paragraph of Article 63 EC, under which the Council was required to adopt measures on asylum, in accordance with the 1951 Geneva Convention and other relevant treaties, within the area of minimum standards with respect to 'the qualification of nationals of third countries as refugees'.

77 Recitals 3, 16 and 17 to Directive 2004/83 state that the 1951 Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (*Salahadin Abdulla and Others*, paragraph 52, and Case C-31/09 *Bolbol* [2010] ECR I-0000, paragraph 37).

78 Directive 2004/83 must for that reason be interpreted in the light of its general scheme and purpose, and in a manner consistent with the 1951 Geneva Convention and the other relevant treaties referred to in point (1) of the first paragraph of Article 63 EC, now Article 78(1) TFEU. As is apparent from recital 10 to that directive, Directive 2004/83 must also be interpreted in a manner consistent with the fundamental rights and the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union (*Salahadin Abdulla and Others*, paragraphs 53 and 54, and *Bolbol*, paragraph 38).

The first question

79 By its first question in each case, the Bundesverwaltungsgericht asks, in substance, whether a case where the person concerned has been a member of an organisation which, because of its involvement in terrorist acts, is on the list of persons, groups and entities annexed to Common Position 2001/931 and that person has actively supported the armed struggle waged by that organisation – and perhaps occupied a prominent position within that organisation – is a case of 'serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations' within the meaning of Article 12(2)(b) or (c) of Directive 2004/83.

80 In order to answer that question, which seeks to elicit the extent to which a person's membership of an organisation on that list can bring that person within the scope of points (b) and (c) of Article 12(2) of Directive 2004/83, it is necessary at the outset to ascertain whether the acts committed by such an organisation can, as the national court assumes, fall within the categories of the serious crimes and the acts referred to in those points.

81 First, it is clear that terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes within the meaning of point (b).

82 Secondly, with regard to acts contrary to the purposes and principles of the United Nations, as referred to in point (c) of Article 12(2) of Directive 2004/83, recital 22 to that directive states that such acts are referred to in the preamble to the Charter of the United Nations and in Articles 1 and 2 of that Charter and that they are among the acts identified in the UN Resolutions relating to 'measures combating international terrorism.'

83 Those include Resolutions 1373 (2001) and 1377 (2001) of the UN Security Council, from which it is clear that the Security Council takes as its starting point the principle that international terrorist acts are, generally speaking and irrespective of any State participation, contrary to the purposes and principles of the United Nations.

84 It follows that – as is argued in their written observations by all the Governments which submitted such observations to the Court, and by the European Commission – the competent authorities of the Member States can also apply Article 12(2)(c) of Directive 2004/83 to a person who, in the course of his membership of an organisation which is on the list forming the Annex to Common Position 2001/931, has been involved in terrorist acts with an international dimension.

85 Next, the question arises as to what extent membership of such an organisation implies that the person concerned falls within the scope of Article 12(2)(b) and (c) of Directive 2004/83 where he has actively supported the armed struggle waged by that organisation, possibly occupying a prominent position within that organisation.

86 On that point, it should be noted that points (b) and (c) of Article 12(2) of Directive 2004/83 – in the same way, moreover, as points (b) and (c) of Article 1F of the 1951 Geneva Convention – permit the exclusion of a person from refugee status only where there are 'serious reasons' for considering that 'he … has committed' a serious non-political crime outside the country of refuge prior to his admission as a refugee or that 'he … has been guilty' of acts contrary to the purposes and principles of the United Nations.

87 It is clear from the wording of those provisions of Directive 2004/83 that the competent authority of the Member State concerned cannot apply them until it has undertaken, for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those exclusion clauses.

88 As a consequence, first, even if the acts committed by an organisation on the list forming the Annex to Common Position 2001/931 because of its involvement in terrorist acts fall within each of the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83, the mere fact that the person concerned was a member of such an organisation cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions.

89 There is no direct relationship between Common Position 2001/931 and Directive 2004/83 in terms of the aims pursued, and it is not justifiable for a competent authority, when considering whether to exclude a person from refugee status pursuant to Article 12(2) of the directive, to base its decision solely on that person's membership of an organisation which is on a list adopted outside the framework set up by Directive 2004/83 consistently with the 1951 Geneva Convention.

90 However, the inclusion of an organisation on a list such as that which forms the Annex to Common Position 2001/931 makes it possible to establish the terrorist nature of the group of which the person concerned was a member, which is a factor which the competent authority must take into account when determining, initially, whether that group has committed

acts falling within the scope of Article 12(2)(b) or (c) of Directive 2004/83.

91 In that regard, it is important to note that the circumstances in which the two organisations to which the respondents before the Bundesverwaltungsgericht respectively belonged were placed on that list cannot be assimilated to the individual assessment of the specific facts which must be undertaken before any decision is taken to exclude a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83.

92 Nor, secondly, and contrary to the submissions of the Commission, can participation in the activities of a terrorist group, within the meaning of Article (2)(2)(b) of Framework Decision 2002/475, come necessarily and automatically within the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83.

93 Not only was Framework Decision 2002/475, like Common Position 2001/931, adopted against a background different from the context of Directive 2004/83, which is essentially humanitarian, but the intentional act of participating in the activities of a terrorist group, which is defined in Article 2(2)(b) of that Framework Decision and which the Member States were required to make punishable under their national law, is not such as to trigger the automatic application of the exclusion clauses laid down in Article 12(2)(b) and (c) of the directive, which presuppose a full investigation into all the circumstances of each individual case.

94 It follows from all those considerations that the exclusion from refugee status of a person who has been a member of an organisation which uses terrorist methods is conditional on an individual assessment of the specific facts, making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organisation, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way, within the meaning of Article 12(3) of Directive 2004/83.

95 Before a finding can be made that the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83 apply, it must be possible to attribute to the person concerned – regard being had to the standard of proof required under Article 12(2) – a share of the responsibility for the acts committed by the organisation in question while that person was a member.

96 That individual responsibility must be assessed in the light of both objective and subjective criteria.

97 To that end, the competent authority must, inter alia, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.

98 Any authority which finds, in the course of that assessment, that the person concerned has – like D – occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 can be adopted.

99 In the light of all the foregoing considerations, the answer to the first question referred in each of the two cases is that Article 12(2)(b) and (c) of Directive 2004/83 must be interpreted as meaning that:

– the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931 and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed ‘a serious non-political crime’ or ‘acts contrary to the purposes and principles of the United Nations’;

– the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the directive.

The second question

100 By its second question in each of the cases, the Bundesverwaltungsgericht wishes to know whether exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is conditional upon the person concerned continuing to

represent a danger for the host Member State.

101 It is appropriate to point out first that, within the system of Directive 2004/83, any danger which a refugee may currently pose to the Member State concerned is to be taken into consideration, not under Article 12(2) of the directive but under (i) Article 14(4)(a) of that directive, pursuant to which Member States may revoke refugee status where, in particular, there are reasonable grounds for regarding the person concerned as a danger to security and (ii) Article 21(2) of the directive, which provides that the host Member State may – as it is also entitled to do under Article 33(2) of the 1951 Geneva Convention – *refoule* a refugee where there are reasonable grounds for considering him to be a danger to the security or the community of that Member State.

102 Under points (b) and (c) of Article 12(2) of Directive 2004/83, which are analogous to points (b) and (c) of Article 1F of the 1951 Geneva Convention, a third country national is excluded from refugee status where there are serious reasons for considering that 'he … has committed' a serious non-political crime outside the country of refuge 'prior to his … admission as a refugee' or that he 'has been guilty' of acts contrary to the purposes and principles of the United Nations.

103 In accordance with the wording of the provisions in which they are laid down, both those grounds for exclusion are intended as a penalty for acts committed in the past, as has been pointed out by all the Governments which submitted observations and by the Commission.

104 In that regard it should be pointed out that the grounds for exclusion at issue were introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability. Accordingly, it would not be consistent with that dual objective to make exclusion from refugee status conditional upon the existence of a present danger to the host Member State.

105 In those circumstances, the answer to the second question is that exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host Member State.

The third question

106 By its third question in each of the cases, the Bundesverwaltungsgericht asks whether exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is conditional upon a proportionality test being undertaken in relation to the particular case.

107 In that regard, it should be borne in mind that it is clear from the wording of Article 12(2) of Directive 2004/83 that, if the conditions laid down therein are met, the person concerned 'is excluded' from refugee status and that, within the system of the directive, Article 2(c) expressly makes the status of 'refugee' conditional upon the fact that the person concerned does not fall within the scope of Article 12.

108 Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of Directive 2004/83, as stated in respect of the answer to the first question, is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that directive.

109 Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot – as the German, French, Netherlands and United Kingdom Governments have submitted – be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed.

110 It is important to note that the exclusion of a person from refugee status pursuant to Article 12(2) of Directive 2004/83 does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin.

111 The answer to the third question is that the exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.

The fourth question

112 In view of the answer given to the third question, there is no need to answer the fourth question referred by the Bundesverwaltungsgericht in each of these two cases.

The fifth question

113 By its fifth question in both cases, the Bundesverwaltungsgericht wishes, in substance, to know whether it is compatible with Directive 2004/83, for the purposes of Article 3 of that directive, for a Member State to recognise that a person excluded from refugee status pursuant to Article 12(2) of the directive has a right of asylum under its constitutional law.

114 In that regard, it should be borne in mind that Article 3 permits Member States to introduce or retain more favourable standards for determining who qualifies as a refugee in so far, however, as those standards are compatible with Directive 2004/83.

115 In view of the purpose underlying the grounds for exclusion laid down in Directive 2004/83, which is to maintain the credibility of the protection system provided for in that directive in accordance with the 1951 Geneva Convention, the reservation in Article 3 of the directive precludes Member States from introducing or retaining provisions granting refugee status under Directive 2004/83 to persons who are excluded from that status pursuant to Article 12(2).

116 However, it is clear from the closing words of Article 2(g) of Directive 2004/83 that the directive does not preclude a person from applying for 'another kind of protection' outside the scope of Directive 2004/83.

117 Directive 2004/83, like the 1951 Geneva Convention, is based on the principle that host Member States may, in accordance with their national law, grant national protection which includes rights enabling persons excluded from refugee status under Article 12(2) of the directive to remain in the territory of the Member State concerned.

118 The grant by a Member State of such national protection status, for reasons other than the need for international protection within the meaning of Article 2(a) of Directive 2004/83 – that is to say, on a discretionary and goodwill basis or for humanitarian reasons – does not, as is stated in recital 9, fall within the scope of that directive.

119 That other kind of protection which Member States have discretion to grant must not, however, be confused with refugee status within the meaning of Directive 2004/83, as the Commission, amongst others, has rightly stated.

120 Accordingly, in so far as national rules under a right of asylum is granted to persons excluded from refugee status within the meaning of Directive 2004/83 permit a clear distinction to be drawn between national protection and protection under the directive, they do not infringe the system established by that directive.

121 In the light of those considerations, the answer to the fifth question referred is that Article 3 of Directive 2004/83 must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 12(2)(b) and (c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that:

– the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations';

– the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the

directive.

2. Exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host Member State.

3. The exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.

4. Article 3 of Directive 2004/83 must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.

JUDGMENT OF THE COURT (Third Chamber)

5 May 2011 (*)

(Freedom of movement for persons – Article 21 TFEU – Directive 2004/38/EC – 'Beneficiary' – Article 3(1) – National who has never made use of his right of free movement and has always resided in the Member State of his nationality – Effect of being a national of another Member State – Purely internal situation)

In Case C-434/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Supreme Court of the United Kingdom, formerly the House of Lords (United Kingdom), made by decision of 5 May 2009, received at the Court on 5 November 2009, in the proceedings

Shirley McCarthy

v

Secretary of State for the Home Department,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta (Rapporteur), E. Juhász and J. Malenovský, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 October 2010,

after considering the observations submitted on behalf of:

– Mrs McCarthy, by S. Cox, Barrister, and K. Lewis, Solicitor,

– the United Kingdom Government, by S. Ossowski, acting as Agent, and by T. Ward, Barrister,

– the Danish Government, by C. Vang, acting as Agent,

– the Estonian Government, by M. Linntam, acting as Agent,

– Ireland, by D. O'Hagan and D. Conlan Smyth, acting as Agents, and by B. Lennon, Barrister,

– the Netherlands Government, by C. Wissels and M. de Ree, acting as Agents,

– the European Commission, by D. Maidani and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 November 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3(1) and Article 16 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigendum OJ 2004 L 229, p. 35).

2 The reference was made in the course of proceedings between Mrs McCarthy and the Secretary of State for the Home Department ('the Secretary of State') concerning an application for a residence permit made by Mrs McCarthy.

Legal context

European Union law

3 According to recitals 1 to 3 in the preamble to Directive 2004/38:

‘(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.’

4 Chapter I of Directive 2004/38, entitled ‘General provisions’, comprises Articles 1 to 3 of the directive.

5 Article 1, entitled ‘Subject’, states:

‘This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.’

6 Article 2 of Directive 2004/38, entitled ‘Definitions’, provides:

‘For the purposes of this Directive:

1. “Union citizen” means any person having the nationality of a Member State;

2. “family member” means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3. “host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.’

7 Article 3 of Directive 2004/38, entitled ‘Beneficiaries’, provides in paragraph 1:

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

8 Chapter III of that directive, entitled ‘Right of residence’, comprises Articles 6 to 15 of the directive.

9 Article 6 provides:

‘1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.’

10 Article 7 of Directive 2004/38 states:

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

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

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

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

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

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

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

…

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

11 Under Chapter IV, headed 'Right of permanent residence', Article 16 of Directive 2004/38, entitled 'General rule for Union citizens and their family members', provides:

'1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

…

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.'

12 Chapter V of that directive, entitled 'Provisions common to the right of residence and the right of permanent residence', includes Article 22 which, under the heading 'Territorial scope', provides:

'The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.'

National law

13 Under the United Kingdom Immigration Rules, nationals of third countries who do not have leave to remain in the United Kingdom thereunder also do not meet the requirements to be granted leave to remain under those Rules as the spouse of a person settled in the United Kingdom.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Mrs McCarthy, a national of the United Kingdom, is also an Irish national. She was born and has always lived in the United Kingdom, and has never argued that she is or has been a worker, self-employed person or self-sufficient person. She is in receipt of State benefits.

15 On 15 November 2002, Mrs McCarthy married a Jamaican national who lacks leave to remain in the United Kingdom under the Immigration Rules of that Member State.

16 Following her marriage, Mrs McCarthy applied for an Irish passport for the first time and obtained it.

17 On 23 July 2004, Mrs McCarthy and her husband applied to the Secretary of State for a residence permit and residence document under European Union law as, respectively, a Union citizen and the spouse of a Union citizen. The Secretary of State refused their applications on the ground that Mrs McCarthy was not 'a qualified person' (essentially, a worker, self-employed person or self-sufficient person) and, accordingly, that Mr McCarthy was not the spouse of 'a qualified person'.

18 Mrs McCarthy appealed against the decision that had been made in relation to her by the Secretary of State before the Asylum and Immigration Tribunal ('the Tribunal'), which dismissed the appeal on 17 October 2006. The High Court of Justice of England and Wales ordered the Tribunal to reconsider the appeal, and on 16 August 2007 the Tribunal upheld the decision to dismiss it.

19 The appeal brought by Mrs McCarthy against the decision of the Tribunal was dismissed by the Court of Appeal (Civil Division) (England and Wales). Mrs McCarthy brought an appeal against the decision of that court before the referring court.

20 For his part, Mr McCarthy did not appeal against the decision of the Secretary of State in relation to him, but nevertheless made a further application which was also refused. Mr McCarthy then appealed against that second decision to the Tribunal, which adjourned the appeal to await the final outcome of Mrs McCarthy's appeal.

21 In that context, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a person of dual Irish and United Kingdom nationality who has resided in the United Kingdom for her entire life a "beneficiary" within the meaning of Article 3 of Directive 2004/38 …?

2. Has such a person "resided legally" within the host Member State for the purpose of Article 16 of [that] directive in circumstances where she was unable to satisfy the requirements of Article 7 of [that directive]?'

Consideration of the questions referred

22 As is apparent from paragraphs 14 to 19 of this judgment, the main proceedings concern an application for a right of residence under European Union law brought by Mrs McCarthy, a Union citizen, to a Member State of which she is a national and where she has always resided.

23 That application is in fact intended to confer on Mr McCarthy, a national of a third country, a right of residence under Directive 2004/38, as a member of Mrs McCarthy's family, given that a comparable right of residence does not arise under the Immigration Rules of the United Kingdom.

The first question

24 At the outset, it should be noted that, even though, formally, the national court has limited its questions to the interpretation of Articles 3(1) and 16 of Directive 2004/38, such a situation does not prevent the Court from providing the national court with all the elements of interpretation of European Union law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions (see Case C-251/06 *ING. AUER* [2007] ECR I-9689, paragraph 38 and the case-law cited).

25 There is no indication in the order for reference, in the case-file or in the observations submitted to the Court that Mrs McCarthy has ever exercised her right of free movement within the territory of the Member States, either individually or as a family member of a Union citizen who has exercised such a right. Likewise, Mrs McCarthy is applying for a right of residence under European Union law even though she does not argue that she is or has been a worker, self-employed person or self-sufficient person.

26 Thus, the first question from the national court must be understood as asking, in essence, whether Article 3(1) of Directive 2004/38 or Article 21 TFEU is applicable to the situation of a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

Preliminary observations

27 As a preliminary point, it should be observed that citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and the measures adopted for their implementation, freedom of movement for persons being,

moreover, one of the fundamental freedoms of the internal market, which was also reaffirmed in Article 45 of the Charter of Fundamental Rights of the European Union (Case C-162/09 *Lassal* [2010] ECR I-0000, paragraph 29).

28 With regard to Directive 2004/38, the Court has already had occasion to point out that it aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59, and *Lassal*, paragraph 30).

29 Likewise, the Court has also held that a principle of international law, reaffirmed in Article 3 of Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, that European Union law cannot be assumed to disregard in the context of relations between Member States, precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason (see Case 41/74 *van Duyn* [1974] ECR 1337, paragraph 22, and Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557, paragraph 81); that principle also precludes that Member State from expelling its own nationals from its territory or refusing their right to reside in that territory or making such right conditional (see Cases C-370/90 *Singh* [1992] ECR I-4265, paragraph 22 and C-291/05 *Eind* [2007] ECR I-10719, paragraph 31).

The applicability of Directive 2004/38

30 The first part of the first question, as reformulated by the Court, concerns whether Article 3(1) of Directive 2004/38 is to be interpreted as meaning that that directive applies to a citizen in a situation such as that of Mrs McCarthy, who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

31 A literal, teleological and contextual interpretation of that provision leads to a negative reply to that question.

32 First, according to Article 3(1) of Directive 2004/38, all Union citizens who 'move to' or reside in a Member State 'other' than that of which they are a national are beneficiaries of that directive.

33 Secondly, whilst it is true that, as stated in paragraph 28 of this judgment, Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on each citizen of the Union, the fact remains that the subject of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right.

34 Since, as stated in paragraph 29 of this judgment, the residence of a person residing in the Member State of which he is a national cannot be made subject to conditions, Directive 2004/38, concerning the conditions governing the exercise of the right to move and reside freely within the territory of the Member States, cannot apply to a Union citizen who enjoys an unconditional right of residence due to the fact that he resides in the Member State of which he is a national.

35 Thirdly, it is apparent from Directive 2004/38, taken as a whole, that the residence to which it refers is linked to the exercise of the freedom of movement for persons.

36 Thus, first of all, Article 1(a) of that directive defines its subject by reference to the exercise of 'the' right 'of free movement and residence' within the territory of the Member States by Union citizens. Such a relationship between residence and free movement is also apparent both from the title of that directive and from the majority of its recitals, the second of which refers, moreover, exclusively to the free movement of persons.

37 Furthermore, the rights of residence referred to in Directive 2004/38, namely both the right of residence under Articles 6 and 7 and the permanent right of residence under Article 16, refer to the residence of a Union citizen either in 'another Member State' or in 'the host Member State' and therefore govern the legal situation of a Union citizen in a Member State of which he is not a national.

38 Lastly, although, as stated in paragraph 32 of this judgment, Article 3(1) of Directive 2004/38 designates as 'beneficiaries' of that directive all Union citizens who move to 'or' reside in a Member State, it is apparent from Article 22 that the territorial scope of the right of residence and the right of permanent residence referred to in that directive covers the whole territory of 'the host Member State', the latter being defined in Article 2(3) as the Member State to which a Union citizen 'moves' in order to exercise 'his/her' right of free movement and residence within the territory of the Member States.

39 Hence, in circumstances such as those of the main proceedings, in so far as the Union citizen concerned has never exercised his right of free movement and has always resided in a Member State of which he is a national, that citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him.

40 That finding cannot be influenced by the fact that the citizen concerned is also a national of a Member State other than that where he resides.

41 Indeed, the fact that a Union citizen is a national of more than one Member State does not mean that he has made use of his right of freedom of movement.

42 Lastly, it should also be noted that, since a Union citizen such as Mrs McCarthy is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, her spouse is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family (see, in relation to instruments of European Union law prior to Directive 2004/38, Case C-243/91 *Taghavi* [1992] ECR I-4401, paragraph 7, and *Eind*, paragraph 23).

43 It follows that Article 3(1) of Directive 2004/38 is to be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

The applicability of Article 21 TFEU

44 The second part of this question, as reformulated by the Court, concerns whether Article 21 TFEU is applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

45 In that regard, it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State (see, to that effect, Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 33, and *Metock and Others*, paragraph 77).

46 On this point, it must be observed, however, that the situation of a Union citizen who, like Mrs McCarthy, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation (see Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 22).

47 Indeed, the Court has stated several times that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000, paragraph 41 and case-law cited). Furthermore, the Court has held 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 (see *Ruiz Zambrano*, paragraph 42).

48 As a national of at least one Member State, a person such as Mrs 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 (see Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 17 and case-law cited).

49 However, no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU. Indeed, the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to move and reside freely within the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen.

50 In that regard, by contrast with the case of *Ruiz Zambrano*, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union. Indeed, as is clear from paragraph 29 of the present judgment, Mrs McCarthy enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom.

51 The case in the main proceedings also differs from Case C-148/02 *García Avello* [2003] ECR I-11613. In that judgment, the Court held that the application of the law of one Member State to nationals of that Member State who were also nationals of another Member State had the effect that those Union citizens had different surnames under the two legal systems concerned, and that that situation was liable to cause serious inconvenience for them at both professional and

private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in the other Member State of which they are also nationals.

52 As the Court noted in Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639, in circumstances such as those examined in *Garcia Avello*, what mattered was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that that discrepancy was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement that could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued (see, to that effect, *Grunkin et Paul*, paragraphs 23, 24 and 29).

53 Thus, in *Ruiz Zambrano* and *García Avello*, the national measure at issue had the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status or of impeding the exercise of their right of free movement and residence within the territory of the Member States.

54 As stated in paragraph 49 of the present judgment, in the context of the main proceedings in this case, the fact that Mrs McCarthy, in addition to being a national of the United Kingdom, is also a national of Ireland does not mean that a Member State has applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the Member States. Accordingly, in such a context, such a factor is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU.

55 In those circumstances, the situation of a person such as Mrs McCarthy has no factor linking it with any of the situations governed by European Union law and the situation is confined in all relevant respects within a single Member State.

56 It follows that Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

57 In the light of the foregoing, the answer to the first question is as follows:

– Article 3(1) of Directive 2004/38 must be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

– Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

The second question

58 In view of the answer to the first question referred by the national court, there is no need to answer the second question.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. Article 3(1) 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that that

directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

2. Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2011 (*)

(European Union law – Principles – Fundamental rights – Implementation of European Union law – Prohibition of inhuman or degrading treatment – Common European Asylum System – Regulation (EC) No 343/2003 – Concept of 'safe countries' – Transfer of an asylum seeker to the Member State responsible – Obligation – Rebuttable presumption of compliance, by that Member State, with fundamental rights)

In Joined Cases C-411/10 and C-493/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) and the High Court (Ireland), by decisions of 12 July and 11 October 2010, lodged at the Court on 18 August and 15 October 2010 respectively, in the proceedings

N. S. (C-411/10)
v
Secretary of State for the Home Department
and
M. E. (C-493/10),
A. S. M.,
M. T.,
K. P.,
E. H.
v
Refugee Applications Commissioner,
Minister for Justice, Equality and Law Reform,

intervening parties:
Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) (C-411/10),
United Nations High Commissioner for Refugees (UNHCR) (UK) (C-411/10),
Equality and Human Rights Commission (EHRC) (C-411/10),
Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (IRL) (C-493/10),
United Nations High Commissioner for Refugees (UNHCR) (IRL) (C-493/10),

THE COURT (Grand Chamber),
composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenosvský and U. Lõhmus, Presidents of Chambers, A. Rosas (Rapporteur), M. Ilešič, T. von Danwitz, A. Arabadjiev, C. Toader and J.J. Kasel, Judges,
Advocate General: V. Trstenjak,
Registrar: L. Hewlett, Principal Administrator,
having regard to the written procedure and further to the hearing on 28 June 2011,
after considering the observations submitted on behalf of:
– N. S., by D. Rose, QC, M. Henderson and A. Pickup, Barristers, and by S. York, Legal Officer,
– M.E. and Others., by C. Power, BL, F. McDonagh, SC, and G. Searson, Solicitor,
– Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) (Case C-411/10), by S. Cox and S. Taghavi, Barristers, and J. Tomkin, BL,
– Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (IRL) (Case C-493/10), by B. Shipsey, SC, J. Tomkin, BL, and C. Ó Briain, Solicitor,
– The Equality and Human Rights Commission (EHRC), by G. Robertson, QC, J. Cooper and C. Collier, Solicitors,
– The United Nations High Commissioner for Refugees (UNHCR) (UK), by R. Husain, QC, R. Davies, Solicitor, and S. Knights and M. Demetriou, Barristers,
– Ireland, by D. O'Hagan, acting as Agent, assisted by S. Moorhead, SC, and D. Conlan Smyth, BL,
– the United Kingdom Government, by C. Murrell, acting as Agent, and D. Beard, Barrister,
– the Belgian Government, by C. Pochet and T. Materne, acting as Agents,
– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,
– the Government of the Hellenic Republic, by A. Samoni-Rantou, M. Michelogiannaki, T. Papadopoulou, F. Dedousi and M. Germani, acting as Agents,
– the French Government, by G. de Bergues, and by E. Belliard and B. Beaupère-Manokha, acting as Agents,
– the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Russo, avvocato dello Stato,
– the Netherlands Government, by C.M. Wissels and M. Noort, acting as Agents,
– the Austrian Government, by G. Hesse, acting as Agent,
– the Polish Government, by M. Arciszewski, B. Majczyna and M. Szpunar, acting as Agents,
– the Slovenian Government, by N. Aleš Verdir and V. Klemenc, acting as Agents,
– the Finnish Government, by J. Heliskoski, acting as Agent,
– the European Commission, by M. Condou-Durande and by M. Wilderspin and H. Kraemer, acting as Agents,
– the Swiss Confederation, by O. Kjelsen, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 22 September 2011,

gives the following

Judgment

1 The two references for preliminary rulings concern the interpretation, first, of Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) and, second, the fundamental rights of the European Union, including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and, third, Protocol (No 30) on the application of the Charter to Poland and to the United Kingdom (OJ 2010 C 83, p. 313; 'Protocol (No 30)').

2 The references have been made in proceedings between asylum seekers who were to be returned to Greece pursuant to Regulation No 343/2003 and, respectively, the United Kingdom and Irish authorities.

Legal context

International law

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol 189, p. 150, No 2545 (1954)) ('the Geneva Convention'), entered into force on 22 April 1954. It was extended by the Protocol relating to the Status of Refugees of 31 January 1967 ('the 1967 Protocol'), which entered into force on 4 October 1967.

4 All the Member States are contracting parties to the Geneva Convention and the 1967 Protocol, as are the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Principality of Liechtenstein. The European Union is not a contracting party to the Geneva Convention or to the 1967 Protocol, but Article 78 TFEU and Article 18 of the Charter provide that the right to asylum is to be guaranteed with due respect for the Geneva Convention and the 1967 Protocol.

5 Article 33(1) of the Geneva Convention, headed 'Prohibition of expulsion or return ("refoulement")', provides:

> 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

The Common European Asylum System

6 In order to achieve the objective, laid down by the European Council meeting in Strasbourg on 8 and 9 December 1989, of the harmonisation of their asylum policies, the Member States signed in Dublin, on 15 June 1990, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (OJ 1997 C 254, p. 1; 'the Dublin Convention'). The Dublin Convention entered into force on 1 September 1997 for the twelve original signatories, on 1 October 1997 for the Republic of Austria and the Kingdom of Sweden, and on 1 January 1998 for the Republic of Finland.

7 The conclusions of the European Council meeting in Tampere on 15 and 16 October 1999 envisaged, inter alia, the establishment of a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to a place where they again risk being persecuted, that is to say,

maintaining the principle of non-refoulement.

8 The Amsterdam Treaty of 2 October 1997 introduced Article 63 into the EC Treaty, which conferred competence on the European Community to adopt the measures recommended by the European Council in Tampere. That treaty also annexed to the EC Treaty the Protocol (No 24) on asylum for nationals of Member States of the European Union (OJ 2010 C 83, p. 305), according to which those States are to be regarded as constituting safe countries of origin in respect to each other for all legal and practical purposes in relation to asylum matters.

9 The adoption of Article 63 EC made it possible, inter alia, to replace between the Member States, with the exception of the Kingdom of Denmark, the Dublin Convention by Regulation No 343/2003, which entered into force on 17 March 2003. It is also on that legal basis that the directives applicable to the cases in the main proceedings were adopted, for the purpose of establishing the Common European Asylum System foreseen by the conclusions of the Tampere European Council.

10 Since entry into force of the Lisbon Treaty, the relevant provisions in asylum matters are Article 78 TFEU, which provides for the establishment of a Common European Asylum System, and Article 80 TFEU, which reiterates the principle of solidarity and fair sharing of responsibility between the Member States.

11 The European Union legislation of relevance to the present cases includes:

(1) Regulation No 343/2003;

(2) Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18);

(3) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12, and corrigendum, OJ 2005 L 204, p. 24);

(4) Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13, and corrigendum, OJ 2006 L 236, p. 36).

12 It is also appropriate to mention *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12).* As is apparent from recital 20 in the preamble to that directive, one of its objectives is to provide for a solidarity mechanism intended to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx.

13 The recording of the fingerprint data of foreign nationals illegally crossing an external border of the European Union makes it possible to determine the Member State responsible for an asylum application. Such recording is provided for by Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2000 L 316, p. 1).

14 Regulation No 343/2003 and Directives 2003/9, 2004/83 and 2005/85 refer, in their first recitals, to the fact that a common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community. They also refer, in their second recitals, to the conclusions of the Tampere European Council.

15 Each of those texts states that it respects the fundamental rights and observes the principles recognised, in particular, by the Charter. Among others, recital 15 in the preamble to Regulation No 343/2003 states that it seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter; recital 5 in the preamble to Directive 2003/9 states that, in particular, that directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter; and recital 10 in the preamble to Directive 2004/83 states that, in particular, that directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

16 Article 1 of Regulation No 343/2003 lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.

17 Article 3(1) and (2) of that regulation provide:

‘1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.’

18 In order to determine which is ‘the Member State responsible’ for the purposes of Article 3(1) of Regulation No 343/2003, Chapter III of that regulation lists objective and hierarchical criteria relating to unaccompanied minors, family unity, the issue of a residence document or visa, irregular entry into or residence in a Member State and applications made in an international transit area of an airport.

19 Article 13 of that regulation provides that, where no Member State can be designated according to the hierarchy of criteria, the default rule is that the first Member State with which the application was lodged will be responsible for examining the asylum application.

20 According to Article 17 of Regulation No 343/2003, where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible, call upon the other Member State to take charge of the applicant.

21 Article 18(7) of that regulation provides that failure by the requested Member State to act before the expiry of a two-month period, or within one month where urgency is pleaded, is to be tantamount to accepting the request, and entails the obligation, for that Member State, to take charge of the person, including the provisions for proper arrangements for arrival.

22 Article 19 of Regulation No 343/2003 is worded as follows:

‘1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case-by-case basis if national legislation allows for this.

…

4. Where the transfer does not take place within the six months’ time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

…’

23 The United Kingdom participates in the application of each of the regulations and the four directives mentioned in paragraphs 11 to 13 of the present judgment. Ireland, by contrast, participates in the application of the regulations and of Directives 2004/83, 2005/85 and 2001/55, but not Directive 2003/9.

24 The Kingdom of Denmark is bound by the Agreement which it concluded with the European Community extending to Denmark the provisions of Council Regulation (EC) No 2725/2000, approved by Council Decision 2006/188/EC of 21 February 2006 (OJ 2006 L 66, p. 37). It is not bound by the directives referred to in paragraph 11 of the present judgment.

25 The European Community has also concluded an Agreement with the Republic of Iceland and the Kingdom of Norway

concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway, approved by Council Decision 2001/258/EC of 15 March 2001 (OJ 2001 L 93, p. 38).

26 The European Community has similarly concluded an Agreement with the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, approved by Council Decision 2008/147/EC of 28 January 2008 (OJ 2008 L 53, p. 3), and the Protocol with the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, approved by Council Decision 2009/487/EC of 24 October 2008 (OJ 2009 L 161, p. 6).

27 Directive 2003/9 lays down minimum standards for the reception of asylum seekers in Member States. Those standards concern in particular the obligations concerning the information and documents which must be provided to asylum seekers, the decisions which may be adopted by the Member States concerning residence and freedom of movement of asylum seekers within their territory, families, medical screening, schooling and education of minors, employment of asylum seekers and their access to vocational training, the general rules on material reception conditions and health care available to asylum applicants, the modalities for material reception conditions and the health care which must be granted to asylum applicants.

28 Directive 2003/9 also provides for an obligation to control the level of reception conditions and the possibility of appealing with regard to the matters and decisions covered by it. In addition, it contains rules concerning the training of the authorities and the necessary resources in connection with the national provisions enacted to implement the Directive.

29 Directive 2004/83 lays down minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Chapter II thereof contains several provisions explaining how to assess applications. Chapter III thereof lays down the conditions which must be satisfied in order to qualify for being a refugee. Chapter IV concerns refugee status. Chapters V and VI concern the conditions which must be satisfied in order to qualify for subsidiary protection and the status conferred thereby. Chapter VII contains various rules setting out the content of international protection. According to Article 20(1) of Directive 2004/83, that chapter is to be without prejudice to the rights laid down in the Geneva Convention.

30 Directive 2005/85 lays down the rights of asylum seekers and the procedures for examining applications.

31 Article 36(1) of Directive 2005/85, under the heading 'The European safe third countries concept' states:

'Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.'

32 The conditions laid down in Article 36(2) include:

– ratification of and compliance with the provisions of the Geneva Convention;

– the existence of an asylum procedure prescribed by law;

– ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), and compliance with its provisions, including the standards relating to effective remedies.

33 Article 39 of Directive 2005/85 sets out the effective remedies that it must be possible to pursue before the courts of the Member States. Article 39(1)(a)(iii) refers to decisions not to conduct an examination pursuant to Article 36 of the directive.

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-411/10

34 N.S., the appellant in the main proceedings, is an Afghan national who came to the United Kingdom after travelling through, among other countries, Greece. He was arrested in Greece on 24 September 2008 but did not make an

asylum application.

35 According to him, the Greek authorities detained him for four days and, on his release, gave him an order to leave Greece within 30 days. He claims that, when he tried to leave Greece, he was arrested by the police and was expelled to Turkey, where he was detained in appalling conditions for two months. He states that he escaped from his place of detention in Turkey and travelled from that State to the United Kingdom, where he arrived on 12 January 2009 and where, that same day, he lodged an asylum application.

36 On 1 April 2009, the Secretary of State for the Home Department ('the Secretary of State') made a request to the Hellenic Republic, pursuant to Article 17 of Regulation No 343/2003, to take charge of the appellant in the main proceedings in order to examine his asylum application. The Hellenic Republic failed to respond to that request within the time limit stipulated by Article 18(7) of the Regulation and was accordingly deemed, on 18 June 2009, pursuant to that provision, to have accepted responsibility for examining the appellant's claim.

37 On 30 July 2009, the Secretary of State notified the appellant in the main proceedings that directions had been given for his removal to Greece on 6 August 2009.

38 On 31 July 2009, the Secretary of State notified the appellant in the main proceedings of a decision certifying that, under paragraph 5(4) of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ('the 2004 Asylum Act'), his claim that his removal to Greece would violate his rights under the ECHR was clearly unfounded, since Greece is on the 'list of safe countries' in Part 2 of Schedule 3 to the 2004 Asylum Act.

39 The consequence of that certification decision was, in accordance with paragraph 5(4) of Part 2 of Schedule 3 to the 2004 Asylum Act, that the appellant in the main proceedings did not have a right to lodge an immigration appeal in the United Kingdom, with suspensive effect, against the decision ordering his transfer to Greece, an appeal to which he would have been entitled in the absence of such a certification decision.

40 On 31 July 2009, the appellant in the main proceedings requested the Secretary of State to accept responsibility for examining his asylum claim under Article 3(2) of the Regulation, on the ground that there was a risk that his fundamental rights under European Union law, the ECHR and/or the Geneva Convention would be breached if he were returned to Greece. By letter of 4 August 2009, the Secretary of State maintained his decision to transfer the appellant in the main proceedings to Greece and his decision certifying that the claim of the appellant in the main proceedings based on the ECHR was clearly unfounded.

41 On 6 August 2009, the appellant in the main proceedings issued proceedings seeking judicial review of the Secretary of State's decisions. As a result, the Secretary of State annulled the directions for his transfer. On 14 October 2009, the permission sought by the appellant for judicial review was granted.

42 The application was examined by the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) from 24 to 26 February 2010. By judgment of 31 March 2010, Mr Justice Cranston dismissed the application but granted the appellant in the main proceedings leave to appeal to the Court of Appeal (England & Wales) (Civil Division).

43 The appellant in the main proceedings appealed to that court on 21 April 2010.

44 It emerges from the order for reference, in which the Court of Appeal refers to the judgment of the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), that:

(1) asylum procedures in Greece are said to have serious shortcomings: applicants encounter numerous difficulties in carrying out the necessary formalities; they are not provided with sufficient information and assistance; their claims are not examined with due care;

(2) the proportion of asylum applications which are granted is understood to be extremely low;

(3) judicial remedies are stated to be inadequate and very difficult to access;

(4) the conditions for reception of asylum seekers are considered to be inadequate: applicants are either detained in inadequate conditions or they live outside in destitution, without shelter or food.

45 The High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) considered that the risks of refoulement from Greece to Afghanistan and Turkey were not established in the case of persons returned under Regulation No 343/2003, but that view is contested by the appellant in the main proceedings before the referring court.

46 Before the Court of Appeal (England & Wales) (Civil Division), the Secretary of State accepted that 'the fundamental rights set out in the Charter can be relied on as against the United Kingdom and … that the Administrative Court erred in holding otherwise'. According to the Secretary of State, the Charter simply restates rights which already form an integral part of European Union law and does not create any new rights. However, the Secretary of State contended that the High Court of Justice (England & Wales) Queen's Bench Division (Administrative Court) was wrong to find that she was bound to take into account European Union fundamental rights when exercising her discretion under Article 3(2) of the Regulation. According to the Secretary of State, that discretionary power does not fall within the scope of European Union law.

47 In the alternative, the Secretary of State contended that the obligation to observe European Union fundamental rights does not require her to take into account the evidence that, if the appellant were returned to Greece, there would be a substantial risk that his fundamental rights under European Union law would be infringed. She maintained that the scheme of Regulation No 343/2003 entitles her to rely on the conclusive presumption that Greece (or any other Member State) would comply with its obligations under European Union law.

48 Finally, the appellant in the main proceedings contended before the referring court that the protection conferred by the Charter is higher than and goes beyond that guaranteed by, inter alia, Article 3 of the ECHR, which might lead to a different outcome in the present case.

49 At the hearing of 12 July 2010, the referring court decided that decisions on certain questions of European Union law were necessary for it to give judgment on the appeal.

50 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a decision made by a Member State under Article 3(2) of … Regulation No 343/2003 whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Regulation fall within the scope of EU law for the purposes of Article 6 [TEU] and/or Article 51 of the Charter …?

If Question 1 is answered in the affirmative:

(2) Is the duty of a Member State to observe EU fundamental rights (including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter) discharged where that State sends the asylum seeker to the Member State which Article 3(1) [of Regulation No 343/2003] designates as the responsible State in accordance with the criteria set out in Chapter III of the regulation ("the responsible State"), regardless of the situation in the responsible State?

(3) In particular, does the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the responsible State will observe (i) the claimant's fundamental rights under European Union law; and/ or (ii) the minimum standards imposed by Directives 2003/9 …, 2004/83 … and 2005/85 …?

(4) Alternatively, is a Member State obliged by European Union law, and, if so, in what circumstances, to exercise the power under Article 3(2) of the Regulation to examine and take responsibility for a claim, where transfer to the responsible State would expose the [asylum] claimant to a risk of violation of his fundamental rights, in particular the rights set out in Articles 1, 4, 18, 19(2) and/or 47 of the Charter, and/or to a risk that the minimum standards set out in Directives [2003/9, 2004/83 and 2005/85] will not be applied to him?

(5) Is the scope of the protection conferred upon a person to whom Regulation [No 343/2003] applies by the general principles of European Union law, and, in particular, the rights set out in Articles 1, 18 and 47 of the Charter wider than the protection conferred by Article 3 of the ECHR?

(6) Is it compatible with the rights set out in Article 47 of the Charter for a provision of national law to require a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation [No 343/2003], to treat that Member State as a State from which the person will not be sent to another State in contravention of his rights pursuant to the [ECHR] or his rights pursuant to the [Geneva Convention] and [the 1967 Protocol]?

(7) In so far as the preceding questions arise in respect of the obligations of the United Kingdom, are the answers to [the second to sixth questions] qualified in any respect so as to take account of the Protocol (No 30)?'

51 This case concerns five appellants in the main proceedings, all unconnected with each other, originating from Afghanistan, Iran and Algeria. Each of them travelled via Greece and was arrested there for illegal entry. They then travelled to Ireland, where they claimed asylum. Three of the appellants in the main proceedings claimed asylum without disclosing that they had previously been in Greece, whilst the other two admitted they had previously been in Greece. The Eurodac system confirmed that all five appellants had previously entered Greece, but that none of them had claimed asylum there.

52 Each of the appellants in the main proceedings resists return to Greece. As is apparent from the order for reference, it has not been argued that the transfer of the appellants to Greece under Regulation No 343/2003 would violate Article 3 ECHR because of a risk of refoulement, chain refoulement, ill treatment or suspension of asylum claims. It is also not alleged that the transfer would breach another article of the ECHR. The appellants in the main proceedings argued that the procedures and conditions for asylum seekers in Greece are inadequate and that Ireland is therefore required to exercise its power under Article 3(2) of Regulation No 343/2003 to accept responsibility for examining and deciding on their asylum claims.

53 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the transferring Member State under … Regulation (EC) No 343/2003 obliged to assess the compliance of the receiving Member State with Article 18 of the Charter …, … Directives 2003/9/EC, 2004/83/EC and 2005/85/EC and Regulation (EC) No 343/2003?

(2) If the answer is yes, and if the receiving Member State is found not to be in compliance with one or more of those provisions, is the transferring Member Sate obliged to accept responsibility for examining the application under Article 3(2) of … Regulation (EC) No 343/2003?'

54 Cases C-411/10 and C-493/10 were, by order of the President of the Court of 16 May 2011, joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

The first question in Case C-411/10

55 By its first question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of that regulation falls within the scope of European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

Observations submitted to the Court

56 N.S., the Equality and Human Rights Commission (EHRC), Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK), the United Nations High Commissioner for Refugees (UNHCR), the French, Netherlands, Austrian and Finnish Governments and the European Commission consider that a decision adopted on the basis of Article 3(2) of Regulation No 343/2003 falls within the scope of European Union law.

57 N.S. points out, in that regard, that the exercise of the power provided for by that provision will not necessarily be more favourable to the applicant, which explains why, in its assessment of the Dublin system (COM (2007) 299 final), the Commission proposed that exercise of the power provided for by Article 3(2) of Regulation No 343/2003 should be subject to the consent of the asylum seeker.

58 According to Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) and the French Government, in particular, the possibility provided for in Article 3(2) of Regulation No 343/2003 is justified by the fact that the purpose of the Regulation is to protect fundamental rights and that it might be necessary to exercise the power provided for by that article.

59 The Finnish Government emphasises that Regulation No 343/2003 forms part of a set of rules establishing a system.

60 According to the Commission, when a regulation confers a discretionary power on a Member State, it must exercise that power in accordance with European Union law (Case 5/88 *Wachauf* [1989] ECR 2609; Case C-578/08 *Chakroun* [2010] ECR I-1839; and Case C-400/10 PPU *McB.* [2010] ECR I-0000). It points out that a decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 has consequences for that Member State,

which will be bound by the procedural obligations of the European Union and by the directives.

61 Ireland, the United Kingdom, the Belgian Government and the Italian Government, on the other hand, consider that such a decision under Article 3(2) of the Regulation does not fall within the scope of European Union law. The arguments put forward are the clarity of the text, which provides for an option, the reference to a 'sovereignty' clause or 'discretionary clause' in the Commission documents, the raison d'être of such a clause, that is humanitarian grounds, and, lastly, the logic of the system established by Regulation No 343/2003.

62 The United Kingdom emphasises that a sovereignty clause is not a derogation within the meaning of Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43. It also points out that the fact that the exercise of that clause does not implement European Union law does not mean that Member States are disregarding fundamental rights, since they are bound by the Geneva Convention and the ECHR. The Belgian Government, however, submits that carrying out the decision to transfer the asylum seeker implements Regulation No 343/2003 and therefore falls within the scope of Article 6 TEU and the Charter.

63 The Czech Government takes the view that the decision by a Member State falls within European Union law when that State exercises the sovereignty clause, but not when it does not exercise that power.

The Court's reply

64 Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States only when they are implementing European Union law.

65 Scrutiny of Article 3(2) of Regulation No 343/2003 shows that it grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the European Union legislature.

66 As stated by the Commission, that discretionary power must be exercised in accordance with the other provisions of that regulation.

67 In addition, Article 3(2) of Regulation No 343/2003 states that the derogation from the principle laid down in Article 3(1) of that regulation gives rise to the specific consequences provided for by that regulation. Thus, a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of Regulation No 343/2003 and must, where appropriate, inform the other Member State or Member States concerned by the asylum application.

68 Those factors reinforce the interpretation according to which the discretionary power conferred on the Member States by Article 3(2) of Regulation No 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter.

69 The answer to the first question in Case C-411/10 is therefore that the decision by a Member State on the basis of Article 3(2) of Regulation No 343/2003 whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

The second to fourth questions and the sixth question in Case C-411/10 and the two questions in Case C-493/10

70 By the second question in Case C-411/10 and the first question in Case C-493/10, the referring courts ask, in essence, whether the Member State which should transfer the asylum seeker to the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible is obliged to assess the compliance, by that Member State, with the fundamental rights of the European Union, Directives 2003/9, 2004/83 and 2005/85 and with Regulation No 343/2003.

71 By the third question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the obligation on the Member State which should transfer the asylum seeker to observe fundamental rights precludes the operation of a conclusive presumption that the responsible State will observe the claimant's fundamental rights under European Union law and/or the minimum standards imposed by the abovementioned

directives.

72 By the fourth question in Case C-411/10 and the second question in Case C-493/10, the referring courts ask, in essence, whether, where the Member State responsible is found not to be in compliance with fundamental rights, the Member State which should transfer the asylum seeker is obliged to accept responsibility for examining the asylum application under Article 3(2) of Council Regulation (EC) No 343/2003?

73 Finally, by its sixth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether a provision of national law which requires a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation No 343/2003, to treat that Member State as a 'safe country' is compatible with the rights set out in Article 47 of the Charter.

74 Those questions should be considered together.

75 The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted. Article 18 of the Charter and Article 78 TFEU provide that the rules of the Geneva Convention and the 1967 Protocol are to be respected (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 53, and Case C-31/09 *Bolbol* [2010] ECR I-5539, paragraph 38).

76 As stated in paragraph 15 above, the various regulations and directives relevant to in the cases in the main proceedings provide that they comply with the fundamental rights and principles recognised by the Charter.

77 According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28).

78 Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard.

79 It is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003 and the conventions referred to in paragraphs 24 to 26 of the present judgment in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.

80 In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR.

81 It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.

82 Nevertheless, it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.

83 At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.

84 In addition, it would be not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible. Regulation No 343/2003 aims – on the assumption that the fundamental rights of the asylum seeker are observed in the Member State primarily responsible for examining the application – to establish,

as is apparent inter alia from points 124 and 125 of the Opinion in Case C-411/10, a clear and effective method for dealing with an asylum application. In order to achieve that objective, Regulation No 343/2003 provides that responsibility for examining an asylum application lodged in a European Union country rests with a single Member State, which is determined on the basis of objective criteria.

85 If the mandatory consequence of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned State, that would add to the criteria for determining the Member State responsible set out in Chapter III of Regulation No 343/2003 another exclusionary criterion according to which minor infringements of the abovementioned directives committed in a certain Member State may exempt that Member State from the obligations provided for under Regulation No 343/2003. Such a result would deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union.

86 By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.

87 With regard to the situation in Greece, the parties who have submitted observations to the Court are in agreement that that Member State was, in 2010, the point of entry in the European Union of almost 90% of illegal immigrants, that influx resulting in a disproportionate burden being borne by it compared to other Member States and the inability to cope with the situation in practice. The Hellenic Republic stated that the Member States had not agreed to the Commission's proposal that the application of Regulation No 343/2003 be suspended and that it be amended by mitigating the criterion of first entry.

88 In a situation similar to those at issue in the cases in the main proceedings, that is to say the transfer, in June 2009, of an asylum seeker to Greece, the Member State responsible within the meaning of Regulation No 343/2003, the European Court of Human Rights held, inter alia, that the Kingdom of Belgium had infringed Article 3 of the ECHR, first, by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment (European Court of Human Rights, *M.S.S.* v. *Belgium and Greece*, § 358, 360 and 367, judgment of 21 January 2011, not yet published in the *Reports of Judgments and Decisions*).

89 The extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers.

90 In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S.* v *Belgium and Greece*, § 347-350).

91 Thus, and contrary to the submissions of the Belgian, Italian and Polish Governments, according to which the Member States lack the instruments necessary to assess compliance with fundamental rights by the Member State responsible and, therefore, the risks to which the asylum seeker would be exposed were he to be transferred to that Member State, information such as that cited by the European Court of Human Rights enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks.

92 The relevance of the reports and proposals for amendment of Regulation No 343/2003 emanating from the Commission should be noted – these must be known to the Member State which has to carry out the transfer, given its participation in the work of the Council of the European Union, which is one of the addressees of those documents.

93 In addition, Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Directive 2001/55 is an example of that solidarity but, as was stated at the hearing, the solidarity mechanisms which it contains apply only to wholly exceptional situations falling within the scope of that directive, that is to say, a mass influx of displaced persons.

94 It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

95 With regard to the question whether the Member State which cannot carry out the transfer of the asylum seeker to the Member State identified as 'responsible' in accordance with Regulation No 343/2003 is obliged to examine the application itself, it should be recalled that Chapter III of that Regulation refers to a number of criteria and that, in accordance with Article 5(1) of that regulation, those criteria apply in the order in which they are set out in that chapter.

96 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to Greece, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

97 In accordance with Article 13 of Regulation No 343/2003, where the Member State responsible for examining the application for asylum cannot be designated on the basis of the criteria listed in that Regulation, the first Member State with which the application for asylum was lodged is to be responsible for examining it.

98 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

99 It follows from all of the foregoing considerations that, as stated by the Advocate General in paragraph 131 of her Opinion, an application of Regulation No 343/2003 on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights.

100 In addition, as stated by N.S., were Regulation No 343/2003 to require a conclusive presumption of compliance with fundamental rights, it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States.

101 That would be the case, inter alia, with regard to a provision which laid down that certain States are 'safe countries' with regard to compliance with fundamental rights, if that provision had to be interpreted as constituting a conclusive presumption, not admitting of any evidence to the contrary.

102 In that regard, it should be pointed out that Article 36 of Directive 2005/85, concerning the safe third country concept, provides, in paragraph 2(a) and (c), that a third country can only be considered as a 'safe third country' where not only has it ratified the Geneva Convention and the ECHR but it also observes the provisions thereof.

103 Such wording indicates that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions. The same principle is applicable both to Member States and third countries.

104 In those circumstances, the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable.

105 In the light of those factors, the answer to the questions referred is that European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.

106 Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

107 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

108 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

The fifth question in Case C-411/10

109 By its fifth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the extent of the protection conferred on a person to whom Regulation No 343/2003 applies by the general principles of EU law, and, in particular, the rights set out in Articles 1, concerning human dignity, 18, concerning the right to asylum, and 47, concerning the right to an effective remedy, of the Charter, is wider than the protection conferred by Article 3 of the ECHR.

110 According to the Commission, the answer to that question must make it possible to identify the provisions of the Charter the infringement of which by the Member State responsible would result in the secondary responsibility of the Member State which has to decide on the transfer.

111 Even if the Court of Appeal (England & Wales) (Civil Division) did not expressly provide reasons, in the order for reference, why it required an answer to the question in order to give judgment, a reading of that decision in fact suggests that that question can be accounted for by the decision of 2 December 2008 in *K.R.S.* v. *United Kingdom*, not yet published in the *Reports of Judgments and Decisions*, in which the European Court of Human Rights held inadmissible an application claiming that Article 3 and 13 of the ECHR would be infringed were the applicant to be transferred by the United Kingdom to Greece. Before the Court of Appeal (England & Wales) (Civil Division), a number of parties claimed that the protection of fundamental rights stemming from the Charter is wider than that conferred by the ECHR and that, taking the Charter into account, their request not to transfer the applicant in the main proceedings to Greece would have to be granted.

112 After the order for reference was made, the European Court of Human Rights reviewed its position in the light of new evidence and held, in *M.S.S.* v *Belgium and Greece*, not only that the Hellenic Republic had infringed Article 3 of the ECHR owing to the applicant's detention and living conditions in Greece and also Article 13 of the ECHR read in conjunction with the aforesaid Article 3 on account of the deficiencies in the asylum procedure conducted in the applicant's case, but also that the Kingdom of Belgium had infringed Article 3 of the ECHR by exposing the applicant to the risks linked to the deficiencies in the asylum procedure in Greece and to detention and living conditions in Greece which did not comply with that article.

113 As follows from paragraph 106 above, a Member State would infringe Article 4 of the Charter if it transferred an asylum seeker to the Member State responsible within the meaning of Regulation No 343/2003 in the circumstances described in paragraph 94 of the present judgment.

114 Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.

115 Consequently, the answer to the fifth question in Case C-411/10 is that Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.

The seventh question in Case C-411/10

116 By its seventh question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the answers to the second to sixth questions should be qualified in any respect so as to take account of Protocol (No 30).

117 As noted by the EHRC, that question arises because of the position taken by the Secretary of State before the High Court of Justice (England & Wales) (Administrative Court) that the provisions of the Charter do not apply in the United Kingdom.

118 Even if the Secretary of State no longer maintained that position before the Court of Appeal (England & Wales) (Civil Division), it must be noted that Protocol (No 30) provides, in Article 1(1), that the Charter is not to extend the ability of the Court of Justice or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it affirms.

119 According to the wording of that provision, as noted by the Advocate General in points 169 and 170 of her Opinion in Case C-411/10, Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.

120 In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.

121 Since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Article 1(2) of Protocol (No 30).

122 The answer to the seventh question in Case C-411/10 is therefore that, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30).

On those grounds, the Court (Grand Chamber) hereby rules:

1. The decision adopted by a Member State on the basis of Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter of Fundamental Rights of the European Union.

2. European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial

grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

3. Articles 1, 18 and 47 of the Charter of Fundamental Rights of the European Union do not lead to a different answer.

4. In so far as the preceding questions arise in respect of the obligations of the United Kingdom of Great Britain and Northern Ireland, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.

JUDGMENT OF THE COURT (Grand Chamber)
15 November 2011 (*)

(Citizenship of the Union – Right of residence of nationals of third countries who are family members of Union citizens – Refusal based on the citizen's failure to exercise the right to freedom of movement – Possible difference in treatment compared with EU citizens who have exercised their right to freedom of movement – EEC-Turkey Association Agreement – Article 13 of Decision No 1/80 of the Association Council – Article 41 of the Additional Protocol – 'Standstill' clauses)

In Case C-256/11,
REFERENCE for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 5 May 2011, received at the Court on 25 May 2011, in the proceedings

Murat Dereci,
Vishaka Heiml,
Alban Kokollari,
Izunna Emmanuel Maduike,
Dragica Stevic

v

Bundesministerium für Inneres,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenovský, U. Lõhmus, Presidents of Chambers, R. Silva de Lapuerta (Rapporteur), M. Ilešič and E. Levits, Judges,
Advocate General: P. Mengozzi,
Registrar: K. Malacek, Administrator,

having regard to the order of the President of the Court of 9 September 2011 applying an accelerated procedure to the reference for a preliminary ruling under Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Rules of Procedure of the Court,

having regard to the written procedure and further to the hearing on 27 September 2011,

after considering the observations submitted on behalf of:

– M. Dereci, by H. Blum, Rechtsanwalt,

– the Austrian Government, by G. Hesse, acting as Agent,

– the Danish Government, by C. Vang, acting as Agent,

– the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,

– Ireland, by D. O'Hagan, acting as Agent, assisted by P. McCann, BL,

– the Greek Government, by T. Papadopoulou, acting as Agent,

– the Netherlands Government, by C. Wissels and J. Langer, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the United Kingdom Government, by S. Hathaway and S. Ossowski, acting as Agents, assisted by K. Beal, barrister,

– the European Commission, by D. Maidani and C. Tufvesson and by B.-R. Killmann, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of European Union law provisions on citizenship of the Union, and Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed in

Ankara on 12 September 1963 by Turkey, on the one hand, and by Member States of the EEC and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision No 64/732/EEC of 23 December 1963 (OJ 1964, 217, p. 3685) ('Decision No 1/80' and 'the Association Agreement' respectively), and the Additional Protocol, signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1972 L 293, p. 1) ('the Additional Protocol').

2 The reference has been made in proceedings between Mr Dereci, Mrs Heiml, Mr Kokollari, Mr Maduike and Mrs Stevic, on the one hand, and the Bundesministerium für Inneres (Ministry of Home Affairs), on the other, concerning the latter's rejection of the application for residence authorisations by the applicants in the main proceedings, coupled with, in four of the disputes in the main proceedings, an expulsion order and individual removal orders from Austria.

Legal context

International Law

3 Under the heading 'Right to respect for private and family life', Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ('ECHR') provides:

'(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

European UnionLaw

Association Agreement

4 The Association Agreement is intended, in the words of Article 2(1), 'to promote the continuous and balanced strengthening of trade and economic relations between the parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people'. Under Article 12 of the Association Agreement, 'the Contracting Parties agree to be guided by Articles [39 EC], [40 EC] and [41 EC] for the purpose of progressively securing freedom of movement for workers between them' and, under Article 13 of that agreement, those parties 'agree to be guided by Articles [43 EC] to [46 EC] and [48 EC] for the purpose of abolishing restrictions on freedom of establishment between them'.

Decision No 1/80

5 Article 13 of Decision No 1/80 states:

'The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.'

Additional Protocol

6 According to Article 62 thereof, the Additional Protocol and its Annexes form an integral part of the Association Agreement.

7 Article 41(1) of the Additional Protocol provides:

'The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.'

Directive 2003/86/EC

8 Article 1 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) states:

'The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.'

9 According to Article 3(3) of that directive:

'This Directive shall not apply to members of the family of a Union citizen.'

Directive 2004/38/EC

10 Under the heading ‘General provisions’, Chapter I 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34) consists of Articles 1 to 3.

11 Article 1 of that directive, which is entitled ‘Subject’, provides:

‘This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.’

12 Under the heading ‘Definitions’, Article 2 of that directive states:

‘For the purposes of this Directive:

(1) “Union citizen” means any person having the nationality of a Member State;

(2) “Family member” means:

a) the spouse;

b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) “Host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.’

13 Article 3 of Directive 2004/38, which is entitled ‘Beneficiaries’, provides in paragraph 1:

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

National law

14 The Federal Law on establishment and residence in Austria (Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich, BGBl. I, 100/2005, ‘NAG’), makes a distinction, in its provisions on establishment and residence in Austria, between rights derived from European Union law, on the one hand, and those derived from Austrian law, on the other.

15 Under the heading ‘General conditions for obtaining a residence permit’, Paragraph 11 of the NAG provides:

‘...

(2) A residence permit may be issued to an alien only if

1. the residence of the alien is not contrary to the public interest;

2. the alien can provide evidence of a legal right to accommodation considered usual for a family of comparable size;

3. the alien has comprehensive sickness insurance cover valid in Austria;

4. the residence of the alien is not liable to entail a financial burden for the public authorities in Austria;

…

(3) a residence permit may be issued despite a ground for refusal under subparagraph 1(3), (5) or (6) or where the conditions under subparagraph 2(1) to (6) are not met if required by respect for private and family life within the meaning of Article 8 of the [ECHR]. Private and family life within the meaning of Article 8 of the [ECHR] shall be assessed in the light, in particular, of:

1. the nature and duration of residence so far and the question of the lawfulness or otherwise of the residence so far of the third country national;

2. the actual existence of family life;

3. whether the private life is worthy of protection;

4. the degree of integration;

5. the links of the third country national with his own country;

6. the absence of a criminal record;

7. breaches of public policy, in particular in the area of the law on asylum, on border policing and on immigration;

8. whether the private and family life of the third country national arose at the time the persons concerned became aware of the uncertain status of their residence;

(4) the residence of an alien is contrary to the public interest (subparagraph 2(1)) where

1. his residence would compromise public policy or public security …

(5) The residence of an alien does not entail a financial burden for the public authorities in Austria (subparagraph 2(4)) where the alien has a fixed and regular income of his own which allows him to live without seeking social security benefits from the public authorities and the amount of which corresponds to the scales laid down by Paragraph 293 of the General law on social security (Allgemeines Sozialversicherungsgesetz) …'

16 Paragraph 21 of the NAG, entitled 'Procedure applicable to initial applications', provides:

'(1) the initial application must be made abroad, before entering Austrian territory, to the competent local diplomatic services. The applicant is required to remain abroad until a decision has been made on his application.

(2) By way of derogation from subparagraph 1, the following persons are authorised to submit their application in Austria:

1. Family members of Austrians, EEA nationals and Swiss nationals, residing permanently in Austria who have not exercised the right of residence of more than three months conferred on them by Community law or by the [Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6)], following lawful entry and during their lawful residence;

...

(3) By way of derogation from subparagraph 1, the authorities may accept, on submission of a reasoned request, the lodging of an application in Austria if there are no grounds for refusal under Paragraph 11(1)(1), (2) or (4), and if it is established that it is impossible for the alien to leave Austria in order to submit his application or if this cannot reasonably be required of him:

...

2. in order to respect private and family life within the meaning of Article 8 of the ECHR (Paragraph 11(3)).

...

(6) An application submitted in Austria under subparagraph 2(1) and (4) to (6), subparagraph 3 and subparagraph 5, does not confer any right to remain in Austria beyond the authorised residence without a visa or with a visa. Nor does it preclude the adoption and implementation of measures for the registration of aliens and therefore can have no suspensory effect on aliens' registration procedures.'

17 Paragraph 47 of the NAG provides:

'(1) Persons seeking to reunite their family within the meaning of subparagraphs 2 to 4 are Austrians or EEC or Swiss nationals residing permanently in Austria who have not exercised their right of residence of more than three months

conferred on them by Community law or the [agreement mentioned in Paragraph 21(2)].

(2) Third country nationals who are family members of a person seeking to reunite their family within the meaning of subparagraph 1 shall be issued with a 'residence permit for family members in the strict sense' if they fulfil the conditions of part 1. If the conditions of part 1 are met, that residence permit shall be renewed for the first time after 12 months and thereafter every 24 months.

(3) Other family members of a person seeking to reunite a family within the meaning of subparagraph 1 may be issued on request with a 'residence authorisation for other family members' if they fulfil the conditions of part 1 and

1. they are relatives in the direct ascending line of the person seeking family reunification, his spouse or registered partner, provided that they are actually maintained by that person;

2. they are partners of that person who can demonstrate the existence of a permanent relationship in their country of origin and are actually being maintained; or

3. they are other family members,

a) who have already been maintained in their country of origin by the person seeking family reunification;

b) who have already lived in their country of origin under the same roof as the person seeking family reunification or

c) who suffer from serious health problems such that the person seeking family reunification is required to take care of them personally.

…'

18 The NAG considers only spouses, registered partners and unmarried minor children to be 'family members in the strict sense' and spouses and registered partners must additionally be over 21 at the time of the application. Other members of the family, in particular parents and adult children, are considered to be 'other family members'.

19 According to Paragraph 57 of the NAG, third country nationals who are family members of an Austrian citizen are given the status granted to family members of a citizen of a Member State other than the Republic of Austria where that Austrian citizen has exercised in such a Member State or in Switzerland a right of residence of more than three months and has returned to Austria at the end of that period of residence. Other than in that situation, such nationals must meet the same conditions as those imposed on other third country nationals who have moved to Austria, that is to say the conditions laid down in Paragraph 47 of the NAG.

20 The NAG repealed, with effect from 1 January 2006, the Federal Law on the entry, residence and establishment of aliens (Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden, BGBl. I, 75/1997, 'the 1997 Law'). Under Paragraph 49 of the 1997 Law:

'(1) The family members of Austrian nationals pursuant to Paragraph 47(3), who are nationals of a third country, enjoy freedom of establishment; they are covered, save as otherwise provided below, by the provisions applicable to nationals of third countries enjoying a favourable regime under section 1. Such aliens may submit in Austria an application for an initial residence authorisation. The residence authorisations issued to them on the first two occasions shall be valid for one year each.

(2) Such third country nationals shall be issued on request with a residence authorisation of unlimited duration if the conditions for the issue of a residence permit (Paragraph 8(1)) are fulfilled and if the aliens

1. have been married for two years at least to an Austrian citizen and live with that citizen under the same roof in Austria;

…'

21 The 1997 Law also repealed the Law on Residence (Aufenthaltsgesetz, BGBl. 466/1992) and the Law on Aliens (Fremdengesetz, BGBl. 838/1992), which were in force at the time of the accession of the Republic of Austria to the European Union on 1 January 1995.

The actions in the main proceedings and the questions referred for a preliminary ruling

22 It is apparent from the order for reference that the applicants in the main proceedings are all third-country nationals who wish to live with their family members, who are European Union citizens resident in Austria and who are nationals of that Member State. It should also be noted that the Union citizens concerned have never exercised their right to free movement and that they are not maintained by the applicants in the main proceedings.

23 By contrast, it must be observed that the facts giving rise to the dispute differ as regards, inter alia, whether the entry into Austria of the applicants in the main proceedings was lawful or unlawful, their current place of residence as well as the nature of their family relationship with the Union citizen concerned and whether they are maintained by that Union citizen.

24 For instance, Mr Dereci, who is a Turkish national, entered Austria illegally and married an Austrian national by whom he had three children who are also Austrian nationals and who are still minors. Mr Dereci currently resides with his family in Austria. Mr Maduike, a Nigerian national, also entered Austria illegally and married an Austrian national with whom he currently resides in Austria.

25 By contrast, Mrs Heiml, a Sri Lankan national, married an Austrian national before entering Austria legally where she currently lives with her husband, despite the subsequent expiry of her residence permit.

26 Mr Kokollari, who entered Austria legally at the age of two with his parents who possessed Yugoslav nationality at the time, is 29 years old and states that he is maintained by his mother who is now an Austrian national. He currently resides in Austria. Mrs Stevic, a Serbian national, is 52 years old and has applied for family reunification with her father who has resided in Austria for many years and who obtained Austrian nationality in 2007. She has regularly received monthly support from her father and she claims that he would continue to support her if she resided in Austria. Mrs Stevic currently resides in Serbia with her husband and their three adult children.

27 All of the applicants in the main proceedings had their applications for residence permits in Austria rejected. In addition, Mrs Heiml, Mr Dereci, Mr Kokollaria and Mr Maduike have all been subject to expulsion orders and individual removal orders from Austria.

28 The applications were rejected by the Bundesministerium für Inneres, inter alia, on one or more of the following grounds: the existence of procedural defects in the application; failure to comply with the obligation to remain abroad whilst awaiting the decision on the application on account of either irregular entry into Austria or regular entry followed by an extended stay beyond that which was originally permitted; lack of sufficient resources; or a breach of public policy.

29 In all of the disputes in the main proceedings, the Bundesministerium für Inneres refused to apply, in respect of the applicants in the main proceedings, a similar regime to that provided for in Directive 2004/38 for the family members of a Union citizen, on the ground that the Union citizen concerned has not exercised his right of free movement. Similarly, that authority refused to grant the applicants a right of residence pursuant to Article 8 of the ECHR on the ground, in particular, that their residence status in Austria had to be considered to be uncertain from the start of their private and family life.

30 The referring court has before it the rejection of the appeals brought by the applicants in the main proceedings against the decisions of the Bundesministerium für Inneres. The referring court considers that the question arises whether the indications given by the Court in its judgment of 8 March 2011 in *Ruiz Zambrano* (C-34/09 *Ruiz Zambrano* [2011] ECR I-0000) may be applied to one or more of the disputes in the main proceedings.

31 In that regard, the referring court notes that, as in the circumstances at issue in *Ruiz Zambrano*, the third-country nationals and their family members who are Union citizens who possess Austrian nationality and who have not exercised their right of free movement wish, primarily, to live together.

32 However, unlike the situation in *Ruiz Zambrano*, there is no risk here that the Union citizens concerned may be deprived of their means of subsistence.

33 The referring court therefore asks whether the refusal of the Bundesministerium für Inneres to grant the applicants in the main proceedings a right of residence may be interpreted as leading, for their family members who are Union citizens, to a denial of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as citizens of the Union.

34 In the event that that question is answered in the negative, the referring court points out that Mr Dereci is contemplating not only reunification with his family in Austria but also the pursuit of employed or self-employed activities. In so far as the provisions of the 1997 Law were more favourable than those of the NAG, the referring court asks whether Article 13 of Decision No 1/80 and Article 41 of the Additional Protocol must be interpreted as meaning that, in a situation such as that of Mr Dereci, the more favourable provisions of the 1997 Law are applicable.

35 In those circumstances the Verwaltungsgerichtshof decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1)

(a) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – whose spouse and minor children are Union citizens – residence in the Member State of residence of the spouse and children, who are nationals of that Member State, even in the case where those Union citizens are not dependent on the national of a non-member country for their subsistence? (*Dereci* case)

(b) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – whose spouse is a Union citizen – residence in the Member State of residence of that spouse, who is a national of that Member State, even in the case where that Union citizen is not dependent on the national of a non-member country for his or her subsistence? (*Heiml* and *Maduike* cases)

(c) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – who has reached the age of majority and whose mother is a Union citizen – residence in the Member State of residence of the mother, who is a national of that Member State, even in the case where it is not the Union citizen who is dependent on the national of a non-member country for her subsistence but rather that national of a non-member country who is dependent on the Union citizen for his subsistence? (*Kokollari* case)

(d) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – who has reached the age of majority and whose father is a Union citizen – residence in the Member State of residence of the father, who is a national of that Member State, even in the case where it is not the Union citizen who is dependent on the national of a non-member country for his subsistence but rather the national of a non-member country who receives subsistence support from the Union citizen? (*Stevic* case)

(2) If any of the questions under 1 is to be answered in the affirmative:

Does the obligation on the Member States under Article 20 TFEU to grant residence to nationals of non-member countries relate to a right of residence which follows directly from European Union law, or is it sufficient that the Member State grants the right of residence to the national of a non-member country on the basis of its law establishing such a right?

(3)

(a) If, according to the answer to Question 2, a right of residence exists by virtue of European Union law:

Under what conditions, exceptionally, does the right of residence which follows from European Union law not exist, or under what conditions may the national of a non-member country be deprived of the right of residence?

(b) If, according to the answer to Question 2, it should be sufficient for the national of a non-member country to be granted the right of residence on the basis of the law of the Member State concerned which establishes such a right:

Under what conditions may the national of a non-member country be denied the right of residence, notwithstanding an obligation in principle on the Member State to enable that person to acquire residence?

(4) In the event that Article 20 TFEU does not prevent a national of a non-member country, as in the situation of Mr Dereci, from being denied residence in the Member State:

Does Article 13 of Decision No 1/80 of 19 September 1980 …, or Article 41 of the Additional Protocol…, which, according to Article 62 thereof, forms an integral part of the [Association] Agreement …, preclude, in a case such as that of Mr Dereci, the subjection of the initial entry of a Turkish national to stricter national rules than those which previously applied to the initial entry of Turkish nationals, even though those national provisions which had facilitated the initial entry did not enter into force until after the date on which the aforementioned provisions concerning the association with Turkey entered into force in the Member State in question?'

36 By order of the President of the Court of 9 September 2011, the accelerated procedure is to be applied to this reference for a preliminary ruling pursuant to under Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Rules of Procedure of the Court.

Consideration of the questions referred

The first question

37 The first question must be understood as seeking to determine, in essence, whether European Union law and, in particular, the provisions concerning citizenship of the Union, must be interpreted as precluding a Member State from refusing to grant residence within its territory to a third country national, although that third country national wishes to reside with a family member who is a European Union citizen, resident in that Member State and a national of that Member State,

who has never exercised his right to free movement and who is not maintained by that third country national.

Observations submitted to the Court

38 The Austrian, Danish, German, Irish, Netherlands, Polish and United Kingdom Governments and the European Commission consider that the provisions of European Union law concerning citizenship of the Union do not preclude a Member State from refusing to grant a right of residence to a third country national in situations such as those in the main proceedings.

39 According to those governments and to the Commission, firstly, Directive 2004/38 does not apply to the disputes in the main proceedings, given that the Union citizens concerned have not exercised their right to free movement and, secondly, the provisions of the TFEU concerning citizenship of the Union do not apply either in so far as the disputes concern purely internal situations that possess no connecting factors to European Union law.

40 In essence, they consider that the principles laid down in *Ruiz Zambrano* apply to very exceptional situations in which the application of a national measure would lead to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of the status of citizen of the Union. In this case, the events which gave rise to the disputes in the main proceedings differ substantially from those which gave rise to the aforementioned judgment in so far as the Union citizens concerned were not at risk of having to leave the territory of the Union and thus of being denied the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. Similarly, according to the Commission, neither is there a barrier to the exercise of the right conferred on Union citizens to freedom of movement and residence within the territory of the Member States.

41 Mr Dereci, on the other hand, considers that European Union law must be interpreted as precluding a Member State from refusing to grant residence within its territory to a third country national, although that national wishes to reside with his wife and three children who are European Union citizens resident in that Member State and who are nationals of that Member State.

42 According to Mr Dereci, the question whether there is a cross-border situation or not is irrelevant. In that regard, Article 20 TFEU should be interpreted as meaning that the question to be taken into consideration is whether the Union citizen is denied the genuine enjoyment of the substance of the rights conferred by virtue of his status. This is the case for Mr Dereci's children in so far as they are maintained by him, and the effectiveness of that maintenance is likely to be compromised if they were subject to expulsion from Austria.

43 Lastly, the Greek Government considers that developments in the case-law of the Court impose an obligation to be guided, by analogy, by the provisions of European Union law, in particular by the provisions of Directive 2004/38, and therefore to grant residence to the applicants in the main proceedings, provided the following conditions are satisfied. First of all, the situation of the Union citizens who have not exercised their right to free movement should be similar to that of those who have exercised that same right, which would mean, in this case, that a national and his family members must satisfy the conditions laid down by that directive. Second, the national measures should entail a significant infringement of the right of free movement and residence. Third, national law should not provide at least equivalent protection to the party concerned.

The Court's reply

– Applicability of Directives 2003/86 and 2004/38

44 It should be noted at the outset that the applicants in the main proceedings are all third country nationals who have applied for the right of residence in a Member State in order to live with their family members who are European Union citizens and who have not exercised their right to free movement within the territory of the Member States.

45 In order to answer the first question, as reformulated by the Court, it is necessary to analyse at the outset whether Directives 2003/86 and 2004/38 are applicable to the applicants in the main proceedings.

46 So far as concerns, first of all, Directive 2003/86, it must be stated that, under Article 1, its purpose is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

47 However, in accordance with Article 3(3) of Directive 2003/86, that directive is not to apply to members of the family of a Union citizen.

48 In so far as the disputes in the main proceedings concern Union citizens who reside in a Member State and their family members who are third country nationals who wish to enter and to reside in that Member State for the purposes of

living as a family with those citizens, it must be held that Directive 2006/38 is not applicable to the applicants in the main proceedings.

49 Furthermore, as the Commission has correctly observed, although the proposal for a Council Directive on the right to family reunification ((2000/C 116 E/15), COM(1999)638 final - 1999/0258 (CNS)), submitted by the Commission on 11 January 2000 (OJ C 116 E, p. 66), included within its scope Union citizens who have not exercised their right to free movement, that inclusion was deleted in the course of the legislative process leading to Directive 2003/86.

50 Second, the Court has already had occasion to point out that Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59, and Case C-434/09 *McCarthy* [2011] ECR I-0000, paragraph 28).

51 As is apparent from paragraphs 24 to 26 of the present judgment, Mrs Heiml, Mr Dereci and Mr Maduike, as spouses of Union citizens, fall within the definition of 'family member' in point 2 of Article 2 of Directive 2004/38. Similarly, Mr Kokollari and Mrs Stevic, as direct descendants over the age of 21 of Union citizens, are covered by that definition provided that the requirement of being dependent on those citizens is satisfied, pursuant to point 2(c) of Article 2 of that Directive.

52 However, as the referring court observed, Directive 2004/38 does not apply in situations such as those at issue in the main proceedings.

53 Indeed, as provided for in Article 3(1) of Directive 2004/38, that directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 of the directive who accompany them or join them in that Member State (see *Ruiz Zambrano*, paragraph 39).

54 The Court has already had occasion to state that, in accordance with a literal, teleological and contextual interpretation of that provision, a Union citizen, who has never exercised his right of free movement and has always resided in a Member State of which he is a national, is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him (*McCarthy*, paragraphs 31 and 39).

55 Similarly, it has been held that, in so far as a Union citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, their family member is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family (see, so far as concerns spouses, *McCarthy*, paragraph 42, and the case-law cited).

56 Indeed, not all third country nationals derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (*Metock and Others*, paragraph 73).

57 In the present case, as the Union citizens concerned have never exercised their right to free movement and have always resided in a Member State of which they are nationals, it must be held that they are not covered by the concept 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is neither applicable to them nor to their family members.

58 It follows that Directives 2003/86 and 2004/38 are not applicable to third country nationals who apply for the right of residence in order to join their European Union citizen family members who have never exercised their right to free movement and who have always resided in the Member State of which they are nationals.

– Applicability of the Treaty provisions concerning citizenship of the Union

59 Notwithstanding the inapplicability to the disputes in the main proceedings of Directives 2003/86 and 2004/38, it is necessary to consider whether the Union citizens concerned by those disputes may rely on the provisions of the Treaty concerning citizenship of the Union.

60 In that regard, it must be borne in mind that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State (see, to that effect, Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 33; *Metock and Others*, paragraph 77 and, *McCarthy*, paragraph 45).

61 However, the situation of a Union citizen who, like each of the citizens who are family members of the applicants in the main proceedings, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation (see Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 22, and *McCarthy*, paragraph 46).

62 Indeed, the Court has stated several times that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see *Ruiz Zambrano*, paragraph 41, and the case-law cited).

63 As nationals of a Member State, family members of the applicants in the main proceedings enjoy the status of Union citizens under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against their Member State of origin (see *McCarthy*, paragraph 48).

64 On this basis, the Court has held 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 (see *Ruiz Zambrano*, paragraph 42).

65 Indeed, in the case leading to that judgment, the question arose as to whether 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 a refusal to grant such a person a work permit have such an effect. The Court considered in particular that such a refusal would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (see *Ruiz Zambrano*, paragraphs 43 and 44).

66 It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union 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.

67 That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

68 Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.

69 That finding is, admittedly, without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case.

– The right to respect for private and family life

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

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

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

undertake that examination in the light of Article 8(1) of the ECHR.

73 All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8.

74 In the light of the foregoing observations the answer to the first question is that European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.

The second and third questions

75 Since the second and third questions were raised only in the event of the first question being answered in the negative, there is no need to provide an answer.

The fourth question

76 By its fourth question, the referring court is asking, essentially, whether Article 13 of Decision No 1/80 or Article 41(1) of the Additional Protocol must be interpreted as meaning that they preclude a Member State from subjecting the initial entry of a Turkish national to stricter national rules than those which previously applied to such entry, even though those previous national rules, which had relaxed the initial entry regime, did not enter into force until after those articles were given effect in the Member State in question, following its accession to the Union.

Observations submitted to the Court

77 The Austrian, German and United Kingdom Governments consider that neither Article 13 of Decision No 1/80 nor Article 41(1) of the Additional Protocol preclude stricter national rules than those which existed on the entry into force of those provisions from being applied to Turkish nationals wishing to pursue employed or self-employed activities in a Member State, given that those provisions apply only to Turkish nationals whose position was lawful in the host Member State and do not cover situations such as that of Mr Dereci, who entered and has always resided unlawfully in Austria.

78 On the other hand, the Netherlands Government and the Commission consider that such provisions preclude the introduction into the national legislation of the Member States of any new restriction on the exercise of freedom of movement for workers and freedom of establishment, including those relating to the conditions of substance or procedure as regards the initial entry into the territory of the Member States.

79 Mr Dereci observes that he entered Austria on the basis of an application for asylum and that he had withdrawn that application because of his marriage to an Austrian national. That marriage, under the law in force at the time, gave him a right of establishment. Moreover, from 1 July 2002 to 30 June 2003, he worked as a salaried employee and, subsequently, from 1 October 2003 to 31 August 2008, he was self-employed, having taken over his brother's hairdressing salon.

Reply of the Court

80 As a preliminary point, it must be observed that the fourth question relates to Article 13 of Decision No 1/80 and to Article 41(1) of the Additional Protocol without making any distinction between them.

81 Although those two provisions have the same meaning, each of them has been given a very specific scope, with the result that they cannot be applied concurrently (Joined Cases C-317/01 and C-369/01 *Abatay and Others* [2003] ECR I-12301, paragraph 86).

82 In that connection, it must be observed that, according to the referring court, Mr Dereci married an Austrian national on 24 July 2003 and subsequently, on 24 June 2004, submitted an initial application for a residence authorisation under the 1997 law. Moreover, Mr Dereci states that it was at that time that he took over his brother's hairdressing salon.

83 It follows that Mr Dereci's situation concerns freedom of establishment and is thus covered by Article 41(1) of the Additional Protocol.

84 Moreover, it must be borne in mind that the Law on Residence and the Law on Aliens, mentioned in paragraph 21 of the present judgment, were the provisions applicable to the conditions for the exercise of freedom of establishment of Turkish nationals in Austria, at the time of the accession of that Member State to the European Union on 1 January 1995

and, therefore, of the entry into force of the Additional Protocol in that Member State.

85 Although the 1997 Law repealed those laws, it was in turn repealed by the NAG as of 1 January 2006, and the latter legislation constituted, according to the referring court, a stricter approach compared with the 1997 Law, as regards the conditions for the exercise of freedom of establishment by Turkish nationals.

86 Accordingly, the fourth question must be understood as seeking to know whether Article 41(1) of the Additional Protocol must be interpreted as meaning that the enactment of new legislation more restrictive than the previous legislation, which, for its part, had relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.

87 In that regard, it must be recalled that Article 41(1) of the Additional Protocol has direct effect in the Member States, so that the rights which it confers on the Turkish nationals to whom it applies may be relied on before the national courts to prevent the application of inconsistent rules of national law. That provision lays down, in terms which are clear, precise and unconditional, an unequivocal 'standstill' clause, which contains an obligation entered into by the contracting parties which amounts in law to a duty not to act (see Case C-16/05 *Tum and Dari* [2007] ECR I-7415, paragraph 46, and the case-aw cited).

88 According to consistent case-law, even if the 'standstill' clause set out in Article 41(1) of the Additional Protocol is not, in itself, capable of conferring on Turkish nationals – on the basis of European Union legislation alone – a right of establishment or, as a corollary, a right of residence, nor a right to freedom to provide services or to enter the territory of a Member State, the fact remains that such a clause prohibits generally the introduction of any new measures having the object or effect of making the exercise by a Turkish national of those economic freedoms on the territory of that Member State subject to stricter conditions than those which applied to him at the time when the Additional Protocol entered into force with regard to the Member State concerned (see Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, paragraph 47, and the case-law cited).

89 A standstill clause, such as that embodied in Article 41(1) of the Additional Protocol, does not operate in the same way as a substantive rule by rendering inapplicable the relevant substantive law which it replaces, but as a quasi-procedural rule which specifies, *ratione temporis*, the provisions of a Member State's legislation that must be referred to for the purposes of assessing the position of a Turkish national who wishes to exercise freedom of establishment in a Member State (*Tum and Dari*, paragraph 55, and Case C-186/10 *Oguz* [2011] ECR I-0000, paragraph 28).

90 In that regard, Article 41(1) of the Additional Protocol is intended to create conditions conducive to the progressive establishment of freedom of establishment by way of an absolute prohibition on national authorities from creating any new obstacle to the exercise of that freedom by making more stringent the conditions which exist at a given time, so as not to render more difficult the gradual securing of that freedom between the Member States and the Republic of Turkey. That provision thus appears to be the necessary corollary to Article 13 of the Association Agreement, and constitutes the indispensable precondition for achieving the progressive abolition of national restrictions on freedom of establishment (*Tum and Dari*, paragraph 61, and the case-law cited).

91 Accordingly, even if, initially, with a view to the progressive implementation of that freedom, existing national restrictions as regards establishment may be retained, it is important to ensure that no new obstacle is introduced in order not to further obstruct the gradual implementation of such freedom of establishment (*Tum and Dari*, paragraph 61, and the case-law cited).

92 The Court has already had occasion to find, as regards a national provision concerning the granting of a residence permit to Turkish nationals that it is necessary to ensure that the Member States do not depart from the objective pursued by reversing measures which they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of Decision No 1/80 within their territory (Joined Cases C-300/09 and C-301/09 *Toprak and Oguz* [2010] ECR I-0000, paragraph 55).

93 Moreover, the Court has held that Article 13 of Decision No 1/80 must be interpreted as meaning that a tightening of a provision which provided for a relaxation of the provision applicable to the conditions for the exercise of the freedom of movement of Turkish workers at the time of the entry into force of Decision No 1/80 in the Member State concerned, constitutes a 'new restriction', even where that tightening does not make those conditions more stringent than those under the provision applicable at the time of the entry into force of Decision No 1/80 in that Member State (see, to that effect, *Toprak and Oguz*, paragraph 62).

94 Having regard to the convergence in the interpretation of both Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 as regards the objective pursued, it must be held that the scope of the standstill obligation in Article 13 extends by analogy to any new obstacle to the exercise of freedom of establishment, freedom to provide services or freedom of movement for workers which makes more stringent the conditions which exist at a given time (see, to that effect, *Toprak and Oguz*, paragraph 54), so that it is necessary to ensure that the Member States do not depart from the objective pursued by the standstill clauses by reversing measures which they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of Decision No 1/80 or the Additional Protocol within their territory.

95 In the present case, it is not disputed that, with the entry into force of the NAG on 1 January 2006, the conditions for the exercise of freedom of establishment for Turkish nationals in Mr Dereci's position worsened.

96 According to Paragraph 21 of the NAG, third country nationals, including Turkish nationals in Mr Dereci's position, must, as a general rule, submit their application for residence from outside Austrian territory and are required to remain outside that territory until a decision has been made on their application.

97 On the other hand, pursuant to Paragraph 49 of the 1997 Law, Turkish nationals in Mr Dereci's position, as family members of Austrian nationals, enjoyed freedom of establishment and could submit an application for an initial establishment permit in Austria.

98 In those circumstances, it must be held that, by worsening the conditions for the exercise of freedom of establishment by Turkish nationals compared with the conditions applicable to them previously under the provisions adopted since the entry into force of the Additional Protocol, the NAG constitutes a 'new restriction' within the meaning of Article 41(1) of that protocol.

99 Finally, as regards the argument relied on by the Austrian, German and United Kingdom Governments, according to which Mr Dereci was in an 'unlawful position' and could not therefore benefit from the application of Article 41(1) of the Additional Protocol, suffice it to note that, according to the order for reference, while it is true that Mr Dereci entered Austrian territory illegally in November 2001, the fact remains that, at the time he lodged his application for establishment, he had, under the national legislation in force at the time, a right of establishment by reason of his marriage to an Austrian national, and he was entitled to submit an application to that effect in Austria, which, moreover, he did. According to the referring court, it was only the entry into force of the NAG which caused his initially lawful residence to become subsequently unlawful, which led to the rejection of his application for a residence authorisation.

100 It follows that his position cannot be classed as unlawful, given that that unlawfulness arose following the application of the provision which constitutes a new restriction.

101 In the light of the foregoing observations, the answer to the fourth question is that Article 41(1) of the Additional Protocol must be interpreted as meaning that the enactment of new legislation more restrictive than the previous legislation, which, for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.

Costs

102 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.

2. Article 41(1) of the Additional Protocol, signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, must be interpreted as meaning that the enactment of new legislation more restrictive that the previous legislation, which,

for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.

E. JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS
(Chronologically ordered and edited)

Berrehab v. The Netherlands

(Application no. 10730/84)

JUDGMENT

STRASBOURG

21 June 1988

In the Berrehab case[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges: Mr. R. Ryssdal, President, Mr. Thór Vilhjálmsson, Mr. G. Lagergren, Mr. C. Russo, Mr. A. Spielmann, Mr. J. De Meyer, Mr. S.K. Martens, ad hoc judge, and also of Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar,

Having deliberated in private on 26 February and 28 May 1988,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Netherlands Government ("the Government") on 13 March and 10 April 1987 respectively, within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10730/84) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by a Moroccan national, Abdellah Berrehab, a Netherlands national, Sonja Koster, and their daughter Rebecca Berrehab, likewise of Netherlands nationality, on 14 November 1983. "The applicants" hereinafter means only Abdellah and Rebecca Berrehab, as the Commission declared Sonja Koster's complaints inadmissible (see paragraph 18 below).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands Government recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). Both sought a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3 and 8 (art. 3, art. 8).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings pending before the Court and designated the lawyer who would represent them (Rule 30).

3. The Chamber of seven judges to be constituted included ex officio Mr. A.M. Donner, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 23 May 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr. Thór Vilhjálmsson, Mr. G. Lagergren, Mr. C. Russo, Mr. A. Spielmann and Mr. J. De Meyer (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). In December 1987, as Mr. Donner was unable to attend, the Government appointed Mr. S.K. Martens, Vice-President of the Netherlands Court of Cassation (Hoge Raad), to sit as an ad hoc judge (Rules 23 § 1 and 24 § 1).

4. Mr. Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and consulted - through the Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants on the need for a written procedure (Rule 37 § 1). In accordance with the order made in consequence on 31 July 1987, the registry received:

(a) on 3 November, the memorials of the Government and of the applicants;

(b) on 26 October, the applicants' claims for just satisfaction (Article 50 of the Convention) (art. 50), which they supplemented in January 1988.

In a letter of 23 November, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted - through the Registrar - the persons due to appear before the Court, the President directed on 24 November that the oral proceedings should commence on 23 February 1988 (Rule 38).

6. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

(a) for the Government

Miss D.S. Van Heukelom, Assistant Legal Adviser, Ministry for Foreign Affairs, Agent,

Mr. J.L. De Wijkerslooth de Weerdesteijn, Landsadvocaat, Counsel;

(b) for the Commission

Mr. H. Schermers, Delegate;

(c) for the applicants

Mr. C.N.A.M. Claassen, advocaat, Counsel.

The Court heard addresses by Mr. De Wijkerslooth de Weerdesteijn for the Government, Mr. Schermers for the Commission and Mr. Claassen for the applicants, as well as their replies to its questions.

At the hearing the Commission produced various documents at the Registrar's request on the President's instructions. By a letter of 19 April 1988, the Government supplemented their reply to a question posed by the Court.

AS TO THE FACTS

I. The circumstances of the case

7. Mr. Berrehab, a Moroccan citizen born in Morocco in 1952, was permanently resident in Amsterdam at the time when he applied to the Commission.

His daughter Rebecca, who was born in Amsterdam on 22 August 1979, has Netherlands nationality. She is represented by her guardian, viz. her mother, Mrs. Koster, who is likewise a Netherlands national.

8. After marrying Mrs. Koster on 7 October 1977, Mr. Berrehab sought permission to stay in the Netherlands where he had been for some time already. The Ministry of Justice granted him permission on 25 January 1978 "for the sole purpose of enabling him to live with his Dutch wife", and then renewed it until 8 December 1979.

From November 1977 Mr. Berrehab worked for a self-service shop. On 9 March 1978, a work permit was issued to him under the Aliens (Work Permits) Act 1964 (replaced since 1 November 1979 by the Employment of Aliens Act). This permit was renewed on 18 October 1979. From April 1981 to April 1983 Mr. Berrehab was employed by a cleaning firm.

9. On 8 February 1979, his wife sued for divorce. The Amsterdam Regional Court (Arrondissementsrechtbank) granted the divorce on 9 May 1979 on the ground of the irretrievable breakdown of the marriage, which was dissolved by registration of the decision in the Civil Registry of Amsterdam on 15 August 1979. By an order of 26 November 1979, the Amsterdam Regional Court appointed Mrs. Koster guardian of her daughter, Rebecca, who had been born in the meantime, and appointed the girl's father as an auxiliary guardian (toeziende voogd). On 5 February 1980, it ordered the latter to pay the Child Welfare Council 140 guilders a month as a contribution to the cost of maintaining and educating his daughter.

When Rebecca was born, her father and Mrs. Koster agreed to ensure that the child had frequent, regular contacts with her father. On 27 February 1984, they had a notary legalise an agreement between them as to arrangements for these contacts and certify that over the previous two years Mr. Berrehab had seen his daughter four times a week for several hours each time.

10. On 7 December 1979, Mr. Berrehab made an application for renewal of his residence permit. The head of the Amsterdam police refused the application on the same day, stating that it would be contrary to the public interest to renew the permit, regard being had to the fact that Mr. Berrehab had been allowed to remain in the Netherlands for the sole purpose of living with his Dutch wife, which condition was no longer fulfilled on account of the divorce.

By letter of 26 December 1979, Mr. Berrehab asked the Minister of Justice to review this decision. He pointed out among other things that he needed an "independent" residence permit in order to fulfil his moral and legal obligations as a father. He said he had sufficient means of subsistence and that he was in a position to bear part of the costs of Rebecca's upbringing

and education.

11. The Minister did not reply within the statutory period of three months, which under Netherlands law constituted an implied rejection of the request.

Mr. Berrehab consequently appealed, on 23 April 1980, to the Litigation Division (Afdeling Rechtspraak) of the Raad van State. He stated that he could not see how the grant to him of a residence permit could be prejudicial to the national interest, particularly since he was under various legal obligations as a father and he had been able to support himself since 1977 by working. At the hearing on 14 March 1983, he claimed that the impugned decision infringed Article 8 § 1 (art. 8-1) of the Convention on the ground that it prevented him from remaining in contact with his daughter whom he saw regularly four times a week.

The Raad van State dismissed his appeal on 9 May 1983. It recalled in the first place that, under section 11(5) of the Aliens Act of 13 January 1965 (Vreemdelingenwet - "the 1965 Act"), renewal of a residence permit could be refused in the public interest. As the Minister of State for Justice had pointed out, Mr. Berrehab no longer satisfied the condition upon which the grant of his residence permit depended; consequently, the refusal appealed against could be justified under section 11(5). As for Mr. Berrehab's obligations to his daughter, the Raad van State held that the fulfilment thereof did not serve any vital national interest and that those obligations subsisted independently of his place of residence. It added that four meetings a week were not sufficient to constitute family life within the meaning of Article 8 (art. 8) of the Convention and that the impugned decision would, moreover, not necessarily entail a break in relations between the child and her father, as the latter could remain in contact with his daughter by agreement with his ex-wife.

12. On 30 March 1983, Mr. Berrehab was dismissed by his employer with effect from 15 April. He was, furthermore, arrested on 28 December 1983 for the purpose of his deportation. He made an urgent application (kort geding) to the presiding judge of the Amsterdam Regional Court, but withdrew it shortly after the execution of the impugned deportation order on 5 January 1984; on 18 January, the presiding judge accordingly held that there was no ground on which to give a decision.

In 1984, Rebecca and her mother spent two months with Mr. Berrehab and his family in Morocco. On 28 August 1984, Mr. Berrehab applied to the Netherlands Embassy in Rabat for a three-month residence permit. After an initial refusal he obtained a visa valid for one month, for the purpose of enabling him to exercise his rights of access. Accordingly, he went to the Netherlands on 27 May 1985 where he requested an extension of his visa until the following 27 August. His request having been turned down on 6 June, he lodged an appeal with the Raad van State, accompanied by an urgent application. Hearing the latter application, the President of the Litigation Division decided, on 20 June, that the applicant should be treated - subject to a condition which is not relevant to this judgment - as if he had been granted a visa valid until 27 August.

13. On 14 August 1985, Mr. Berrehab remarried Mrs. Koster in Amsterdam. On 9 December 1985, the Ministry of Justice granted him permission (which he had sought on 29 August) to reside in the Netherlands "for the purpose of living with his Dutch wife and working during that time".

II. The relevant legislation, practice and case-law

A. The general context of Netherlands immigration policy

14. The Netherlands authorities pursue a restrictive immigration policy. The authorities, however, permit exceptions prompted, inter alia, by the wish to honour the obligations flowing from the Convention, by the country's economic well-being and by humanitarian considerations, including the reuniting of families.

The entry requirements and the grounds on which aliens may be expelled are laid down primarily in the 1965 Act and its implementing regulations. In addition to these legal provisions, there is the "Circular on Aliens" (Vreemdelingencirculaire), which is a body of directives drawn up and published by the Ministry of Justice.

The right to stay is therefore governed in principle by sections 8-11 of the Act. A prolonged stay requires the authorisation of the Minister of Justice or a body acting under his control. A refusal to grant an authorisation must be accompanied by a statement of the reasons on which it is based. An appeal lies to the Minister of Justice and then, if need be, to the Raad van State. An application is usually granted - normally for one year - only if the individual's presence serves an essential national interest or if there are compelling humanitarian grounds.

Foreigners married to a Netherlands national fall into the latter category; they may obtain a residence permit "in order to live with their spouse" in the Netherlands and, if appropriate, "in order to work there during that time".

B. Changes in this policy

15. This policy, however, has changed over the years. Foreigners coming to live with their husbands or their wives were initially granted resident status and a conditional residence permit. That status was forfeited if the marriage in respect of which it was granted was dissolved, in which case the foreigner had to leave the country.

In order to enhance the position of foreigners lawfully established in the Netherlands, the Minister of State for Justice felt it necessary to soften the line followed in this respect. Under the terms of the "Vreemdelingencirculaire" (Chapter B 19, paragraph 4.3), foreigners who had been married for more than three years and had lived with their spouses in the Netherlands for at least three years prior to the dissolution of their marriage were enabled to apply for an "independent" residence permit; the underlying idea was that after that length of time they would have forged sufficient links with the country for it to be unnecessary to make their status subject to conditions.

It was subsequently thought advisable to make further changes in the regulations in favour of this category of foreigner. The requirement of three years' marriage was retained but the requisite period of residence was reduced to one year. The purpose of this relaxation was to improve the often precarious position of divorced women, particularly those of Mediterranean origin; it was felt that they ought to be permitted to stay in the Netherlands with a status independent of that of their former husbands.

This policy was later refined still further, when it was decided that even where the aforementioned conditions were not met, overriding humanitarian considerations might justify the grant to a foreigner of authorisation to remain on Netherlands territory on an independent residence permit, for example if he had close links with the Netherlands or with a person resident there. According to the Government, this was an exceptional measure that was rarely applied.

C. Case-law

16. As far as the Netherlands case-law on aliens is concerned, a distinction must be drawn between the courts hearing urgent applications - the civil courts up to and including the Court of Cassation at last instance - and the court conducting a full examination of the merits of the case, namely the Litigation Division of the Raad van State.

While the Court of Cassation in its decisions in other fields, such as the right of access, had already favoured a fairly broad conception of "family life" (see in particular the leading case decided on 22 February 1985, in Nederlandse Jurisprudentie, 1986, no. 3), the Litigation Division of the Raad van State had tended to take a narrower view. Its decision in the instant case is fully in line with that tradition. Several of its most recent decisions, however, suggest that it is going to adopt the principle laid down in a Court of Cassation judgment of 12 December 1986 concerning aliens, from which it emerges that cohabitation is not a sine qua non of "family life" for the purposes of Article 8 (art. 8) of the Convention (Nederlandse Jurisprudentie, 1988, no. 188).

The Court of Cassation recently had before it a case similar to the present one. A court of appeal, hearing an urgent application, had held that where a foreigner threatened with expulsion pleads the right to respect for his own and his child's family life, the onus is on him to show that the minor's interest is sufficiently important to outweigh the State's interest. On appeal, the Court of Cassation quashed the decision on 18 December 1987 (Rechtspraak van de Week, 1988, no. 9). It fell to be decided whether "family life" existed between the alien and his child, and the Court of Cassation began by emphasising that the child was a legitimate one. It went on:

"For the duration of the marriage, there existed between Garti and his son a relationship that amounted to family life within the meaning of Article 8 (art. 8) of the... Convention.... Neither the cessation of cohabitation nor the divorce ended that relationship. It must also be noted that, as Garti claimed and as the Court of Appeal apparently regarded as having been established, Garti and his son remained in close touch after the cessation of cohabitation."

The decision was quashed on the ground, inter alia, that the appeal court had lost sight of the fact that:

"if, in such a case, the expulsion of a foreigner must be regarded as an interference with his right to respect for family life within the meaning of Article 8 (art. 8)..., the sole means of determining whether that interference is justified or may be justified is to weigh, in the light of the facts of the case and the policy directives (beleidsregels) in force, the seriousness of the interference with the right of the foreigner concerned and his minor child to respect for their family life against the interests served by those policy directives, and in so doing one may, in order to assess the seriousness of the interference, have regard notably to the length of time during which those concerned have lived together, to the nature and degree of intensity of the contacts maintained after cohabitation came to an end and to whether it is the parent or the child who is threatened with expulsion".

PROCEEDINGS BEFORE THE COMMISSION

17. In their application of 14 November 1983 to the Commission (no. 10730/84), Mr. Berrehab and his ex-wife Mrs. Koster, the latter acting in her own name and as guardian of their under-age daughter Rebecca, alleged that Mr. Berrehab's deportation amounted - in respect of each of them, and more particularly for the daughter - to treatment that was inhuman and therefore contrary to Article 3 (art. 3) of the Convention. In their submission, the deportation was also an unjustified infringement of the right to respect for their private and family life, as guaranteed in Article 8 (art. 8).

18. On 8 March 1985, the Commission declared Mrs. Koster's complaints inadmissible, but Mr. Berrehab's and Rebecca's complaints were declared admissible.

In its report of 7 October 1986 (made under Article 31) (art. 31), the Commission concluded that there had been a violation of Article 8 (art. 8) (by eleven votes to two) but not of Article 3 (art. 3) (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

19. In the applicants' submission, the refusal to grant a new residence permit after the divorce and the resulting expulsion order infringed Article 8 (art. 8) of the Convention, which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government disputed this submission but the Commission accepted it.

A. Applicability of Article 8 (art. 8)

20. The applicants asserted that the applicability of Article 8 (art. 8) in respect of the words "right to respect for... private and family life" did not presuppose permanent cohabitation. The exercise of a father's right of access to his child and his contributing to the cost of education were also factors sufficient to constitute family life.

The Government challenged that analysis, whereas the Commission agreed with it.

21. The Court likewise does not see cohabitation as a sine qua non of family life between parents and minor children. It has held that the relationship created between the spouses by a lawful and genuine marriage - such as that contracted by Mr. and Mrs. Berrehab - has to be regarded as "family life" (see the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 32, § 62). It follows from the concept of family on which Article 8 (art. 8) is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life", even if the parents are not then living together.

Subsequent events, of course, may break that tie, but this was not so in the instant case. Certainly Mr. Berrehab and Mrs. Koster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume cohabitation afterwards. That does not alter the fact that, until his expulsion from the Netherlands, Mr. Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her (see paragraph 9 in fine above) prove that he valued them very greatly. It cannot therefore be maintained that the ties of "family life" between them had been broken.

B. Compliance with Article 8 (art. 8)

1. Paragraph 1 of Article 8 (art. 8-1)

22. In the applicants' submission, the refusal to grant Mr. Berrehab a new residence permit after the divorce and his resulting expulsion amounted to interferences with the right to respect for their family life, given the distance between the Netherlands and Morocco and the financial problems entailed by Mr. Berrehab's enforced return to his home country.

The Government replied that nothing prevented Mr. Berrehab from exercising his right of access by travelling from Morocco to the Netherlands on a temporary visa.

23. Like the Commission, the Court recognises that this possibility was a somewhat theoretical one in the circumstances of the case; moreover, Mr. Berrehab was given such a visa only after an initial refusal (see paragraph 12 above). The two

disputed measures thus in practice prevented the applicants from maintaining regular contacts with each other, although such contacts were essential as the child was very young. The measures accordingly amounted to interferences with the exercise of a right secured in paragraph 1 of Article 8 (art. 8-1) and fall to be considered under paragraph 2 (art. 8-2).

2. Paragraph 2 of Article 8 (art. 8-2)

(a) "In accordance with the law"

24. The Court finds that, as was submitted by the Government and the Commission, the measures in question were based on the 1965 Act; and indeed, the applicants did not dispute that.

(b) Legitimate aim

25. In the applicants' submission, the impugned interferences did not pursue any of the legitimate aims listed in Article 8 § 2 (art. 8-2); in particular, they did not promote the "economic well-being of the country", because they prevented Mr. Berrehab from continuing to contribute to the costs of maintaining and educating his daughter.

The Government considered that Mr. Berrehab's expulsion was necessary in the interests of public order, and they claimed that a balance had been very substantially achieved between the various interests involved.

The Commission noted that the disputed decisions were consistent with Dutch immigration-control policy and could therefore be regarded as having been taken for legitimate purposes such as the prevention of disorder and the protection of the rights and freedoms of others.

26. The Court has reached the same conclusion. It points out, however, that the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 2 of Article 8 (art. 8-2) rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market.

(c) "Necessary in a democratic society"

27. The applicants claimed that the impugned measures could not be considered "necessary in a democratic society".

The Government rejected this argument, but the Commission accepted it, being of the view that the interferences complained of were disproportionate as the authorities had not achieved a proper balance between the applicants' interest in maintaining their contacts and the general interest calling for the prevention of disorder.

28. In determining whether an interference was "necessary in a democratic society", the Court makes allowance for the margin of appreciation that is left to the Contracting States (see in particular the W v. the United Kingdom judgment of 8 July 1987, Series A no. 121-A, p. 27, § 60 (b) and (d), and the Olsson judgment of 24 March 1988, Series A no. 130, pp. 31-32, § 67).

In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. According to the Court's established case-law (see, inter alia, the judgments previously cited), however, "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

29. Having to ascertain whether this latter condition was satisfied in the instant case, the Court observes, firstly, that its function is not to pass judgment on the Netherlands' immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Netherlands Court of Cassation also noted (see paragraph 16 above), the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life.

As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage.

As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Berrehab and his daughter for several years (see paragraphs 9 and 21 above) and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young.

Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8 (art. 8).

II. ALLEGED VIOLATION OF ARTICLE 3 (art. 3)

30. The applicants maintained that the refusal to grant Mr. Berrehab a new residence permit after the divorce and his resulting deportation infringed Article 3 (art. 3), which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

In the Government's submission, the applicants' complaints disclosed no problem under this provision.

In the Commission's view, the facts of the case did not show that either of the applicants underwent suffering of a degree corresponding to the concepts of "inhuman" or "degrading" treatment.

31. The Court shares this view and finds that there has been no violation of Article 3 (art. 3).

III. APPLICATION OF ARTICLE 50 (art. 50)

32. By Article 50 (art. 50) of the Convention,

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicants, who had legal aid for the proceedings before the Commission and the Court, did not seek reimbursement of costs and expenses. They did, on the other hand, claim financial compensation for twofold pecuniary damage: loss of earnings (31,429.56 guilders) allegedly suffered by Mr. Berrehab from April 1983 to May 1985 by reason both of the dismissal from his job following the refusal to issue him with a new residence permit and of the impossibility of finding work in his home country; and the cost (4,700 guilders) of the journey made by Rebecca Berrehab and her mother to Morocco in July 1984 and by Mr. Berrehab to the Netherlands in May 1985 (see paragraph 12 above). The applicants also sought an unspecified amount of compensation for the mental suffering caused by their separation.

33. In the Government's submission, no causal link had been established between the disputed measures and the alleged pecuniary damage. The Commission accepted that argument with respect to the loss of earnings, but considered that partial compensation for the travel expenses was justified. It also recognised that Mr. Berrehab and Rebecca had sustained non-pecuniary damage; the Government did not express any view on that point.

34. The Court shares the view of the Commission. Taking its decision on an equitable basis, as required by Article 50 (art. 50), it awards the applicants the sum of 20,000 guilders.

FOR THESE REASONS, THE COURT

1. Holds by six votes to one that there has been a violation of Article 8 (art. 8);

2. Holds unanimously that there has been no violation of Article 3 (art. 3);

3. Holds unanimously that the Netherlands is to pay to the applicants 20,000 (twenty thousand) Dutch guilders by way of just satisfaction;

4. Rejects unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 June 1988.

Signed: Rolv RYSSDAL President

Signed: Marc-André EISSEN Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the dissenting opinion of Mr. Thór Vilhjálmsson is annexed to this judgment.

Initialled: R.R.

Initialled: M.-A.E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

To my regret, I have not been able to agree with my colleagues who have found a violation of Article 8 (art. 8) of the Convention in this case. I can agree with the judgment with the sole exception of paragraph 29. It is therefore not necessary for me to elaborate on the issues where I share the opinion of the majority of the Court, namely that there was family life between the applicants, that the first applicant, Mr. Abdellah Berrehab, was treated in accordance with the Aliens Act 1965 and other applicable rules and that the legislation pursues a legitimate aim. There remains the question of whether the interference complained of was "necessary in a democratic society". As already indicated, I have no comments to make on what is stated on this point in paragraph 28 of the judgment. As to the final assessment of whether or not there was a violation of Article 8 (art. 8), I would make the following observations.

The policy of the Netherlands in the field at issue here is set out in detailed rules found in or based on the 1965 Act, as amended. The amendments have been made in the light of experience and there has been a tendency to enable persons of foreign nationality who have certain family ties with Netherlands citizens to take up residence in the Netherlands. As already indicated, the rules pursue a legitimate aim. It may be added that the problem of immigration and residence of foreigners is a very important issue and there is no doubt that restrictions are unavoidable. Generally speaking, in this field the Government must have a wide margin of appreciation when formulating their policy and the necessary legal rules.

Against this have to be weighed the rights embodied in the first paragraph of Article 8 (art. 8-1). There are two applicants, the father and his daughter. It was the father who had to leave the Netherlands and who had dealings with that country's authorities. As stated in the judgment, he and the mother of his daughter had been married to each other, but they had been divorced by the time their child was born. They did not live together. The mother and the first applicant agreed that he should see his daughter frequently and regularly and it must be assumed that he did so during the relevant period. He was also formally appointed an auxiliary guardian of his daughter. Notwithstanding their contacts, which constituted family life, I nevertheless find, taking into account the circumstances that the applicants did not live in the same home and that the parents of the child were not married to each other at the relevant time, that on balance the first applicant's rights did not outweigh the respondent State's interests recognised in paragraph 2 of Article 8 (art. 8-2). This conclusion is supported by the fact that the contacts between the two applicants were not completely terminated after the first applicant left the Netherlands.

As to the rights of the second applicant, the daughter, it seems that they were not considered by the Netherlands authorities who dealt with the first applicant's case. That in itself did not, in my opinion, give rise to a violation of Article 8 (art. 8). I take the view that the Court must assess the competing rights and interests independently. It should be noted that the second applicant was a young girl when her father had to leave the Netherlands. The family life she had enjoyed with him was limited to what he had agreed with the mother. The child had hardly any voice on the scope of her contacts with her father and the respondent State could not alter that situation by any positive action on its part. Thus, her situation was very precarious. In my opinion, this is an argument in favour of the respondent State's position in this case. Taking into account the family situation already described, I have come to the conclusion that neither the rights of the second applicant, taken alone, or the combined rights of the two applicants can lead to a finding of a breach of Article 8 (art. 8).

It should be mentioned that I have, in accordance with the practice in this Court, voted on the question of Article 50 (art. 50) on the basis that there was a violation of Article 8 (art. 8) as decided by the majority.

Társaság a Szabadságjogokért v. Hungary (ECtHR 2009)

(Application no. 37374/05)

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Nona Tsotsoria, *judges,*
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 13 November 2008 and 24 March 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 37374/05) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an association registered in Hungary, the Hungarian Civil Liberties Union (*Társaság a Szabadságjogokért*) ("the applicant"), on 11 October 2005.

2. The applicant was represented by Mr L. Baltay, a lawyer practising in Gyál. The Hungarian Government ("the Government") were represented by Mr L. Höltzl, Agent, Ministry of Justice and Law Enforcement.

3. The applicant alleged that the decisions of the Hungarian courts denying it access to the details of a parliamentarian's complaint pending before the Constitutional Court had amounted to a breach of its right to have access to information of public interest.

4. By a decision of 13 November 2008 the Court declared the application admissible.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant is an association founded in 1994, with its seat in Budapest.

7. In March 2004 a Member of Parliament ("the MP") and other individuals lodged a complaint for abstract review with the Constitutional Court. The complaint requested the constitutional scrutiny of some recent amendments to the Criminal Code which concerned certain drug-related offences.

8. In July 2004 the MP gave a press interview concerning the complaint.

9. On 14 September 2004 the applicant – a non-governmental organisation whose declared aim is to promote fundamental rights as well as to strengthen civil society and the rule of law in Hungary and which is active in the field of drug policy – requested the Constitutional Court to grant them access to the complaint pending before it, in accordance with section 19 of Act no. 63 of 1992 on the Protection of Personal Data and the Public Nature of Data of Public Interest ("the Data Act 1992").

10. On 12 October 2004 the Constitutional Court denied the request without having consulted the MP, explaining that a complaint pending before it could not be made available to outsiders without the approval of its author.

11. On 10 November 2004 the applicant brought an action against the Constitutional Court. It requested the Budapest Regional Court to oblige the respondent to give it access to the complaint, in accordance with section 21(7) of the Data Act 1992.

12. On 13 December 2004 the Constitutional Court adopted a decision on the constitutionality of the impugned amendments to the Criminal Code. It contained a summary of the complaint in question and was pronounced publicly.

13. Notwithstanding the fact that the Constitutional Court procedure had already been terminated, on 24 January 2005 the Regional Court dismissed the applicant's action. It held in essence that the complaint could not be regarded as "data" and

the lack of access to it could not be disputed under the Data Act 1992.

14. The applicant appealed, disputing the Regional Court's findings. Moreover, it requested that the complaint be made available to it after the deletion of any personal information contained therein.

15. On 5 May 2005 the Court of Appeal upheld the first-instance decision. It considered that the complaint contained some "data"; however, that data was "personal" and could not be accessed without the author's approval. Such protection of personal data could not be overridden by other lawful interests, including the accessibility of public information.

16. The applicant's secondary claim was rejected without any particular reasoning.

II. RELEVANT DOMESTIC LAW

1. The Constitution of the Republic of Hungary

Article 59

"(1) ... [E]veryone has the right to a good reputation, the privacy of his home and the protection of secrecy in private affairs and personal data."

Article 61

"(1) ... [E]veryone has the right to express freely his/her opinion and, furthermore, to access and distribute information of public interest."

2. Act no. 32 of 1989 on the Constitutional Court

Section 1

"The competence of the Constitutional Court includes:

(b) posterior review of the constitutionality of statutes..."

Section 21

"(2) The procedure under section 1 (b) may be initiated by anyone."

3. The Data Act 1992

Section 2 (as in force at the material time)

"(4) *Public information*: data, other than personal data, which relates to the activities of, or is processed by, a body or a person carrying out State or municipal tasks or other public duties defined by the law."

Section 3

"(1) (a) Personal data may be processed if the person concerned consents to it...."

Section 4

"Unless exception is made under the law, the right to protection of personal data and the personality rights of the person concerned must not be violated by ... interests related to data management, including the public nature (section 19) of data of general interest."

Section 19

"(1) The organs or persons charged with exercising State ... functions shall, within the scope of their competence ..., promote and secure the right of the public to be informed accurately and speedily.

(2) The organs mentioned in subsection 1 hereof shall regularly publish or otherwise make accessible the most important data ... concerning their activities. ...

(3) Those mentioned in subsection 1 hereof shall ensure that anyone is able to access any data of public interest which they may handle, unless the data has been lawfully declared State or service secrets by a competent authority ... or the law restricts the right of public access to data of public interest, specifying the types of data concerned, regard being had to:

(a) the interests of national defence;

(b) the interests of national security;

(c) the interests of the prevention or prosecution of crime;

(d) the interests of central finances or foreign exchange policy;

(e) foreign relations or relations with international organisations;

(f) a pending court procedure. ...”

Section 21

“(1) If an applicant's request for data of public interest is denied, he or she shall have access to a court.

(2) The burden of proof concerning the lawfulness and well-foundedness of the refusal shall lie with the organ handling the data.

(3) The action shall be brought within 30 days from the notification of the refusal against the organ which has denied the information sought. ...

(6) The court shall give priority to these cases.

(7) If the court accepts the applicant's claim, it shall issue a decision ordering the organ handling the data to communicate the information of public interest which has been sought.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

17. The applicant submitted that the Hungarian court decisions in the present case had constituted an infringement of its right to receive information of public interest. In its view, this was in breach of Article 10 of the Convention, of which the relevant part reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, [or] for preventing the disclosure of information received in confidence, ...”

A. The Government's arguments

18. The Government did not contest that there had been an interference with the applicant's rights under Article 10 of the Convention. However, they emphasised that paragraph 2 of that provision allowed the Contracting States to restrict this right in certain circumstances. According to the Court's case-law, States have a certain margin of appreciation in determining whether or not a restriction on the rights protected by Article 10 is necessary.

19. They submitted that the Constitution recognised the rights to freedom of expression and access to information of public interest, and ensured their exercise by regulation under separate laws. The possibility to interfere with these rights was therefore prescribed by law. The Data Act 1992 regulated the functioning of the fundamental rights enshrined in Articles 59 (1) and 61(1) of the Constitution. Its definition of public information, which had been in force until an amendment on 1 June 2005, had excluded personal data, whilst ensuring access to other types of data. In the instant case, the second-instance court had established that the data sought to be accessed had been personal, because it had contained the MP's personal details and opinions, which would enable conclusions to be drawn about his personality. The mere fact that the MP had decided to lodge a constitutional complaint could not be regarded as consent to disclosure, since the Constitutional Court deliberated *in camera* and its decisions, although pronounced publicly, did not contain personal information about those having applied. Consequently, constitutional applicants did not have to take into account the possibility that their personal details would be disclosed.

20. The Government endorsed the courts' finding that the handling of public data was governed by the rule defining its public nature, whilst that of personal data by the rule of self-determination. Hence, access to data of a public nature could be restricted on the ground that it contained information the preservation of which was essential to protect personal data. Should the legislature make constitutional complaints and the personal data contained therein accessible to anyone by characterising the complaints as public information, this would discourage citizens from instituting such proceedings. Therefore, in the Government's view, the domestic courts in the present case had acted lawfully and in conformity with the Convention when they had denied access to the MP's constitutional complaint.

21. Within the framework of the Data Act 1992, the right of access to data of public interest was restricted by the right to the protection of personal data. The Government maintained that this restriction met the requirements laid down in the Convention, in that it was prescribed by law, it was applied in order to protect the rights of others and it was necessary in a democratic society.

B. The applicant's arguments

22. The applicant submitted at the outset that to receive and impart information is a precondition of freedom of expression, since one could not form or hold a well-founded opinion without knowing the relevant and accurate facts. Since it is actively engaged in Hungarian drug policy, the denial of access to the complaint in question had made it impossible for it to accomplish its mission and enter into the public debate about the issue. It claimed to play a press-like role in this connection, since its work allowed the public to discover, and form an opinion about, the ideas and attitudes of political leaders concerning drug policy. The Constitutional Court had thwarted its attempt to start a public debate at the preparatory stage.

23. The applicant further maintained that States have positive obligations under Article 10 of the Convention. Since, in the present case, the Hungarian authorities had not needed to collect the impugned information, because it had been ready and available, their only obligation would have been not to bar access to it. The disclosure of public information on request in fact falls within the notion of the right "to receive", as understood by Article 10 § 1. This provision protects not only those who wish to inform others but also those who seek to receive such information. To hold otherwise would mean that freedom of expression is no more than the absence of censorship, which would be incompatible with the above-mentioned positive obligations.

24. The applicant also submitted that the private sphere of politicians was narrower than that of other citizens, since they exposed themselves to criticism. Therefore, access to their personal data might be necessary if it concerned their public performance, as in the present case. If one accepted the Government's arguments, all data would be considered personal and excluded from public scrutiny – which would render the notion of public information meaningless. In any event, no details of the protected private sphere of the MP would have been made public in connection with his complaint.

25. Moreover, the applicant disputed the existence of a legitimate aim. The Constitutional Court had never asked the MP whether he would permit the disclosure of his personal data contained in his constitutional complaint. Therefore it could not be said that the restriction had served the protection of his rights. The Constitutional Court's real aim had been to prevent a public debate on the question. For the applicant, the secrecy of such complaints was alarming, since it prevented the public from assessing the Constitutional Court's practice. However, even assuming the existence of a legitimate aim, the restriction had not been necessary in a democratic society. Wide access to public information is in line with recent development of human rights' protection, as well as with Resolution No. 1087 (1996) of the Council of Europe's Parliamentary Assembly.

C. The Court's assessment

1. Whether there has been an interference

26. The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom which serves to impart information and ideas on such matters (see Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216, and *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239). In this connection, the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999 III, and *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298), even measures which merely make access to information more cumbersome.

27. In view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom (see *Dammann v. Switzerland* (no. 77551/01, § 52, 25 April 2006). The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate. The Court has repeatedly recognised civil society's important contribution to the discussion of public affairs (see, for example, *Steel and Morris v. the United Kingdom* (no. 68416/01, § 89, ECHR 2005 II). The applicant is an association involved in human rights litigation with various objectives, including the protection of freedom of information. It may therefore be characterised, like the press, as a social "watchdog" (see *Riolo v. Italy*, no. 42211/07, § 63, 17 July 2008; *Vides Aizsardzības Klubs v. Latvia*,

no. 57829/00, § 42, 27 May 2004). In these circumstances, the Court is satisfied that its activities warrant similar Convention protection to that afforded to the press.

28. The subject matter of the instant dispute was the constitutionality of criminal legislation concerning drug-related offences. In the Court's view, the submission of an application for an *a posteriori* abstract review of this legislation, especially by a Member of Parliament, undoubtedly constituted a matter of public interest. Consequently, the Court finds that the applicant was involved in the legitimate gathering of information on a matter of public importance. It observes that the authorities interfered in the preparatory stage of this process by creating an administrative obstacle. The Constitutional Court's monopoly of information thus amounted to a form of censorship. Furthermore, given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.

29. There has therefore been an interference with the applicant's rights enshrined in Article 10 § 1 of the Convention.

2. Whether the interference was justified

30. The Court reiterates that an interference with an applicant's rights under Article 10 § 1 will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

a. "Prescribed by law"

31. The applicant requested the information, relying on the Data Protection Act which guarantees access to data of public interest. The Government argued that the relevant legislation provided a sufficient legal basis for the interference with the applicant's right to freedom of expression, the treatment of 'personal data' overriding the element of public interest.

32. The Court is satisfied that the interference was "prescribed by law", within the meaning of Article 10 § 2 of the Convention.

b. Legitimate aim

33. The applicant argued that the restriction could not be said to have served the protection of the MP's rights, since the Constitutional Court had never asked his permission for the disclosure of his personal data. The Government argued that the interference served to protect the rights of others.

34. The Court considers that the interference in question can be seen as having pursued the legitimate aim of the protection of the rights of others, within the meaning of Article 10 § 2 of the Convention.

c. Necessary in a democratic society

35. The Court recalls at the outset that "Article 10 does not ... confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" (*Leander v. Sweden*, 26 March 1987, § 74 *in fine*, Series A no. 116) and that "it is difficult to derive from the Convention a general right of access to administrative data and documents" (*Loiseau v. France* (dec.), no. 46809/99, ECHR 2003-XII (extracts)). Nevertheless, the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" (see *Sdružení Jihočeské Matky c. la République tchèque* (dec.), no. 19101/03, 10 July 2006) and thereby towards the recognition of a right of access to information.

36. In any event, the Court notes that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him" (*Leander*, *op. cit.*, § 74). It considers that the present case essentially concerns an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents. In this connection, a comparison can be drawn with the Court's previous concerns that preliminary obstacles created by the authorities in the way of press functions call for the most careful scrutiny (see *Chauvy and Others v. France*, no. 64915/01, § 66, ECHR 2004 VI). Moreover, the State's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities. The Court notes at this juncture that the information sought by the applicant in the present case was ready and available (see, *a contrario*, *Guerra and Others v. Italy*, 19 February 1998, § 53 *in fine*, *Reports of Judgments and Decisions* 1998-I) and did not require the collection of any data by the Government. Therefore, the Court considers that the State had an obligation not to impede the flow of information sought by the applicant.

37. The Court observes that the applicant had requested information about the constitutional complaint eventually without the personal data of its author. Moreover, the Court finds it quite implausible that any reference to the private life of the MP, hence to a protected private sphere, could be discerned from his constitutional complaint. It is true that he had informed the press that he had lodged the complaint, and therefore his opinion on this public matter could, in principle, be identified with his person. However, the Court considers that it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent. These considerations cannot justify, in the Court's view, the interference of which complaint is made in the present case.

38. The Court considers that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs" and their ability to provide accurate and reliable information may be adversely affected (see, *mutatis mutandis*, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports* 1996-II, p. 500, § 39).

39. The foregoing considerations lead the Court to conclude that the interference with the applicant's freedom of expression in the present case cannot be regarded as having been necessary in a democratic society. It follows that there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

41. The applicant claimed 5,000 euros (EUR) for non-pecuniary damage suffered on account of the fact that, because of the restriction complained of, it had been unable to generate, and contribute to, an open and well-informed public debate on drug policy.

42. The Government contested this claim.

43. The Court considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered.

B. Costs and expenses

44. The applicant claimed EUR 5,594 in respect of legal fees incurred before the Court (this amount, which includes VAT at 20%, would correspond to altogether 44 hours of work by its lawyer) and EUR 80 in respect of clerical costs.

45. The Government contested this claim.

46. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant EUR 3,000 for costs and expenses under all heads.

C. Default interest

47. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds* that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Hungarian forints at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Françoise Tulkens
Registrar President

GRAND CHAMBER
CASE OF M.S.S. v. BELGIUM AND GREECE
(Application no. 30696/09)

JUDGMENT
STRASBOURG
21 January 2011

In the case of M.S.S. v. Belgium and Greece,

The European Court of Human Rights, sitting as a Grand Chamber composed of:
Jean-Paul Costa, President,
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Ireneu Cabral Barreto,
Elisabet Fura,
Khanlar Hajiyev,
Danutė Jočienė,
Dragoljub Popović,
Mark Villiger,
András Sajó,
Ledi Bianku,
Ann Power,
Işıl Karakaş,
Nebojša Vučinić, Judges,
and Michael O'Boyle, Deputy Registrar,

Having deliberated in private on 1 September and 15 December 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 30696/09) against the Kingdom of Belgium and the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national, Mr M.S.S. ("the applicant"), on 11 June 2009. The President of the Chamber to which the case had been assigned acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr Z. Chihaoui, a lawyer practising in Brussels. The Belgian Government were represented by their Agent, Mr M. Tysebaert and their co-Agent, Mrs I. Niedlispacher. The Greek Government were represented by Mrs M. Germani, Legal Assistant at the State Legal Council.

3. The applicant alleged in particular that his expulsion by the Belgian authorities had violated Articles 2 and 3 of the Convention and that he had been subjected in Greece to treatment prohibited by Article 3; he also complained of the lack of a remedy under Article 13 of the Convention that would enable him to have his complaints examined.

.....8. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 September 2010 (Rule 59 § 3).

FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Entry into the European Union

9. The applicant left Kabul early in 2008 and, travelling via Iran and Turkey, entered the European Union through Greece, where his fingerprints were taken on 7 December 2008 in Mytilene.

10. He was detained for a week and, when released, was issued with an order to leave the country. He did not apply for asylum in Greece.

B. Asylum procedure and expulsion procedure in Belgium

11. On 10 February 2009, after transiting through France, the applicant arrived in Belgium, where he presented himself to the Aliens Office with no identity documents and applied for asylum.

12. The examination and comparison of the applicant's fingerprints generated a Eurodac “hit” report on 10 February 2009 revealing that the applicant had been registered in Greece.

13. The applicant was placed initially in the Lanaken open reception centre for asylum seekers.

14. On 18 March 2009, by virtue of Article 10 § 1 of Regulation no. 343/2003/EC (the Dublin Regulation, see paragraphs 65-82 below), the Aliens Office submitted a request for the Greek authorities to take charge of the asylum application. When the Greek authorities failed to respond within the two-month period provided for in Article 18 § 1 of the Regulation, the Aliens Office considered this to be a tacit acceptance of the request to take charge of the application, pursuant to paragraph 7 of that provision.

15. During his interview under the Dublin Regulation on 18 March 2009 the applicant told the Aliens Office that he had fled Afghanistan with the help of a smuggler he had paid 12,000 dollars and who had taken his identity papers. He said he had chosen Belgium after meeting some Belgian North Atlantic Treaty Organisation (NATO) soldiers who had seemed very friendly. He also requested that the Belgian authorities examine his fears. He told them he had a sister in the Netherlands with whom he had lost contact. He also mentioned that he had had hepatitis B and had been treated for eight months.

16. On 2 April 2009, the UNHCR sent a letter to the Belgian Minister for Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece (see paragraphs 194 and 195, below). A copy was sent to the Aliens Office.

17. On 19 May 2009, in application of section 51/5 of the Act of 15 December 1980 on the entry, residence, settlement and expulsion of aliens (“the Aliens Act”), the Aliens Office decided not to allow the applicant to stay and issued an order directing him to leave the country. The reasons given for the order were that, according to the Dublin Regulation, Belgium was not responsible for examining the asylum application; Greece was responsible and there was no reason to suspect that the Greek authorities would fail to honour their obligations in asylum matters under Community law and the 1951 Geneva Convention relating to the Status of Refugees. That being so, the applicant had the guarantee that he would be able, as soon as he arrived in Greece, to submit an application for asylum, which would be examined in conformity with the relevant rules and regulations. The Belgian authorities were under no obligation to apply the derogation clause provided for in Article 3 § 2 of the Regulation. Lastly, the applicant suffered from no health problem that might prevent his transfer and had no relatives in Belgium.

18. On the same day the applicant was taken into custody with a view to the enforcement of that decision and placed in closed facility 127 bis for illegal aliens, in Steenokkerzeel.

19. On 26 May 2009 the Belgian Committee for Aid to Refugees, the UNHCR's operational partner in Belgium, was apprised of the contact details of the lawyer assigned to the applicant.

20. On 27 May 2009 the Aliens Office scheduled his departure for 29 May 2009.

21. At 10.25 a.m. on the appointed day, in Tongres, the applicant's initial counsel lodged an appeal by fax with the Aliens Appeals Board to have the order to leave the country set aside, together with a request for a stay of execution under the extremely urgent procedure. The reasons given, based in particular on Article 3 of the Convention, referred to a risk of arbitrary detention in Greece in appalling conditions, including a risk of ill-treatment. The applicant also relied on the deficiencies in the asylum procedure in Greece, the lack of effective access to judicial proceedings and his fear of being sent back to Afghanistan without any examination of his reasons for having fled that country.

22. The hearing was scheduled for the same day, at 11.30 a.m., at the seat of the Aliens Appeals Board in Brussels. The applicant's counsel did not attend the hearing and the application for a stay of execution was rejected on the same day, for failure to attend.

23. The applicant refused to board the aircraft on 29 May 2009 and his renewed detention was ordered under section 27, paragraph 1, of the Aliens Act.

24. On 4 June 2009 the Greek authorities sent a standard document confirming that it was their responsibility under Articles 18 § 7 and 10 § 1 of the Dublin Regulation to examine the applicant's asylum request. The document ended with the following sentence: “Please note that if he so wishes this person may submit an application [for asylum] when he arrives in Greece.”

25. On 9 June 2009 the applicant's detention was upheld by order of the chambre du conseil of the Brussels Court of First Instance.

26. On appeal on 10 June, the Indictments Chamber of the Brussels Court of Appeal scheduled a hearing for 22 June 2009.

27. Notified on 11 June 2009 that his departure was scheduled for 15 June, the applicant lodged a second request, through his current lawyer, with the Aliens Appeals Board to set aside the order to leave the territory. He relied on the risks he would face in Afghanistan and those he would face if transferred to Greece because of the slim chances of his application for asylum being properly examined and the appalling conditions of detention and reception of asylum seekers in Greece.

28. A second transfer was arranged on 15 June 2009, this time under escort.

29. By two judgments of 3 and 10 September 2009, the Aliens Appeals Board rejected the applications for the order to leave the country to be set aside – the first because the applicant had not filed a request for the proceedings to be continued within the requisite fifteen days of service of the judgment rejecting the request for a stay of execution lodged under the extremely urgent procedure, and the second on the ground that the applicant had not filed a memorial in reply.

30. No administrative appeal on points of law was lodged with the Conseil d'Etat.

C. Request for interim measures against Belgium

31. In the meantime, on 11 June 2009, the applicant applied to the Court, through his counsel, to have his transfer to Greece suspended. In addition to the risks he faced in Greece, he claimed that he had fled Afghanistan after escaping a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the international air force troops stationed in Kabul. In support of his assertions, he produced certificates confirming that he had worked as an interpreter.

32. On 12 June 2009 the Court refused to apply Rule 39 but informed the Greek Government that its decision was based on its confidence that Greece would honour its obligations under the Convention and comply with EU legislation on asylum. The letter sent to the Greek Government read as follows:

“That decision was based on the express understanding that Greece, as a Contracting State, would abide by its obligations under Articles 3, 13 and 34 of the Convention. The Section also expressed its confidence that your Government would comply with their obligations under the following:

- the Dublin Regulation referred to above;

- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; and

- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

I should be grateful therefore if your Government would undertake to inform the Court of the progress of any asylum claim made by the applicant in Greece as well as the place of detention, if he is detained on arrival in Greece.”

D. Indication of interim measures against Greece

33. On 15 June 2009 the applicant was transferred to Greece. On arriving at Athens international airport he gave his name as that used in the agreement to take responsibility issued by the Greek authorities on 4 June 2009.

34. On 19 June 2009 the applicant's lawyer received a first text message (sms), in respect of which he informed the Court. It stated that upon arrival the applicant had immediately been placed in detention in a building next to the airport, where he was locked up in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor.

35. When released on 18 June 2009, he was given an asylum seeker's card (“pink card”, see paragraph 89 below). At the

same time the police issued him with the following notification (translation provided by the Greek Government):

“In Spata, on 18.06.2009 at 12.58 p.m., I, the undersigned police officer [...], notified the Afghan national [...], born on [...], of no registered address, that he must report within two days to the Aliens Directorate of the Attica Police Asylum Department to declare his home address in Greece so that he can be informed of progress with his asylum application.”

36. The applicant did not report to the Attica police headquarters on Petrou Ralli Avenue in Athens (hereafter “the Attica police headquarters”).

37. Having no means of subsistence, the applicant went to live in a park in central Athens where other Afghan asylum seekers had assembled.

38. Having been informed of the situation on 22 June 2009, the Registrar of the Second Section sent a further letter to the Greek Government which read as follows:

“I should be obliged if your Government would inform the Court of the current situation of the applicant, especially concerning his possibilities to make an effective request for asylum. Further, the Court should be informed about the measures your Government intend to take regarding:

a) the applicant's deportation;

b) the means to be put at the applicant's disposal for his subsistence.”

39. The Greek authorities were given until 29 June 2009 to provide this information, it being specified that: “Should you not reply to our letter within the deadline, the Court will seriously consider applying Rule 39 against Greece.”

40. On 2 July 2009, having regard to the growing insecurity in Afghanistan, the plausibility of the applicant's story concerning the risks he had faced and would still face if he were sent back to that country and the lack of any reaction on the part of the Greek authorities, the Court decided to apply Rule 39 and indicate to the Greek Government, in the parties' interest and that of the smooth conduct of the proceedings, not to have the applicant deported pending the outcome of the proceedings before the Court.

41. On 23 July 2009 the Greek Government informed the Court, in reply to its letter of 22 June 2009, that on arriving at Athens airport on 15 June 2009 the applicant had applied for asylum and the asylum procedure had been set in motion. The Government added that the applicant had then failed to go to the Attica police headquarters within the two-day time-limit to fill in the asylum application and give them his address.

42. In the meantime the applicant's counsel kept the Court informed of his exchanges with the applicant. He confirmed that he had applied for asylum at the airport and had been told to go to the Attica police headquarters to give them his address for correspondence in the proceedings. He had not gone, however, as he had no address to give them.

E. Subsequent events

43. On 1 August 2009, as he was attempting to leave Greece, the applicant was arrested at the airport in possession of a false Bulgarian identity card.

44. He was placed in detention for seven days in the same building next to the airport where he had been detained previously. In a text message to his counsel he described his conditions of detention, alleging that he had been beaten by the police officers in charge of the centre, and said that he wanted to get out of Greece at any cost so as not to have to live in such difficult conditions.

45. On 3 August 2009 he was sentenced by the Athens Criminal Court to two months' imprisonment, suspended for three years, for attempting to leave the country with false papers.

46. On 4 August 2009, the Ministry of Public Order (now the Ministry of Civil Protection) adopted an order stipulating that in application of section 76 of Law no. 3386/2005 on the entry, residence and social integration of third-country nationals in Greece, the applicant was the subject of an administrative expulsion procedure. It further stipulated that the applicant could be released as he was not suspected of intending to abscond and was not a threat to public order.

47. On 18 December 2009 the applicant went to the Attica police headquarters, where they renewed his pink card for six months. In a letter on the same day the police took note in writing that the applicant had informed them that he had nowhere to live, and asked the Ministry of Health and Social Solidarity to help find him a home.

48. On 20 January 2010 the decision to expel the applicant was automatically revoked by the Greek authorities because the

applicant had made an application for asylum prior to his arrest.

49. In a letter dated 26 January 2010 the Ministry of Health and Social Solidarity informed the State Legal Council that, because of strong demand, the search for accommodation for the applicant had been delayed, but that something had been found; in the absence of an address where he could be contacted, however, it had not been possible to inform the applicant.

50. On 18 June 2010 the applicant went to the Attica police headquarters, where his pink card was renewed for six months.

51. On 21 June 2010 the applicant received a notice in Greek, which he signed in the presence of an interpreter, inviting him to an interview at the Attica police headquarters on 2 July 2010. The applicant did not attend the interview.

52. Contacted by his counsel after the hearing before the Court, the applicant informed him that the notice had been handed to him in Greek when his pink card had been renewed and that the interpreter had made no mention of any date for an interview.

53. In a text message to his counsel dated 1 September 2010 the applicant informed him that he had once again attempted to leave Greece for Italy, where he had heard reception conditions were more decent and he would not have to live on the street. He was stopped by the police in Patras and taken to Salonika, then to the Turkish border for expulsion there. At the last moment, the Greek olice decided not to expel him, according to the applicant because of the presence of the Turkish police.

II. RELEVANT INTERNATIONAL AND EUROPEAN LAW

A. The 1951 Geneva Convention relating to the Status of Refugees

54. Belgium and Greece have ratified the 1951 Geneva Convention relating to the Status of Refugees (“the Geneva Convention”), which defines the circumstances in which a State must grant refugee status to those who request it, as well as the rights and duties of such persons.

55. In the present case, the central Article is Article 33 § 1 of the Geneva Convention, which reads as follows:

“1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

56. In its note of 13 September 2001 on international protection (A/AC.96/951, § 16), the UNHCR, whose task it is to oversee how the States Parties apply the Geneva Convention, stated that the principle of “non-refoulement” was: “a cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established non-refoulement as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to refoule is also recognized as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect refoulement, whether of an individual seeking asylum or in situations of mass influx.”

B. Community law

1. The Treaty on European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009)

57. Fundamental rights, as guaranteed by the Convention, are part of European Union law and are recognised in these terms:

Article 2

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities...”

Article 6

“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European

Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

...

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

2. The Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009)

58. The issues of particular relevance to the present judgment are covered by Title V – Area of Freedom, Security and Justice – of Part Three of the Treaty on the Functioning of the European Union on Union Policies and internal action of the Union. In Chapter 1 of this Title, Article 67 stipulates:

"1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It ... shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. ..."

59. The second chapter of Title V concerns "policies on border checks, asylum and immigration".

Article 78 § 1 stipulates:

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

60. Article 78 § 2 provides, inter alia, for the Union's legislative bodies to adopt a uniform status of asylum and subsidiary protection, as well as criteria and mechanisms for determining which Member State is responsible for considering an application for asylum.

3. The Charter of Fundamental Rights of the European Union

61. The Charter of Fundamental Rights, which has been part of the primary law of the European Union since the entry into force of the Treaty of Lisbon, contains an express provision guaranteeing the right to asylum, as follows:

Article 18 – Right to asylum

"The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

4. The "Dublin" asylum system

62. Since the European Council of Tampere in 1999, the European Union has organised the implementation of a common European asylum system.

63. The first phase (1999-2004) saw the adoption of several legal instruments setting minimum common standards in the fields of the reception of asylum seekers, asylum procedures and the conditions to be met in order to be recognised as being in need of international protection, as well as rules for determining which Member State is responsible for examining an application for asylum ("the Dublin system").

64. The second phase is currently under way. The aim is to further harmonise and improve protection standards with a view to introducing a common European asylum system by 2012. The Commission announced certain proposals in its policy plan on asylum of 17 June 2008 (COM(2008) 360).

(a) The Dublin Regulation and the Eurodac Regulation 65. Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("the Dublin Regulation") applies to the Member States of the European Union and to Norway, Iceland and Switzerland.

66. The Regulation replaces the provisions of the Dublin Convention for determining the State responsible for examining

applications for asylum lodged in one of the Member States of the European Communities, signed on 15 June 1990.

67. An additional regulation, Regulation no. 1560/2003 of 2 September 2003, lays down rules for the application of the Dublin Regulation.

68. The first recital of the Dublin Regulation states that it is part of a common policy on asylum aimed at progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

69. The second recital affirms that the Regulation is based on the presumption that the member States respect the principle of non-refoulement enshrined in the Geneva Convention and are considered as safe countries.

70. Under the Regulation, the Member States must determine, based on a hierarchy of objective criteria (Articles 5 to 14), which Member State bears responsibility for examining an asylum application lodged on their territory. The aim is to avoid multiple applications and to guarantee that each asylum seeker's case is dealt with by a single Member State.

71. Where it is established that an asylum seeker has irregularly crossed the border into a Member State having come from a third country, the Member State thus entered is responsible for examining the application for asylum (Article 10 § 1). This responsibility ceases twelve months after the date on which the irregular border crossing took place.

72. Where the criteria in the regulation indicate that another Member State is responsible, that State is requested to take charge of the asylum seeker and examine the application for asylum. The requested State must answer the request within two months from the date of receipt of that request. Failure to reply within two months is stipulated to mean that the request to take charge of the person has been accepted (Articles 17 and 18 §§ 1 and 7).

73. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged must notify the applicant of the decision to transfer him or her, stating the reasons. The transfer must be carried out at the latest within six months of acceptance of the request to take charge. Where the transfer does not take place within that time-limit, responsibility for processing the application lies with the Member State in which the application for asylum was lodged (Article 19).

74. By way of derogation from the general rule, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation (Article 3 § 2). This is called the “sovereignty” clause. In such cases the State concerned becomes the Member State responsible and assumes the obligations associated with that responsibility.

75. Furthermore, any Member State, even where it is not responsible under the criteria set out in the Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations (Article 15 § 1). This is known as the “humanitarian” clause. In this case that Member State will, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.

76. Another Council Regulation, no. 2725/2000 of 11 December 2000, provides for the establishment of the Eurodac system for the comparison of fingerprints (“the Eurodac Regulation”). It requires the States to register asylum seekers' fingerprints. The data is transmitted to Eurodac's central unit, run by the European Commission, which stores it in its central database and compares it with the data already stored there.

77. On 6 June 2007 the European Commission transmitted a report to the European Parliament and the Council on the evaluation of the Dublin system (COM(2007)299 final). On 3 December 2008 it made public its proposal for a recasting of the Dublin Regulation (COM(2008) 820 final/2). The purpose of the reform is to improve the efficiency of the system and ensure that all the needs of persons seeking international protection are covered by the procedure for determining responsibility.

78. The proposal aims to set in place a mechanism for suspending transfers under the Dublin system, so that, on the one hand, member States whose asylum systems are already under particularly heavy pressure are not placed under even more pressure by such transfers and, on the other hand, asylum seekers are not transferred to Member States which cannot offer them a sufficient level of protection, particularly in terms of reception conditions and access to the asylum procedure (Article 31 of the proposal). The State concerned must apply to the European Commission for a decision. The transfers may be suspended for up to six months. The Commission may extend the suspension for a further six months at its own initiative or at the request of the State concerned.

79. The proposal, examined under the codecision procedure, was adopted by the European Parliament at first reading on 7

May 2009 and submitted to the Commission and the Council.

80. At the Informal Justice and Home Affairs Council meeting in Brussels on 15 and 16 July 2010, the Belgian Presidency of the Council of the European Union placed on the agenda an exchange of views on the means of arriving at a single asylum procedure and a uniform standard of international protection by 2012. Discussion focused in particular on what priority the Council should give to negotiations on the recasting of the Dublin Regulation and on whether the ministers would back the inclusion of the temporary suspension clause.

81. The Court of Justice of the European Communities (CJEC), which became the Court of Justice of the European Union (CJEU) upon the entry into force of the Treaty of Lisbon, has delivered one judgment concerning the Dublin Regulation. In the Petrosian case (C-19/08, judgment of 29 January 2009) it was asked to clarify the interpretation of Article 20 §§ 1 and 2 concerning the taking of responsibility for an asylum application and the calculation of the deadline for making the transfer when the legislation of the requesting Member State provided for appeals to have suspensive effect. The CJEU found that time started to run from the time of the decision on the merits of the request.

82. The CJEU has recently received a request from the Court of Appeal (United Kingdom) for a preliminary ruling on the interpretation to be given to the sovereignty clause in the Dublin Regulation (case of N.S., C-411/10). (b) The European Union's directives on asylum matters

83. Three other European texts supplement the Dublin Regulation.

84. Directive 2003/9 of 27 January 2003, laying down minimum standards for the reception of asylum seekers in the Member States ("the Reception Directive"), entered into force on the day of its publication in the Official Journal (OJ L 31 of 6.2.2003). It requires the States to guarantee asylum seekers: - certain material reception conditions, including accommodation; food and clothing, in kind or in the form of monetary allowances; the allowances must be sufficient to protect the asylum seeker from extreme need; - arrangements to protect family unity; - medical and psychological care; - access for minors to education, and to language classes when necessary for them to undergo normal schooling. In 2007 the European Commission asked the CJEC (now the CJEU) to examine whether Greece was fulfilling its obligations concerning the reception of refugees. In a judgment of 19 April 2007 (case C-72/06), the CJEC found that Greece had failed to fulfil its obligations under the Reception Directive. The Greek authorities subsequently transposed the Reception Directive. On 3 November 2009 the European Commission sent a letter to Greece announcing that it was bringing new proceedings against it.

85. Directive 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status in the Member States (the "Procedures Directive"), which entered into force on the day of its publication in the Official Journal (OJ L 326/13 of 13.12.2005), guarantees the following rights: - an application for asylum cannot be rejected on the sole ground that it has not been made as soon as possible. In addition, applications must be examined individually, objectively and impartially; - asylum applicants have the right to remain in the Member State pending the examination of their applications; - the Member States are required to ensure that decisions on applications for asylum are given in writing and that, where an application is rejected, the reasons are stated in the decision and information on how to challenge a negative decision is given in writing; - asylum seekers must be informed of the procedure to be followed, of their rights and obligations, and of the result of the decision taken by the determining authority; - asylum seekers must receive the services of an interpreter for submitting their case to the competent authorities whenever necessary; - asylum seekers must not be denied the opportunity to communicate with the UNHCR. More generally, the Member States must allow the UNHCR to have access to asylum applicants, including those in detention, as well as to information on asylum applications and procedures, and to present its views to any competent authority; - applicants for asylum must have the opportunity, at their own cost, to consult a legal adviser in an effective manner. In the event of a negative decision by a determining authority, Member States must ensure that free legal assistance is granted on request. This right may be subject to restrictions (choice of counsel restricted to legal advisers specifically designated by national law, appeals limited to those likely to succeed, or free legal aid limited to applicants who lack sufficient resources). The European Commission initiated proceedings against Greece in February 2006 for failure to honour its obligations, because of the procedural deficiencies in the Greek asylum system, and brought the case before the CJEC (now the CJEU). Following the transposition of the Procedures Directive into Greek law in July 2008, the case was struck out of the list. On 24 June 2010 the European Commission brought proceedings against Belgium in the CJEU on the grounds that the Belgian authorities had not fully transposed the Procedures Directive – in particular, the minimum obligations concerning the holding of personal interviews. In its proposal for recasting the Procedures Directive, presented on 21 October 2009 (COM(2009) 554 final), the Commission contemplated strengthening the obligation to inform the applicant. It also provided for a full and ex nunc review of first-instance decisions by a court or tribunal and specified that the notion of effective remedy required a review of both

facts and points of law. It further introduced provisions to give appeals automatic suspensive effect. The proposed amendments were intended to improve consistency with the evolving case-law regarding such principles as the right to defence, equality of arms, and the right to effective judicial protection.

86. Directive 2004/83 of 29 April 2004 concerns minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (“the Qualification Directive”). It entered into force 20 days after it was published in the Official Journal (OJ L 304 of 30.09.2004). This Directive contains a set of criteria for granting refugee or subsidiary protection status and laying down the rights attached to each status. It introduces a harmonised system of temporary protection for persons not covered by the Geneva Convention but who nevertheless need international protection, such as victims of widespread violence or civil war. The CJEC (now the CJEU) has delivered two judgments concerning the Qualification Directive: the Elgafaji (C-465/07) judgment of 17 February 2009 and the Salahadin Abdulla and Others judgment of 2 March 2010 (joined cases C- 175, 176, 178 and 179/08). C. Relevant texts of the Council of Europe Commissioner for Human Rights

87. In addition to the reports published following his visits to Greece (see paragraph 160 below), the Commissioner issued a recommendation “concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders”, dated 19 September 2001, which states, inter alia: “1. Everyone has the right, on arrival at the border of a member State, to be treated with respect for his or her human dignity rather than automatically considered to be a criminal or guilty of fraud. 2. On arrival, everyone whose right of entry is disputed must be given a hearing, where necessary with the help of an interpreter whose fees must be met by the country of arrival, in order to be able, where appropriate, to lodge a request for asylum. This must entail the right to open a file after having being duly informed, in a language which he or she understands, about the procedure to be followed. The practice of refoulement “at the arrival gate” thus becomes unacceptable. 3. As a rule there should be no restrictions on freedom of movement. Wherever possible, detention must be replaced by other supervisory measures, such as the provision of guarantees or surety or other similar measures. Should detention remain the only way of guaranteeing an alien's physical presence, it must not take place, systematically, at a police station or in a prison, unless there is no practical alternative, and in such case must last no longer than is strictly necessary for organising a transfer to a specialised centre. ... 9. On no account must holding centres be viewed as prisons. ... 11. It is essential that the right of judicial remedy within the meaning of Article 13 of the ECHR be not only guaranteed in law but also granted in practice when a person alleges that the competent authorities have contravened or are likely to contravene a right guaranteed by the ECHR. The right of effective remedy must be guaranteed to anyone wishing to challenge a refoulement or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 or 3 of the ECHR is alleged.” III. RELEVANT LAW AND PRACTICE IN GREECE A. The conditions of reception of asylum seekers 1. Residence

88. The conditions of reception of asylum seekers in Greece are regulated primarily by Presidential Decree (“PD”) no. 220/2007 transposing the Reception Directive. The provisions of this text applicable to the present judgment may be summarised as follows.

89. The authority responsible for receiving and examining the asylum application issues an asylum applicant's card free of charge immediately after the results of the fingerprint check become known and in any event no later than three days after the asylum application was lodged. This card, called the “pink card”, permits the applicant to remain in Greece throughout the period during which his or her application is being examined. The card is valid for six months and renewable until the final decision is pronounced (Article 5 § 1).

90. Under Article 12 §§ 1 and 3 the competent authorities must take adequate steps to ensure that the material conditions of reception are made available to asylum seekers. They must be guaranteed a standard of living in keeping with their state of health and sufficient for their subsistence and to protect their fundamental rights. These measures may be subjected to the condition that the persons concerned are indigent.

91. An asylum seeker with no home and no means of paying for accommodation will be housed in a reception centre or another place upon application to the competent authorities (Article 6 § 2). According to information provided by the Greek Ministry of Health and Social Solidarity, in 2009 there were fourteen reception centres for asylum seekers in different parts of the country, with a total capacity of 935 places. Six of them were reserved for unaccompanied minors.

92. Asylum seekers who wish to work are issued with temporary work permits, in conformity with the conditions laid down in PD no. 189/1998 (Article 10 § 1 of PD no. 220/2007). Article 4 c) of PD 189/1998 requires the competent authority to issue the permit after making sure the job concerned does not interest “a Greek national, a citizen of the European Union, a person with refugee status, a person of Greek origin, and so on”.

93. Asylum seekers have access to vocational training programmes under the same conditions as Greek nationals (Article 11).

94. If they are financially indigent and not insured in any way, asylum seekers are entitled to free medical care and hospital treatment. First aid is also free (Article 14 of PD no. 220/2007).

2. Detention

95. When the administrative expulsion of an alien is permitted under section 76(1) of Law no. 3386/2005 (see paragraph 119, below) and that alien is suspected of intending to abscond, considered to be a threat to public order or hinders the preparation of his or her departure or the expulsion procedure, provisional detention is possible until the adoption, within three days, of the expulsion decision (section 76(2)). Until Law 3772/2009 came into force, administrative detention was for three months. It is now six months and, in certain circumstances, may be extended by twelve months.

96. An appeal to the Supreme Administrative Court against an expulsion order does not suspend the detention (section 77 of Law no. 3386/2005).

97. Where section 76(1) is found to apply upon arrival at Athens international airport, the persons concerned are placed in the detention centre next to the airport. Elsewhere in the country, they are held either in detention centres for asylum seekers or in police stations.

98. Under Article 13 § 1 of PD no. 90/2008, lodging an application for asylum is not a criminal offence and cannot, therefore, justify the applicant's detention, even if he or she entered the country illegally.

....

. 4. Risk of refoulement

...192. The risk of refoulement of asylum seekers by the Greek authorities, be it indirectly, to Turkey, or directly to the country of origin, is a constant concern. The reports listed in paragraph 161 above, as well as the press, have regularly reported this practice, pointing out that the Greek authorities deport, sometimes collectively, both asylum seekers who have not yet applied for asylum and those whose applications have been registered and who have been issued with pink cards. Expulsions to Turkey are effected either at the unilateral initiative of the Greek authorities, at the border with Turkey, or in the framework of the readmission agreement between Greece and Turkey. It has been established that several of the people thus expelled were then sent back to Afghanistan by the Turkish authorities without their applications for asylum being considered.

193. Several reports highlight the serious risk of refoulement as soon as the decision is taken to reject the asylum application, because an appeal to the Supreme Administrative Court has no automatic suspensive effect. 5. Letter of the UNHCR of 2 April 2009

194. On 2 April 2009 the UNHCR sent a letter to the Belgian Minister of Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece. A copy was sent to the Aliens Office. The letter read as follows (extracts): “The UNHCR is aware that the Court, in its decision in K.R.S. v. the United Kingdom ... recently decided that the transfer of an asylum seeker to Greece did not present a risk of refoulement for the purposes of Article 3 of the Convention. However, the Court did not give judgment on compliance by Greece with its obligations under international law on refugees. In particular, the Court said nothing about whether the conditions of reception of asylum seekers were in conformity with regional and international standards of human rights protection, or whether asylum seekers had access to fair consideration of their asylum applications, or even whether refugees were effectively able to exercise their rights under the Geneva Convention. The UNHCR believes that this is still not the case.”

195. It concluded: “For the above reasons the UNHCR maintains its assessment of the Greek asylum system and the recommendations formulated in its position of April 2008, namely that Governments should refrain from transferring asylum seekers to Greece and take responsibility for examining the corresponding asylum applications themselves, in keeping with Article 3 § 2 of the Dublin Regulation.”

.....THE LAW

204. In the circumstances of the case the Court finds it appropriate to proceed by first examining the applicant's complaints against Greece and then his complaints against Belgium.

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY GREECE BECAUSE OF THE CONDITIONS OF THE APPLICANT'S DETENTION

205. The applicant alleged that the conditions of his detention at Athens international airport amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention, which reads: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

.....

III. ALLEGED VIOLATION BY GREECE OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE SHORTCOMINGS IN THE ASYLUM PROCEDURE 265.

265. The applicant complained that he had no effective remedy in Greek law in respect of his complaints under Articles 2 and 3, in violation of Article 13 of the Convention, which reads as follows: Article 13 “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

266. He alleged that the shortcomings in the asylum procedure in Greece were such that he faced the risk of refoulement to his country of origin without any real examination of the merits of his asylum application, in violation of Article 3, cited above, and of Article 2 of the Convention, which reads: Article 2 “1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ...”

A. The parties' submissions

1. The applicant

267. The applicant submitted that he had fled Afghanistan after escaping an attempt on his life by the Taliban in reprisal for his having worked as an interpreter for the international air force troops based in Kabul. Since arriving in Europe he had had contacts with members of his family back in Afghanistan, who strongly advised him not to come home because the insecurity and the threat of reprisals had grown steadily worse.

268. The applicant wanted his fears to be examined and had applied for asylum in Greece for that purpose. He had no confidence in the functioning of the asylum procedure, however.

269. Firstly, he complained about the practical obstacles he had faced. For example, he alleged that he had never been given an information brochure about the asylum procedure at the airport but had merely been told that he had to go to the Attica police headquarters to register his address. He had not done so because he had had no address to register. He had been convinced that having an address was a condition for the procedure to be set in motion. He had subsequently presented himself, in vain, at the police headquarters on several occasions, where he had had to wait for hours, so far without any prospect of his situation being clarified.

270. Secondly, the applicant believed that he had escaped being sent back to his own country only because of the interim measure indicated by the Court to the Greek Government. Apart from that “protection”, he had no guarantee at this stage that his asylum procedure would follow its course. Even if it did, the procedure offered no guarantee that the merits of his fears would be seriously examined by the Greek authorities. He argued that he did not have the wherewithal to pay for a lawyer's services, that there was no provision for legal aid at this stage, that first-instance interviews were known to be superficial, that he would not have the opportunity to lodge an appeal with a body competent to examine the merits of his fears, that an appeal to the Supreme Administrative Court did not automatically have suspensive effect and that the procedure was a lengthy one. According to him, the almost non-existent record of cases where the Greek authorities had granted international protection of any kind whatsoever at first instance or on appeal showed how ineffective the procedure was.

....2. The Greek Government

271. The Government submitted that the applicant had not suffered the consequences of the alleged shortcomings in the asylum procedure and could therefore not be considered as a victim for the purposes of the Convention.

272. The applicant's attitude had to be taken into account: he had, in breach of the legislation, failed to cooperate with the authorities and had shown no interest in the smooth functioning of the procedure. By failing to report to the Attica police headquarters in June 2009 he had failed to comply with the formalities for initiating the procedure and had not taken the opportunity to inform the police that he had no address, so that they could notify him of any progress through another

channel. Furthermore, he had assumed different identities and attempted to leave Greece while hiding from the authorities the fact that he had applied for asylum there.

273. The Government considered that the Greek authorities had followed the statutory procedure in spite of the applicant's negligence and the errors of his ways. They argued in particular that this was illustrated by the fact that the applicant was still in Greece and had not been deported in spite of the situation he had brought upon himself by trying to leave the country in August 2009.

274. In the alternative, the Government alleged that the applicant's complaints were unfounded. They maintained that Greek legislation was in conformity with Community and international law on asylum, including the non-refoulement principle. Greek law provided for the examination of the merits of asylum applications with regard to Articles 2 and 3 of the Convention. Asylum seekers had access to the services of an interpreter at every step of the proceedings.

275. The Government confirmed that the applicant's application for asylum had not yet been examined by the Greek authorities but assured the Court that it would be, with due regard for the standards mentioned above.

276. In conformity with Article 13 of the Convention, unsuccessful asylum seekers could apply for judicial review to the Supreme Administrative Court. According to the Government, such an appeal was an effective safety net that offered the guarantees the Court had requested in its Bryan v. the United Kingdom judgment (22 November 1995, § 47, Series A no. 335-A). They produced various judgments in which the Supreme Administrative Court had set aside decisions rejecting asylum applications because the authorities had failed to take into account certain documents that referred, for example, to a risk of persecution. In any event, the Government pointed out that providing asylum seekers whose applications had been rejected at first instance with an appeal on the merits was not a requirement of the Convention.

277. According to the Government, complaints concerning possible malfunctions of the legal aid system should not be taken into account because Article 6 did not apply to asylum procedures. In the same manner, any procedural delays before the Supreme Administrative Court fell within the scope of Article 6 of the Convention and could therefore not be examined by the Court in the present case.

278. Moreover, as long as the asylum procedure had not been completed, asylum seekers ran no risk of being returned to their country of origin and could, if necessary, ask the Supreme Administrative Court to stay the execution of an expulsion order issued following a decision rejecting the asylum application, which would have the effect of suspending the enforcement of the measure. The Government provided several judgments in support of that affirmation.

279. The Government averred in their oral observations before the Grand Chamber that even in the present circumstances the applicant ran no risk of expulsion to Afghanistan at any time as the policy at the moment was not to send anyone back to that country by force. The forced returns by charter flight that had taken place in 2009 concerned Pakistani nationals who had not applied for asylum in Greece. The only Afghans who had been sent back to Afghanistan – 468 in 2009 and 296 in 2010 – had been sent back on a voluntary basis as part of the programme financed by the European Return Fund. Nor was there any danger of the applicant being sent to Turkey because, as he had been transferred to Greece by another European Union Member State, he did not fall within the scope of the readmission agreement concluded between Greece and Turkey.

280. In their oral observations before the Grand Chamber, the Government further relied on the fact that the applicant had not kept the appointment of 21 June 2010 for an initial interview on 2 July 2010, when that interview would have been an opportunity for him to explain his fears to the Greek authorities in the event of his return to Afghanistan. It followed, according to the Government, that not only had the applicant shown no interest in the asylum procedure, but he had not exhausted the remedies under Greek law regarding his fears of a violation of Articles 2 and 3 of the Convention.

B. Observations of the Council of Europe Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the Aire Centre, Amnesty International and the Greek Helsinki Monitor, intervening as third parties

281. The Commissioner, the UNHCR, the Aire Centre, Amnesty International and GHM were all of the opinion that the current legislation and practice in Greece in asylum matters were not in conformity with international and European human rights protection standards. They deplored the lack of adequate information, or indeed of any proper information at all about the asylum procedure, the lack of suitably trained staff to receive and process asylum applications, the poor quality of firstinstance decisions owing to structural weaknesses and the lack of procedural guarantees, in particular access to legal aid and an interpreter and the ineffectiveness as a remedy of an appeal to the Supreme Administrative Court because of the excessively long time it took, the fact that it had no automatic suspensive effect and the difficulty in obtaining legal aid. They emphasised that “Dublin” asylum seekers were faced with the same obstacles in practice as other asylum seekers.

282. The Commissioner and the UNHCR expressed serious concern about the continuing practice by the Greek authorities of forced returns to Turkey, be they collective or individual. The cases they had identified concerned both persons arriving for the first time and those already registered as asylum seekers.

C. The Court's assessment

1. Admissibility

283. The Greek Government submitted that the applicant was not a victim within the meaning of Article 34 of the Convention because he alone was to blame for the situation, at the origin of his complaint, in which he found himself and he had not suffered the consequences of any shortcomings in the procedure. The Government further argued that the applicant had not gone to the first interview at the Attica police headquarters on 2 July 2010 and had not given the Greek authorities a chance to examine the merits of his allegations. This meant that he had not exhausted the domestic remedies and the Government invited the Court to declare this part of the application inadmissible and reject it pursuant to Article 35 §§ 1 and 4 of the Convention.

284. The Court notes that the questions raised by the Government's preliminary objections are closely bound up with those it will have to consider when examining the complaints under Article 13 of the Convention taken in conjunction with Articles 2 and 3, because of the deficiencies of the asylum procedure in Greece. They should therefore be examined together with the merits of those complaints.

285. Moreover, the Court considers that this part of the application raises complex issues of law and fact which cannot be determined without an examination of the merits. It follows that it is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible. 2. Merits (a) Recapitulation of general principles

286. In cases concerning the expulsion of asylum seekers the Court has explained that it does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled (see, among other authorities, T.I. v. the United Kingdom (dec. no. 43844/98, ECHR 2000-III), and Müslim, cited above, §§ 72 to 76).

287. By virtue of Article 1 (which provides: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”), the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention (see Kudła v. Poland [GC], no. 30210/96, § 152, ECHR 2000-XI).

288. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be “effective” in practice as well as in law (see Kudla cited above, § 157).

289. The “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see Gebremedhin [Gaberamadhien] v. France, no. 25389/05, § 53, ECHR 2007-V § 53).

290. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see Çakıcı v. Turkey [GC], no. 23657/94, § 112, ECHR 1999-IV).

291. Article 13 requires the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see Jabari v. Turkey, no. 40035/98, § 48, ECHR 2000-VIII).

292. Particular attention should be paid to the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration (see Doran v. Ireland, no. 50389/99, § 57, ECHR 2003-X).

293. Lastly, in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority (see Shamayev and Others v. Georgia and Russia, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see Jabari, cited above, § 50), as well as a particularly prompt response (see Batı and Others v. Turkey, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts)); it also requires that the person concerned should have access to a remedy with automatic suspensive effect (see Čonka v. Belgium, no. 51564/99, §§ 81-83, ECHR 2002-I, and Gebremedhin [Gaberamadhien], cited above, § 66). (b) Application in the present case

294. In order to determine whether Article 13 applies to the present case, the Court must ascertain whether the applicant can arguably assert that his removal to Afghanistan would infringe Article 2 or Article 3 of the Convention.

295. It notes that, when lodging his application the applicant produced, in support of his fears concerning Afghanistan, copies of certificates showing that he had worked as an interpreter (see paragraph 31 above). It also has access to general information about the current situation in Afghanistan and to the Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Afghanistan published by the UNHCR and regularly updated (see paragraphs 197-202 above).

296. For the Court, this information is prima facie evidence that the situation in Afghanistan has posed and continues to pose a widespread problem of insecurity and that the applicant belongs to a category of persons particularly exposed to reprisals at the hands of the anti-government forces because of the work he did as an interpreter for the international air forces. It further notes that the gravity of the situation in Afghanistan and the risks that exist there are not disputed by the parties. On the contrary, the Greek Government have stated that their current policy is not to send asylum seekers back to that country by force precisely because of the high-risk situation there.

297. The Court concludes from this that the applicant has an arguable claim under Article 2 or Article 3 of the Convention.

298. This does not mean that in the present case the Court must rule on whether there would be a violation of those provisions if the applicant were returned. It is in the first place for the Greek authorities, who have responsibility for asylum matters, themselves to examine the applicant's request and the documents produced by him and assess the risks to which he would be exposed in Afghanistan. The Court's primary concern is whether effective guarantees exist in the present case to protect the applicant against arbitrary removal directly or indirectly back to his country of origin.

299. The Court notes that Greek legislation, based on Community law standards in terms of asylum procedure, contains a number of guarantees designed to protect asylum seekers from removal back to the countries from which they have fled without any examination of the merits of their fears (see paragraphs 99-121 above). It notes the Government's assurances that the applicant's application for asylum will be examined in conformity with the law.

300. The Court observes, however, that for a number of years the UNHCR and the Council of Europe Commissioner for Human Rights as well as many international non-governmental organisations have revealed repeatedly and consistently that Greece's legislation is not being applied in practice and that the asylum procedure is marked by such major structural deficiencies that asylum seekers have very little chance of having their applications and their complaints under the Convention seriously examined by the Greek authorities, and that in the absence of an effective remedy, at the end of the day they are not protected against arbitrary removal back to their countries of origin (see paragraphs 160 and 173-195 above).

301. The Court notes, firstly, the shortcomings in access to the asylum procedure and in the examination of applications for asylum (see paragraphs 173-188 above): insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessively lengthy delays in receiving a decision. These shortcomings affect asylum seekers arriving in Greece for the first time as well as those sent back there in application of the Dublin Regulation.

302. The Court is also concerned about the findings of the different surveys carried out by the UNHCR, which show that almost all first-instance decisions are negative and drafted in a stereotyped manner without any details of the reasons for the

decisions being given (see paragraph 184 above). In addition, the watchdog role played by the refugee advisory committees at second instance has been removed and the UNHCR no longer plays a part in the asylum procedure (see paragraphs 114 and 189 above).

303. The Government maintained that whatever deficiencies there might be in the asylum procedure, they had not affected the applicant's particular situation.

304. The Court notes in this connection that the applicant claims not to have received any information about the procedures to be followed. Without wishing to question the Government's good faith concerning the principle of an information brochure being made available at the airport, the Court attaches more weight to the applicant's version because it is corroborated by a very large number of accounts collected from other witnesses by the Commissioner, the UNHCR and various non-governmental organisations. In the Court's opinion, the lack of access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures.

305. The Government also criticised the applicant for not setting the procedure in motion by going to the Attica police headquarters within the time-limit prescribed in the notification.

306. On this point the Court notes firstly that the three-day time-limit the applicant was given was a very short one considering how difficult it is to gain access to the police headquarters concerned.

307. Also, it must be said that the applicant was far from the only one to have misinterpreted the notice and that many asylum seekers do not go to the police headquarters because they have no address to declare.

308. Moreover, even if the applicant did receive the information brochure, the Court shares his view that the text is very ambiguous as to the purpose of the convocation (see paragraph 112 above), and that nowhere is it stated that asylum seekers can inform the Attica police headquarters that they have no address in Greece, so that information can be sent to them through another channel.

309. In such conditions the Court considers that the Government can scarcely rely on the applicant's failure to comply with this formality and that they should have proposed a reliable means of communicating with the applicant so that he could follow the procedure effectively.

310. Next, the Court notes that the parties agree that the applicant's asylum request has not yet been examined by the Greek authorities.

311. According to the Government, this situation is due at present to the fact that the applicant did not keep the appointment on 2 July 2010 to be interviewed by the refugee advisory committee. The Government have not explained the impact of that missed appointment on the progress of the domestic proceedings. Be that as it may, the applicant informed the Court, through his counsel, that the convocation had been given to him in Greek when he renewed his pink card, and that the interpreter had made no mention of any date for an interview. Although not in a position to verify the truth of the matter, the Court again attaches more weight to the applicant's version, which reflects the serious lack of information and communication affecting asylum seekers.

312. In such conditions the Court does not share the Government's view that the applicant, by his own actions, failed to give the domestic authorities an opportunity to examine the merits of his complaints and that he has not been affected by the deficiencies in the asylum procedure.

313. The Court concludes that to date the Greek authorities have not taken any steps to communicate with the applicant or reached any decision in his case, offering him no real and adequate opportunity to defend his application for asylum. What is more, the Court takes note of the extremely low rate of asylum or subsidiary protection granted by the Greek authorities compared with other European Union member States (see paragraphs 125-126 above). The importance to be attached to statistics varies, of course, according to the circumstances, but in the Court's view they tend here to strengthen the applicant's argument concerning his loss of faith in the asylum procedure.

314. The Court is not convinced by the Greek Government's explanations concerning the policy of returns to Afghanistan organised on a voluntary basis. It cannot ignore the fact that forced returns by Greece to high-risk countries have regularly been denounced by the third-party interveners and several of the reports consulted by the Court (see paragraphs 160, 192 and 282).

315. Of at least equal concern to the Court are the risks of refoulement the applicant faces in practice before any decision is taken on the merits of his case. The applicant did escape expulsion in August 2009, by application of PD no. 90/2008 (see paragraphs 43-48 and 120 above). However, he claimed that he had barely escaped a second attempt by the police to

deport him to Turkey. The fact that in both cases the applicant had been trying to leave Greece cannot be held against him when examining the conduct of the Greek authorities with regard to the Convention and when the applicant was attempting to find a solution to a situation the Court considers contrary to Article 3 (see paragraphs 263 and 264 above).

316. The Court must next examine whether, as the Government alleged, an application to the Supreme Administrative Court for judicial review of a possible rejection of the applicant's request for asylum may be considered as a safety net protecting him against arbitrary refoulement.

317. The Court begins by observing that, as the Government have alleged, although such an application for judicial review of a decision rejecting an asylum application has no automatic suspensive effect, lodging an appeal against an expulsion order issued following the rejection of an application for asylum does automatically suspend enforcement of the order.

318. However, the Court reiterates that the accessibility of a remedy in practice is decisive when assessing its effectiveness. The Court has already noted that the Greek authorities have taken no steps to ensure communication between the competent authorities and the applicant. That fact, combined with the malfunctions in the notification procedure in respect of “persons of no known address” reported by the Council of Europe Commissioner for Human Rights and the UNHCR (see paragraph 187 above), makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit.

319. In addition, although the applicant clearly lacks the wherewithal to pay a lawyer, he has received no information concerning access to organisations which offer legal advice and guidance. Added to that is the shortage of lawyers on the list drawn up for the legal aid system (see paragraphs 191 and 281 above), which renders the system ineffective in practice. Contrary to the Government's submissions, the Court considers that this situation may also be an obstacle hindering access to the remedy and falls within the scope of Article 13, particularly where asylum seekers are concerned.

320. Lastly, the Court cannot consider, as the Government have suggested, that the length of the proceedings before the Supreme Administrative Court is irrelevant for the purposes of Article 13. The Court has already stressed the importance of swift action in cases concerning ill-treatment by State agents (see paragraph 293 above). In addition it considers that such swift action is all the more necessary where, as in the present case, the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious consideration at first instance, statistically has virtually no chance of being offered any form of protection and lives in a state of precariousness that the Court has found to be contrary to Article 3. It accordingly considers that the information supplied by the Council of Europe Commissioner for Human Rights concerning the length of proceedings (see paragraph 190 above), which the Government have not contradicted, is evidence that an appeal to the Supreme Administrative Court does not offset the lack of guarantees surrounding the examination of asylum applications on the merits. (c) Conclusion 321. In the light of the above, the preliminary objections raised by the Greek Government (see paragraph 283 above) cannot be accepted and the Court finds that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 because of the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he faces of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.

322. In view of that finding and of the circumstances of the case, the Court considers that there is no need for it to examine the applicant's complaints lodged under Article 13 taken in conjunction with Article 2.

IV. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION BY BELGIUM FOR EXPOSING THE APPLICANT TO THE RISKS ARISING FROM THE DEFICIENCIES IN THE ASYLUM PROCEDURE IN GREECE

323. The applicant alleged that by sending him to Greece under the Dublin Regulation when they were aware of the deficiencies in the asylum procedure in Greece and had not assessed the risk he faced, the Belgian authorities had failed in their obligations under Articles 2 and 3 of the Convention, cited above. A. The parties' submissions

1. The applicant

324. The applicant submitted that at the time of his expulsion the Belgian authorities had known that the asylum procedure in Greece was so deficient that his application for asylum had little chance of being seriously examined by the Greek authorities and that there was a risk of him being sent back to his country of origin. In addition to the numerous international reports already published at the time of his expulsion, his lawyer had clearly explained the situation regarding the systematic violation of the fundamental rights of asylum seekers in Greece. He had done this in support of the appeal lodged with the Aliens Appeals Board on 29 May 2009 and also in the appeal lodged with the Indictments Chamber of the Brussels Court of Appeal on 10 June 2009. The applicant considered that the Belgian authorities' argument that he could not claim to have

been a victim of the deficiencies in the Greek asylum system before coming to Belgium was irrelevant. In addition to the fact that formal proof of this could not be adduced in abstracto and before the risk had materialised, the Belgian authorities should have taken the general situation into account and not taken the risk of sending him back.

325. In the applicant's opinion, in keeping with what had been learnt from the case of T.I. (dec., cited above) the application of the Dublin Regulation did not dispense the Belgian authorities from verifying whether sufficient guarantees against refoulement existed in Greece, with regard to the deficiencies in the procedure or the policy of direct or indirect refoulement to Afghanistan. Without such guarantees and in view of the evidence adduced by the applicant, the Belgian authorities themselves should have verified the risk the applicant faced in his country of origin, in accordance with Articles 2 and 3 of the Convention and with the Court's case-law (in particular the case of NA. v. the United Kingdom, no. 25904/07, 17 July 2008). In this case, however, the Belgian Government had taken no precautions before deporting him. On the contrary, the decision to deport him had been taken solely on the basis of the presumption – by virtue of the tacit acceptance provided for in the Dublin Regulation – that the Greek authorities would honour their obligations, without any individual guarantee concerning the applicant. The applicant saw this as a systematic practice of the Belgian authorities, who had always refused and continued to refuse to apply the sovereignty clause in the Dublin Regulation and not transfer people to Greece.

2. The Belgian Government

326. The Government submitted that in application of the Dublin Regulation Belgium was not responsible for examining the applicant's request for asylum, and it was therefore not their task to examine the applicant's fears for his life and his physical safety in Afghanistan. The Dublin Regulation had been drawn up with due regard for the principle of non-refoulement enshrined in the Geneva Convention, for fundamental rights and for the principle that the Member States were safe countries. Only in exceptional circumstances, on a case-by-case basis, did Belgium avail itself of the derogation from these principles provided for in Article 3 § 2 of the Regulation, and only where the person concerned showed convincingly that he was at risk of being subjected to torture or inhuman or degrading treatment within the meaning of Article 3. Indeed, that approach was consistent with the Court's case-law, which required there to be a link between the general situation complained of and the applicant's individual situation (as in the cases of Sultani, cited above, Thampibillai v. the Netherlands, no. 61350/00, 17 February 2004, and Y. v. Russia, no. 20113/07, 4 December 2008).

327. The Belgian Government did not know in exactly what circumstances the sovereignty clause was used, as no statistics were provided by the Aliens Office, and when use was made of it no reasons were given for the decisions. However, in order to show that they did apply the sovereignty clause when the situation so required, the Government produced ten cases where transfers to the country responsible had been suspended for reasons related, by deduction, to the sovereignty clause. In half of those cases Poland was the country responsible for the applications, in two cases it was Greece and in the other cases Hungary and France. In seven cases the reason given was the presence of a family member in Belgium; in two, the person's health problems; and the last case concerned a minor. In the applicant's case Belgium had had no reason to apply the clause and no information showing that he had personally been a victim in Greece of treatment prohibited by Article 3. On the contrary, he had not told the Aliens Office that he had abandoned his asylum application or informed it of his complaints against Greece. Indeed, the Court itself had not considered it necessary to indicate an interim measure to the Belgian Government to suspend the applicant's transfer.

328. However, the Government pointed out that the order to leave the country had been issued based on the assurance that the applicant would not be sent back to Afghanistan without the merits of his complaints having been examined by the Greek authorities. Concerning access to the asylum procedure and the course of that procedure, the Government relied on the assurances given by the Greek authorities that they had finally accepted responsibility, and on the general information contained in the summary document drawn up by the Greek authorities and in the observations Greece had submitted to the Court in other pending cases. The Belgian authorities had noted, based on that information, that if an alien went through with an asylum application in Greece, the merits of the application would be examined on an individual basis, the asylum seeker could be assisted by a lawyer and an interpreter would be present at every stage of the proceedings. Remedies also existed, including an appeal to the Supreme Administrative Court. Accordingly, although aware of the possible deficiencies of the asylum system in Greece, the Government submitted that they had been sufficiently convinced of the efforts Greece was making to comply with Community law and its obligations in terms of human rights, including its procedural obligations.

329. As to the risk of refoulement to Afghanistan, the Government had also taken into account the assurances Greece had given the Court in K.R.S. v. the United Kingdom (dec. cited above) and the possibility for the applicant, once in Greece, to lodge an application with the Court and, if necessary, a request for the application of Rule 39. On the strength of these assurances, the Government considered that the applicant's transfer had not been in violation of Article 3.

B. Observations of the Governments of the Netherlands and the United Kingdom, and of the Office of the United Nations High Commissioner for Refugees, the Aire Centre and Amnesty International and the Greek Helsinki Monitor, intervening as third parties

330. According to the Government of the Netherlands, it did not follow from the possible deficiencies in the Greek asylum system that the legal protection afforded to asylum seekers in Greece was generally illusory, much less that the Member States should refrain from transferring people to Greece because in so doing they would be violating Article 3 of the Convention. It was for the Commission and the Greek authorities, with the logistical support of the other Member States, and not for the Court, to work towards bringing the Greek system into line with Community standards. The Government of the Netherlands therefore considered that they were fully assuming their responsibilities by making sure, through an official at their embassy in Athens, that any asylum seekers transferred would be directed to the asylum services at the international airport. In keeping with the Court's decision in K.R.S. (cited above), it was to be assumed that Greece would honour its international obligations and that transferees would be able to appeal to the domestic courts and subsequently, if necessary, to the Court. To reason otherwise would be tantamount to denying the principle of inter-State confidence on which the Dublin system was based, blocking the application of the Regulation by interim measures, and questioning the balanced, nuanced approach the Court had adopted, for example in its judgment in the case of Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC] (no. 45036/98, ECHR 2005 VI), in assessing the responsibility of the States when they applied Community law.

331. The Government of the United Kingdom emphasised that the Dublin Regulation afforded a fundamental advantage in speeding up the examination of applications, so that the persons concerned did not have time to develop undue social and cultural ties in a State. That being so, it should be borne in mind that calling to account under Article 3 the State responsible for the asylum application prior to the transfer, as in the present case, was bound to slow down the whole process no end. The Government of the United Kingdom were convinced that such complaints, which were understandable in cases of expulsion to a State not bound by the Convention, should be avoided when the State responsible for handling the asylum application was a party to the Convention. In such cases, as the Court had found in K.R.S. decision (cited above), the normal interpretation of the Convention would mean the interested parties lodging their complaints with the courts in the State responsible for processing the asylum application and subsequently, perhaps, to the Court. According to the United Kingdom Government, this did not absolve the transferring States of their responsibility for potential violations of the Convention, but it meant that their responsibility could be engaged only in wholly exceptional circumstances where it was demonstrated that the persons concerned would not have access to the Court in the State responsible for dealing with the asylum application. No such circumstances were present in the instant case, however.

332. In the opinion of the UNHCR, as they had already stated in their report published in April 2008, asylum seekers should not be transferred when, as in the present case, there was evidence that the State responsible for processing the asylum application effected transfers to high-risk countries, that the persons concerned encountered obstacles in their access to asylum procedures, to the effective examination of their applications and to an effective remedy, and where the conditions of reception could result in a violation of Article 3 of the Convention. Not transferring asylum seekers in these conditions was provided for in the Dublin Regulation itself and was fully in conformity with Article 33 of the Geneva Convention and with the Convention. The UNHCR stressed that this was not a theoretical possibility and that, unlike in Belgium, the courts in certain States had suspended transfers to Greece for the above-mentioned reasons. In any event, as the Court had clearly stated in the case of T.I. (dec. cited above), each Contracting State remained responsible under the Convention for not exposing people to treatment contrary to Article 3 through the automatic application of the Dublin system.

333. The Aire Centre and Amnesty International considered that in its present form, without a clause on the suspension of transfers to countries unable to honour their international obligations in asylum matters, the Dublin Regulation exposed asylum seekers to a risk of refoulement in breach of the Convention and the Geneva Convention. They pointed out considerable disparities in the way European Union Member States applied the Regulation and the domestic courts assessed the lawfulness of the transfers when it came to evaluating the risk of violation of fundamental rights, in particular when the State responsible for dealing with the asylum application had not properly transposed the other Community measures relating to asylum. The Aire Centre and Amnesty International considered that States which transferred asylum seekers had their share of responsibility in the way the receiving States treated them, in so far as they could prevent human rights violations by availing themselves of the sovereignty clause in the Regulation. The possibility for the European Commission to take action against the receiving State for failure to honour its obligations was not, in their opinion, an effective remedy against the violation of the asylum seekers' fundamental rights. Nor were they convinced, as the CJEU had not pronounced itself on the lawfulness of Dublin transfers when they could lead to such violations, of the efficacy of the preliminary question procedure introduced by the Treaty of Lisbon.

334. GHM pointed out that at the time of the applicant's expulsion there had already been a substantial number of documents attesting to the deficiencies in the asylum procedure, the conditions in which asylum seekers were received and the risk of direct or indirect refoulement to Turkey. GHM considered that the Belgian authorities could not have been unaware of this, particularly as the same documents had been used in internal procedures to order the suspension of transfers to Greece. According to GHM, the documents concerned, particularly those of the UNHCR, should make it possible to reverse the Court's presumption in K.R.S. (dec. cited above) that Greece fulfilled its international obligations in asylum matters.

C. The Court's assessment

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340. The Court concludes that, under the Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention. Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations. Accordingly, the presumption of equivalent protection does not apply in this case.

3. Merits of the complaints under Articles 2 and 3 of the Convention

(a) The T.I. and K.R.S. decisions

341. In these two cases the Court had the opportunity to examine the effects of the Dublin Convention, then the Dublin Regulation with regard to the Convention.

342. The case of T.I. (dec., cited above) concerned a Sri Lankan national who had unsuccessfully sought asylum in Germany and had then submitted a similar application in the United Kingdom. In application of the Dublin Convention, the United Kingdom had ordered his transfer to Germany In its decision the Court considered that indirect removal to an intermediary country, which was also a Contracting Party, left the responsibility of the transferring State intact, and that State was required, in accordance with the well-established case-law, not to deport a person where substantial grounds had been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. Furthermore, the Court reiterated that where States cooperated in an area where there might be implications as to the protection of fundamental rights, it would be incompatible with the purpose and object of the Convention if they were absolved of all responsibility vis-à-vis the Convention in the area concerned (see, among other authorities, Waite and Kennedy v. Germany [GC], no. 26083/94, § 67, ECHR 1999-I). When they apply the Dublin Regulation, therefore, the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention. Although in the T. I. case the Court rejected the argument that the fact that Germany was a party to the Convention absolved the United Kingdom from verifying the fate that awaited an asylum seeker it was about to transfer to that country, the fact that the asylum procedure in Germany apparently complied with the Convention, and in particular Article 3, enabled the Court to reject the allegation that the applicant's removal to Germany would make him run a real and serious risk of treatment contrary to that Article. The Court considered that there was no reason in that particular case to believe that Germany would have failed to honour its obligations under Article 3 of the Convention and protect the applicant from removal to Sri Lanka if he submitted credible arguments demonstrating that he risked ill-treatment in that country.

343. That approach was confirmed and developed in the K.R.S. decision (cited above). The case concerned the transfer by the United Kingdom authorities, in application of the Dublin Regulation, of an Iranian asylum seeker to Greece, through which country he had passed before arriving in the United Kingdom in 2006. Relying on Article 3 of the Convention, the applicant complained of the deficiencies in the asylum procedure in Greece and the risk of being sent back to Iran without the merits of his asylum application being examined, as well as the reception reserved for asylum seekers in Greece. After having confirmed the applicability of the T.I. case-law to the Dublin Regulation (see also on this point Stapleton v. Ireland (dec.), no. 56588/07, § 30, ECHR 2010-...), the Court considered that in the absence of proof to the contrary it must assume that Greece complied with the obligations imposed on it by the Community directives laying down minimum standards for asylum procedures and the reception of asylum seekers, which had been transposed into Greek law, and that it would comply with Article 3 of the Convention. In the Court's opinion, in view of the information available at the time to the United Kingdom Government and the Court, it was possible to assume that Greece was complying with its obligations and not sending anybody back to Iran, the applicant's country of origin. Nor was there any reason to believe that persons sent back to Greece under the Dublin Regulation, including those whose applications for asylum had been rejected by a final decision

of the Greek authorities, had been or could be prevented from applying to the Court for an interim measure under Rule 39 of the Rules of Court. (b) Application of these principles to the present case

344. The Court has already stated its opinion that the applicant could arguably claim that his removal to Afghanistan would violate Article 2 or Article 3 of the Convention (see paragraphs 296- 297 above).

345. The Court must therefore now consider whether the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters, in spite of the K.R.S. case-law, which the Government claimed the administrative and judicial authorities had wanted to follow in the instant case.

346. The Court disagrees with the Belgian Government's argument that, because he failed to voice them at his interview, the Aliens Office had not been aware of the applicant's fears in the event of his transfer back to Greece at the time when it issued the order for him to leave the country.

347. The Court observes first of all that numerous reports and materials have been added to the information available to it when it adopted its K.R.S. decision in 2008. These reports and materials, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect refoulement on an individual or a collective basis.

348. The authors of these documents are the UNHCR and the Council of Europe Commissioner for Human Rights, international non-governmental organisations like Amnesty International, Human Rights Watch, Pro-Asyl and the European Council on Refugees and Exiles, and non-governmental organisations present in Greece such as Greek Helsinki Monitor and the Greek National Commission for Human Rights (see paragraph 160 above). The Court observes that such documents have been published at regular intervals since 2006 and with greater frequency in 2008 and 2009, and that most of them had already been published when the expulsion order against the applicant was issued.

349. The Court also attaches critical importance to the letter sent by the UNHCR in April 2009 to the Belgian Minister in charge of immigration. The letter, which states that a copy was also being sent to the Aliens Office, contained an unequivocal plea for the suspension of transfers to Greece (see paragraphs 194 and 195 above).

350. Added to this is the fact that since December 2008 the European asylum system itself has entered a reform phase and that, in the light of the lessons learnt from the application of the texts adopted during the first phase, the European Commission has made proposals aimed at substantially strengthening the protection of the fundamental rights of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights (see paragraphs 77-79 above).

351. Furthermore, the Court notes that the procedure followed by the Aliens Office in application of the Dublin Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece. The form the Aliens Office filled in contains no section for such comments (see paragraph 130 above).

352. In these conditions the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.

353. The Belgian Government argued that in any event they had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see, mutatis mutandis, Saadi v. Italy [GC], no. 37201/06, § 147, ECHR 2008-...).

354. The Court is also of the opinion that the diplomatic assurances given by Greece to the Belgian authorities did not amount to a sufficient guarantee. It notes first of all that the agreement to take responsibility in application of the Dublin Regulation was sent by the Greek authorities after the order to leave the country had been issued, and that the expulsion order had therefore been issued solely on the basis of a tacit agreement by the Greek authorities. Secondly, it notes that the agreement document is worded in stereotyped terms (see paragraph 24 above) and contains no guarantee concerning the applicant in person. No more did the information document the Belgian Government mentioned, provided by the Greek authorities, contain any individual guarantee; it merely referred to the applicable legislation, with no relevant information

about the situation in practice.

355. The Court next rejects the Government's argument that the Court itself had not considered it necessary to indicate an interim measure under Rule 39 to suspend the applicant's transfer. It reiterates that in cases such as this, where the applicant's expulsion is imminent at the time when the matter is brought to the Court's attention, it must take an urgent decision. The measure indicated will be a protective measure which on no account prejudges the examination of the application under Article 34 of the Convention. At this stage, when an interim measure is indicated, it is not for the Court to analyse the case in depth – and indeed it will often not have all the information it needs to do so (see, mutatis mutandis, Paladi v. Moldova [GC], no. 39806/05, § 89, ECHR 2009-...). In the instant case, moreover, the letters sent by the Court clearly show that, fully aware of the situation in Greece, it asked the Greek Government to follow the applicant's case closely and to keep it informed (see paragraphs 32 and 39, above). #

356. The respondent Government, supported by the third-party intervening Governments, lastly submitted that asylum seekers should lodge applications with the Court only against Greece, after having exhausted the domestic remedies in that country, if necessary requesting interim measures.

357. While considering that this is in principle the most normal course of action under the Convention system, the Court deems that its analysis of the obstacles facing asylum seekers in Greece clearly shows that applications lodged there at this point in time are illusory. The Court notes that the applicant is represented before it by the lawyer who defended him in Belgium. Considering the number of asylum applications pending in Greece, no conclusions can be drawn from the fact that some asylum seekers have brought cases before the Court against Greece. In this connection it also takes into account the very small number of Rule 39 requests for interim measures against Greece lodged by asylum seekers in that country, compared with the number lodged by asylum seekers in the other States.

358. In the light of the foregoing, the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.

359. The Government argued that the applicant had not sufficiently individualised, before the Belgian authorities, the risk of having no access to the asylum procedure and being sent back by the Greek authorities. The Court considers, however, that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable (see, mutatis mutandis, Saadi, cited above, § 132).

(c) Conclusion

360. Having regard to the above considerations, the Court finds that the applicant's transfer by Belgium to Greece gave rise to a violation of Article 3 of the Convention. 361. Having regard to that conclusion and to the circumstances of the case, the Court finds that there is no need to examine the applicant's complaints under Article 2.

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY BELGIUM FOR EXPOSING THE APPLICANT TO CONDITIONS OF DETENTION AND LIVING CONDITIONS CONTRARY TO ARTICLE 3

362. The applicant alleged that because of the conditions of detention and existence to which asylum seekers were subjected in Greece, by returning him to that country in application of the Dublin Regulation the Belgian authorities had exposed him to treatment prohibited by Article 3 of the Convention, cited above.

....

365. On the merits, the Court reiterates that according to its well-established case-law the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see Soering v. the United Kingdom, judgment of 7 July 1989, Series A no. 161, §§ 90-91; Vilvarajah and Others v. the United Kingdom, judgment of 30 October 1991, Series A no. 125, § 103; H.L.R. v. France, judgment of 29 April 1997, Reports 1997-III, § 34; Jabari cited above, § 38; Salah Sheekh v. the Netherlands, no. 1948/04, § 135, ECHR 2007-I (extracts), no. 1948/04; and Saadi, cited above, § 152). 366. In the instant case the Court has already found the applicant's conditions of detention and living conditions in Greece degrading

(see paragraphs 233, 234, 263 and 264 above). It notes that these facts were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources (see paragraphs 162-164 above). It also wishes to emphasise that it cannot be held against the applicant that he did not inform the Belgian administrative authorities of the reasons why he did not wish to be transferred to Greece. It has established that the procedure before the Aliens Office made no provision for such explanations and that the Belgian authorities applied the Dublin Regulation systematically (see paragraph 352 above).

367. Based on these conclusions and on the obligations incumbent on the States under Article 3 of the Convention in terms of expulsion, the Court considers that by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment. 368. That being so, there has been a violation of Article 3 of the Convention. .....

FOR THESE REASONS, THE COURT

1. Joins to the merits, by sixteen votes to one, the preliminary objections raised by the Greek Government and rejects them;

2. Declares admissible, unanimously, the complaint under Article 3 of the Convention concerning the conditions of the applicant's detention in Greece;

3. Holds, unanimously, that there has been a violation by Greece of Article 3 of the Convention because of the applicant's conditions of detention;

4. Declares admissible, by a majority, the complaint under Article 3 of the Convention concerning the applicant's living conditions in Greece;

5. Holds, by sixteen votes to one, that there has been a violation by Greece of Article 3 of the Convention because of the applicant's living conditions in Greece;

6. Declares admissible, unanimously, the complaint against Greece under Article 13 taken in conjunction with Article 3 of the Convention;

7. Holds, unanimously, that there has been a violation by Greece of Article 13 taken in conjunction with Article 3 of the Convention because of the deficiencies in the asylum procedure followed in the applicant's case and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy;

8. Holds, unanimously, that there is no need to examine the applicant's complaints under Article 13 taken in conjunction with Article 2 of the Convention;

9. Joins to the merits, unanimously, the preliminary objection raised by the Belgian Government, rejects it and declares admissible, unanimously, the complaints lodged against Belgium;

10. Holds, by sixteen votes to one, that there has been a violation by Belgium of Article 3 of the Convention because, by sending him back to Greece, the Belgian authorities exposed the applicant to risks linked to the deficiencies in the asylum procedure in that State;

11. Holds, unanimously, that there is no need to examine the applicant's complaints under Article 2 of the Convention;

12. Holds, by fifteen votes to two, that there has been a violation by Belgium of Article 3 of the Convention because, by sending him back to Greece, the Belgian authorities exposed the applicant to detention and living conditions in that State that were in breach of that Article;

13. Holds, unanimously, that there has been a violation by Belgium of Article 13 taken in conjunction with Article 3 of the Convention;

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 January 2011. Michael O'Boyle Jean-Paul Costa Deputy Registrar President In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment: (a) Concurring opinion of Judge Rozakis; (b) Concurring opinion of Judge Villiger; (c) Partly concurring and partly dissenting opinion of Judge Sajó; (d)

CONCURRING OPINION OF JUDGE ROZAKIS

I have voted, with the majority, to find a violation on all counts concerning Greece, and am fully in agreement with the reasoning leading to the violations. Still, I would like to further emphasise two points, already mentioned in the judgment, to which I attach particular importance. The first point concerns the Court's reference to the considerable difficulties that States forming the European external borders are currently experiencing “in coping with the increasing influx of migrants and asylum seekers”. This statement, which is analysed and elaborated further in paragraph 223 of the judgment, correctly describes the general situation which prevails in many northern Mediterranean coastal countries. However, in the case of Greece, with its extensive northern borders but also a considerable maritime front, the migratory phenomenon has acquired a truly dramatic dimension in recent years. Statistics clearly show that the great majority of foreign immigrants – mainly of Asian origin – attempt to enter Europe through Greece, and either settle there or move on to seek a new life in other European countries.

As it has alreadly been stated, almost 88 % of the immigrants (and among them asylum seekers) entering the European Union today cross the Greek borders to land in our continent. In these circumstances it is clear that European Union immigration policy – including Dublin II – does not reflect the present realities, or do justice to the disproportionate burden that falls to the Greek immigration authorities. There is clearly an urgent need for a comprehensive reconsideration of the existing European legal regime, which should duly take into account the particular needs and constraints of Greece in this delicate domain of human rights protection.

The second point concerns the Court's reference to the applicant's living conditions while in Greece, and the finding of a violation of Article 3 of the Convention. In paragraph 249 of the judgment the Court considered it necessary “to point out that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home. Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living”. However, as the Court rightly points out, in the circumstances of the case “the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law” (paragraph 250).

What the Court meant by “positive law” is duly explained in paragraph 251, where it referred to the “existence of a broad consensus at the international and European level concerning [the need for special protection of asylum seekers as a particularly underprivileged and vulnerable population group], as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive”. Indeed this last European document clearly requires that the European Union's members guarantee asylum seekers “certain material reception conditions, including accommodation, food and clothing, in kind or in the form of monetary allowances. The allowances must be sufficient to protect the asylum seekers from extreme need”.

The existence of those international obligations of Greece – and notably, vis-à-vis the European Union – to treat asylum seekers in conformity with these requirements weighed heavily in the Court's decision to find a violation of Article 3. The Court has held on numerous occasions that to fall within the scope of Article 3 ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative and it depends on all the circumstances of the case (such as the duration of the treatment, its physical and mental effects and, in some instances, the sex, age and state of health of the victim). In the circumstances of the present case the combination of the long duration of the applicant's treatment, coupled with Greece's international obligation to treat asylum seekers in accordance with what the judgment calls current positive law, justifies the distinction the Court makes between treatment endured by other categories of people – where Article 3 has not been found to be transgressed – and the treatment of an asylum seeker, who clearly enjoys a particularly advanced level of protection.

.....PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SAJÓ

I welcome most of the expected consequences of this judgment, namely the hoped-for improvements in the management of asylum proceedings under the Dublin system. It is therefore to my sincere regret that I have to dissent on a number of points. My disagreements are partly of a technical nature.

While I agree with the finding that Article 13 was violated as no effective remedy was available in Greece against a potential violation of Article 3, I find that the applicant cannot be regarded a victim in the sense of Article 34 of the Convention as far as the conditions of his stay in Greece are concerned, and also in regard to the deficiencies in the asylum procedure there. I agree with the Court that there was a violation regarding the conditions of his detention, but on slightly different grounds. I dissent as to the finding that Belgium is in violation of Article 3 of the Convention for returning the applicant into detention in Greece.

.....III. ALLEGED VIOLATION BY GREECE OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE SHORTCOMINGS IN THE ASYLUM PROCEDURE AND THE SUBSEQUENT RISK OF REFOULEMENT

I found that the applicant lacked victim status regarding his stay in Greece during the asylum procedure. It therefore needs some explanation why I find that the applicant has standing regarding the risks of refoulement. Contrary to the Court, I do not find convincing the information that there is forced refoulement to Afghanistan (paragraph 314). At the material time (2009), referring to the Court's judgment in K.R.S. v. the United Kingdom, the UNCHR did not consider that the danger of refoulement existed in Greece (paragraph 195).7 However, the Government's policy may change in this regard. Only a system of proper review of an asylum request and/or deportation order with suspensive effect satisfies the needs of legal certainty and protection required in such matters. Because of the shortcomings of the procedure in Greece, as described in paragraph 320, the applicant remains without adequate protection, irrespective of his non-participation in the asylum procedure, irrespective of his contribution to the alleged humiliation due to the deficiencies of the asylum procedure, and irrespective of the present risk of refoulement. For this reason the measure required by Judge Villiger should apply.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY BELGIUM FOR EXPOSING THE APPLICANT TO CONDITIONS OF DETENTION AND LIVING CONDITIONS CONTRARY TO ARTICLE 3

For the Court, the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. I agree that Belgium had enough information to foresee that the Greek asylum procedure did not offer sufficient safeguards against the humiliation inherent in this inefficient procedure, which was the basis for the finding of a violation of Article 3 in that regard (paragraph 360). (Here again, I find the living-conditions-based considerations irrelevant.) I could not come to the same conclusion regarding the applicant's detention. It was not foreseeable that the applicant would be detained, or for how long. The detention of transferred asylum seekers is not mandatory and there is no evidence in the file that such a practice is followed systematically. Even if one could not rule out that at the beginning of the asylum process, in the event of illegal entry, some restriction of liberty might occur, the Belgian State could not have foreseen that the applicant would not be placed in a section of the Airport Detention Centre that might have been considered satisfactory, at least for a short stay, and was designed to handle people in a situation comparable to that of the applicant. The Belgian State could certainly not have foreseen that the applicant would attempt to leave Greece illegally, for which he was again detained in one of the sections of the Airport Detention Centre and sentenced to two months imprisonment. It is for this same reason that I found the sum Belgium was ordered to pay in respect of non-pecuniary damage excessive.

V. ALLEGED VIOLATION BY BELGIUM OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE LACK OF AN EFFECTIVE REMEDY AGAINST THE EXPULSION ORDER

The applicant was ordered to leave Belgium and detained on 19 May 2009, and on 27 May 2009 the departure date was set for 29 May. There was enough time to organise adequate representation (the lawyer made an application only after studying the file for 3 days) and to take proper legal action. (However, the Aliens Appeals Board dismissed his application, while his personal appearance was hindered by his detention.) Appeals could be lodged with the Aliens Appeals Board at any time, round the clock and with suspensive effect. The Court had confirmed the effectiveness of the procedure in the case of Quraishi v. Belgium (application no. 6130/08, decision of 12 May 2009). In the present case the Court evaluates only the impossibility for the applicant's lawyer to get to the hearing. For these reasons, I cannot follow the Court's conclusion in paragraph 392. Nevertheless, I agree with the Court that there is a systemic problem in the Belgian deportation procedure resulting in the violation of Article 13. While the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant, the lack of any prospect of obtaining adequate redress in Belgian courts (paragraph 394) is decisive under Article 13. This in itself is sufficient for the finding of a violation.

PARTLY DISSENTING OPINION OF JUDGE BRATZA

1. It is with regret that I find myself in disagreement with the other judges of the Grand Chamber in their conclusion that Belgium violated Article 3 of the Convention by returning the applicant to Greece in June 2009. I could readily accept that, if Belgium or any other Member State were, in the light of the Court's findings in the present judgment as to the risk of refoulement in Greece and the conditions of detention and living conditions of asylum seekers there, forcibly to return to Greece an individual from a “suspect” country of origin such as Afghanistan, it would violate Article 3 even in the absence of an interim measure being applied by the Court. What I cannot accept is the majority's conclusion that the situation in Greece and the risks posed to asylum seekers there were so clear some 18 months ago as to justify the serious finding that Belgium

violated Article 3, even though the Court itself had found insufficient grounds at that time to apply Rule 39 of the Rules of Court to prevent the return to Greece of the applicant and many others in a similar situation. The majority's conclusion appears to me to pay insufficient regard to the unanimous decision of the Court concerning the return of asylum seekers to Greece under the Dublin Regulation in the lead case of K.R.S. v. the United Kingdom, which was delivered in December 2008, less than 6 months prior to the return of the present applicant, and which has been relied on not only by national authorities but by the Court itself in rejecting numerous requests for interim measures.

2. As was noted in the K.R.S. decision itself, the Court had received, in the light of the UNHCR position paper of 15 April 2008, an increasing number of Rule 39 requests from applicants in the United Kingdom who were to be removed to Greece: between 14 May and 16 September 2008 the Acting President of the Section responsible had granted interim measures in a total of 80 cases. The Court's principal concern related to the risk that asylum seekers from "suspect" countries – in the K.R.S. case itself, Iran – would be removed from Greece to their country of origin without having had the opportunity to make an effective asylum claim to the domestic authorities or, should the need arise, an application to the Court under Rule 39. To this end, the Court sought and obtained certain assurances from the Greek authorities through the United Kingdom Government. These included assurances that no asylum seeker was returned by Greece to such countries as Afghanistan, Iraq, Iran, Somalia, Sudan or Eritrea even if his asylum application was rejected by the Greek authorities; that no asylum applicant was expelled from Greece unless all stages of the asylum procedure were completed and all the legal rights for review had been exhausted, according to the provisions of the Geneva Convention; and that an asylum seeker had a right to appeal against any expulsion decision made and to apply to the Court for a Rule 39 indication.

3. The Court in the K.R.S. decision also took express account of reports and other evidential material before it, including: (i) the judgment of the Court of Justice of the European Communities ("the ECJ") of 19 April 2007 in Commission v. Greece, in which the ECJ found that Greece had failed to implement Council Directive 2003/9/EC, laying down minimum standards for the reception of asylum seekers: the Directive was subsequently transposed into Greek law in November 2007; (ii) a report of the Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment ("the CPT") dated 8 February 2008 in which the CPT published its findings on a visit to Greece in February 2007. Having reviewed the conditions of detention for asylum seekers, the CPT made a series of recommendations concerning the detention and treatment of detainees, including a revision of occupancy rules so as to offer a minimum of 4 square metres of space per detainee, unimpeded access to toilet facilities and the provision of products and equipment for personal hygiene. The CPT also found the staffing arrangements in the detention facilities to be totally inadequate and directed that proper health care services be provided to detainees; (iii) a report of Amnesty International of 27 February 2008, entitled "No place for an asylum seeker in Greece", which described the poor conditions in which immigration detainees were held in that country and the lack of legal guarantees with regard to the examination of their asylum claims, particularly the conduct of interviews in the absence of an interpreter or lawyer. While noting that Greece did not return persons to Afghanistan, the report criticised Greece for failing to process their applications in a prompt, fair way, leaving them without legal status and therefore without legal rights; (iv) a report of 9 April 2008 of the Norwegian Organisation for Asylum Seekers, Norwegian Helsinki Committee and Greek Helsinki Monitor recording, inter alia, the keeping of asylum seekers in Greece in police custody; the very limited resources in the country for handling asylum applications; the lack of legal assistance for asylum seekers; the very small number of residence permits granted; the inadequate number of reception centre places; and the small number of police officers assigned to interview more than 20,000 asylum seekers arriving in Greece in the course of a year and the short and superficial nature of the asylum interviews; (v) the position paper of the UNHCR of 15 April 2008, advising Member States of the European Union to refrain from returning asylum seekers from Greece under the Dublin Regulation until further notice. The position paper criticised the reception procedures for "Dublin returnees" at Athens Airport and at the central Police Asylum Department responsible for registering asylum applications. The paper characterised the percentage of asylum seekers who were granted refugee status in Greece as "disturbingly low" and criticised the quality of asylum decisions. Concern was further expressed about the extremely limited reception facilities for asylum seekers and the lack of criteria for the provision of a daily financial allowance.

4. In its decision in K.R.S. the Court recalled its ruling in T.I. v. the United Kingdom to the effect that removal of an individual to an intermediary country which was also a Contracting State did not affect the responsibility of the returning State to ensure that the person concerned was not, as a result of the decision to expel, exposed to treatment contrary to Article 3 of the Convention. In this regard, the Court noted the concerns expressed by the UNHCR and shared by the various Non-Governmental Organisations and attached weight to the fact that, in recommending that parties to the Dublin Regulation should refrain from returning asylum seekers to Greece, the UNHCR believed that the prevalent situation in Greece called into question whether "Dublin returnees" would have access to an effective remedy as foreseen by Article 13 of the Convention.

5. Despite these concerns, the Court concluded that the removal of the applicant to Greece would not violate Article 3 of the Convention. In so finding, the Court placed reliance on a number of factors: (i) On the evidence before the Court, which included the findings of the English Court of Appeal in the case of R. (Nasseri) v. the Secretary of State for the Home Department, Greece did not remove individuals to Iran, Afghanistan, Iraq, Somalia or Sudan and there was accordingly no risk that the applicant would be removed to Iran on his arrival in Greece. (ii) The Dublin Regulation was one of a number of measures agreed in the field of asylum policy at European Union level and had to be considered alongside European Union Member States' additional obligations under the two Council Directives to adhere to minimum standards in asylum procedures and to provide minimum standards for the reception of asylum seekers. The presumption had to be that Greece would abide by its obligations under those Directives. In this connection, note had to be taken of the new legislative framework for asylum applications introduced in Greece and referred to in the letter provided to the Court by the Greek Government. (iii) There was nothing to suggest that those returned to Greece under the Dublin Regulation ran the risk of onward removal to a third country where they would face ill-treatment contrary to Article 3 without being afforded a real opportunity, on the territory of Greece, of applying to the Court for a Rule 39 measure to prevent such removal. Assurances had been obtained from the Greek Dublin Unit that asylum applicants in Greece had a right of appeal against any expulsion decision and to seek interim measures from the Court under Rule 39. There was nothing in the materials before the Court which would suggest that Dublin returnees had been or might be prevented from applying for interim measures on account of the timing of their onward removal or for any other reason. (iv) Greece, as a Contracting State, had undertaken to abide by its Convention obligations and to secure to everyone within its jurisdiction the rights and freedoms defined therein, including those guaranteed by Article 3: in concrete terms, Greece was required to make the right of any returnee to lodge an application with the Court under Article 34 of the Convention both practical and effective. In the absence of any proof to the contrary, it had to be presumed that Greece would comply with that obligation in respect of returnees, including the applicant. (v) While the objective information before the Court on conditions of detention in Greece was of serious concern, not least given Greece's obligations under Council Directive 2003/9/EC and Article 3 of the Convention, should any claim arise from these conditions, it could and should be pursued first with the Greek domestic authorities and thereafter in an application to the Court. In consequence of the Court's decision in K.R.S., the interim measures under Rule 39 which had been applied by the Court pending the decision in that case were lifted.

6. Whether or not, with the benefit of hindsight, the K.R.S. case should be regarded as correctly decided by the Court, Member States concerned with the removal of persons to Greece under the Dublin Regulation were, in my view, legitimately entitled to follow and apply the decision in the absence of any clear evidence of a change in the situation in Greece which had been the subject of examination by the Court or in the absence of special circumstances affecting the position of the particular applicant. It is apparent that the K.R.S. case was applied by national authorities as a recent and authoritative decision on the compatibility with the Convention of returns to Greece, more particularly by the House of Lords in the Nasseri case, in which judgment was delivered on 6 May 2009. The decision was also expressly relied on by the Aliens Office in Belgium in rejecting the present applicant's request for asylum.

7. The majority of the Grand Chamber take the view that, as a result of developments before and since the K.R.S. case, the presumption that the Greek authorities would respect their international obligations in asylum matters should have been treated as rebutted by the Belgian authorities in June 2009. It is noted in the judgment that numerous reports and materials have been added to the information which was available to the Court when it adopted its K.R.S. decision, which agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedures in that country and the practice of direct or indirect refoulement on an individual or collective basis. These reports, it is said, have been published at regular intervals since 2006 “and with greater frequency in 2008 and 2009 and ... most of them had already been published when the expulsion order against the applicant was issued” (paragraph 348). In this regard “critical importance” is attached in the judgment to the letter of 2 April 2009 addressed to the Belgian Immigration Minister which contained “an unequivocal plea for the suspension of transfers to Greece” (paragraph 349). Reliance is also placed on the fact that, since December 2008, the European asylum system has itself entered a “reform phase” aimed at strengthening the protection of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights.

8. I am unpersuaded that any of the developments relied on in the judgment decision should have led the Belgian authorities in June 2009 to treat the decision as no longer authoritative or to conclude that the return of the applicant would violate Article 3. As to the reports and other materials dating back to the years 2006, 2007 and 2008, while the material may be regarded as adding to the detail or weight of the information which had already been taken into account by the Court, it did not in my view change the substantive content of that information or otherwise affect the Court's reasoning in the K.R.S.

decision. Moreover, I have difficulty in seeing how it can be held against the Belgian authorities that they failed to take account of material which was already in the public domain at the time of the K.R.S. decision itself.

9. I have similar difficulty in seeing how, in June 2009, the presumption of Greek compliance which the Court had found to exist in December 2008 could be rebutted by the numerous reports and other information which became available in the second half of 2009 and in 2010. The graphic detail in those reports and in the powerful submissions to the Court by the Council of Europe Commissioner of Human Rights and the UNHCR as to the living conditions for asylum seekers in Greece, the grave deficiencies in the system of processing asylum applications in that country and the risk of onward return to Afghanistan, unquestionably provide a solid basis today on which to treat the presumption of compliance as rebutted. But this material post-dates the decision of the Belgian authorities to return the applicant and cannot in my view be prayed in aid as casting doubt on the validity of the K.R.S. decision at that time.

10. The same I consider applies to the majority's reliance on the proposal to modify the Dublin system by providing for a mechanism to suspend transfers, which proposal had not been adopted by the Commission or Council or implemented at the time of the applicant's return to Greece. The proposal has still not been adopted at the present day.

11. The letter of the UNHCR of April 2009 is clearly a document of some importance, coming as it did from an authority whose independence and objectivity are beyond doubt. The letter noted that, although the Court in K.R.S. had decided that the transfer of asylum seekers to Greece did not present a risk of refoulement under Article 3, the Court had not given judgment on compliance by Greece with its obligations under international law on refugees. The letter went on to express the belief of the UNHCR that it was still not the case that the reception of asylum seekers in Greece complied with human rights standards or that asylum seekers had access to fair consideration of their asylum applications or that refugees were effectively able to exercise their rights under the Geneva Convention. The UNHCR concluded the letter by maintaining its assessment of the Greek asylum system and the recommendation which had been formulated in its position paper in April 2008, which had been expressly taken into account by the Court in its K.R.S. decision. Significant as the letter may be, it provides to my mind too fragile a foundation for the conclusion that the Belgian authorities could no longer rely on the K.R.S. decision or that the return of the applicant to Greece would violate his rights under Article 3 of the Convention.

12. The diplomatic assurances given by Greece to the Belgian authorities are found in the judgment not to amount to a sufficient guarantee since the agreement of Greece to take responsibility for receiving the applicant under the Dublin Regulation was sent after the order to leave Belgium had been issued and since the agreement document was worded in stereotyped terms and contained no guarantee concerning the applicant in person. It is true that the assurances of the kind sought by the United Kingdom authorities in the K.R.S. case after interim measures had been applied and after specific questions had been put by the Court to the respondent Government, were not sought by the Belgian authorities in the present case. However, the assurances given in K.R.S. were similarly of a general nature and were not addressed to the individual circumstances of the applicant in the case. Moreover, there was no reason to believe in June 2009 that the general practice and procedures in Greece, which had been referred to in the assurances and summarised in the K.R.S. decision, had changed or were no longer applicable. In particular, there was not at that time any evidence that persons were being directly or indirectly returned by Greece to Afghanistan in disregard of the statements relied on by the Court in K.R.S. Such evidence did not become available until August 2009, when reports first emerged of persons having been forcibly returned from Greece to Afghanistan on a recent flight, leading the Court to reapply Rule 39 in the case of the return of Afghan asylum seekers to Greece.

13. It is indeed the Court's practice prior to August 2009 with regard to interim measures in the case of returns to Greece to which I attach particular importance in the present case. The majority of the Grand Chamber are dismissive of the respondent Government's argument that the Court itself had not considered it necessary to suspend the applicant's transfer to Greece by applying Rule 39. It is pointed out that interim measures do not prejudge the examination of an application under Article 34 of the Convention and that, at the stage when interim measures are applied for, the Court is required to take an urgent decision, often without the material with which to analyse the claim in depth.

14. I can accept that a State is not absolved from its responsibility under the Convention in returning an individual to a country where substantial grounds exist for believing that he faces a real risk of ill-treatment in breach of Article 3 by the mere fact that a Rule 39 application has not been granted by the Court. The role of the Court on any such application is not only different from that of national immigration authorities responsible for deciding on the return of the person concerned but is one which is frequently carried out under pressure of time and on the basis of inadequate information. Nevertheless, the refusal of the Rule 39 application in the present case is not, I consider, without importance. I note, in particular, that it is acknowledged in the judgment (paragraph 355) that, at the time of refusing the application, the Court was “fully aware of the situation in Greece”, as evidenced by its request to the Greek Government in its letter of 12 June 2009 to follow the

applicant's case closely and to keep it informed. I also note that in that letter it was explained that it had been decided not to apply Rule 39 against Belgium, “considering that the applicant's complaint was more properly made against Greece” and that the decision had been “based on the express understanding that Greece, as a Contracting State, would abide by its obligations under Articles 3, 13 and 34 of the Convention”. However, of even greater significance in my view than the Court's refusal to apply Rule 39 in the present case, is the general practice followed by the Court at the material time in the light of its K.R.S. decision. Not only did the Court (in a decision of a Chamber or of the President of a Chamber) lift the interim measures in the numerous cases in which Rule 39 had been applied prior to that decision, but, in the period until August 2009, it consistently declined the grant of interim measures to restrain the return of Afghan asylum seekers to Greece in the absence of special circumstances affecting the individual applicant. In the period between 1 June and 12 August 2009 alone, interim measures were refused by the Court in 68 cases of the return of Afghan nationals to Greece from Austria, Belgium, Denmark, France, the Netherlands, Sweden and the United Kingdom. I find it quite impossible in these circumstances to accept that Belgium and other Member States should have known better at that time or that they were not justified in placing the same reliance on the Court's decision in K.R.S. as the Court itself.

15. For these reasons, I am unable to agree with the majority of the Grand Chamber that, by returning the applicant to Greece in June 2009, Belgium was in violation of Article 3 of the Convention, either on the grounds of his exposure to the risk of refoulement arising from deficiencies in the asylum procedures in Greece, or on the grounds of the conditions of detention or the living conditions of asylum seekers in that country.

16. Notwithstanding this view, the present case has thrown up a series of deficiencies in Belgium's own system of remedies in respect of expulsion orders which are arguably claimed to violate an applicant's rights under Articles 2 or 3 of the Convention. These deficiencies are, in my view, sufficiently serious to amount to a violation of Article 13 and, in this regard, I share the conclusion and reasoning in the Court's judgment. While this finding alone would justify an award of just satisfaction against Belgium, it would not in my view justify an award of the full sum claimed by the applicant, hence my vote against the award which is made against Belgium in the judgment.

1 It seems that in international humanitarian law “particularly vulnerable group” refers to priority treatment of certain categories of refugees.

2 Third party intervenors claimed that asylum seekers are deprived of the right to provide for their needs (paragraph 246). If this were corroborated and shown to be attributable to the State, e.g. if the practical difficulties of employment that were mentioned originated from restrictive regulation or official practice, I would find the State responsible under Article 3 for the misery of the asylum seekers. This point was, however, not fully substantiated.

3Laban, C.J., Dutch Study of Iraqi Asylum Seekers: Impact of a long asylum procedure on health and health related dimensions among Iraqi asylum seekers in the Netherlands; An epidemiological study. Doctoral dissertation, 2010. p. 151 http://dspace.ubvu.vu.nl/bitstream/1871/15947/2/part.pdf. (comparing Iraqi asylum seekers whose asylum procedure has taken at least two years with Iraqi asylum seekers who had just arrived in the Netherlands, with additional literature).

4 Once again, it is hard to accept that the typical asylum seeker or refugee has the same profile as the applicant, who had money and speaks English.

5 The Court’s case-law required there to be a link between the general situation complained of and the applicant’s individual situation (Thampibillai v. the Netherlands, no. 61350/00, 17 February 2004, and Y. v. Russia, no. 20113/07, 4 December 2008). Where there is a mandatory procedure the general situation will apply inevitably to the applicant, therefore the nexus is established, and Greece is responsible; likewise Belgium, as it was aware of this fact. But it was not inevitable that M.S.S. would be kept for three days at a detention centre, as this does not follow from Greek law and there is no evidence of a standard practice in this regard; Belgium cannot be held responsible for the degrading detention.

6 Certainly, Belgium could not foresee that he would make efforts to bypass the Greek (and European Union) system as he simply wished to leave Greece. I do not find convincing the argument that the applicant wanted to leave Greece because of his state of need (paragraph 239). He left Greece six weeks after he applied for asylum. However, this personal choice which showed disregard for the asylum procedure does not absolve Belgium of its responsibilities which existed at the moment of the applicant’s transfer to Greece. The inhuman and degrading nature of the asylum procedure was a matter known to Belgium. This does not apply to the applicant’s detention in Greece (see below).

7 The Court held this letter of the UNHCR of 2 April 2009 to be of critical importance (paragraph 349) when it came to the determination of Belgium’s responsibility. Further, given the assurances of the Greek Government (paragraph 354) and the lack of conclusive proof of refoulement, there was nothing Belgium should have known in this regard; and Belgium has no responsibility in this respect.

F. ACADEMIC MATERIALS

Just a little sunshine in the rain: the 2010 case law of the European Court of Justice on access to documents

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1. Introduction

Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents1 – the EU's freedom of information or "sunshine" legislation – has now been in force for ten years. It has been the subject of a number of rulings by the General Court, and on appeal, the European Court of Justice. The case law has had some difficulty in finding its course. However, it is now established that while the purpose of the Regulation is to give the fullest possible effect to the right of public access to documents held by the institutions, the right is nonetheless subject to certain limitations. The Regulation provides for a number of exceptions which must be interpreted strictly and the application of which requires, as a rule, case-by-case assessment of the content of the documents covered by the application for access.The risk that the interest protected by each of those exceptions might be undermined cannot be purely hypothetical.**2**

During the ten years of application of the Regulation, the European Parliament has repeatedly called on the Commission to present a proposal to reform it.3 These calls were strengthened by the anticipation that the Treaty of Lisbon would enter into force, with its explicit aim to enhance transparency and citizen involvement in decision making. In the context of possible reform, it has also been discussed whether the Courts' case law would give reason to either incorporate some of the jurisprudence in the Regulation or, alternatively, to amend or clarify some of the relevant provisions. In 2007, the Commission finally initiated the reform process by issuing a Green Paper,4 followed in 2008 by a legislative proposal to "recast" the Regulation.5 Negotiations on the file have, however, been shelved since 2009. Member States are divided in the Council into those thinking reform ought to mean going forward towards increased openness, and those wishing to turn the clock back,6 while divergent national traditions and wishes of national parliaments to access EU-related information are also involved. The European Parliament again is mixed up in protecting its own institutional prerogatives and getting confused about whose rights it is to protect: those of the citizen or its own interest in gaining access to the Council's confidential files.7 The Commission's role in the review process seems to be mainly trying to avoid seeming too eager to limit the access rights of citizens.8

The three judgments by the Grand Chamber of the European Court of Justice in the summer of 2010, Case C-139/07 P, *Commission* v. *Technische Glaswerke Ilmenau*,9 Case C-28/08 P, *Commission* v. *Bavarian Lager*10 and Joined Cases C-514/07 P, 528/07 P & 532/07 P, *Sweden* v. *API and Commission*,11 concerned the interpretation of some of the core provisions of Regulation 1049/2001; key provisions that are also open for review in the context of the ongoing legislative process. All three cases were appeals against judgments by the General Court given before the 2008 Commission proposal, and with a transparency-friendly orientation. The Commission, which had lost all three cases, appealed to the ECJ, in one case joined by Sweden and the applicant. All three rulings of 2010 reversed or significantly altered the earlier judgments. The Commission has explained its reform agenda with reference to wishing to clarify certain matters without limiting citizen access, and its legislative proposal certainly includes both controversial and non-controversial parts.12 However, according to some,13 the outcome of its two parallel projects, one on the side of the legislature and the other in court, would seem to be exactly a reconsideration of the balance between openness and secrecy. The cases serve as a glorious reminder of the fact that there is little agreement on how fundamental rights – in this case the right of access to documents, as laid down in Article 42 of the EU Charter of Fundamental Rights – should be turned into political practice.

The three cases decided in 2010 were the first three transparency cases to reach the ECJ Grand Chamber after its 2008 landmark ruling in *Turco*,14 which concerned a request by Mr Turco for access to the documents appearing on a specific Council meeting agenda, including an opinion of the Council's legal service relating to a legislative file. The Council had refused the application, arguing that there were no specific reasons pointing to a particular overriding public interest in disclosure. The ECJ rejected the arguments of the Council. It found the Council's fear that disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned to be unjustified:

"it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view

to be openly debated. It is in fact rather a lack of informttion and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole" (para 59).

According to the Court,

"disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act" (para 67).

These considerations led the Court to conclude that the Regulation "imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process" (para 68), even if there were exceptions to this general principle.15

In emphasizing wide access to legislative documents, the *Turco* ruling was greeted by some commentators as "spectacularly progressive"16 while others suggested the Court might have forgotten the need for "[j]udicial respect for the essential elements" of the political compromises embodied in the relevant legislation, which is "as important as openness to the legitimacy of the Union and its decision-making processes".17 As will be shown below, the Court's obvious interest in distinguishing the three 2010 rulings from the logic behind its *Turco* judgment two years earlier led it to suggest that in some situations the need for transparency might be more pressing than in others. In largely accepting the arguments relating to administrative burden and duties of secrecy put forward by the Commission in the three recent cases, the Court has caused a serious setback for those believing that the phrases in the Treaty on European Union on decisions being made "as openly as possible" might actually weigh heavier.

The purpose of the current analysis is to examine the state of openness after the Court's 2010 rulings and to place it in the context of the ongoing revision of the Regulation. In two of the cases, the Commission argued for general presumptions of secrecy, which would free it from the general duty of principle of examining each requested document individually in order to establish whether granting access to its contents would harm one of the protected interests – a foundational principle of the Regulation. *Technische Glaswerke Ilmenau* and *Sweden* v. *API and Commission*, significantly contributed, though in a negative way, to the discussion on whether general presumptions could, in exceptional cases, be allowed (section 2 below).

All three judgments concern applications for documents held by the Commission and are based on requests under Regulation 1049/2001; however, a number of other pieces of legislation were also relevant. In *Bavarian Lager*, the question concerned the relationship between Regulation 1049/2001 and the procedural guarantees provided by the data protection Regulation 45/200118 (section 3 below). In *Techn ische Glaswerke Ilmenau* (TGI), the question related to the relationship between Regulation 1049/2001 and the rights of interested parties – or rather lack of such rights – under the State aid rules19 (section 4). *Swede n* v. *API and Commission* (API) was about documents relating to Court proceedings but held by the Commission, access to which, in the view of the Commission, ought to be decided with reference to rules other than those contained in Regulation 1049/2001. Finally, *Turco* left open the extent to which the Court's argumentation was specific to legislative matters, or whether similar arguments could be used for other matters of similar importance. The rulings continued this discussion (section 6).

2. Legal background

Under old Article 255 EC, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions laid down for reasons of public or private interest. The relevant principles and conditions are established by Regulation 1049/2001.20

The Treaty of Lisbon made some important openings relating to transparency, underlining in particular the principle of wide public access to legislative documents, and slightly amended the general provision on transparency and the legal basis of public access. Under Article 15 TFEU(1), "[i]n order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible," thus extending the obligation even to other than the three "main" institutions. As regards legislative matters, paragraph 2 establishes that the "European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act". The legal basis for more specific rules on public access is included in paragraph 3, which also makes reference to the institutions' own Rules of Procedure and lays down an obligation on the European Parliament and the Council to ensure publication of the documents relating to legislative

procedures under the terms laid down by the public access regulations. It is also specified that the Court of Justice, the European Central Bank and the European Investment Bank are subject to the access to documents rules only when exercising their administrative tasks; however, the general obligation to conduct their tasks as openly as possible in Article 15(1) TFEU still applies.

After the entry into force of the new Treaty, the question was naturally raised whether the Commission would update its 2008 recast proposal, given at a time when the fate of the Lisbon Treaty was still unclear, to reflect the new legal basis. The Commission considered the changes brought by the new Treaty to be of a limited nature and thus there was, in its view, no immediate need to present an amended proposal in order to align it to Article 15 TFEU.21 In March 2011, however, the Commission came forward with a new proposal amending Regulation 1049/2001, aiming at extending the institutional scope of the Regulation and without prejudice to its proposal of 2008.22 For the European Parliament, the differences between the new and old Treaty provisions have been so significant that they would necessitate giving a new proposal with even other substantive amendments included, especially as regards legislative documents.23 The *Turco* ruling, however, has certainly softened the transition from ex Article 255 EC to Article 15 TFEU, by emphasizing the great need to grant access to legislative files, anticipating the reforms to be brought by the new Treaty. Discussions between the institutions concerning the right way forward are still ongoing.

The current Regulation 1049/2001 aims at ensuring "widest possible access to documents".24 While all documents are in principle accessible "subject to the principles, conditions and limits defined in this Regulation",25 there are various interests to be protected by means of exceptions. Article 2(3) of the Regulation provides that the Regulation is to apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, "in all areas of activity of the European Union". Article 3(a) includes the definition of a "document" as "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility". These seem like relatively clear-cut provisions: all documents held by the institution, with the concept of a "document" defined broadly. However, the rulings of 2010 demonstrate that seemingly simple provisions still leave room for divergent, and even opposite, interpretations.

Article 4 lays down the exceptions, three of which were also relevant for the recent Court rulings, even if the cases concerned more the application of certain core principles than the interpretation of individual exceptions. Article 4(1)(b) provides that 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". Unlike the exceptions provided by the first paragraph, the exceptions contained in paragraph 2 contain a "public interest test": the exception is to apply "unless there is an overriding public interest in disclosure", something that the institution is to examine. Under Article 4(2), protection is given to

– "commercial interests of a natural or legal person, including intellectual property,

– court proceedings and legal advice,

– the purpose of inspections, investigations and audits."

The last of these three is a core exception from the point of view of the Commission and an exception it tried to invoke in all three cases. Article 4(3) applies to documents drafted by the institutions for their internal use and protects their "space to think". Article 4(6) provides for partial access by establishing that "[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released". Paragraph 7 lays down a temporal limitation for the implementation of the exceptions: they are only to apply "for the period during which protection is justified on the basis of the content of the document".

Article 6 of the Regulation provides that "applications for access to a document shall be made … in a sufficiently precise manner to enable the institution to identify the document", and also that "the applicant is not obliged to state reasons for the application". The latter is a key principle of the Regulation. Furthermore, if an application is imprecise, the institution is under an obligation to both ask the applicant to clarify it and assist her in the process. If an application relates to "a very long document or to a very large number of documents", the institution is told to confer with the applicant "informally, with a view to finding a fair solution".

3. In dividual examination vs. general presumption

3.1. *Background*

The principle of examining each of the requested documents is a key element of Regulation 1049/2001. Individual

examination has been deemed necessary since the decision to grant or deny access is taken by balancing the benefit of access against the need to protect the interest by refusing access. Such balancing can only be done based on the substance of the document. Moreover, partial access and the temporal limitation of the exceptions under Article 4(6) and (7) also require evaluating the substance of the document. Both must be considered by the institution *ex officio* when deciding on access.26 However, the institutions, in particular the Commission, have experienced the principle of individual examination as burdensome, especially when the application has concerned a very large number of documents, and in particular if relating to a situation in which access would seldom be granted.

In 2005, the General Court showed some understanding for the Commission concerns when in *VKI* v. *Commission*27 it addressed a request to access a cartel file consisting of more than 47 000 pages. The General Court ruled that, in principle, an institution receiving an application for access to documents must carry out a concrete, individual assessment of the content of the documents referred to in the request in order to assess the extent to which an exception to the right of access is applicable and the possibility of partial access. However,

"such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such could be case, inter alia, if certain documents were either, first, manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a concrete, individual assessment by the Commission in similar circumstances." (para 75)

The Court referred to the duty to confer with the applicant informally, and said that Regulation 1049/2001 "does not contain any provision expressly permitting the institution, in the absence of a fair solution reached together with the applicant, to limit the scope of the examination which it is normally required to carry out in response to a request for access" (para 96). A failure to examine documents one by one constituted, in principle, a "manifest breach of the principle of proportionality" (para 98). However, the Court continued, it was possible that a request for access was made for "a manifestly unreasonable number of documents, perhaps for trivial reasons, thus imposing a volume of work for processing of his request which could very substantially paralyse the proper working of the institution" (para 101). For this reason, the institution had in exceptional cases the possibility not to examine the documents individually, "only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required" (para 112). The burden of proof is on the institution, and it is still under an obligation to try to consult with the applicant, aiming at a solution that is most favourable to the applicant's right of access (paras. 113–114). Thus, "It follows that the institution may avoid carrying out a concrete, individual examination only after it has genuinely investigated all other conceivable options and explained in detail in its decision the re*asons for which those various options also involve an unreasonable amount of work"* (para 115). There is no doubt about the General Court's message: the possibility of not examining all documents was to be invoked only in extremely rare cases.

Quite exceptionally for an important transparency ruling, the *VKI* judgment was not appealed to the ECJ. Even the coalition working for "government in the sunshine" and a public "right to know"28 could comprehend that 47 000 pages is indeed a considerable number of pages to browse through, and appreciated the strict criteria set by the Court as to when individual examination might not be necessary. But after the ruling, due to the significant admission of principle by the General Court, there now was "every possibility that the floodgates are opened to a development where the obligation to a concrete and individual assessment and, consequently, the right of partial access, are limited to an unacceptable degree".29 Of course, for the Commission at least, it proved very tempting to test the limits of the new exception and to explore in which other policy areas a similar admission might be approved. Since then, as could very well be anticipated, the existence of "exceptional circumstances" has been a matter of discussion resulting both in *TGI* and *API*, and a proposal by the Commission to amend the Regulation to abolish the duty of individual examination in relation to some groups of documents.

3.2. Documents relating to investigations

The *TGI* case was extremely relevant for this discussion, since it concerned an application to access certain large State aid files held by the Commission. There were two problems of principle: first, the number of documents applied for was again large, which raised questions about the need to assess them one by one in order to decide whether access could be granted. Second, there was an apparent clash between Regulation 1049/2001 and the relevant rules on State aid: while the former grants a universal right of access to files held by the Commission (i.e. when access is granted the documents are made publicly available on the internet), in the State aid procedure interested parties other than the Member State concerned have no right to consult the Commission file. The latter question will be addressed in section 4 below.

In March 2002, TGI applied, on the basis of Regulation 1049/2001, for access to all documents in the

Commission's files in all the aid cases concerning itself, and to all documents in the Commission's files concerning State aid for the undertaking Schott Glas, save for business secrets relating to other undertakings. The Commission rejected the application for access, arguing that the disclosure of those various documents would be likely to undermine the protection of the purpose of inspections and investigations and the commercial interests of Schott Glas. Partial access was impossible since the documents could not be divided into confidential and non-confidential parts. Furthermore, there was no overriding public interest justifying disclosure. In August 2002 TGI brought an action before the General Court. Sweden and Finland applied for leave to intervene in its support.

In its ruling,30 the General Court held that the examination which the institution must, in principle, undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision (paras. 76 and 77). Only a concrete, individual examination could allow the assessment of the possibility of partial access and the temporal limitations (para 79). Such an assessment is an approach to be adopted as a matter of principle, and as such also applicable to cartels or the control of public subsidies (para 85). The Court then examined whether the criteria it had established in *VKI* for when an examination might not be necessary were fulfilled. For the Court, so general an assessment as the one now invoked by the Commission, applying to the entire administrative file relating to procedures for reviewing State aid granted to TGI, did not demonstrate the existence of "special circumstances of the individual case". In particular, it did not establish that those documents were manifestly covered in their entirety by an exception to the right of access (para 87–89). The General Court thus repeated the VKI principle, but found that the required "special circumstances" were not present, as shown by the scant justifications provided by the Commission for its rejection.

The Commission appealed the ruling. In addition to Finland and Sweden, also Denmark intervened in support of TGI. In her Opinion, Advocate General Kokott supported the General Court's reading: the principle of individual examination is consistent with the method of appraising the information in the document applied for and the effects of its possible dislosure on protected interests. Consequently, "it is incumbent on the Commission to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose" (para 82). Advocate General Kokott had some sympathy for the need for room of manoeuvre during ongoing infringement procedure, but found that unlimited freedom cannot be guaranteed, since "[c] ompliance with Community law by the Member States and its enforcement by the Commission are legitimate subjects of common interest" (para 112). In conclusion, Advocate General Kokott, proposed to dismiss the Commission appeal in its entirety.

The Court of Justice, however, chose a different path of interpretation. It began by pointing out that TGI's application concerned the whole of the administrative file regarding the State aid granted to it. While the documents applied for by TGI did indeed fall within an activity of "investigation", within the meaning of Article 4(2), this was not sufficient, but the institution concerned must also explain how access to the document could specifically and effectively undermine the interest protected by the exception. However, the Court stated, referring to its *Turco* ruling, it is in principle open to the Community institution to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature (paras. 53 and 54). In *Turco*, this finding continued with a very significant "however", which the Court decided not to repeat in *TGI*:

"However, it is incumbent on the Council to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose" (Turco, para 50).

The Court of Justice found that the General Court should have taken account of the lack of a right to consult the documents in the Commission's administrative file for interested parties other than the Member State concerned in the procedures for reviewing State aid, and, "therefore, have acknowledged the existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities" (para 61). That general presumption does not, however,

"exclude the right of those interested party to demonstrate that a given document disclosure of which has been requested 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" (para 62).

In terms of transparency, the *TGI* ruling is far weaker than both the *VKI* ruling of the General Court and the *Turco* ruling of the ECJ itself, not least because it leaves too many central questions open in a matter that is at the core of implementing the Regulation. The ECJ established that the Commission was able to refuse access to *all* the documents relating to procedures for the review of State aid covered by TGI's request for access. This could be done without first making a concrete, individual examination of *any* of the documents. As TGI had failed to argue for the

reversal of this "general presumption" – which nobody had heard of at the time TGI submitted its original application – no evidence existed to rebut the presumption and thus TGI could not claim that the Commission must carry out an individual examination.

If the *TGI* ruling is compared with *VKI*, it should be noted that the Court of Justice regrettably did not see a need to repeat the criteria relating to the request concerning a "manifestly unreasonable amount of documents" and the examination of them resulting in substantially paralysing the proper working of th e institution (cf. *VKI* para 112). While in *TGI* the application was wide, and assessing each document one-by-one would have caused a considerable administrative burden, also the justification offered by the Commission was by any standard too general, relating to the entire file. The Commission did not in any way even attempt to demonstrate that it had considered possible ways of dealing with the request other than blank refusal, as the General Court had earlier required in *VKI*. The challenged Commission decision included no indication that it had "genuinely investigated all other conceivable options", a requirement set in *VKI* (para 115), For example, the ECJ did not require any attempt to use administrative means to deal with this wide request, or wide requests in general, and did not evaluate the work load caused by this particular request in any concrete way so as to establish criteria for future cases. Therefore, following *TGI*, the criteria for invoking a "general presumption" are non-existent.

Moreover, unlike in *Turco*, the institution was not required to verify whether the general presumption invoked by it actually applied to the documents covered by the application. This is a serious omission by the Court of Justice, especially considering that the Regulation itself includes no mention of the possibility of invoking general presumptions and many of its provisions actually speak against them, as correctly noted by the General Court and Advocate General Kokott. The very wide presumption approved by the ECJ also makes it in practice impossible to evaluate whether partial access to the requested documents could have been granted, or whether a temporal limitation applies. The only positive aspects – from a transparency perspective – of the ECJ's ruling were that, first, the scope of the ruling was limited and concerned only a particular request by an interested party in a State aid procedure. Second, that the Court did not at least categorically deny the possibility to reverse the "general presumption", even if it did not specify what kind of a public interest could be invoked to reverse the presumption.

While the objective of the Commission in appealing *TGI* was similar to those aimed at by its recast proposal, they are fortunately now only partially achieved through the ECJ's ruling. In its legislative proposal of 2008, the Commission proposed to limit the scope of the Regulation altogether by adding a new Article 2(6):

"Without prejudice to specific rights of access for interested parties established by EC law, documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope shall not be accessible to the public until the investigation has been closed or the act has become definitive. Documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public."

For the Commission, its proposal would relieve it of the duty of examining requests while an investigation is pending or until the final decision in the matter has been taken. The Commission proposes that when "the final decision can no longer be challenged in Court, requests for access to documents pertaining to the case file will be handled in accordance with the general rules on access, including an individual examination of each requested document. This provision merely clarifies the existing situation and codifies case law."31 It is questionable which case law the Commission is referring to, but the outcome of its proposal would be a temporary and a permanent32 block exception from the scope of the Regulation, and a subsequent limitation of the need to even consider releasing certain documents, irrespective of the harm that might be caused by granting access to them.

This proposed amendment by the Commission did not fly quite as smoothly as it had hoped, and in its first reading report the European Parliament proposed to delete it.33 In the Council, the reception was more mixed; while some proposed to delete the amendment altogether, others felt it ought to have been more specific in covering infringement proceedings as well.34 But, as could be guessed, there is already a case pending, *LPN* v. *Commission*,35 concerning the application of the "general presumption" to infringement proceedings. The applicant LPN argues that the Commission has relied "on a theoretical model that the exception related to inspections and audits prevails, without giving any additional, concrete reasons on a document by document basis, in order to adopt a decision refusing access to all of the documents requested by the LPN".36 Similarly, in the appeal in *Agrofert*,37 the Commission argues for a "general presumption of non-accessibility" in the application of the Merger Regulation. No doubt, these cases will be followed by others.

3.3. Access to Court submissions

Access to documents relating to ongoing State aid investigations was of course not the only area where the

existence of “particular circumstances” came to be tested. The *API* case concerned access to documents relating to Court proceedings. The justification offered by the Commission this time did not relate to the workload caused by the application, but that the documents should not come under the scope of the Regulation at all. Ex Article 255 EC did not establish specific obligations of access for the Court of Justice. There are no rules governing access to case files of the EU courts other than the Statute of the Court of Justice, the Rules of Procedure of the Courts and the Instructions to the Registrar of the General Court. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, which also applies to the General Court, written submissions are only communicated to the other parties and to the institutions whose decisions are in dispute. However, clearly the other institutions are in possession of a number of documents relating to Court proceedings, a matter also raised by the Commission in the context of the revision of Regulation 1049/2001.

In August 2003, API – a non-profit-making organization of foreign journalists based in Belgium – applied to the Commission under Regulation 1049/2001 for access to the written pleadings lodged by the Commission before the General Court or the Court of Justice in proceedings relating to fifteen cases at different stages including the *Open Skies* cases.38 The Commission granted access only in respect of the pleadings lodged in two preliminary ruling cases. Access to two pleadings was refused essentially because the cases were pending. The same exception applied also to the pleadings of a closed case that was closely connected with another pending case. The *Open Skies* cases, again, were closed, but they concerned infringement proceedings and could thus, in the view of the Commission, be protected under the relevant exception. Finally, the Commission found that there was no overriding public interest in disclosure. To be fair, the reasoning offered by the Commission this time was better than that given in *TGI* and indicated that it had at least had a look at the requested documents to consider which exception might come into question.

In its ruling,39 the General Court had underlined that, in principle, documents should be examined individually, whatever the field to which those documents relate but acknowledged the *VKI* principle that an individual examination of each document is not required in all circumstances (para 58). The Court emphasized that the purpose of the exception for the protection of court proceedings is primarily to ensure observance of the right of every person to a fair hearing by an independent tribunal (paras. 59–61, 63). First, in relation to documents relating to pending cases, the General Court established that such documents are manifestly covered in their entirety by the exception relating to the protection of court proceedings and that remains the position until the proceedings in question have reached the hearing stage. This finding was not affected by the fact that disclosure of procedural documents is possible in a number of Member States and that it is also provided for, as regards documents lodged with the European Court of Human Rights, in the ECHR, since the Rules of Procedure of the EU Courts do not provide for a third-party right of access to procedural documents lodged at their registries by the parties (paras. 84 and 85). However, these rules, which provide that the pleadings of the parties are in principle confidential, cannot be relied on after the hearing, since the ECJ has made it clear that they do not prevent the parties from disclosing their own written submissions (paras. 86 to 89). Lastly, the General Court held that API had failed to raise overriding public interests capable of justifying disclosure of the documents in question (para 100). In the closed cases, the General Court held that the Commission’s refusal was not justified.

Both API, Sweden and the Commission all appealed the General Court’s ruling to the ECJ, on different grounds, and the Court decided to join the cases. Denmark and Finland intervened in support of Sweden and the UK in support of the Commission. The three cases concerned the questions whether the General Court had erred in finding that access should be granted to pleadings after the hearing stage in pending cases; access to pleadings in “closed” cases; whether the ex Article 226 EC procedure should still be found as ongoing once it had reached the ex Article 228 EC stage; the question of “general presumption” versus “individual examination” and the nature of the “public interest” that might require access to be granted even when an exception under Regulation 1049/2001 applied in principle (this last point will be considered separately in section 6).

In a relatively brief Opinion, Advocate General Maduro did not at any point offer his reading of the relevant provisions of Regulation 1049/2001 but rather concentrated on giving expression to how he felt the matter *should* be solved. He pointed out the fundamental problem with API’s request, namely that it had been made to the Commission and not to the Court. This is not because values of transparency did not apply to the judiciary, but because “the Court is master of the case” during litigation and thus “in a position to weigh the competing interests and to determine whether the release of documents would cause irreparable harm to either party or undermine the fairness of the judicial process” (paras. 13–14). For Advocate General Maduro, the “best conclusion” – reached without any analysis of the applicable provisions – “would be to find that all documents submitted by parties in pending cases fall outside the scope of Regulation No 1049/2001”. In cases that are closed, “it is reasonable to adopt a general principle favouring access” with a possibility that the Court decide to impose an “obligation of confidentiality” on the parties “

if it considers that it is fair and just to do so" (para 39).

The Court of Justice confirmed in its ruling that an institution may base its decisions on general presumptions which apply to certain categories of document, as considerations of a generally similar kind are likely to apply to applications for disclosure which relate to documents of the same nature (para 74). Again, there was no mention of the more specific *VKI* criteria – quite naturally so, since this time the justification for invoking a "general assumption" no longer related to the workload caused by the application but to the nature of the activity to which the documents related. Instead, it was to be determined whether general considerations supported a presumption that the disclosure of pleadings relating to direct actions that were pending would undermine the court proceedings and that the Commission was, thus, not under an obligation to carry out a specific assessment of the content of each of those documents (paras. 75–76). The reply was affirmative. For the Court,

"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, established by those rules, of the right of access to documents" (para 79).

For the Court, it was evident from the wording of ex Article 255 EC that the Court is not subject to the obligations of transparency laid down in that provision, clarified further by Article 15 TFEU, and justified by the nature of the judicial responsibilities which it is called upon to discharge under ex Article 220 EC. While the exclusion of the documents from the scope of public access was, in principle, acceptable, the Court remained unconvinced about the General Court's choice of oral hearing as the decisive point in time:

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

For this reason, it judged it appropriate that there should be "a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings … while those proceedings remain pending" (para 94). In the Court's view, "disclosure would flout the special nature of that category of documents and would be tantamount to making a significant part of the court proceedings subject to the principle of transparency." Consequently, "the effectiveness of the exclusion of the Court of Justice from the institutions to which the principle of transparency applies ... would be largely frustrated" (para 95).

As regards pleadings that had been lodged in closed cases, the Court pointed out that once proceedings have been closed by a decision of the Court, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court and the "general presumption" thus no longer applied. The Court then pointed out that the procedures provided for under Articles 226 and 228 EC (now 258 and 260 TFEU, as amended) constitute two distinct procedures, each with its own subject-matter. Accordingly, as the General Court had found, it could not be presumed that disclosure of pleadings lodged in a procedure which ultimately led to the delivery of a judgment under Article 226 EC undermines investigations which could lead to proceedings being brought under Article 228 EC (para 122).

As a matter of principle, the existence of yet another "general presumption" in the *API* case is of course again significant. From a more practical point of view, as the Commission confirmed in the oral hearing, there have been very few requests for documents relating to court proceedings during the existence of Regulation 1049/2001. The most serious objection to be raised in the present article relates to the Court's obvious mission in the case, since it seems to have trespassed on the side of the legislature in establishing the outcome of the case. The documents applied for clearly did fall within the scope of application of Regulation 1049/2001, in that they were documents either drawn up or received by the Commission and in its possession, and belonged to an area of activity of the European Union. The Court left this aspect completely without consideration. The difference between the new Article 15 TFEU and ex Article 255 is clear: Article 15 TFEU includes a specific rule on documents held by the Court. The relevance of this for API's application is however questionable, since the Treaty of Lisbon was not even near to entering into force at the time the contested decision by the Commission was adopted. Moreover, Article 15 TFEU does not exempt the Court from the general obligation to function as openly as possible – another significant point that the Court did not grant much importance. Overall, the Court seemed to engage in much the same exercise of legislating as Advocate General Maduro, but was less honest about its undertaking.

Moreover, if one compares *API* with *Turco*, it may be seen that in the latter the Court discussed and clearly dismissed concerns relating to public pressure in the context of access to legal opinions:

"As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by

the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it" (para 64).

In *API*, Advocate General Maduro considered whether the same conclusion would be valid in the context of access to Court proceedings, and argued that it was "no less valid in the context of improper pressure on the judiciary and the parties to judicial proceedings".40 Interestingly, the Court's conclusion in *API* was the opposite, since it deferred to the point about public pressure with reference to equality of arms: "if the content of the Commission's pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts" (*API*, para 86). Moreover, not only the members of the Commission legal service would risk being affected by such pressure, but the Court proceedings themselves would be at risk:

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

The recast proposal currently on the legislature's table is inspired by *API* but not identical with it. With reference to the General Court's ruling, the Commission argued that written submissions to the Courts were manifestly covered by the exception aimed at protecting court proceedings before an oral hearing has taken place.41 It proposed adding a new paragraph to Article 2 clarifying that documents submitted to Courts by other parties than the institutions do not fall within the scope of the Regulation at all.42 The Commission argued that disclosure of written submissions to the Courts under Regulation 1049/2001 would circumvent the Courts' own rules and the Protocol on the Statute of the Court of Justice, which is an integral part of the Treaty.43 The European Parliament indicated that carving out such categories of documents from the scope of the Regulation is not the right way forward.44 The new Commission proposal from March 2011 aims at a more obedient transposition of Article 15 TFEU: while expanding the institutional scope to also cover the Court of Justice, its implementation would be limited to the administrative tasks of the Court only.45

On the whole, however, the *API* ruling was perhaps the least astonishing of the three: it is hardly surprising that the Court's interest in transparency was lacking when it came to its own documents. For the Court, the ruling it had handed down in *TGI* and the "general presumption" approved for the Commission in that ruling three months earlier came in very handy: it would indeed have been suspicious for the Court to acknowledge its first "general presumption" in relation to documents relating to Court proceedings. The *API* case was a case of mere institutional politics: the main question was about who should rule on access to documents relating to Court proceedings and not about the harm that granting access to the documents API had applied for might cause – even if assessing this harm ought to have been at the core of the case. As Advocate General Maduro noted in his Opinion, the practice of various international tribunals suggests that there is no reason to fear that disclosure of documents relating to judicial proceedings will undermine the judicial process: all submissions are public unless there are exceptional reasons for keeping them confidential.46 This approach would seem to coincide with the basic principle of Regulation 1049/2001. In this respect, Advocate General Maduro also notes the "tendency seems to be that the more remote the judicial body, the greater its concern with the transparency of its judicial proceedings" (para 26). This might not be a bad perspective to consider for the Court of a Union constantly struggling with challenges relating to a democratic deficit.

4. The difficult balance between openness and data protection

There are two main pieces of legislation that try to strike a balance between public information and the protection of privacy. Article 4(1)(b) of Regulation 1049/2001 is of course a key provision, establishing that an exception to public access is to apply "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". In addition, Regulation 45/2001,47 adopted on the basis of ex Article 286 EC (now replaced, in substance, by Art. 16 TFEU), includes a number of provisions on the matter. The two regulations were negotiated simultaneously and acknowledge each other's existence.48 The attempt was thus made, in 2001, to create two separate pieces of legislation with one focusing on transparency and the other on the protection of personal data, that would still be compatible with each other. However, the two regulations have certain provisions that conflict: while Regulation 1049/2001 does not mention any requirement of consent by the data subject, grants universal access to the released information, and specifically denies any need to reason one's request, Regulation 45/2001 requires the consent of the data subject, grants access only to the applicant, and requires reasons for the application. The question has thus been how to apply

the provisions without granting priority to one at the expense of the other, and the balance has been difficult to find. The practice has been, for example, to blank out names and other personal data in documents to which public access has been granted; but, as the Commission notes in its legislative proposal, this has been "perceived as too restrictive, in particular where persons act in a public capacity".49 *Bavarian Lager* concerns this specific question.

The *Bavarian Lager* dispute is a long-standing one and pre-dates Regulation 1049/2001, since the first access request was made based on the earlier Code of Conduct concerning public access to Council and Commission documents.50 Before the entry into force of Regulation 1049/2001 the request had already resulted in a case before the General Court51 and the European Ombudsman.52 It concerned access to the names of persons acting in their professional capacity who had participated in a meeting organized by the Commission with an interest group and UK Government officials on 11 October 1996 in the context of infringement proceedings. The question was whether the process to be followed in granting such access was that of Regulation 1049/2001 – under which the request was made – or under the relevant data protection rules, since the requested documents included personal data, in particular the names of the persons attending the meeting. The Court cases concerned five names that had been blanked out from the minutes of the meeting, following two express refusals by persons to consent to the disclosure of their identity and the Commission's failure to contact the remaining three attendees. In the Commission's view, Bavarian Lager had not established an express and legitimate purpose or need for the disclosure. In any case, the Commission argued that it would need to refuse to disclose the other names so as not to compromise its ability to conduct inquiries.

The General Court annulled the Commission decision, establishing that Bavarian Lager's request was based on Regulation 1049/2001 and, under Article 6(1), a person requesting access to a document is not required to justify his request and thus does not have to demonstrate any interest in having access to the requested documents.53 The General Court thus treated the case as mainly focusing on the question of whether the disclosure of the names of those who attended the meeting of October 1996 would undermine protection of their privacy and integrity and answered this in the negative: there was no interference with the privacy of the individuals and thus the Commission had erred in refusing to disclose the names of the individuals. Examination as to whether a person's private life might be undermined was to be carried out in the light of Article 8 of the ECHR and the case law based thereon.

The Commission appealed the ruling and the UK and the Council intervened in its support. The case gathered wide interest: Finland and Sweden intervened in support of Bavarian Lager, and Denmark intervened in support of Bavarian Lager and the European Data Protection Supervisor (EDPS), which had already intervened in the first instance.

In her Opinion, Advocate General Sharpston adopted an alternative reading to the relationship between the two regulations.54 She argued for a "test" to consider whether the application for a document was in fact an application for a document with incidental mention of personal data or a document that essentially contained a large quantity of personal data. While the first group of documents should, in her view, be treated under the public access rules, the latter group belonged under the data protection rules (para 159 and 160). The first group of documents would in general be disclosed *erga omnes*, and partial access would be granted if part of the document was covered by the exception relating to the protection of privacy under Regulation 1049/2001. The second group of documents would be disclosed only on a case-by-case basis and only to the applicant who has provided due reasons for his application (para 166). According to the Advocate General, the General Court had wrongly established that the disclosure of the relevant names was not a potential interference with private life, but it constituted an interference fulfilling the criteria under Article 8(2) ECHR: first, the disclosure was according to law, second, "few things would appear to be more necessary in a democratic society than transparency and close involvement of citizens in the decision-making process", and third, the disclosure was fully proportionate (paras. 208–213). When analysed this way, disclosure would become "lawful" under Article 5(b) of Regulation 45/2001 and consequently the data subject's consent would no longer be needed. Advocate General Sharpston concluded by pointing out that the right to safeguard one's personal data is not an absolute right. Either way, the Commission should have opted for disclosure.

The Court of Justice adopted a completely different interpretation. The ECJ notes that the two regulations do not contain any provisions granting one regulation primacy over the other. In principle, "*their full application should be ensured* " (para 56, emphasis added). For the ECJ, however, the General Court had disregarded the wording of Article 4(1)(b) of Regulation 1049/2001, which is "an indivisible provision and requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with Regulation No 45/2001" (para 60).

In the view of the ECJ, "Article 4(1)(b) of Regulation No 1049/2001 establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public" (para 60). When a request based on Regulation 1049/2001, in fact, "seeks to obtain access to documents including personal

data, the provisions of Regulation No 45/2001 become applicable in their entirety" (para 63). Basically, the contested ruling had failed to observe some of the essential provisions of Regulation 45/2001 and the system of protection it establishes (para 64) and thus failed to "correspond to the equilibrium which the Union legislature intended to establish between the two regulations in question" (para 65).

For the ECJ, it was enough that the names included in the relevant documents enabled the persons concerned to be identified. The Court pointed out that Bavarian Lager could have access to all the information concerning the meeting, including the opinions which those contributing expressed in their professional capacity, and that the Commission had sought the agreement of all the participants to the disclosure of their names. In the view of the Court, the Commission had been right to verify whether the data subjects had given their consent to the disclosure of personal data concerning them (para 75): "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" *(*para 76). The ECJ also concluded that as Bavarian Lager had not provided "any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred", the Commission had not been able to weigh up the various interests of the parties concerned. Nor was it able to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced, as required by Article 8(b) of Regulation No 45/2001" (para 78). Consequently, the Commission was right to reject the application for access to the full minutes of the meeting of 11 October 1996.

In many ways, the *Bavarian Lager* ruling left the relationship between the two regulations open in establishing that both were fully applicable. This is the sentence that the transparency-minded will carry close to their hearts. The rest of the ruling provides little comfort, since the Court also accepted the Commission argument that it could not release the names of the participants without their specifically expressed consent. If the ruling of the General Court was challenged because it relied heavily on Regulation 1049/2001 – on the basis of which the application had, after all, been made – the ruling of the ECJ does not seem to have paid much attention to this Regulation or to the Treaty provisions guaranteeing openness in the activities of the Union. As it seems that for the applicant the five names were of considerable interest, the Court's argument that the Commission had "sufficiently complied with its duty of openness" (para 76) seems odd: it is not the amount of information – however trivial – to which access is granted that counts, but granting access to the information that the applicant is interested in gaining.

From the perspective of Regulation 1049/2001, quite crucially, the Court does not give any consideration to whether granting access to the requested names was an infringement of privacy, as interpreted by the General Court The only necessary consideration for the ECJ seems to be that the name of a person constitutes personal data which should not be released to outsiders without weighty reasons. In this way, the Court seems to get mixed up with whether it in fact was private life or personal data – any personal data – it was supposed to be protecting. After all, everyone present at the famous meeting of 11 October 1996 was there in a public capacity, and one could assume that very little that could be characterized as "private" took place at the meeting. Another interesting characteristic of the case was that the ECJ found completely against the view of the European Data Protection Supervisor, who had consistently supported the applicant and the reading of the General Court and held that the Commission took too strict an approach. According to the EDPS, actual harm to privacy should always be a necessary threshold to justify refusal of access to documents containing personal details.55

While the Court's ruling in *Bavarian Lager* is perhaps the only one of the three that is understandable in light of the wording of the relevant exception under Regulation 1049/2001, it is the also the one that affects the greatest number of applications.56 After all, a great number of documents include some kind of personal data. And as the European Data Protection Supervisor has pointed out, the effects of the approach will be difficult to administer, since a name is seldom included in a document on its own, but is linked to other data, such as a contribution in a discussion. Thus it is doubtful whether particular data can be considered in isolation.57

What is currently being considered by the legislature in the context of the reform of Regulation 1049/2001 is a Commission proposal, partly inspired by the General Court's ruling in *Bavarian Lager*, to move Article 4(1)(b) to a new Article 4(5) and reformulate it in order to clarify the relationship between Regulations 1049/2001 and 45/2001:

"Names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed unless, given the particular circumstances, disclosure would adversely affect the persons concerned. Other personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on the protection of individuals with regard to the processing of personal data."58

In terms of openness, the Commission proposal is of course more generous than the interpretation given to

current Article 4(1)(b) by the ECJ in *Bavarian Lager*, since it creates a presumption of openness to certain information relating to a person's public functions. In today's situation, with the interpretation of Article 4(1)(b) confirmed by the Court of Justice, the Commission proposal certainly has new charm to it. Prior to the ECJ's ruling, however, the proposal gathered criticism, among others by the European Data Protection Supervisor,59 who argued that the proposal did not do justice to the need for the right balance between the fundamental rights at stake. A simple reference to Regulation 45/2001 might, in the view of the EDPS, "respect the right to data protection, but does not respect the right to public access",60 especially since the EU legislation on data protection does not provide a clear answer as to when a decision on public access must be made. Instead, the EDPS argued for a "balanced approach", also emphasized in a number of documents dealing with the collision between those two rights61 and reflected in the way the General Court had approached the question of privacy in *Bavarian Lager*. The EDPS also argued that the Commission proposal suggestion that only names, titles and functions are disclosed ought to be reconsidered. The EDPS proposed his own wording for the new clause, which was endorsed by the European Parliament.62 The ECJ ruling also led the EDPS to declare that the review of the relationship between access to documents and data protection was now even more urgent.63 Fortunately, as well as Regulation 1049/2001, the EU data protection rules are also under review, and the relationship between the two sets of rules has already been placed on the reform agenda.64 Moreover, since even other cases on the application of the protection of privacy are already pending, the courts will receive a further opportunity to address the matter.65

5. On the relationship between access to one's own file and public access

All three cases decided in 2010 concerned, in one way or another, the relationship between access to documents by a participant in EU proceedings and the right of public access, a right that belongs equally to all EU citizens and legal persons. In practice, the General Court's interpretation, especially in *TGI* and *Bavarian Lager*,66 suggested that the applicants could get wider access to their own file – a right actually protected by Article 41 of the EU Charter of Fundamental Rights – based on the implementation of Regulation 1049/2001 as "any citizen of the Union" than they had been granted in their attempts to gain access to documents in a Commission file concerning themselves under other EU legislation. Both cases highlight insofar that if other rights of access are limited, the pressure to invoke the rules on public access to the file, often your own file, increases. Opinions diverge on whether this suggests a need to limit public access rules or provides an incentive to consider whether access rules in various other pieces of legislation ought to be revisited in order to make access in those areas genuinely privileged.

The *TGI* affair related to two separate investigations concerning Germany's notification to the Commission of various measures designed to consolidate TGI's financial position. Both procedures ended with a Commission decision finding the State aid measure incompatible with the common market. TGI had submitted its observations in respect of the second formal investigation procedure and requested the Commission to give it access to a non-confidential version of the file and the opportunity to submit, subsequently, further observations. The Commission had rejected the requests. TGI had also challenged the decisions in vain before the General Court. Even though the request considered by the ECJ in its recent ruling was made under Regulation 1049/2001, the rules on party access in the area of State aid came to be of more relevance than might have been anticipated.67 Under the relevant State aid procedure, interested parties may submit comments to the Commission, and will later receive a copy of its decision, but the rules make no provision for access to its files. The question thus was whether priority should be given to the public access rules of Regulation 1049/2001 or the specific rules on party access relating to State aid procedures.

The Commission argued that the absence of a right to consult the file for interested parties other than the Member State concerned in the State aid procedures must be recognized as a "particular circumstance of the individual case", justifying a "general presumption". Advocate General Kokott considered the Commission argument in her Opinion in *TGI*, but found the two procedures to be separate, and pointed out that other parties are not prohibited from access to the file (para 92). For Advocate General Kokott, public access to documents was "an independent right distinct from the procedure for reviewing State aid", which might sometimes lead to a *de facto* comparable situation with regard to information but not the same position in law (para 98). Consequently, "the fact that other parties interested in the aid procedure are precluded from gaining access to the file gives no grounds for an exception to the right of access to documents …." (para 102).

The Court of Justice was not convinced. In its view, the lack of a right for other interested parties than Member States to consult documents in the Commission file was a fact that had to be taken into account when interpreting the relevant exception under Regulation 1049/2001. If interested parties were able to consult the file on the basis of the rules on public access, the system for the review of State aid would be called into question, the Court argued (paras. 57–58). While the right to consult the administrative file in the context of a review procedure and the

right of access to documents are indeed legally distinct, as Advocate General Kokott had argued, they lead to a comparable situation from a practical point of view:

"Whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain all the observations and documents submitted to the Commission, and, where appropriate, adopt a position on those matters in their own observations, which is likely to modify the nature of such a procedure." (para 59)

In conclusion, the Court established that the lack of party access under the relevant sectoral piece of legislation affected the interpretation given to the rules on public access so that a "general presumption" of no access could be approved. Also in *API*, the lack of third party access in the Statute of the Court of Justice and the Rules of Procedure of the EU Courts was a part of the logic that in the Court's view justified the "general presumption" of no access to documents relating to court proceedings. If third parties could use Regulation 1049/2001 to obtain access to those pleadings, the Court argued, the system of procedural rules would be called into question (paras. 96 et seq).

A slightly similar – though not identical – logic was behind the Commission legislative proposal to limit the scope of Regulation 1049/2001 in the area of investigations. The Commission justified its proposal for a new Article 2(6) by arguing that

"Access to documents related to the exercise of the investigative powers of an institution should be excluded until the relevant decision can no longer be challenged by an action for annulment or the investigation is closed. During this investigation phase, only the specific rules in this field will apply. The Regulations governing competition and trade defence (antidumping, anti-subsidy and safeguard) proceedings and proceedings under the Trade Barriers Regulations contain provisions regarding privileged rights of access for interested parties and provisions on publicity. These rules would be undermined if the public were to be granted wider access under Regulation (EC) No 1049/2001."68

This is problematic as a point of principle. If such a principle – similar to the "strategy of referral" proposed by the Commission for requests concerning documents containing personal data discussed above – were accepted, Regulation 1049/2001 would not be a "self-contained regime" but simply a strategy of referring a great number of applications to be settled with reference to other pieces of legislation. From a practical point of view, few applicants have such a good grasp of EU legislation that they would be aware of all possible pieces of legislation that might affect their rights of access. However, while in the Commission proposal the existence of special rules would automatically result in moving the relevant matters outside the scope of the Regulation altogether, the Court's approach is more moderate and requires taking them into account when interpreting the relevant exception under Regulation 1049/2001.

The three cases of 2010 follow the Court's earlier line of reluctance to use the rules on public access to compensate defects in other access regimes. In *Sison*, the Court underlined the purpose of Regulation 1049/2001 "to give the general public a right of access to documents of the institutions and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one of them".69 According to the Court, "the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected …." (para 47). At the same time, this declaration should not be taken as meaning that the particular interest that an individual has in gaining access would *always* automatically exclude the possibility of there also existing a public interest in access.

Consequently, the relationship between a public interest and a particular private interest is not completely clear. The matter is likely to be addressed also in *Agrofert*,70 w here the Commission argues that the earlier General Court ruling failed "to take into account the specific features of competition law procedures and guarantees offered by the Merger Regulation to the undertakings participating in the merger proceedings". The matter was touched upon in the General Court's ruling in *MyTravel*,71 in which an appeal is currently pending. The applicant MyTravel had referred to the need to obtain disclosure of certain documents with reference to the overriding interest in the sound administration of justice. The General Court remained unconvinced since in its view, the argument, while referring to a wider public interest, merely sought, "in substance, to assert that those documents would allow the applicant to argue its case better in the action for damages" (para 65). In the view of the General Court, this objective did not alone "constitute an overriding public interest in disclosure which is capable of prevailing over the protection of confidentiality". The Court argued that

"[T]hat interest must be objective and general in nature and must not be indistinguishable from individual or private interests, such as those relating to the pursuit of an action brought against the Community institutions, since such individual or private interests do not constitute an element which is relevant to the weighing up of interests "(para

65).

In its appeal in *MyTravel*, Sweden contends that the considerations put forward by MyTravel "could quite plausibly constitute such a public interest" and "cannot be dismissed without further examination solely with reference to the applicant's private interests" in the way the General Court had done. Sweden points out that the "applicant is under no obligation either to plead or to prove anything in that regard; rather, it is for the institutions to ascertain whether there is an overriding public interest".72 The appeal by Sweden will thus give the Court of Justice another possibility to examine the relationship between the private interest of the applicant and the public interest pursued by Regulation 1049/2001. The *MyTravel* appeal has again gathered wide interest: Sweden is being backed up by the usual suspects Denmark, Finland and the Netherlands, while the Commission is supported by Germany, France and the UK. In her Opinion, delivered on 3 March, Advocate General Kokott agrees with Sweden and criticizes the General Court for merely stressing the existence of personal interests of MyTravel: " Such explanations and possible personal interests cannot be relevant if the Commission does not even begin to consider an evident special public interest" (para 110).

It is certainly to be wished that the Court of Justice would follow this advice. However, so far it has been difficult to convince the Court that there might be a wider public interest relating to granting access to a document if a particular private interest of the applicant is also involved. On the whole, the mere existence of "special rules" would seem too light a justification to limit public access as well, unless harm would be caused by granting access. However, one should be cautious in generalizing the outcome in *TGI* too much. In its action, TGI – and quite understandably so, given that at the time the application was made, the idea of a general presumption of no access was unheard of – neither argued that part of the documents covered by its request were not covered by the general presumption, nor stated what higher public interest might justify their disclosure. The great miss by TGI was that while submitting a request under Regulation 1049/2001, it still relied merely on its interest as the beneficiary of the State aid concerned by review procedures instead of arguing more widely based on the principles behind Regulation 1049/2001. Had TGI argued differently the outcome might have been even the opposite.

It is certainly odd if rules on public access generally generate more generous outcomes than those relating to access rights for interested parties. But this does not suggest a fault in public access rules, but a need to revise rules of privileged access to take more careful consideration of the possible harm that might be caused by granting access. When there is no harm, then access should be granted.73 Or as Advocate General Kokott suggested in *TGI*, the "competent services must especially consider the extent to which their need for confidentiality can continue in the light of Regulation No 1049/2001", of course keeping in mind the principle of proportionality (paras. 66–67).

6. When transparency is "especially pressing"

The *Turco* ruling highlighted the position of documents relating to legislative procedures as a category that ought to enjoy particularly wide openness. The distinction between legislative and other matters is not completely without foundation since in current Regulation 1049/2001 the importance of granting access to legislative documents is also emphasized.74 However, under the Regulation, wide legislative transparency is not to suggest that other than legislative matters are excluded from the scope of transparency: "In principle, all documents of the institutions should be accessible to the public."75 Moreover, the Regulation also refers specifically to transparency in the Union administration: "Openness enables citizens to participate more closely in the decisionmaking process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system."76 This certainly means that openness is not just relevant for legislative matters, but for administrative matters as well.

While the ruling in *Turco* established openness as the main rule when legislation is concerned, all the three rulings of 2010 concerned matters that, for the Commission at least, appeared different in character: documents relat ing to State aid, court proceedings, and infringement proceedings. In *TGI*, Advocate General Kokott specifically considered the Commission argument that Regulation 1049/2001 is mainly aimed at legislative documents. She agreed with the Commission on the specific intention of the legislature to promote the accessibility of certain types of documents that are of a particular interest to the general public, such as documents relating to law-making and to the development of policies and strategies. However, in her view the Commission had missed the fact that Regulation 1049/2001 expressly provides for openness in *all* areas of Union activity. Files on State aid investigation procedures were in no way exempted from this:

"Furthermore, the public interest in the reviewing of State aid is not necessarily less than the public interest in legislative procedure. There are admittedly many administrative procedures that are of very limited interest but the

reviewing of aid is often, quite rightly, of great interest. It affects the economic development of the Member States and, in particular, measures relating to the creation or safeguarding of jobs". (para 60)

Similarly, in *Bavarian Lager*, Advocate General Sharpston argued that, although the disclosure of the names constituted interference in privacy, the Commission had been wrong not to disclose the names, since "the context (an official meeting involving representatives of an industry group acting as spokesmen for their employers, and thus purely in a professional capacity), taken together with the principle of transparency, provided ample justification" (para 192). In *Bavarian Lager* there seemed to be a strong case for openness and public availability of information; after all, questions relating to who lobbies the Commission are by no means irrelevant.

The Court, however, wished in *TGI*, to underline the difference between the cases where Union institutions act in a legislative capacity, as in *Turco*, and requests for documents relating to procedures for reviewing State aid, such as those requested by TGI, that fall within the framework of administrative functions specifically allocated to the said institutions (para 60). Correspondingly, in *API* the Court noted that pleadings lodged before the Court of Justice are wholly specific since they are inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission; those latter activities, moreover, do not require the same breadth of access to documents as the legislative activities of an EU institution (para 77). This is the same logic that the General Court invoked in *MyTravel*, where it considered that the report requested by the applicant "falls within the purely administrative functions of the Commission". In the view of the General Court,

"[T]hose who were primarily concerned by the appeal proceedings that were considered and by the improvements discussed in the report were the undertakings affected … Consequently, the interest of the public in obtaining access to a document pursuant to the principle of transparency … does not carry the same weight in the case of a document drawn up in an administrative procedure intended to apply rules governing the control of concentrations or competition law in general, as in the case of a document relating to a procedure in which the Community institution acts in its capacity as legislator."77

In its appeal, Sweden argues that the principle of openness and access to documents is of great importance in *all* the institutions' activities, and thus also in the administrative procedure within an institution, as established by Article 2(3) of Regulation 1049/2001. In the view of Sweden, the reasoning of the General Court is not consistent with the principle of the greatest possible openness. 78 In her Opinion of March 2011, Advocate General Kokott agrees with the Court of Justice that "administrative activities do not require the same breadth of access to documents as the legislative activities of an EU institution" (para 61), but underlines that transparency is of a great importance for administrative matters as well:

"Union citizens are ... intended to understand how and for what reasons the administration takes its decisions. It is one of the aims of Regulation No 1049/2001 to provide citizens with information on positions which the institution in question has discussed internally and subsequently rejected. They are thus able to form an opinion regarding the quality of the administration's action, in particular its decision-making processes, participate in the public discussion on the administration's action and possibly be given guidance in making their democratic vote" (para 48).

Advocate General Kokott argues that the interest in protecting decision-making diminishes for procedures in which a decision has been taken (para 75), and suggests that the Court should set aside the Commission decisions refusing access in their entirety.

The relationship between legislative and other matters is something that both the Court of Justice and the General Court will need to return to. In addition to *MyTravel*, there are currently at least two cases pending before the General Court that can shed light on the question of public interest relating to legislative and other matters. The first one, *Toland* v. *Parliament*,79 concerns a request to obtain access to a Report by the Parliament's Internal Audit Service entitled "Audit of the Parliamentary Assistance Allowance". The application is justified, *inter alia*, by reference to a failure by the Parliament to consider whether there was an overriding public interest which might outweigh the openness and transparency are overriding public interests which outweigh the grounds for refusal. A second pending case, *LPN* v. *Commission*,80 concerns both Regulation 1049/2001 and the so-called Arhus Regulation on access to environmental information,81 and the central argument is that the information requested by LPN should be regarded information which can and must be made available given the significant environmental interest and the duty by the Commission to weigh the overriding public interest in each individual case.82 *Toland* and *LPN* could provide two reasonably solid candidates for matters with a strong interest in transparency, as strong as for legislative matters, in that the cases concern protection of the environment and use of EU funds. But since the case law on transparency has recently shown wide differences between the General Court and the Court of Justice, it is unlikely that the last word will be said in that matter before the case has reached the ECJ.

The special significance attached to legislative matters by the Court in *Turco* seems to relate to all documents that are linked to legislative procedures, as has been recently confirmed by the General Court in *Access Info Europe*. 83 This would seem to be a different consideration from the reasoning of the ECJ in *TGI* and *API*, where it referred to the possibility of openness sometimes being "especially pressing" even in contexts where a general presumption of no access applies. In *TGI*, in establishing that a general presumption of non-disclosure applied to documents relating to pending investigations, the Court underlined that the presumption did not "*exclude the right of those interested parties to demonstrate that a given document disclosure of which has been requested 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" (para 62).*

This finding in *TGI* links up to the arguments brought by Sweden and API in *API* that the general public interest in receiving information relating to pending court proceedings could constitute an overriding public interest for the purposes of Article 4(2) of Regulation 1049/2001. The ECJ pointed out in *API* that the overriding public interest referred to in Article 4(2) must, in general, be distinct from the principle of transparency. It found that the General Court had correctly weighed the interest in transparency against the interest of preventing all external influences on the proper conduct of court proceedings. It recalled the General Court's finding that:

"it is only where the particular circumstances of the case substantiate a finding that the principle of transparency is especially pressing that that principle can constitute an overriding public interest capable of prevailing over the need for protection of the disputed documents and, accordingly, capable of justifying their disclosure in accordance with the last line of Article 4(2) of Regulation No 1049/2001" (para 156).

In the ECJ's view, the vague considerations raised by API could not provide an appropriate basis for establishing that, in the present case, the principle of transparency was in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question.

The logical question then would seem to be whether the "higher public interest" referred to by the Court in *TGI* is the same "overriding public interest" that underlies Regulation 1049/2001 and which the institutions are required to consider under Article 4(2) when granting or refusing access. The ECJ does not specify this, but since it places the obligation to invoke the "especially pressing" interest on the applicant, the argument seems to be separate from the general "public interest", the existence of which the institutions are to consider assessing applications. The challenge from the point of view of the applicant is the same that Advocate General Maduro noted in his Opinion in *Turco:*

"The duty of striking a balance, which lies with the institution concerned, cannot be limited … to the prior demonstration by the applicant that, having regard to the specific facts of the case, the principle of transparency is so pressing that it overrides the need to protect the legal opinion in question. That would be to forget that one of the fundamental reasons for the specific and individual examination imposed on the institution concerned lies in that duty of balancing public interests." (para 54)

Advocate General Maduro went on to argue that accepting the opposite outcome would impose an excessive burden of proof on the applicant. Since the applicant does not know the content of the document sought, he would scarcely be able to show the interest in disclosing it, and will tend to rely on the overriding public interest in general terms. Thus, Advocate General Maduro argues, it is only the institution that "can, – and must –, carry out such an assessment on the basis of the content of the document in question and of the specific circumstances of the case" (para 54). Exactly the same finding would have been correct in *TGI*: it is extremely problematic if the Court places the burden of proof for reversing the "general presumption" on the applicant, who, according to Regulation 1049/2001 does not need to reason his application and, when making the application, has not seen the document applied for and may thus have only a vague idea of its content. The applicant will not know whether the content of the documents justifies the "general presumption" being reversed, but will need to argue this in any case as a procedural point.

7. What happened to the EU's sunshine legislation?

There are in essence two ways of looking at the Court's recent case law. The pragmatic one is to treat the rulings as being of limited relevance and only affecting the individual applications at issue or others with exactly the same characteristics. In terms of their contents, the rulings confirm that certain documents relating to pending State aid investigations and certain documents relating to Court proceedings fall under a "general presumption" of no public access, which can, however, be reversed. Since documents of this kind have in fact seldom been released, the

practical effect of the cases is limited. As for *Bavarian Lager*, the relationship between the public access rules and the data protection rules will be reconsidered by the legislature in near future in any case. The ruling thus offers a short term solution. Transparency is essentially legislative in nature, seems to be the Court's clearest message, a message it will soon in a position to rectify or clarify. Other than that, the 2010 rulings are characterized by a certain amount of conceptual confusion, making the underlying logic difficult to follow and equally difficult to implement in practice. The clearest result of the rulings might be that they created an interest for the transparency-minded to revise the current Regulation, the interpretation of which had – until the summer of 2010 – been broadly satisfactory. Today, those who are tired of the rain and hope for a bit more sunshine might have more to gain if the legislature decided to amend the Regulation.

The other possible interpretation is to conclude dramatically that the vision of openness, legitimacy and citizen participation seems to have reached its culmination in the Court's *Turco* ruling. Since then, if the ECJ's case law serves as any kind of an indicator, the destination is getting blurred, as the Court has given its authoritative blessing to some of the Commission's most serious attempts to limit citizens' access and, what is more, has done so against the specific wording of Regulation 1049/2001. *API* and *TGI* were an obvious continuation of the *VKI* ruling, but unfortunately, do not achieve the same level of transparency, since the threshold for accepting a "general presumption" is now significantly lowered – and the story will continue. One may now only hope that the development will not lead to a situation where the Regulation, which after all was supposed to apply to *all* documents held by the institutions in *all* policy areas, is effectively emptied of contents through "general presumptions" applying to entire policy fields. As a question of principle, a general presumption of no access is problematic in a regime which is based on the opposite assumption: that everything is in principle open and accessible unless there are justified grounds to deny access.

Suggesting that the latter interpretation has at least some truth is of course the latest move by the Commission in March 2011 to give a second legislative proposal on reforming Regulation 1049/2001. The Commission, which certainly was harshly criticized for its 2008 proposal, now seems to have drawn the conclusion that it should not place the obvious gains it has since then received through the Court's case law at risk by amending the exceptions that the Regulation currently contains. It is not unlikely that in the near future the Commission will formally withdraw its 2008 proposal, on the ground that negotiations on the file have not advanced, and instead of the block exceptions it tried to introduce through the legislative avenue comfort itself with the Court's acceptance of "general presumptions", which seem to serve the same logic. But in times when negotiations on Article 298 TFEU and a new regulation on "open, efficient and independent" EU administration are drawing closer, it is of course illuminating to consider what kind of a picture the Commission's recent activities in Court give of the EU administration today: it is hardly an example of good, responsive administration to use litigation against citizens to try to secure one's own position at all costs. Think of the *Bavarian Lager* saga for example: 14 years spent in Court arguing, against the advice of both the European Ombudsman and the European Data Protection Supervisor, over the release of five names in an official meeting protocol. What might have been won in terms of data protection, was certainly lost in the name of good administration.

It might be wise for both the Court and the legislature to return to some of the basics of open government – if this principle is indeed still an ideology with some foothold in the European Union. This would require putting the consideration of potential harm back to the core of questions of public access. Quite simply: when there is no harm in releasing a document, then there is no reason to limit access either. Requests for access to documents are hardly ever convenient for the administration that is under an obligation to deal with them. And yet transparency is specifically one of the keys to enhance the trust of the citizens in the very same institutions.

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1. European Parliament and Council Regulation (EC) No 1049/2001 of 30 May 2001, O.J. 2001, L 145/43.

2. For a useful summary, see e.g. Case T-36/04, *API* v. *Commission*, [2007] ECR II-3201, paras. 51–56.

3. P6_A(2006) 052.

4. Green Paper "Public Access to Documents held by institutions of the European Community – A review", COM(2007)185.

5. Proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 30 April 2008, COM(2008)229 final, 2008/0090 (COD).

6. See "Revision of access rules would boost confidence. Seven ministers call for the EU to make good its commitment to transparency", published in European Voice on 5 March 2009, available at <www.europeanvoice.com/article/imported/revision-of-access-rules-would-boostconfidence-/ 64189.aspx> .

7. See the European Parliament resolution on the Commission proposal adopted on 11 March 2009, P6_TA-PROV(2009)0114, and e.g. "Journalists angry over the European Parliament's views on transparency – Swedish Union of Journalists", available at <www.statewatch.org/ news/2009/mar/02sweden-journalists-access-reg.htm> .

8. See "Commissioner Wallstroms hits back at critics: 'They can't have read the text'", available at the Wobbing Europe website, <www.wobsite.be/index.php?page=4&detail=375&PHPS ESSID=7100ec23c3451225d9573bff14ba3c76> .

9. Judgment of the Grand Chamber of 29 June 2010, nyr.

10. Judgment of the Grand Chamber of 29 June 2010, nyr.

11. Joined Cases C-514/07 P, 528/07 P & 532/07 P, *Sweden* v. *API*, *API* v. *Commission*, and *Commission* v. *API*, judgment of the Grand Chamber of 21 Sept. 2010, nyr.

12. E.g., the proposal to align the Regulation with the provisions on access to environmental information (Reg. 1367/2006 implementing the Aarhus Convention, O.J. 2006, L 264/13) seems to gain widespread support.

13. See e.g. Contribution of the XL COSAC, Paris, 4 Nov 2008, O.J. 2009, C 17/01, expressing "its concerns about the proposal for a regulation regarding public access to documents ..., which should not limit the access to documents in comparison with the current situation". See also the UK House of Lords European Union Committee, 15th Report of Session 2008–09, Access to EU Documents, Report with Evidence, published 18 Jun 2009; 510th Resolution of the Czech Senate, delivered on the 17th session held on 30 Oct 2008 and arguing that the Commission proposal "is in its essential parts a step backwards which does not contribute to enhancing of the legitimacy of European administration or strengthening of its responsibility towards the public"; Resolution of the Grand Committee of the Parliament of Finland of 17 Oct 2008 emphasizing that "if approved, the Commission's proposal would lead to a major reversal of the Union's transparency and the public's access to documents. The proposal is thus in contradiction to goals that have been repeatedly affirmed by the European Council. The Grand Committee considers it worrying and reproachable that the Commission has advanced in support of its proposal justifications that must be considered untrue and misleading. Such conduct is liable to weaken the Commission's public credibility."

14. Joined Cases C-39 & 52/05 P, *Kingdom of Sweden and Maurizio Turco* v. *Council of the European Union*, [2008] ECR 1-4723; annotation by Arnull, 46 CML Rev. (2009) 1219–1238. For a similar logic relating to the transparency of legislative matters, see Case T-233/09 *Access Info* Europe v. *Council*, judgment of 22 March 2011, nyr.

15. The Court acknowledged that there might be specific legal opinions whose disclosure could still be refused if they were of a "particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question" (para 69). These exceptions are to be interpreted by the General Court in the pending Case T-452/10, *ClientEarth* v. *Council*, O.J. 2010, C 328/37.

16. Adamski, "How wide is the 'widest possible'? Judicial interpretation of the exceptions to the right of access to official documents revisited", 46 CML Rev (2009) 521–549, 536.

17. Arnull, op. cit. *supra* note 14, at 1238.

18. Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 Dec 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, O.J. 2001, L 8/1.

19. Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty O.J. 1999, L 83/1.

20. Recital 4

21. Communication from the Commission to the European Parliament and the Council. Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decisionmaking procedures, Brussels, 2.12.2009, COM(2009) 665 final.

22. See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, 21 March 2011, COM(2011)137 final.

23. European Parliament resolution of 17 December 2009 on improvements needed to the legal framework for access to documents

following the entry into force of the Lisbon Treaty, Regulation (EC) No 1049/2001, P7_TA(2009)0116. 24. Art. 1 25. Art. 2(1).

24. Art 1

25. Art 2((1)

26. This was established already in Case C-353/99 P, *Council* v. *Hautala and others*, [2001] ECR I-9565. 27. Case T-2/03, *Verein fur Konsumenteninformation* v. *Commission*, [2005] ECR II-1121.

28. I owe the term, referring to Sweden, Denmark, Finland and the Netherlands, to my former professor, see Harlow, "Transparency in the European Union: Weighing the Public and Private Interest" in Wouters, Verhey and Kiiver (Eds.), *European Constitutionalism beyond Lisbon* (Intersentia 2009), pp. 209–238, 210.

29. Heliskoski and Leino, "Darkness at the break of noon: the case law on Regulation No. 1049/2001 on access to documents", 43 CML Rev. (2006), 735–781, 759.

30. Ruling of 14 Dec 2006 in Case T-237/02, *Technische Glaswerke Ilmenau* v. *Commission*, [2006] ECR II-5131.

31. Maes, Deputy Head of Unit, European Commission, Secretariat-General, Directorate for Better Regulation and Institutional Matters, "Increasing the involvement of citizens in decisionmaking. Aims and objectives of the Commission's proposal amending regulation (EC) no 1049/2001 on public access to European Parliament, Council and Commission documents". Paper presented at a Seminar on the reform of the regulation organized on 11 Dec 2008. Contributions are available at:

www.om.fi/en/Etusivu/Ministerio/OikeusasiatEUssa/SeminaronaccesstodocumentsContributionsoftheseminar

32. Some of the information would be permanently (up to 30 years) unavailable for the public, namely information gathered from individuals or undertakings under investigative powers and which may only be used for the purpose of the investigation, such as documents seized during inspections or information provided by applicants for immunity or a reduction of fines (leniency scheme). See also Maes, Ibid.

33. T6-0114/2009 .

34. A number of Council documents are available on the Statewatch website, <www.state watch.org/foi/observatory-access-reg-2008-2009.htm> .

35. Case T-29/08, *Liga para a Proteccao da Natureza* v. *Commission*, O.J. 2008, C 79/58.

36. Ibid.

37. See Case C-477/10 P, by the Commission against the judgment of the GC of 7 July 2010 in Case T-111/07, O.J. 2010, C 328/39.

38. Open skies cases: Case C-466/98, *Commission* v. *United Kingdom*, [2002] ECR I-9427, and Cases C-467/98, *Commission* v. *Denmark*; C-468/98, *Commission* v. *Sweden*; C-469/98, *Commission* v. *Finland*; C-471, *Commission* v. *Belgium*; C-472/98, *Commission* v. *Luxembourg*; C-475/98, *Commission* v. *Austria*; C-476/98, *Commission* v. *Germany*.

39. Judgment in Case T-36/04, *API* v. *Commission*, [2007] ECR II-3201.

40. Opinion of A.G. Maduro in *API*, cited *supra* note 11, para 25.

41. Proposal cited *supra* note 5, 6.

42. Ibid. 7.

43. Maes, cited *supra* note 31

44. T6-0114/2009.

45. Proposal cited *supra* note 22.

46. A.G. Maduro's Opinion in *API*, cited *supra* note 11, para 26.

47. Regulation (EC) No 45/2001, cited *supra* note 18.

48. Recital 15 of Regulation No 45/2001 indicates that access to documents, including those containing personal data, is governed by Art. 255 EC, while Recital 11 of Regulation No 1049/2001 underlines that the institutions should take account of the principles in Community legislation concerning the protection of personal data in all areas of activity of the Union. For a discussion of the two regulations, see Kranenborg, "Access to documents and data protection in the European Union: on the public nature of personal data", 45 CML Rev. (2008), 1079–1114.

49. Proposal cited *supra* note 5, 4.

50. O.J. 1993, L 340/41. In 1997, Bavarian Lager asked the Commission for a copy of the 'reasoned opinion' under the Code of Conduct but was refused. Bavarian Lager brought an action before the General Court against that decision but the action was dismissed. In May 1998 Bavarian Lager addressed a new request to the Commission for access to all of the submissions in the relevant file by 11 named companies and organizations and by three defined categories of person or company. The Commission refused the application on the ground that the Code of Conduct applied only to documents of which the Commission was the author.

51. Case T-309/97, *Bavarian Lager* v. *Commission* [1999] ECR II-3217, in which the GC found that the preservation of the aim in question, namely allowing a Member State to comply voluntarily with the requirements of the Treaty, or, where necessary, to give it the

opportunity to justify its position, justified, for the protection of the public interest, the refusal of access to a preparatory document relating to the investigation stage of the procedure under ex Art. 169 EC.

52. Reference 713/98/IJH. Bavarian Lager argued that it wished to obtain the names of the delegates of the CBMC who had attended the meeting on 11 Oct 1996 and the names of the companies and any persons who fell into one of the 14 categories identified in the original request for access to documents containing the communications to the Commission under file reference P/93/4490/UK. The Commission indicated to the Ombudsman that, of the 45 letters that it had written to the persons concerned requesting approval to disclose their identities to Bavarian Lager, 20 replies had been received, 14 positive and 6 negative. The Commission supplied the names and addresses of those that had responded positively. Bavarian Lager stated to the Ombudsman that the information provided by the Commission was still incomplete. In his special report of November 2000, the Ombudsman recommended that the Commission should inform the applicant of the names of the CBMC delegates who had attended the meeting and of companies and persons in the 14 categories identified in the original request.

53. Case T-194/04, *Bavarian Lager* v. *Commission*, [2007] ECR II-4523. For a detailed analysis, see Kranenborg op. cit. *supra* note 48.

54. A.G. Sharpston's contribution was, in fact, so original that after its delivery both the Commission and the European Data Protection Supervisor applied for the reopening of the oral procedure, claiming that the Opinion was based on arguments that were not debated either before the General Court or before the Court of Justice. However, the Court found no need to reopen the oral procedure.

55. See "Review of relationship between transparency and data protection more urgent after Court ruling on Bavarian Lager", press release by the European Data Protection Supervisor, 30 June 2010. Available on the EDPS website at: www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2010/EDPS-2010-11_ECJ_Bavarian_Lager_EN.pdf

56. Unfortunately, the Grand Chamber has recently delivered another similar ruling relating to the publication of information relating to persons receiving agricultural aid. Joined cases *Volker und Markus Schecke* GbR (C-92/09) and *Hartmut Eifert* (C-93/09) v. *Land Hessen*, Judgment of 9 Nov 2010, nyr. While the ruling as such is better reasoned, the logic behind it seems similar. Common to both cases was that priority was given to the protection of personal data – any personal data – in a situation where a person's personal integrity would not seem to be seriously at risk. In the latter case, the ECJ declared void those provisions that required the publication of names of natural persons that receive agricultural aid. And the justification? These provisions were in conflict with the right of private life and protection of personal data included in the EU Charter. Again, there was no consideration of the harm caused, and the data was already legally in the public domain.

57. Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents O.J. 2009, C 2/03, para 48.

58. Proposal cited *supra* note 5, 8.

59. Opinion of the European Data Protection Supervisor cited *supra* note 57.

60. Ibid, para 37.

61. The EDPS referred to Art. 29 Working Party and the Convention of the Council of Europe on Access to Official Documents, which establishes that contracting parties may limit the right of access to official documents to the aim of protecting, *inter alia*, "privacy and other legitimate private interests".

62. See the European Parliament resolution on the Commission proposal adopted on 11 Mar 2009, P6_TA-PROV(2009)0114, Amendments 90, 96 and 102.

63. See press release cited *supra* note 55.

64. The Commission Communication of 4 Nov. 2010, COM(2010)609 final, disregards this need; but, see the Council conclusions on the Communication from the Commission to the European Parliament and the Council – A comprehensive approach on personal data protection in the European Union, JHA Council meeting, 24–25 Feb. 2011, preamble, para 7.

65. See e.g. Case T-82/09, *Dennekamp* v. *Parlement*, pending, O.J. 2009, C 102/29, which concerns *inter alia* access to the names of those Members of the European Parliament that are members of the Additional Pension Scheme. The Parliament has based its refusal on Art. 4(1)(b) of Regulation No 1049/2001.

66. In *Bavarian Lager*, the applicant had lodged a complaint with the Commission, which led the Commission to institute proceedings against the UK. In the context of these proceedings the Commission organized a meeting with UK officials and an interest group. Bavarian Lager had requested the right to attend the meeting, but the Commission refused to grant permission to attend. Later the UK decided to amend its national legislation, which led the Commission to suspend the proceedings. It was only after its avenue as a complainant in the infringement proceedings context had come to an end that Bavarian Lager decided to invoke the rules on public access to request access to documents relating to the meeting which it had not been able to attend. The widest access was granted to Bavarian Lager following its request based on Regulation No 1049/2001, but also a significant amount of time had lapsed from its first requests, the effect of which is difficult to evaluate retrospectively.

67. Council Regulation (EC) No 659/1999 of 22 March1999 laying down detailed rules for the application of Art. 88 of the EC Treaty, O.J. 1999, L 83/1. Art. 20 headed "Rights of interested parties" establishes, in para 1, that any interested party may submit comments following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission. Under para 2, any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission takes a decision on a case concerning the subject matter of the information supplied, the interested party shall be sent a copy of that decision. Under para 3, at its

request, any interested party shall obtain a copy of any decision pursuant to Arts. 4 and 7, Art. 10(3) and Art. 11 of the Regulation.

68. Proposal cited *supra* note 5, 7.

69. In Case C-266/05 P, *Jose Maria Sison* v. *Council of the European Union*, [2007] ECR I-1233, in which the Court upheld the earlier Genera Court ruling, Joined Cases T-110, 150 & 405/03, *Sison* v. *Council*, [2005] ECR II-1429, para 43.

70. See Case C-477/10 P, appeal by European Commission against the judgment of the General Court in Case T-111/07, *Agrofert*, judgment of 7 July 2010, nyr, O.J. 2010, C 328/22.

71. Case T-403/05, *MyTravel Group plc* v. *the Commission*, [2008] ECR II-2027.

72. Case 506/08 P, *Sweden* v. *MyTravel and Commission,* O.J. 2009, C 55/6, para 8.

73. For a more detailed discussion, see Leino, "Minding the Gap in European administrative law: On lacunae, fragmentation and the prospect of a brighter future", Briefing note prepared for the European Parliament Committee on Legal Affairs, March 2011. The document is available on the internet at <www.europarl,europa.eu/studies> .

74. Recital 6 and Art. 12(2) of the Regulation, which establishes that "Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent."

75. Preamble, Recital 11.

76. Preamble, Recital 2.

77. *MyTravel Group plc* v. *the Commission*, cited *supra* note 71, para 66.

78. *Sweden* v. *MyTravel and Commission*, cited *supra* note 72, p.6, para 1.

79. Case T-471/08, *Toland* v. *Parliament*, pending, O.J. 2009, C 32/72.

80. *Liga para a Proteccao da Natureza* v. *Commission of the European Communities*, cited *supra* note 35.

81. Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 Sept. 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, O.J. 2006, L 264/13.

82. *Liga para a Proteccao da Natureza*, cited *supra* note 35. 83. *Access Info Europe* v. *Council*, cited *supra* note 14.

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SUPPLEMENTARY BACKGROUND READING

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Cases and Materials on EU Law (8th Edition)

Stephen Weatherill
OUP 2007

(Extracts) The Direct Effect of Directives

SECTION 1: ESTABLISHING THE PRINCIPLE

The most difficult area relating to 'direct effect' arises in the application of the notion to EC *Directives.* Although the rest of this Chapter concentrates on this area, it is important not to develop an inflated notion of the importance of the problem of the direct effect of Directives. Directives are after all only one source of Community law. However, the issue deserves examination in some depth, not least because Directives play a major role in elaborating the detailed scope of Community policy-making in respect of which the Treaty provides a mere framework. Moreover, Directives are a rather peculiar type of act - Community law but implemented at national level through national legal procedures. An examination of this area, then, should reveal much about the general problem of the interrelation of national law with the Community legal order.

The starting point is Article 249 EC, formerly Article 189, set out at p.30. This suggests that a Directive, in contrast to a Regulation, would not be directly effective. Regulations are directly applicable, and if they meet the *Van Gend en Loos* (Case 26/62) test for direct effect they are directly effective too. They are law in the Member States (direct applicability) and they may confer legally enforceable rights on individuals (direct effect). Directives, in marked contrast, are clearly dependent on implementation by each State, according to Article 249. When made by the Community, they are not designed to be law in that form at national level. Nor are they designed directly to affect the individual. (The same is true of the European framework law, envisaged by Article 1-33 of the Treaty establishing a Constitution as the functional successor to the Directive, p.34 above.) Yet in *Van Duyn* (Case 41/74), at p.114 above, the Court held that a Directive might be relied on by an individual before a national court. In the next case, *Pubblico Ministero* v *Ratti* (Case 148/78), the European Court explains how, when and why Directives can produce direct effects (or, at least, effects analogous thereto) at national level.

***Pubblico Ministero* v *Ratti* (Case 148/78)**

[1979] ECR 1629, [1980] 1 CMLR 96, Court of Justice of the European Communities

Directive 73/173 required Member States to introduce into their domestic legal orders rules governing the packaging and labelling of solvents. This had to be done by December 1974. Italy had failed to implement the Directive and maintained in force a different national regime. Ratti produced his solvents in accordance with the Directive, not the Italian law. In 1978 he found himself the subject of criminal proceedings in Milan for non-compliance with Italian law. Could he rely on the Directive which Italy had left unimplemented?

[18] This question raises the general problem of the legal nature of the provisions of a directive adopted under Article 189 of the Treaty.

[19] In this regard the settled case law of the Court, last reaffirmed by the judgment of 1 February 1977 in Case 51/76 *Nederlandse Ondernemingen* [1977] 1 ECR 126, lays down that, whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of acts covered by that article can never produce similar effects.

[20] It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude on principle the possibility of the obligations imposed by them being relied on by persons concerned.

[21] Particularly in cases in which the Community authorities have, by means of directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of Community law.

[22] Consequently *a* Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.

[23] It follows that a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request if the obligation in question is unconditional and sufficiently precise.

[24] Therefore the answer to the first question must be that after the expiration of the period fixed for the implementation of

a directive a Member State may not apply its internal law - even if it is provided with penal sanctions - which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive.

NOTE: Directive 77/728 applied a similar regime to varnishes. But here Ratti had jumped the gun. The deadline for implementation was November 1979. Yet in 1978 his varnishes were already being made according to the Directive, not Italian law. In the criminal prosecution for breach of Italian law he sought to rely on this Directive too. He argued that he had a legitimate expectation that compliance with the Directive prior to its deadline for implementation would be permissible:

***Pubblico Ministero* v *Ratti* (Case 148/78)**

[1979] ECR 1629, [1980] 1 CMLR 96, Court of Justice of the European Communities

[43] It follows that, for the reasons expounded in the grounds of the answer to the national court's first question, it is only at the end of the prescribed period and in the event of the Member State's default that the directive - and in particular Article 9 thereof - will be able to have the effects described in the answer to the first question.

[44] Until that date is reached the Member States remain free in that field.

[45] If one Member State has incorporated the provisions of a directive into its internal legal order before the end of the period prescribed therein, that fact cannot produce any effect with regard to other Member States.

[46] In conclusion, since a directive by its nature imposes obligations only on Member States, it is not possible for an individual to plead the principle of 'legitimate expectation' before the expiry of the period prescribed for its implementation.

[47] Therefore the answer to the fifth question must be that Directive No 77/728 of the Council of the European Communities of 7 November 1977, in particular Article 9 thereof, cannot bring about with respect to any individual who has complied with the provisions of the said directive before the expiration of the adaptation period prescribed for the Member State any effect capable of being taken into consideration by national courts.

NOTE: A small indentation into the Court's insistence that the expiry of the period prescribed for a Directive's implementation is the vital trigger for its relevance in law before national courts was made in Case C-129/96 *Inter-Environnement Wallonie ASBL* v *Region Wallone* [1997] ECR I-7411. In advance of the deadline, Member States are obliged 'to refrain ... from adopting measures liable seriously to compromise the result prescribed' by the Directive. A violation was established in Case C-14/02 *ATRAL* [2003] ECR 1-4431. In normal circumstances, however, it is the expiry of the prescribed deadline which converts an unimplemented (and sufficiently unconditional) Directive into a provision on which an individual may rely before a national court.

• QUESTION

Why did the European Court decide to uphold Ratti's ability to rely on the unimplemented 1973 solvents Directive in the face of the apparently conflicting wording of the Treaty (Article 189, now 249)? One may return to Judge Mancini for one explanation:

F. Mancini, 'The Making of a Constitution for Europe' (1989) 26 CML Rev 595

(Footnotes omitted.)

3. Costa v *Enel* may be therefore regarded as a sequel of *Van Gend en Loos.* It is not the only sequel, however. Eleven years after Von *Gend en Loos,* the Court took in *Van Duyn* v *Home Office* a further step forward by attributing direct effect to provisions of Directives not transposed into the laws of the Member States within the prescribed time limit, so long as they met the conditions laid down in *Van Gend en Loos.* In order to appreciate fully the scope of this development it should be borne in mind that while the principal subjects governed by Regulations are agriculture, transport, customs and the social security of migrant workers, Community authorities resort to Directives when they intend to harmonise national laws on such matters as taxes, banking, equality of the sexes, protection of the environment, employment contracts and organisation of companies. Plain cooking and haute cuisine, in other words. The hope of seeing Europe grow institutionally, in matters of social relationships and in terms of quality of life rests to a large extent on the adoption and the implementation of Directives.

Making Directives immediately enforceable poses, however, a formidable problem. Unlike Regulations and the Treaty provisions dealt with by *Van Gend en Loos,* Directives resemble international treaties, in so far as they are binding *only* on the States and *only* as to the result to be achieved. It is understandable therefore that, whereas the *Van Gend en Loos* doctrine established itself within a relatively short time, its extension to Directives met with bitter opposition in many quarters. For example, the French Conse/7 *d'Etat* and the German *Bundesfinanzhof* bluntly refused to abide by it and Professor

Rasmussen, in a most un-Danish fit of temper, went so far as to condemn it as a case of 'revolting judicial behaviour'.

Understandable criticism is not necessarily justifiable. It is mistaken to believe that in attributing direct effect to Directives not yet complied with by the Member States, the Court was only guided by political considerations, such as the intention of by-passing the States in a strategic area of law-making. Non-compliance with Directives is the most typical and most frequent form of Member State infraction; moreover, the Community authorities often turn a blind eye to it and, even when the Commission institutes proceedings against the defaulting State under Article 169 of the Treaty, the Court cannot impose any penalty on that State. [See now Article 228 EC, a Maastricht innovation, p.110 above.] This gives the Directives a dangerously elastic quality: Italy, Greece or Belgium may agree to accept the enactment of a Directive with which it is uncomfortable knowing that the price to pay for possible failure to transpose it is non-existent or minimal.

Given these circumstances, it is sometimes submitted that the *Van Duyn* doctrine was essentially concerned with assuring respect for the rule of law. The Court's main purpose, in other words, was 'to ensure that neither level of government can rely upon its malfeasance - the Member State's failure to comply, the Community's failure or even inability to enforce compliance', with a view to frustrating the legitimate expectation of the Community citizens on whom the Directive confers rights, indeed, 'if a Court is forced to condone wholesale violation of a norm, that norm can no longer be termed law'; nobody will deny that 'Directives are intended to have the force of law under the Treaty'.

Doubtless, in arriving at its judgment in *Van Duyn*, the Court may also have considered that by reducing the advantages Member States derived from non-compliance, its judgment would have strengthened the 'federal' reach of the Community power to legislate and it may even have welcomed such a consequence. But does that warrant the revolt staged by the *Conseil d'Etat* or the *Bundesfinanzhof?* The present author doubts it; and so did the German Constitutional Court, which sharply scolded the *Bundesfinanzhof* for its rejection of the *Van Duyn* doctrine. This went a long way towards restoring whatever legitimacy the Court of Justice had lost in the eyes of some observers following *Van Duyn.* The wound, one might say, is healed and the scars it has left are scarcely visible.

• QUESTION

Do you agree with Mancini that the Court's work in this area is 'essentially concerned with assuring respect for the rule of law'? See also N. Green, 'Directives, Equity and the Protection of Individual Rights' (1984) 9 EL Rev 295.

NOTE: Difficult constitutional questions arise at Community level and at national level in relation to the direct effect of Directives. You will quickly notice that many of the issues hav$_c$ arisen in the context of cases about sex discrimination. This has happened because equality between the sexes constitutes an area of Community competence which is given shape by ; string of important Directives, often inadequately implemented at national level.

SECTION 2: CURTAILING THE PRINCIPLE

The next case allowed the Court to refine its approach to the direct effect of Directives.

***Marshall* v *Southampton Area Health Authority* (Case 152/84)**

[1986] ECR723, [1986] 1 CMLR 688, Court of Justice of the European Communities

Ms Marshall was dismissed by her employers, the Health Authority, when she reached the age of 62. A man would not have been dismissed at that age. This ***was*** discrimination on grounds of sex. But was there a remedy in law? Apparently not under the UK's Sex Discrimination Act 1975, because of a provision excluding discrimination arising out of treatment in relation to retirement. Directive 76/207 requiring equal treatment between the sexes, *did* appear to envisage a legal remedy for such discrimination, but that Directive had not been implemented in the UK even though the deadline was past. So could Ms Marshall base a claim on the unimplemented Community Directive before an English court? The European Court was asked this question in a preliminary reference by the Court of Appeal

The European Court first held that Ms Marshall's situation was an instance of discrimination on grounds of sex contrary to the Directive. It continued:

[39] Since the first question has been answered in the affirmative, it is necessary to consider whether Article 5(1) of Directive No 76/207 may be relied upon by an individual before national courts and tribunals.

[40] The appellant and the Commission consider that that question must be answered in the affirmative. They contend

in particular, with regard to Articles 2(1) and 5(1) of Directive No 76/207, that those provisions are sufficiently clear to enable national courts to apply them without legislative intervention by the Member States, at least so far as overt discrimination is concerned.

[41] In support of that view, the appellant points out that directives are capable of conferring rights on individuals which may be relied upon directly before the courts of the Member States; national courts are obliged by virtue of the binding nature of a directive, in conjunction with Article 5 of the EEC Treaty, to give effect to the provisions of directives where possible, in particular when construing or applying relevant provisions of national law (judgment of 10 April 1984 in Case 14/83 *von* Co/son *and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891). Where there is any inconsistency between national law and Community law which cannot be removed by means of such a construction, the appellant submits that a national court is obliged to declare that the provision of national law which is inconsistent with the directive is inapplicable.

[42] The Commission is of the opinion that the provisions of Article 5(1) of Directive No 76/207 are sufficiently clear and unconditional to be relied upon before a national court. They may therefore be set up against section 6(4) of the Sex Discrimination Act, which, according to the decisions of the Court of Appeal, has been extended to the question of compulsory retirement and has therefore become ineffective to prevent dismissals based upon the difference in retirement ages for men and for women.

[43] The respondent and the United Kingdom propose, conversely, that the second question should be answered in the negative. They admit that a directive may, in certain specific circumstances, have direct effect as against a Member State in so far as the latter may not rely on its failure to perform its obligations under the directive. However, they maintain that a directive can never impose obligations directly on individuals and that it can only have direct effect against a Member State *qua* public authority and hot against a Member State qua employer. As an employer a State is no different from a private employer. It would not therefore be proper to put persons employed by the State in a better position than those who are employed by a private employer.

[44] With regard to the legal position of the respondent's employees the United Kingdom states that they are in the same position as the employees of a private employer. Although according to United Kingdom constitutional law the health authorities, created by the National Health Service Act 1977, as amended by the Health Services Act 1980 and other legislation, are Crown bodies and their employees are Crown servants, nevertheless the administration of the National Health Service by the health authorities is regarded as being separate from the government's central administration and its employees are not regarded as civil servants.

[45] Finally, both the respondent and the United Kingdom take the view that the provisions of Directive No 76/207 are neither unconditional nor sufficiently clear and precise to give rise to direct effect. The directive provides for a number of possible exceptions, the details of which are to be laid down by the Member States. Furthermore, the wording of Article 5 is quite imprecise and requires the adoption of measures for its implementation.

[46] It is necessary to recall that, according to a long line of decisions of the Court (in particular its judgment of 19 January 1982 in Case 8/81 Becter v *Finanzamt Munster-lnnenstadt* [1982] ECR 53), wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.

[47] That view is based on the consideration that it would be incompatible with the binding nature which Article 189 confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the Court deduced that a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.

[48] With regard to the argument that a directive may not be relied upon against an individual, it must be emphasised that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.

[49] In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

[50] It is for the national court to apply those considerations to the circumstances of each case; the Court of Appeal has, however, stated in the order for reference that the respondent, Southampton and South West Hampshire Area Health Authority (Teaching), is a public authority.

[51] The argument submitted by the United Kingdom that the possibility of relying on provisions of the directive against the respondent *qua* organ of the State would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the directive in national law.

[52] Finally, with regard to the question whether the provision contained in Article 5(1) of Directive No 76/207, which implements the principle of equality of treatment set out in Article 2(1) of the directive, may be considered, as far as its contents are concerned, to be unconditional and sufficiently precise to be relied upon by an individual as against the State, it must be stated that the provision, taken by itself, prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, in a general manner and in unequivocal terms. The provision is therefore sufficiently precise to be relied on by an individual and to be applied by the national courts.

[53] It is necessary to consider next whether the prohibition of discrimination laid down by the directive may be regarded as unconditional, in the light of the exceptions contained therein and of the fact that according to Article 5(2) thereof the Member States are to take the measures necessary to ensure the application of the principle of equality of treatment in the context of national law.

[54] With regard, in the first place, to the reservation contained in Article 1 (2) of Directive No 76/207 concerning the application of the principle of equality of treatment in matters of social security, it must be observed that, although the reservation limits the scope of the directive *rations materiae*, it does not lay down any condition on the application of that principle in its field of operation and in particular in relation to Article 5 of the directive. Similarly, the exceptions to Directive No 76/207 provided for in Article 2 thereof are not relevant to this case.

[55] It follows that Article 5 of the Directive No 76/207 does not confer on the Member States the right to limit the application of the principle of equality of treatment in its field of operation or to subject it to conditions and that that provision is sufficiently precise and unconditional to be capable of being relied upon by an individual before a national court in order to avoid the application of any national provision which does not conform to Article 5(1).

[56] Consequently, the answer to the second question must be that Article 5(1) of Council Directive No 76/207 of 9 February 1976, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5(1).

NOTES

1. Ms Marshall was able to rely on the Directive because she was employed by the State. Her subsequent quest for compensation took her back to the European Court, where it was made clear that national limits on compensatory awards should not be applied in so far as they impede an effective remedy (Case C-271/91 [19931 ECR 1-4367). However, had she been employed by a private firm she would have been unable to rely on the direct effect of the Directive. So, as far as direct effect is concerned, there are requirements which always apply - those explained above in *Van Gend en Loos* (Case 26/62) (p. 114). But for Directives there are extra requirements: first, that the implementation date has passed; and, second, that the State is the party against which enforcement is claimed. Directives may be vertically directly effective, but not horizontally directly effective.

2. In rejecting the horizontal direct effect of Directives, the Court in fact made a choice between competing rationales for the direct effect of Directives. In its early decisions the Court laid emphasis on the need to extend direct effect in this area in order to secure the 'useful effect' of measures left unimplemented by defaulting States. Consider para 12 of *Van Duyn* (Case 41/74) (p.114 above); and, for example, in *Nederlandse Ondernemingen* (Case 51/76) [1977] ECR 113, the Court observed (at para 23) that:

where the Community authorities have, by Directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.

This dictum came in the context of a case against the State, but this logic would lead a bold court to hold an unimplemented Directive enforceable against a private party too, in order to improve its useful effect. However, in *Ratti* (Case 148/78) (p.133 above) and in *Marshall* (Case 152/84) (p.136 above), the Court appears to switch its stance away from the idea of 'useful effect' to a type of 'estoppel' as the legal rationale for holding Directives capable of

direct effect. See para 49 of the judgment in *Marshall* (Case 152/84).

3. The Court's curtailment of the impact of Directives before national courts may also be seen as a manifestation of judicial minimalism, mentioned at p.28 above. The realist would examine the awareness of the Court that in this area it risks assaulting national sensitivities if it insists on deepening the impact of Community law in the national legal order. The next case was mentioned in passing by Judge Mancini (p.135 above), but the decision deserves further attention.

Minister* of the *Interior* v *Cohn Bendit

[1980] 1 CMLR543, Conseil d'Etat

The matter concerned the exclusion from France of Cohn Bendit, a noted political radical (who subsequently became a Member of the European Parliament!). He relied on Community rules governing free movement to challenge the exclusion. The Conseil d'Etat, the highest court in France dealing with administrative law, addressed itself to the utility of a Directive in Cohn Bendit's action before the French courts.

According to Article 56 of the Treaty instituting the European Economic Community of 25 March 1957, no requirement of which empowers an organ of the European Communities to issue, in matters of *ordre public,* regulations which are directly applicable in the member-States, the co-ordination of statute and of subordinate legislation *(dispositions legislatives et reglementaires)* 'providing for special treatment for foreign nationals on grounds of public policy *(ordre public),* public security or public health' shall be the subject of Council directives, enacted on a proposal from the Commission and after consultation with the European Assembly. It follows clearly from Article 189 of the Treaty of 25 March 1957 that while these directives bind the member-States 'as to the result to be achieved' and while, to attain the aims set out in them, the national authorities are required to adapt the statute law and subordinate legislation and administrative practice of the member-States to the directives which are addressed to them, those authorities alone retain the power to decide on the form to be given to the implementation of the directives and to fix themselves, under the control of the national courts, the means appropriate to cause them to produce effect in national law. Thus, whatever the detail that they contain for the eyes of the member-States, directives may not be invoked by the nationals of such States in support of an action brought against an individual administrative act. It follows that M. Cohn-Bendit could not effectively maintain, in requesting the Tribunal Administratif of Paris to annul the decision of the Minister of the Interior of 2 February 1976, that that decision infringed the provisions of the directive enacted on 25 February 1964 by the Council of the European Communities with a view to coordinating, in the circumstances laid down in Article 56 of the EEC Treaty, special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. Therefore, in the absence of any dispute on the legality of the administrative measures taken by the French Government to comply with the directives enacted by the Council of the European Communities, the solution to be given to the action brought by M. Cohn-Bendit may not in any case be made subject to the interpretation of the directive of 25 February 1964. Consequently, without it being necessary to examine the grounds of the appeal, the Minister of the Interior substantiates his argument that the Tribunal Administratif of Paris was wrong when in its judgment under appeal of 21 December 1977 it referred to the Court of Justice of the European Communities questions relating to the interpretation of that directive and stayed proceedings until the decision of the European Court. In the circumstances the case should be referred back to the Tribunal Administratif of Paris to decide as may be the action of M. Cohn-Bendit.

NOTE: See, similarly, the *Bundesftnanzhof* (German federal tax court) in *VAT Directives* [1982] 1 CMLR 527.

As D. Anderson observed in the wake of the Court's rejection in *Marshall* (Case 152/ 84) of the enforceability of unimplemented Directives against private parties, '[t]he present concern of the Court is to consolidate the advances of the 1970s rather than face the legal complexities and political risks of attempting to extend the doctrine [of direct effect] further' *(Boston College International & Comparative Law Review* (1988) XI 91, 100). This implies that the Court might have been expected to return to the matter. This proved correct. In 1993 and 1994 three Advocates-General pressed the Court to reconsider its rejection of the horizontal direct effect of Directives: Van Gerven in *'Marshall 2'* (Case C-271/91) [1993] ECR 1-4367; Jacobs in *Vaneetveld* v *SA Le Foyer* (Case C-316/93) [1994] ECR 1-763 and Lenz in *Paola Faccini Dori* v *Recreb Sri* (Case C-91/92) [1994] ECR 1-3325. Advocate-General Lenz insisted that the Citizen of the Union was entitled to expect equality before the law throughout the territory of the Union and observed that, in the absence of horizontal direct effect, such equality was compromised by State failure to implement Directives. Advocate-General Jacobs thought that the effectiveness principle militated against drawing distinctions based on the status of a defendant. All three believed that the pursuit of coherence in the Community legal order dictated acceptance of the horizontal direct effect of Directives. Only in the third of these cases, *Faccini Dori* v *Recreb,* was the European Court unable to avoid addressing the issue directly.

Paolo *Faccini Dori* v *Recreb Sri* (Case C-91/92)

[1994] ECR I-3325, Court of Justice of the European Communities

Ms Dori had concluded a contract at Milan Railway Station to buy an English language correspondence course. By virtue of Directive 85/577, which harmonizes laws governing the protection of consumers in respect of contracts negotiated away from business premises, the so-called 'Doorstep Selling Directive', she ought to have been entitled to a 'cooling-off period of at least seven days within which she could exercise a right to withdraw from the contract. However, she found herself unable to exercise that right under Italian law because Italy had not implemented the Directive. She therefore sought to rely on the Directive to defeat the claim brought against her by the private party with which she had contracted. The ruling in *Marshall* (Case 152/84) appeared to preclude reliance on the Directive and the Court, despite the promptings of Advocate-General Lenz, *refused* to overrule *Marshal]*. It maintained that Directives are incapable of horizontal direct effect.

[23] It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State's relations - or those of State entities - with individuals and to confer certain rights, on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights. Thus the Court has recognised that certain provisions of directives on conclusion of public works contracts and of directives on harmonisation of turnover taxes may be relied on against the State (or State entities) (see the judgment in Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839 and the judgment in Case 8/81 *Becker* v *Finarizamt Munster-lnnenstadt* [1982] ECR 53).

[24] The effect of extending that case law to the sphere of relations between individuals would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.

[25] It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.

NOTE: Paragraph 48 of the ruling in *Marshall* expresses comparable sentiments to those expressed in para 24 of the *Dori* ruling, but the emphasis in the latter on the limits of Community competence (specifically under Article 189 - now 249 - EC) is noticeably firmer. Although the Court did not consider that Ms Dori was wholly barred from relying on the Directive (see p.156 below on 'indirect' effect and p.164 on a claim against the defaulting State), it nevertheless refused to allow a Directive to exert direct effect in relations between private individuals. In rulings subsequent to *Dori,* the Court has repeated its rejection of the horizontal direct effect of Directives: e.g., Case *C-192/94 El Corte Ingles v Cristma Blasquez Rivera* [1996] ECR 1-1281; Case C-97/96 *Verband Deutscher Daihatsu Handler eV v Daihatsu Deutschland GmbH* [1997] ECR 1-6843. The reader is invited to consider whether, just as the Conseil d'Etat's ruling in *Cohn Bendit* (p. 139 above) may have prompted the European Court's caution in *Marshall,* so too national judicial anxieties, expressed with particular force by the the *Bundesverfassungsgericht,* about Treaty amendment in the guise of judicial interpretation may have prompted the European Court in *Dori* to emblazon its fidelity to the text of the EC Treaty by declining to extend Community legislative competence to include the enactment of obligations for individuals with immediate effect. Chapter 21 will examine this material in depth.

SECTION 3: THE SCOPE OF THE PRINCIPLE: THE STATE

Whatever one's view of the Court's motivations in ruling against the horizontal direct effect of Directives in *Marshall* (Case 152/84), confirmed in *Don* (Case C-91/92) and subsequently, the decision left many questions unanswered. First, what is the 'State'? The more widely this is interpreted, the more impact the unimplemented Directive will have.

Foster v British Gas (Case C-188/89)

[1990] ECR 1-3133, Court of Justice of the European Communities

The applicant wished to rely on the Equal Treatment Directive 76/207 against her employer before English courts. She and other applicants had been compulsorily retired at an age earlier than male employees. This raised the familiar issue of the enforceability of Directives before national courts where national law is inadequate. The Court examined the nature of the defendant (the British Gas Corporation: BGC).

[3] By virtue of the Gas Act 1972, which governed the BGC at the material time, the BGC was a statutory corporation responsible for developing and maintaining a system of gas supply in Great Britain, and had a monopoly

of the supply of gas.

[4] The members of the BGC were appointed by the competent Secretary of State. He also had the power to give the BGC directions of a general character in relation to matters affecting the national interest and instructions concerning its management.

[5] The BGC was obliged to submit to the Secretary of State periodic reports on the exercise of its functions, its management and its programmes. Those reports were then laid before both Houses of Parliament. Under the Gas Act 1972 the BGC also had the right, with the consent of the Secretary of State, to submit proposed legislation to Parliament.

[6] The BGC was required to run a balanced budget over two successive financial years. The Secretary of State could order it to pay certain funds over to him or to allocate funds to specified purposes.

It then proceeded to explain the legal approach to defining the 'State' for these purposes:

[13] Before considering the question referred by the House of Lords, it must first be observed as a preliminary point that the United Kingdom has submitted that it is not a matter for the Court of Justice but for the national courts to determine, in the context of the national legal system, whether the provisions of a directive may be relied upon against a body such as the BGC.

[14] The question what effects measures adopted by Community institutions have and in particular whether those measures may be relied on against certain categories of persons necessarily involves interpretation of the articles of the Treaty concerning measures adopted by the institutions and the Community measure in issue.

[15] It follows that the Court of Justice has jurisdiction in proceedings for a preliminary ruling to determine the categories of persons against whom the provisions of a directive may be relied on. It is for the national courts, on the other hand, to decide whether a party to proceedings before them falls within one of the categories so defined.

The Court then disposed of the question referred:

[16] As the Court has consistently held (see the judgment of 19 January 1982 in Case 8/81, *Becker* v *Hauptzollamt Munster-lnnenstadt,* [1982] ECR 53 at paragraphs 23 to 25), where the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

[17] The Court further held in its judgment of 26 February 1986 in Case 152/84 *(Marshall,* at paragraph 49) that where a person is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

[18] On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.

[19] The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgments of 19 January 1982 in Case 8/81, *Becker,* cited above, and of 22 February 1990 in Case C-22188, *ECSC* v *Acciaierie e Ferriere Busseni (in liquidation)),* local or regional authorities (judgment of 22 June 1989 in Case 103/88, *Fratelli Costanzo* v *Comune di Milano),* constitutionally independent authorities responsible for the maintenance of public order and safety (judgment of 15 May 1986 in Case 222/84, *Johnston* v *Chief Constable of the Royal Ulster Constabulary,* [1986] ECR 1651), and public authorities providing public health services (judgment of 26 February 1986 in Case 152/84, *Marshall,* cited above).

[20] It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between

individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.

[21] With regard to Article 5(1) of Directive 76/207 it should be observed that in the judgment of 26 February 1986 in Case 152/84 *(Marshall,* cited above, at paragraph 52), the Court held that that provision was unconditional and sufficiently precise to be relied on by an individual and to be applied by the national courts.

[22] The answer to the question referred by the House of Lords must therefore be that Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

NOTE: The case has been widely commented upon; see, e.g., N. Grief, (1991) 16 EL Rev 136; E. Szyszczak, (1990) 27 CML Rev 859. For a full examination of the policy issues, see D. Curtin, The Province of Government', (1990) 15 EL Rev 195. For another case discussing the reach of unimplemented Directives in this vein see Case C-157/02, *Rieser International Transport* (judgment of 5 February 2004).

• QUESTION

The case arose before British Gas was 'privatized' under the Gas Act 1986 (sold to the private sector). What difference would this sale make to the application of the Court's test?

NOTE: The notion of the 'State' embraces local authorities.

***Fratelli Costanzo* v *Milano* (Case 103/88)**

[1989] ECR 1839, Court of Justice of the European Communities

The case arose out of the alleged failure of the municipal authorities in Milan to respect *inter alia* a Community Directive in awarding contracts for the construction of a football stadium for the 1990 World Cup. Could a disappointed contractor rely on the unimplemented Directive before Italian courts against the municipal authorities? The matter reached the European Court by way of a preliminary reference.

[28] In the fourth question the national court asks whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.

[29] In its judgments of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Munster-lnnenstadt* [1982] ECR 53, at p.71 and 26 February 1986 in Case 152/84 *Marshall* v *Southampton and* South-West *Hampshire Area Health Authority* [1986] ECR 723, at p.748, the Court held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the Directive correctly.

[30] It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

[31] It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

[32] With specific regard to Article 29(5) of Directive 71/305, it is apparent from the discussion of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State. An individual may therefore plead that provision before the national courts and, as is clear from the foregoing, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it.

SECTION 4: 'INCIDENTAL EFFECT'

It has been shown that Directives are incapable of application against private individuals before national courts. It is only when the State has fulfilled its Treaty obligation of implementation pursuant to Articles 10 and 249 EC that the Directive, duly transformed, becomes 'live' for the purposes of imposing obligations on private parties.

But this is not to say that an unimplemented Directive will never exert an effect before a national court that is prejudicial to a private party. Without abandoning its stance against horizontal direct effect, the Court has nevertheless chosen to recognise circumstances in which the State's default may incidentally affect the position of a private individual.

Case C-201/94 *R* v *The Medicines Control Agency, ex. parte Smith & Nephew Pharmaceuticals Ltd* and *Primecrown Ltd* v *The Medicine Control Agency* [1996] ECR 1-5819 concerned Article 3 of Directive 65/65. This provided that no proprietary medicinal product could be placed on the market in a Member State unless a prior authorisation had been issued by the competent authority of that Member State - the Medicines Control Agency (MCA) in the UK. The UK's Medicines Control Agency (MCA) had issued to Primecrown a licence to import a proprietary medicinal product of Belgian origin bearing the same name, and manufactured under an agreement with the same (American) licensor, as a product for which Smith & Nephew already held a marketing authorisation in the United Kingdom. But the MCA decided it was in error and it withdrew the authorisation. Both Primecrown and Smith & Nephew initiated proceedings before the English courts and, in a preliminary reference, the European Court was asked to provide an interpretation of the Directive's rules governing authorisation. But it was also asked whether Smith & Nephew, as the holder of the original authorisation issued under the normal procedure referred to in Directive 65/65, could rely on the Directive in proceedings before a national court in which it contested the validity of a marketing authorisation granted by a competent public authority to one of its competitors. The Court decided that it could. The consequence is that Primecrown's position could be detrimentally affected by a competitor's reliance on a Directive in proceedings against the public authorities. True, Smith & Nephew did not rely on the Directive in an action against Primecrown. This is *not* horizontal direct effect of the type painstakingly excluded by the Court in Don (Case C-91/92, p.141 above). But it is a case in which the application of a Directive by a national court *incidentally* affected the legal position of a private party.

The Court has developed this case law further. Without any direct challenge to its dogged resistance to the horizontal direct effect of Directives, it has nevertheless extended the *incidental* effect of Directives on private parties in national proceedings.

Council Directive 83/189/EEC provided for Member States to give advance notice to the Commission and other Member States of plans to introduce new product specifications. The amendments were consolidated in Directive 98/34 [1998] OJ L204/37, itself amended by Directive 98/48 [1998] OJ L217/18. The purpose of this notification system is to avoid the introduction of new measures having equivalent effect to quantitative restrictions on trade (and to supply the Commission with a possible basis for developing its harmonisation programme). It is an 'early warning system' (see Chapter 9 more generally on 'market management').

In the next case the Court decided that non-notification of a draft technical regulation (as defined by the Directive) affected the enforceability of that measure before the courts of the defaulting Member State.

***CIA Security International SA* v *Signalson SA and Securitel Sprl* (Case C-194/94)**

[1996] ECR 1-2201, Court of Justice of the European Communities

Signalson and Securitel sought a court order from a Belgian court requiring that their competitor CIA Security cease marketing a burglar alarm. The alarm was not compatible with Belgian technical standards. But the Belgian technical standards had not been notified to the Commission, as was required by Directive 83/189. Did this State default have any effect in the national proceedings involving two private parties? The Directive did not address the matter. This did not deter the Court.

[42] It is settled law that, wherever provisions of a directive appear to be, from the point of view of their content, unconditional and sufficiently precise, they may be relied on against any national provision which is not in accordance with the directive (see the judgment in Case 8/81 *Becker* [1982] ECR 53 and the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357).

[43] The United Kingdom considers that the provisions of Directive 83/189 do not satisfy those criteria on the ground, in particular, that the notification procedure contains a number of elements that are imprecise.

[44] That view cannot be adopted. Articles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of their content, those articles may be relied on by individuals before

national courts.

[45] It remains to examine the legal consequences to be drawn from a breach by Member States of their obligation to notify and, more precisely, whether Directive 83/189 is to be interpreted as meaning that a breach of the obligation to notify, constituting a procedural defect in the adoption of the technical regulations concerned, renders such technical regulations inapplicable so that they may not be enforced against individuals.

[46] The German and Netherlands Governments and the United Kingdom consider that Directive 83/189 is solely concerned with relations between the Member States and the Commission, that it merely creates procedural obligations which the Member States must observe when adopting technical regulations, their competence to adopt the regulations in question after expiry of the suspension period being, however, unaffected, and, finally, that it contains no express provision relating to any effects attaching to non-compliance with those procedural obligations.

[47] The Court observes first of all in this context that none of those factors prevents non-compliance with Directive 83/189 from rendering the technical regulations in question inapplicable.

[48] For such a consequence to arise from a breach of the obligations laid down by Directive 83/189, an express provision to this effect is not required. As pointed out above, it is undisputed that the aim of the directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such Community control. The effectiveness of Community control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.

[49] That interpretation of the directive is in accordance with the judgment given in Case 380/87 *Enichern Base and Others* v *Cornune di Cinisello Balsamo* [1989] ECR 2491, paragraphs 19 to 24. In that judgment, in which the Court ruled on the obligation for Member States to communicate to the Commission national draft rules falling within the scope of an article of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p.39), the Court held that neither the wording nor the purpose of the provision in question provided any support for the view that failure by the Member States to observe their obligation to give notice in itself rendered unlawful the rules thus adopted. In this regard, the Court expressly considered that the provision in question was confined to imposing an obligation to give prior notice which did not make entry into force of the envisaged rules subject to the Commission' s agreement or lack of opposition and which did not lay down the procedure for Community control of the drafts in question. The Court therefore concluded that the provision under examination concerned relations between the Member States and the Commission but that it did not afford individuals any right capable of being infringed in the event of breach by a Member State of its obligation to give prior notice of its draft regulations to the Commission.

[50] In the present case, however, the aim of the directive is not simply to inform the Commission. As already found in paragraph 41 of this judgment, the directive has, precisely, a more general aim of eliminating or restricting obstacles to trade, to inform other States of technical regulations envisaged by a State, to give the Commission and the other Member States time to react and to propose amendments for lessening restrictions to the free movement of goods arising from the envisaged measure and to afford the Commission time to propose a harmonising directive. Moreover, the wording of Articles 8 and 9 of Directive 83/189 is clear in that those articles provide for a procedure for Community control of draft national regulations and the date of their entry into force is made subject to the Commission' s agreement or lack of opposition.

NOTE: The *effectiveness* rationale contained in para 48 is remarkably far-reaching. It was also encountered in *Ratti* (Case 148/78 para 21, p.134 above)). But the reasoning in *Ratti* was treated more circumspectly by the Court subsequently in *Marshall* (Case 152/84, p. 136), and the approach taken in *CIA Security* has also been curtailed in the light of the salutary experience provided by litigation.

***Johannes Martinus Lemmens* (Case C-226/97)**

[1998] ECR 1-3711, Court of Justice of the European Communities

Lemmens was charged with driving while under the influence of alcohol. He argued that the breathalyser was made according to a technical standard that had not been notified to the Commission and that accordingly, following *CIA Security*, it was incompatible with Community law to rely on such evidence before national (criminal) courts. Para 12 of the judgment records Mr Lemmens' disingenuous but ingenious idea:

It is apparent from the order for reference that, in the course of the criminal proceedings instituted against him, Mr Lemmens said 1 understand from the press that there are difficulties regarding the breath-analysis apparatus. I maintain that this apparatus has not been notified to Brussels and wonder what the consequences of this could be for my case'.

The Court concluded that the Dutch Regulation governing breathalyser kits constituted a technical regulation which should, prior to its adoption, have been notified to the Commission in accordance with Article 8 of the Directive. But with what consequence?

[32] . . . it should be noted that, in paragraph 40 of its judgment in *CIA Security International*, cited above, the Court emphasised that the Directive is designed to protect, by means of preventive control, freedom of movement for goods, which is one of the foundations of the Community. This control serves a useful purpose in that technical regulations covered by the Directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling requirements relating to the public interest.

[33] In paragraphs 48 and 54 of that judgment, the Court pointed out that the obligation to notify is essential for achieving such Community control and went on to State that the effectiveness of such control will be that much greater if the Directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable, and thus unenforceable against individuals.

[34] In criminal proceedings such as those in the main action, the regulations applied to the accused are those which, on the one hand, prohibit and penalise driving while under the influence of alcohol and, on the other, require a driver to exhale his breath into an apparatus designed to measure the alcohol content, the result of that test constituting evidence in criminal proceedings. Such regulations differ from those which, not having been notified to the Commission in accordance with the Directive, are unenforceable against individuals.

[35] While failure to notify technical regulations, which constitutes a procedural defect in their adoption, renders such regulations inapplicable inasmuch as they hinder the use or marketing of a product which is not in conformity therewith, it does not have the effect of rendering unlawful any use of a product which is in conformity with regulations which have not been notified.

[36] The use of the product by the public authorities, in a case such as this, is not liable to create an obstacle to trade which could have been avoided if the notification procedure had been followed.

[37] The answer to the first question must therefore be that the Directive is to be interpreted as meaning that breach of the obligation imposed by Article 8 thereof to notify a technical regulation on breath-analysis apparatus does not have the effect of making it impossible for evidence obtained by means of such apparatus, authorised in accordance with regulations which have not been notified, to be relied upon against an individual charged with driving while under the influence of alcohol.

Paragraph 35 of *Lemmens* provides a re-focusing of the test applied in *CIA Security*. Paragraph 36 constitutes a narrower reading of the *effectiveness* rationale. In the next case the Court explicitly adopts the reasoning advanced in *Lemmens* but accepts the application of the notification Directive in litigation between two contracting parties in which, at first glance, the State had no involvement.

***Unilever Italia SpA* v *Central Food SpA* (Case C-443/98)**

[2000] ECR I-7535, Court of Justice of the European Communities

Unilever had supplied Central Food with a quantity of virgin olive oil. Central Food rejected the goods on the basis that they were not labelled in accordance with a relevant Italian law. This law had been notified to the Commission but Italy had not observed the Directive's 'standstill' obligation, which required it to wait a defined period before bringing the law into force. The Court treated breach of the 'standstill' obligation as indistinguishable for these purposes from outright failure to notify (which was the nature of the default in both *CIA Security* and *Lemmens).* Unilever submitted that the law should not be applied and sued Central Food under the contract for the price of the goods.

[46] … in civil proceedings of that nature, application of technical regulations adopted in breach of Article 9 of Directive 83/189 may have the effect of hindering the use or marketing of a product which does not conform to those regulations.

[47] That is the case in the main proceedings, since application of the Italian rules is liable to hinder Unilever in marketing the extra virgin olive oil which it offers for sale.

[48] Next, it must be borne in mind that, in *CIA Security*, the finding of inapplicability as a legal consequence of breach of the obligation of notification was made in response to a request for a preliminary ruling arising from proceedings between competing undertakings based on national provisions prohibiting unfair trading.

[49] Thus, it follows from the case law of the Court that the inapplicability of a technical regulation which has not been notified in accordance with Article 8 of Directive 83/189 can be invoked in proceedings between individuals for the reasons set out in paragraphs 40 to 43 of this judgment. The same applies to non-compliance with the

obligations laid down by Article 9 of the same directive, and there is no reason, in that connection, to treat disputes between individuals relating to unfair competition, as in the *CIA Security* case, differently from disputes between individuals concerning contractual rights and obligations, as in the main proceedings.

[50] Whilst it is true, as observed by the Italian and Danish Governments, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20), that case-law does not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable.

[51] In such circumstances, and unlike the case of non-transposition of directives with which the case-law cited by those two Governments is concerned, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.

[52] In view of all the foregoing considerations, the answer to the question submitted must be that a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted during a period of postponement of adoption prescribed in Article 9 of Directive 83/189.

NOTE: This is *not* horizontal direct effect. The Directive did not impose an obligation on Central Food. The contract with Unilever imposed the obligation. This seems to be the Court's point in para 51. But the invocation of the Directive completely changed the legal position that had appeared to prevail between the two parties under the contract. It transplanted the commercial risk.

Advocate-General Jacobs had argued vigorously in his Opinion in *Unilever that* legal certainty would be damaged by a finding that the notification Directive be relevant to the status of the contractual claim between private parties.

ADVOCATE-GENERAL JACOBS:

[99] . . . The fact that a Member State did not comply with the procedural requirements of the directive as such should not, in my view, entail detrimental effects for individuals.

[100] That is, first, because such effects would be difficult to justify in the light of the principle of legal certainty. For the day-to-day conduct of trade, technical regulations which apply to the sale of goods must be clearly and readily identifiable as enforceable or as unenforceable. Although the present dispute concerns a relatively small quantity of bottled olive oil of a value which may not affect the finances of either Unilever or Central Food to any drastic extent, it is easy to imagine an exactly comparable case involving highly perishable goods and sums of money which represent the difference between prosperity and ruin for one or other of the parties concerned. In order to avoid difficulties in his contractual relations, an individual trader would have to be aware of the existence of Directive 83/189, to know the judgment in *CIA Security*, to identify a technical regulation as such, and to establish with certainty whether or not the Member State in question had complied with all the procedural requirements of the directive. The last element in particular might prove to be extremely difficult because of the lack of publicity of the procedure under the directive. There is no obligation on the Commission to publish the fact that a Member State has notified or failed to notify a given draft technical regulation. In respect of the standstill periods under Article 9 of the directive, there is no way for individuals to know that other Member States have triggered the six-month standstill period by delivering detailed opinions to the Commission. Similarly, the Commission is also not required to publish the fact that it has informed a Member State of intended or pending Community legislation.

[101] The second problem is possible injustice. If failure to notify were to render a technical regulation unenforceable in private proceedings an individual would lose a case in which such a regulation was in issue, not because of his own failure to comply with an obligation deriving from Community law, but because of a Member State's behaviour. The economic survival of a firm might be threatened merely for the sake of the effectiveness of a mechanism designed to control Member States' regulatory activities. That would be so independently of whether the technical regulation in question constituted an obstacle to trade, a measure with neutral effects on trade, or even a rule furthering trade. The only redress for a trader in such a situation would be to bring ex post a hazardous and costly action for damages against a Member State. Nor is there any reason for the other party to the proceedings to profit, entirely fortuitously, from a Member State's failure to comply with the directive.

[102] It follows, in my view, that the correct solution in proceedings between individuals is a substantive solution. The applicability of a technical regulation in proceedings between individuals should depend only on its compatibility with Article 30 [now 28: Chapter 11 of this book] of the Treaty. If in the present case Italian Law No 313 complies with Article

30, I can see no reason why Central Food, which understandably relied on the rules laid down in the Italian statute book, should lose the case before the national court. If, however, Italian Law No 313 infringes Article 30 then the national court should be obliged to set the Law aside on that ground.

[103] I accordingly conclude that as against an individual another individual should not be able to rely on a Member State's failure to comply with the requirements of Directive 83/189 in order to set aside a technical regulation.

NOTE: Plainly these anxieties did not move the Court in *Unilever*. It did not follow the Advocate-General and it did not limit the matter to resolution under Article 28 (ex 30) EC, concerning the free movement of goods. It accepted the incidental effect of the notification Directive on the contractual claim. This thrusts EC law of market integration deep into national contract law in so far as private compliance with technical standards is at stake. In the next case the Court nonetheless adopts an additional line of reasoning which may be capable of providing a basis for softening some of the harsh commercial uncertainty likely to flow from the principle that technical standards may be treated as unenforceable by national courts if the requirements of the notification Directive are not observed bv the State.

***Sapod Audic* v *Eco-Emballages SA* (Case C-159/00)**

[2002] ECR 1-5031, Court of Justice of the European Communities

[49] … it should be observed, first, that according to settled case law Directive 83/189 must be interpreted as meaning that a failure to observe the obligation to notify laid down in Article 8 of that directive constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable and thus unenforceable against individuals (see, in particular, *CIA Security International*, paragraphs 48 and 54, and *Lemmens*, paragraph 33).

[50] Second, it should be borne in mind that according to the case law of the Court the inapplicability of a technical regulation which has not been notified to the Commission in accordance with Article 8 of Directive 83/189 may be-invoked in legal proceedings between individuals concerning, *inter alia*, contractual rights and duties (see *Unilever*, paragraph 49).

[51] Accordingly, if the national court were to interpret the second paragraph of Article 4 of Decree No 92-377 as establishing an obligation to apply a mark or label and, hence, as constituting a technical regulation within the meaning of Directive 83/189, it would be incumbent on that court to refuse to apply that provision in the main proceedings.

[52] It should, however, be observed that the question of the conclusions to be drawn in the main proceedings from the inapplicability of the second paragraph of Article 4 of Decree No 92-377 as regards the severity of the sanction under the applicable national law, such as nullity or unenforceability of the contract between Sapod and Eco-Emballages, is a question governed by national law, in particular as regards the rules and principles of contract law which limit or adjust that sanction in order to render its severity proportionate to the particular defect found. However, those rules and principles may not be less favourable than those governing similar domestic actions (principle of equivalence) and may not be framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness) (see, *inter alia*, Case 33/76 *Rewe* v *Landwirtschaftskammer fur das Saarland* [1976] ECR 1989, paragraph 5, and Joined Cases C-52/99 and C-53/99 *Camorotto and Vignone* [2001] ECR 1-1395, paragraph 21).

NOTE: The principles of equivalence and effectiveness, mentioned in para 52, were examined above in Chapter 4, p.122 above. With reference to relevant national rules on remedies with which you are familiar, consider what they may mean in the context sketched by the Court in para 52 of *Sapod Audic.*

In conclusion, none of these decisions on 'incidental' effect overturns the Court's long-standing exclusion of the horizontal direct effect of Directives. After all in none of these cases did a Directive impose an obligation directly on a private party. However these decisions do demonstrate that the legal position of private parties may be prejudicially affected by the lurking presence of an unimplemented Directive of which they may be perfectly unaware.

• QUESTION

The Court's case law places a sharp distinction between the horizontal direct effect of Directives (which is not allowed) and the 'incidental' effect of Directives of private parties (which is allowed). Is this distinction fair?

SECTION 5: THE PRINCIPLE OF INDIRECT EFFECT, OR THE OBLIGATION OF 'CONFORM-

INTERPRETATION'

The previous section questioned the extent to which the rejected notion that Directives may exert horizontal direct effect can be rationally sealed off from the phenomenon of incidental effect. But however one chooses to categorize the horizontal direct effect/incidental effect case law, and however one defines the 'State' for the purposes of fixing the outer limits of 'vertical' direct effect (Case 152/84 *Marshall,* p.136 above), an unavoidable anomaly taints the law governing the scope of the direct effect of Directives. Consider the sex discrimination Directives. If a State has failed to implement a Directive properly, then, provided that the standard *Van Gend en Loos* (Case 26/62) 'test' for direct effect is met by the provision in question, a State employee can rely on the direct effect of the Directive (vertical direct effect). A private employee cannot (horizontal direct effect). So, in the UK, where Directive 76/207 on Equal Treatment of the Sexes was not properly implemented in time, Ms Marshall (above), a State employee, succeeded in relying on Community law, whereas Ms Duke *(Duke vGEC Reliance* [1988] 2WLR359, [1988] 1 All ER 626), who was making the same complaint, failed, for she happened to be a private sector employee.

The UK had made this point in *Marshall* (Case 152/84) as a reason for *withholding* direct effect, but its objections were swept aside by the Court in para 51 of the judgment (p.138 above). Yet the anomaly is real, even if the Court's refusal to permit a recalcitrant State to benefit from pointing it out is understandable. Submissions in Don (Case C-91/92, p.141 above) urged the Court to eliminate the anomaly by *extending* direct effect, but these were not successful.

The European Court's contribution to the resolution of this anomaly first began to take shape in *Von Colson and Kamann* v *Land Nordrhein-Westfalen* (Case 14/83) and *Harz* v*Deutsche Tradax* (Case 79/83). Mention is made of Case 14/83 in para 41 of the judgment in *Marshall* at p.137 above, but the Court's approach in the case deserves careful separate attention.

***Von Colson and Kamann* v *Land Nordrhein-Westfalen* (Case 14/83)**

[1984] ECR 1891, [1986] 2 CMLR 430, Court of Justice of the European Communities

The case was a preliminary reference from Germany, and concerned that fertile source of litigation, the Equal Treatment Directive 76/207. The issue was described by the Court as follows:

[2] Those questions were raised in the course of proceedings between two qualified social workers, Sabine von Colson and Elisabeth Kamann, and the Land Nordrhein-Westfalen. It appears from the grounds of the order for reference that Werl prison, which caters exclusively for male prisoners and which is administered by the Land Nordrhein-Westfalen, refused to engage the plaintiffs in the main proceedings for reasons relating to their sex. The officials responsible for recruitment justified their refusal to engage the plaintiffs by citing the problems and risks connected with the appointment of female candidates and for those reasons appointed instead male candidates who were however less well-qualified.

[3] The Arbeitsgehcht Hamm held that there had been discrimination and took the view that under German law the only sanction for discrimination in recruitment is compensation for 'Vertrauens-schaden', namely the loss incurred by candidates who are victims of discrimination as a result of their belief that there would be no discrimination in the establishment of the employment relationship. Such compensation is provided for under Paragraph 611 a(2) of the Burgerliches Gesetzbuch.

[4] Under that provision, in the event of discrimination regarding access to employment, the employer is liable for 'damages in respect of the loss incurred by the worker as a result of his reliance on the expectation that the establishment of the employment relationship would not be precluded by such a breach [of the principle of equal treatment]'. That provision purports to implement Council Directive No 76/207.

[5] Consequently the Arbeitsgericht found that, under German law, it could order the reimbursement only of the travel expenses incurred by the plaintiff von Colson in pursuing her application for the post (DM 7.20) and that it could not allow the plaintiffs' other claims.

Von Colson's objection centred on Article 6 of the Directive:

[18] Article 6 requires Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination 'to pursue their claims by judicial process'. It follows from the provision that Member States are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed

up where necessary by a system of fines. However the directive does not prescribe a specific sanction; it leaves Member States free to choose between the different solutions suitable for achieving its objective.

Was this adhered to in the German legal order? The Court's approach was markedly different from standard 'direct effect' analysis:

[22] It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the directive but more specifically from Article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates have rights of which they may avail themselves before the courts.

[23] Although, as has been stated in the reply to Question 1, full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.

[24] In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive.

[25] The nature of the sanctions provided for in the Federal Republic of Germany in respect of discrimination regarding access to employment and in particular the question whether the rule in Paragraph 611a (2) of the Burgerliches Gesetzbuch excludes the possibility of compensation on the basis of the general rules of law were the subject of lengthy discussion before the Court. The German Government maintained in the oral procedure that that provision did not necessarily exclude the application of the general rules of law regarding compensation. It is for the national court alone to rule on that question concerning the interpretation of its national law.

[26] However, the Member States' obligation arising from *a* directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.

[27] On the other hand, as the above considerations show, the directive does not include any unconditional and sufficiently precise obligation as regards sanctions for discrimination which, in the absence of implementing measures adopted in good time may be relied on by individuals in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.

[28] It should, however, be pointed out to the national court that although Directive No 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.

NOTE: J. Steiner, (1985) 101 LQR 491, observed that the decision marks 'a subtle but significant change of direction' in the European Court's approach to the enforceability of EEC Directives before national courts'. P. Morris, (1989) JBL 233, at p.241, suggested that 'if national judiciaries respond positively to this exhortation [in *Von Colson]* something approaching horizontal direct effect may be achieved by a circuitous route'. B. Fitzpatrick, (1989) 9 OJLS 336, at p.346, refers to *Von Colson* having established a principle of 'indirect effect' and suggests that 'it may effectively bridge the gap between vertical and horizontal direct effect'.

• QUESTION

To what extent do you think the *Von Colson* approach offers a route for resolving the anomalies of the horizontal/vertical direct effect distinction which emerges from the Court's ruling in *Marshall* (Case 152/84)?

NOTE: In the *Von Colson* (Case 14/83) judgment itself, one can pick out important contradictions in respect of the national court's task of 'conform-interpretation' (para 28). Compare the second sentence of para 26 with the more qualified statement in the concluding sentence of the Court's ruling in answer to the questions referred to above. The next two cases are both worthy of examination from the perspective of clarifying the ambit of *Von Colson* (Case 14/83).

Offic/er *van* Just/tie v *Kolpinghuis Nijmegen* (Case 80/86)

[1987] ECR 3969, Court of Justice of the European Communities

A criminal prosecution was brought against a cafe owner for stocking mineral water which was in fact simply fizzy tap water. The Dutch authorities sought to supplement the basis of the prosecution by relying on definitions of mineral water detrimental to the defendant which were contained in a Directive which had not been implemented in The Netherlands. A preliminary reference was made to the European Court.

The Court ruled that 'a national authority may not rely, as against an individual, upon a provision of a Directive whose necessary implementation in national law has not yet taken place'. It then turned to the third question referred to it:

[11] The third question is designed to ascertain how far the national court may or must take account of a directive as an aid to the interpretation of a rule of national law.

[12] As the Court stated in its judgment of 10 April 1984 in Case 14/83 *Von* Co/son and *Kamann* v Land *Nordrhein-Westfalen* [1984] ECR 1891, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement the directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty.

[13] However, that obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity. Thus the Court ruled in its judgment of 11 June 1987 in Case 14/86 Pretore *di* So/6 v X [1987] ECR 2545 that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.

[14] The answer to the third question should therefore be that in applying its national legislation a court of a Member State is required to interpret that legislation in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty, but a directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.

NOTE: The Court is anxious to emphasise the importance of preserving legal certainty and protecting reasonable expectations. See also Case C-168/95 *Luciano Arcaro* [1996] ECR 1-4705.

***Marleasing SA* v *La Comercial International de Alimentation SA* (Case C-106/89)**

[1990] ECR 1-4135, Court of Justice of the European Communities

The case arose out of a conflict between the Spanish Civil Code and Community Company Law Directive (68/151) which was unimplemented in Spain. The litigation was between private parties, which, following *Marshall* (Case 152/84), ruled out the direct effect of the Directive. The European Court explained the national court's duty of interpretation in the following terms:

[8]… [T]he Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and

thereby comply with the third paragraph of Article 189 of the Treaty.

NOTE: The obligation imposed on national courts in *Marleasing* (Case C-108/89) has a firmer feel than that in *Von Colson* (Case 14/83, p.152 above). See J. Stuyck and P. Wytinck, (1991) 28 CMLRev205.

The Court also confirmed the obligation of sympathetic interpretation that is cast on national courts by virtue of what was Article 5 and is now Article 10 EC post-Amsterdam in its ruling in *Paola Faccini Dori* (Case C-91/92). Even though Ms Dori was not able to rely directly on the unimplemented Directive in proceedings involving another private party (p.141 above), she was entitled to expect that the national court would not simply ignore the Directive in applying national law.

***Paola Faccini Dori* v *Recreb Sri* (Case C-91/92)**

[1994] ECR I-3325, Court of Justice of the European Communities

[26] It must also be borne in mind that, as the Court has consistently held since its judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. The judgments of the Court in Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentation* [1990] ECR 1-4135, paragraph 8, and Case C-334/92 *Wagner Miret* v *Fonda de Garantia Salahal* [1993] ECR 1-6911, paragraph 20, make it clear that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty.

NOTE: The logic of this reasoning leads to the conclusion that the Community law obligations pertaining to the absorption of a Directive into the national legal order are enduring, and do not come to an end on the Directive's transposition 'on paper' into national law. This is made clear in the next case.

***Marks and Spencer pic* v *Commissioners of Customs and Excise* (C-62/00)**

[2002] ECR 1-6325, Court of Justice of the European Communities

[24] … it should be remembered, first, that the Member States' obligation under a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty (now Article 10 EC) to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, *inter alia*, Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 41). It follows that in applying domestic law the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive, in order to achieve the purpose of the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) (see, in particular, Case C-106/89 *Marleasing* [1990] ECR 1-4135, paragraphs, and Case C-334/92 *Wagner Miret* [1993] ECR 1-6911, paragraph 20).

[25] Second, as the Court has consistently held, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, *inter alia*, Case 8/81 *Becker* [1982] ECR 53, paragraph 25; Case 103/88 Prate/// *Costanzo* [1989] ECR 1839, paragraph 29; and Case C-319/97 *Kortas* [1999] ECR 1-3143, paragraph 21).

[26] Third, it has been consistently held that implementation of a directive must be such as to ensure its application in full (see to that effect, in particular, Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 31, and Case C-214/98 *Commission* v Greece [2000] ECR 1-9601, paragraph 49).

[27] Consequently, the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.

[28] As the Advocate General noted in point 40 of his Opinion, it would be inconsistent with the Community legal

order for individuals to be able to rely on a directive where it has been implemented incorrectly but not to be able to do so where the national authorities apply the national measures implementing the directive in a manner incompatible with it.

NOTE: The scope of the obligation to interpret national law in conformity with a Directive was taken a step further in the next case. However, the Court did not help to stabilize and clarify the State of the law by introducing textual anomalies into its ruling.

***Centrosteel Sri* v *Adipol GmbH* (Case C-456/98)**

[2000] ECR I-6007, Court of Justice of the European Communities

[15] It is true that, according to settled case law of the Court, in the absence of proper transposition into national law, a directive cannot of itself impose obligations on individuals (Case 152/84 *Marshall* v *Southampton and* South-West *Hampshire Health Authority* [1986] ECR 723, paragraph 48, and Case C-91/92 *Facdni Don* v *Recreb* [1994] ECR I-3325, paragraph 20).

[16] However, it is also apparent from the case law of the Court (Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentation* [1990] ECR 1-4135, paragraph 8; Case C-334/92 *Wagner Miret* v Fondo de *Garantia Salarial* [1993] ECR 1-6911, paragraph 20; *Facdni* Dor/, paragraph 26; and Joined Cases C-240/98 to C-244/98 Oceano *Grupo Editorial* v *Salvat* Ed/tores [2000] ECR 1-4941, paragraph 30) that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).

[17] Where it is seised of a dispute falling within the scope of the Directive and arising from facts postdating the expiry of the period for transposing the Directive, the national court, in applying provisions of domestic law or settled domestic case law, as seems to be the case in the main proceedings, must therefore interpret that law in such a way that it is applied in conformity with the aims of the Directive...

The reference in para 17 to the application of 'settled domestic case law' in conformity with the aims of the Directive is striking. However, this phrase is missing from the formal ruling.

Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents precludes national legislation which makes the validity of an agency contract conditional upon the commercial agent being entered in the appropriate register. The national court is bound, when applying provisions of domestic law predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive, so that those provisions are applied in a manner consistent with the result pursued by the Directive.

NOTE: In its subsequent ruling in *AXA Royal Beige* (Case C-386/00 [2002] ECR1-2209) the Court referred explicitly to its own ruling in *Centrosteel* (Case C-456/98), but cited only paragraphs 15 and 16, not 17!

This peculiarity was not addressed directly by the Court in the next case, but the Court did take the opportunity to refer to *Centrosteel* and to revisit its view of the nature of the obligation imposed on national judges.

***Bernhard Pfeiffer* v *Deutsches Rotes Kreuz* (Joined Cases C-397/01 to C-403/01)**

Judgment of 5 October 2004, Court of Justice of the European Communities

The litigation, originating before German labour courts, concerned matters falling within the scope of Directive 89/391 on health and safety at work and Directive 93/ 104 on the organization of working time. After confirming its long-standing refusal to accept that Directives are capable of application in litigation before national courts exclusively involving private parties - that is, no horizontal direct effect -the Court insisted:

[111] It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.

[112] That is *a fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see Case C-334/92 *Wagner Miret[1*993] ECR 1-6911, paragraph 20).

[113] Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in *Von* Co/son *and Kamann*, paragraph 26; /War/easing, paragraph 8, and *Faccini* Dor/, paragraph 26; see also Case C-63/97 *BMW* [1999] ECR I-905, paragraph 22; Joined Cases C-240/98 to C-244/98 *Oceano Grupo Editorial and Salvat* Ed/tores [2000] ECR 1-4941, paragraph 30; and Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-OOOO, paragraph 21).

[114] The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it (see, to that effect, Case C-160/01 *Mau* [2003] ECR 1-4791, paragraph 34).

[115] Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive (see, to that effect, *Carbonari* [Case C-131/97], paragraphs 49 and 50).

[116] In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.

[117] In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (see, to that effect, the judgment in Case C-456/98 Centrostee/[2000] ECR I-6007, paragraphs 16 and 17).

[118] In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, /War/easing, paragraphs 7 and 13).

[119] Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded.

The assertion in para 114 that the principle of conform-interpretation is 'inherent in the system of the Treaty' is strikingly bold. However, this cements a direct connection between this principle and the Court's finding in *Francovich* (Cases C-6/90 & C-9/90) that a State may be liable for damage caused to individuals as a result of breach of EC law. That judgment too locates the principle as 'inherent in the system of the Treaty' (para 35 of the judgment in *Francovich*, p.162 below).

If the obligation cast on national courts is inherent in the system of the Treaty it is not to be confined to the impact of Directives. A Regulation is directly applicable but may in some circumstances leave room for necessary national implementation (for example in fixing penalties in the event of infringement). In Case C-60/02 *Rolex* judgment of 7 January 2004 the Court transposed the principle of 'conform-interpretation' from the sphere of Directives to the context of a Regulation of this type. It stated that 'National courts are required to interpret their national law within the limits set by Community law, in order to achieve the result intended by the Community rule in question', referring to Case C-106/89 *Marleasing* [1990] ECR 1-4135 (para 59 of the ruling in *Rolex).* However, the Court accepted the relevance of principles of legal certainty and of non-retroactivity in criminal matters, which preclude an EC act from determining or aggravating the liability in criminal law of persons who act in contravention of its provisions, referring to Case C-168/95 *Arcaro* [1996] ECR 1-4705, mentioned at p. 155 above.

Cases and Materials on EU Law (8th Edition)

Stephen Weatherill

OUP 2007

Pps 59-66 (Extracts): Proportionality

The principle of proportionality is not spelled out in those terms in the EC Treaty. But Article 5(3) captures the concept.

ARTICLE 5(3) EC

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

This statement is amplified by the Protocol attached to the EC Treaty on the application of the principles of subsidiarity and proportionality, which, admittedly, is more concerned to elucidate the former principle than the latter.

NOTE: Article 5(3) is a relative newcomer to the EC Treaty. It was inserted by the Maastricht Treaty and therefore entered into force only in 1993 (p.9 above). The Court had long before already developed proportionality as a basis for checking the exercise of power in the Community. So Article 5(3) clearly establishes the shape of the principle, but it is the Court's case law that amplifies what is at stake in applying the principle of proportionality.

The following case arose before English courts. It reached the European Court *via* the Article 234 preliminary reference procedure which allows national courts to cooperate with the Community Court and is discussed in Chapter 7. It allows the European Court to answer questions about Community law referred to it by a national court. The European Court took the opportunity in this case to insist that Community legislation must conform to the principle of proportionality.

***R* v *Intervention Board,* exports *Man (Sugar) Ltd* (Case 181/84)**

[1985] ECR 2889, Court of Justice of the European Communities

The case involved the sugar market, which is regulated by Community legislation administered at national level. Man, a British sugar trader, submitted to the Intervention Board, the regulatory agency, tenders for the export of sugar to States outside the Community. It lodged securities with a bank. Under relevant Community legislation, Man ought to have applied for export licences by noon on 2 August 1983. It was nearly four hours late, because of its own internal staff difficulties. The Board, acting pursuant to Community Regulation 1880/83, declared the security forfeit. This amounted to £1,670,370 lost by Man. Man claimed that this penalty was disproportionate; a small error resulted in a severe sanction. It accordingly instituted judicial review proceedings before the English courts in respect of the Board's action and argued that the authorising Community legislation was invalid because of its disproportionate effect. The matter was referred to the European Court under the preliminary reference procedure. Man's submission was explained by the Court as follows:

[16] ... Man Sugar maintains that, even if it is accepted that the obligation to apply for an export licence is justifiable, the forfeiture of the entire security for failure to comply with that obligation infringes the principle of proportionality, in particular for the following reasons: the contested regulation unlawfully imposes the same penalty for failure to comply with a secondary obligation - namely, the obligation to apply for an export licence - as for failure to comply with the primary obligation to export the sugar. The obligation to apply for an export licence could be enforced by other, less drastic means than the forfeiture of the entire security and therefore the burden imposed is not necessary for the achievement of the aims of the legislation. The severity of the penalty bears no relation to the nature of the default, which may, as in the present case, be only minimal and purely technical.

The Court held:

[20] It should be noted that, as the Court held in its judgments of 20 February 1979 (Case 122/78, *Buitoni* v *FORMA*, [1979] ECR 677) and of 23 February 1983 (Case 66/82, Fromonco *SA* v *FORMA*, [1983] ECR 395), in order to establish whether a provision of Community law is in conformity with the principle of proportionality it is necessary to ascertain whether the means which it employs are appropriate and necessary to attain the objective sought. Where Community legislation makes a distinction between a primary obligation, compliance with which is necessary in order to attain the objective sought, and a secondary obligation, essentially of an administrative nature, it cannot, without breaching the principle of proportionality, penalize failure to comply with the secondary obligation as

severely as failure to comply with the primary obligation.

[21] It is clear from the wording of the abovementioned Council and Commission regulations concerning standing invitations to tender for exports of white sugar, from an analysis of the preambles thereto and from the statements made by the Commission in the proceedings before the Court that the system of securities is intended above all to ensure that the undertaking, voluntarily entered into by the trader, to export the quantities of sugar in respect of which tenders have been accepted is fulfilled. The trader's obligation to export is therefore undoubtedly a primary obligation, compliance with which is ensured by the initial lodging of a security of 9 ECU per 100 kilograms of sugar.

[22] The Commission considers, however, that the obligation to apply for an export licence within a short period, and to comply with that time-limit strictly, is also a primary obligation and as such is comparable to the obligation to export; indeed, it is that obligation alone which guarantees the proper management of the sugar market. In consequence, according to the Commission, failure to comply with that obligation, and in particular failure to comply with the time-limit, even where that failure is minimal and unintentional, justifies the forfeiture of the entire security, just as much as the total failure to comply with the primary obligation to export justifies such a penalty.

[23] In that respect the Commission contended, both during the written procedure and in the oral argument presented before the Court, that export licences fulfil four separate and important functions:

(i) They make it possible to control the release onto the market of sugar.

(ii) They serve to prevent speculation.

(iii) They provide information for the relevant Commission departments.

(iv) They establish the system of monetary compensatory amounts chosen by the exporter.

[24] As regards the use of export licences to control the release onto the world market of exported sugar, it must be noted that the traders concerned have a period of five months within which to export the sugar and no Community provision requires them to export it at regular, staggered intervals. They may therefore release all their sugar onto the market over a very short period. In those circumstances export licences cannot be said to have the controlling effect postulated by the Commission. That effect is guaranteed, though only in part, simply by staggering the invitations to tender.

[25] The Commission considers, secondly, that the forfeiture of the entire security for failure to comply with the time-limit for applying for an export licence makes it possible to prevent traders from engaging in speculation with regard to fluctuations in the price of sugar and in exchange rates and accordingly delaying the submission of their applications for export licences.

[26] Even if it is assumed that there is a real risk of such speculation, it must be noted that Article 12(c) of Regulation No 1880/83 requires the successful tenderer to pay the additional security provided for in Article 13(3) of the same regulation. The Commission itself recognised at the hearing that that additional security removes any risk of speculation by traders. It is true that at the hearing the Commission expressed doubts about the applicability of Article 13(3) before export licences have been issued. However, even if those doubts are well founded, the fact remains that a simple amendment of the rules regarding the payment of an additional security, requiring for example that, in an appropriate case, the additional security should be paid during the tendering procedure, in other words, even before the export licence has been issued, would make it possible to attain the objective sought by means which would be much less drastic for the traders concerned. The argument that the fight against speculation justifies the contested provision of Regulation No 1880/83 cannot therefore be accepted.

[27] With regard to the last two functions attributed by the Commission to export licences, it is true that those licences make it possible for the Commission to monitor accurately exports of Community sugar to non-member countries, although they do not provide it with important new information not contained in the tenders and do not, in themselves, guarantee that the export will actually take place. It is also true that the export licence makes it possible for the exporter to state whether he wishes the monetary compensatory amounts to be fixed in advance.

[28] However, although it is clear from the foregoing that the obligation to obtain export licences performs a useful administrative function from the Commission's point of view, it cannot be accepted that that obligation is as important as the obligation to export, which remains the essential aim of the Community legislation in question.

[29] It follows that the automatic forfeiture of the entire security, in the event of an infringement significantly less serious than the failure to fulfil the primary obligation, which the security itself is intended to guarantee, must be considered too drastic a penalty in relation to the export licence's function of ensuring the sound management of the market in question.

[30] Although the Commission was entitled, in the interests of sound administration, to impose a time-limit for the submission of applications for export licences, the penalty imposed for failure to comply with that time-limit should have been significantly less severe for the traders concerned than forfeiture of the entire security and it should have been more consonant with the practical effects of such a failure.

[31] The reply to the question submitted must therefore be that Article 6(3) of Regulation No 1880/83 is invalid inasmuch as it prescribes forfeiture of the entire security as the penalty for failure to comply with the time-limit imposed for the submission of applications for export licences.

NOTE: A key element in the practical expression of the principle of proportionality is the need to show a link between the nature and scope of the measures taken and the object in view. The next extract is taken from a case in which a firm sought to show that a measure affected it disproportionately and that it was accordingly invalid. The issue arose in the coal and steel sector, and therefore the provisions in question were found in the ECSC Treaty, which has now expired. However, the Court explained the nature of the principle of proportionality in terms of general application.

***Valsabbia* v *Commission* (Case 154/78)**

[1980] ECR 907, Court of Justice of the European Communities

[117] It is now necessary to examine whether in view of the omissions established the obligations imposed upon the undertakings cast disproportionate burdens upon the applicants which would constitute an infringement of the principle of proportionality. In reply to the applicants' allegations on this matter, the Commission states that the validity of a general decision cannot depend on the existence or absence of other formally independent decisions.

[118] That argument is not relevant in this case and the Court must inquire whether the defects established imposed disproportionate burdens upon the applicants, having regard to the objectives laid down by Decision No 962/77. But the Court has already recognised in its judgment of 24 October 1973 in Case 5/73, *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091, that 'In exercising their powers, the Institutions must ensure that the amounts which commercial operators are charged are no greater than is required to achieve the aim which the authorities are to accomplish; however, it does not necessarily follow that that obligation must be measured in relation to the individual situation of any one particular group of operators'.

[119] It appears that, on the whole, the system established by Decision No 962/77 worked despite the omissions disclosed and in the end attained the objectives pursued by that decision. Although it is true that the burden of the sacrifices required of the applicants may have been aggravated by the omissions in the system, that does not alter the fact that that decision did not constitute a disproportionate and intolerable measure with regard to the aim pursued.

[120] In those circumstances, and taking into consideration the fact that the objective laid down by Decision No 962/77 is in accordance with the Commission's duty to act in the common interest, and that a necessary consequence of the very nature of Article 61 of the ECSC Treaty is that certain undertakings must, by virtue of European solidarity, accept greater sacrifices than others, the Commission cannot be accused of having imposed disproportionate burdens upon the applicants.

NOTE: The nature of the Court's scrutiny is influenced by the type of act subject to challenge. (See, for example, Hermann, G., 'Proportionality and Subsidiarity' Ch. 3 in Barnard, C. and Scott, J., *The Law of the Single European Market* (Oxford: Hart Publishing, 2002).) It was mentioned above (p.43) that the UK's submission that Directive 93/104 on Working Time violated the principle of proportionality was rejected. The Court explained its role in the following terms.

***United Kingdom* v *Council* (Case C-84/94)**

[1996] ECR I-5755, Court of Justice of the European Communities

[57] As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it (see, in particular, Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, paragraph 42).

[58] As to judicial review of those conditions, however, the Council must be aiiowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has

been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.

There were no such flaws and consequently the plea failed. Notice that in Case 181/84 (p.59 above) Man Sugar was not complaining about a broad legislative choice. The matter was more specific to its circumstances. In Case C-84/94 the Court's concession that the legislature be allowed a 'wide discretion' in areas of policy choice means that the principle of proportionality, though flexible and therefore a tempting addition to any challenge to the validity of a Community act, is only infrequently held to have been violated where broad legislative choices are impugned. This is well illustrated by revisiting a ruling already considered above.

R v Secretary of State for *Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (Case C-491/01)

[2002] ECR 1-11543, Court of Justice of the European Communities

The validity of Directive 2001/37, which amended and extended common rules governing tar yields and warnings on tobacco product packaging, was challenged in this case. As explained above (p.51), the Court was not persuaded that an incorrect legal base had been chosen. The applicant fared no better by alleging the measure violated the principle of proportionality.

[122] As a preliminary point, it ought to be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (see, *inter alia*, Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15; Case C-339/92 *ADM Qlmuhlen* [1993] ECR I-6473, paragraph 15, and Case C-210/00 *Kaserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59).

[123] With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, to that effect, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraphs 55 and 56, and Case C-157/96 *National Farmers' Union and Others* [1998] ECR 1-2211, paragraph 61).

[124] With regard to the Directive, the first, second and third recitals in the preamble thereto make it clear that its objective is, by approximating the rules applicable in this area, to eliminate the barriers raised by differences which, notwithstanding the harmonization measures already adopted, still exist between the Member States' laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco products and impede the functioning of the internal market. In addition, it is apparent from the fourth recital that, in the attaining of that objective, the Directive takes as a basis a high level of health protection, in accordance with Article 95(3) of the Treaty.

[125] During the procedure various arguments have been put forward in order to challenge the compatibility of the Directive with the principle of proportionality, particularly so far as Articles 3, 5 and 7 are concerned.

[126] It must first be stated that the prohibition laid down in Article 3 of the Directive on releasing for free circulation or marketing within the Community cigarettes that do not comply with the maximum levels of tar, nicotine and carbon monoxide, together with the obligation imposed on the Member States to authorise the import, sale and consumption of cigarettes which do comply with those levels, in accordance with Article 13(1) of the Directive, is a measure appropriate for the purpose of attaining the objective pursued by the Directive and one which, having regard to the duty of the Community legislature to ensure a high level of health protection, does not go beyond what is necessary to attain that objective.

[127] Secondly, as pointed out in paragraph 85 above, the purpose of the prohibition, also laid down in Article 3 of the Directive, on manufacturing cigarettes which do not comply with the maximum levels fixed by that provision is to avoid the undermining of the internal market provisions in the tobacco products sector which might be caused by illicit reimports into the Community or by deflections of trade within the Community affecting products which do not comply with the requirements of Article 3(1).

[128] The proportionality of that ban on manufacture has been called into question on the ground that it is not a

measure for the purpose of attaining its objective and that it goes beyond what is necessary to attain it since, in particular, an alternative measure, such as reinforcing inspections of imports from non-member countries, would have been sufficient.

[129] It must here be stated that, while the prohibition at issue does not of itself make it possible to prevent the development of the illegal trade in cigarettes in the Community, having particular regard to the fact that cigarettes which do not comply with the requirements of Article 3(1) of the Directive may also be placed illegally on the Community market after being manufactured in non-member countries, the Community legislature did not overstep the bounds of its discretion when it considered that such a prohibition nevertheless constitutes a measure likely to make an effective contribution to limiting the risk of growth in the illegal trafficking of cigarettes and to preventing the consequent undermining of the internal market.

[130] Nor has it been established that reinforcing controls would in the circumstances be enough to attain the objective pursued by the contested provision. It must be observed that the prohibition on manufacture at issue is especially appropriate for preventing at source deflections in trade affecting cigarettes manufactured in the Community for export to non-member countries, deflections which amount to a form of fraud which, ex *hypothesi*, it is not possible to combat as efficiently by means of an alternative measure such as reinforcing controls on the Community's frontiers.

[131] As regards Article 5 of the Directive, the obligation to show information on cigarette packets as to the tar, nicotine and carbon monoxide levels and to print on the unit packets of tobacco products warnings concerning the risks to health posed by those products are appropriate measures for attaining a high level of health protection when the barriers raised by national laws on labelling are removed. Those obligations in fact constitute a recognised means of encouraging consumers to reduce their consumption of tobacco products or of guiding them towards such of those products as pose less risk to health.

[132] Accordingly, by requiring in Article 5 of the Directive an increase in the percentage of the surface area on certain sides of the unit packet of tobacco products to be given over to those indications and warnings, in a proportion which leaves sufficient space for the manufacturers of those products to be able to affix other material, in particular concerning their trade marks, the Community legislature has not overstepped the bounds of the discretion which it enjoys in this area.

[133] Article 7 of the Directive calls for the following observations.

[134] The purpose of that provision is explained in the 27th recital in the preamble to the Directive, which makes it clear that the reason for the ban on the use on tobacco product packaging of certain texts, such as 'low-tar', light', 'ultra-light', 'mild', names, pictures and figurative or other signs is the fear that consumers may be misled into the belief that such products are less harmful, giving rise to changes in consumption. That recital states in this connection that the level of inhaled substances is determined not only by the quantities of certain substances contained in the product before consumption, but also by smoking behaviour and addiction, which fact is not reflected in the use of such terms and so may undermine the labelling requirements set out in the Directive.

[135] Read in the light of the 27th recital in the preamble, Article 7 of the Directive has the purpose therefore of ensuring that consumers are given objective information concerning the toxicity of tobacco products.

[136] Such a requirement to supply information is appropriate for attaining a high level of health protection on the harmonization of the provisions applicable to the description of tobacco products.

[137] It was possible for the Community legislature to take the view, without overstepping the bounds of its discretion, that stating those tar, nicotine and carbon monoxide levels in accordance with Article 5(1) of the Directive ensured that consumers would be given objective information concerning the toxicity of tobacco products connected to those substances, whereas the use of descriptors such as those referred to in Article 7 of the Directive did not ensure that consumers would be given objective information.

[138] As the Advocate-General has pointed out in paragraphs 241 to 248 of his Opinion, those descriptors are liable to mislead consumers. In the first place, they might, like the word 'mild', for example, indicate a sensation of taste, without any connection with the product's level of noxious substances. In the second place, terms such as 'low-tar', 'light', 'ultra-light', do not, in the absence of rules governing the use of those terms, refer to specific quantitative limits. In the third place, even if the product in question is lower in tar, nicotine and carbon monoxide than other products, the fact remains that the amount of those substances actually inhaled by consumers depends on their manner of smoking and that that product may contain other harmful substances. In the fourth place, the use of descriptions which suggest that consumption of a certain tobacco product is beneficial to health, compared with other tobacco

products, is liable to encourage smoking.

[139] Furthermore, it was possible for the Community legislature to take the view, without going beyond the bounds of the discretion which it enjoys in this area, that the prohibition laid down in Article 7 of the Directive was necessary in order to ensure that consumers be given objective information concerning the toxicity of tobacco products and that, specifically, there was no alternative measure which could have attained that objective as efficiently while being less restrictive of the rights of the manufacturers of tobacco products.

[140] It is not clear that merely regulating the use of the descriptions referred to in Article 7, as proposed by the claimants in the main proceedings and by the German, Greek and Luxembourg Governments, or saying on the tobacco products' packaging, as proposed by Japan Tobacco, that the amounts of noxious substances inhaled depend also on the user's smoking behaviour would have ensured that consumers received objective information, having regard to the fact that those descriptions are in any event likely, by their very nature, to encourage smoking.

[141] It follows from the preceding considerations concerning Question 1(c) that the Directive is not invalid by reason of infringement of the principle of proportionality.

R v Secretary *of State for Health, ex parte Swedish Match AB* (Case C-210/03)

Judgment of 14 December 2004, Court of Justice of the European Communities

This is the decision, encountered above *(p.52)*, in which the Court found that Directive 2001/37's ban on the marketing of tobacco for oral use was validly based on Article 95 EC. Faced with the submission that the measure was nonetheless invalid for violation of the proportionality principle, the Court made an explicit connection with the direction in Article 95(3) that the Community legislature shall take as a base a high level of health protection in setting harmonized standards.

[56] To satisfy its obligation to take as a base a high level of protection in health matters, in accordance with Article 95(3) EC, the Community legislature was thus able, without exceeding the limits of its discretion in the matter, to consider that a prohibition of the marketing of tobacco products for oral use was necessary, and in particular that there was no alternative measure which allowed that objective to be achieved as effectively.

[57] As the Advocate General observes in points 116 to 119 of his Opinion, no other measures aimed at imposing technical standards on manufacturers in order to reduce the harmful effects of the product, or at regulating the labelling of packagings of the product and its conditions of sale, in particular to minors, would have the same preventive effect in terms of the protection of health, inasmuch as they would let a product which is in any event harmful gain a place in the market.

[58] It follows from the above considerations that, with respect both to the objective of ensuring a high level of protection of human health given to the Community legislature by Article 95(3) EC and to its obligation to comply with the principle of proportionality, the contested prohibition cannot be regarded as manifestly inappropriate.

NOTE: The principle of proportionality applies not only to Community legislation, but also arises in the application of substantive Treaty provisions.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 5: Principles of direct applicability and direct effects

5.1 Introduction

It has already been seen that EC law, if not EU law, is supreme to national law and that domestic courts are under an obligation to give full effect to EC law (see Chapter 4). With this in mind, the question then arises to what extent individuals can rely on EC law before the national courts, particularly where a Member State has failed to implement a particular measure, or where the implementation is in some way defective and does not provide the full extent of the rights an individual should enjoy by virtue of the relevant EC measure. To deal with this question, and very much in accordance with the principle of supremacy, the European Court of Justice (ECJ) has developed three interrelated doctrines: direct effect, indirect effect, and state liability. Taken together, these seek to ensure that individuals are given the greatest possible level of protection before their national courts. This chapter considers the scope of the doctrines of direct and indirect effect, as well as identifying difficulties in the jurisprudence. One particular area in which problems arise is that of ensuring the enforceability of directives. This chapter will look at this issue and the various approaches that the ECJ has developed with regard to it. Chapter 9 will examine the jurisprudence in the field of state liability.

5.2 Doctrine of direct effects

5.2.1 Direct applicability

As was noted in Chapter 4, the European Community Treaties were incorporated into UK law by the European Communities Act 1972. With the passing of this Act all Community law became, in the language of international law, directly applicable, that is, applicable as part of the British internal legal system. Henceforth, 'Any rights or obligations created by the Treaty are to be given legal effect in England without more ado' (per Lord Denning MR in *HP Bulmer Ltd v JBollinger SA* [1974] Ch 401). As directly applicable law, EC law thus became capable of forming the basis of rights and obligations enforceable by individuals before their national courts.

Provisions of international law which are found to be capable of application by national courts *at the suit of individuals* are also termed 'directly applicable'. This ambiguity (the same ambiguity is found in the alternative expression 'self-executing') has given rise to much uncertainty in the context of EC law. For this reason it was suggested by Winter that the term 'directly effective' be used to convey this secondary meaning. Although this term has generally found favour amongst British academic writers, the ECJ as well as the British courts tend to use the two concepts of direct applicability and direct effects interchangeably. However, for purposes of clarity it is proposed to use the term 'directly effective' or 'capable of direct effects' in this secondary meaning, to denote those provisions of EC law which give rise to rights or obligations which individuals may enforce before their national courts.

Not all provisions of directly applicable international law are capable of direct effects. Some provisions are regarded as binding on, and enforceable by states alone; others are too vague to form the basis of rights or obligations for individuals; others are too incomplete and require further measures of implementation before they can be fully effective in law. Whether a particular provision is directly effective is a matter of construction, depending on its language and purpose as well as the terms on which the treaty has been incorporated into domestic law. Although most states apply similar criteria of clarity and completeness, specific rules and attitudes inevitably differ, and since the application of the criteria often conceals an underlying policy decision, the results are by no means uniform from state to state.

5.2.2 Relevance of direct effect in EC law

The question of the direct effects of Community law is of paramount concern to EC lawyers. If a provision of EC law is directly effective, domestic courts must not only apply it but, following the principle of primacy of EC

law (discussed in Chapter 4), must do so in priority over any conflicting provisions of national law. Since the scope of the EC Treaty is wide, the more generous the approach to the question of direct effects, the greater the potential for conflict.

Which provisions of EC law will then be capable of direct effect? The EC Treaty merely provides in Article 249 (ex 189; post Lisbon, Article 288 TFEU) that regulations (but only regulations) are 'directly applicable'. Since, as has been suggested, direct applicability is a necessary precondition for direct effects, this would seem to imply that only regulations are capable of direct effects.

This has not proved to be the case. In a series of landmark decisions, the ECJ, principally in its jurisdiction under Article 234 EC (ex 177; post Lisbon, Article 267 TFEU) to give preliminary rulings on matters of interpretation of EC law on reference from national courts, has extended the principle of direct effects to treaty articles, directives, decisions, and even to provisions of international agreements to which the EC is a party.

5.2.3 Treaty articles

s.2.3. 1 *The Starting Point: Van Gend en Loos*

The question of the direct effect of a treaty article was first raised in *Van Gend en Loos v Nederlandse Administratie der Belastingen* (case 26/62). The Dutch administrative tribunal, in a reference under Article 234, asked the ECJ 'Whether Article 12 of the EEC Treaty [now 25 EC] has an internal effect... in other words, whether the nationals of Member States may, on the basis of the Article in question, enforce rights which the judge should protect?'

Article 25 (ex 12) EG (Article 30 TFEU) prohibits states from 'introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect'.

It was argued on behalf of the defendant customs authorities that the obligation in Article 25 was addressed to states and was intended to govern rights and obligations between states. Such obligations were not normally enforceable at the suit of individuals. Moreover the treaty had expressly provided enforcement procedures under what are now Articles 226-7 EC (ex 169-70; post Lisbon, Articles 258-9 TFEU) (see Chapter 11) at the suit of the Commission or Member States, respectively. Advocate-General Roemer suggested that Article 25 was too complex to be enforced by national courts; if such courts were to enforce Article 25 directly there would be no uniformity of application.

Despite these persuasive arguments the ECJ held that Article 25 was directly effective. The Court stated that 'this Treaty is more than an agreement creating only mutual obligations between the contracting parties. . . Community law . . . not only imposes obligations on individuals but also confers on them legal rights'. These rights would arise:

not only when an explicit grant is made by the Treaty, but also through obligations imposed, in a clearly denned manner, by the Treaty on individuals as well as on Member States and the Community institutions.

... The text of Article 12 [now 25] sets out a clear and unconditional prohibition, which is not a duty to act but a duty not to act. This duty is imposed without any power in the States to subordinate its application to a positive act of internal law. The prohibition is perfectly suited by its nature to produce direct effects in the legal relations between the Member States and their citizens.

And further:

The vigilance of individuals interested in protecting their rights creates an effective control additional to that entrusted by Articles 169-70 [now 226-7] to the diligence of the Commission and the Member States.

Apart from its desire to enable individuals to invoke the protection of EC law the Court clearly saw the principle of direct effects as a valuable means of ensuring that EC law was enforced uniformly in all Member States, even when states had not themselves complied with their obligations.

s.2.3.2 *Subsequent developments*

It was originally thought that, as the Court suggested in *Van Gend*, only prohibitions such as (the then) Article

25 ('standstill' provisions) would qualify for direct effects; this was found in *Alfons Liitticke GmbHvHauotzollamt Saarlouk* in relation to the obligation that 'Member States shall, not later than at the beginning of the second stage, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules'.

The ECJ found that the then Article 95(1) was directly effective; what was Article 95(3), which was subject to compliance within a specified time limit, would, the Court implied, become directly effective once that time limit had expired.

The Court has subsequently found a large number of treaty provisions to be directly effective. All the basic principles relating to free movement of goods and persons, competition law, and discrimination on the grounds of sex and nationality may now be invoked by individuals before their national courts.

5.2.3.3 *Criteria for direct effect*

In deciding whether a particular provision is directly effective certain criteria are applied: the provision must be sufficiently clear and precise; it must be unconditional, and leave no room for the exercise of discretion in implementation by Member States or Community institutions. The criteria are, however, applied generously, with the result that many provisions which are not particularly clear or precise, especially with regard to their scope and application, have been found to produce direct effects. Even where they are conditional and subject to further implementation they have been held to be directly effective once the date for implementation is past. The Court reasons that while there may be discretion as to the means of implementation, there is no discretion as to ends.

5.2.3.4 *Vertical and horizontal effect of treaty provisions*

In *Van Gend* the principle of direct effects operated to confer rights on Van Gend exercisable against the Dutch customs authorities. Thus the obligation fell on an organ of the state, to whom Article 25 was addressed. (This is known as a 'vertical' direct effect, reflecting the relationship between individual and state.) But treaty obligations, even when addressed to states, may fall on individuals too. May they be invoked by individuals against individuals? (This is known as a 'horizontal effect', reflecting the relationship between individual and individual.)

Van Gend implies so, and this was confirmed in *Defrenne* v *Sabena (No 2)* (case 43/75). Ms Defrenne was an air hostess employed by Sabena, a Belgian airline company. She brought an action against Sabena based on what was then Article 119 of the EEC Treaty (now 141 EC; post Lisbon Article 157 TFEU). It provided that 'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work'.

Ms Defrenne claimed, inter alia, that in paying their male stewards more than their air hostesses, when they performed identical tasks, Sabena was in breach of the then Article 119. The gist of the questions referred to the ECJ was whether, and in what context, that provision was directly effective. Sabena argued that the treaty articles so far found directly effective, such as Article 25, concerned the relationship between the State and its subjects, whereas former Article 119 was primarily concerned with relationships between individuals. It was thus not suited to produce direct effects. The Court, following Advocate-General Trabucci, disagreed, holding that 'the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals'.

This same principle was applied in *Walrave v Association Union Cycliste Internationale* (case 36/74) to Article 12 (ex 6, originally 7) EC which provides that 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

The claimants, Walrave and Koch, sought to invoke Article 12 (post Lisbon, Article 18 TFEU) in order to challenge the rules of the defendant association which they claimed were discriminatory.

The ECJ held that the prohibition of any discrimination on grounds of nationality 'does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective

manner gainful employment and the provision of services'.

To limit the prohibition in question to acts of a public authority would risk creating inequality in their application. Even now, the precise scope of the horizontal nature of the provisions relating to free movement of individuals (Articles 39, 43, and 49; post Lisbon Articles 45, 49 and 56 TFEU respectively) is not clear. Whilst the judgment in *Walrave* can be read as a form of effectiveness, which could then extend the scope of the provisions to all non-state actors, it can equally be read as relating to collective agreements, or to situations where there is a violation of the principle of non-discrimination. Subsequent cases have not cleared up this ambiguity (see Chapter 21). It is generally accepted that the provisions on the free movement of goods (Articles 28-9 EC; post Lisbon Articles 34-5 TFEU) do not have horizontal direct effect, although the ECJ's jurisprudence has operated to compensate for this limitation (see Chapter 20). Nonetheless, many treaty provisions have now been successfully invoked vertically and horizontally. The fact of their being addressed to, and imposing obligations on, states has been no bar to their horizontal effect.

5.2.4 Regulations

A regulation is described in Article 249 EC as of 'general application ... binding in its entirety and directly applicable in all Member States'. It is clearly intended to take immediate effect without the need for further implementation.

Regulations are thus by their very nature apt to produce direct effects. However, even for regulations direct effects are not automatic. There may be cases where a provision in a regulation is conditional, or insufficiently precise, or requires further implementation before it can take full legal effect. But since a regulation is of 'general application', where the criteria for direct effects are satisfied, it may be invoked vertically or horizontally.

In *Antonio Munoz Cia SA v Frumar Ltd* (case C-253/00), the ECJ confirmed that regulations by their very nature operate to confer rights on individuals which must be protected by the national courts. In this case, Regulation 2200/96 ([1996] OJ L 297/1) laid down the standards by which grapes are classified. Munoz brought civil proceedings against Frumar who had sold grapes under particular labels which did not comply with the corresponding standard. The relevant provision in the regulation did not confer rights specifically on Munoz, but applied to all operators in the market. A failure by one operator to comply with the provision could have adverse effects, since the purpose of the regulation was to keep products of unsatisfactory quality off the market, and to ensure the full effectiveness of the regulation, it must be possible for a trader to bring civil proceedings against a competitor to enforce the regulation. This decision is noteworthy for several reasons. As with the early case law on the treaty articles, it reasons from the need to ensure the effectiveness of Community law. It also confirms that, as directly applicable measures, regulations can apply horizontally between private parties as well as vertically against public bodies. In terms of enforcement, it also seems to suggest that it is not necessary that rights be conferred expressly on the claimant before that individual may rely on the sufficiently clear and unconditional provisions of a regulation. Insofar as the ECJ's jurisprudence requires individuals seeking to rely on a directive to have received rights under that directive (see 5.2.5.3 below), there seems to be the beginning of a divergence between the jurisprudence on regulations and that on directives.

5.2.5 Directives

5.2.5.1 *The problem of the direct effect of directives*

A directive is (Article 249 EC) 'binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

Because directives are not described as 'directly applicable' it was originally thought that they could not produce direct effects. Moreover the obligation in a directive is addressed to states, and gives the state some discretion as to the form and method of implementation; its effect thus appeared to be conditional on the implementation by the state.

5.2.5.2 *The principle of direct effect of directives*

This was not the conclusion reached by the ECJ, which found, in *Grad v Finanzamt Traunstein* (case 9/70) that a directive could be directly effective. The claimant in *Grad* was a haulage company seeking to challenge a tax levied by the German authorities that the claimant claimed was in breach of an EC directive and decision. The

directive required states to amend their VAT systems to comply with a common EC system and to apply this new VAT system to, inter alia, freight transport from the date of the directive's entry into force. The German government argued that only regulations were directly applicable. Directives and decisions took effect internally only via national implementing measures. As evidence they pointed out that only regulations were required to be published in the *Official Journal.* The ECJ disagreed. The fact that only regulations were described as directly applicable did not mean that other binding acts were incapable of such effects:

It would be incompatible with the binding effect attributed to Decisions by Article 189 [now 249] to exclude in principle the possibility that persons affected may invoke the obligation imposed by a Decision. . . the effectiveness of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law.

Although expressed in terms of a decision, it was implied in the judgment that the same principle applied in the case of directives. The direct effect of directives was established beyond doubt in a claim based on a free-standing directive in *Van Duyn v Home Office* (case 4 1/74). Here the claimant sought to invoke Article 3 of Directive 64/221 to challenge the Home Office's refusal to allow her to enter to take up work with the Church of Scientology. Under EC law Member States are allowed to deny EC nationals rights of entry and residence only on the grounds of public policy, public security and public health (see Chapter 25). Article 3 of Directive 64/22 1 provided that measures taken on the grounds of public policy must be based exclusively on the personal conduct of the person concerned. Despite the lack of clarity as to the scope of the concept of 'personal conduct' the ECJ held that Mrs Van Duyn was entitled to invoke the directive directly before her national court. It suggested that even if the provision in question was not clear the matter could be referred to the ECJ for interpretation under Article 234 EC.

So both directives and decisions may be directly effective. Whether they will in fact be so will depend on whether they satisfy the criteria for direct effects—they must be sufficiently clear and precise, unconditional, leaving no room for discretion in implementation. These conditions were satisfied in *Grad.* Although the directive was not unconditional in that it required action to be taken by the state, and gave a time limit for implementation, once the time limit expired the obligation became absolute. At this stage there was no discretion left. *Van Duyn* demonstrates that it is not necessary for a provision to be particularly precise for it to be deemed 'sufficiently' clear. Significantly, the ECJ held in *Riksskatterverket v Soghra Gharehveran* (case C-441/99) that a provision in a directive could be directly effective where it contained a discretionary element if the Member State had already exercised that discretion. The reason for this was that it could then no longer be argued that the Member State still had to take measures to implement the provision.

The reasoning in *Grad* was followed in *Van Duyn* and has been repeated on many occasions to justify the direct effect of directives once the time limit for implemen tation has expired. A more recent formulation of the test for direct effects, and one that is generally used, is that the provision in question should be 'sufficiently clear and precise and unconditional'.

A directive cannot, however, be directly effective before the time limit for implementation has expired. It was tried unsuccessfully in the case of *Pubblico Ministero v Ratti* (case 148/78). Mr Ratti, a solvent manufacturer, sought to invoke two EC har-monisation directives on the labelling of dangerous preparations to defend a criminal charge based on his own labelling practices. These practices, he claimed, were not illegal according to the directive. The ECJ held that since the time limit for the implementation of one of the directives had not expired it was not directly effective. He could, however, rely on the other directive for which the implementation date had passed.

Even when a state has implemented a directive it may still be directly effective. The ECJ held this to be the case in *Verbond van Nederlandse Ondernemingen (VNO) v Inspecteur der Invoerrechten en Accijnzen* (case 51/76), thereby allowing the Federation of Dutch Manufacturers to invoke the Second VAT Directive despite implementation of the provision by the Dutch authorities. The grounds for the decision were that the useful effect of the directive would be weakened if individuals could not invoke it before national courts. By allowing individuals to invoke the directive the Union can ensure that national authorities have kept within the limits of their discretion. Indeed, it seems possible to rely on even a properly implemented directive if it is not properly applied in practice *(Marks and Spencer* (case G-62/00)).

Arguably, the principle in *VNO* could apply to enable an individual to invoke a 'parent' directive even before the

expiry of the time limit, where domestic measures have been introduced for the purpose of complying with the directive (see *Offtcier van Justitie v Kolpinghuis Nijmegen* (case 80/86)). This view gains some support from the case of *Inter-Environment WallonieASBL vRegion Wallonie* (case C-129/96). Here the ECJ held that even within the implementation period Member States are not entitled to take any measures which could seriously compromise the result required by the directive. This applies irrespective of whether the domestic measure which conflicts with a directive was adopted to implement that directive (case C-14/02 *ATRAL).* In *Mangold* (case C-l 44/04, see further below), the ECJ strengthened this view. According to its ruling, the obligation on a national court to set aside domestic law in conflict with a directive before its period for implementation has expired appears to be even stronger where the directive in question merely aims to provide a framework for ensuring compliance with a general principle of Community law, such as non-discrimination on the grounds of age (see Chapter 6). Note also the approach in regards to the obligation for consistent interpretation (see, eg, *Adeneler v ELOG* (case C-2 12/04) below).

5.2.5.3 ***Must rights be conferred by the directive?***

The ECJ's test for direct effects (the provision must be sufficiently clear, precise, and unconditional) has never expressly included a requirement that the directive should be intended to give rise to rights for the individual seeking to invoke its provisions. However, the justification for giving direct effect to EC law has always been the need to ensure effective protection for individuals' Community rights. Furthermore, the ECJ has, in a number of recent cases, suggested that an individual's right to invoke a directive may be confined to situations in which he can show a particular interest in that directive. In *Becker v Finanzamt MunsterInnenstadt* (case 8/81), in confirming and clarifying the principle of direct effect as applied to directives, the Court held that 'provisions of Directives can be invoked by individuals *insofar as they define rights which individuals are able to assert against the state'* (emphasis added).

Drawing on this statement in *Verholen* (cases C-87 to C-89/90), the Court suggested that only a person with a direct interest in the application of the directive could invoke its provisions: this was held in *Verholen* to include a third party who was directly affected by the directive. In *Verholen*, the husband of a woman suffering sex discrimination as regards the granting of a social security benefit, contrary to Directive 79/7, was able to bring a claim based on the directive in respect of disadvantage to himself consequential on the discriminatory treatment of his wife.

In most recent cases in which an individual seeks to invoke a directive directly, the existence of a direct interest is clear. The question of his or her standing has not therefore been in issue. Normally the rights he or she seeks to invoke, be it for example a right to equal treatment or to employment protection, are contained in the directive. Its provisions are clearly, if not explicitly, designed to benefit persons such as the individual. There are circumstances, however, where this is not so.

5.2.5.4 ***Member States' initial response***

Initially national courts were reluctant to concede that directives could be directly effective. The Conseil d'Etat, the supreme French administrative court, in *Minister of the Interior v Cohn-Bendit* ([1980] 1 CMLR 543), refused to follow *Van Duyn vHome Office* and allow the claimant to invoke Directive 64/221. The English Court of Appeal in *O'Brien v Sim-Chem Ltd* ([1980] ICR 429) found the Equal Pay Directive (75/117) not to be directly effective on the grounds that it had purportedly been implemented in the Equal Pay Act 1970 (as amended 1975). *VNO* was apparently not cited before the court. The German Federal Tax Court, the Bundesfinanzhof, in *Re VAT Directives* ([1982] 1 CMLR 527) took the same view on the direct effects of the Sixth VAT Directive, despite the fact that the time limit for implementation had expired and existing German law appeared to run counter to the directive. The courts' reasoning in all these cases ran on similar lines. Article 249 expressly distinguishes regulations and directives; only regulations are described as 'directly applicable'; directives are intended to take effect within the national order via national implementing measures.

On a strict interpretation of Article 249 EC this is no doubt correct. On the other hand the reasoning advanced by the ECJ is compelling. The obligation in a directive is 'binding "on Member States" as to the result to be achieved'; the useful effects of directives would be weakened if states were free to ignore their obligations and enforcement of EC law were left to direct action by the Commission or Member States under Articles 226 or 227. Moreover states are obliged under Article 10 (post Lisbon, Article 4 of the Treaty on European Union (TEU)) to 'take all appropriate measures... to ensure fulfilment of the obligations arising out of this Treaty or

resulting from action taken by the institutions of the Community'. If they have failed in these obligations why should they not be answerable to individual litigants?

5.2.5.5 ***Vertical and horizontal direct effects: A necessary distinction***

The reasoning of the ECJ is persuasive where an individual seeks to invoke a directive against the state on which the obligation to achieve the desired results has been imposed. In cases such as *VNO*, *Van Duyn*, and *Ratti*, the claimant sought to invoke a directive against a public body, an arm of the state. This is known as *vertical* direct effect, reflecting the relationship between the individual and the state. Yet as with treaty articles, there are a number of directives, impinging on labour, company or consumer law for example, which a claimant may wish to invoke against a private person. Is the Court's reasoning in favour of direct effects adequate as a basis for the enforcement of directives against individuals? This is known as *horizontal* direct effect, reflecting the relationship between individuals.

The arguments for and against horizontal effects are finely balanced. Against horizontal effects is the fact of uncertainty. Prior to the entry into force of the TEU, directives were not required to be published. More compelling, the obligation in a directive is addressed to the state. In *Becker v Finanzamt MunsterInnenstadt* (case 8/8 1) the Court, following dicta in *Pubblico Ministero v Ratti* (case 148/78), had justified the direct application of the Sixth VAT Directive against the German tax authorities on the grounds that the obligation to implement the directive had been placed on the state. It followed that:

a Member State which has not adopted, within the specified time limit, the implementing measure$ prescribed in the Directive, cannot raise the objection, as against individuals, that it has not fulfilled the obligations arising from the Directive. This reasoning is clearly inapplicable in the case of an action against a private person. In favour of horizontal effects is the fact that directives have always in fact been published; that treaty provisions addressed to, and imposing obligations on,Member States have been held to be horizontally effective; that it would be anomalous, and offend against the principles of equality, if an individual's rights to invoke a directive were to depend on the status, public or private, of the party against whom he wished to invoke it; and that the useful effect of Community law would be weakened if individuals were not free to invoke the protection of Community law against *all* parties.

Although a number of references were made in which the issue of the horizontal effects of directives was raised, the ECJ for many years avoided the question, either by declaring that the claimant's action lay outside the scope of the directive, as in *Burton v British Railways Board* (case 19/8 1) (Equal Treatment Directive 76/207) or by falling back on a directly effective treaty provision, as in *Worringham v Lloyds Bank Ltd* (case 69/80) in which the then Article 119 (now 141) was applied instead of Directive 75/117, the Equal Pay Directive.

The nettle was finally grasped in *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)* (case 152/84). Here Mrs Marshall was seeking to challenge the health authority's compulsory retirement age of 65 for men and 60 for women as discriminatory, in breach of the Equal Treatment Directive 7 6/207. The difference in age was permissible under the Sex Discrimination Act 1975, which expressly excludes 'provisions relating to death or retirement' from its ambit. The Court of Appeal referred two questions to the ECJ:

(a) Was a different retirement age for men and women in breach of Directive 7 6/207?

(b) If so, was Directive 76/207 to be relied on by Mrs Marshall in the circumstances of the case?

The relevant circumstances were that the area health authority, though a 'public' body, was acting in its capacity as employer.

The question of vertical and horizontal effects was fully argued. The Court, following a strong submission from Advocate-General Slynn, held that the compulsory different retirement age was in breach of Directive 7 6/207 and could be invoked against a public body such as the health authority. Moreover 'where a person involved in legal proceedings is able to rely on a Directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority'.

On the other hand, following the reasoning of *Becker*, since a directive is, according to Article 249, binding only on 'each Member State to which it is addressed':

It follows that a Directive may not of itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against such a person.

If this distinction was arbitrary and unfair:

Such a distinction may easily be avoided if the Member State concerned has correctly implemented the Directive in national law.

So, with *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)* the issue of the horizontal effect of directives was, it seemed, finally laid to rest (albeit in an *obiter* statement, since the health authority was arguably a public body at the time). By denying their horizontal effect on the basis of Article 249 the Court strengthened the case for their vertical effect. The decision undoubtedly served to gain acceptance for the principle of vertical direct effects by national courts (see, eg, *R v London Boroughs Transport Committee, ex parte Freight Transport Association Ltd* [1990] 3 CMLR 495). But problems remain, both with respect to vertical and horizontal direct effects.

5.2.5.6 ***Vertical direct effects: Reliance against public body***

First, the concept of a 'public' body, or an 'agency of the State', against whom a directive may be invoked, is unclear. In *Fratelli Costanzo SPA v Comune di Milano* (case 103/88), in a claim against the Comune di Milano based on the Comune's alleged breach of Public Procurement Directive 71/305, the Court held that since the reason for which an individual may rely on the provisions of a directive in proceedings before the national courts is that the obligation is binding on all the authorities of the Member States, where the conditions for direct effect were met, 'all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply these provisions'. The area health authority in *Marshall* was deemed a 'public' body, as was the Royal Ulster Constabulary in *Johnston v RUC* (case 222/84). But what of the status of publicly owned or publicly run enterprises such as the former British Rail or British Coal? Or semi-public bodies? Are universities 'public' bodies and what is the position of privatised utility companies, or banks, which are in the main owned by the taxpayer?

These issues arose for consideration in *Foster v British Gas pic* (case C-l 88/89). In a claim against the British Gas Corporation in respect of different retirement ages for men and women, based on Equal Treatment Directive 7 6/207, the English Court of Appeal had held that British Gas, a statutory corporation carrying out statutory duties under the Gas Act 1972 at the relevant time, was not a public body against which the directive could be enforced. On appeal the House of Lords sought clarification on this issue from the ECJ. That court refused to accept British Gas's argument that there was a distinction between a nationalised undertaking and a state agency and ruled (at para 18) that a directive might be relied on against organisations or bodies which were 'subject to the authority or control of the State or had special powers beyond those which result from the normal relations between individuals'.

Applying this principle to the specific facts of *Foster v British Gas pic* it ruled (at para 20) that a directive might be invoked against:

a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State arid has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

On this interpretation a nationalised undertaking such as the then British Gas would be a 'public' body against which a directive might be enforced, as the House of Lords subsequently decided in *Foster* v *British Gaspic* ([1991] 2 AC 306).

It may be noted that the principle expressed in para 18 is wider than that of para 20, the criteria of 'control' and 'powers' being expressed as alternative, not cumulative; as such it is wide enough to embrace any nationalised undertaking, and even bodies such as universities with a more tenuous public element, but which are subject to *some* state authority or control. However, in *Rolls-Royce pic v Doughty* ([1992] ICR 538), the English Court of Appeal, applying the 'formal ruling' of para 20 of *Foster*, found that Rolls-Royce, a nationalised undertaking at the relevant time, although 'under the control of the State', had not been 'made responsible pursuant to a measure adopted by the State for providing a public service'. The public services which it provided, for example, in the defence of the realm, were provided to the *state* and not to the *public* for the purposes of benefit to the state: nor did the company possess or exercise any special powers of the type enjoyed by

British Gas. Mustill LJ suggested that the test provided in para 18 was 'not an authoritative exposition of the way in which cases like *Foster* should be approached': it simply represented a 'summary of the (Court's) jurisprudence to date'.

There is little evidence to support such a conclusion. The Court has never distinguished between its 'formal' rulings (ie, on the specific issue raised) and its more general statements of principle. Indeed such general statements often provide a basis for future rulings in different factual situations. A restrictive approach to the Court's rulings, as taken in *Rolls-Royce pic v Doughty,* is inconsistent with the purpose of the ECJ, namely to ensure the effective implementation of Community law and the protection of individuals' rights under that law by giving the concept of a public body the widest possible scope. This was acknowledged by the Court of Appeal in *National Union of Teachers v Governing Body ofSt Mary's Church ofEngland (Aided) Junior School* ([1997] 3 CMLR 630) when it suggested that the concept of an emanation of the state should be a 'broad one'. The definition provided in para 20 of *Foster* should not be regarded as a statutory definition: it was, in the words of para 20, simply *'included among* those bodies against which the provisions of a Directive can be applied'.

The English courts' approach to whether a particular body is an 'emanation of the state' for the purpose of enforcement of EC directives is unpredictable. It is not altogether surprising that they fail to take a generous view when the result would be to impose liability on bodies which are in no way responsible for the non-implementation of directives, a factor which was undoubtedly influential in *Rolls-Royce pic v Doughty.* But even if national courts were to adopt a generous approach, no matter how generously the concept of a 'public' body is defined, as long as the public/private distinction exists there can be no uniformity in the application of directives as between one state and another. Neither will it remove the anomaly as between individuals. Where a state has failed to fulfil its obligations in regard to directives, whether by non-implementation or inadequate implementation, an individual would, it appeared, following *Marshall,* be powerless to invoke a directive in the context of a 'private' claim.

s.2.5.7 *Horizontal direct effects*

In 1993, in the case of *Dori v Recreb Sri* (case C-9 1/92), the Court was invited to change its mind on the issue of horizontal direct effects in a claim based on EC Directive 85/577 on Door-step Selling, which had not at the time been implemented by the Italian authorities, against a private party. Advocate-General Lenz urged the Court to reconsider its position in *Marshall* and extend the principle of direct effects to allow for the enforcement of directives against *all* parties, public and private, in the interest of the uniform and effective application of Community law. This departure from its previous case law was, he suggested, justified in the light of the completion of the internal market and the entry into force of the Treaty on European Union, in order to meet the legitimate expectations of citizens of the Union seeking to rely on Community law. In the interests of legal certainty such a ruling should however not be retrospective in its effect (on the effect of Article 234 rulings—see Chapter 10).

The Court, no doubt mindful of national courts' past resistance to the principle of direct effects, and the reasons for that resistance, declined to follow the Advocate-General's advice and affirmed its position in *Marshall:* Article 249 distinguished between regulations and directives; the case law establishing vertical direct effects was based on the need to prevent states from taking advantage of their own wrong; to extend this case law and allow directives to be enforced against individuals 'would be to recognise a power to enact obligations for individuals with immediate effect, whereas (the Community) has competence to do so only where it is empowered to adopt Regulations'. This decision was confirmed in subsequent cases, such as *El Corte Ingles SA vRivero* (case C-192/94) *Arcaro* (case C-l68/95), and more recently in *Carp v Ecorad* (case C-80/06).

However, in denying horizontal effects to directives in *Dori,* the Court was at pains to point out that alternative remedies might be available based on principles introduced by the Court prior to *Dori,* namely the principle of indirect effects and the principle of State liability introduced in *Francovich v Italy* (cases C-6 and 9/90— see Chapter 9). *Francovich* was also suggested as providing an alternative remedy in *El Corte Ingles SA v Rivero. Pfeiffer* (joined cases C-397/01 to 403/0 1) confirmed that directives could not have horizontal direct effect, but it emphasised, in the strongest possible terms, that a court was obliged to interpret domestic law in so far as possible in accordance with a directive (see 5.3, below). In the circumstances of that case, the practical outcome would have been akin to admitting horizontal direct effect, albeit by following the 'indirect effect' route. It must be borne in mind that one of the principal justifications for rejecting 'horizontal direct effect' has been that directives cannot, of themselves, impose obligations on individuals. In two-party situations, this

reasoning is straightforward. It is less so in a three-party situation where an individual is seeking to enforce a right under a directive against the Member State where this would have an impact on a third party. This issue arose in *Wells v SoSfor Transport, Local Government and the Regions* (case C-201/02), where Mrs Wells challenged the government's failure to carry out an environmental impact assessment (as required under Directive 85/337/EEC, [1985] OJ LI 7 5/40) when authorising the recommencement of quarrying works. The UK government argued that to accept that the relevant provisions of the directive had direct effect would result in 'inverse direct effect' in that UK government would be obliged to deprive another individual (the quarry owners) of their rights. The ECJ dismissed this, holding that permitting an individual to hold the Member State to its obligations was not linked to the performance of any obligation which would fall on the third party (at para 58), although there would be consequences for the third party as a result. It would be for the national courts to consider whether to require compliance with the directive in the particular case, or whether to compensate the individual for any harm suffered. A similar approach can be seen m *Arcor* (case C- 152-4/07). The case concerned a decision by the German telecommunications authority, approving a connection charge for calls from Deutsche Telekom's national network to a connection partner to cover the costs of maintaining the local telecommunications infrastructure. Third-party telecommunications operators sought to challenge that decision and it was this challenge that formed the basis of the reference. The ECJ held that the decision was incompatible with the directives regulating the area. The ECJ then referred to its decision in *Wells,* although the referring court had not raised the question in these terms, and re-emphasised that 'mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from relying on the provisions of a directive against the Member State concerned' (para 36). In coming to its conclusion in *Wells,* the ECJ relied, in part, on case law developed in the context of Directive 83/1 89/EEC on the enforceability of technical standards which have not been notified in accordance with the requirements of that directive. It had been suggested that these cases create something akin to 'incidental' horizontal effect, and it is therefore necessary to examine these in more detail.

5.2.5.8 *'Incidental' horizontal effect*

There have been cases in which individuals have sought to exploit the principle of direct effects not for the purposes of claiming Community rights denied them under national law, but simply in order to establish the illegality of a national law and thereby prevent its application to them. This may occur in a two-party situation, in which an individual is seeking to invoke a directive, whether as a sword or a shield, against the state. It presents particular problems in a three-cornered situation, in which a successful challenge based on an EC directive by an individual to a domestic law or practice, although directed at action by the state, may adversely affect third parties. In this case the effect of the directive would be felt horizontally. To give the directive direct effects in these cases would seem to go against the Court's stance on horizontal direct effects in the line of cases beginning with *Dori v Recreb Sri,* and the reasoning in these cases. Two cases, with contrasting outcomes, *CIA Security International SA v Signalson SA* (case C-194/94) and *Lemmens* (case C-226/97), illustrate the difficulty. Both cases involve Directive 83/189 (Directive 83/189 has been replaced and extended, by Directive 98/34 ([1998] OJ L204/37, amended by Directive 98/44, OJ L217/18), see 16.3.6). The directive, which is designed to facilitate the operation of the single market, lays down procedures for the provision of information by Member States to the Commission in the field of technical standards and regulations. Article 8 prescribes detailed procedures requiring Member States to notify, and obtain clearance from, the Commission for any proposed regulatory measures in the areas covered by the directive. In *CIA Security International SA v Signalson SA,* the defendants, CIA Security, sought to rely on Article 8 of Directive 83/189 as a defence to an action, brought by Signalson, a competitor, for unfair trading practices in the marketing of security systems. The defendants claimed that the Belgian regulations governing security, which the defendants had allegedly breached, had not been notified as required by the directive: they were therefore inapplicable. Contrary to its finding in the earlier case of *Enichem Base v Comune di Cinsello Balsamo* (case C-380/87), involving very similar facts and the same directive, the ECJ accepted this argument, distinguishing *Enichem* on the slenderest of grounds. Thus the effects of the directive fell horizontally on the claimant, whose actions, based on national law, failed.

Article 8 of Directive 83/189 was again invoked as a defence in *Lemmens* (case C-226/97). Lemmens was charged in Belgium with driving above the alcohol limit. Evidence as to his alcohol level at the relevant time had been provided by a breath analysis machine. Invoking *CIA Security International SA v Signalson SA,* he argued that the Belgian regulations with which breath analysis machines in Belgium were required to conform had not been notified to the Commission, as required by Article 8 of Directive 83/189. He argued that the consequent

inapplicability Of the Belgian regulations regarding breath analysis machines impinged on the evidence obtained by using those machines; it could not be used in a case against him. The ECJ refused to accept this argument. It looked to the purpose of the directive, which was designed to protect the interest of free movement of goods. The Court concluded:

Although breach of an obligation (contained in the Directive) rendered (domestic) regulations inapplicable inasmuch as they hindered the marketing of a product which did not conform with its provisions, it did not have the effect of rendering unlawful any use of the product which conformed with the unnotified regulations. Thus the breach (of Article 8) did not make it impossible for evidence obtained by means of such regulations, authorized in accordance with the regulations, to be relied on against an individual.

This distinction, between a breach affecting the marketing of a product, as in *CIA Security International SA v Signalson SA*, and one affecting its use, as in *Lemmens*, is fine, and hardly satisfactory. The decision in *CIA Security International SA* v *Signalson SA* had been criticised because the burden imposed by the breach (by the state) of Article 8, the non-application of the state's unfair practice laws, would have fallen on an individual, in this case the claimant. This was seen as a horizontal application in all but name. In two other cases decided, like *CIA Security International SA v Signalson SA*, in 1996, *Ruiz Bemaldez* (case C-129/94) and *Panagis Parfitis* (case C-441/93), individuals were permitted to invoke directives to challenge national law, despite their adverse impact on third parties.

Lemmens, on the other hand, did not involve a third-party situation. The invocation by the defendant of Article 8 of Directive 83/189 did, however, smack of abuse. The refinement introduced in *Lemmens* may thus be seen as an attempt by the ECJ to impose some limits on the principle of direct effects as affected by *CIA Security* and as applied to directives.

The *CIA Security* principle was, however, confirmed and extended to a contractual relationship between two companies in *Unilever Italia SpA v Central Food SpA* (case C443/98). Italy planned to introduce legislation on the geographical origins of various kinds of olive oil and notified this in accordance with Article 8 of the directive after the Commission requested that this be done. The Commission subsequently decided to adopt a Community-wide measure and invoked the 'standstill' procedure in Article 9 of the directive, which requires a Member State to delay adoption of a technical regulation for- 12 months if the Commission intends to legislate in the relevant field. Italy nevertheless adopted its measure before the 12-month period had expired. The dispute leading to the Article 234 reference arose when Unilever supplied Central Foods with olive oil which had not been labelled in accordance with Italian law. Unilever argued that Italian legislation should not be applied because it had been adopted in breach of Article 9 of the directive. Advocate-General Jacobs argued that the C/A principle could not affect contractual relations between individuals, primarily because to hold otherwise would infringe the principle of legal certainty. The Court disagreed and held that the national court should refuse to apply the Italian legislation. It noted that there was no reason to treat the dispute relating to unfair competition in *CIA Security* differently from the contractual dispute in *Unilever.* The Court acknowledged the established position that directives cannot have horizontal direct effect, but went on to say that this did not apply in relation to Articles 8-9 of Directive 83/189. The Court did not feel that the case law on horizontal direct effect and the case law under Directive 83/189 were in conflict, because the latter directive does not seek to create rights or obligations for individuals.

The initial reaction to *CIA Security* was that the Court appeared to accept that directives could have horizontal direct effect. But after *Unilever*, it is clear that this has not been its intention. However, this area remains one of some uncertainty. The position now seems to be that private parties to a contract for the sale or supply of goods need to investigate whether any relevant technical regulations have been notified in accordance with the directive. There may then be a question of whether the limitation introduced by *Lemmens* comes into play. The end result appears to be the imposition on private parties of rights and obligations of which they could not have been aware—this was the main reason *against* the acceptance of horizontal direct effect in the case of directives. Although the Court in *Unilever* was at pains to restrict this line of cases to Directive 83/189 (and its replacement, Directive 98/34), this is not convincing. Nevertheless, the ECJ has maintained its approach under this Directive (see, eg, *Lidl Italia Sri v Comune di Stradella* (case C-303/04)), and it would appear to be best to regard the case law under Directive 9 8/34 (and its predecessor) as being confined to the context of that and similar directives (see also, eg, *R v Medicines Control Agency exparte Smith & Nephew Ltd* (case C-201/94) in the context of the authorisation of medicinal products under Directive 65/65/EEC (superseded by 1993 measures),

permitting the holder of a marketing authorisation to rely on Article 5 of that directive in challenging the grant of an authorisation to a competitor). It should also be noted that the ECJ has not adopted this approach in analogous situations involving decisions *(Carp v Ecorad* (case C-80/06)). Such a view should, of course, not be understood as reducing the significance of these cases in the context of an important field of EC law, and *Wells* (case C-20 1/02) and *Arcor* (case C-1 52-4/07) have taken this approach into the field of direct effect generally.

5.2.5.9 ***No direct effect to impose criminal liability***

One important limitation to the direct effect principle was confirmed in *Berlusconi and others* (joined cases C-387/02, C-39 1/02, and C-403/02). Here, Italian company legislation had been amended after proceedings against Mr Berlusconi and others had been commenced to make the submission of incorrect accounting information a summary offence, rather than an indictable offence. The Italian criminal code provides that a more lenient penalty introduced after proceedings have been commenced but prior to judgment should be imposed, and in the instant cases, proceedings would therefore have to be terminated as the limitation period for summary offences had expired. The ECJ was asked (in Article 234 proceedings) if Article 6 of the First Company Law Directive (68/15 1/EEC) could be relied upon directly against the defendants. Having observed that the directive required an appropriate penalty and that it was for the national court to consider whether the revised provisions of Italian law were appropriate, the Court confirmed that it is not permissible to rely on the direct effect of a directive to determine the criminal liability of an individual (paras 73-8). In so holding, the ECJ followed the principles developed in the context of indirect effect (5.3.2, below) and reflects general principles of law (see Chapter 6).

s.2.5.10 ***Direct effect of directives: Conclusions***

The jurisprudence of the ECJ in this area has matured sufficiently to permit the conclusion that, as a general rule, directives cannot take direct effect in the context of a two-party situation where both parties are individuals. Directives can only be relied upon against a Member State (in a broad sense) by an individual (on limitations on the obligations an individual can enforce, note *Verholen* (case C-87/90)). A directive cannot impose an obligation on an individual of itself; it needs to be implemented to have this consequence. Nevertheless, it is apparent that the clear-cut distinction between vertical and horizontal direct effect in two-party situations becomes blurred when transposed into a tripartite context. The enforcement by an individual of an obligation on the Member State may affect the rights of other individuals, which, according to *Wells* (case C-201/02), is a consequence of applying direct effect, but does not appear to change its vertical nature. The rather specific context of notification and authorisation directives, which may also have an effect on relationships not involving Member States, adds to the uncertainty. But whilst the case law may seem settled, the debate as to whether directives *should* have horizontal direct effect is one that is unlikely to go away soon.

5.2.6 Decisions

A decision is 'binding in its entirety upon those to whom it is addressed' (Article 249 EC). Decisions may be addressed to Member States, singly or collectively, or to individuals. Although, like directives, they are not described as 'directly applicable', they may, as was established in *Grad v Finanzamt Traustein* (case 9/70), be directly effective provided the criteria for direct effects are satisfied. The direct application of decisions does not pose the same theoretical problems as directives, since they will only be invoked against the addressee of the decision. If the obligation has been addressed to him and is 'binding in its entirety', there seems no reason why it should not be invoked against him, providing, of course, that it satisfies the test of being sufficiently clear precise and unconditional. In the recent case of *Fosele v Sud-Ouest-Sarl* (case C- 18/08), which concerned a decision which permitted the state to exempt certain vehicles from motor tax, the ECJ held that due to the element of choice left to the Member State, the individual could not rely on the decision to obtain such an exemption. An individual may seek to rely on a decision addressed to a Member State against that Member State (eg, recently, *Fosele v Sud-Ouest-Sarl* (case C- 18/08)). In *Ecorad* (case C80/60), Ecorad sought to rely on the contents of a decision, adopted according to the terms of a directive, addressed to a Member State in the context of a contractual dispute with Carp. Carp claimed it was not bound by the decision. The ECJ reviewed the cases on the horizontal application of directives and concluded that:

the considerations underpinning the case-law referred to in the preceding paragraph with regard to directives apply *mutatis mutandis* to the question whether Decision 1999/93 may be relied upon as against an individual. [Para 21.]

5.2.7 Recommendations and opinions

Since recommendations and opinions have no binding force it would appear that they cannot be invoked by individuals, directly or indirectly, before national courts. However, in *Grimaldi v Fonds des Maladies Professionnelles* (case C-322/88), in the context of a claim by a migrant worker for benefit in respect of occupational diseases, in which he sought to invoke a Commission recommendation concerning the conditions for granting such benefit, the ECJ held that national courts were:

bound to take Community recommendations into consideration in deciding disputes submitted to them, in particular where they clarify the interpretation of national provisions adopted in order to implement them or where they are designed to supplement binding EEC measures.

Such a view is open to question. It may be argued that recommendations, as non-binding measures, can at the most only be taken into account in order to resolve ambiguities in domestic law.

5.2.8 International agreements to which the EC is a party

There are three types of international agreements capable of being invoked in the context of EC law arising from the Community's powers under Articles 281, 300, 133, and 310 (ex 210, 228, 113 and 238 EC, post Lisbon, Articles 243, 260, 294, and 272 TFEU respectively—see Chapter 3). First, agreements concluded by the Community institutions falling within the treaty-making jurisdiction of the EC; secondly, 'hybrid' agreements, such as the WTO agreements, in which the subject matter lies partly within the jurisdiction of Member States and partly within that of the EC; and thirdly, agreements concluded prior to the EC Treaty, such as GATT, which the EC has assumed as being within its jurisdiction, by way of succession. There is no indication in the EC Treaty that such agreements may be directly effective.

The ECJ's case law on the direct effect of these agreements has not been wholly consistent. It purports to apply similar principles to those which it applies in matters of 'internal' law. A provision of an association agreement will be directly effective when 'having regard to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'. Applying these principles in some cases, such as *International Fruit Co NV v Produktschap voor Groenten en Fruit (No 3)* (cases 21 and 22/72), the Court, in response to an enquiry as to the direct effects of Article XI of GATT, held, following an examination of the agreement as a whole, that the Article was not directly effective.

In others, such as *Bresciani* (case 87/75) and *Kupferberg* (case 104/81), Article 2(1) of the Yaounde Convention and Article 21 of the EC-Portugal trade agreement were examined respectively on their individual merits and found to be directly effective. The reasons for these differences are at not at first sight obvious, particularly since the provisions in all three cases were almost identical in wording to EC Treaty articles already found directly effective. The suggested reason (see Hartley (1983) 8 EL Rev 383) for this inconsistency is the conflict between the ECJ's desire to provide an effective means of enforcement of international agreements against Member States and the lack of a solid legal basis on which to do so. The Court justifies divergences in interpretation by reference to the scope and purpose of the agreement in question, which are clearly different from, and less ambitious than, those of the EC Treaty *(Opinion 1/91* (on the draft EEA Treaty)). As a result, the criteria for direct effects tend to be applied more strictly in the context of international agreements entered into by the EC.

Since the *International Fruit Co* cases the Court has maintained consistently that GATT rules cannot be relied upon to challenge the lawfulness of a Community act except in the special case where the Community provisions have been adopted to implement obligations entered into within the framework of GATT. Because GATT rules are not unconditional, and are characterised by 'great flexibility', direct effects cannot be inferred from the 'spirit, general scheme and wording of the Treaty'. This principle was held in *Germany v Council* (case C280/93) to apply not only to claims by individuals but also to actions brought by Member States. As a result the opportunity to challenge Community law for infringement of GATT rules is seriously curtailed. Despite strong arguments in favour of the direct applicability of WTO provisions from Advocate-General Tesauro in *THermes International v FH Marketing Choice BV* (case C-53/96), the Court has not been willing to change its mind. It appears that there is near-unanimous political opposition to the direct application of WTO. (See recently *Merck Genericos-Produtos Farmaciuticos Lda v Merck & Co Inc, and Merck Sharp & Dohme Lda* (case C-43 1/05)).

However, where the agreement or legislation issued under the agreement confers clear rights on

individuals the ECJ has not hesitated to find direct effects (eg, *Sevince* (case C192/89); *Bahia Kziber* (case C- 18/90)).

Thus, paradoxically, an individual in a dualist state such as the UK will be in a stronger position than he would normally be vis-a-vis international law, which is not as a rule incorporated into domestic law.

5.2.9 Exclusions from the principle of direct effects

In extending the jurisdiction of the ECJ to matters within the third—justice and home affairs (JHA)—pillar of the TEU to encompass decisions and framework decisions in the field of political and judicial cooperation in criminal matters taken under Title VI TEU, the Treaty of Amsterdam (ToA) expressly denied direct effects to these provisions (Article 34(2) TEU). Similarly, although areas within the third pillar of the TEU, relating to visas, asylum, immigration, and judicial cooperation in civil matters, were incorporated into the EC Treaty (new Title IV), the ToA excluded the ECJ's jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) 'relating to the maintenance of law and order and the safeguarding of internal security' (Article 68(2) EC); thus access to the ECJ via a claim before their national court was denied to individuals in areas in which they may be significantly and adversely affected. It should be noted that if the Treaty of Lisbon comes into force, Article 34 TEU would be deleted, all the provisions relating to judicial cooperation in criminal matters and to police cooperation being relocated to the TFEU (the EC Treaty after Lisbon corrfes into effect) as part of the area of freedom security and justice provisions. With the unitary structure, it will no longer be possible to distinguish between the policy areas in the current manner and thus these areas would seem to have the potential to become directly effective, though it should be noted that the CFSP provisions will remain in the TEU and therefore structurally separate. Arguably, distinctions may continue to be made here.

Although not an express exclusion from the principle of direct effects, a situation in which an individual was not be able to rely on Community law arose in the case of *Rechberger and Greindle v Austria* (case C-140/97). The case, a claim based on *Francovich,* concerned Austria's alleged breaches of Directive 90/134 on package travel both before Austria's accession, under the EEA Agreement, and, following accession, under the EC Treaty. The ECJ held that where the obligation to implement the directive arose under the EEA Agreement, it had no jurisdiction to rule on whether a Member State was liable under that agreement prior to its accession to the European Union (see also *Ulla-Brith Andersson v Swedish State* (case C321/97)).

5.3 Principle of indirect effects

Although the ECJ has not shown willing to allow horizontal direct effect of directives, it has developed an alternative tool by which individuals may rely on directives against another individual. This tool is known as the principle of 'indirect effect', which is an interpretative tool to be applied by domestic courts interpreting national legislation which conflicts with a directive in the same area. It is sometimes also called the principle of consistent interpretation.

The principle of indirect effects was introduced in a pair of cases decided shortly before *Marshall,* namely: *von Colson v Land Nordrhein-Westfalen* (case 14/83) and *Harz v Deutsche Tradax GmbH* (case 79/83). Both cases were based on Article 6 of Equal Treatment Directive 76/207. Article 6 provides that:

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment... to pursue their claims by judicial process after possible recourse to other competent authorities.

The claimants had applied for jobs with their respective defendants. Both had been rejected. It was found by the German court that the rejection had been based on their sex, but it was justifiable. Under German law they were entitled to compensation only in the form of travelling expenses. This they claimed did not meet the requirements of Article 6. Ms von Colson was claiming against the prison service; Ms Harz against Deutsche Tradax GmbH, a private company. So the vertical/ horizontal, public/private anomaly was openly raised and argued in Article 234 proceedings before the ECJ.

The Court's solution was ingenious. Instead of focusing on the vertical or horizontal effects of the directive it turned to Article 10 of the EC Treaty. Article 10 requires states to 'take all appropriate measures' to ensure fulfilment of their Community obligations,

This obligation, the Court said, applies to *all* the authorities of Member States, including the courts. It thus falls on the courts of the Member States to interpret national law in such a way as to ensure that the objectives of the directive are achieved. It was for the German courts to interpret German law in such a way as to ensure an effective remedy as required by Article 6 of the directive. The result of this approach is that although Community law is not applied directly—it is not 'directly effective'—it may still be applied indirectly as domestic law by means of interpretation.

The success of the *von Colson* principle of indirect effect depended on the extent to which national courts perceived themselves as having a discretion, under their own constitutional rules, to interpret domestic law to comply with Community law. Although the courts in the UK showed some reluctance initially to apply this principle, relying on a strict interpretation of s 2(1) of European Communities Act 1972 as applying only to directly effective Community law (see the House of Lords in *Duke v GEC Reliance Ltd* ([1988] AC 618)), the position soon changed *(Litster v Forth Dry Dock & Engineering Co Ltd* ([1990] 1 AC 546). Occasional 'hiccups' still occurred, however, and may still do so today. In *Finnegan v Clowney Youth Training Programme Ltd* ([1990] 2 AC 407) the House of Lords had refused to interpret Article 8(4) of the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042) in line with *Marshall,* even though the order had been made after the ECj 's decision in *Marshall.* This was because that provision was enacted in terms identical to the parallel provision considered in *Duke v GEC Reliance Ltd,* and 'must have been intended to' have the same meaning as in that Act. In the light of *Marleasing* (case 106/89, see below), such a decision would be unsustainable now, and today, the UK courts are taking their obligation seriously (see, eg, *Braymist Ltd* v *Wise Finance Co Ltd* [2002] Ch 273; *Director-General ofFair Trading* v *First National Bank* [2002] 1 AC 481).

5.3.1 The scope of the doctrine: *Marleasing*

The ECJ considered the scope of the 'indirect effect' doctrine in some depth in *Marleasing SA v La Comercial Internacional de Alimentation SA* (case C-106/89). In this case, which was referred to the ECJ by the Court of First Instance, Oviedo, the claimant company was seeking a declaration that the contracts setting up the defendant companies were void on the grounds of 'lack of cause', the contracts being a sham transaction carried out in order to defraud their creditors. This was a valid basis for nullity under Spanish law. The defendants argued that this question was now governed by EC Directive 68/151. The purpose of Directive 68/151 was to protect the members of a company and third parties from, inter alia, the adverse effects of the doctrine of nullity. Article 11 of the directive provides an exhaustive list of situations in which nullity may be invoked. It does not include 'lack of cause'. The directive should have been in force in Spain from the date of accession in 1986, but it had not been implemented. The Spanish judge sought a ruling from the ECJ on whether, in these circumstances, Article 11 of the directive was directly effective.

The ECJ reiterated the view it expressed in, *Marshall* that a directive cannot of itself 'impose obligations on private parties'. It reaffirmed its position in *von Colson* that national courts must *as far as possible* interpret national law in the light ot the wording and purpose of the directive in order to achieve the result pursued by the directive (para 8). And it' added that this obligation applied *whether the national provisions in question were adopted before or after the directive.* It concluded by ruling specifically, and without qualification, that national courts were 'required' to interpret domestic law in such a way as to ensure that the objectives of the directive were achieved (para 13).

Given that in *Marleasing* no legislation had been passed, either before or after the issuing of the directive, to comply with the directive, and given the ECJ's suggestion that the Spanish court must nonetheless strive to interpret domestic law to comply with the directive, it seems that, according to the ECJ, it is not necessary to the application of the *von Colson* principle that the relevant national measure should have been introduced for the purpose of complying with the directive, nor even that a national measure should have been specifically introduced at all.

5.3.2 The limits of *Marleasing*

The strict line taken in *Marleasing was* modified in *Wagner MiretvFondo de Garantira Salaria* (case C-334/92), in a claim against a private party based on Directive 80/987. This directive is an employee protection measure designed, inter alia, to guarantee employees arrears of pay in the event of their employer's insolvency. Citing its ruling in *Marleasing* the Court suggested that, in interpreting national law to conform with the objectives of a

directive, national courts must *presume* that the state intended to comply with Community law. They must strive 'as far as possible' to interpret domestic law to achieve the result pursued by the directive. But if the provisions of domestic law cannot be interpreted in such a way (as was found to be the case in *Wagner Miret)* the state may be obliged to make good the claimant's loss on the principles of state liability laid down in *Francovich v Italy* (cases 6 and 9/90).

Wagner Miret thus represents a tacit acknowledgment on the part of the Court that national courts will not always feel able to 'construe' domestic law to comply with an EC directive, particularly when the provisions of domestic law are clearly at odds with an EC directive, and there is no evidence that the national legislature intended national law to comply with its provisions, or with a ruling on its provisions by the ECJ. This limitation proved useful for courts which were unwilling to follow *Marleasing.* Thus, in *R v British Coal Corporation, ex parte Vardy* ([1993] ICR 720), a case decided after, but without reference to, *Marleasing,* the English High Court adverted to the House of Lords judgment in *Litster* but found that it was 'not possible' to interpret a particular provision of the Trade Union and Labour Relations Act 1992 to produce the same meaning as was required by the relevant EC directive (see also *Re Hartlebury Printers Ltd* [1993] 1 All ER 470 at 478b, ChD).

Thus the indirect application of EC directives by national courts cannot be guaranteed. Some reluctance on the part of national courts to comply with the *von Colson* principle, particularly as applied in *Marleasing,* is hardly surprising. It may be argued that in extending the principle of indirect effect in this way the ECJ is attempting to give horizontal effect to directives by the back door, and impose obligations, addressed to Member States, on private parties, contrary to their understanding of domestic law. Where such is the case, as the House of Lords remarked in *Duke v GEC Reliance Ltd* (see also *Finnegan v Clowney Youth Training Programme Ltd),* this could be 'most unfair'. Indeed, the dividing line between giving 'horizontal direct effect' to a directive and merely relying on the interpretative obligation under the doctrine of 'indirect effect' can be a very fine and technical one in the circumstances of a particular case, as evidenced by *Mangold* (case C-144/04). This case involved an interpretation of the notion of 'working time' in the context of the Working Time Directive (93/104/EC [1993] OJ L307/1 8). German case law had developed a distinction between duty time, on-call time and stand-by time, with only the first being regarded as 'working time'. Emergency workers employed by the German Red Cross had challenged a provision in their collective labour agreement which, they argued, extended their working time beyond the prescribed 48-hour limit. The Court suggested that this agreement may be in breach of the directive, but that the claimants could not rely on the directive itself as against their employer. Having restated the basic principle that national law must be interpreted in accordance with the treaty, in particular where this has been enacted to implement a directive, the Court went on to say that this obligation was not restricted to the provisions themselves, but extended to 'national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive' (para 115).

A national court must do 'whatever lies within its jurisdiction' to ensure compliance with EC law. The ECJ did not go so far as to state expressly that existing case law might have to be reviewed to ensure such compliance, but the force of its reasoning appears to point in that direction. On the facts of the case, the outcome would be very close to allowing the individuals to invoke the direct effect of the directive against their employer.

The ECJ in *Adeneler* (case C-2 12/04) referred to another limitation on indirect effect, legal certainty and non-retroactivity. This line of reasoning finds its basis in the case of *Kolpinghuis Nijmegen* (case 80/8 6). Here, in the context of criminal proceedings against Kolpinghuis for breach of EC Directive 80/777 on water purity, which at the relevant time had not been implemented by the Dutch authorities, the Court held that national courts' obligation to interpret domestic law to comply with EC law was 'limited by the general principles of law which form part of Community law [see Chapter 6] and in particular the principles of legal certainty and non-retroactivity'.

Although expressed in the context of criminal liability, to which these principles were 'especially applicable', it was not suggested that the limitation should be confined to such situations. Where an interpretation of domestic law would run counter to the legitimate expectations of individuals *afortiori* where the state is seeking to invoke a directive against an individual to determine or aggravate his criminal liability, as was the case in *Arcaro* (case C-l68/95, see further below), the doctrine will not apply. Where domestic legislation has been introduced to comply with a Community directive, it is legitimate to expect that domestic law will be interpreted in conformity with Community law, provided that it is capable of such an interpretation (cf *Mangold,* case C-144/04, above). Where legislation has not been introduced with a view to compliance domestic law may still be interpreted in the

light of the aims of the directive as long as the domes'tic provision is reasonably capable of the meaning contended for. But in either case an interpretation which conflicts with the clear words and intentions of domestic law is unlikely to be acceptable to national courts. This has repeatedly been acknowledged by the Court *(Wagner Miret* (case C-334/92) and *Arcaro* (case C-1 68/95)).

Mangold could, however, be seen as a more unsympathetic approach to the limits of interpretation. A^-similarly unsympathetic approach to the difficulties of the national court can be seen in *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbdnde* (case C-404/06), where it was argued that, as the national court had ruled that there was only one possible interpretation and it was prohibited under national law from making a ruling *contra legem,* the reference should be declared inadmissible as the referring court would not be able to take account of any differing interpretation from the ECJ. The ECJ rejected the argument, on the basis of the separation of functions between the ECJ and the national court (see Chapter 10). It continued:

The uncertainty as to whether the national court—following an answer given by the Court of Justice to a question referred for a preliminary ruling relating to interpretation of a directive—may, in compliance with the principles laid down by the Court... interpret national law in the light of that answer cannot affect the Court's obligation to rule on that question. [Para 22.]

In effect, the ECJ held here that the problems of dealing with the doctrine of indirect effect are for the national court. It should not be thought that *Quelle* signals an end to the *contra legem* principle. It was a ruling of one of the chambers. The Grand Chamber shortly before *Quelle* in *Impact v Minister for Agriculture and Food and others* (case C-268/06) reaffirmed the principle, holding that the national court's duty under indirect effect is 'limited by general principles of law, particularly those of legal certainty and non-retroactivity' and therefore indirect effect 'cannot serve as the basis for an interpretation of national law *contra legem'* (para 100). *Quelle* and *Mangold* seem then to be exceptions, but the uncertainty they introduced is not helpful.

Arcaro (case C-1 68/9 5) could also be seen as introducing further limitations on the scope of indirect effect. There, the ECJ held that the:

obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law *reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed* or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions.

The Court has subsequently affirmed that the obligation to interpret domestic law in accordance with EC law cannot result in criminal liability independent of a national law adopted to implement an EC measure, particularly in light of the principle of non-retroactivity of criminal penalties in Article 7 of the European Convention on Human Rights (case C-60/02 *Criminal Proceedings againstX ('Rolex')).* This reasoning has also been applied in the context of direct effect (see *Berlusconi and others* (joined cases C-387/02, C-39 1/02 and C-403/02)).

The phrase 'imposition on an individual of an obligation' in *Arcaro* could be interpreted to mean that indirect effect could never require national law to be interpreted so as to impose obligations on individuals not apparent on the face of the relevant national provisions. It is submitted, however, that the ECJ's view in *Arcaro* is limited to the context of criminal proceedings, and that the application of the doctrine of indirect effect can result in the imposition of civil liability not found in domestic law (see also Advocate-General Jacobs in *Centrosteel Sri v Adipol GmbH* (case C-456/98), paras 31-5).

This seems to be the result of *Oceano Grupo Editorial vRocio Murciano Quintero* (case C240/9 8). Here, Oceano had brought a claim in a Barcelona court for payment under a contract of sale for encyclopaedias. The contract contained a term which gave jurisdiction to the Barcelona court rather than a court located near the consumer's home. That court had doubts regarding the fairness of the jurisdiction clause. The Unfair Contract Terms Directive (93/13/EEC) requires that public bodies be able to take steps to prevent the continued use of unfair terms. It also contains a list of unfair terms, including a jurisdiction clause, but this only became effective in Spanish law *after* Oceano's claim arose. Spanish law did contain a general prohibition on unfair terms which could have encompassed the jurisdiction clause, but the scope of the relevant Spanish law was unclear. The question arose whether the Barcelona court should interpret Spanish legislation in accordance with the Unfair

Contract Terms Directive. The ECJ reaffirmed the established position that a 'national court is obliged, when it applies national law provisions predating or postdating [a directive], to interpret those provisions, so far as possible, in the light of the wording of the directive' (para 32).

The Court went on to say that in light of the emphasis on public enforcement in the Unfair Contract Terms Directive, the national court may be required to decline of its own motion the jurisdiction conferred on it by an unfair term. As a consequence, Oceano would be deprived of a right which it might otherwise have enjoyed under existing Spanish law. This latter consideration should not prevent the national court from interpreting domestic law in light of the directive. In terms of the scope of the doctrine of indirect effect, it would be nonsensical to distinguish between cases which involve the imposition of obligations and those which concern restrictions on rights. Often, in a relationship between individuals, one individual's right is an obligation placed on another individual. The reasoning in *Arcaro* is best confined to the narrow context of criminal penalties.

Some questions have arisen as to when the obligation to use a consistent interpretation arises and in particular should it be the date the directive is enacted, or the date by which it must be implemented. This question came before the ECJ in *Adeneler.* The ECJ distinguished a positive and a negative duty for the courts of Member States. The positive aspect is the obligation to interpret all national law in line with the directive; that arises from the date by which the directive must be transposed. The negative aspect is based on the ECJ's reasoning in *Inter-Environnement Wallonie* (see 5.2.5.2 above). According to this line of reasoning, the national courts must, once the directive is in force (but before it is due to be transposed), refrain from interpreting national law in a way liable seriously to compromise the attainment of the result prescribed by the directive.

It may therefore be stated that the doctrine of indirect effect continues to be significant. However, there will be circumstances when it wilfhot be possible to apply it. In such a situation, as the Court suggested in *Wagner Miret,* it will be necessary to pursue the alternative remedy of a claim in damages against the state under the principles laid down in *Francovich v Italy* (cases C-6 and 9/90—see Chapter 9).

It may be significant that in *El Corte Ingles SA v Rivero* (case C-l92/94) the Court, in following the *Dori* ruling that a directive could not be invoked directly against private parties, did not suggest a remedy based on indirect effect, as it had in *Dori,* but focused only on-the possibility of a claim against the state under *Francovich.*

5.3.3 Indirect effect in other contexts

The discussion has, so far, concentrated on the application of this principle in the context of directives. However, *mMariaPupino* (case C-l05/03), the ECJ held that the obligation to interpret national law in accordance with European rules can extend to framework decisions adopted under Article 34(2) TEU, and that a national court is required to interpret domestic law, in so far as possible, in accordance with the wording and purpose of a corresponding framework decision. The decision is controversial, because it extends the notion of indirect effect into the domain of criminal law, an area in respect of which the Community has no competence to act and seems also to circumvent the limitation on the direct effect of JHA provisions noted at 5.2.9.

5.4 Conclusions

The principle of direct effects, together with its twin principle of supremacy of EC law, discussed in Chapter 4, has played a crucial part in securing the application and integration of Community law within national legal systems. By giving individuals and national courts a role in the enforcement of Community law it has ensured that EC law is applied, and Community rights enforced, even though Member States have failed, deliberately or inadvertently, to bring national law and practice into line with Community law. Thus, as the Court suggested in *Van Gend* (case 26/62), the principle of direct effects has provided a means of control over Member States additional to that entrusted to the Commission under Article 226 and Member States under Article 227 (see further Chapter 11). But there is no doubt that the ECJ has extended the concept of direct effects well beyond its apparent scope as envisaged by the EC Treaty. Furthermore, although the criteria applied by the ECJ for assessing the question of direct effects appear straightforward, in reality they have in the past been applied loosely, and any provision which is justiciable has, until recently, been found to be directly effective, no matter what difficulties may be faced by national courts in its application, or what impact it may have on the parties, public or private, against whom it is enforced. Thus the principle of direct effects created problems for national

courts, particularly in its application to directives.

In recent years there have been signs that the ECJ, having, with a few exceptions, won acceptance from Member States of the principle of direct effects, or at least—in the case of directives—of vertical effects, had become aware of the problems faced by national courts and was prepared to apply the principles of direct and indirect effect with greater caution. Its more cautious approach to the question of standing, demonstrated in *Lemmens* (case C-226/97), has been noted above. In *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* (case C-236/92), the Court found that Article 4 of Directive 7 5/442 on the Disposal of Waste, which required states to 'take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment', was not unconditional or sufficiently precise to be relied on by individuals before their national courts. It 'merely indicated a programme to be followed and provided a framework for action' by the Member States. The Court suggested that in order to be directly effective the obligation imposed by the directive must be 'set out in unequivocal terms'. In *R v Secretary of State for Social Security, exparte Sutton* (case C-66/95) the Court refused to admit a claim for the award of interest on arrears of social security benefit on the basis of Article 6 of EC Directive 79/7 on Equal Treatment for Men and Women in Social Security, although in *Marshall (No 2)* (case C-27 1/91) it had upheld a claim for compensation for discriminatory treatment based on an identically worded Article 6 of Equal Treatment Directive 7 6/207. The Court's attempts to distinguish between the two claims ('amounts payable by way of social security are not compensatory') were unconvincing. In *El Corte Ingles SA v Rivero* (case C-192/94) it found the then Article 1 29a (now 153) of the EC Treaty requiring the Community to take action to achieve a high level of consumer protection insufficiently clear and precise and unconditional to be relied on as between individuals. This may be contrasted with its earlier approach to the former Article 128 EC, which required the Community institutions to lay down general principles for the implementation of a vocational training policy, which was found, albeit together with the non-discrimination principle of (the then) Article 7 EEC, to be directly effective (see *Gravier v City of Liege* (case 293/83)). Thus, a directive may be denied direct effects on any of the following the grounds:

(a) the right or interest claimed in the directive is not sufficiently clear, precise and unconditional

(b) the individual seeking to invoke the directive did not have a direct interest in the provisions invoked *(Verholen,* cases C-87-9/90)

(c) the obligation allegedly breached was not intended for the benefit of the individual seeking to invoke its provisions *(Lemmens).*

In the area of indirect effects, in *Dori v Recreb Sri* (case C-9 1/92), the ECJ, following its lead in *Marshall* (case 152/84), declared unequivocally that directives could not be invoked horizontally. This view was endorsed in *El Corte Ingles SA v Rivero, Arcaro* (case C- 168/95) and, most recently, in *Pfeiffer* (joined cases C-397/01 to C-403/01). In *Wagner Miret* (case C3 34/92) the ECJ acknowledged that national courts might not feel able to give indirect effect to Community directives by means of 'interpretation' of domestic law. This was also approved in *Arcaro.* In almost all of these cases, decided after *Francovich,* the Court pointed out the possibility of an alternative remedy based on *Francovich,* discussed in Chapter 9.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 6: General Principles of Law

6.1 Introduction

6.1.1 The relevance of general principles

After the concept of direct effects and the principle of supremacy of EC law the third major contribution of the European Court of Justice (ECJ) has been the introduction of general principles of law into the corpus of EU law. Although primarily relevant to the question of remedies and enforcement of EC law, a discussion of the role of general principles of law is appropriate at this stage in view of their fundamental importance in the jurisprudence of the ECJ.

General principles of law are relevant in the context of EU law in a number of ways. First, they may be invoked as an aid to interpretation: EU law, including domestic law implementing EC law obligations, must be interpreted in such a way as not to conflict with general principles of law. Secondly, general principles of law may be invoked by both states and individuals to challenge Community action, either to annul or invalidate acts of the institutions (under Articles 230, 234, 236, and 241 (ex 173, 177,179, and 184) EC post Lisbon 263, 267, 270 and 277 TFEU), or to challenge inaction on the part of these institutions (under Articles 232 or 236 (ex 175 and 179) EC post Lisbon 265 and 270 TFEU). Thirdly, as a logical consequence of its second role, but less generally acknowledged, general principles may also be invoked as a means of challenging action by a Member State, whether in the form of a legal or an administrative act, where the action is performed in the context of a right or obligation arising from Community law (see *Klensch* (cases 201 and 202/85); *Wachaufv Germany* (case 5/88); *Lageder v Amministrazione delle Finanze dello Stato* (case C31/91); but cf*R v Ministry ofAgriculture, Fisheries and Food, ex parte Bostock* (case C2/93)). The degree to which general principles of law affect actions by Member States will be discussed in more detail later in this chapter. General principles of law may be invoked to support a claim for damages against the Community, under Article 288(2) (ex 2 15(2) post Lisbon Article 340 TFEU) (see Chapter 14).

These reasons are all practical reasons, based in the arena of legal action. There are other reasons, too, which relate to how the Union is seen; what sort of values it has. The jurisprudence in this area expands the rights of individuals beyond the economic rights found in the original treaty. In parallel with the concept of citizenship, the protection of such rights suggests the Union itself has greater links with the individuals and is, itself, obtaining greater legitimacy.

This area has become a steadily evolving aspect of Union law. This chapter examines the general historical development of the Court's jurisprudence to explain how general principles have been received into Union law. It will be seen that general principles, in particular fundamental rights, are invoked with increasing frequency before the European courts. Some of these general principles are examined in more detail. However, this chapter does not provide a full survey of the substantive rights which are now recognised in Union law. Such a discussion is beyond the scope of this book and readers should refer to the specialist texts which are now available.

6.1.2 Fundamental principles

General principles of law are not to be confused with the fundamental principles of Community law, as expressed in the EC Treaty, for example, the principles of free movement of goods and persons, of non-discrimination on the grounds of sex (Article 141 (ex 119, as amended) EC) or nationality (Article 12 (ex 6) EC), although there may be some overlap or commonality between the two. General principles of law constitute the 'unwritten' law of the Union and they have been developed—or discovered—over time by the ECJ.

6.2 Rationale for the introduction of general principles of law

The original legal basis for the incorporation of general principles into Union law was slim, resting precariously on three articles. Article 230 gives the ECJ power to review the legality of Community acts on the basis of, inter alia, 'infringement of this Treaty', or 'any rule of law relating to its application'. Article 288(2), which

governs Community liability in tort, provides that liability is to be determined 'in accordance with the general principles common to the laws of the Member States'. And Article 220, governing the role of the ECJ, provides that the Court 'shall ensure that in the interpretation and application of this Treaty the law is observed'.

In the absence of any indication as to the scope or content of these general principles, it has been left to the ECJ to put flesh on the bones provided by the treaty. This function the Court has amply fulfilled, to the extent that general principles now form an important element of EU law.

One of the reasons for what has been described as the Court's 'naked law-making' in this area is best illustrated by the case of *Internationale Handelsgesellschaft mbH* (case 11/70). There the German courts were faced with a conflict between an EC regulation requiring the forfeiture of deposits by exporters if export was not completed within an agreed time, and a number of principles of the German constitution, in particular, the principle of proportionality. It is in the nature of constitutional law that it embodies a state's most sacred and fundamental principles. Although these principles were of particular importance, for obvious reasons in post-war Germany, other Member States also had written constitutions embodying similar principles and rights. Clearly it would not have done for EC law to conflict with such principles. Indeed, as the German constitutional court made clear ([1974] 2 CMLR 540), were such a conflict to exist, national constitutional law would take precedence over EC law. This would have jeopardised not only the principle of primacy of EC law but also the uniformity of application so necessary to the success of the new legal order. So while the ECJ asserted the principle of primacy of EC law in *Internationale Handelsgesellschaft,* it was quick to point out that respect for fundamental rights was in any case part of EC law.

Another reason now given to justify the need for general principles is that the Community's powers—and now those of the Union—have expanded to such a degree that some check on the exercise of the institutions' powers is needed. Furthermore, the expansion of Union competence means that the institutions' powers are now more likely to operate in policy areas in which human rights have an influence. Although those who wish to see sovereignty retained by the nation state may originally have been pleased to see the limitation of the institutions' powers, the development of human-rights jurisprudence in this context can be seen as a double-edged sword, giving the ECJ increased power to impugn both acts of the Union institutions and implementing measures taken by Member States on grounds of infringement of general principles.

6.3 Development of general principles

6.3.1 Fundamental human rights

The Court's first tentative recognition of fundamental human rights was prior to *Internationale Handelsgesellschaft,* in the case of *Stauder v City ofUlm* (case 29/69). Here the applicant was claiming entitlement to cheap butter provided under a Community scheme to persons in receipt of welfare benefits. He was required under German law to divulge his name and address on the coupon which he had to present to obtain the butter. He challenged this law as representing a violation of his fundamental human rights (namely, equality of treatment). The ECJ, on reference from the German court on the validity of the relevant Community decision, held that, on a proper interpretation, the Community measure did not require the recipient's name to appear on the coupon. This interpretation, the Court held, contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of law and protected by the Court.

The ECJ went further in *Internationale Handelsgesellschaft.* There it asserted that respect for fundamental rights forms an integral part of the general principles of law protected by the Court—such rights are inspired by the constitutional traditions common to the Member States. One point to note here is that the ECJ was not comparing EC law with *national* law but with the principles of *international* law which are embodied in varying degrees in the national constitutions of Member States. A failure to make the distinction between general principles of international law (even if embodied in national laws) which the Community legal order respects and national law proper could erode the doctrine of supremacy of Community law vis-a-vis national laws.

The *International Handelsgesellschaft* judgment can be taken as implying that only rights arising from traditions common to Member States can constitute part of EC law (a 'minimalist' approach). It may be argued that if the problem of conflict between Community law and national law is to be avoided in *all* Member States it is necessary for *any* human right upheld in the constitution of *any* Member State to be protected under EU law (a maximalist approach). In *Hoechst* v *Commission* (cases 46/87 and 227/88), in the context of a claim based on

the fundamental right to the inviolability of the home, the Court, following a comprehensive review by Advocate-General Mischo of the laws of all the Member States on this question, distinguished between this right as applied to the 'private dwelling of physical persons', which was common to all Member States (and which would by implication be protected as part of Community law), and the protection offered to commercial premises against intervention by public authorities, which was subject to 'significant differences' in different Member States. In the latter case the only common protection, provided under various forms, was protection against arbitrary or disproportionate intervention on the part of public authorities. Similarly, but dealing with administrative law, in *Australian Mining & Smelting Europe Ltd v Commission* (case 155/79), in considering the principle of professional privilege, the Court found that the scope of protection for confidentiality for written communications between lawyers and their clients varied from state to state; only privilege as between independent (as opposed to in-house) lawyers and their clients was generally accepted, and would be upheld as a general principle of Community law.

These cases suggest that where certain rights are protected to differing degrees and in different ways in Member States, the Court will look for some *common* underlying principle to uphold as part of Union law. Even if a particular right protected in a Member State is not universally protected, where there is an apparent conflict between that right and EU law, the Court will strive to interpret Union law so as to ensure that the substance of that right is not infringed. An exception to this approach can be seen in *Society for the Protection of the Unborn Child v Grogan* (case 159/90). This case concerned the officers of a students' union who provided information in Ireland about the availability of legal abortion in the UK. SPUC brought an action alleging that this was contrary to the Irish constitution. The officers' defence was based on the freedom to provide services within the Community and on the freedom of expression contained in the ECHR which also forms part of Community law as a general principle (see further below). The ECJ evaded this issue. Since the students' union did not have an economic link with the clinics whose services they advertised, the provision of information about the clinics was not an economic activity within the treaty. As the issues fell outside the scope of EC law, the officers could not rely on either the provisions on freedom to provide services in the treaty or on general principles of law. (See further Chapter 21.)

6.3.2 Role of international human-rights treaties

Following *Internationale Handelsgesellschaft* the scope for human-rights protection was further extended in the case of *Nold KG v Commission* (case 4/73). In this case J Nold KG, a coal wholesaler, was seeking to challenge a decision taken under the ECSC as being in breach of the company's fundamental right to the free pursuit of business activity. While the Court did not find for the company on the merits of the case, it asserted its commitment to fundamental rights in the strongest terms. As well as stating that fundamental rights form an integral part of the general principles of law, the observance of which it ensures, it went on to say: In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

The reasons for this inclusion of principles of certain international treaties as part of EU law are clearly the same as those upholding fundamental constitutional rights; it is the one certain way to guarantee the avoidance of conflict.

In this context, the most important international treaty concerned with the protection of human rights is the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), to which all Member States are now signatories. The Court has on a number of occasions confirmed its adherence to the rights protected therein, an approach to which the other institutions gave their support 0oint Declaration, [1977] OJ C 103/1). In *R v Kirk* (case 63/83), in the context of criminal proceedings against Kirk, the captain of a Danish fishing vessel, for fishing in British waters (a matter subsequently covered by EC regulations), the principle of non-retroactivity of penal measures, enshrined in Article 7 of the ECHR, was invoked by the Court and applied in Captain Kirk's favour. The EC regulation, which would have legitimised the British rules under which Captain Kirk was charged, could not be applied to penalise him retrospectively. (See also *Johnston v Chief Constable of the Royal Ulster Constabulary* (case 222/84) (ECHR, Article 6, right to

judicial process); *Hoechst* (cases 46/87, 227/88) contrast substantive ruling in *Roquette Freres* (case C-94/00); *National Panasonic v Commission* (case 136/79) (ECHR Article 8, right to respect for private and family life, home and correspondence—not infringed).) The impact of Article 8 ECHR can be seen clearly in the case law on free movement of people (see Chapter 25).

Thus, it seems that any provision in the ECHR may be invoked, provided it is done in the context of a matter of EU law. In *Kaur* v *Lord Advocate* ([1980] 3 CMLR 79), an attempt was made to invoke the Convention (Article 8 'respect for family life') by an Indian immigrant seeking to challenge a deportation order made under the Immigration Act 1971. She failed on the grounds that the Convention had not been incorporated into British law. Its alleged incorporation via the European Communities Act 1972 did not enable a party to invoke the Convention before a Scottish court in a matter wholly unrelated to EU law (see also *SPUC v Grogan* (case 159/90) and *Kremzow v Austria* (case C-299/95)). In *Mannesmannrohren-Werke AG* v *Commission* (Case T-l 12/98), the Court of First Instance (CFI) emphasised that although the ECHR has special significance in defining the scope of fundamental rights recognised by the Community, because it reflects the constitutional traditions common to the Member States, the Court has no jurisdiction to apply the ECHR itself. The CFI therefore rejected arguments based directly on Article 6 ECHR in relation to an application to annul a Commission decision, but allowed the application on other grounds (see 6.6.7). The CFI's view with regard to invoking ECHR articles may be technically correct, but it sits somewhat uneasily with other judgments both by the CFI and the ECJ in which the courts appeared more willing to refer directly to ECHR provisions, and even to the jurisprudence of the European Court of Human Rights itself (see, eg, *Roquette Freres* (case C-94/00); *Orfanopoulos* (case C-482/0 1), citing *Boultifv Switzerland* concerning right to family life; *Connolly v Commission* (case C-274/99P): civil servants' freedom of expression under Article 10 ECHR).

Other international treaties concerned with human rights referred to by the Court as constituting a possible source of general principles are the European Social Charter (1971) and Convention 111 of the International Labour Organisation (1958) *(Defrenne v Sabena (No 3)* (case 149/77)). In *Ministere Public v Levy* (case C-158/91) the Court suggested that a Member State might even be obliged to apply a national law which conflicted with a ruling of its own on the interpretation of EC Directive 7 6/207 where this was necessary to ensure compliance with an international convention (in this case ILO Convention 89,1948) concluded prior to that state's entry into the EC. The list has grown over the years, with the ECJ adding recently, for example, Convention on the Protection and Promotion of the Diversity of Cultural Expressions *(UTECA v Administracion General del Estado* (case C-222/07)) and the UN Convention on the Rights of the Child *(Dynamic Medien* (case C-244/06)).

6.3.3 Relationship between different legal systems protecting human rights

6.3.3.1 *Relationship with national constitutions*

We saw at the beginning of this chapter that one of the central reasons for the introduction of fundamental rights into EU law was the resistance of some of the constitutional courts to giving effect to Community rules which conflicted with national constitutional principles. The ECJ's tactics to incorporate these principles and stave off rebellion were undoubtedly successful as exemplified by the *Wilnsche* case ([1987] 3 CMLR 225), in which the German constitutional court resiled from its position in *InternationaleHandelsgesellschaft* ([1974] 2 CMLR 540) (see Chapter 4). This does not, however, mean that the ECJ can rest on its laurels in this regard. The Italian constitutional court in Fragd *(SpA Fragd v Amministrazione delle Finanze* Decision No 232 of 21 April 1989) reaffirmed its right to test Community rules against national constitutional rules and stated that Community rules that, in its view, were incompatible with the Italian constitution would not be applied. Similarly, the German constitutional courts have reasserted the right to challenge Community legislation that is inconsistent with the German constitution (see, eg, *Brunner v European Union Treaty* [1994] 1 CMLR 57; *M GmbH v Bundesregierung* (case 2 BvQ3/89) [1990] 1 CMLR 570 (an earlier tobacco-advertising case) and the bananas cases—*Germany v Council (Re Banana Regime)* (case C-280/93), *Germany v Council (Bananas II)* (case C-l22/95) and T Porr *GmbH v Hauptzollamt Hamburg-Jonas* (cases C-364 and 365/95)—discussed further in Chapter 4). Although the supremacy of Community law vis-a-vis national law might not be threatened by the possibility of its review in accordance with provisions of national constitutions embodying general principles of international law, its uniformity and the supremacy of the ECJ might well be eroded if national courts seek themselves to interpret these broad and flexible principles, rather than referring for a ruling on these matters from the ECJ. Equally, a failure on the part of national courts to recognise fundamental principles, in conjunction with a failure to refer, may have a similar effect.

6.3.3.2 *Accession to the ECHR*

Deferring to the ECJ does, however, concentrate a significant degree of power in that court, against whose rulings there is no appeal. One suggested safeguard for fundamental rights would be for the Community to accede to the ECHR. Questions of human rights and, in particular, interpretation of the ECHR, could then be taken to the European Court of Human Rights, a court which specialises in these issues. This would minimise the risk of the ECJ misinterpreting the ECHR and avoid the possibility of two conflicting lines of case law developing (eg, *Orkem* (case 3 74/87) and *FunkevFrance* (case SA 256A)). The ECJ, however, has ruled that accession to the ECHR would not be within the present powers of the Community: treaty amendment would be required before the Community could take this step *(Opinion 2/94 on the Accession by the Community to the European Convention on Human Rights).*

This was one of the issues discussed by the Convention on the Future of Europe preparing for the 2004 IGC. The treaty establishing a Constitution would not only have incorporated the EU Charter of Fundamental Rights (a separate document, not to be confused with the ECHR) into the Constitution (see further below), but would also have included an article in Part I which provided that the Union 'shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. A further declaration provided for cooperation between the ECHR and the ECJ. As we know, the Constitution has been abandoned and replaced by the Lisbon Treaty. Although Lisbon does not incorporate the charter, it continues the intention to accede to the ECHR (Article 6(2) TEU), but the status of the Lisbon Treaty is, like the Constitution before it, in doubt (see Chapter 1). Even if it were in force, the details of timing and other practicalities of accession remain to be worked out. The Treaty on European Union (TEU) (as amended by Lisbon) also specifies that accession would not affect the Union's competence as defined in the treaties. Yet, this remains a significant step forward. It also follows the line established by recent treaty amendments, which have seen a progressive raising of the profile of human-rights protection within the Community and, indeed, the Union.

6.3.3.3 *Enforcing respect for the ECHR within the EU structure*

The TEU had included in the Union general provisions a reference to the ECHR to the effect that:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. . . and as they result from the constitutional tradition common to the Member States, as general principles of Community law. [Article 6(2) (ex F(2) TEU).]

The Constitution provided, to a similar effect, that:

Fundamental Rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. [Article 1-9(3).]

This wording has been reproduced by the Lisbon Treaty at Article 6(3) TEU.

Additionally, Article 6(1) (ex F(l)) TEU stated that the Union was founded on respect for 'liberty, democracy and respect for human rights'. However, by Article L TEU, as it then was (now amended and renumbered as Article 46 TEU), the ECJ's jurisdiction as regards the general Union provisions was excluded. The Treaty of Amsterdam (ToA) amended Article 46 TEU to give the ECJ express competence in respect of Article 6(2) TEU with regard to action of the institutions 'insofar as the ECJ has jurisdiction either under the treaties establishing the Communities or under the TEU'. This would seem to be little more than a confirmation of the existing position, at least as far as the EC Treaty is concerned, though it might have some significance in respect of the ECJ's (limited) jurisdiction regarding justice and home affairs (JHA). Article 46 TEU will be repealed should the Lisbon Treaty come in to force.

The ToA inserted Article 7 into the TEU. This provided that where there has been a persistent and serious breach of a principle mentioned in Article 6(1) TEU, the Council may suspend certain of the rights of the offending Member State, including its voting rights. Were this provision used, it could have serious consequences for the Member State in question; such a Member State would lose its opportunity to influence the content of Union legislation by which it would be bound, even in sensitive areas where otherwise it could have vetoed legislation. Thus, one might suggest that the need to comply with fundamental principles is being taken seriously indeed. It is likely, though, that this provision will be used only rarely given the severity of the breach needed to trigger the procedure, which itself is long-winded, requiring unanimity

(excluding the offending Member State) in the first instance. Given the potential consequences for Member States, however, the complexity of the procedure is perhaps appropriate. The Lisbon Treaty contains a new provision, Article 269 TFEU, which gives the ECJ the jurisdiction to decide on the legality of such a decision on procedural grounds only.

6.3.3.4 *Relationship with international law*

The relationship between EU and international law has been the subject of consideration recently. The factual backdrop concerned Union measures implementing UN Resolutions on economic sanctions. Effectively, these measures allowed for the freezing of individuals' assets, without prior warning. The matter came before the CFI, as an action for annulment. It held that the courts are not empowered to review decisions of the UN, including the Security Council, even in the light of Community law or the fundamental rights recognised by Union law *(Ahmed AH Yusufand Others v Council of the European Union* (cases T-306 and 3 15/01), known as *Kadi).* The CFI based this decision on the fact that, according to its interpretation of the requirements of international law, the obligations of the Member States of the United Nations prevail over any other obligation. The Community, although not itself a member of the UN, must, in the CFI's opinion, be bound by the obligations flowing from the Charter of the United Nations. Nonetheless, the CFI reserved the rights of the Community courts to check the lawfulness of the Council Regulation (which implemented the UN Security Council Resolution and was under challenge in this case), and therefore implicitly the underlying resolution, by reference to the higher rules of international law *(jus cogens),* from which neither the Member States nor the bodies of the Union should, under international law, be able to derogate. This includes provisions intended to secure universal protection of fundamental human rights. On the facts, the CFI found the application unfounded.

The ECJ heard the appeal in *Kadi* (joined cases C-402 and 415/05 P) and approached the matter in a completely different way, overturning the CFI's internationalist approach. While the ECJ accepted that the EU (and its Member States) were subject to international obligations, such as those contained in the UN, this does not change the allocation of powers within the EU. Furthermore, the EU was characterised by the ECJ, drawing on its previous jurisprudence, as an autonomous legal order built on the rule of law and respect for fundamental human rights. Thus there is a distinction between international obligations and the effect of Community norms, and the fact that Community measures might arise from those international obligations does not affect the fact that Union law must comply with human rights, as recognised by the EU. On this basis, the ECJ reviewed whether the EU implementing measures (not the UN Resolutions) complied with a number of procedural rights and the right to respect for property, and in this, it is arguable that the ECJ was taking a stronger line that had the European Court of Human Rights. This is a significant judgment, which re-emphasises the centrality of the rule of law and the protection of human rights within the EU.

6.4 Relationship between the EC/EU and the ECHR in the protection of human rights: View from the ECHR

All Member States of the EU have signed the ECHR, and in most Member States, the Convention has been incorporated into domestic law. (It was incorporated in the UK by the Human Rights Act 1998, which came into force in October 2000.) When it is so incorporated, the Convention's provisions may be invoked before the domestic courts in order to challenge *national* rules or procedures which infringe the rights protected by the Convention. Even without the Convention being incorporated into domestic law, the Member States are bound by its terms and individuals, after they have exhausted national remedies, have a right of appeal under the Convention to the European Court of Human Rights.

The ECJ has done a great deal to ensure the protection of human rights within the context of the application of Community law, whether by Community institutions or by Member States. But, as the ECHR has not so far been incorporated into *Community* law, its scope has been limited and the relationship between the ECHR and the Union legal system is somewhat unclear. The difficulties are illustrated by the decision of the European Court of Human Rights in the *Matthews* case (European Court of Human Rights judgment, 18 February 1999).

Matthews concerned the rights of UK nationals resident in Gibraltar to vote in European Parliamentary elections. They were excluded from participating in the elections as a result of the 1979 agreement between the Member States which established direct elections in respect of the European Parliament. The applicants argued that this was contrary to Protocol 1, Article 3 of the ECHR, which provides that signatory States to the

Convention are under an obligation 'to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. The British government argued that not only was Community law not within the jurisdiction of the ECHR (as the Community had not acceded to the Convention), but also that the UK government could not be held responsible for joint acts of the Member States. The European Court of Human Rights found, however, that there had been a violation of the Convention.

The Court held that States which are party to the ECHR retain residual obligations in respect of the rights protected by the Convention, even as regards areas of lawmaking which had been transferred to the Union. Such a transfer of power is permissible, provided Convention rights continue to be secured within the Community framework. In this context the Court of Human Rights noted the ECJ's jurisprudence in which the ECJ recognised and protected Convention rights. In this case, however, the existence of the direct elections was based on a *sui generis* international instrument entered into by the UK and the other Member States which could not be challenged before the ECJ, as it was not a normal Community act. Furthermore, the TEU, which extended the European Parliament's powers to include the right to co-decision thereby increasing the Parliament's claim to be considered a legislature and taking it within the terms of Protocol 1, Article 3 of the ECHR, was equally an act which could not be challenged before the ECJ. There could therefore be no protection of Convention rights in this regard by the ECJ. Arguing that the Convention is intended to guarantee rights that are not theoretical or illusory, the Court of Human Rights held that:

The United Kingdom, together with all other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol 1, for the consequences of that Treaty. [Para 33.]

It may be noted that it is implicit in the reasoning in this judgment that the EU is regarded by the Court of Human Rights as being the creature of the Member States, which remain fundamentally responsible for the Community's actions—and for those of the Union. This corresponds with the conception of the EU expressed by some of the Member States' constitutional courts (eg, see the German constitutional court's reasoning in *Brunner* [1994] 1 CMLR 57).

Arguably, this judgment opens the way for the Member States to be held jointly responsible for those Community (or Union) acts that currently fall outside the jurisdiction of the ECJ, sealing lacunae in the protection offered to individual human rights within the Community legal order. The difficulty is, of course, that in this case only the UK was the defendant. The British government is dependent on the cooperation of the other Member States to enable it to fulfil its own obligations under the ECHR. It is possible that a case could be brought under the ECHR against all Member States jointly. (See, eg, *Societe Guerin Automobiles* (Application No 51717/99), inadmissible on other grounds; *DSR Senator Lines,* (Application No 56672/00) (Grand Chamber), dismissed as the applicant could not claim on the facts to be a victim, though note third-party representations, including that of the ICJ.) Although this would not obviate the need for cooperation to remedy any violation found, it would avoid the situation where one Member State alone was carrying the responsibility for Union measures that were the choice of all (or most) Member States. The implication that the European Court of Human Rights will step in only where there is no effective means of securing human-rights protection within an existing international body (ie, that the ECJ has primary responsibility for these issues in the EU) is underlined by its approach in another case involving another European supranational organisation, Euratom *(Waite and Kennedy v Germany,* European Court of Human Rights judgment, 18 February 1999). There the Court emphasised the necessity for an independent review board which is capable of protecting fundamental rights to exist within the organisational structure. More recently, we can see this approach in *Bosphorus Airways v Ireland* (European Court of Human Rights judgment, 30 June 2005 (GC)), which concerned alleged human-rights violations resulting from Community secondary legislation which the ECJ had upheld. There the European Court of Human Rights held that it would not interfere provided the rights protection awarded by the ECJ was equal to that under the ECHR, noting that in this context, 'equal' means equivalent or comparable rather than identical (para 155). It should be noted that in a concurring judgment, one of the European Court of Human Rights judges did make the point that, although there have been reviews of ECJ jurisprudence, they have looked at the level of protection in a general or formal way, rather than looking at the substance of a right in an individual case (Concurring Opinion of Judge Ress, para 2), highlighting a potential weakness in the system of protection awarded to individuals. Of course, this may all change should the EU accede to the ECHR.

6.5 The EU Charter of Fundamental Rights

6.5.1 Background

We have already seen that there has been a debate about whether the EC/EU should accede to the ECHR. In 1999, the Cologne European Council set up a Convention, under the chairmanship of Roman Herzog (a former German federal president), to produce a draft Union charter as an alternative mechanism to ensure the protection of fundamental rights. This was completed in time for the 2000 European Council meeting at Nice, where the European institutions solemnly proclaimed the charter (published at [2000] OJ C364/1— hereinafter EUCFR). At the present time, the EUCFR does not have legal effect. As with the Constitution, the Lisbon Treaty proposes to give legal effect to the Charter. It does so by a different route, though. The Constitution would have incorporated the Charter as Part II and Article 1-9(1) specified that 'the Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights'. Lisbon instead refers to the Charter rather than incorporating it. Thus, Article 6(1) TEU (as amended by Lisbon) states:

the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights. . . which shall have the same legal value as the Treaties.

Nonetheless the scope of the rights granted is as limited as it was under the Charter (see 6.5.2). Further provisions clarify that the reference to the Charter does not create any new rights or extend the Union's competence.

Despite some contention about the status and impact of the Charter, the ECJ has alreadymentioned the EUCFR in a number of judgments by way of reference in confirming that the European legal order recognises particular fundamental rights (see, eg, *R v SoS ex parte BAT* (Case C-491/01), where the Court observed that 'the right to property ... is recognised to be a fundamental human right in the Community legal order, protected by the first subparagraph of Article 1 of the First Protocol to the European Convention on Human Rights ("ECHR") and *enshrined in Article 17 of the Charter of Fundamental Rights of the European Union'* (para 144, emphasis added). See also *Jego-Quere et Cie v Commission* (case T-177/01 para 42; see further Chapter 12 and *Mannesmannrohren-Werke AG* v *Commission* (case T-l 12/98) paras 15 and 76). These have begun to cover a wide range of rights: we have already noted the *Kadi* judgment. In *Dynamic Medien*, the ECJ referred to the rights of the child protected by the Charter and in *Varec v Belgian State* (case C-450/06), the ECJ refers to the right to private life. However, there has been no judgment to date in which the ECJ has *based* its judgment on the EUCFR.

6.5.2 Scope

By virtue of Article 51(1) EUCFR, its provisions are addressed to the institutions and bodies of the Union and to the Member States only when they are implementing Union law. As far as the institutions and bodies of the Union are concerned, due regard is to be had to the principle of subsidiarity. It is not entirely clear what the significance of this reference is, other than perhaps to confirm that the Union must always act in accordance with the principle of subsidiarity. With regard to the Member States, Article 51(1) EUCFR confirms existing case law which has held that there is only an obligation on the Member States to respect fundamental rights under EU law when they are acting in the context of Community law (see *Karlsson and ors* (case C-292/97), para 37). Outside this context, Member States are, of course, obliged to respect fundamental rights under the ECHR (see above, on 'residual obligations').

Article 52(1) EUCFR provides that limitations on the exercise of the rights and freedoms guaranteed by the EUCFR must be provided by law. Any such limitations must be proportionate and are only permitted if they are necessary and genuinely meet objectives recognised by the EU. In this, there are similarities to the approach taken with regard to the derogation provisions in the ECHR. Article 52(2) EUCFR further confirms that those rights which derive from the treaties are subject to the conditions and limitations that apply to the corresponding treaty provisions.

6.5.3 Substance

The EUCFR is divided into six substantive chapters. Chapter I, Dignity, includes:

(a) human dignity

(b) the right to life

(c) the right to the integrity of the person

(d) prohibitions on torture, inhuman or degrading treatment or punishment, slavery and forced labour.

Chapter II, Freedoms, provides for:

(a) right to liberty and security

(b) respect for private and family life

(c) protection of personal data

(d) right to marry and found a family

(e) freedom of: (i) thought, conscience and religion (ii) expression and information (iii) assembly and association (iv) the arts and sciences (v) a right to education; (vi) choice in an occupation and a right to engage in work; (vii) ability to conduct a business, right to property, right to asylum, and protection in the event of removal, expulsion or deportation.

Chapter III, Equality, guarantees:

(a) equality before the law, non-discrimination, cultural, religious and linguistic diversity

(b) equality between men and women

(c) the rights of the child and the elderly

(d) the integration of persons with disabilities.

The solidarity rights in Chapter IV are:

(a) the workers' right to information and consultation with the right of collective bargaining and action

(b) right of access to placement services

(c) protection in the event of unjustified dismissal

(d) fair and just working conditions

(e) prohibition of child labour and protection of young people at work

(f) family and professional life

(g) social security and social assistance

(h) health care

(i) access to services of general economic interest

(j) environmental protection

(k) consumer protection.

Chapter V provides for citizenship rights (see also Chapter 24), which are the right to:

(a) vote and stand as candidate at elections to the European Parliament and at municipal elections

(b) good administration

(c) access to documents

(d) access to the Ombudsman

(e) petition the European Parliament

(f) have freedom of movement and residence

(g) diplomatic and consular protection.

Finally, Chapter VI, Justice, guarantees a right to:

(a) effective remedy and to a fair trial

(b) presumption of innocence and right of defence

(c) principles of legality and proportionality of criminal offences and penalties;

(d) not to be tried or punished twice in criminal proceedings for the same criminal offence.

The preceding enumeration of all the rights contained in the EUCFR demonstrates that the Charter consists of a mixture of human rights found in the ECHR, rights derived from other international conventions and provisions of the EC Treaty. The Council of the European Union has published a booklet which explains the origin of each of the rights contained in the EUCFR (see 'Further Reading' at the end of this chapter).

6.5.4 Overlap between the Charter and the ECHR

Article 52(3) deals with the complex problem of overlap between the ECHR and the EUCFR. It specifies that those rights in the EUCFR which correspond with ECHR rights must be given the same meaning and scope as the ECHR rights. EU law may provide more generous protection, but not a lower level of protection than guaranteed under the ECHR and other international instruments (Article 53).

At present, the question of overlap is not a cause for concern, because the EUCFR has no legal status. However, if the Lisbon Treaty comes into force, it will be necessary to determine to what extent the ECJ has jurisdiction to enforce the Charter. Presumably, Article 51 would mean that the EUCFR rights are not free-standing rights, but are only relevant in matters of European law. In that case, the position would probably not be any different from the current situation.

If, however, certain EUCFR rights (such as those based on the ECHR) are regarded as free-standing rights, then the ECJ may be in danger of 'competing' with the European Court of Human Rights. The ECJ would be obliged to interpret EUCFR rights in accordance with the ECHR, but a difficulty may arise if the ECJ interprets an ECHR-based right in one way and the Court of Human Rights subsequently takes a different view. Member States may then face a conflict between complying with their obligations under European law, in particular the doctrine of supremacy (see Chapter 4) and under the ECHR, respectively. It is submitted that in such a case, the ECHR should prevail. This seems to be the current position under the ECJ's case law. In *Roquette Freres* (case C-94/00), the question arose whether business premises could be protected under Article 8 ECHR against 'dawn raids' by the Commission under Regulation 17 (now replaced by Regulation 1/2003). In its earlier decision in *Hoechst* (case C-46/87), the ECJ had held that Article 8 required no such protection. However, subsequent ECHR case law has extended the scope of Article 8 to cover business premises. In *Roquette*, the ECJ held that the case law under the ECHR must be taken into account in applying the *Hoechst* decision. The ECJ therefore appears to recognise that ECHR case law can have an impact on the scope of fundamental rights guaranteed by Union law. Interestingly, it has been noted the Court of Human Rights has likewise taken account of relevant case law of the ECJ. It seems that in their respective jurisdictions the two courts are endeavouring to minimise conflict. Whilst this is good practice, the risk of inconsistency remains.

6.5.5 Conclusion on EUCFR

Currently, the EUCFR has only declaratory status and it remains to be seen whether it will become legally binding. If this were to happen, some thought would need to be given to the relationship between the ECHR and the EUCFR and the role of the ECJ in interpreting the fundamental rights contained in the EUCFR. The potential accession of the EU to the ECHR, which would be possible if the Lisbon Treaty became effective in its current form, would acknowledge the supremacy of the Convention and the European Court of Human Rights.

The general principles of Union law have been expanded through the case law of the ECJ to cover a wide variety of rights and principles developed from many sources. We will now look at some specific examples of those rights. The following is not, however, an exhaustive list, and there may be degrees of overlap between the categories mentioned.

6.6 Rules of administrative justice

6.6.1 Proportionality

This was the principle invoked in *Internationale Handelsgesellschaft mbH* (case 11/70). It is now enshrined in Article 5 (ex 3b) EC (see 6.8 below). The principle, applied in the context of administrative law, requires that the means used to achieve a given end must be no more than that which is appropriate and necessary to achieve that end. The test thus puts the burden on an administrative authority to justify its actions and requires some consideration of possible alternatives. In this respect it is a more rigorous test than one based on reasonableness.

The principle has been invoked on many occasions as a basis of challenge to EC secondary legislation, often successfully (eg, *Werner A Bock KG v Commission* (case 62/70); *Bela-Muhle JosefBergmann KG v Grows-Farm GmbH & Co KG* (case 114/76). It was applied *in Rv Intervention Boardfor Agricultural Produce, exparte ED & F Man (Sugar) Ltd* (case 181/84) in the context of a claim by ED & F Man (Sugar) Ltd before the English Divisional Court, on facts very similar to *Internationale Handelsgesellschaft.* Here the claimant, ED & F Man (Sugar) Ltd, was seeking repayment of a security of £1,670,370 forfeited when it failed to comply with an obligation to submit licence applications to the Board within a specified time limit. Due to an oversight they were a few hours late. The claimant's claim rested on the alleged illegality of the EC regulations governing the common organisation of the sugar market. The regulations appeared to require the full forfeiture of the deposit (lodged by the exporter at the time of the initial offer to export) in the event of a breach of both a *primary* obligation to export goods as agreed with the Commission and a *secondary* obligation to submit a licence application following the initial offer within a specified time limit. The ECJ held, on a reference from the Divisional Court on the validity of the regulations, that to require the same forfeiture for breach of the secondary obligation as for the primary obligation was disproportionate, and to the extent that the regulation required such forfeiture, it was invalid. As a result of this ruling, the claimant was held entitled in the Divisional Court to a declaration that the forfeiture of its security was unlawful: a significant victory for the claimant.

The proportionality principle has also been applied in the context of the EC Treaty, for example, in the application of the provisions relating to freedom of movement for goods and persons. Under these provisions States are allowed some scope for derogation from the principle of free movement, but derogations must be 'justified' on one of the grounds provided (Articles 30 (ex 36) and 39(3) (ex 48(3) post Lisbon Articles 36 and 45(3) TFEU). This has been interpreted by the ECJ as meaning that the measure must be *no more than is necessary* to achieve the desired objective (see Chapters 20 (goods), and 25 (persons)).

In *Watson* (case 118/75) the proportionality principle was invoked in the sphere of the free movement of persons to challenge the legality of certain action by the Italian authorities. One of the defendants, Ms Watson, was claiming rights of residence in Italy. The right of free movement of workers expressed in Article 39 EC is regarded as a fundamental Community right, subject only to 'limitations' which are 'justified' on the grounds of public policy, public security or public health (Article 39(3)). The Italian authorities sought to invoke this derogation to expel Ms Watson from Italy. The reason for the defendants' expulsion was that they had failed to comply with certain administrative procedures, required under Italian law, to record and monitor their movements in Italy. The ECJ, on reference from the Italian court, held that, while states were entitled to impose penalties for non-compliance with their administrative formalities, these must not be disproportionate; and they must never provide a ground for deportation. Here, it is worth noting, it is a Member State's action which was deemed to be illegal for breach of the proportionality principle. Likewise, in *Wijsenbeek* (case C-378/97) the ECJ held that, although Member States were still entitled to check the documentation of EC nationals moving from one Member State to another, any penalties imposed on those whose documentation was unsatisfactory must be proportionate: in this case, imprisonment for failure to carry a passport was disproportionate. (See further Chapter 25.)

Similarly, in the context of goods, in a case brought against Germany in respect of its beer purity laws (case 178/84), a German law imposing an absolute ban on additives was found in breach of EC law (Article 28 EC) and not 'justified' on public-health grounds under Article 30. Since the same (public health) objective could have been achieved by other less restrictive means, the ban was not 'necessary'; it was disproportionate.

More recently, however, there seems to have been a refinement of the principle of proportionality. In the case of *Sudzucker Mannheim/Ochsenfiirt AG v HauptzoUamt Mannheim* (case C-161/96) the ECJ confirmed the

distinction between primary and secondary (or administrative) obligations made in *R v Inteivention Board for Agricultural Produce* (case 181/84). The breach of a secondary obligation should not be punished as severely as a breach of a primary obligation. On the facts of the case, the ECJ held that a failure to comply with customs formalities by not producing an export licence was a breach of a primary and not a secondary obligation. The ECJ stated that the production of the export licence was necessary to ensure compliance with export requirements and thus the production of the export licence was part of the primary obligation. On this reasoning, it may be difficult to distinguish between primary and secondary obligations.

Further, the ECJ has held that, where an institution has significant discretion in the implementation of policies, such as in CAP, the ECJ may only interfere if the 'measure is manifestly inappropriate having regard to the objectives which the competent institution is seeking to pursue' *(Germany v Council (Re Banana Regime)* (case C-280/93), para 90). The same is also true of actions of Member States where they have a broad discretion in the implementation of Community policy (see *R v Minister ofAgriculture, Fisheries and Food,* ex parte *National Federation of Fishermen's Organisations* (case C-44/94)). In these circumstances, the distinction between proportionality and *Wednesbury* reasonableness is not great.

6.6.2 Legal certainty

The principle of legal certainty was invoked by the ECJ in *Defrenne v Sabena (No 2)* (case 43/75). The principle, which is one of the widest generality, has been applied in more specific terms as:

(a) the principle of legitimate expectations

(b) the principle of non-retroactivity (c) the principle of *resjudicata.*

The principle of legitimate expectations, derived from German law, means that, in the absence of an overriding matter of public interest, Community measures must not violate the legitimate expectations of the parties concerned. A legitimate expectation is one which might be held by a reasonable person as to matters likely to occur in the normal course of his affairs. It does not extend to anticipated windfalls or speculative profits. In *Efisol SA v Commission* (case T-336/94) the CFI commented that an individual would have no legitimate expectations of a particular state of affairs existing where a 'prudent and discriminating' trader would have foreseen the development in question. Furthermore, in *Germany v Council* (case C-280/93), the ECJ held that no trader may have a legitimate expectation that an existing Community regime will be maintained. In that the principle requires the encouragement of a reasonable expectation, a reliance on that expectation, and some loss resulting from the breach of that expectation, it is similar to the principle of estoppel in English law.

The principle was applied in *August Tbpfer & Co GmbH v Commission* (case 112/77) (see Chapter 2). August Topfer & Co GmbH was an exporter which had applied for, and been granted, a number of export licences for sugar. Under Community law, as part of the common organisation of the sugar market, certain refunds were to be payable on export, the amount of the refunds being fixed in advance. If the value of the refund fell, due to currency fluctuations, the licence holder could apply to have his licence cancelled. This scheme was suddenly altered by an EC regulation, and the right to cancellation withdrawn, being substituted by provision for compensation. This operated to Topfer's disadvantage, and it sought to have the regulation annulled, for breach, inter alia, of the principle of legitimate expectations. Although it did not succeed on the merits, the principle of legitimate expectations was upheld by the Court. (See also *CNTA SA v Commission* (case 74/74), monetary compensation scheme ended suddenly and without warning: Chapter 14.) In *Opel Austria GmbH v Council* (case T-l 15/94) the Court held that the principle of legitimate expectations was the corollary of the principle of good faith in public international law. Thus, where the Community had entered into an obligation and the date of entry into force of that obligation is known to traders, such traders may use the principle of legitimate expectations to challenge measures contrary to any provision of the international agreement having direct effect.

The principle of non-retroactivity, applied to Community secondary legislation, precludes a measure from taking effect before its publication. Retrospective application will only be permitted in exceptional circumstances, where it is necessary to achieve particular objectives and will not breach individuals' legitimate expectations. Such measures must also contain a statement of the reasons justifying the retroactive effect *(Diversinte SA v Administration Principal de Aduanos e Impuestos Especiales de la Junqueros* (case C-260/91)).

In *R v Kirk* (case 63/83) the principle of non-retroactivity of penal provisions (activated in this case by a

Community regulation) was invoked successfully. However, retroactivity may be acceptable where the retroactive operation of the rule in question improves an individual's position (see, for example, *Road Air BV v Inspecteur der Invoerrechten enAccijnzen* (case C-3 10/95)).

This principle also has relevance in the context of national courts' obligation to interpret domestic law to comply with Union law when it is not directly effective (the *Von Colson* principle, see Chapter 5). In *Pretore di Said v Persons Unknown* (case 14/86) in a reference from the Said magistrates' court on the compatibility of certain Italian laws with EEC Water Purity Directive 78/659, which had been invoked against the defendants in criminal proceedings, the Court held that:

A Directive cannot of itself have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of the Directive.

The Court went further in *Offtcier van Justitie v Kolpinghuis Nijmegen* (case 80/86). Here, in response to a question concerning the scope of national courts' obligation of interpretation under the *von Colson* principle, the Court held that that obligation was 'limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity'. Thus national courts are not required to interpret domestic law to comply with EC law in violation of these principles. This would appear to apply even where the EC law in question has direct effects, at least where criminal proceedings are in issue (see *Berlusconi* (joined cases C-387/02, C-391/02 and C-403/02), discussed in Chapter 5).

Problems also arise over the temporal effects of ECJ rulings under Article 234. In *Defrenne v Sabena (No 2)* (case 43/75) the Court held that, given the exceptional circumstances, 'important considerations of legal certainty' required that its ruling on the direct effects of the then Article 119 (now 141 post Lisbon, 157 TFEU) should apply prospectively only. It could not be relied on to support claims concerning pay periods prior to the date of judgment, except as regards workers who had already brought legal proceedings or made an equivalent claim. However, in *ArieteSpA* (case 811/79) and *Meridionale Industria Salumi Sri* (cases 66, 127 and 128/79) the Court affirmed that *Defrenne* was an exceptional case. In a 'normal' case a ruling from the ECJ was retroactive; the Court merely declared the law as it always was. This view was approved in *Barra* (case 309/85). However, in *Blaizot* (case 24/86), a case decided the same day as *Barra*, 'important considerations of legal certainty' again led the Court to limit the effects of its judgment on the lines of *Defrenne.* It came to the same conclusion in *Barber v Guardian Royal Exchange Assurance Group* (case 262/88). These cases indicate that in exceptional cases, where the Court introduces some new principle, or where the judgment may have serious effects as regards the past, the Court will be prepared to limit the effects of its rulings. *Kolpinghuis Nijmegen* may now be invoked to support such a view. Nevertheless, the Court did not limit the effect of its judgment in *Francovich* (cases C-6 and 9/90) contrary to Advocate-General Mischo's advice, despite the unexpectedness of the ruling and its 'extremely serious financial consequences' for Member States. Nor did it do so in *Marshall (No 2)* (case C-271/91) when it declared that national courts were obliged, by Article 5 of Directive 76/207 and their general obligation under Article 10 (ex 5) EC to ensure that the objectives of the directives might be achieved, to provide full compensation to persons suffering loss as a result of infringements of the directive, a matter which could not have been deduced either from the ECJ's case law or from the actual wording of the directive (see further Chapter 8).

The question of the temporal effect of a ruling from the ECJ under Article 234 EC was considered by the Italian constitutional court in *Fragd (SpA Fragd v Amministrazione delle Finanze* Decision No 232 of 21 April 1989) in the light of another general principle. Although the point did not arise out of the reference in question, the Italian court considered the effect that a ruling under Article 234 holding a Community measure void should have on the referring court if the ECJ had held that the ruling would apply for future cases only, excluding the judgment in which it was given. The Italian constitutional court suggested that in the light of the right to judicial protection given under the Italian constitution, such a holding should have effect in the case in which the reference was made. A finding of invalidity with purely prospective effect would offend against this principle and would therefore be unacceptable.

Resjudicata is a principle accepted in both the civil- and common-law traditions; its significance has been recognised also by the Human Rights Court in Strasbourg (see eg *Brumarescuv Romania* (28342/05)). Essentially it operates to respect the binding force of a final judgment in a matter; once any relevant time limits for appeal have expired, the judgment cannot be challenged. The ECJ has recognised this principle in many cases. In *Kobler* (case C-224/01), the ECJ held that:

attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of *resjudicata.* In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question. [Para 38.]

Applying this in *Kapferer* (case C-234/04) the ECJ ruled that in the light of *resjudi cata,* a national court does not have to disapply domestic rules of procedure con ferring finality on a decision, even though doing so would enable it to remedy an infringement of Community law by the decision at issue. Surprisingly, in *Lucchini Siderurgica* (case C-l 19/05), the ECJ came to the opposite conclusion. An undertak ing was seeking to claim state aid, which had been granted by the Italian government in breach of the state aid rules. The undertaking had a decision of an Italian court to this effect, whose judgment was protected by the principle of *resjudicata.*

In proceedings to challenge this decision, the ECJ addressed the question of whether Community law precluded the appplication of *resjudicata.* The ECJ concluded that it did. The Advocate-General in *Lucchini* pointed out that the principle is not absolute; the systems of the various Member States allow exceptions under certain strict conditions and the ECtHR has accepted this. Some commentators have questioned whether the circumstances in *Lucchini* come within the ECHR case law, however. Certainly, *Lucchini* is best regarded as an isolated case on exceptional facts.

6.6.3 Procedural rights

Where a person's rights are likely to be affected by EC law, EC secondary legislation normally provides for procedural safeguards (eg, Regulation 1/2003, competition law; and Directive 2004/38/EC, free movement of workers, Chapter 25). However, where such provision does not exist, or where there are lacunae, general principles of law may be invoked to fill those gaps.

6.6.4 Natural justice: The right to a hearing

The right to natural justice, and in particular the right to a fair hearing, was invoked, this time from English law, in *Transocean Marine Paint Association v Commission* (case 17/74) by Advocate-General Warner. The case, which arose in the context of competition law, was an action for annulment of the Commission's decision, addressed to the claimant association, that their agreements were in breach of EC law. The Court, following Advocate-General Warner's submissions, asserted a general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his views known. Since the Commission had failed to comply with this obligation its decision was annulled. The principle was affirmed in *Hoffman-La Roche & Co AG v Commission* (case 85/76), in which the Court held that observance of the right to be heard is, in all proceedings in which sanctions, in particular fines and periodic payments, may be imposed, a fundamental principle of law which must be respected even if the proceedings in question are administrative proceedings.

Another aspect of the right to a fair hearing is the notion of 'equality of arms'. This is exemplified in a series of cases against the Commission following a Commission investigation into alleged anti-competitive behaviour on the part of ICI and another company, Solvay. In the *Solvay* case (case T-30/91) the Court stated that the principle of equality of arms presupposed that both the Commission and the defendant company had equal knowledge of the files used in the proceeding. That was not the case here, as the Commission had not informed Solvay of the existence of certain documents. The Commission argued that this did not affect the proceedings because the documents would not be used in the company's defence. The Court took the view that this point was not for the Commission to decide, as this would give the Commission more power vis-a-vis the defendant company because it had full knowledge of the file whereas the defendant did not. Equally, in the *ICI* cases (T-36 and 37/9 1) the Commission's refusal to grant ICI access to the file was deemed to infringe the rights of the defence.

There are, however, limits to the rights of the defence: in *Descom Scales Manufacturing Co Ltd v Council* (case T-171/94), the ECJ held that the rights of the defence do not require the Commission to provide a written record of every stage of the investigation detailing information which needed still to be verified. In this case, the Commission had notified the defendant company of the position although it had not provided a written record and the ECJ held that this was sufficient.

The right to a hearing within Article 6 ECHR also includes the right to a hearing within a reasonable period of

time. The ECJ, basing its reasoning on Article 6 ECHR, thus held that, in respect of a case that had been pending before the CFI for five years and six months, the CFI had been in violation of its obligation to dispose of cases within a reasonable time *(Baustahlgewerbe v Commission* (case C-1 85/95 P)).

The right to a hearing has arisen in more difficult circumstances, that of the freezing of assets of persons thought to be involved in or supporting terrorism. Even in these circumstances, the European courts have reiterated the principle of the right to be heard *(OMPI v Council (OMPI I)* (case T-228/02). Nonetheless, the CFI recognised that this right is subject to broad limitations in the interests of the overriding requirement of public security, which relate to all aspects of procedural justice rights, including the hearing of certain types of evidence, It seems in these circumstances the right to a hearing is limited to a right to be notified as soon as possible as to the adoption of an economic sanction; given this finding, the duty to state reasons has a still greater significance than it usually would have. The rule of law is protected by the right to seek a review of the decision-making process subsequently. In *OMPI II* (case T-256/07) the CFI clarified that the right to a hearing does not necessitate a formal hearing if the relevant legislation does not provide for it; nor is there a right to continuous conversation. Rather, it suffices if the persons involved have the right to make their views known to the competent authorities (See *OMPI II,* para 93; see also *Common Market Fertilisers* v *Commission* (cases T-l 34-5/03, para 108)).

6.6.5 The duty to give reasons

The duty was affirmed in *Union Nationale des Entraineurs et Cadres Techniques Professionels du Football (UNECTEF) v Heylens* (case 222/86). In this case, M Heylens, a Belgian and a professional football trainer, was the defendant in a criminal action brought by the French football trainers' union, UNECTEF, as a result of his practising in Lille as a professional trainer without the necessary French diploma, or any qualifications recognised by the French government as equivalent. M Heylens held a Belgian football trainers' diploma, but his application for recognition of this diploma by the French authorities had been rejected on the basis of an adverse opinion from a special committee, which gave no reasons for its decision. The ECJ, on a reference from the Tribunal de Grande Instance, Lille, held that the right of free movement of workers, granted by Article 39 EC, required that a decision refusing to recognise the equivalence of a qualification issued in another Member State should be subject to legal redress which would enable the legality of that decision to be established with regard to Community law, and that the person concerned should be informed of the reasons upon which the decision was based.

Similarly in *Al-Jubail Fertiliser Company (SAMAD) v Council* (case C-49/88) in the context of a challenge to a Council regulation imposing antidumping duties on the import of products manufactured by the applicants, the Court held that since the applicants had a right to a fair hearing the institutions were under a duty to supply them with all the information which would enable them effectively to defend their interests. Moreover if the information is supplied orally, as it may be, the Commission must be able to prove that it was in fact supplied.

The duty to give reasons was considered in the OMPI cases. These have a greater significance due to the potential for a limited right to a hearing. In *OMPI II,* the CFI emphasised that the Council was under an obligation to provide actual and specific reasons justifying the inclusion of a person on a sanctions list. This requires the Council not only to identify the legal conditions found in the underlying regulation, but why the Council considered that they applied to the particular person, justifying their inclusion on the sanctions list. The duty to give reasons does not, however, include the obligation to respond to all points made by the applicant.

6.6.6 The right to due process

As a corollary to the right to be informed of the reasons for a decision is the right, alluded to in *UNECTEF v Heylens* (case 222/86), to legal redress to enable such decisions and reasons to be challenged. This right was established in *Johnston* v *Chief Constable of the Royal Ulster Constabulary* (case 222/84). The case arose from a refusal by the RUC (now the Police Service of Northern Ireland) to renew its contracts with women members of the RUC Reserve. This decision had been taken as a result of a policy decision taken in 1980 that henceforth full-time RUC Reserve members engaged on general police duties should be fully armed. For some years women had not been issued with firearms nor trained in their use. Ms Johnston, who had been a full-time member of the Reserve for some years and wished to renew her contract, challenged the decision as discriminatory, in breach of EC Directive 76/207, which provides for equal treatment for men and women in all

matters relating to employment. Although the measure was admittedly discriminatory, since it was taken solely on the grounds of sex, the Chief Constable claimed that it was justified, arguing from the 'public policy and public security' derogation of Articles 30 (goods, see Chapter 20) and 39 (workers, see Chapter 25), and from Article 297, which provides for the taking of measures in the event of, inter alia, 'serious internal disturbances affecting the maintenance of law and order'. As evidence that these grounds were made out the Chief Constable produced before the industrial tribunal a certificate issued by the Secretary of State certifying that the act refusing to offer Ms Johnston further employment in the RUC Reserve was done for the purpose of safeguarding national security and safeguarding public order. Under Article 53(2) of the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042) a certificate that an act was done for that purpose was 'conclusive evidence' that it was so done. A number of questions were referred to the ECJ by the industrial tribunal on the scope of the public order derogation and the compatibility of the Chief Constable's decision with Directive 76/207. The question of the Secretary of State's certificate and the possibility of judicial review were not directly raised. Nevertheless this was the first matter seized upon by the Court. The Court considered the requirement of judicial control, provided by Article 6 of Directive 7 6/207, which requires states to enable persons who 'consider themselves wronged' to 'pursue their claims by judicial process after possible recourse to the competent authorities'. This provision, the Court said, reflected:

a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ...

It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the Directive provides.

The Court went on to say that Article 5 3(2) of the Sex Discrimination (Northern Ireland) Order 1976, in requiring the Secretary of State's certificate to be treated as conclusive evidence that the conditions for derogation are fulfilled, allowed the competent authority to deprive an individual of the possibility of asserting by judicial process the rights conferred by the directive. Such a provision was contrary to the principle of effective judicial control laid down in Article 6 of the directive. A similar approach has, in fact, been taken by the European Court of Human Rights in relation to such certificates issued in relation to a variety of substantive issues (eg, *Tinnelly and ors v UK*, ECHR judgment, 10 July 1998).

Although the ECJ's decision was taken in the context of a right provided by the directive it is submitted that the right to effective judicial control enshrined in the European Convention on Human Rights and endorsed in this case could be invoked in any case in which a person's Community rights have been infringed. The case of *UNECTEF* v *Heylens* (case 222/8 6) would serve to support this proposition. Further, the CFI has held that the Commission, in exercising its competition-policy powers, must give reasons sufficient to allow the Court's review of the Commission's decision-making process, if that decision is challenged (eg, *Ufex v Commission* (case C-1 19/97P)).

In the *OMPI* cases, the CFI made clear that reasons of public security could not remove the decisions and the decision making processes at issue from the scope of judicial review (see also *Kadi*, para 344 and see comments of Advocate-General at para 45), although that review may necessarily be limited. In *OMPI II*, the CFI clarified (at paras 138-41) the scope and standard of review, at least as regards decisions concerning economic sanctions. While the Council has broad discretion as to whether to impose sanctions, the CFI must ensure that a threefold test is satisfied: whether the requirements of the applicable law are fulfilled; whether the evidence contains all information necessary to assess the situation and whether it is capable of supporting the inferences drawn from it; and whether essential procedural guarantees have been satisfied. The CFI seems to have taken a surprisingly tough stance in favour of the protection of procedural rights here.

Thus general principles of law act as a curb not only on the institutions of the Union but also on Member States, which are required, in the context of EU law, to accommodate these principles alongside existing remedies and procedures within their own domestic systems of administrative law and may result eventually in some modification in national law itself. There are, in any event, problems in determining the boundaries between matters of purely national law and matters of Union law (see 6.9 below).

6.6.7 Right to protection against self-incrimination

The right to a fair trial and the presumption of innocence of 'persons charged with a criminal offence' contained in Article 6 ECHR are undoubtedly rights which will be protected as general principles of law under Community law. However, in *Orkem* (case 3 74/87) and *Solvay* (case 27/8 8) the ECJ held that the right under Article 6 not to give evidence against oneself applied only to persons charged with an offence in criminal proceedings; it was not a principle which could be relied on in relation to infringements in the economic sphere, in order to resist a demand for information such as may be made by the Commission to establish a breach of EC competition law. This view was placed in doubt following a ruling from the Court of Human Rights in the case of *Funke v France* (case SA 25 6A) ([1993] 1 CMLR 897) and has been the subject of some academic criticism.

Funke involved a claim, for breach of Article 6 ECHR, in respect of a demand by the French customs' authorities for information designed to obtain evidence of currency and capital transfer offences. Following the applicant's refusal to hand over such information fines and penalties were imposed. The Court of Human Rights held that such action, undertaken as a 'fishing expedition' in order to obtain documents which, if found, might produce evidence for a prosecution, infringed the right, protected by Article 6(1) ECHR, of anyone charged with a criminal offence (within the autonomous meaning of that phrase in Article 6 ECHR), to remain silent and not incriminate himself. It appears that Article 6, according to its 'autonomous meaning', is wide enough to apply to investigations conducted under the Commission's searchand-seizure powers under competition law, and that *Orkem* and *Solvay* may no longer be regarded as good law. This view, assimilating administrative penalties to criminal penalties, appears to have been taken by the ECJ in *Otto BVv Postbank NV* (case C60/92). Moreover, in *Mannesmannrbhren-Werke AG v Commission* (case T-l 12/98), also a case involving a request for information about an investigation into anticompetitive agreements, the CFI held that although Article 6 ECHR could not be invoked directly before the Court, Community law offered 'protection equivalent to that guaranteed by Article 6 of the Convention' (para 77). A party subject to a Commission investigation could not be required to answer questions that might involve an admission of involvement in an anticompetitive agreement, although it would have to respond to requests for general information.

6.7 Equality

The principle of equality means, in its broadest sense, that persons in similar situations are not to be treated differently unless the difference in treatment is objectively justified. This, of course, gives rise to the question of what are similar situations. Discrimination can only exist within a framework in which it is possible to draw comparisons, for example, the framework of race, sex, nationality, colour, religion. The equality principle will not apply in situations which are deemed to be 'objectively different' (see *Les Assurances du Credit SA v Council* (case C63/89), public export credit insurance operations different from other export credit insurance operations). What situations are regarded as comparable, subject to the equality principle, is clearly a matter of political judgement. The EC Treaty expressly prohibits discrimination on the grounds of nationality (Article 12 (ex 6) EC) and, to a limited extent, sex (Article 141 (ex 119) EC provides for equal *pay* for men and women for equal work). In the field of agricultural policy, Article 34(3) (ex 40(3)) prohibits 'discrimination between producers or consumers within the Community'. The To A introduced further provisions, giving the EC powers to regulate against discrimination on grounds of race, religion, sexual orientation or disability (Article 13 EC). There has been some discussion as to whether these aspects of discrimination constitute separate general principles of law, as seemed to be suggested by the ECJ in *Mangold* (Case C-l44/04). Although a number of Advocates-General have discussed the issue, it is indicative of the matter's sensitive nature that in each of the cases, the ECJ has handed down rulings without addressing the *Mangold* point. (See, eg, *Chacon Navas* (case C-l3/05) concerning disability discrimination and see Opinion of Advocate-General at paras 46-56; *Lindorfer* (case C-227/04) and the Opinion of the Advocate-General at paras 87-97 and 132-8; *Palacios de la Villa* (case C-41 1/05) and *Maruko* (case C-267/06) on discrimination based on sexual orientation—see Opinion of Advocate-General at para 78; *The Queen, on the application of The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for BERR* (case C-388/07) and *Bartsch v Bosch und Siemens Hausgerdte (BSH) Altersfursorge GmbH* (case C-427/06).) Directive 2000/43/EC ([2000] OJ L1 80, p 22) has been adopted to combat discrimination, both direct and indirect, on grounds of racial or ethnic origin, in relation to employment matters, social protection, education, and access to public goods and services (see, eg, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Feryn* (case C-54/07)). Directive 2000/78/EC ([2000] OJ L303, p 16) has been adopted to combat discrimination on the grounds of religion or belief,

disability, age, or sexual orientation with regard to employment and occupation. These directives are discussed further in Chapter 27.

However, a general principle of equality is clearly wider in scope than these provisions. In the first isoglucose case, *Royal Scholten-Honig (Holdings) Ltd v Intervention Board for Agricultural Produce* (cases 103 and 145/77), the claimants, who were glucose producers, together with other glucose producers, sought to challenge the legality of a system of production subsidies whereby sugar producers were receiving subsidies financed in part by levies on the production of glucose. Since glucose and sugar producers were in competition with each other the claimants argued that the regulations implementing the system were discriminatory, ie in breach of the general principle of equality, and therefore invalid. The ECJ, on a reference on the validity of the regulations from the English court, agreed. The regulations were held invalid. (See also *Ruckdeschel* (case 117/76); *Pont-d-Mousson* (cases 124/76 and 20/77).)

Similarly, the principle of equality was invoked in the case of *Airola* (case 21/74) to challenge a rule which was discriminatory on grounds of sex (but not pay), and in *Prais* (case 130/75) to challenge alleged discrimination on the grounds of religion. Neither case at the time fell within the more specific provisions of Community law, although would now fall within the scope of Directive 2000/78/ EC (see above).

6.8 Subsidiarity

The principle of subsidiarity in its original philosophical meaning, as expressed by Pope Pius XI (Encyclical letter, 1931), is that:

It is an injustice, a grave evil and disturbance of right order for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies.

It was invoked in the Community context during the 1980s when the Community's competence was extended under the Single European Act. It was incorporated into that Act, in respect of environmental measures, in the then Article 1 30r (now 174) EC (post Lisbon Article 191 TFEU), and introduced into the EC Treaty in Article 5 (ex 3b) by the TEU. Article 5 EC requires the Community to act 'only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the Community'. Article 5 EC will, should Lisbon come into force, be replaced in substance by Article 5 TEU.

As expressed in Article 5 EC, subsidiarity appears to be a test of comparative efficiency; as such it lacks its original philosophical meaning, concerned with fostering social responsibility. This latter meaning has however been retained in Article 1 (ex A) TEU, which provides that decisions of the European Union 'be taken as closely as possible to the people'. Although it has not been incorporated into the EC Treaty it is submitted that this version of the principle of subsidiarity could be invoked as a general principle of law if not as a basis to challenge EC law then at least as an aid to the interpretation of Article 5 EC (see Chapter 3). The principle of subsidiarity in its narrow form in Article 5 has, on occasion, been referred to as a ground for challenge of EC legislation *(R v Secretary ofState for Health, exparte British American Tobacco and others* (case C-491/01); *R v SoSfor Health exparte Swedish Match* (case C-210/03)), but this has never succeeded.

6.9 Effectiveness

The doctrine of effectiveness is not usually recognised as a general principle of Union law, save—perhaps—when it is equated with the idea of effective judicial protection. Nonetheless, the principle is ubiquitous and has had a significant effect on the development of Union law. Notably, it was an effectiveness argument that was used to develop the doctrine of supremacy, direct effect *(Van Gend en Loos* (case 26/62) and *Costa vENEL* (case 6/64), and state liability *(Francovich and Bonifaci v Italy* (joined cases C-6 and 9/90), and was used to extend the loyalty principle found in Article 10 EC to the third pillar *(Pupino* (case C-105/03)). As we shall see in Chapter 8, it has been used to ensure effective protection for EC law, and for individuals' rights; indeed sometimes the ECJ seems to blur the boundaries between the two (eg *Courage v Creehan* (case C -453/99)). Should the Lisbon Treaty come into force, Article 19 TEU (as amended by Lisbon) expressly requires Member States to provide remedies so as to ensure effective legal protection of Union law rights. The concept is a somewhat slippery one, used in different contexts for different purposes. Crucially, it can operate both to determine the scope of Union law (identifying the boundary between national and EU law) and to determine the scope of any remedial action needed within the national legal system. While it may be argued that fundamental rights arguments may be used

on both these ways (see below), the broad and amorphous nature of the effectiveness principle(s) make it particularly difficult to determine its proper scope and appropriate use.

6.10 General principles applied to national legislation

It has been suggested that general principles of law, incorporated by the ECJ as part of Union law, also affect certain acts of the Member States. These fall into three broad categories:

(a) when EC rights are enforced within national courts

(b) when the rules of a Member State are in (permitted) derogation from a fundamental principle of Community law, such as free movement of goods (Articles 25 and 28 EC) or persons (Articles 39 and 49)

(c) when the Member State is acting as an agent of the Community in implementing Community law (eg, *Klensch v Secretaire d'Etat a VAgriculture eta la Viticulture* (cases 201 and 202/85)).

6.10.1 Enforcement of Community law in national courts

The ECJ has repeatedly held that, in enforcing Community rights, national courts must respect procedural rights guaranteed in international law; for example, individuals must have a right of access to the appropriate court and the right to a fair hearing (see, eg, *Johnston vRUC* (case 222/84) and *UNECTEF v Heylens* (case 222/86)). This applies, however, only where the rights which the individual seeks to enforce are derived from *Community* sources: Ms Johnston relied on the Equal Treatment Directive (Directive 76/207); M Heylens on the right of freedom of movement for workers enshrined in Article 39 EC. In *Konstantinidis* (case C-l68/91), a case concerning the rules governing the transliteration of Greek names, the ECJ handed down a judgment which did not follow the Opinion of the Advocate-General. The Advocate-General suggested that such rules, which resulted in a change in a person's name as a result of the way the transliteration was carried out, could constitute an interference with the rights protected by Article 8 ECHR. Although the ECJ agreed that this could be the case, it held that such rules would only be contrary to EC law where their application causes such inconvenience as to interfere with a person's right to free movement.

The constraints implied by this case seem to have been undermined. *Carlos Garcia Avello* (case C-148/02) concerned a Spanish national's right to register his children's names in the Spanish style in Belgium, where they were born. The case is based not on free-movement rights, but on European citizenship, a factor which both the European Commission and the Advocate-General agree allows a broader scope to EC protection of human rights. The ECJ agreed with the outcome without expressly considering human rights. The decision seems to limit the notion of the internal situation seen in *Kaur* (discussed above) and *Uecker and facquet* (joined cases C64/96 and C-65/96, discussed in Chapter 21) and to extend the scope of circumstances in which the ECJ would be required to respect ECHR rights (see 6.10.4 below). A similar extension can be seen in *Chen* (case C-200/02), in which a baby holding Irish nationality but born in the UK was deemed to have rights to have her mother, a Chinese national, remain in the UK with her (see further Chapter 21).

The extension of human-rights protection is not limited to circumstances in which citizenship is in issue, but arises in the context of any of the treaty freedoms. in *Karner* (case C-71/02), a case concerning advertising on the Internet, the ECJ held that the national rules complained of were not selling arrangements and therefore they would not fall within Article 28 EC (see Chapter 19). In this aspect, the case is different from the preceding cases, as those cases concerned situations where the national legislation fell within the relevant treaty provision. Despite the fact that the situation seemed to lie outside the prohibition in Article 28 (thus rendering a consideration of a derogation, discussed at 5.9.2, unnecessary), the ECJ then went on to give the national court 'guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures' (para 49). According to the ECJ, in this case the national legislation fell within the scope of application of EC law (see further 6.10.4 below).

Finally, any penalties imposed by national judicial bodies must be proportionate (eg, *Watson and Belmann* (case 118/75)).

6.10.2 Derogation from fundamental principles

Most treaty rules provide for some derogation in order to protect important public interests (eg, Articles 30 and 39(3)). The ECJ has insisted that any derogation from the fundamental principles of Community law must be narrowly construed. When Member States do derogate, their rules may be reviewed in the light of general prin-

ciples, as the question of whether the derogation is within permitted limits is one of Community law. Most, if not all, derogations are subject to the principle of proportionality (eg, *Watson* (case 118/75)). The *ERT*case *(Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis* (case C-260/89)) concerned the establishment by the Greek government of a monopoly broadcaster. The ECJ held that this would be contrary to Article 49 (ex 59) regarding the freedom to provide services. Although the treaty provides for derogation from Article 49 in Articles 46 and 55 (ex 56 and 66), any justification provided for by Community law must be interpreted in the light of fundamental rights, in this case the principle of freedom of expression embodied in Article 10 ECHR. Similarly, in *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* (case C-368/95), the need to ensure plurality of the media (based on Article 10 ECHR) was accepted as a possible reason justifying a measure (the prohibition of prize games and lotteries in magazines) which would otherwise breach Article 28 EC. More recently, in *Schmidberger* (C-l 12/00), Advocate-General Jacobs argued that the right to freedom of expression and assembly permits a derogation from the free movement of goods (Article 28 EC)) in a context where the main transit route across the Alps was blocked for a period of 28 hours on a single occasion and steps were taken to ensure that the disruption to the free movement of goods was not excessive. The ECJ came to the same end conclusion, noting the wide margin of discretion given to the national authorities in striking a balance between fundamental rights and treaty obligations (and contrast *Commission v France* (case C-265/95)). (See also on Article 8 ECHR, *Mary Carpenter v SoS for the Home Department* (case C-60/00).)

One issue in this context is whether fundamental human rights should properly be seen as a derogation from treaty freedoms, perhaps falling within the scope of the public-policy objection, or whether they should be seen as operating to limit treaty freedoms at an earlier point in the legal analysis. In *Omega Spielhallen* (case C3 6/02), human dignity was seen as forming part of the public-policy grounds of derogation. In her Opinion in this case, Advocate-General Stickx-Hackl emphasised, the importance of the protection of human dignity, and suggested that public policy should be interpreted in the light of the Community-law requirement that human dignity should be protected. Nonetheless, this still leaves human-rights protection with the status of an exception to EC Treaty freedoms rather than constraining the scope of those rights in the first place. Recognition that human-rights protection forms part of the public-policy exception can be seen in *Dynamic Medien Vertiiebs GmbH v Avides Media AG* (C-244/06). The potential problem with this approach is that exceptions to the treaty freedoms are normally narrowly construed and subject to the proportionality test, which hardly puts them on the same footing as the economic treaty freedom. In *Schmidberger* (case C-l 12/00), the ECJ suggested that rather than the usual proportionality test, in such cases the different interests should be balanced; whether this approach is consistently adopted in cases concerning fundamental rights, remains to be seen.

6.10.3 State acting as agent

When Member States implement Union rules, either by legislative act or as administrators for the Union, they must not infringe fundamental rights. National rules may be challenged on this basis: for example, in *Commission v Germany* (case 249/86), the Commission challenged Germany's rules enforcing Regulation 1612/86 which permitted the family of a migrant worker to install themselves with the worker in a host country provided that the worker has housing available for the family of a standard comparable with that of similarly employed national workers. Germany enforced this in such a way as to make the residence permit of the family conditional on the existence of appropriate housing for the duration of the stay. The ECJ interpreted the regulation as requiring this only in respect of the beginning of their period of residence. Since the regulation had to be interpreted in the light of Article 8 ECHR concerning respect for family life, a fundamental principle recognised by Community law, German law was incompatible with Community law. When Member States are implementing obligations contained in Union law, they must do so without offending against any fundamental rights recognised by the Union. In *Wachaufv Germany* (case 5/88)) the ECJ held that 'Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements' (para 19).

6.10.4 Scope of Union law

In all three situations listed above, general principles have an impact because the situations fall within the scope of Union law, specifically Community law. The ECJ has no power to examine the compatibility with the ECHR of national rules which do not fall therein *(Cinetheque SA v Federation Nationale des Cinemas Frangaises* (cases 60 and 61/84), noting the different approach of Advocate-General and Court, and contrast *Karner* (case C-

71/02)). The problem lies in defining the boundary between Community law and purely domestic law, as can be seen in, for example, *Karner.* The scope of Community law could be construed very widely, as evidenced by the approach of the Advocate-General in *Konstantinidis v Stadt Altensteig-Standesamt* (case C-168/91). As noted above, he suggested that, as the applicant had exercised his right of free movement under Article 43 (ex 52) EC, national provisions affecting him fell within the scope of Community law; therefore he was entitled to the protection of his human rights by the ECJ. The Court has not expressly gone this far although some of the citizenship cases can be seen in this light (see *Garcia Avello* (case C-148/02), *Carpenter* (case C-60/00), *Chen* (case C-200/02)).

One particular problem area is where an individual seeks to extend the nature of the fundamental principles recognised in his or her home state by reference to rights protected in other Member States and recognised as such by the ECJ. This can be illustrated by contrasting two cases which arose out of similar circumstances: *Wachaufv Germany* (case 5/8 8) and *R v Ministry ofAgriculture, Fisheries and Food, ex parte Bostock* (case C-2/93).

Wachauf was a tenant farmer who, upon the expiry of his tenancy, requested compensation arising out of the loss of 'reference quantities' on the discontinuance of milk production. When this was refused, he claimed that this was an infringement of his right to private property, protected under the German constitution. The German authorities claimed that the rules they applied were required by the Community regulation, but the ECJ held that on its proper interpretation the regulation required no such thing: although the regulation did not itself provide the right to compensation, equally it did not preclude it. The discretion thereby given to the Member States by the regulation should be exercised in accordance with fundamental rights, thus, in practice meaning that the applicant should receive the compensation.

Bostock, similarly, had been a tenant farmer. Following *Wachauf* (case 5/8 8) he argued that he too should be entitled to compensation for the value of the reference quantities on the expiry of his lease. Unlike the situation in Germany, though, this right was not protected by British law at the time when Bostock's lease ended. Bostock therefore sought to challenge that British law on the basis that the provisions breached general principles of non-discrimination and unjust enrichment. Despite its approach in *Wachauf,* the ECJ ruled that the right to property protected by the Community legal order did not include the right to dispose of the 'reference quantities' for profit. The ECJ held that the question of unjust enrichment, as part of the legal relations between lessor and lessee, was a matter for national law and therefore fell outside the scope of Community law.

It is difficult to reconcile these two cases if one accepts that general principles accepted by the ECJ should apply across the EU. From recent case law we can still see differences in the approach to the scope of rights deemed worthy of protection. In *Omega Spielhallen* (case C-36/02), the German authorities sought to prevent a laser-dome game operating on the basis that a game based on shooting people infringed respect for human dignity; no such problem arose in the UK where the game operator originated. One clear message seems to be that there are limits to the circumstances when general principles will operate and that a challenge to national acts for breach of a general principle is likely to be successful only when national authorities are giving effect to clear obligations of Community law. In matters falling within the discretion of Member States, national authorities are not required to recognise general principles not protected by that state's national laws.

6.11 Conclusions

This chapter illustrates the importance of general principles of law in the judicial protection of individual rights. Member States' commitment to fundamental human rights has now been acknowledged in Article 6 TEU. Nonetheless, certain points should be noted.

The fact that a particular principle is upheld by the ECJ and appears to be breached does not automatically lead to a decision in favour of the claimant. Fundamental rights are not absolute rights. As the Court pointed out in / *Nold KG v Commission* (case 4/73), rights of this nature are always subject to limitations laid down in the public interest, and, in the Community context, limits justified by the overall objectives of the Community (eg, *O'Dwyer* v *Council* (cases T-466, 469, 473-4 and 477/93)). The pursuit of these objectives can result in some hard decisions (eg, *Dowling v Ireland* (case C-85/90)), although the Court has held that it may not constitute a 'disproportionate and intolerable interference, impairing the very substance of those rights' *(Wachauf (case* 5/88) at para 18). This principle was applied in *Germany v Commission (Re Banana Regime)* (case C-280/93), para 78, another harsh decision,

Thus, where the objectives are seen from the Union standpoint to be essential, individual rights must yield to the common good. In / *Nold KG* v *Commission* the system set up under an ECSC provision, whereby Nold, as a small-scale wholesaler, would be deprived of the opportunity, previously enjoyed, to buy direct from the producer, to its commercial disadvantage, was held to be necessary in the light of the system's overall economic objectives. 'The disadvantages claimed by the applicant', held the Court, 'are in fact the result of economic change and not of the contested Decision'.

The latitude shown to the Union institutions, particularly where they are exercising discretionary powers in pursuit of common Community policies (most notably the CAP) does not always extend to Member States in their implementation of Union law. Where Member States are permitted a certain discretion in implementation (and Member States have little discretion as regards the ends to be achieved), the Court will not substitute its own evaluation for that of the Member State: it will restrict itself solely to the question of whether there was a patent error in the Member State's action *{R v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations* (case C-44/94)). Otherwise, general principles of law are strictly enforced. Thus, under the guise of the protection of individual rights, general principles of law also serve as a useful (and concealed) instrument of policy.

The adoption of the Charter of Fundamental Rights marks a significant further step. Although little more than a summary of the current level of protection recognised by the Union, it may evolve into a legally binding instrument which reaches beyond fundamental human rights to include employment and social rights and for this, we wait upon the ratification of the Lisbon Treaty. Nonetheless difficulties remain with its relationship with the ECHR, a convention to which the Union, it now seems, is intended to accede. Of crucial significance in the successful and equal protection of individuals' rights is the relationship between the European Court of Human Rights and both the CFI and, most importantly, the ECJ. This issue has yet to be fully resolved.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 9: State Liability

9.1 Introduction

The preceding chapters have identified that the ECJ, relying to a significant extent on the need to make EC law effective, extended the possible mechanisms by which individuals could seek access to rights derived from EC law in their national courts. Giving individuals incentives through the possibility of financial redress to bring legal action not only protects their rights but ensures enforcement of Community law. Whether these two objectives are equally weighted has been the subject of some debate. Perhaps the most significant development in this area over the past 25 years has been the creation and development of the principle of state liability under *Francovich* (cases C-6 and & 9/90). A logical development of the notion of direct effect, it can enable an individual, before his national court, to seek a remedy for losses suffered as a result of the failure by a Member State to implement, or apply correctly, provisions of EC law. While the national courts may have accepted this development, despite it potential impact on the autonomy of the national legal systems, there are still questions about the scope of the doctrine. This chapter will outline the development of the state liability doctrine and, in doing so, will examine its scope and the conditions for liability, as well identifying its relationship with other provisions. In all this, we question what the doctrine's underlying rationale is and, consequently, whether state liability can be extended beyond Community law to other pillars.

9.2 Principle of state liability under *Froncovich v Italy* 9.2.1 The *Francovich* ruling

The shortcomings of the principles of direct and indirect effects, particularly in the context of enforcement of directives, as outlined in Chapter 5, led the European Court of Justice (ECJ) to develop a third and separate principle in *Francovich v Italy* (cases C-6 and 9/90), the principle of state liability. Here the claimants, a group of ex-employees, were seeking arrears of wages following their employers' insolvency. Their claim (like that in the subsequent case of *Wagner Miret* (case C-334/92)) was based on Directive 80/987, which required Member States, inter alia, to provide for a guarantee fund to ensure the payment of employees' arrears of wages in the event of their employers' insolvency. Since a claim against their former employers would have been fruitless (they being insolvent and 'private' parties), they brought their claim for compensation against the state. There were two aspects to their claim. The first was based on the state's breach of the claimants' (alleged) substantive rights contained in the directive, which they claimed were directly effective. The second was based on the state's primary failure to implement the directive, as required under Article 249 and Article 10 EC (post Lisbon Articles 288 TFEU and Art 4 TEU). The Court had already held, in Article 226 EC post Lisbon Article 258 TFEU proceedings, that Italy was in breach of its Community obligations in failing to implement the directive *(Commission v Italy* (case 22/87)).

Withregard to the first claim, the Court found that the provisions in question were not sufficiently clear, precise, and unconditional to be directly effective. Although the content of the right, and the class of intended beneficiaries, was clear, the state had a discretion as to the appointment of the guarantee institution; it would not necessarily itself be liable under the directive. The claimants were, however, entitled in principle to succeed in their second claim. The Court held that where, as here, a state had failed to implement an EC directive it would be obliged to compensate individuals for damage suffered as a result of its failure to implement the directive if certain conditions were satisfied—that is, where:

(a) the directive involved rights conferred on individuals

(b) the content of those rights could be identified on the basis of the provisions of the directive and

(c) there was a causal link between the state's failure and the damage suffered by the persons affected.

The Court's reasoning was based on (i) the Member States' obligation to implement directives under Article 249 and their general obligation under Article 10 EC to 'take all appropriate measures ... to ensure fulfilment of their obligations under Community law; (ii) on its jurisprudence in *Van Gend en Loos* (case 26/62) and *Costa v ENEL* (case 6/64) that certain provisions of EC law are intended to give rise to rights for individuals; and (iii) that national courts are obliged to provide effective protection for those rights, as established in *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (case 106/77) and *Factortame* (case C-213/89)—see further Chapter 4). It concluded that 'a principle of state liability for damage to individuals caused by a breach of Community law for which it is responsible is inherent in the scheme of the Treaty'.

Thus, where the three conditions of *Francovich* are fulfilled, individuals seeking compensation as a result of activities and practices which are inconsistent with EC directives may proceed directly against the state. There will be no need to rely on the principles of direct or indirect effects. Responsibility for the non-implementation of the directive will be placed not on the employer, 'public' or 'private', but squarely on the shoulders of the state, arguably, where it should always have been. Rather than changing the law, it provides compensation for a Member State's failure to do so and, as well as providing protection for individuals' rights, creates an indirect mechanism for enforcement of Community law.

9.2.2 Scope of the principle

The reasoning in *Francovich* is compelling; its implications for Member States, however, remained unclear. Although expressed in terms of a state's liability for the non-implementation of a directive, *Francovich* appeared to lay down a wider principle of liability for all breaches of Community law 'for which the state is responsible'. Would it then apply to legislative or administrative acts and omissions in breach of treaty articles or other provisions of EC law? Would it be an additional remedy, or available only in the absence of other remedies based on direct or indirect effects? Apart from the three conditions for liability, which are themselves open to interpretation, what other conditions would have to be fulfilled? Would liability be strict or dependent on culpability, even serious culpability, as was the case with actions for damages against Community institutions under Article 288 (2) (ex 2 15(2) EC, post Lisbon 340 TFEU) (see Chapter 14)? In the case of non-implementation of directives, as in *Francovich* itself, the state's failure is clear; *afortiori* when established by the Court under Article 226. But in cases of faulty or inadequate implementation it is not. The state's 'failure' may only become apparent following an interpretation of the directive by the Court (see, eg, the sex-discrimination cases such as *Marshall* and *Barber—see* Chapter 27). Here the case for imposing liability in damages on the state is less convincing.

9.2.2.1 *Type of action*

Many of these questions were referred to the Court of Justice for interpretation in *Brasserie du Pecheur SA v Germany* and *R v Secretary of State for Transport, exparte Factortame* (cases C46 and 48/93). The Court held that the principle of state liability is not confined to a failure to implement EC directives; rather, *all* domestic acts and omissions, legislative, executive, and judicial, in breach of Community law, can give rise to liability. Provided the conditions for liability are fulfilled it applies to breaches of *all* Community law, whether or not directly effective. However, arguing from the principles applicable to the Community's non-contractual liability under Article 288(2), the Court held that where a state is faced with situations involving choices comparable to those made by Community institutions when they adopt measures pursuant to a Community policy it will be liable only where three conditions are met (see paras 50 and 51 of the judgment):

(a) the rule of law infringed must be intended to confer rights on individuals

(b) the breach must be sufficiently serious

(c) there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

The 'decisive test' for whether a breach is sufficiently serious is whether the institution concerned has 'manifestly and gravely exceeded the limits of its discretion' (para 55). The factors to be taken into account in assessing this question included:

the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or voluntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law. [Para 56.]

9.2.2.2 *For whose actions is the state liable?*

One question left open by *Brasserie de Pecheur* is for whose action a Member State can be liable. There can be little doubt as to the state's liability for actions taken by the government itself in the context of the obligation to implement EC measures. But what about other parts of the state? In *Haim* v *Kassenzahnartzliche Vereinigung Nordrhein* (case C-424/97) it was established that a legally independent body may be liable under *Francovich,*

as well as the Member State itself.

In *AGM-COS MET Sri v Suomen Valtio and Tarmo Lehtinen* (case C-470/03), the Court held, without exploring the point fully, that an individual official may be liable in addition to a Member State for any damage caused by that individual's actions which are in breach of Community law. Article 4(1) of Directive 98/37/ EC on machinery requires that Member States do not restrict the marketing and use of machinery which complies with the Directive. Lehtinen was an official who had been involved in safety inspections of vehicle lifts in respect of which he had doubts as to their safety. His actions included making various public statements about his concerns, although Finland did nothing to arrange for the machinery to be withdrawn from the market. The manufacturer's sales plummeted in the wake of this, and an action was brought for state liability. The Court held that statements such as the ones made by Lehtinen, if attributable to the state as giving the impression of reflecting official rather than personal opinions (which was for the national court to determine), could give rise to liability. It went on to say that Lehtinen's statements could be a breach of Article 4(1) of the Directive and could not be justified on the basis of public health or freedom of expression. As the provision conferred rights on individuals and left no discretion to the Member States, the conditions for liability were satisfied. Crucially, as well as the Member State itself, the individual official could also be held liable under national law. The Court appears to treat this (cf para 98 of the judgment) as the corollary of its ruling in *Haim* that a public body may also be liable under the state liability principle. However, the prospect of individual officials being held liable for actions carried out in their official capacity is a worrying one. The Court has tempered its ruling on this point by adding the proviso that Community law does not *require* such liability, although it does not preclude it.

Of course, the argument that the Member State is the appropriate body to sue because it is at fault, is also challenged in these circumstances, as the behaviour complained of is hardly within the control of the Member State. A similar argument could be made about the actions of regional and local government. In these scenarios, it seems state liability is more about compensating individuals than enforcing EC law. The key point is that the liability—which remains with the state at central government level—is then decoupled from the body actually in breach. From the perspective of the individual claiming compensation, this matters not.

Brasserie de Pecheur also suggested that there may be liability for judicial failures, which was controversial. However, in *Kobler v Austria* (case C-224/01), the ECJ confirmed that such liability may arise in particular circumstances. The case concerned the refusal by the Austrian Administrative Supreme Court (Verwaltungsgerichtshof) to grant Mr Kobler a 'length of service' increment on the basis that the payment would be a loyalty bonus, for which time spent in similar positions in other Member States could not be taken into account. This was a wrong interpretation of EC law and in direct conflict with an earlier ruling by the ECJ *(Schoning-Kougebetopoulou* (case C15/96)), and Mr Kobler therefore brought a new claim under *Francovich* for the failure of the Verwaltungsgerichtshof to apply EC law correctly.

The ECJ stated that, in international law, state liability can arise on the basis of acts by the legislature, executive and judiciary, and that the same must be true of EC law (para 32). In addition, the principle of effectiveness (see 8.3) requires that there must be instances when a state will incur liability for actions by its courts which are in breach of EC law (para 33). However, the ECJ limited this to instances where courts are adjudicating at the last instance (para 33) and emphasised the mandatory jurisdiction of such a court under Article 234 to request a preliminary ruling on the interpretation of EC law (see Chapter 10). In order to ensure the effective protection of individual's rights under Community law, there has to be a possibility of claiming compensation for damage caused by an infringement of these rights by a court adjudicating at last instance (para 36). Such an infringement must be manifest, and it is for the national legal system to designate the courts that would hear such claims. This ruling, it is submitted, follows logically from the basic justification for state liability, and its restrictions to courts of last instance is entirely appropriate because at that point there would be no possibility of an appeal against a ruling which infringes an individual's Community rights. In order to avoid opening the floodgates to claims of state liability or Article 234 references in such circumstances, the ECJ is at pains to emphasise that 'state liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law' (para 53), although this is not limited to intentional fault or serious misconduct by the national court *(Traghetti del Mediterraneo SpA v Italy* (case C-l 73/03)). Whether this will serve as an appropriate brake to such actions remains to be seen.

In coming to its conclusion, the Court had to deal with several fundamental objections. The first was that the principle of *res judicata* (finality of judgments) might be undermined by imposing liability on the state for a serious infringement of EC law. The Court, somewhat optimistically, stated that state liability in such circumstances would not affect the finality of the judgment at issue, especially because the parties to the state liability action would be different, and a finding of liability would not result in a revision of the original decision (para 39). At a technical level, that may be correct, although it cannot be denied that the authority of the ruling in the original case would be undermined. Secondly, there was concern that the independence of the judiciary may be affected, and the authority of the court undermined, by the possibility of a state liability claim. This, too, was given short shrift by the Court, simply denying that there would be 'any particular risk to the independence' of the court concerned (para 42), and that the possibility of a state liability action might be 'regarded as enhancing the quality of a legal system and. . . the authority of the judiciary' (para 43). However, the Court did not expand on this in any detail, and its assertion remains somewhat unconvincing. Finally, there was concern as to whether there would be an appropriate domestic court which might hear a claim for state liability. In this regard, the ECJ referred back to established principles according to which it is for national legal systems to determine the appropriate court to hear such claims. That, however, does not solve the difficulties that may arise in practice. Presumably, a Member State found liable before a domestic court has a right of appeal. In the UK, this might produce the rather strange situation whereby the House of Lords might eventually be called upon to hear a case in state liability based on one of its own judgments. Whilst the basic outcome in *Kbbler* therefore can be defended at a purely logical level, there are many practical difficulties which remain unresolved by this decision. As a final point, it may be noted that in *Kobler* itself, the ECJ thought that the breach by the Austrian Verwaltungsgerichtshof was not sufficiently serious for a claim in state liability to succeed.

9.2.2.3 *Liability only where measure confers rights*

One of the key requirements of liability under *Francovich/Brasserie de Pecheur* is that the rule of law infringed must be intended to confer rights on individuals. Consequently, where a directive in issue does not confer rights on individuals, then there can be no claim under *Francovich.* Thus, in *Peter Paul v Germany* (case C222/02), the failure of the German banking supervisory authority correctly to supervise a bank, which subsequently failed, in accordance with the relevant directive (94/19/EC), did not permit depositors to maintain an action for compensation for lost deposits beyond the maximum threshold of 20,000 provided for in the directive. This was because the obligation to ensure supervision was not combined with an independent right to compensation for the consequences of any failure in that regard, and the individual rights under this directive were limited to a specified amount of compensation (which had been paid already).

9.2.3 Conditions of liability

For liability to arise it is not necessary for the infringement of Community law to have been established by the Court under Article 226 or 234; nor is it necessary to prove fault on the part of the national institution concerned *going beyond that of a sufficiently serious breach of Community law.* In *Brasserie du Pecheur* the Court rephrased the three conditions laid down in *Francovich* and incorporated a requirement that the breach be. sufficiently serious. Condition (b) of *Francovich* (the content of the right infringed must be sufficiently clear) may now be regarded as contained within the definition of 'sufficiently serious'.

The Court based its decision on its past case law, particularly its reasoning in *Francovich:* states are obliged under Articles 249 and 10 to provide effective protection for individuals' Community rights and ensure the full effect of Community law. As regards its own jurisdiction to rule on the matter of states' liability in damages, challenged by the German government, it reasoned that, since the EC Treaty had failed to provide expressly for the consequences of breaches of Community law, it fell to the Court, pursuant to its duty under Article 220 EC (ex 164, post Lisbon Article 19 TEU), to ensure that 'in the interpretation and application of this treaty the law is observed'. The application of the Court's ruling and questions of damages and causation are discussed further below.

Despite the hostility with which this decision was greeted in anti-European quarters, it is submitted that the Court's ruling on the question of, and conditions for, liability is *prima facie* consistent with existing principles and, provided that the multiple test in para 56 of what will constitute a 'sufficiently serious' breach is rigorously applied, strikes a fair balance between the interests of the Community in enforcing Community law and the interests of Member States in restricting liability to culpable breaches of Community law.

9.2.3.1 *Meaning of 'sufficiently serious'*

For liability to arise, the institution concerned must have 'manifestly and gravely exceeded the limits of its discretion': the breach must be 'inexcusable'. If there is to be equality of *responsibility* as between the liability of the Community under Article 28 8(2) EC and Member States under *Francovich*, the criterion of a 'sufficiently serious' breach laid down in *Brasserie du Pecheur* should be interpreted strictly. The question remaining was whether the Court would apply the 'sufficiently serious' test to *all* claims based on *Francovich*, including claims for damage resulting from breaches of Community law which do *not* involve legislative 'choices' analogous to those made by Community institutions when implementing policy. Alternatively it might continue to 'interpret' Member States' actions as involving such choices, as it did, surprisingly, in *Brasserie du Pecheur*. To limit the application of the sufficiently serious test to situations in which Member States are involved in 'legislative choices', by analogy with the position of Community institutions under Article 288(2) (see Chapter 14), as was suggested in *Brasserie du Pecheur*, would be to ignore the essential difference between the position of Member States, when *implementing* Community law, and that of Community institutions when *making* Community law. Since liability depends on the breach by a Member State of a Community obligation, liability should in all cases depend on whether the breach is sufficiently serious. This is reflected in the multiple test laid down in para 56.

Given the lack of clarity of much EC law, and that Member States have no 'choice' to act in breach of Community law, it is submitted that the crucial element in para 56 will often be the clarity and precision of the rule breached, as suggested by Advocate-General Tesauro in *Brasserie du Pecheur*.

This view obtained some support in *R v Her Majesty's Treasury, ex parte British Telecommunications pic* (case C-392/93), a case decided shortly after *Brasserie du Pecheur*. The case, brought by BT, concerned the alleged improper implementation of Council Directive 90/351 on public procurement in the water, energy, transport, and telecommunication sectors ([1990] OJ L297/1). BT, which claimed to have been financially disadvantaged as a result of this wrongful implementation, was claiming damages based on *Francovich*. The Court, appearing to presume that the other conditions for liability were met, focused on the question whether the alleged breach was sufficiently serious. It applied the test of para 56 of *Brasserie du Pecheur*. Although it found that the UK implementing regulations were contrary to the requirements of the directive, it suggested that the relevant provisions of the directive were sufficiently unclear as to render the UK's error excusable. At para 43 of its judgment the Court said that the article in question (Article 8(1)) was:

> imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it [by the ECJ] the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which are not entirely void of substance. The interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the Directive or to the objective pursued by it.

This interpretation was, it is submitted, generous to the UK. The Court held that in the context of the transposition of directives, 'a restrictive approach to state liability is justified' for the same reasons as apply to Community liability in respect of legislative measures, namely:

> that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests. [Para 40.]

The Court adopted a rather different approach in *R v Ministry of Agriculture, Fisheries and Food*, ex parte *Hedley Lomas (Ireland) Ltd* (case C-5/94). This case concerned a claim for damages by an exporter, Hedley Lomas, for losses suffered as a result of a UK ban on the export of live sheep to Spain. The ban was imposed following complaints from animal welfare groups that Spanish slaughterhouses did not comply with the requirements of Council Directive 74/5 77 on the stunning of animals before slaughter ([1974] OJ L3 16/10). The Spanish authorities had implemented the directive, but had made no provision for monitoring compliance or providing sanctions for non-compliance. The UK raised the matter with the Commission, which, following discussion with the Spanish authorities, decided not to take action against Spain under Article 226. Although the UK ban was clearly in breach of Article 29 of the EC Treaty, the UK argued that it was justified on the grounds of the protection of health of animals under Article 30 (for further discussion of the substantive issues see Chapter 20). However, the UK provided no evidence that the directive had in fact been breached, either by particular slaughterhouses or generally.

The Court found that the ban was in breach of Article 29, and was not justified under Article 30. The fact that the Spanish authorities had not provided procedures for monitoring compliance with the directive or penalties for non-compliance was irrelevant. 'Member States must rely on trust in each other to carry out inspections in their respective territories' (para 19). Furthermore, the breach was 'sufficiently serious' to give rise to liability under *Francovich.* The Court suggested (at para 28) that:

where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

This ruling, delivered two months after *R v Her Majesty's Treasury, ex parte British Telecommunications pic,* was surprising. While a finding that the UK would in principle be liable in damages was justified on the facts, the UK having produced no evidence of breach of the directive constituting a threat to animal health to justify the ban under Article 30, the suggestion that a 'mere infringement' of Community law might be sufficient to create liability where the state is not 'called upon to make any legislative choices' or has 'considerably reduced, or no, discretion' is questionable. While a state may have a choice as to the 'form and method of implementation' of directives, and some discretion under the treaty to derogate from basic treaty rules, its discretion is strictly circumscribed, and it has no discretion to act in breach of Community law. The UK had no more legislative discretion in implementing Directive 90/531 in *BT,* indeed possibly less, than it had under Article 30 in *Hedley Lomas.* Indeed, prior to the Court's decision in *Hedley Lomas,* it was thought that a Member State *would* have a discretion to derogate from the prohibition of Article 29 where this was necessary to protect a genuine public interest (see Chapter 20). To pursue the analogy between the Community's liability for 'legislative choices involving choices of economic policy' and Member States' liability under *Francovich,* as the Court has done in all these cases, is to disguise the fact that *the two situations are not similar.* The principal reason for limiting liability under *Francovich* is not because Member States' 'discretion' in implementing Community law must not be fettered, but because the rules of Community law are often not clear. To hold them liable in damages for 'mere infringements' of such rules, thereby introducing a principle akin to strict liability, would not only be politically dangerous, it would be contrary to the principle of legal certainty, itself a respected principle of Community law (for further analysis see Chapter 14).

Nevertheless the principle of liability for a 'mere infringement' of Community law in situations in which Member States are not required to make legislative choices was invoked by the ECJ in *Dillenkofer v Germany* (cases C-178,179,188,189 and 190/94). That case Germany's failure fully to implement Directive 90/314, designed to protect consumers in the event of travel organisers' insolvency, was on all fours with that of the Italian government in *Francovich,* was clearly 'inexcusable', and therefore, as the Court acknowledged, 'sufficiently serious' to warrant liability. Similarly, in *Rechberger and Greindle v Austria* (case C-140/97), concerning the same directive, the ECJ found that the implementing measures set the period for the commencement of claims at a date some months later than the time limit for implementation of the directive, which was 'manifestly' incompatible with the directive, and sufficiently serious to attract liability. In neither *Hedley Lomas* nor *Dillenkofer* did the Court attempt to apply the multiple test laid down in para 56 of *Brasserie du Pecheur.*

However, in *DenkavitInternationalBV v Bundesamt fur Finanzen* (cases C-283, 291 and 292/94), which were cases involving claims for damages resulting from the faulty implementation of a directive decided shortly after *Dillenkofer,* the Court followed its approach in *BT.* On the basis of a strong submission from Advocate-General Jacobs, it applied the criteria of para 56 of *Brasserie du Pecheur* and concluded that, as a result of the lack of clarity and precision of the relevant provisions of the directive, and the lack of clear guidance from the Court's previous case law, Germany's breach of Community law could not be regarded as sufficiently serious to justify liability. Significantly, the Court did not draw a distinction, for the purposes of liability, between acts of Member States involving 'choices of economic policy' and 'mere infringements' of Community law.

In an attempt to rationalise this aspect of state liability, Advocate-General Jacobs in *Sweden v Stockholm Lindopark AB* (case C-1 5 0/99) commented on the origins of the phrase 'sufficiently serious breach'. At para 59 of his opinion, he noted that:

In French, the Court has always used—originally with regard to liability incurred by the Community—the term 'violation suffisamment caracterisee'. This is now normally translated into English as 'sufficiently serious breach'. However, the underlying meaning of 'caracterise', which gives rise to its inherent implication of seriousness, includes the

notion that the breach (or other conduct) has been clearly established in accordance with its legal definition, in other words, that it is a definite, clear-cut breach. This may help to explain why the term was previously translated as 'sufficiently flagrant violation' and may throw additional light on the choice of factors which the Court has indicated should be taken into consideration when deciding whether a breach is 'sufficiently serious'.

On this reasoning, in order to be sufficiently serious, the breach of Community law would have to be definite and clear-cut. Nevertheless, establishing whether a breach is of that nature can be a difficult issue, and the approach by the ECJ to the assessment of the matter of a 'sufficiently serious' breach has not been fully consistent. In *Lindbpark* itself, the Court effectively followed *Hedley Lomas.* Lindopak had not been entitled to deduct VAT on goods and services used for the purposes of its business activities in breach of the sixth VAT directive (91/680/EEC, [1991] OJ L376/1). Sweden had amended its VAT legislation with effect from 1 January 1997, following which Lindopak was entitled to deduct VAT. It claimed for a return of VAT payments made between Sweden's accession to the Community on 1 January 1995 and 1 January 1997. The ECJ observed that the right to deduct VAT was capable of being directly effective. Although the question of Member State liability did not strictly speaking arise, the ECJ was nevertheless prepared to indicate whether Sweden had committed a sufficiently serious breach. It noted that 'given the clear wording of [the directive], the Member State concerned was not in a position to make any legislative choices and had only a considerably reduced, or even no, discretion'. The mere infringement of the directive was therefore enough to create liability.

Although the ECJ has, in some cases, concluded whether a breach was sufficiently serious to give rise to liability, that assessment is properly left to the national courts, with the ECJ only able to provide general guidance (which is correct, in principle, given the nature of the ECJ's jurisdiction under Article 234). Thus, in *Norbrook Laboratories Ltd v Minister of Agriculture, Fisheries and Food* (case C-l 27/95), a case involving a claim for damages for wrongful implementation of EC directives on the authorisation of veterinary products, the ECJ, following an extensive examination of the provisions of the directive allegedly breached, which revealed a number of clear breaches, invoked the *Hedley Lomas/Dillenkofer* mantra:

Where ... the Member State was not called upon to make legislative choices, and had considerably reduced, if no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

The ECJ then left it to the national court to assess whether the conditions for the award of damages were fulfilled. Similarly, in *Klaus Konle v Austria* (case C-302/97), in a claim for damages for losses suffered as a result of laws of the Tyrol governing land transactions, allegedly contrary to Article 46 EC (ex 56) post Lisbon Article 52 TEFU and Article 70 of the Act of Accession, the Court examined these provisions for their compatibility with Community law. and finding some (but not all) of the laws to be 'precluded' by Community law, left it to the national court 'to apply the criteria to establish the liability of Member States for damage caused to individuals by breaches of Community law in accordance with the guidelines laid down by the Court of Justice' (see also *Haim v KLV*(case C-424/97)). If national courts are to assess this crucial question of the seriousness of the breach, it is essential that these guidelines are clear. The multiple criteria laid down in para 56 of *Brasserie du Pecheur* are clear and comprehensive. The *Hedley Lomas* requirement, that in some circumstances a 'mere infringement' of Community law will suffice to establish liability, clouds the issue. It is submitted that if it is to be invoked, it will be applicable only *following* an examination of the Community law allegedly breached under the multiple test in para 56; for only then will the issue of whether the state has any 'discretion' in the exercise of its legislative powers be resolved. If the aim, and the substance, of the Community obligation allegedly infringed is 'manifest', the state will have no discretion to act in its breach. If it is not, the breach will not be sufficiently serious. The *Hedley Lomas* mantra is, it is submitted, superfluous. Nevertheless, it was invoked in *Haim vKLV* alongside the multiple test of para 56 and has been referred to since, though in cases in which the ECJ seems to suggest that the clarity and precision of the rule are key *(The Queen, on the application of: Synthon BVv Licensing Authority of the Department ofHealth* (case C-452/06), para 39).

One factor which may assist the national court is the rulings by the ECJ on the interpretation of the measure in issue. Indeed, it seems that even if there is some ambiguity in the text of the relevant measure, the *ex parte BT* approach will not be followed where the ECJ has interpreted a particular provision of Community law and a Member State has subsequently failed to apply that provision in accordance with the ECJ's interpretation *{Gervais Larsy v Lnstitut national d'assurances sociales pour travail-leurs independants (Inasti)* (case C-l 18/00)).

In that case, it can no longer be said that the Member State has a legislative choice. However, where the exact position only emerges gradually through several rulings by the Court, the national court can take this into account when considering the clarity of the rule in question and whether any errors of law were excusable or inexcusable *(Test Claimants in the FTI Group Litigation v Commissioners ofInland Revenue* (case C-446/04)). By way of contrast, see *Robins v SoSfor Work and Pensions* (case C-278/05), where the ECJ held that the UK had incorrectly implemented Article 8 of Directive 80/987/EEC on protecting employees in the event of insolvency of their employer by not ensuring that a sufficient proportion of expected pension benefits were protected. The UK's liability turned on the interpretation of 'protect' in Article 8, and as its meaning had been unclear prior to the interpretation given in this case, it seemed unlikely that the UK's breach would be sufficiently serious, although it was for the national court to come to a final decision.

9.2.3.2 *The claimant must prove that damage has been suffered*

It is also important that the claimant is able to establish that he has suffered loss or damage. In *Schmidberger v Austria* (case C-l 12/00), Austria had allowed a public protest to take place on the main motorway across the Alps which closed the motorway for 28 hours. Schmidberger claimed damages for delay to his business of transporting goods from Germany to Italy on the basis that this amounted to a breach of Articles 28-30 EC (post Lisbon Articles 34-36 TFEU) (see Chapter 19). Advocate-General Jacobs noted that it was necessary for the claimant to establish loss or damage which is attributable, by a direct causal link, to a sufficiently serious breach of Community law. Importantly, this included a right to claim for lost profit. However, if the claimant is unable to establish the existence of any loss or damage, then there cannot be a claim for state liability. The Advocate-General was willing to accept that it may not be possible to quantify exactly the loss suffered, in which case this may be calculated on an appropriate flat-rate basis. On the facts, the Advocate-General thought that the breach of Articles 28-30 in that case was not sufficiently serious. Austria had authorised a 28-hour demonstration which blocked the main transit route across the Alps, which was technically a breach of Articles 28-30, but this had to be balanced against the freedom of expression of the demonstrators (see further Chapter 6). This and the short duration of the disruption would not be a sufficiently serious breach of Community law. The ECJ, having decided that there was no breach of Articles 28-30, did not address the question of state liability in its judgment. As far as the requirement that damage be proven is concerned, it is submitted that the reasoning of this Advocate-General is sound.

9.2.3.3 *The damage must have been caused by the breach*

It is also necessary that the claimant can demonstrate that any damage suffered was caused by the Member State's breach of EU law. In *Brinkmann Tabakfabriken GmbH v Skatteministeriet* (case C-3 19/96), a case along the more moderate line in *BT* (case C-392/93), the Court found that the Danish authorities' failure properly to implement Directive 79/3 0 on taxes other than turnover taxes affecting the consumption of manufactured tobacco was not sufficiently serious to incur liability. The classification adopted by the authorities, which resulted in the applicant having to pay the higher rates of taxes, was not 'manifestly contrary' to the wording and aim of the directive. It was not clear from the directive whether the tobacco rolls imported by the applicant, which had to be wrapped in paper to be smoked, constituted 'cigarette tobacco' or 'cigarettes'. Significantly, both the Commission and the Finnish government supported the classification adopted by the Danish authorities. The question of liability turned on the question of causation. The directive in question had not been implemented in Denmark by legislative decree, although the authorities had given immediate (albeit imperfect) effect to its provisions. There was no direct causal link between that former (legislative) failure and the damage suffered by the applicant. It is implicit in the decisions that, contrary to the view of some commentators, provided that the requirements of a directive are complied with in practice, a failure to implement a directive by legislative means will not necessarily constitute a sufficiently serious breach to warrant liability.

9.2.4 *Brasserie du Pecheur* in the English courts

In 1997 the ECJ's ruling in *Brasserie du Pecheur* and *R v Secretary ofStatefor Transport, exparte Factortame Ltd* (cases C-46 and 48/93) was applied in the English High Court with a view to ascertaining whether the UK's action in introducing the Merchant Shipping Act 1988 in fact constituted a sufficiently serious breach of Community law *{R v Secretary ofStatefor Transport, exparte Factortame Ltd (No 5)* [1998] 1 CMLR 1353). Hobhouse LJ considered the ECJ's case law on state liability and concluded that whether or not a Member State's action involved the exercise of discretion (ie, 'legislative choices') the same test, requiring proof of a sufficiently serious breach of Community law, applied. That test, requiring a 'manifest and grave disregard of whatever discretion

the Member State might possess', was based on the same principles as applied to Community liability under Article 288(2), and was a relatively difficult one to meet. Having reasoned impeccably thus far he concluded that the UK's breach as regards the Merchant Shipping Act 1988 was sufficiently serious to warrant liability and referred the case back to the Divisional Court to decide the question of causation. Two factors in particular were cited by Hobhouse L as rendering the breach of Community law (Article 43 (ex 52) EC) sufficiently serious:

(a) The UK had introduced the measures in question in primary legislation in order to ensure that the implementation would not be delayed by legal challenge (at the time it was thought that primary legislation could not be challenged, but see now *R v Secretary of State for Transport, exparte Factortame Ltd* (case C-213/89), noted in Chapter 4).

(b) The Commission had from the start been opposed to the legislation on the grounds that it was (in its opinion) contrary to Community law.

Both the Court of Appeal and the House of Lords agreed with Hobhouse L that the UK's breach of Community law was sufficiently serious to warrant liability. Both courts applied the multiple test laid down in para 56 of *Brasserie du Pecheur* (cases C-46 and 48/93) (although they suggested that the list was 'not exhaustive') and found that the balance tipped in favour of the respondents. In pressing ahead with its legislation, against the advice of the Commission, despite its clear adverse impact on the respondents, and in a form (statute) which it was thought could not be challenged, the UK Government was clearly taking a 'calculated risk'. Lord Slynn did, however, express the opinion, contrary to the view of Hobhouse L and the Court of Appeal, that the considered views of the Commission, although of importance, could not be regarded as conclusive proof as to:

(a) whether there had been a breach of Community law

(b) whether the breach (if any) was sufficiently serious to justify an award of damages.

Lords Hoffmann and Clyde expressed a similar view; the position taken by the Commission was 'a relevant factor to be taken into account' in deciding whether a breach was sufficiently serious, but it was not conclusive.

Following the House of Lords' decision in *Factortame,* Sullivan in the English High Court, in assessing the seriousness of the Department of Social Security's breach of Article 7(1) of the Sex Discrimination Directive 79/7 in *R v Department of Social Security, ex parte Scullion* ([1999] 3 CMLR 798), also applied the multiple test of para 56 of *Brasserie du Pecheur,* which he described as the 'global' or 'basket' approach, and decided that, since there the scope of Article 7(1) was not clear at the relevant time, and there was no evidence that the Department had sought legal advice on the matter either from the Commission or from its own legal advisers, the breach was sufficiently serious.

9.2.5 Relationship of the principle of state liability with direct effect

The principle of state liability is an important complement to the principles of direct and indirect effect, particularly in the context of enforcement of directives. Of course, liability under the principles of both direct and indirect effect has been strict (this was confirmed in *Draehmpaehl v Urania Immobilienservice OHG* (case C-1 80/9 5)); there has been no need to consider whether the alleged breach of Community law is 'sufficiently serious'. For direct effects, the criteria have in the past been loosely applied; sometimes, in the case of indirect effects (and sometimes in the case of direct effects), they have not been applied at all. On the other hand, national courts' reluctance to apply these principles in some cases (eg, *Duke v GEC Reliance Ltd; Rolls-Royce pic v Doughty)* appears to have stemmed in part from the perceived injustice of imposing liability, retrospectively, on parties, public or private, when the precise nature of their obligations under Community law at the relevant time was not clear. The existence of a remedy under *Francovich* effectively completes the picture of ensuring the effective protection of individual rights under EU law. A good example is *Francovich* itself, following the ECJ's denial of the direct effects of the relevant provisions of Directive 80/987.

One question that arises is whether state liability can be used in preference to direct effect and indirect effect, or whether it can only be used if neither of these two mechanisms are available. In many decisions (eg, *Faccini Don),* the ECJ has pointed out a gap in protection— in particular due to the fact that directives do not have horizontal effect—can be remedied through the use of state liability. The doctrine on this view has a fallback role. In *Brasserie du Pecheur* the ECJ viewed state liability in a slightly different light, seeing it as a corollary of direct effect (para 22). Nonetheless, the preferred approach seems to see state liability as the approach of last resort. It was suggested in *Lindopark* that a damages claim is unnecessary where the applicant can obtain relief

by instituting an alternative course of action set down in national law. Some commentators have suggested that *Bonifaci v FNPS* (case C-94 and 95/95) implies it is possible to make admissibility of such proceedings dependent on the exhaustion of other domestic remedies which offer full reinstatement of rights. None of this however requires such an approach before an action in state liability may be brought.

9.2.6 State liability and the other pillars

The original judgment in *Francovich* refers to remedies for a breach of Community law. Does this mean that the remedy is not available for a failure to comply with Union law under the JHA and CFSP pillars? Member States certainly sought to exclude direct effect (but not other doctrines such as indirect effect and state liability), and the ECJ's jurisdiction is limited in both these pillars. Nonetheless, as we have seen in Chapter 5, the boundary between the pillars is porous and, in *Pupino* (case C-105/03), the ECJ held that the duty of cooperation which gave rise to the doctrine of indirect effect applied to Union law just as much as to Community law. This is a significant judgment. Of particular importance here is the fact that the doctrine of state liability is likewise based on Article 10 EC, which could imply that state liability—like indirect effects—applies to Union law. This is a contentious issue, but the removal of the pillar structure, should the Lisbon Treaty come into force, would reinforce this argument. For the time being, the question remains open.

9.2.7 Classifying state liability in national law

The principle of state liability remains a hybrid, part national, part Community law, with national courts ultimately responsible for applying the conditions to a particular case. This has created problems for national courts. Prior to *Brasserie du Pecheur* it was assumed, following *Francovich*, that a claim for damages against the state must be brought on the same basis, and according to the same rules, as the 'equivalent' claim based on national law.

However, regrettably, as noted above, the rules governing state liability laid down in *Brasserie du Pecheur* were not comprehensive. It was left to national courts to decide, according to the principles applicable to equivalent claims based on national law, whether the Community law breached was intended to benefit persons such as the applicant (condition (a)); whether there existed the appropriate direct causal link between the state's breach and the applicant's damage (condition (c), which was raised, but not decided, in *Schmidberger* (case C-l 12/00)); and whether the damage suffered was of a kind in respect of which damages might be awarded.

Although a principle of state liability for executive acts, and judicial remedies in respect of such acts, already exists in all Member States, these claims will now also be subject to the rules laid down in *Brasserie du Pecheur.* As with legislative acts, existing national remedies may need to be modified to ensure that they are effective in protecting individuals' rights; alternatively (and preferably) claims may be brought under a new *Francovich* tort.

A principle of liability for judicial acts in breach of Community law, as laid down in *Brasserie du Pecheur,* clearly breaks new constitutional ground in most if not all Member States. If available in theory, it is unlikely to be applied freely in practice. If only for reasons of polity, neither the ECJ nor a national court is likely to find a judicial breach of Community law sufficiently serious to warrant liability.

There is a degree of freedom for the Member States to specify the circumstances in which Member State liability may arise, provided that these are not stricter than those laid down in Community law. Thus, in *Traghetti del Mediterraneo SpA v Italy* (case C-l73/03), Italian legislation excluded state liability for judicial functions involving the interpretation of legal provisions or the assessment of facts and evidence. Following on from its ruling in *Kbbler* (case C-224/01), the Court observed that whilst the interpretation of the law is part of the essence of judicial activity, it is possible that a manifest breach of Community law might occur during the process of interpretation (paragraph 35). Consequently, excluding liability for damages caused by interpretation of law or assessment of facts is incompatible with national law, as is a limitation of liability to instances of intentional fault or serious misconduct by the national court, especially where this would narrow the criteria laid down in *Kobler.* In *AGM-COS MET Sri v Suomen Valtio and Tarmo Lehtinen* (case C-470/03), the Court held that national law may lay down specific conditions, provided that they do not make it impossible or excessively difficult in practice to obtain compensation caused by a Member State's breach of Community law. The Finnish limitation to damage caused by a criminal offence, the exercise of public authority, or on the basis that there are other especially serious reasons for awarding compensation were too restrictive because there may be conduct otherwise giving rise to liability not covered by these factors.

9.3 Conclusions

The principle of state liability provides individuals with a strong tool before their national courts to secure the enforcement of their rights under Community law. Although controversial, the decision in *Kobler v Austria* strengthens this further.

However, as the case law on state liability has shown, *Francovich* is not a universal panacea. To succeed in a claim for damages the applicant must establish that the law infringed was intended to confer rights on individuals and that the breach is sufficiently serious (as well as the requisite damage and causation). In cases of non-implementation of directives, as in *Francovich* or *Dillenkofer,* where there is no doubt about the nature of the Community obligation, the breach is likely to be sufficiently serious. However, where the Community obligation allegedly breached is less clear, the breach may well be found to be excusable. This then is a limitation on the ability of the doctrine to provide an effective remedy—or an effective enforcement mechanism—in every circumstance. Nonetheless, the introduction of state liability was a significant moment in the jurisprudence of the ECJ as it undermined the principle found in the legal systems of many Member States: that the state would not be liable for legislative (in)action. At a systemic level, the introduction of the doctrine emphasises that in the field of Community (if not Union) law, Member States play a subordinate role. It is surprising perhaps, that the doctrine has been so well accepted in the legal systems of the Member States.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 10: The Preliminary Rulings Procedure

10.1 Introduction

The European legal system has several enforcement mechanisms. The most obvious is the possibility for the Commission or Member States to begin actions against Member States for breaching the EC Treaty^ As we have seen however (and will see again in Part III), the role of individuals in the enforcement and development of EC law has been vital. This has been possible through private actions begun in the national courts where private litigants assert their directly effective rights derived from EC law against the state or, in some cases, other private persons. In practice this private enforcement has been critical to the success of the European legal order. Given the need to accord EC law priority, it is perhaps surprising, that the system created by the EC Treaty was not, however, one based upon an appellate structure whereby cases begun in national courts could be appealed to the European Court of Justice (ECJ) for final disposal. Rather the system is one of reference whereby national courts conduct the proceedings throughout but may (and sometimes must) ask the ECJ for its view on the interpretation pf any point of EC law relevant to the case before the national court. The national court is described as making a 'reference' to the ECJ to obtain a 'preliminary ruling'. After the ECJ has given its view on the point of EC law, the case is finally resolved by the national court in light of the legal opinion received. The ECJ does not have the power to make final orders or enforce its judgments in the Member States national legal systems. As a result, the willingness of the national courts to refer cases to the ECJ and follow its interpretations of the EC law in good faith has been critical to the whole evolution of the European legal system.

This chapter seeks to consider the relationship between the national courts and the ECJ in the context of preliminary rulings. In particular we consider the following key issues:

the relative importance of the Article 234 preliminary reference procedure to the development of EC law and European integration, and the role of individuals in that process;

the extent to which the national courts are willing and able to gain access to the ECJ in order to resolve questions of EC law before them;

how far the Article 234 system has ensured that EC law is interpreted uniformly throughout the Member States;

the nature of the relationship between the national courts and the ECJ, and whether that remains one of cooperation between equal partners or whether it has evolved into something more hierarchical, with the ECJ effectively acting as a supreme court for the Union; the extent to which the Article 234 procedures adequately protect fundamental rights and give effective remedies to private litigants; and

the problems raised by the special procedures laid down in the amended treaties which restrict references from national courts to the (ECJ in cases involving justice and home affairs.

10.2 The text of Article 234 and an overview of the procedure

Article 234 EC (EX 177) provides that:

(1) The Court of Justice shall have jurisdiction to give preliminary rulings concerning: the interpretation of this Treaty;

the validity and interpretation of acts of the institutions of the Community;

the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Lisbon makes some textual changes and renumbers the provision Article 267 TFEU

10.2.1 The historical importance of the Article 234 procedure

It is not clear that the framers of the EC Treaty realised the full significance that the Article 234 procedure, linking national courts to the ECJ, would come to have on the development of EC law. The text is fairly humble, suggesting that the ECJ might be called upon to adjudicate to avoid conflicting interpretations of EC law by the national courts. Thus its original purpose was to ensure, by authoritative rulings on the interpretation and validity of EC law, the correct and uniform application of EC law by the courts of Member States. By contrast, it is likely that the framers saw enforcement action by the Commission in cases brought directly before the ECJ (under Article 226 EC; post Lisbon, Article 258 TFEU) as the key to the effectiveness of Community law. The role of citizens and legal persons as enforcers was less obvious. In its early case law however the ECJ suggested that the possibility of individuals bringing cases to it through the national court reference procedure under Article 234 indicated that the treaty was more than simply an 'ordinary' international agreement between states. Citizens too could use Article 234 to gain access to the ECJ and this was one factor that inspired the development of the doctrines of direct effect and supremacy in *Van Gend en Loos* (case 26/62), *Costa vENEL* (case 6/64) (see Chapter 5). The ECJ jurisprudence giving powerful rights to individuals has in turn encouraged more litigation and thus more Article 234 references to be made.

10.2.1.1 *Impact on claimant*

The reference procedure has thus been very valuable to the individual, since it has provided him or her with the primary means of access to the ECJ to challenge Member State actions alleged to breach EC law. It will be recalled that there is no possibility for individuals themselves to begin enforcement action against a Member State under Article 226 EC Treaty. This is reserved to the Commission. In this way the individual has been able indirectly to challenge action by Member States (eg, *Van Gend en Loos).* Similarly, individuals have found it difficult to begin direct actions before the ECJ under Article 230 against the acts and legislation of Community institutions under because of the restrictive rules on standing (see Chapter 12). By bringing a case in the national courts to challenge domestic measures implementing EC law a reference can be made to the ECJ which can rule that the Community legislation is invalid. Using this 'indirect' action, the individual can then obtain an appropriate remedy from his national court, following the decision by the ECJ to declare a Community measure null and void (see Chapter 6 and, eg, *Royal Scholten-Honig*—EC regulation invalid for breach of principle of equality).

10.2.1.2 *Impact on development of Community law*

The importance of the Article 234 procedure has been greatly increased by the development by the ECJ of the concept of direct effects. Where originally only 'directly applicable' regulations might have been expected to be invoked before national courts, these courts may now be required to apply treaty articles, decisions, and even directives. Even where EC law is not directly effective it may be invoked before national courts on the principles of indirect effects or state liability under *Francovich.* As a result, national courts now play a major role in the enforcement of EC law. As we will see, the cooperative relationship between the ECJ and the national courts has been a key factor in the success of the preliminary-rulings procedure. The ECJ has also used the preliminary rulings to pronounce many new legal doctrines vital for the substantive development of EC law. A glance through the preceding chapters of this book will reveal that the majority of cases cited, and almost all the major principles established by the ECJ, were decided in the context of a reference to that court for a preliminary ruling under Article 234.

Cases such as *Van Gend en Loos* (case 26/62), *Costa v ENEL* (case 6/64) and *Defrenne v Sabena (No 2)* (case 43/7 5), concerned with questions of interpretation of EC law, enabled the ECJ to develop the crucial concepts of direct effects and the supremacy of EC law. *Internationale Handelsgesellschaft mbH* (rase 11/70); *Stauder v City ofUlm* (case 29/69) and *Royal Scholten-Honig (Holdings) Ltd* (cases 103 and 145/77) (see Chapter 6), which raised questions of the validity of EC law, led the way to the incorporation of general principles of law into EC law. The principle of state liability in damages was laid down in *Francovich* (cases C-6 and 9/90) in preliminary ruling proceedings. In all areas of EU law, the Article 234 procedure has played a major role in developing the substantive law. The procedure accounts for over 50 per cent of all cases heard by the ECJ. This percentage has of course increased as the Court of First Instance (CFI) has taken over responsibility for judicial review actions (Chapters 12 and 13) and actions for damages (Chapter 14). Nonetheless, the preliminary rulings procedure plays a central part in the development and enforcement of European law

10.2.2 Nature of the preliminary rulings procedure

The preliminary-rulings procedure is not an appeals procedure. An appeals procedure implies a hierarchy between the different types of court, some courts being higher and having more authority than those lower down the judicial architecture. Typically, appeal courts can overrule the decisions of lower courts. The decision whether or not to appeal lies, in the first place, in the hands of the parties, although in some instances leave to appeal from certain courts is required. In contrast, the preliminary-rulings procedure merely provides a means whereby national courts, when questions of EC law arise, may apply to the ECJ for a preliminary ruling on matters of interpretation or validity prior to themselves applying the law. In principle, it is a matter for the national courts to decide whether or not to make a reference. It is an example of shared jurisdiction, depending for its success on mutual cooperation. As Advocate-General Lagrange said in *De Geus en Uitdenbogerdv Robert Bosch GmbH* (case 13/6 1), the first case to reach the ECJ on an application under the preliminary-rulings procedure:

Applied judiciously—one is tempted to say loyally—the provisions of Article 177 [now 234] must lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the Communities with mutual regard for their respective jurisdiction.

We shall consider how far the ECJ has attempted to go beyond this view and impose itself on the national courts in ways that may have departed from the original text and purpose of the treaty.

10.3.1 The generous approach of the EC to Article 234 references

We have noted above that the ECJ has relied heavily upon Article 234 references to develop the jurisprudence of EC law. It has adopted a purposive approach in its rulings on the meaning of EC law aiming to strengthen the effectiveness of EC law and build the single market. Article 234 has thus been crucial to the ECJ securing its own vision of European law. For this reason we can see that, for a long time, the ECJ adopted an open-door approach to national courts and tribunals seeking to refer questions to it. Certainly until fairly recently, the ECJ encouraged wide use of preliminary rulings in order to both secure uniformity of EC law throughout Member States but seemingly also to have more opportunity to develop new principles giving greater rights to individuals. As a result, the ECJ has followed a generous approach to the interpretation of Article 234 whenever parties or Member States sought to prevent a reference from being ruled upon by the court, by arguing that the reference was in some way inadmissible. This can be seen by the ECJ's willingness to accept reference from a wide range of bodies (see 10.3.1 and 10.3.2 below) but also by its lack of formality and flexibility in giving rulings on references from national courts in as many situations as possible (see 10.3.6 below).

We can however detect some changes in the outlook of the ECJ over time. One concern is that the ECJ has become overloaded with cases. This has caused delay, extra cost, and uncertainty for parties and the EC legal system overall. Consequently the ECJ has adopted certain decisions to limit the number of cases brought before it. Here, we can see the ECJ is becoming more like a superior court for Europe in that it wishes to be more than a passive recipient of whatever national courts send it. The ECJ has developed jurisprudence aimed at controlling the types of cases it will hear and a doctrine similar to precedent. Thus whilst the early period of the reference procedure saw the ECJ largely allow any reference to proceed to a hearing with a full preliminary ruling being given, this has changed overtime. The relationship between the ECJ and national courts has shifted to some extent from one of cooperation amongst equal partners towards a hierarchy with the ECJ attempting to position itself at the apex of the European legal system. This is, however, always subject to the important reality that the ECJ has no means of ensuring that national courts actually follow its rulings or make references when required to do so under Article 234 (but see *Kobler* (case C-244/01) 10.5.3).

10.3.1 What is a 'court or tribunal'?

Jurisdiction to refer to the ECJ under Article 234 is conferred on 'any court or tribunal'. With rare exceptions (eg, *Nordsee Deutsche Hochseefischerei GmbH* (case 102/81) to be discussed below; *Corbiau* v *Administration des Contributions* (case C-24/92) (a fiscal authority is not a court or tribunal); *Victoria Film A/S v Riksskattenverkert* (case C-134/97) (a court exercising its administrative duties is not a court or tribunal)) this has been interpreted in the widest sense. Whether a particular body qualifies as a court or tribunal within Article 234 is a matter of *Community* law. National-law classifications are not determinative. Arguably, this facilitates equality of access across the Union. A broad interpretation reduces the risk of rulings which are inconsistent with EC law coming into being.

The ECJ is generally accepted as having set down a number of criteria by which a 'court or tribunal' might be identified. The early case law identified five criteria:

statutory origin

permanence

inter partes procedure

compulsory jurisdiction

the application of rules of law

(See also *Dorsch Consult v Bundesbaugesellschaft Berlin* (case C-54/96), para 23).

Subsequent decisions, such as *Preto di Salo vPersons Unknown* (case 14/86), made it clear than the independence of the body would also be a factor.In *Broekmeulen* (case 246/80) the Court was faced with a reference from the appeal committee of the Dutch professional medical body. One of the questions referred was whether the appeal committee was a 'court or tribunal' within what is now Article 234. The Court held that it was:

in the practical absence of an effective means of redress before the ordinary courts, in a matter concerning the application of Community law, the appeal committee, which performs its duties with the approval of the public authorities and operates with their assistance, and whose decisions are accepted following contentious proceedings and are in fact recognised as final; must be deemed to be a court of a Member State for the purpose of Article 177 [now 234].

It was held that it was imperative, to ensure the proper functioning of Community law, that the ECJ should have the opportunity of ruling on issues of interpretation and validity raised before such a body. More recently, the ECJ has held that a person appointed to hear appeals against home affairs ministry decisions in immigration cases, an Immigration Adjudicator, could make a reference *(El-Yassini v Secretary of Statefor the Home Department* (case C-4 16/96)). In this case, the office of Immigration Adjudicator was a permanent office, established by statute which gives the officer in question the power to hear and determine disputes in accordance with rules set down by statute. The ECJ further agreed with the Advocate-General, who had emphasised the *inter partes* nature of the procedure (para 20) and the fact that the adjudicators are required to give reasons for their decisions.

The ECJ has since been criticised by the Advocate-General in *de Coster* (case C-17/00) for an approach to the interpretation of a 'court or tribunal' that is confused, especially as regards the criteria of whether the body is established by law, the independent nature of the body and the need for *inter partes* procedure, as well as the requirement that the body's decision be of a judicial nature. Although in cases such as *Criminal Proceedings against X*(cases C-74 and 129/95), in which the ECJ declared it did not have jurisdiction because the prosecutor making the reference was not independent, and *Dorsch Consult* (case C-54/96), in which the Court emphasised the need for the referring body to carry out its responsibilities 'independently' (para 35), in other instances, such as *El-Yassini*, the ECJ has not stringently assessed the requirement of independence. Another such example is *Gabalfrisa v AEAT* (cases C-l 10-47/98). There the ECJ held that the Spanish Economic-Administrative Courts, which do not form part of the judiciary but are part of the Ministry of Economic Affairs and Finance, fell within Article 234. The ECJ accepted that the separation of functions between the departments of the Ministry responsible for tax collection and the Economic-Administrative Courts, which ruled on complaints lodged against the collection departments, was sufficient to ensure independence, despite the Opinion of Advocate-General Saggio in that case to the contrary.

In *de Coster,* the Court, contrary to the view of the Advocate-General, accepted the reference. It noted that the body in question was 'a permanent body, established by law, that it gives legal rulings and that the jurisdiction thereby invested in it concerning local tax proceedings is compulsory' (para 12). In the subsequent *Schmid* case (case C-5 16/99), however, the ECJ went to great lengths to distinguish the Fifth Appeal Chamber for the Regional Finance Authority, the referring body in *Schmid,* from the bodies found to fall within the definition of a 'court or tribunal' in *Dorsch Consult* and *Gabalfrisa,* which the Advocate-General in *de Coster* had criticised. Like the bodies in those cases, the appeal chamber was linked in organisational terms to the body whose decisions it reviewed. The ECJ held that the appeal chamber was not independent. In *Synetairismos Farmakopoion Aitolias* & *Akamanias* v *GlaxoSmithKlinepic* (Case C-5 3/03), the ECJ held that the Greek

competition tribunal was subject to control by the relevant government department and therefore not sufficiently independent to be regarded as a 'court or tribunal' for the purposes of Article 234. Whether these cases indicate that the ECJ has taken the comments of the Advocate-General in *de Coster* into account, or rather reflects the fact that some administrative bodies simply cannot be seen as independent is debatable.

Moreover, the ECJ has sometimes emphasised the importance of the *inter partes* nature of proceedings (see, eg, *El Yassini* (case C-4 16/96)), although there have been cases, such as *Dorsch Consult* which concerned undefended proceedings, where this criterion has seemed less central to the determination of the question as to whether a body constitutes a 'court or tribunal'. In a more recent case, *Roda Golf and Beach Resort* (C-l 4/08) Advocate-General Ruiz Jarabo Colomer gave an opinion allowing a reference from a court where proceedings had not yet commenced and a single party was seeking to require the court to effect service a notice cancelling a contract on counterparties to the contract. He sought to argue that the *inter partes* rule should not be rigidly applied and it is suggested that this is right. Where there is a genuine issue of EC law that affects legal rights or remedies then a reference should be possible even in the absence of *inter partes* proceedings being on foot.

10.3.2 Can arbitrators be a 'court or tribunal'?

The position of arbitrators has always given rise to problems in this context. The Court took a narrow view of a 'court or tribunal' in the early case of *Nordsee Deutsche Hochseefischerei GmbH* (case 102/81). The case arose from a joint shipbuilding project which involved the pooling of EC aid. The parties agreed that in the event of a dispute they would refer their differences to an independent arbitrator. Their agreement excluded the possibility of recourse to the ordinary courts. They fell into disagreement and a number of questions involving the interpretation of certain EC regulations were raised before the arbitrator. He sought a ruling from the ECJ as to, inter alia, whether he was a 'court or tribunal' within the meaning of Article 234. The Court held that he was not. According to the Court, the key issue was the nature of the arbitration. Here the public authorities of Member States were not involved in the decision to opt for arbitration, nor were they called upon to intervene automatically before the arbitrator. If questions of Community law were raised before such a body, the ordinary courts might be called upon to give them assistance, or to review the decision; it would be for *them* to refer questions of interpretation or validity of Community law to the ECJ.

The Court's decision in *Nordsee* ignored the fact that in this case recourse to the courts was excluded, and the arbitrator was thus required to interpret a difficult point of Community law, of central importance in the proceedings, unaided. Since in *Nordsee Deutsche Hochseefischerei GmbH* there was no effective means of redress before the ordinary courts and the decisions of the arbitrator were accepted following contentious proceedings and recognised as final it seems that the only factor distinguishing it from *Broekmeulen* was the element of *public* participation or control. This, it seems, will be essential. Certainly, in subsequent cases, such as *Danfoss* (case 109/88), the ECJ has focused on the compulsory nature of an arbitrator's jurisdiction, by contrast to the position in *Nordsee,* when the parties agreed to refer their dispute to arbitration.

The position was confirmed in *Denuit v Transorient* (C-l 25/04) involving a dispute under the Package Travel Directive (90/3 14/EEC) before the arbitration panel of the Belgian Travel Dispute Committee. Having confirmed its case law, the ECJ rejected the reference on the basis that the panel was not a 'court or tribunal', because the parties were 'under no obligation, in law or in fact, to refer their disputes to arbitration' (at para 16). No regard was had to the fact that, in a consumer situation,arbitration may be the only formal procedure which may practically be available to a consumer because of the comparatively high cost of court action; a matter which surprises in view of the increasing emphasis on out-of-court procedures in consumer cases.

10.3.3 'Court or tribunal': Evaluation

In general, the ECJ's approach to the definition of 'court or tribunal' for the purposes of Article 234 has been generous. This approach would seem to have been driven by the need to ensure correct and uniform interpretation of the treaty. One might argue that access to justice from the perspective of the parties would also argue in favour of such a broad definition, especially when the referring body did not meet the criterion of independence. Against this, however, a number of other factors should be weighed. One of the significant problems in the current jurisprudence is a lack of certainty as to where the ECJ will draw the line between a 'court or tribunal' for the purposes of the EC Treaty and other bodies. The current approach, which (usually) takes a broad view of the bodies permitted to refer, means that the ECJ receives more references. An approach which encourages references was understandable during the early years of the Community when both the substantive law and the

relationship between the ECJ and national courts needed to be consolidated, but what of the position now? It has been suggested that although there is much to be said for encouraging national courts, now more experienced in the application of EC law, to decide matters for themselves, there is no justification for a position whereby access to the ECJ is totally excluded. The Advocate-General in *de Coster,* however, commented that '[o]ne well thought out and well-founded decision resolves more problems that a large number of hasty judgments which do not go deeply into the reasoning and do not address the questions submitted to them'. Essentially, it seems that the ECJ is a victim of its own success, with longer delays in dealing with references, delays themselves that do not assist in the proper administration of justice. The Advocate-General suggested that the ECJ should tighten its definition of 'court or tribunal', with the likely consequence that the relationship between the national courts and the ECJ would change. The national courts from this perspective would need to take greater responsibility for Community law.

10.3.4 The question must be a matter of Community law

The Court is only empowered to give rulings on matters of Community law (and, as noted below, limited aspects of the second pillar on justice and home affairs (JHA)). It has no jurisdiction to interpret domestic law, nor to pass judgment on the compatibility of domestic law with EC law. The Court has frequently been asked such questions (eg, *Van Gend en Loos* (case 26/62); *Costa v ENEL* (case 6/64); *Netherlands v Ten Kate Holding BV*(case C-5 11/03)), since it is often the central problem before the national court. But as the Court said in *Costa v ENEL:*

a decision should be given by the Court not uppn the validity of an Italian law in relation to the Treaty, but only upon the interpretation of the above-mentioned [Treaty] Articles in the context of the points of law stated by the Giudice Conciliatore.

Where the Court is asked to rule on such a matter it will merely reformulate the question and return an abstract interpretation on the point of EC law involved. This respects the division of competences laid down in the treaty and avoids the ECJ becoming involved in national law issues over which it has no jurisdiction.

The Court's role is one of interpretation of EC law not application to the facts

The Court maintains a dividing line in principle between interpretation and application. It has no jurisdiction to rule on the application of Community law by national courts. However, since the application of Community law often raises problems for national courts, the Court, in its concern to provide national courts with 'practical' or 'worthwhile' rulings, will sometimes, when interpreting Community law, also offer unequivocal guidance as to its application (see eg, *Stoke-on-Trent City Council v B&Q* (case C-l69/9 1); *R v Her Majesty's Treasury, exparte British Telecommunications pic* (case C-392/93); *Arsenal Football Club v Reed* (case C-206/01)).

The Court must not interfere with the matters within national court discretionThe Court maintains a strict policy of non-interference over matters of what to refer, when to refer, and how to refer. Such matters are left entirely to the discretion of the national judge. As the Court said in *De Geus en Uitdenbogerd v Robert Bosch GmbH* (case 13/61), its jurisdiction depends 'solely on the existence of a request from the national court'. However, it has no jurisdiction to give a ruling when, at the time when it is made, the procedure before the court making it has already been terminated *(Pardini* (case 338/85); *Grogan* (case C-159/90)). In contrast, the Court does have jurisdiction where a court is involved in preparatory inquiries in criminal proceedings which may or may not lead to a formal prosecution, where the question of EC law may determine whether the inquiries will continue (case C-60/02, *Criminal proceedings against X ('Rolex')).*

No formal requirements are imposed on the framing of the questions. Where the questions are inappropriately phrased the Court will merely reformulate the questions, answering what it sees as the relevant issues. It may interpret what it regards as the relevant issues even if they are not raised by the referring court (eg, *OTO SpA v Ministero delle Finanze* (case C-130/92)). Nor will it question the timing of a reference. However, since 'it is necessary for the national court to define the legal context in which the interpretation requested should be placed', the Court has suggested that it might be convenient for the facts of the case to be established and for questions of purely national law to be settled at the time when the reference is made, in order to enable the Court to take cognisance of all the features of fact and law which may be relevant to the interpretation of Community law which it is called upon to give *(Irish Creamery Milk Suppliers Association v Ireland* (cases 36 and 71/80); approved in *Pretore di Said* (case 14/8 6)). In *Telemarsicabruzzo SpA v Circostel* (cases C-320, 321, 322/90) it rejected an application for a ruling from an Italian magistrates' court on the grounds that the reference had provided no background factual information and only fragmentary observations

on the case. The ECJ has since reaffirmed this approach in several cases (eg, *Pretore di Genova v Banchero* (case C-1 57/92); *Monin Automobiles v France* (case C-386/92)). The ECJ has held, however, that the need for detailed factual background to a case is less pressing when the questions referred by the national court relate to technical points *(Vaneetveld v Le Foyer SA* (case C3 16/93)) or where the facts are clear, for example, because of a previous reference *(Crispoltoni* v *Fattoria Autonoma Tabacchi* (cases C-133, 300 and 3 62/92)). The concern seems to be that not only must the ECJ know enough to give a useful ruling in the context, but that there is also enough information for affected parties to be able to make representations. This, according to the ECJ, is especially relevant in competition cases *(Deliege* (case C-191/97), paras 30 and 36 (see further Chapter 29). The Court has issued an 'Information Note on references from national courts for a preliminary ruling' ([2005] OJ C 143/1, replacing guidance issued in 1996), consolidating its rulings in these cases. The circumstances in which the ECJ will decline jurisdiction are discussed further below.

The national courts may refer cases on the validity of EC measures As confirmed in Article 234 itself, the validity EC measures may be called into question within national proceedings. Thus for example a regulation or directive passed by the Council and Parliament may be said to be ultra vires the EC Treaty. If an individual is adversely affected by the measure, they may begin proceedings in the national courts to challenge it. The national courts have often made references to the ECJ in such cases. The ECJ has been receptive to such cases (subject to 10.4.4 below) and is willing to rule that EC measures are invalid in responding to Article 234 references. The only limit placed upon national courts is that they themselves do not have the power to declare EC measures invalid (see *Foto-Frostv Hauptzollamt Lubeck-Ost* (case 314/85)). The ECJ has been keen to maintain a monopoly over this power because of the danger that national courts may undermine the effectiveness of EC law if they were unilaterally to declare measures invalid. The ECJ did however confirm that national courts can grant interim relief suspending the implementation of EC measures that they believe to be invalid in *Zuckerfabrik Siiderdithmarschen AG v Hauptzollamt Itzehoe* (cases C-143/88 and C-92/89). The national courts must use this power with great care and make an urgent reference to the ECJ. This is a good example of the cooperative nature of the relationship between the ECJ and the national courts. The ECJ sought to balance the concerns of national courts about invalid EC legislation affecting individuals with its own concerns about the effectiveness and uniform application of EC law.

10.3.5. The practical reality of the ECJ's jurisdiction

Some of the above limitations of the Court's jurisdiction are more apparent than real. The line between matters of Community law and matters of national law, between interpretation and application are more easily drawn in theory than in practice. An interpretation of EC law may leave little room for doubt as to the legality of a national law and little choice to the national judge in matters of application if he is to comply with his duty to give priority to EC law. The Court has on occasions, albeit in abstract terms, suggested that a particular national law is incompatible with EC law (eg, *R v Secretary of Statefor Transport, exparteFactortameLtd* (case C-221/89); *Johnston v RUC* (case 222/84)). The Court may even offer specific guidance as to the application of its ruling. In the *BT* case (case C-392/93), for example, the ECJ commented:

Whilst it is in principle for the national courts to verify whether or not the conditions of State liability for a breach of Community law are fulfilled, in the present case the Court has all the necessary information to assess whether the facts amount to a sufficiently serious breach of Community law.

The Court then went on to hold that there had been no breach. Further, in rephrasing and regrouping the questions the Court is able to select the issues which it regards as significant, without apparently interfering with the discretion of the national judge.

It may be argued that some encroachment by the ECJ on to the territory of national courts' jurisdiction is necessary to ensure the correct and uniform application of Community law. However, its very freedom of manoeuvre in preliminary rulings proceedings, combined with its teleological approach to interpretation, have resulted on occasions in the Court overstepping the line, laying down broad general (and sometimes unexpected) principles, with far-reaching consequences, in response to *particular* questions from national courts (eg, *Barber* (case 262/88); *Marshall (No 2)* (case C-27 1/91)). This has not been conducive to legal certainty. Such activism has not gone without criticism, as calculated to invite 'rebellion', even 'defiance' by national courts.

The potential difficulties arising from the ECJ overstepping the boundary between its role of interpreting EC

law and the national courts' role of applying that ruling to the facts can be seen in the case of *Arsenal Football Club v Reed* ([2002] All ER (D) 180 (Dec)). The case before the national court concerned the action commenced by Arsenal to prevent Reed from continuing to sell souvenirs which carried its name and logos. The national court referred a number of questions to the ECJ on the interpretation of the Trade Mark Directive (see case C-206/01). The main issue was whether trade mark protection extended only to the circumstances in which the sign was used as a trade mark or whether an infringement would occur irrespective of how the marks were used. The ECJ handed down a judgment in the following terms:

In a situation which is not covered by Article 6(1) of the First Council Directive 89/104/ EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, where a third party uses in the course of trade a sign which is identical to a validly registered trade mark on goods which are identical to those for which it is registered, the trade mark proprietor of the mark is entitled, in circumstances such as those in the present case, to rely on Article 5(l)(a) of that directive to prevent that use. It is immaterial that, in the context of fhat use, the sign is perceived as a badge of support for or loyalty or affiliation to the trade mark proprietor.

The phrase 'in circumstances such as those in the present case' would seem to give the national court little freedom in its determination of the case for which the preliminary ruling was originally made. In the *Arsenal* case, however, the referring court accepted the argument of the defendant's counsel to the effect that in the course of its judgment and in particular by tying the operative part of its judgment to the facts of the case, the ECJ had made a determination of fact which in some aspects was inconsistent with the finding of fact made by the national court. On this basis, the national court commented: 'If this is so, the ECJ has exceeded its jurisdiction and I am not bound by its final conclusion. I must apply its guidance on the law to the facts as found at the trial' (para 27) It further remarked:

The courts of this country cannot challenge rulings of the ECJ within its areas of competence. There is no advantage to be gained by appearing to do so. Furthermore national courts do not make references to the ECJ with the intention of ignoring the result. On the other hand, no matter how tempting it may be to find an easy way out, the High Court has no power to cede to the ECJ a jurisdiction it does not have. [Para 28.]

Although the court has phrased this in terms of the limits ofjurisdiction, rather than an overt defiance, the assertion by the national court of the limits of the ECJ's jurisdiction was itself a form of rebellion because the trial judge refused to follow the application of law to the facts that had been suggested by the ECJ. The High Court before which the *Arsenal case* was heard did point out that there was the possibility of an appeal to the Court of Appeal, which might make a different application of the law to the facts but in the absence of this, he declined to accept the ECJ's, as he saw it, improper ruling on factual matters. This is what happened subsequently (see [2003] 2 CMLR 25), when the Court of Appeal held that the ECJ's reference to the facts was *not* at variance with those of the trial judge, but that there was a difference in legal reasoning. The trial judge had therefore been wrong to disagree with the ECJ in this case, although the Court of Appeal did confirm the principle on which the first-instance decision was based. We can see in *Reed* a good example of a case where the ECJ was perceived to have exceeded its proper jurisdiction as a court of reference by taking the final decision on the case away from the national court. The nature of cooperation requires that both national courts and ECJ respect each others jurisdictions.

10.4 The ECJ's refusal to give rulings in some cases

As was noted above, for many years, the ECJ generally encouraged national courts to refer and did not seek to limit the kinds of cases sent to it. There have however been important limitations upon the ECJ's policy of being willing to provide rulings in all cases referred to it. These limitations are controversial because some of them go against the text of Article 234 which seems to require the ECJ to give a ruling whenever this is 'necessary' to resolve an issue of EC law. There appears to be no inherent jurisdiction in the ECJ to refuse to give a ruling. Furthermore, refusal to answer may lead to uncertainty in national courts about when to refer and this may damage the uniform application of EC law. One practical, thus justifiable, limitation that we have already seen is that the ECJ will refuse jurisdiction when the referring court has not included enough information to enable the ECJ to give a ruling on the question referred (see eg, *Telemarsicabruzzo SpA v Circostel* (cases C-320, 321, 322/90)).

We now consider some more important limitations developed by the court. These show the ECJ developing the idea that, as a kind of supreme court for the EU, it should have the inherent power to decide which kinds of cases it will hear. This is sometimes referred to as the compentence to determine its own jurisdiction (Kompetenz-

Kompetenz is the German phrase). 10.4.1 The ECJ can decline to hear cases brought in artificial proceedings

The most important limitation was first laid down by the ECJ in the cases of *Foglia v Novello (No 1)* (case 104/79) and *Foglia v Novello (No 2)* (case 244/80). Here for the first time the Court refused its jurisdiction to give a ruling on a question of EC law. The questions, which were referred by an Italian judge, concerned the legality under EC law of an import duty imposed by the French on the import of wine from Italy. It arose in the context of litigation between two Italian parties. Foglia, a wine producer, had agreed to sell wine to Mrs Novello, an exporter. In making their contract the parties agreed that Foglia should not bear the cost of any duties levied by the French in breach of EC law. When duties were charged and eventually paid by Foglia, he sought to recover the money from Mrs Novello. In his action before the Italian court for recovery of the money that court sought a preliminary ruling on the legality under EC law of the duties imposed by the French. The ECJ refused its jurisdiction. The proceedings, it claimed, had been artificially created in order to question the legality of the French law; they were not 'genuine'. The parties were no more successful the second time when the judge referred the case back to the ECJ having not received a satisfactory answer to his previous reference. In a somewhat peremptory judgment the Court declared that the function of Article 234 was to contribute to the administration of justice in the Member States; not to give advisory opinions on general or hypothetical questions.

The ECJ's decision has been criticised. Although the parties had contrived their contractual arrangements so as to bring a claim in their own national court, rather than challenging the French duty in the French courts, they did genuinely think the duty was in breach of EC law and the Italian judge called upon to decide the case was faced with a genuine problem, central to which was the issue of EC law. If, in his discretion, he sought guidance from the ECJ in this matter, surely it was not for that Court to deny it. The principles expressed in *Foglia v Novello* were, however, applied in *Meilicke v AD V/OR GA AG* (case C-83/91). Here the Court refused to answer a lengthy and complex series of questions relating, inter alia, to the interpretation of the second Company Law Directive. The dispute between the parties centred on a disagreement as to the interpretation of certain provisions of German company law. It appeared that the EC directive was being invoked in order to prove the theories of one of the parties (a legal scholar). The Court held that it had no jurisdiction to give advisory opinions on hypothetical questions submitted by national courts (contrast *Mangold* (case C-144/Q4, discussed in Chapter 5), which also appeared to have been raised to prove an argument made by one of the parties (cf para 32), but a contract forming the basis of the dispute and the Article 234 reference had been performed—thereby causing the ECJ to reject the German government's claim that the case was artificial). It is not unusual for supreme courts to limit cases to those where parties really are in dispute with each other. The reasons are partly those of docket control but also to prevent the courts becoming the forum for political rather than legal disputes.

It has also been suggested that political considerations and national rivalries played their part in the *Foglia* decision (the Court held it 'must display special vigilance when ... a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law': *Foglia v Novello (No 2)).* This assessment is supported by the more recent case of *Bacardi-Martini SAS v Newcastle United Football Company Ltd* (case C-3 18/00). Bacardi entered into a contract for advertising time on an electronic revolving display system during a match between Newcastle and Metz, a French football club. The match was to be televised live in the United Kingdom and France. Although the advertising deal was in cbmpliance with English law, it contravened French law and Newcastle therefore pulled out of the advertising agreement. Bacardi brought an action against Newcastle, claiming that it could not rely on the French law to justify its actions, as the French law was incompatible with Article 49 EC (ex 59; post Lisbon 56 TFEU) on the freedom to provide services. The High Court made a reference on this point. When discussing the question of admissibility, the ECJ referred to *Foglia* and the special need for vigilance when the law of another Member State was in issue; it then reviewed whether the national court had made it clear why an answer was necessary. The ECJ concluded:

In those circumstances, the conclusion must be that the Court does not have the material before it to show that it is necessary to rule on the compatibility with the Treaty of legislation of a Member State other than that of the court making the reference. [Para 53.]

From this case, it seems that although a national court is not precluded from referring questions relating to the national laws of other Member States, the ECJ will review the justification for the reference more stringently than it would otherwise do.

10.4.2 The case must relate to a cross-border issue and not a purely internal situation

Another area in which the ECJ has sometimes limited references has been when the subject matter of the case is 'internal' and does not involve Community law directly. Internal law issues are governed by national not EC law. The ECJ has generally been careful not to rule on cases which appear to concern internal situations because to do so would be to assume a power not conferred upon it by the EC Treaty. This issue came before the Court in *Dzodzi v Belgium* (cases C-297/88 and C-l97/89). Here the Court was prepared to provide a ruling on the interpretation of EC social security law in a purely 'internal' matter, for the purpose of clarifying provisions of Belgian law invoked by a Togolese national. The Court held that it was 'exclusively for national courts which were dealing with a case to assess, with regard to the specific features of each case, both the need for a preliminary ruling in order to enable it to give judgment, and the relevance of the question'. Following *Dzodzi*, in *LeurBloem* (case C-28/95), the ECJ held that it has jurisdiction to interpret provisions of Community law where the facts of the case lie outside these provisions but are applicable to the case because the national law governing the main dispute has transposed the Community rule to a non-Community context ('spontaneous harmonisation'). This is subject to the proviso that national law does not expressly prohibit it *(Kleinwort Benson* (case C-346/93)). Similarly, the ECJ has accepted references for a preliminary ruling in circumstances where a national provision is tied into a Community rule in order to avoid nondiscrimination even in purely internal situations (case C-300/01, *Salzmann*—internal situation affected by rules on free movement of capital in Article 56 (ex 73b) EC; post Lisbon 63 TFEU).

10.4.3 A preliminary ruling must be 'objectively required'

Another potential limitation on the ECJ's willingness to accept references can be seen in *Motrin Automobiles—Maison du Deux-Roues* (case C-428/93). There the ECJ suggested that the questions referred must be 'objectively required' by the national court as 'necessary to enable that court to give judgment' in the proceedings before it as required under Article 234(2). This case concerned a company which was in the process of being wound up. The company argued that it should not be finally wound up until certain questions relating to EC law had been answered. Conversely, the company's creditors thought that the company had been artificially kept in existence for too long already and should be wound up immediately. The national court referred the EC-law questions to determine the strength of the company's argument. The ECJ held that, although there was a connection between the questions and the dispute, answers to the question would not be *applied* in the case. The ECJ therefore declined jurisdiction.

10.4.4 The parties must challenge EC measures directly under Article 230 if they have standing

Another limitation on the ECJ's willingness to give preliminary rulings relates to cases where a party is seeking to challenge an EC measure indirectly using proceedings in the national courts. Whilst we saw that often the ECJ will rule on such issues where national courts refer questions to the ECJ under Article 234 (see 10.3.7 above), there are some limits to this open-door policy. The Court has been concerned to prevent parties using Article 234 to get round the rules on direct challenges under Article 230. This was the situation in *TWD Textilwerke GmbHv Germany* (case C-l 88/92) where the Court refused to give a ruling on the validity of a Commission decision, addressed to the German government, demanding the recovery from the applicants of state aid granted by the government in breach of EC law. Its refusal was based on the fact that the applicants, having been informed by the government of the Commission's decision, and advised of their right to challenge it under Article 230, had failed to do so within the two-month limitation period. Having allowed this period to expire the Court held that the applicants could not, in the interests of legal certainty, be permitted to attack the decision under Article 234. This would defeat the restrictions on challenging Community acts imposed by Article 230 because a party could wait many months or years before attempting to invalidate long-standing EC decisions or legislation.

This decision, wholly out of line with its previous jurisprudence, which has been to encourage challenges to validity under Article 234 rather than (the more restrictive) Article 230, has caused concern, as calculated to drive parties, perhaps prematurely, into action under Article 230, for fear of being denied a later opportunity to challenge Community legislation under Article 234 (see further, Chapter 12). However, the ECJ has since mitigated some of the effects of its judgment in *TWD. InRv Intervention BoardforAgriculture, exparteAccrington Beef Co Ltd* (case C-24 1/9 5), the parties had not sought to bring an action for annulment within the time limits set out in the then Article 230. Nonetheless, the ECJ was prepared to hear the preliminary ruling reference because it was not clear, as the parties were seeking to challenge a regulation, that they would have had standing to bring an action under Article 230 (see also *Atzeni and others* (cases C-346 and 529/03), discussed at 11.4.3.4). It seems therefore

that Article 234 can be used in such cases as long as it is not obvious that the party would have had standing to challenge the EC measure directly under Article 230.

10.5 National courts and the reference procedure

We should note at the outset the position of the national courts is in some ways more powerful than that of the ECJ. Because there is no right of appeal to the ECJ, it is up to the national-court judge whether to decide to refer matters to Luxembourg. As will be seen, in some cases Article 234 imposes a duty to refer cases but there is no method of compelling this if a national court declines to do so. The ECJ has thus relied very much upon judges cooperating with it in order to develop European law and to ensure uniform application throughout the Member States. In this sense, national courts are also part of the Union legal order.

10.5.1 When must a national court refer and when does it have choice?

Although any court or tribunal may refer questions to the ECJ under Article 234, a distinction must be drawn between those courts or tribunals which have a discretion to refer ('permissive' jurisdiction) and those for which referral is mandatory ('mandatory' jurisdiction). Under Article 234(3), where a question concerning interpretation is raised 'in a case pending before a court or tribunal of a Member State, *against whose decisions there is nojudicial remedy under national law,* that court or tribunal *shall* bring the matter before the Court of Justice' (emphasis added). For all courts other than those within Article 234(3) referral is discretionary. The treaty therefore created a system whereby most of the time the national courts would have a choice about when to refer questions to the ECJ. Decisions of national courts which are disputed (including on points of EC law) could be appealed internally (subject to the national law regarding appeals of the particular Member State). Only when a case could go no further within the domestic legal system does the treaty require a reference to the ECJ.

10.5.2Article 234(3): The mandatory obligation to refer for courts against whom no appeal lies

The purpose of Article 234(3) must be seen in the light of the function of Article 234 as a whole, which is to prevent a body of national case law not in accordance with the rules of Community law from coming into existence in any Member State *(Hoffman-La Roche AG v Centrafarm Vertiebsgesellschaft Pharmazeutischer Erzeugnisse mbH* (case 107/76)). To this end Article 234(3) seeks to ensure that, when matters of EC law arise, there is an obligation to refer to the ECJ if the proceedings can go no further in the domestic court system. This purpose should be kept in mind when questions of interpretation of Article 234(3) arise.

The scope of Article 234(3) is not entirely clear. While it obviously applies to courts or tribunals at the apex of the legal system whose decisions are *never* subject to appeal (the 'abstract theory'), such as the House of Lords in England, or the Conseil d'Etat in France, it is less clear whether it applies also to courts whose decisions *in the case in question* are not subject to appeal (the 'concrete theory'), such as the Italian magistrates' court *{giudice conciliatore)* in *Costa v ENEL* (case 6/64) (no right of appeal because sum of money involved too small). Furthermore, if leave to appeal is required to go to a higher court and this is refused, does this mean the lower court becomes a court 'against whose decisions there is no judicial remedy under national law'? In the UK we see this in appeals from the Court of Appeal where leave to the House of Lords is refused, or when the High Court refuses leave for judicial review from a tribunal decision. These cases all involve courts not at the apex of the system but whose decision has effectively concluded the domestic proceedings. If a point of EC law remained in dispute, the parties would not have had the benefit of a ruling from the ECJ and so their fundamental rights might have been impaired. Furthermore, the interpretation and application of EC law in that Member State might be wrong thus threatening the uniformity of the EC law system across the Member States.

The judgment of the ECJ in *Costa v ENEL* was seen, albeit *obiter,* to support the wider, 'concrete' theory. In that case, in the context of a reference from the Italian magistrates' court, from which there was no appeal due to the small amount of money involved, the Court said, with reference to the then Article 177(3) (now 234(3)): 'By the terms of this Article ... national courts against whose decisions, *as in the present case,* there is no judicial remedy, *must* refer the matter to the Court of Justice' (emphasis added). Taking into account the function of Article 234(3) and particularly its importance for the individual, this would have seemed to be the better view.

The issue has finally been resolved by the ECJ in favour of the concrete theory in the *Lyckeshog* (case C-99/00). The ECJ ruled that where there was a right for a party to seek to appeal against the decision under challenge, that was not a final court. It followed that if there was no right to appeal against the decision then that court was a 'final court' regardless of its status in the judicial hierarchy.

In *Lyckeshog* case the ECJ was also referred the question of whether national courts are 'final' courts for the purposes of Article 234(3) if an appeal against their decision is possible but only with leave to appeal having been granted by a higher court (or the lower court itself). The ECJ noted that the function of the obligation on courts against whose decisions there was no judicial remedy to refer questions to the ECJ was to prevent a body of national case law coming into being that was inconsistent with the requirements of Community law. The ECJ argued that 'the fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy' (para 16). In coming to this conclusion, the ECJ noted that 'uncertainty as to the interpretation of the law applicable, including Community law, may give rise to review, at last instance, by the supreme court' (para 17). In this light, the ECJ concluded that, where leave depends on permission from a superior 'final' court, that latter court is obliged to grant the requested leave and make a reference to the ECJ when a question of EC law arises. Any other course would frustrate the purpose of Article 234 and amount to a denial of the individual's Community law rights.

10.5.3 When does a 'question' of EC law arise?

Whether a national court is a final court or merely one that has a discretion to refer cases to the ECJ, the national judge must consider if a case raises a 'question' of Community law such that a ruling from the ECJ is *'necessary* to enable it to give judgment'. If the case does raise such a question then, if the court is a final court, the judge must, in principle, refer the case to the ECJ. Of course, not every case where a party relies on Community law may be said to involve a 'question' of EC law. Only those cases where the point of EC law concerned is in doubt really involve a question of law requiring the ECJ's interpretation.

Guidelines on these matters have been supplied by the ECJ and by national courts. It is submitted that as the ultimate arbiter on matters of Community law the ECJ must decide whether a 'question' of EC law arises. We can see a tension in relation to this issue. On the one hand the ECJ has been keen to encourage references to be made to ensure uniformity of application of EC law. On the other hand, there has been the concern that overloading the ECJ with references diminishes the effectiveness of judicial protection for parties because of delay this produces. The ECJ has also been mindful of national courts being reluctant to refer cases that are too 'obvious' seriously to raise EC law issues. It has sought to find a rule that allows national courts not to refer cases where there clearly is no danger that they will misinterpret the issue of EC concerned.

The ECJ considered a number of relevant matters in this context in the important case of *CILFIT Sri* (case 283/81). The reference was from the Italian Supreme Court, the Cassazione, and concerned national courts' mandatory jurisdiction under Article 234(3). On a literal reading of Article 234(2) and (3) it would appear that the question of whether 'a decision on a matter of Community law if necessary' only applies to the national courts' discretionary jurisdiction under Article 234(2). Thus in principle the highest national court would have to refer all questions of EC law to the ECJ even if not strictly necessary to resolve the case before it. This would have been an absurd result whereby the lower courts had more discretion than the supreme court. However, in *CILFIT* the ECJ held that:

it followed from the relationship between Article 177(2) and (3) [now 234(2) and (3)] that the courts or tribunals referred to in Article 177(3) [now 234(3)] have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment.

Thus both final courts and other courts have the power to consider if the 'question' of EC law that requires resolution through a ruling from the ECJ is actually material to deciding the case before them. While it is clearly not necessary for 'final' courts to refer questions of Community law in every case, a lax approach by such courts towards their need to refer, resulting in non-referral, may lead to an incorrect application of Community law and, for the individual concerned, a denial of justice. Since *Kbbler* (case C-224/01), 'final' courts choosing not to make a reference run the risk of incurring liability under *Francovich* should they get the point of EC law significantly wrong (see 9.2.2.2).

10.5.3.1 *A doctrine of precedent in EC law*

One way in which the ECJ has allowed national courts to avoid referring cases was the early development of a form of principle of precedent. The doctrine was first invoked in the sphere of EC law by Advocate-General Lagrange in *Da Costa en Schaake NV* (cases 28-30/62), in the context of a reference on a question of interpretation almost identical to a matter already decided by the Court in *Van Gend en Loos* (case 26/62). Like *CILFITSrl,* it arose in a case concerning the court's mandatory jurisdiction under Article 234(3). While asserting

that Article 234(3) 'unqualifiedly' required national courts to submit to the ECJ 'every question of interpretation raised before the court', the Court added that this would not be necessary if the question was materially identical with a question which had already been the subject of a preliminary ruling in a similar case. This was an important step because it established the ECJ as laying down general interpretations that could and should be followed by all the national courts rather than individual rulings only addressed to the particular court that made the reference.

However, the *Da Costa* criteria are not foolproof and have been criticised as providing national courts with an excuse not to refer, undermining the very purpose of Article 234(3). In *R v Secretary of State for the Home Department, exparte Sandhu (The Times*, 10 May 1985), the House of Lords was faced with a request for a ruling on the interpretation of certain provisions of Regulation 1612/68 (concerning rights of residence of members of the family of workers), in the context of a claim by an Indian, the divorced husband of an EC national, threatened with deportation from the UK as a result of his divorce. The *Da Costa* criteria were cited, as was *Diatta v Land Berlin* (case 267/83), a case dealing with the rights of residence of a *separated* wife living apart from her husband, which was decided in the wife's favour. The House of Lords found that the matter had already been interpreted in *Diatta,* and, on the basis of certain statements delivered *obiter* in *Diatta,* decided not to refer. On their Lordships' interpretation Mr Sandhu was not entitled to remain in the UK.

The existence of a previous decision may not negate a national court's obligation to refer under Article 234(3) where the matter involves the legality of an *EC measure* (as opposed to a challenge to Member State measures). The ECJ has always been very concerned to ensure that it has a monopoly on declaring EC measures invalid rather than see national courts do so. Thus it made clear in *Gaston Schul v Minister van Landbouw* (case C-461/03) that invalidity cases should always be referred by final courts. This case involved a question as to the validity of Article 4(l)-(2) of Commission Regulation 1423/95 on import rules for products in the sugar sector ([1995] OJ L14 1/16). The provisions corresponded with those in another regulation (1484/95) which had been declared invalid by the ECJ in an earlier decision *(Kloosterbooer Rotterdam,* case C-3 17/99). The Dutch court in *Gaston* therefore asked whether it was still subject to the mandatory obligation to refer the question of validity to the ECJ under Article 234(3). The ECJ held that questions of *validity* of EC law differed from questions of *interpretation,* and a reference should always be made, even where there is an earlier ruling dealing with corresponding provisions in another measure (para 25). The possible time delay was not a justification for changing the position that questions of invalidity are only for the ECJ to decide upon (para 23).

10.5.3.2 *Acte clair*

For some time, it seemed that once a relevant 'question' of EC law had arisen before a final court, so long as the point had not been previously ruled upon by ECJ, the national court must make a reference. This was so even if the point of law was very simple and incapable of more than one interpretation. The ECJ was under some pressure from the highest courts within the Member States to allow them a means of not referring such cases which they felt they could safely rule upon themselves. The ECJ had no means to compel referral and faced the embarrassing prospect of final courts in Member States declining to pass cases on to it according to a variety of different national principles of interpretation. The solution fashioned by the ECJ was to create an EC law exception to Article 234(3) allowing final courts not to refer cases where the issue of law is particularly obvious. This is known as *acte clair.*

Acte clair is a doctrine originating in French administrative law whereby, if the meaning of a provision is clear, no 'question' of interpretation arises. The ECJ eventually accepted a very limited version of *acte clair* in *CILFIT Sri* (case 283/81) in the context of a question from the Italian Cassazione (Supreme Court) concerning its obligation under Article 234(3). The national court asked if Article 234 created an absolute obligation to refer, or was referral conditional on a prior finding of a reasonable interpretative doubt in relation to the question of EC law? The ECJ summarised its case law thus far saying that there was no need to refer if the matter was (a) irrelevant, (b) materially identical to a question already the subject of a preliminary ruling, or (c) so obvious as to leave 'no scope for reasonable doubt'. This third criteria may be taken as endorsing a version, albeit a narrow one, of *acte clair*. Of particular importance to its third criterion is the Court's rider that, in deciding whether a matter was free from doubt, account must be taken of the specific characteristics of Community law, its particular difficulties, and the risk of divergence in judicial interpretation. The ECJ also required the national court to consider each of the different language versions of the EC law measure under consideration. Thus, if *acte clair* is to be invoked by a final court so as not to refer a case to the ECJ, the issue of EC law must meet the *CILFIT* criteria. This will be rare. As such, the ECJ did not actually cede much power to national courts through the *acte*

clair doctrine. It set the benchmark so high that, whilst theoretically possible, in practice final courts will find it difficult to safely conclude that there is no 'question' of EC law requiring resolution. This means that whilst formally paying deference to the expertise of the national courts, the ECJ has maintained its monopoly over interpretation. The ECJ has however been urged by some commentators to relax the *CILFIT* criteria in recent years to help reduce the burden of its caseload.

The ECJ's caution is probably justified as there is some danger that national courts acting in accordance with their own views without seeking a reference may make errors of interpretation even in relation to matters they consider to be 'obvious'. This was revealed in the Court of Appeal in the case of *R v Henn* ([1978] 1 WLR 1031). There Lord Widgery suggested that it was clear from the case law of the Court of Justice that a ban on the import of pornographic books was not a quantitative restriction within Article 28 (ex 30) of the EC Treaty (post Lisbon, Article 34 TFEU). A subsequent referral on this matter by the House of Lords revealed that it undoubtedly was. Lord Diplock, giving judgment in the House of Lords ([1981] AC 850), warned English judges not to be too ready to hold that because the meaning of an English text seemed plain to them no question of interpretation was involved: the ECJ and the English courts have very different styles of interpretation and may ascribe different meanings to the same provision. He did, however, approve a version of *acte clair* consistent with that of the ECJ in *Da Costa en Schaake NV* and *CILFIT Sri* in *Garland v British Rail Engineering Ltd* ([1983] 2 AC 751) when he suggested that where there was a 'considerable and consistent line of case law' from the ECJ the answer would be 'too obvious and inevitable' to be capable of giving rise to what could properly be called a question within the meaning of Article 234.

Moreover, the doctrine, depending as it does on a subjective assessment as to what is clear, can all too easily be used as a means of avoiding referral. This appears to have occurred in *Minister of the Interior v Cohn-B endit* ([1980] 1 CMLR 543). In this case, heard by the French Conseil d'Etat, the supreme administrative court, Cohn-Bendit sought to invoke an EC directive to challenge a deportation order made by the French authorities. Certain provisions of the directive had already been declared by the ECJ to be directly effective (*Van Duyn v Home Office* (case 4 1/74); see Chapter 5). Despite urgings from the Commissaire du Gouvernement, M Genevois, that in such a situation the Conseil d'Etat must either follow *Van Duyn* and apply the directive or seek a ruling from the Court under Article 234(3), the Conseil d'Etat declined to do either. In its opinion, the law was clear. The directive was not directly effective.

10.5.3.3 *The question may not be relevant to the case*

The ECJ had confirmed in *CILFIT* that there was no obligation to refer questions relating to EC law that were not relevant to the case before the national court. This is in one sense obvious but there is potential for final national courts to misuse this discretion so as to decline to refer cases that should be referred. A court may avoid its obligations under Article 234(3) by deciding the case before it without considering the possibility of referral (see, eg, *Mees v Belgium* [1988] 3 CMLR 137, Belgian Conseil d'Etat). In *Wellcome Foundation Ltd v Secretary of State for Social Services* ([1988] 1 WLR 635) the House of Lords, in considering the factors to be taken into account by a licensing authority in issuing a licence to parallel import a trade-mark medicine, thought it 'highly undesirable to embark on considerations of Community law which might have necessitated a referral to the Court of Justice under Article 177 [now 234]'. This suggests the national court did not consider closely enough the relevance of EC law to the case in question.

In contrast, the German federal constitutional court has emphasised national courts' duty to refer under Article 234(3'),' according to the *CILFIT* criteria, in the strongest terms. In quashing the German Bundesfinanzhof's decision on the direct effects of directives in *Re VATDirectives* ([1982] 1 CMLR 527), *Kloppenburg v Finanzamt Leer* ([1989] 1 CMLR 873), it held that a court subject to Article 234(3) which deliberately departs from the case law of the ECJ and fails to make a reference under that article is acting in breach of Article 101 of the German constitution. The principle of *acte clair* could not operate where there existed a ruling from the ECJ to the contrary *(Re VAT exemption* [1989] 1 CMLR 113). In *Re Patented Feedingstuffs* ([1989] 2 CMLR 902), the same court declared that it would review an 'arbitrary' refusal by a court subject to Article 234(3) to refer to the ECJ. A refusal would be arbitrary:

where the national court gave no consideration at all to a reference in spite of the accepted relevance of Community law to the judgment and the court's doubt as to the correct answer

where the law consciously departs in its judgment from the case law of the ECJ on the relevant questions, and

nevertheless does not make a reference or a fresh reference

where there is not yet a decisive judgment of the ECJ on point, or such judgments may not have provided an exhaustive answer to the relevant questions or there is a more than remote possibility of the ECJ developing its case law further, and the national court exceeds to an indefensible extent the scope of its necessary judicial discretion, as where there may be contrary views of the relevant question of Community law which should obviously be given preference over the view of the national court.

It is suggested that these principles, applied in good faith, would ensure that a reference to the ECJ will be made in the appropriate case. Although a decision of a domestic court rather than of the ECJ, these principles should prove useful to the courts from all the Member States.

10.5.4 Article 234(2): Courts that have a discretion whether to refer or not

Courts or tribunals which do not fall within Article 234(3) enjoy, according to the ECJ, an unfettered discretion in the matter of referrals. This reflects the importance of the cooperative nature of the relationship between the ECJ and national courts. The ECJ has sought to respect the unfettered jurisdiction of national courts, where a case falls under Article 234(2), by refraining from being prescriptive about when cases should be referred to it. A court or tribunal at any level is free, 'if it considers that a decision on the question is necessary to enable it to give judgment', to refer to the ECJ in any kind of proceedings, including interim proceedings *(Hoffman-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* (case 107/76)), at any stage in the proceedings. In *De Geus en Uitdenbogerd v Robert Bosch GmbH* (case 13/61) the Court held that national courts have jurisdiction to refer whether or not an appeal is pending; the ECJ is not even concerned to discover whether the decision of the national judge has acquired the force of *resjudicata.* However, following *Pardini* (case 338/85) and *Grogan* (case C-l59/90), if proceedings have been terminated and the Court is aware of this fact, it may refuse jurisdiction on the grounds that its ruling is not necessary to enable the national court to give judgment.

10.5.4.1 *Courts may make a referral even where there is a previous ECJ ruling on the issue*

Even if the ECJ has already ruled on a similar question, national courts are not precluded from requesting a further ruling. This point was made in *Da Costa en Schaake NV*(cases 28-30/62). There the Court held, in the context of a reference for interpretation of a question substantially the same as that referred in *Van Gend en Loos,* that the Court should retain a legal right to depart from its previous judgments. It may recognise its errors in the light of new facts. It ruled in similar terms in the context of a request concerning the effect of a prior ruling of validity in *International Chemical Corporation SpA v Amministrazione delleFinanze dello Stato* (case 66/80). Here it held that while national courts could assume from a prior declaration of invalidity that the regulation was invalid, they should not be deprived of an opportunity to refer the same issue if they have a 'real interest' in making a further reference.

10.5.4.2 *National Courts can ignore national rules of precedent in order to refer cases*

This discretion to refer is in no way affected by national rules of precedent within the Member State. This important principle was established in the case of *Rheinmuhlen-Dusseldorf* (case 146/73). In this case, which concerned an attempt by a German cereal exporter to obtain an export rebate under Community law, the German federal tax court (the Bundesfinanzhof), hearing the case on appeal from the Hessian tax court (Hessische Finanzgericht), had quashed the Hessian court's judgment and remitted the case to that court for a decision on certain issues of fact. The Hessian court was not satisfied with the Bundesfinanzhof's ruling since questions of Community law were involved. It sought a ruling from the ECJ on the interpretation of the Community law, and also on the question of whether it was permissible for a lower court to refer in this way when its own superior court had already set aside its earlier judgment on appeal. On an appeal by Rheinmuhlen-Dtisseldorf to the Bundesfinanzhof challenging the Hessian court's right to refer to the ECJ, the Bundesfinanzhof itself referred certain questions to the Court of Justice. The principal question, raised in both cases, was whether Article 234 gave national courts an unfettered right to refer or whether that right is subject to national provisions whereby lower courts are bound by the judgments of superior courts. The Court's reply was in the strongest terms. The object of the preliminary rulings procedure, the Court held, was to ensure that in all circumstances the law was the same in all Member States. No provision of domestic law can take away the power provided by Article 234. The lower court must be free to make a reference if it considers that the superior court's ruling could lead it to give judgment contrary to Community law. It would only be otherwise if the question put by the lower court were substantially the same. The ECJ's view may be compared with that of Wood J in the

Employment Appeal Tribunal in *Enderby v Frenchay Health Authority* ([1991] ICR 382). Here he suggested that lower English Courts were bound even in matters of Community law by decisions of their superior courts; thus they should not make references to the ECJ but should leave it to the House of Lords, a fortiori when the House has decided on a particular issue that British law does not conflict with EC law. Wood J's observations are clearly at odds with Community law. It appears that *RheinmiihlenDiisseldorf* was not cited before the tribunal. A reference to the ECJ was subsequently made in this case by the Court of Appeal ([1992] 1RLR 15) resulting in a ruling (case C-1 27/92) and a decision on an important issue of equal pay for work of equal value contrary to that of Wood J and in the claimant's favour.

10.5.4.3 ***How should non-final courts exercise their discretion to refer?***

When the national court hears a case in which there arises a question of EC law a number of factors will obviously have to be taken into account in deciding whether or not to refer. These are largely questions for domestic courts according to the particular features of the domestic legal system. They have not been subject to detailed scrutiny by the ECJ because they are largely outside its jurisdiction.

There has been some interesting discussion in the lower courts of the UK on this question. In an early opinion, Lord Denning in *HP Bulmer Ltd v Bollinger SA* ([1974] Ch 401) sitting in the Court of Appeal adopted a broad approach which required the national judge to consider a wide range of factors before making a reference. He suggested that a decision would only be 'necessary' if it was 'conclusive' to the judgment. Even then it would not be necessary if:

the ECJ had already given judgment on the question or the matter was reasonably clear and free from doubt.

Although the criteria in both cases are similar, the first and third *CILFIT Sri* criteria are clearly stricter; it would be easier under Lord Denning's guidelines to decide that a decision was not 'necessary'. If courts within the area of discretionary jurisdiction consider, applying the *CILFIT* criteria, that a decision from the ECJ is necessary, how should they exercise their discretion? With regard to other factors, Lord Denning suggested in *HP Bulmer Ltd v JBollinger SA* that time, cost, workload of the ECJ, and the wishes of the parties should be taken into account by national courts in the exercise of their discretion. In a contrasting view, however, Bingham J in *Commissioners of Customs and Excise v Samex ApS* ([1983] 3 CMLR 194) said that factors such as time and cost need to be treated with care, weighing the fact that deferring a referral may in the end increase the time and cost to the parties: there may be cases where it is appropriate to refer at an early stage. He also stressed the ECJ's 'panoramic' view of the Community law system that a national judge would find it impossible to match. The more difficult and uncertain the issue of EC law, the greater the likelihood of appeal, requiring, in the end, a referral to the ECJ under Article 234(3). The workload of the ECJ is an increasing problem and no doubt a reason for some modification in recent years of its open-door policy. However, whereas it may justify non-referral in a straightforward case, it should not prevent referral where the point of EC law is difficult or novel. The *CILFIT* criteria should operate to prevent unnecessary referrals.

On the question of timing, the ECJ has suggested that the facts of the case should be established and questions of purely national law settled before a reference is made *(Irish Creamery Milk Suppliers Association v Ireland* (cases 36 and 71/80)). This would avoid referrals being made too early, and enable the Court to take cognisance of all the features of fact and law which may be relevant to the issue of Community law on which it is asked to rule. A similar point was made by Lord Denning MR in *HP Bulmer Ltd v IBollinger SA* ([1974] Ch 401) ('decide the facts first') and approved by the House of Lords in *R v Henn* ([1981] AC 850). However, Lord Diplock did concede in *R v Henn* that in an urgent, eg interim, matter, where important financial interests are concerned, it might be necessary to refer *before* all the facts were found.

The wishes of the parties also need to be treated with caution. If the point of EC law is relevant (which under *CILFIT* it must be) and difficult or uncertain, clearly *one* of the parties' interests will be better served by a referral. As Templeman LJ said in the Court of Appeal in *Polydor Ltd v Harlequin Record Shops Ltd* ([1980] 2 CMLR 413) when he chose to refer a difficult point of EC law in proceedings for an interim injunction, 'it is the right of the plaintiff [claimant] to go to the European Court'. Furthermore, the ECJ has held that the question of referral is one for the national court and that a party to the proceedings in the context of which the reference is made cannot challenge a decision to refer, even if that party thinks that the national court's findings of fact are inaccurate *(SATFluggesellschaft mbH v European Organization for the Safety ofAir Navigation* (case C-364/92)).

Another factor which might point to an early referral, advanced by Ormrod LJ in *Polydor Ltd v Harlequin Record*

Shops Ltd is the wider implications of the ruling. In *PolydorLtd v Harlequin Record Shops Ltd* there were a number of similar cases pending. The issue, which was a difficult one, concerned the protection of British copyright law in the context of an international agreement between the EC and Portugal, and affected not merely the parties to the case but the record industry as a whole.

Finally, in *R v Henn* Lord Diplock suggested that in a criminal trial on indictment it might be better for The question to be decided by the national judge and reviewed if necessary through the hierarchy of the national courts. Although this statement could be invoked to counter spurious defences based on EC law, and unnecessary referrals, it is submitted that where a claim is genuinely based on EC law, and a ruling from the ECJ would be conclusive of the case, delay would serve no purpose. The time and cost of the proceedings would only be increased.

10.6 What is the temporal effect of a ruling from the ECJ?

There are a number of issues concerning the effect of a preliminary ruling by the ECJ. These Ramifications can often go well beyond the particular proceedings that led to the reference. Particularly because of development of what is effectively a doctrine of precedent discussed earlier, important rulings from the ECJ can affect legal relations across all the Member States and lead to wide economic and social impacts. There have therefore been some cases in which the ECJ has limited the effects of its rulings so that they are only 'prospective' and do not affect prior legal relations. More narrowly, clearly a ruling from the ECJ under Article 234 is binding in the individual case and will govern the legal effects between the parties. Given Member States' obligation under Article 10 (ex 5) EC to 'take all appropriate measures ... to ensure fulfilment of the obligations arising out of this treaty or resulting from action taken by the institutions of the Community' the ruling should also be applied in all subsequent cases. This does not preclude national courts from seeking a further ruling on the same issue should they have a 'real interest' in making a reference *(Da Costa en Schaake* (cases 28-30/62)—interpretation; *International Chemical Corporation SpA* (case 66/80) validity).

10.6.1 Rulings involving interpretation are generally retrospective in effect

The question of the temporal effect of a ruling on persons not party to the case, namely whether it should take effect retroactively *(ex tunc*, ie from the moment of entry into force of the provision subject to the ruling) or only from the date ofjudgment *(ex nunc)* is less clear. In *Defrenne v Sabena (No 2)* (case 43/75) the Court was prepared to limit the effect of the then Article 119 (now 141) to future cases (including *Defrenne* itself) and claims lodged prior to the date of judgment. important considerations of legal certainty', the Court held, 'affecting all the interests involved, both public and private, make it impossible to reopen the question as regards the past'. The Court was clearly swayed by the arguments of the British and Irish governments that a retrospective application of the equal pay principle would have serious economic repercussions on parties (ie, employers) who had been led to believe they were acting within the law.

However, in *ArieteSpA* (case 811/79) and *Salumi Sri* (cases 66,127 andl28/79) the Court made it clear that *Defrenne* was to be an exceptional case. As a general rule an interpretation under Article 234 of a rule of Community law 'clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to be understood and applied*from the time ofits coming intoforce* (emphasis added). A ruling under that article must therefore be applied to legal relationships arising prior to the date of the judgment provided that the conditions for its application by the national court are satisfied. The court said:

It is only exceptionally that the Court may, in the application of the principle of legal certainty inherent in the Community legal order and in taking into account the serious effects which its judgments might have as regards the past, on legal relationships established in good faith, be moved to restrict for any person concerned the opportunity of relying on the provision as thus interpreted with a view to calling into question those legal relationships.

Moreover, 'such a restriction may be allowed *only* in the actual judgment ruling upon the interpretation sought' and 'it is for the Court of Justice *alone* to decide on the temporal restrictions as regards the effects of the interpretation which it gives'.

These principles were applied in *Blaizot* (case 24/86) and *Barra* (case 309/85). Both cases involved a claim for reimbursement of the Belgian minerval, based on *Gravier* (case 293/83, see Chapter 23). In both cases the claims were in respect of periods prior to the ECJ's ruling in *Gravier.* In *Barra* it was not disputed that the course for

which the minerval had been charged was vocational; but Blaizot's university course in veterinary medicine was, the defendant university argued, not vocational, not being within the scope of the *Gravier* ruling.

Since *Barra's* case fell squarely within *Gravier* and the Court had imposed no temporal limits on the effect of its judgment in *Gravier* itself, that ruling was held to apply retrospectively in *Barra s* favour. *Blaizot,* on the other hand, raised new issues. In deciding that university education could, and a course in veterinary science did, constitute vocational training the Court, clearly conscious of the impact of such a ruling on Belgian universities if applied retroactively, decided that 'important considerations of legal certainty' required that the effects of its ruling should be limited on the same lines as *Defrenne*— that is, to future cases and those lodged prior to judgment.

Unless the Court can be persuaded to change its mind and reconsider the question of the temporal effect of a prior ruling in a subsequent case when *no* new issues are raised, the question of the temporal effect will need to be considered in every case in which a retrospective application may give rise to serious repercussions as regards the past. Yet it is in the nature of this kind of ruling that it and, therefore, its consequences are unpredictable. Should a party wish, subsequently, to limit the effects of an earlier ruling, it will be necessary to ensure, as in *Blaizot,* that some new issue of EC law is raised.

In *Barber v Guardian Royal Exchange Assurance Group* (case C-262/88) the Court was again persuaded by 'overriding considerations of legal certainty' to limit the effects of its ruling that employers' contracted-out pension schemes fell within the then Article 119 (now 141) EC. Unfortunately the precise scope of the non-retroactivity principle that 'Article 119 [now 141] may not be relied upon in order to *claim entitlement* to a pension with effect prior to that of this judgment (except in the case of workers... who have initiated proceedings before this date or raised an equivalent claim under the applicable national law)' was disputed as being unclear. This lack of specificity, a characteristic of the Court's style ofjudgment, can create problems in the context of rulings on interpretation under Article 234. The Court's judgments can on occasions be too Delphic, leaving too much to be decided by national courts. It has taken a protocol to the Maastricht Treaty and further cases to spell out the precise scope of the *Barber* ruling (see Chapter 27). Only now are the *full* implications of the Court's rulings in *Francovich* (cases C-6, 9/90) and *Marshall (No 2)* (case C271/91) being revealed.

Despite its commitment to the principle of legal certainty the Court has chosen not to limit the effect of its rulings in a number of cases in which it has introduced new and unexpected principles with significant consequences for Member States and even (in the case of treaty articles) for individuals. It did not limit the effects of its judgment in *Francovich* despite Advocate-General Mischo's warnings as to the 'extremely serious' financial consequences for Member States if the judgment were not so limited: nor did it do so when it laid down a principle of full compensation for breach of a directly effective directive in *Marshall (No 2).* Where a ruling is likely to result in serious consequences, whether for states or 'public' or private bodies, for example employers, Member States would be advised to take advantage of their opportunity to intervene in Article 234 proceedings as they are entitled to do, to argue against retroactivity, as they did successfully in *Defrenne* and *Barber.* Other 'interested parties' may also apply to intervene.

The effects of the ECJ's strict approach to retroactivity may be mitigated by its more recent approach to Member States' procedural rules. In a number of cases *(IN CO GE* '90 (cases C-10 and 22/97) and *EDIS* (case C-23 1/96)), it has held that the principle of retroactivity should not prevent the application of detailed procedural rules (in these cases relating to limitation of actions) governing legal proceedings under national law, provided that these national rules do not make it 'impossible or excessively difficult' for individuals to exercise their Community rights (see further Chapter 8).

The impact of an interpretation on previous rulings by domestic administrative authorities which conflict with the ECJ's ruling was considered in *Kuhne & Heitz NV v Productschap voorPluimvee en Eieren* (case C-453/00). The case involved a claim for reimbursement of export refunds made by a Dutch administrative authority against Kuhne. The latter's objection had been rejected by a court and the claim had therefore become a final decision by the administrative authority. The ECJ then delivered a ruling *(Voogd Vleesimport en-export* (case C-1 51/93)) which rendered the previous Dutch decision incorrect. Kuhne therefore requested a reopening of the administrative procedure. The ECJ held that there was an obligation on administrative authorities to comply with an interpretation given by the Court in respect of all legal relationships, because the effect of a ruling is to clarify and define the meaning of a European rule 'as it ought to have been understood and applied from the time of its coming into force' (para 21). This was subject to the principle of legal certainty, requiring finality of

administrative decisions once a reasonable time-limit for legal remedies had expired or those remedies had been exhausted (para 24); in such circumstances, there was no obligation to reopen previous decisions which had become final. However, on the facts of the case, the Dutch authority could reopen its decision, and the ECJ held that in such a situation, where a decision had become final and was based on a misinterpretation of EC law adopted without a preliminary ruling, and the matter had been raised without delay after the ECJ's intepretation, the administrative authority should review its decision.

10.6.2 Rulings as to the validity of EC measures: More flexible temporal effects

The cases considered above relate to rulings on interpretation. Where matters of validity of EC measures are concerned, the Court's approach is more flexible. This is logical because where a prima facie valid EC measure has been in place for some time, the finding that it is invalid may cause serious disruption to those that relied upon it. On grounds of legal certainty there are good arguments to decide in each case what effect the finding of invalidity should have. The ECJ has adopted the same approach to the effects of a ruling of invalidity to those of a successful annulment action, as a result of which the illegal act is declared void. However, arguing from Article 231(2) (ex 174(2)), which enables the Court, in a successful annulment action, to limit the effects of a regulation which it has declared void (see Chapter 12), the Court has limited the effects of a finding of invalidity in a number of cases, sometimes holding the ruling to be purely prospective (ie, for the future only, *excluding* the present case, eg, *Roquette Freres v France* (case 145/79); policy doubted in *Roquette Freres SA v Hauptzollamt Geldem* (case C-228/92), see Chapter 12). The Court has not so far insisted that the effect of a ruling of invalidity can only be limited in the case in which the ruling itself is given. The Court is more likely to be prepared to limit the effects of a ruling on validity than one on interpretation. Where matters of validity are concerned parties will have relied legitimately on the provision in question. A retrospective application of a ruling of invalidity may produce serious economic repercussions: thus it may not be desirable to reopen matters as regards the past. On the other hand too free a use of prospective rulings in matters of interpretation would seriously threaten the objectivity of the law, its application to all persons and all situations. Moreover, as the Court no doubt appreciates, a knowledge on the part of Member States and individuals that the law as interpreted may not be applied retrospectively could foster a dangerous spirit of non-compliance.

10.7 Special limits on references in JRA

Thus far we have discussed the system that operates for references under Article 234. This constitutes the vast majority of cases. There is one notable exception to this system—that of home affairs. When the EC (and EU) came to have powers in the field of JRA, some of the Member States were reluctant to allow easy access to the ECJ from the national courts. This was partly because of concerns that the broad purposive approach to interpretation taken by the ECJ might lead to greater obligations being placed upon Member States than they anticipated. On the other hand, it was clear that there had to be some judicial means of resolving questions of interpretation relating to EC justice and home affairs legislation. The result was a compromise which created special, more restrictive, arrangements in relation to references in this field such that not all national courts can make references to the ECJ. The first instance of this was in the Maastricht Treaty, more properly known as the Treaty of the European Union (TEU), which introduced the possibility for preliminary references within the JRA second pillar by virtue of Article 35 TEU which relates to police and judicial cooperation issues in criminal and civil cases. Following this, the Treaty of Amsterdam (ToA) led to the introduction of the new Title IV into the EC Treaty relating to asylum and immigration cases.

This created a separate preliminary-rulings mechanism in Article 68 EC for questions relating to that title. Thus we have two separate systems for different aspects of JRA. As we shall see below, each has restrictions not found in Article 234.

The ECJ only has jurisdiction in relation to certain limited JRA provisions of the TEU comprising 'framework decisions and decisions' and conventions established under the JRA. Thus, cases regarding certain measures simply cannot be brought before the ECJ for a preliminary ruling. Furthermore, the ECJ only has jurisdiction to hear any references insofar as each Member State accepts its jurisdiction (Article 35 TEU). There is no compulsory jurisdiction. Even then, each Member State has the option of limiting the rights of the national courts to refer a question to the ECJ to courts against whose decision there is no judicial remedy under national law. So far, most Member States have accepted the ECJ's jurisdiction at least as regards 'final' courts and around half have conferred jurisdiction upon all national courts. This 'flexible' approach to jurisdiction has led to confusion, but may also be criticised for the uncertainties and inequalities it introduces into the system: individuals' rights

of access to the ECJ will vary depending on the Member State in which the action is brought. There is real danger that there will be a failure of effective legal protection, which is particularly significant because JRA measures touch upon individual liberty. This still may be better than the previous position under the TEU, where there was no such access. The courts of some Member States are availing themselves of the possibility to refer questions in the field of JRA (see Chapter 26).

The Article 68 provisions relating to asylum and immigration in Title IV of the EC Treaty create a different regime as regards the jurisdiction of the ECJ in respect of the provisions in Title IV. Although a preliminary ruling procedure will apply in all Member States to all these provisions, there are certain differences from Article 234. Most notably, only the courts against whose decisions there is no judicial remedy are required to ('shall') make a reference 'if they consider it necessary' to do so. Furthermore, the ECJ will not have jurisdiction in relation to measures taken under new Article 62(1) EC (concerning the crossing of external borders) relating to 'the maintenance of law and order and safeguarding of internal security'. These provisions create holes in the judicial protection offered; unlike the JRA Pillar of the TEU, the ECJ's jurisdiction under Article 234 prior to the ToA applied to the whole of the EC Treaty. The ToA amendments undermine the homogeneity and generality of access to the ECJ. Many important references under Article 234 came from the lower courts: now these courts are, in this new area, precluded from making references. Consequently, individuals seeking a European ruling will be forced to litigate through their national appeal structure. The provision also creates uncertainty: when will circumstances necessitating the maintenance of law and order or safeguarding internal security arise? Indeed, who decides this question? It affects those most in need of protection: an asylum seeker, for example, may not be in a position to exhaust national remedies. Even if he does, he may find he falls outside the ECJ's jurisdiction. This approach, accepted with reluctance by the Commission on the insistence of Member States, hardly matches up with a Union which claims to be based on the rule of law and respect for human rights. The position will be improved if the Lisbon Treaty comes into force because this provides for the normal preliminary rulings procedure to apply to justice and home affairs issues subject to limitations relating to validity of law enforcement and national security (Article 276 TFEU). CFSP, which remains in the TEU, continues by Article 275 TFEU to fall outside the preliminary rulings procedure contained in what will, should the Lisbon Treaty come into force, become Article 267 TFEU.

10.8 The increasing workload of the ECJ: The need for reform

The current system governing preliminary rulings is under stress as, despite the *acte clair* doctrine, the number of references made to the ECJ remains high. With enlargement, the backlog can only get worse. There will probably be an increased number of referrals as an enlarged geographic jurisdiction will lead to a greater number of people (and courts) covered by EU law. The very fact that the new Member States are still new to the EU legal system could mean that they are likely to create initially a disproportionate number of references. This arises from two linked points. The first is that there are more likely to be questions arising in the new Member States as their legal systems adjust to the Union legal order. Further, their courts are less likely to have the experience and confidence to deal with many EU law questions without guidance from the ECJ, especially given that many of the new Member States are relatively new to democracy and a market economy.

There are many proposals to reform the current system to ensure that the ECJ can better provide effective judicial protection by removing the delays in the reference system. The difficulty remains one of how to reduce the number of references without damaging the uniform interpretation of EU law. The easy access of national courts to the ECJ has been the key to the relationship between domestic and EU legal systems. Some have suggested that the ECJ should become a true appeal court which decides for itself which cases to hear by granting or refusing leave to appeal from the national courts. This would require treaty amendments and would be controversial because it would more openly establish the ECJ as the supreme court in the Union legal order. This would look rather too much like a federal state to be politically acceptable to the Member States. Other suggestions have been to create Union Courts located in the Member States (rather like the federal Circuit Courts in the United States of America).

The Treaty of Nice attempted to address the problem by providing in Article 225(3) that the CFI is to have jurisdiction to hear preliminary references in areas specified in the Statute of the Court. As a safety mechanism, the same paragraph further provides that where a 'case requires a decision of principle likely to affect the unity or consistency of Community law' the CFI 'may refer the case to the Court of Justice for a ruling'. Additionally, decisions of the CFI on preliminary references may be subject to review by the ECJ. This possibility is stated to be

available 'exceptionally' and 'where there is a serious risk of the unity or consistency of Community law being affected'. In the November 2005 version of the Statute, no areas were allocated to the CFI under Article 225(3).

Once the power in Article 225(3) is exercised, the restriction of access to the ECJ may cut down that Court's workload and, subject to the CFI not being swamped by the cases diverted to it, may reduce the backlog in cases—especially the preliminary references. In any event, this would constitute a significant change in the judicial architecture within the European Union.

More modestly the ECJ itself has introduced new rules into its Rules of Procedures and Statute that allow for expedited procedures to be used in some cases which are simple or raise no new issues. Thus the ECJ is taking steps to devote less resources to cases that do not merit them because they are legally straightforward. This change emphasises the importance of the ECJ in the Union's court system, suggesting a more hierarchical structure to the system than that found in the early days. Unlike the power in Article 225(3) EC, these steps are actually being put into practice. Thus Article 1 04a provides for an accelerated procedure where the case involves a matter of 'execeptional urgency'. This provision is particularly important in cases involving persons in detention, those facing deportation or children. The court can fix a hearing date within weeks in these cases. Article 104(3) allows the ECJ to dispense with oral hearings and proceed simply by issuing a 'reasoned order' where the case referred raises identical issues upon which the ECJ has already ruled or is free from reasonable doubt. Thus if a national court refers a case that meets the *CILFIT* rules, the ECJ can deal swiftly with the matter. The Statute was also amended by the Nice Treaty so that where no new point of law arises, the ECJ can dispense with the requirement for an Advocate-General's opinion. These procedural steps have helped to focus the ECJ's resources upon cases that really need them because they raise new issues of EU law but they have preserved the crucial right of access that national courts have to refer any question that they wish to.

10.9 Conclusions

The success of the preliminary rulings procedure depends on a fruitful collaboration between the ECJ (and, at some point, the CFI) and the courts of Member States. Generally speaking both sides have played their part in this collaboration. The ECJ has rarely refused its jurisdiction or attempted to interfere with national courts' discretion in matters of referral and application of EC law. National courts have generally been ready to refer; cases in which they have unreasonably refused to do so are rare. Equally rare are the cases in which the ECJ has exceeded the bounds of its jurisdiction without justification. However, this very separation of powers, the principal^ strength of Article 234, is responsible for some of its weaknesses. The decision whether to refer and what to refer rests entirely with the national judge. No matter how important referral may be to the individual concerned (eg, *Sandhu)* he cannot compel referral; he can only seek to persuade. And although the ECJ will extract the essential matters of EC law from the questions referred it can only give judgment in the context of the questions referred (see *Hessische Knappschaft v Maison Singer etFils* (case 44/65)). Thus, it is essential for national courts to ask the right questions. As the relevance of the questions can only be assessed in the light of the factual and legal circumstances of the case in hand, these details must also be supplied. A failure to fulfil both these requirements may result in a wasted referral or a misapplication of EC law. Given the increasing pressures on the ECJ, wasted references and the drafting of sloppy questions can also be seen as a waste of the limited judicial resources at the Union level.

As the body of case law from the ECJ has developed and national courts have acquired greater confidence and expertise in applying EC law and ascertaining its relevance to the case before them, there should be less need to resort to Article 234. The initial issue, of whether a decision on a 'question' of EC law arises during the proceedings, has become crucial. As we have seen *CILFITSrl* (case 283/81) has supplied guidelines to enable national courts to answer this question. Where a lower court is in doubt as to whether a referral is necessary the matter may be left to be decided on appeal. On the other hand, where a final court has the slightest doubt as to whether a decision is necessary, it should always refer—bearing in mind the purpose of Article 234(3) and its particular importance for the individual litigant. The danger that final courts will fail to refer seems to have been one of the factors that influenced the ECJ in its ruling in *Kobler* (Case C-224/0 1) which allows individuals to sue for damages where a reference was not made when it should have been. This case, along with others like *CILFIT* and *Foglia v Novello* is illustrative of the trend that we have noted whereby the ECJ has been positioning itself not as an equal partner in a horizontally structured relationship, but as a superior court. Some might even say it sees itself as the Supreme Court for the Union. In so doing, it has sought to put itself firmly in control of the development of European law and not simply to act as the servant of the national courts.

The historical significance of the ECJ's rulings and the Article 234 procedure has been well recognised by courts, commentators and Member States. The current issue of importance for the procedure is the delay inherent in the legal system of the expanded European Union which is jeopardising effective judicial proctection and uniform application of EC law. The solutions to these problems are not clear but the procedural steps taken by the ECJ so far have had some effect in limiting any increase in the length of references if not actually reducing it. Further steps would require serious changes to reduce the number of cases heard by the ECJ which would entail a system of prioritising cases. This would remove the ease of access to the ECJ that has hitherto been so successful. Nevertheless, such a change is probably justified given the growing maturity of the EC law system and the increased familiarity of judges with it. The alternative of increasing delay is just as unattractive as that of some risk of 'wrong' decisions being made by national courts.

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CHAPTER 12. UNION CITIZENSHIP

A. INTRODUCTION

So far we have considered the position of those nationals who have exercised their rights of free movement as workers, the self-employed, and the providers and recipients of services. These migrants have been described as market citizens (*homo economicus* or the *bourgeois*) who participate in, and benefit from, the common market as economic actors.[1] Yet, they constitute only a small percentage of the EU's working population: prior to the 2004 enlargement, approximately 1.5 per cent of EU-15 citizens lived and worked in a different Member State from their country of origin (less than 3 million people)—a proportion that had hardly changed for the last 30 years.[2] Post enlargement, the figure stands at about 8 million[3] (out of a total population of about 500 million), albeit that many more millions of EU citizens exercise their right to travel to other Member States temporarily—particularly as tourists or as students.

This means that the vast majority of Union nationals who are economically active have never exercised their rights of free movement under Articles 45, 49, and 56 (except possibly in their capacity as tourists); by definition, those who are not economically active cannot enjoy the rights of free movement (although they have been assisted by decisions of the Court on work-seekers, tourists, and students as well as by the original 1990 Residence Directives[4]). Yet, Union law continues to affect many aspects of the daily lives of those nationals who do not, or cannot, exercise their rights of free movement. Such individuals often feel at best removed, and at worst alienated, from those taking decisions in their name. This legitimacy gap has presented a major challenge for the EU: what can be done to enable all nationals to identify with, and feel loyalty to, the EU?

The concept of 'Citizenship of the Union', introduced at Maastricht, formed a key part of the Union's response, aiming to provide the glue to help bind together nationals of all the Member States. Union citizenship is both a retrospective and prospective concept: retrospective in that it contains a recognition that the EU has its own people; prospective in that it is through citizenship that communities and identities are constituted.[5] However, the concept of Union citizenship is itself subject to an important limitation: it can be enjoyed only by those holding the nationality of one of the Member States. It has therefore not helped the 18.5 million (and rising) third-country nationals (TCNs) who are legally resident in the EU.[6] Many contribute to the economies of the host country and so,

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[1] M. Everson, 'The legacy of the market citizen' in J. Shaw and G. More (eds.), *New Legal Dynamics of the European Union* (Oxford: Clarendon Press, 1995).

[2] <http://www.ec.europa.eu/employment_social/workersmobility_2006>. See also A. Taylor, 'Skilled staff reluctant to move in Europe', *Financial Times*, 11 Dec. 2006. As we have seen, obstacles included differences in tax systems, healthcare, benefits, lack of EU-wide integrated employment legislation, patchy cross-border recognition of professional qualifications, difficulty finding work for spouses, and availability of housing and schools.

[3] 5th Report on Citizenship of the Union: COM(2008) 85.

[4] Council Dir. 90/364/EEC ([1990] OJ L180/26) on the rights of residence for persons of sufficient means; Council Dir. 90/365/EEC on the rights of residence for employees and self-employed who have ceased their occupational activity ([1990] OJ L180/28) and Council Dir. 93/96 on the rights of residence for students ([1993] OJ L317/59). These directives have been repealed and replaced by the Citizens' Rights Dir. 2004/38 ([2004] OJ L158/77).

[5] See J. Shaw, *Citizenship of the Union: Towards post-national membership*, specialized course delivered at the Academy of European Law, Florence, Jul. 1995.

[6] Commission, *First Annual Report on Migration and Integration*, COM(2004) 508.

indirectly, to the EU, but they are excluded from the rights granted to citizens.[7] This chapter will examine the concept of Union citizenship and the rights EU citizens enjoy; in Chapter 14 the position of TCNs is considered.

B. CITIZENSHIP OF THE UNION

While a desire to create a 'Europe for Citizens'[8] or a 'People's Europe'[9] dates back to the early 1970s, it was not until the Spanish pressed the issue at Maastricht[10] that the idea of Union citizenship took concrete form. A new Part Two, entitled 'Citizenship of the Union', was added to the EC Treaty by the Maastricht Treaty in 1992, establishing 'Citizenship of the Union' and listing a number of specific rights which citizens can enjoy.

The inclusion of the citizenship provisions into the Treaties started a lengthy and ongoing debate about the nature of EU citizenship, focusing on two interrelated questions. First, what model of citizenship can and should the Union adopt? The copious literature is full of suggestions, including market citizenship (focusing on the rights of economic actors), social citizenship (emphasizing the social-welfare rights of citizenship), or republican citizenship (based on active citizen participation in the decision-making process). Secondly, given that the EU is a *sui generis*, transnational polity, should EU citizenship aim to replicate citizenship of a nation state (so that European citizenship means citizenship of a European nation state), or should the EU aim to create a new, post-national form of citizenship based on multiple-level associations and identifications at regional, national, and European level. If the latter model, this raises the further question of the extent to which it is legitimate to draw on the literature and ideas relating to the development of citizenship of a nation state in mapping and analysing what is occurring at EU level.

In practice, many writers do take this literature as their starting point since this informs most individuals' understanding of citizenship. This chapter draws on one particular strand of the literature, examining whether the term citizenship is or should be based on ideas of inclusion or exclusion.[11] An approach to citizenship based on inclusionary ideologies casts the net of potential beneficiaries widely, including not only nationals (whether economically active or not) but also those TCNs who are lawfully resident. It envisages that these citizens enjoy a broad range of civil, political, economic, and social rights. This version of citizenship is sometimes referred to as 'social citizenship'[12] and has some resonance in the EU as the EU develops, albeit in a piecemeal fashion, a broad range of social policies.[13]

By contrast, the exclusionary approach to citizenship constructs the identity of the citizen through the 'Other': the TCN who needs to be excluded to make the citizen 'secure'.[14] For a while this model seemed to be in the ascendancy in the EU. At Amsterdam a new objective was introduced into

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[7] They are sometimes described as 'denizens'. See, e.g., K. Groenendijk, 'The Long Term Residents Directive, denizenship and integration' in A. Baldaccini, E. Guild, and H. Toner (eds.), *Whose Freedom, Security and Justice? EU immigration and asylum law and policy* (Oxford: Hart Publishing, 2007), 429.

[8] See the Tindemans Report on the European Union which contained a chapter entitled 'Towards a Europe for citizens' (Bull. EC (8) 1975 II no. 12, 1) which was drawn up at the request of the Paris summit in 1974.

[9] See the two Adonnino Reports of 1985 to the European Council on a People's Europe (Bull. EC Suppl. 7/85).

[10] For a full discussion of the background see S. O'Leary, *The Evolving Concept of Community Citizenship* (The Hague: Kluwer, 1996), Ch. 1. See also the Spanish memorandum on citizenship, 'The road to European citizenship', Co.SN 3940/90, 24 Sep. 1990.

[11] See, e.g., J. D'Oliveira, 'European citizenship: Its meaning, its potential' in R. Dehousse (ed.), *Europe after Maastricht: An ever closer union*? (Munich: Law Books in Europe, 1994), 141–6; J. Shaw, 'The many pasts and futures of citizenship in the European Union' (1997) 22 *ELRev*. 554.

[12] M. Dougan, 'Free movement: The workseeker as citizen' (2001) 4 *CYELS* 93, 103.

[13] C. Barnard, 'EU social policy: From Employment Law to Labour Market Reform' in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford: OUP, forthcoming).

[14] Shaw, above n. 11, 571. See also G. de Búrca, 'The quest for legitimacy in the European Union' (1996) 59 *MLR* 349, 356–61.

(now) Article 3(2) TEU of maintaining and developing 'an area of freedom justice and security without internal frontiers' in which 'the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. This idea is developed further by Title V of Part Two TFEU. Yet the reality is inevitably more complex than this and, as we shall see in Chapter 14, the need to welcome TCN migrant workers to fill jobs in areas where there are skills gaps and to help address problems created by an ageing population has forced the EU to rethink any exclusionary agenda suggested by Article 3 TEU.

We begin by examining the citizenship offered by the EU to its nationals, taking Held's understanding of citizenship as our starting point:[15]

Citizenship has meant a reciprocity of rights against, and duties towards, the community. Citizenship has entailed membership, membership of the community in which one lives one's life. And membership has invariably involved degrees of participation in the community.

Held's definition suggests that there are three interconnected strands to citizenship: rights and duties, membership, and participation. These ideas will form the framework in which we examine EU citizenship.

C. RIGHTS AND DUTIES

1. INTRODUCTION

1.1 The Main Treaty Provisions

In his classic work on (British) citizenship,[16] Marshall argued that citizenship involves full membership of the community which has gradually been achieved through the historical development of individual rights, starting with civil rights (basic freedoms from state interference), followed by political rights (such as electoral rights), and, most recently, social rights (including rights to education, health care, unemployment insurance, and old-age pensions—the rudiments of a welfare state). Where does the EU stand against this yardstick? Article 20(2) TFEU provides that 'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*':[17]

- the right to move and reside freely within the territory of the Member States[18]
- the right to vote in local and European elections in the host state and stand as a candidate
- the right to diplomatic and consular protection from the authorities of any Member State in third countries[19]
- the right to petition the European Parliament and the right to apply to the ombudsman and to address the institutions and advisory bodies of the Union in any one of the official languages of the EU.

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[15] D. Held, 'Between state and civil society: Citizenship' in G. Andrews (ed.), *Citizenship* (London: Lawrence and Wishart, 1991), 20, cited in Shaw, above n. 11.

[16] T. H. Marshall, *Citizenship and Social Class* (Cambridge: CUP, 1950), 28–9.

[17] Art. 25 TFEU requires the Commission to report every three years on the application of these provisions. On this basis, the Council, acting unanimously in accordance with the special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Art. 20(2) TFEU. These provisions will enter into force only after their approval by the Member States in accordance with their respective constitutional requirements (Art. 25, para. 2 TFEU).

[18] See also Art. 45(1) of the Charter.

[19] See also Art. 46 of the Charter. Of 166 countries outside the EU, there are only three where all 27 Member States are represented (COM(2009) 262). An estimated 8.7% of EU citizens (7 million people) travelling outside the EU do so to countries where their Member State is not represented (COM(2009) 263). The implementation of this provision can be found in Dec. 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 19 Dec. 1995 regarding protection for citizens of the EU by diplomatic and consular representations ([1995] OJ L314/73). See also the Commission's Green Paper, 'Diplomatic and consular protection of Union citizens in third countries' COM(2006) 712. The Lisbon Treaty added a new Art. 23(2) giving powers to the Council to adopt directives to facilitate diplomatic and consular protection in accordance with the special legislative procedure and after consulting the European Parliament.

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

This rather motley collection of rights falls far short of the full panoply envisaged by Marshall. In part this is due to the Union's lack of competence, particularly in fields connected with the welfare state, and in part due to the principle of subsidiarity—can and should the Union be attempting to replicate welfare-state provision which is already extensively and expensively provided for at national level? This demonstrates the problem of using literature written in the context of the nation state as a measure by which to assess the EU. For this reason, it might be fairer to say that the rights contained in Part Two supplement and complement rights granted at national level.[20]

It is also a mistake to look at the four substantive rights listed in Part Two in isolation. Article 20(2) makes clear that the four rights listed are merely examples ('*inter alia*'). The reference to the fact that '[c]itizens shall enjoy the rights . . . provided for in the Treaties' means that *migrant* citizens also enjoy the right to non-discrimination on the ground of nationality found in Article 18 TFEU,[21] while all citizens (not just those who have exercised their rights of free movement) can enjoy the right to equal treatment, originally on the ground of sex, now on other grounds,[22] along with other social, environmental, and consumer rights.[23] This prompted Advocate General La Pergola in *Stöber and Pereira* to describe Part Two TFEU as progress of 'major significance in the construction of Europe'.[24]

1.2 The Charter

Given that a number of citizens' rights do exist, albeit scattered across primary and secondary sources, the Cologne European Council decided that the fundamental rights should be consolidated into a charter and so become more visible.[25] Eventually the Charter on Fundamental Rights was signed in 2000, bringing together in a single text both civil and political rights on the one hand and economic and social rights on the other.[26] The Charter, which draws on the European Convention on Human Rights, the constitutional traditions of the Member States, and general principles of Union law, is grouped around six fundamental values shared by the 'peoples' (not just the citizens) of Europe:[27] dignity (Articles 1–5); freedoms (Articles 6–19); equality (Articles 20–6); solidarity (Articles 27–38); citizens' rights (Articles 39–46); and justice (Articles 47–50).[28] The Charter's significance is all the greater following the Lisbon Treaty's entry into force giving the Charter legal effect,[29] albeit subject to

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[20] See also Art. 9 TEU: 'Citizenship of the Union shall be additional to national citizenship and shall not replace it', repeated in Art. 20(1) TFEU.

[21] See, e.g., Case C–274/96 *Bickel and Franz* [1998] ECR I–7637 considered below n. 47.

[22] See Art. 19 TFEU (ex Art. 13 EC) and the directives adopted under it: Dir. 2000/43 on Race and Ethnic Origin ([2000] OJ L180/22) and the Framework Dir. 2000/78 ([2000] OJ L303/16) prohibiting discrimination on grounds of age, religion, belief, disability and sexual orientation.

[23] See, e.g., N. Reich, 'A European constitution for citizens: Reflections on the rethinking of Union and Community law' (1997) 3 *ELJ* 131, 142–57 and 'Union citizenship: Metaphor or source of rights?' (2001) 7 *ELJ* 4, 7.

[24] Joined Cases C–4 and 5/95 *Stöber and Pereira* v. *Bundesanstalt für Arbeit* [1997] ECR I–511, para. 50.

[25] See the conclusions of the Cologne European Council setting up a Convention to draft a human rights Charter: <http://www.ue.eu.int/newsroom/newmain.asp?lang=1>, Annex IV, para. 44. Academics have long called for this: e.g. K. Lenaerts, 'Fundamental rights to be included in a Community catalogue' (1991) 16 *ELRev.* 367; P. Alston and J. Weiler, 'An "ever closer union" in need of a human rights policy: The European Union and human rights' in P. Alston (ed.), *The EU and Human Rights* (Oxford: OUP, 1999).

[26] See, e.g., I. Hare, 'Social rights as fundamental human rights' in B. Hepple (ed.), *Social and Labour Rights in a Global Context: International and comparative perspectives* (Cambridge: CUP, 2002); J. Kenner, 'Economic and social rights in the EU legal order: The mirage of indivisibility' in J. Kenner and T. Hervey (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Oxford: Hart Publishing, 2003). Cf. S. Smismans, 'The European Union's fundamental rights myth' (2010) 48 *JCMS* 45.

[27] 1st recital.

[28] For criticism see J. H. H.Weiler, 'Editorial: Does the European Union truly need a charter of rights?' (2000) 6 *ELJ* 95.

[29] See Art. 6(1) TEU. Prior to 1 Dec. 2009, the Charter was not legally binding, described instead as a 'solemn proclamation'. However, a number of AGs referred to it in their Opinions (see, e.g., Jacobs AG's Opinion in Case C–50/00

the special position of the UK and Poland as laid down by the protocol.[30] The protection of human rights will be further reinforced by the EU's accession to the European Convention on Human Rights provided for by Article 6(2) TEU.[31]

However, the Charter's existence serves to highlight an ongoing tension that pervades the area of law concerning citizenship. Fundamental rights are seen as universal, capable of being enjoyed by all human beings. By contrast, the majority of the rights in Part Two TFEU on citizenship of the Union can be enjoyed only by EU citizens who benefit from them by virtue of their nationality. It might also be thought that the rights outlined by Part Two TFEU and the Charter are all enforceable vertically against the body bestowing the title 'citizen', i.e. the EU. In fact, most are enforced vertically but against the state—either the citizen's own state (in the case of social, consumer, and environmental rights) or the host state (in respect of the free movement rights). Only a few rights are enforceable vertically against the EU (the right to petition the Parliament and to contact the ombudsman).[32] Therefore, one of the conundrums of EU citizenship is that rights intended to foster a commitment to the Union are actually being exercised against the Member States.

The relationship between the Union citizen and the Member States also explains another potential tension. The Union gives rights but—despite the wording of Article 20(2)—demands little by way of duties from its citizens (e.g., to pay taxes, to participate in the defence of the country, to obey the law, to vote, willingness to work).[33] These duties are owed to the Member States and thus it is the Member States which bear the burden—using national taxpayers' money—of the rights. And because the Member States hold the purse strings, and ultimately the decision-making power, they are not prepared to relinquish their sovereignty fully. Therefore, while, under international law, citizens of a state cannot be deported, no matter how mad, bad, or impecunious they might be, migrant EU citizens can still be deported from the host state.[34] In this respect EU citizenship is more partial than would first appear.

1.3 Article 21(1) TFEU

Of the rights laid down in Articles 20–5 TFEU, Article 21(1) (ex Article 18(1) EC) is considered the 'primary'[35] right. It gives EU citizens the right to move *and* reside freely within the territory of the Member States,[36] subject to the limitations and conditions laid down in the Treaties and by the

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Unión de Pequeños Agricultores v. *Council of the European Union* [2002] ECR I–6677; Geelhoed AG's Opinion in Case C–224/98 *D'Hoop* v. *Office National d'Emploi* [2002] ECR I–6191), as did the General Court (Case T–177/01 *Jégo Quéré et Cie SA* v. *European Commission* [2002] ECR II–2365) and the Court of Justice: Case C–540/03 *EP v Council (Family Reunification Directive)* [2006] ECR I–5769, paras. 38 and 58. So far the position following the entry into force of the Lisbon Treaty is not so different: Case C-555/07 *Kücückdeveci* v. *Swedex GmbH* [2010] ECR I–000.

[30] Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom. The Heads of States have agreed to extend that protocol to the Czech Republic: Conclusions of the European Council of 29 and 30 Oct. 2009 (Doc. 15265/09 Concl. 3). For a discussion of the protocol, see C. Barnard, 'The 'opt-out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of rhetoric over reality?' in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (New York: SpringerWien), 2008, 257.

[31] See also the Commission's Communication 'An area of freedom, security and justice serving the citizen', COM(2009) 262, 7. The fundamental rights agency (established by Council Reg. 168/2007 ([2007] OJ L53/1)) assists the EU institutions and Member States through research projects and data collection. See also the complementary programme, 'Fundamental rights and citizenship' adopted by Council Dec. 2007/252/JHA ([2007] OJ L110/33).

[32] See S. O'Leary, 'The relationship between Community citizenship and the protection of fundamental rights in Community law' (1995) 32 *CMLRev*. 519.

[33] See, e.g., C. Closa, 'Citizenship of the Union and nationality of the Member States' (1995) 29 *CMLRev*. 487, 509.

[34] This issue is considered in more detail in Ch. 13. Note, in the same spirit, that Member States can still reserve certain senior jobs in the public service to nationals only (Art. 45(4) TFEU and Arts. 51 and 62 TFEU).

[35] La Pergola AG in Case C–85/96 *Martínez Sala* v. *Freistaat Bayern* [1998] ECR I–2691, para. 18. See also 1st recital to CRD 2004/38.

[36] As La Pergola AG said in Case C–85/96 *Martínez Sala* [1998] ECR I–2691, para. 18 in emphasizing the right to move *and* the right to reside, Art. 21(1) extracted the kernel from the other freedoms of movement.

measures adopted to give them effect.[37] The initial question facing the Court was whether Article 21(1) merely codified the existing law (as the drafters had intended), in which case it was largely unremarkable,[38] or whether it went beyond the existing law and created a free-standing right to movement for *all* Union citizens, irrespective of their economic or financial standing. If so, then Article 21 was of considerable importance. After a certain amount of prevarication, when the Court made passing reference to the citizenship provisions but only to reinforce its interpretation of Articles 45, 49, or 56,[39] the Court finally decided on the importance of citizenship when it declared in *Grzelczyk*[40] that:

Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[41]

This paved the way for the Court in *Baumbast*[42] to sever the link between migration and being economically active:

the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two [TFEU], on citizenship of the Union.

This resulted in the finding in *Chen*[43] that a baby, born to Chinese parents in Northern Ireland which gave the baby the nationality of the Republic of Ireland (i.e., Irish nationality), enjoyed the rights of Union citizenship. She therefore enjoyed the right to reside in the UK under Article 21(1), subject to the limitations and conditions laid down by the Person of Independent Means Directive 90/364 (now Article 7(1)(b) of the CRD 2004/38) which had to be interpreted narrowly.

From the case law it is now possible to say that, subject to the limitations and conditions laid down in the Treaties and the secondary legislation, all EU citizens enjoy under Article 21(1) TFEU:[44]

• the initial right of entry into another Member State[45]

• a free standing and directly effective right of residence in another Member State[46]

• the right to enjoy social advantages on equal terms with nationals[47] for those lawfully resident[48] in another Member State.

2. THE CITIZENS' RIGHTS DIRECTIVE 2004/38

2.1 Introduction

[37] The European Parliament and Council, acting in accordance with the ordinary legislative procedure, may 'adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1' (Art. 21(2)) where the Treaties have not provided the necessary powers. However, in respect of social security or social protection Art. 21(3) TFEU provides that the Council can act in accordance with the special legislative procedure.

[38] Even prior to Maastricht there were a number of decisions which can be seen with the benefit of hindsight to have a citizenship component: e.g., Case 186/87 *Cowan* [1989] ECR 195; Case 293/83 *Gravier* v. *City of Liège* [1985] ECR 593.

[39] See, e.g., Case C–193/94 *Skanavi* [1996] ECR I–929; Case C–274/96 *Bickel and Franz* [1998] ECR I–7637.

[40] Case C–184/99 [2001] ECR I–6193, para. 31, echoing La Pergola AG in Case C–85/96 *Martínez Sala* [1998] ECR I–2691, para. 18. For a full discussion, see D. Kostakopoulou, 'Ideas, norms and European citizenship: Explaining institutional change' (2005) 68 *MLR* 233.

[41] See also La Pergola AG in Case C–85/96 *Martínez Sala* [1998] ECR I–2691, para. 20., who said the introduction of Union citizenship creates a new status for the individual, 'a new individual legal standing in addition to that already provided for', and Art. 21 attaches to that new status the right to move and reside freely.

[42] Case C–413/99 *Baumbast and R.* v. *Secretary of State for the Home Department* [2002] ECR I–7091, para. 83.

[43] Case C–200/02 *Chen* v. *Secretary of State for the Home Department* [2004] ECR I–9925. Cf. *McCarthy v. Secretary of State* [2008] EWCA 641 now on appeal to the House of Lords.

[44] A full discussion of the development of this case law can be found in Ch. 15 of the first edition of this book.

[45] Case C–357/98 *Ex p. Yiadom* [2000] ECR I–9265.

[46] Case C–413/99 *Baumbast* [2002] ECR I–7091, para. 84.

[47] Case C–274/96 *Bickel and Franz* [1998] ECR I–7637 (translation facilities); Case C–85/96 *Martínez Sala* [1998] ECR I–2691 (child allowance); Case C–184/99 *Grzelczyk* [2001] ECR I–6193 (minimex).

[48] Case C–85/96 *Martínez Sala* [1998] ECR I–2691; Case C–456/02 *Trojani* [2004] ECR I–7573.

The rights provided by Article 21(1) must now be viewed in the context of the Citizens' Rights Directive (CRD) 2004/38,[49] which repeals and replaces the directives facilitating the migration of the economically active: Directive 68/360[50] on the rights of entry and residence; Regulation 1251/70[51] on the right to remain; the two Union directives on establishment and services;[52] and the three 1990 Residence Directives, together with the provisions on family rights laid down in Articles 10 and 11 of Regulation 1612/68 (now 492/2011). At the heart of the directive lies the basic idea that the rights enjoyed by the migrant citizen and their family members increase the longer a person is resident in another Member State.[53]

Because the Court sees this directive as central to citizens' rights it insisted in *Metock*[54] that it must not be interpreted restrictively nor must the provisions of the CRD be interpreted so as to deprive them of their effectiveness. Furthermore, the Court notes that there is a continuum between the pre- and post-CRD,[55] as well as a raising of standards. It said that the CRD 'aims in particular to strengthen the right of free movement and residence of all Union citizens, so that citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals'.[56]

2.2 The Personal Scope of the Citizens' Rights Directive

(a) The rules

The directive applies to Union citizens, defined, as with Article 20(1) TFEU, as 'any person having the nationality of a Member State'[57] who moves to, or resides in, a Member State other than that of which he or she is a national.[58] In fact, as we shall see, for the first five years, it really applies only to those Union citizens who have sufficient resources, either through employment or independently, who will not become an unreasonable burden on the host state.

The directive also applies to family members, irrespective of nationality,[59] who 'accompany *or* join them'.[60] As with the original Article 10 of Regulation 1612/68, the family members fall into two groups: (1) those who must be admitted[61] and (2) those whose entry and residence the host state must merely facilitate[62] (see fig. 12.1). In respect of the first group, the definition of family members is drafted more broadly than in the original Regulation 1612/68. According to Article 2(2) CRD, family member means:[63]

Fig. 12.1 Family members under the CRD

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[49] In its Report on the Application of the Directive (COM(2008) 840/3, 3) the Commission notes that 'The overall transposition of Directive 2004/38 is rather disappointing. Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States.'

[50] [1968] OJ SE (II) L257/13/485.

[51] This was repealed by Commission Reg. 635/2006 (OJ [2006] L112/9).

[52] Dir. 73/148 OJ [1973] L172/14 and Dir. 75/34 (OJ [1975] L14/10).

[53] The cross-border element remains essential: Case C–127/08 *Metock and others v Minister for Justice, Equality and Law Reform* [2008] ECR I–6241, para. 77. See also 3rd recital of CRD: 'Union citizenship should be the fundamental status of nationals of the Member States *when* they exercise their right of free movement and residence' (emphasis added).

[54] Case C–127/08 *Metock* [2008] ECR I–6241, paras. 84 and 93.

[55] Para. 59.

[56] Ibid.

[57] Art. 2(1).

[58] Art. 3(1).

[59] See also the fifth recital to the directive: 'The right of all citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.'

[60] Ibid. Emphasis added.

[61] Art. 3(1).

[62] Art. 3(2).

[63] Art. 2.

(a) spouse
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in (b)
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in (b).

In respect of the second group (those whose admission must be facilitated), according to Article 3(2) two sorts of family members fall into this category:

(a) any other family members,[64] not falling under Article 2(2) who, in the country from which they have come,[65] are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen[66]
(b) the partner with whom the Union citizen has a durable relationship, duly attested.[67]

While Article 3(2) requires the host state merely to 'facilitate entry and residence' of this second group, the directive provides a strong steer that the normal rule will be to permit entry. Article 3(2)(b) provides: 'The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.'

We shall now consider the meaning of the various terms to describe family members, particularly in the light of the Court's case law under (the now repealed) Article 10 of Regulation 1612/68.

(b) Spouses, registered partners, and partners in a durable relationship duly attested

(i) Spouses

Who is a 'Spouse'? The Court has approached the term 'spouse' in a conventional manner:[68] it is the person to whom the EU citizen is married under the laws of the state where the marriage was entered into. In *Diatta*[69] the Court considered the situation of a couple who were married but separated. The case concerned a Senegalese woman married to a French national who lived and worked in Germany. Eventually she separated from her husband and lived in separate accommodation with the intention of divorcing. The authorities refused to renew her residence permit on the ground that she was no longer a family member of an EU national and did not live with her husband. The Court ruled that the (then) Article 10 of Regulation 1612/68 did not require members of a migrant's family to live permanently together. It reasoned that if cohabitation of spouses was a mandatory condition for a residence permit, the worker could cause his spouse to be expelled from the Member State at any moment, simply by throwing her out of the house.

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[64] The degree of relatedness is not specified: COM(2009) 313, 5.

[65] The meaning of this phrase was considered by the British Court of Appeal in *KG (Sri Lanka)* v. *Secretary of State for the Home Department* [2008] EWCA Civ 13.

[66] The fact that these conditions are satisfied must be proved by a document issued by the relevant authority in the country of origin or country from which they are arriving in the case of those seeking residence under Art. 7: Art. 8(5)(e).

[67] By contrast, the fact that a 'durable relationship, duly attested' exists is satisfied merely by 'proof' for those seeking residence under Art. 7: Art. 8(5)(f).

[68] Although cf. Case C–117/01 *KB* v. *National Health Service Pensions Agency* [2004] ECR I–541, paras. 33–4 interpreting Art. 157 TFEU (ex Art. 141 EC) on equal pay where the Court held that national legislation preventing a transsexual man from marrying a woman interfered with the right to marry under Art. 12 ECHR, thereby preventing the man from receiving a survivor's pension, and so breached Art. 157.

[69] Case 267/83 *Diatta* v. *Land Berlin* [1985] ECR 567.

Diatta therefore suggests that separated couples must be allowed to remain in the host state, a decision compatible with the Court's approach in *Commission* v. *Germany*[70] that Regulation 1612/68 had to be interpreted in the light of the requirement of the respect for family life set out in Article 8 ECHR. However, the position under the CRD may be different. To enjoy a right of residence under Article 7(1)(d) the family members must be 'accompanying or joining a Union citizen', and to acquire permanent residence under Article 16(2) the family members must have 'legally resided with the Union citizen in the host state for a continuous period of five years'.[71] This suggests a requirement of actual cohabitation.

A divorced spouse's position is different again. In *Diatta*[72] the Court said that a 'marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority'.[73] This would suggest that only on the completion of all the formal stages of divorce proceedings, including the grant of a decree absolute, will the spouse's dependent right of residence in the Member State cease. However, as we shall see, Article 13 of Directive 2004/38 does give certain legal protection to divorcees.[74]

The term 'spouse' does not include cohabitees. This was shown in *Reed* [75] where the Court ruled that an English woman wishing to join her cohabitee in the Netherlands could not rely on the then Article 10 of Regulation 1612/68 because she was not a spouse. However, on the facts of the case Reed was successful because under *Dutch* law foreigners in a stable relationship with a Dutch national were entitled to reside in the Netherlands. If Ms Reed were not allowed to remain in the Netherlands, this would be discriminatory, contrary to Articles 18 and 45 TFEU and Article 7(2) of Regulation 1612/68 (now 492/2011). The position of cohabitees is now also covered, at least in part, by the discretionary admission provisions in Article 3(2)(b) CRD, provided the relationship is durable and duly attested (see below).

Forced, arranged and polygamous marriages: To date the Court has not willingly looked behind the marriage 'veil' to see whether the marriage is valid. However, Article 35 CRD provides:

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience.

This provision comes with the caveat that any measure taken has to be proportionate and subject to the procedural safeguards provided in the directive.[76] In its guidance on the directive,[77] the Commission is more expansive: 'Marriages validly contracted anywhere in the world must be in principle recognized for the purpose of the application of the Directive.' It continues that:

Forced marriages, in which one or both parties is married without his or her consent or against his or her will, are not protected by international or Union law. Forced marriages must be distinguished from arranged marriages, where both parties fully and freely consent to the marriage, although a third party takes a leading role in the choice of partner, and from marriages of convenience.

This suggests that the host state is not obliged to admit the spouse of a forced marriage but must admit the spouse of an arranged marriage. The Commission also says that Member States are not obliged to recognize polygamous marriages, contracted lawfully in a third country, which may be in conflict with their own legal order. It adds 'This is without prejudice to the obligation to take due account of the best interests of children of such marriages.'

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[70] Case 249/86 [1989] ECR 1263, para. 10.

[71] Cf. the more favourable position under the Long Term Residents Dir. 2003/109 ([2003] L16/44, adopted under Art. 63(3)(a) and (4) EC discussed in Ch. 14. The TCN family member will enjoy a right to permanent residence and equal treatment rights in the first state without having to move to a second Member State.

[72] Case 267/83 [1985] ECR 567.

[73] Para. 20.

[74] See below, text attached to nn. 183–185.

[75] Case 59/85 [1986] ECR 1283.

[76] Arts. 30–1, considered in detail in Ch. 13.

[77] Commission Guidance for better transposition and application of Dir. 2004/38: COM(2009) 313, 4.

Marriages of convenience: Marriages of convenience are given special attention in the guidance in the section on abuse and fraud. The Commission says:[78]

Recital 28 defines marriages of convenience for the purposes of the Directive as marriages contracted for the *sole* purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise. A marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage. The quality of the relationship is immaterial to the application of Article 35.[79]

The Commission lists a set of indicative criteria for cases where there is *unlikely* to be an abuse of Union rights (e.g., the third-country spouse would have no problem obtaining a right of residence in his/her own capacity or has already lawfully resided in the EU citizen's Member State beforehand; the couple had been in a relationship for a long time; or they had a common domicile/household) and some criteria which indicate the possible intention to abuse the rights conferred by the directive (e.g., the couple have never met before their marriage; they are inconsistent about their respective personal details; they do not speak a language understood by both).

The Commission says that these criteria are possible triggers for investigation only; they are not in anyway conclusive. It continues that due attention has to be given to all the circumstances of the individual case and that the investigation may involve a separate interview with each of the two spouses but any investigation must respect fundamental rights, in particular Articles 8 ECHR (right to respect for private and family life) and 12 ECHR (right to marry) (Articles 7 and 9 of the EU Charter). The burden of proof lies on the Member States seeking to restrict rights under the directive. On appeal, it is for the national courts to verify the existence of abuse in individual cases, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Union law is not undermined.

(ii) Registered partners and partners in a durable relationship duly attested

So far we have examined the position of spouses. We turn now to consider the position of 'partner', a new category introduced by the directive. In respect of registered partners,[80] the CRD follows the approach adopted in *Reed*. It gives rights to 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of legislation of a Member State' provided that 'the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in any such legislation'.[81] In other words, only if the partnership is recognized by both the home and host state will the registered partner enjoy the rights laid down by the CRD.

While unmarried heterosexual couples may be able to benefit from this provision if they are able to enter into a 'registered partnership' recognized in both the home and host state, the most immediate beneficiaries will be homosexual couples. Therefore a British man who has entered into a civil partnership under the British Civil Partnership Act 2004 with a Brazilian man, would be able to go with his Brazilian civil partner to Sweden to reside and work there under the CRD since Swedish law recognizes registered partnerships of homosexual couples. By contrast, this couple will not be able to rely on the directive to reside and work in Greece since Greece does not recognize registered partnerships. Partners in this situation, as well as unmarried heterosexual couples whose relationship is not formally recognized by law, will have to rely on the discretionary provisions in Article 3(2)(b) in order to persuade the host state to admit the Union citizen's partner. However, Article 3(2)(b) is dependent on the individuals showing that the relationship is durable and duly attested, terms not

[78] Ibid., 15 (emphasis in the original).

[79] It adds: 'The definition of marriages of convenience can be extended by analogy to other forms of relationships contracted for the sole purpose of enjoying the right of free movement and residence, such as (registered) partnership of convenience, fake adoption or where an EU citizen declares to be a father of a third country child to convey nationality and a right of residence on the child and its mother, knowing that he is not its father and not willing to assume parental responsibilities.'

[80] See generally, H. Toner, *Partnership Rights, Free Movement and EU Law* (Oxford: Hart Publishing, 2004).

[81] [81] Art. 2(2)(b).

defined in the directive, although the Commission suggests that it could be determined by reference to a certain minimum period of being together. If partners cannot satisfy these requirements, their only avenue of recourse is to rely on the principles in *Reed* (outlined above).

(iii) First point of entry principle and the principle of abuse

It had long been thought that the family provisions of Regulation 1612/68 and now the CRD meant that TCN spouses could either accompany the migrant spouse when moving from Member State A to B, or join the migrant spouse in State B directly from a third country.[82] *Akrich*[83] cast doubt on this orthodoxy.

Akrich, a Moroccan national, was convicted of theft in the UK and deported to Algeria. He then returned to the UK on a false French identity card, was deported again, and again clandestinely returned to the UK. He then married a British national, who went to work in Ireland; he was deported to Ireland. Relying on the principles in *Surinder Singh*,[84] Mrs Akrich wanted to return to the UK, bringing her husband with her. The Court said that Union law did not apply. At paragraphs 50–1 the Court said that in order to benefit from the rights under Article 10 of Regulation 1612/68 a TCN spouse (Mr Akrich) could move to another Member State with the migrant citizen (Mrs Akrich) only once the TCN spouse/registered partner had lawfully entered one EU state under national law (the first point of entry principle) and lawfully resided there (the prior lawful residence (PLR) principle). This suggested that Mr and Mrs Akrich could not return together to the UK. However, the Court added that where the marriage was genuine, the UK had to have regard to respect for Mrs Akrich's family life under Article 8[85] which suggested that the UK should admit husband and wife on human rights grounds.

The decision, particularly in respect of the PLR principle, was subject to much criticism. Although based on the idea of separation of competence between Member States (deciding who could enter their territory) and the EU (guaranteeing movement between states after initial entry),[86] the PLR principle rested on shaky foundations, particularly in the light of decisions such as *MRAX*[87] (Member States cannot deny entry to TCN spouses on the sole ground that the TCN has not obtained the required visa) and *Carpenter*[88] (TCN visa overstayer who subsequently married EU citizen allowed to stay in UK to enable citizen to provide services).

The Court responded to this criticism in *Jia*[89] by limiting *Akrich* to the situation where the TCN spouse was not lawfully resident in one Member States before he moved to another.[90] However, in *Metock*[91] the Court expressly reversed the PLR principle, as laid down in paragraphs 50–1 in *Akrich* (but not the rest of the judgment), following a careful textual analysis of the directive.[92] *Metock* concerned four TCNs who arrived in Ireland and unsuccessfully applied for asylum. While still resident in Ireland they married migrant EU citizens who were also resident in Ireland. None of the marriages was a marriage of convenience. The TCN spouses were all refused a residence card by the Irish authorities on the ground that they did not satisfy the PLR principle.

Relying on the 'restrictions' approach used extensively in respect of free movement of persons, the Court said that 'if Union citizens were not allowed to lead a normal family life in the host Member

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[82] See, e.g., M. Elsmore and P. Starup, case note on *Jia*, (2007) 44 *CMLRev.* 787.
[83] Case C–109/01 *Secretary of State for the Home Department* v. *Akrich* [2001] ECR I–9607, noted by E. Spaventa (2005) 42 *CMLRev.* 225.
[84] Case C–370/90 [1992] ECR I–4265, see Ch. 8.
[85] Para. 58.
[86] Para. 49.
[87] Case C–459/99 *Mouvement contre le racisme l'antisémeitisme et la xénophobie ASBL (MRAX)* v. *Belgium* [2002] ECR I–6591, para. 61.
[88] Case C–60/00 [2002] ECR I–6279.
[89] Case C–1/05 *Jia* v. *Migrationsverket* [2007] ECR I–1.
[90] Para. 26.
[91] Case C–127/08 *Metock* [2008] ECR I–6241, para. 58. See A. Tryfonidou, 'Family reunification rights of (migrant) Union citizens: Towards a more liberal approach' (2009) 15 *ELJ* 634.
[92] Paras. 49–55.

State, the exercise of the freedoms they are guaranteed by the [Treaties] would be seriously obstructed'.[93] It continued that the directive applied to all Union citizens who moved to, or resided in, a Member State other than that in which they were a national, and to their family members who accompanied *or* joined them in that Member State, regardless of whether the TCN has already been lawfully resident in another Member State.[94]

Thus, by giving a broad interpretation to the verb 'joined', the Court abandoned the PLR principle. However, the Court went further than that since it also gave rights not only to pre-existing couples but also to couples that met in the home state.[95] The reason for this was that the refusal of the host state to grant TCN family members a right of residence might discourage Union citizens from continuing to reside in the host state.[96] As Costello points out, in reaching this conclusion, the Court rejects the usual conception of spousal dependency underpinning family reunification law, where the trailing spouse follows the worker to another Member State.[97] Instead, 'the Directive becomes an instrument for both family formation and family reunification, two modes of family migration that Member States often seek to differentiate'.[98]

A number of Member States, especially Denmark,[99] were deeply worried about the implications of the Court's rights-based approach for their conception of discretionary migration control.[100] The Court tried to assuage these concerns by pointing out that first, its ruling applied not to TCNs generally but only to TCN family members of migrant EU citizens.[101] Secondly, it said that Member States could still control migration using the express derogations (public policy, public security, and public health) laid down by the directive.[102] It added that even if the personal conduct of the TCN did not justify the adoption of measures of public policy or security, 'the Member State remains entitled to impose other penalties on him which do not interfere with freedom of movement and residence, such as a fine, provided that they are proportionate'.[103] Thirdly, the Court pointed out that, in accordance with Article 35 CRD, Member States could adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud, such as marriages of convenience,[104] 'it being understood that any such measures must be proportionate and subject to procedural safeguards provided for in the directive'.[105]

The Commission also responded to Member State concerns by issuing guidance[106] on when Union law is being abused in the case of family reunification. It says that abuse occurs 'when EU citizens, unable to be joined by their third country family members in their Member State of origin because of the application of national immigration rules preventing it, move to another Member State

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93 Para. 62.
94 Para. 70.
95 Para. 99. See also Case C–551/07 *Sahin*, Reasoned Order of 19 Dec. 2008.
96 Para. 92.
97 C. Costello, '*Metock*: Free movement and "normal family life" in the Union' (2009) 46 *CMLRev.* 587, 601.
98 Ibid.
99 COM(2008) 840/3, 4. See also A. Willis, 'New guidelines will reduce fake marriages, Brussels says', <http://www.euobserver.com/22/28407>.
100 Costello, above n. 97, 588. See e.g., Justice and Home Affairs Council Conclusions Press release 16325/1/08, 27 and 28 Nov. 2008: 'The Council considers that, in compliance with and in the interests of the right of free movement, every effort must be made to prevent and combat any misuses and abuses, as well as actions of a criminal nature, with forceful and proportionate measures with due regard to the applicable law, against citizens who break the law in a sufficiently serious manner by committing serious or repeated offences which cause serious prejudice.'
101 Para. 73.
102 These derogations are considered further in Ch. 13.
103 Para. 97.
104 The 28th recital adds 'or any other form of relationships contracted for the sole purpose of enjoying the right of free movement or residence'. See also Council Res. 97/C382/01 of 4 Dec. 1997.
105 Para. 75.
106 COM(2009) 313, 17–18.

with the *sole* purpose to evade, upon returning to their home Member State, the national law that frustrated their family reunification efforts'. It continues that the defining characteristics of the line between genuine and abusive use of Union law should be based on the assessment of whether the exercise of Union rights in a Member State from which the EU citizens and their family members return was genuine and effective, an assessment made on a case-by-case basis. If, in a concrete case of return, the use of Union rights was genuine and effective, the Member State of origin should not inquire into the personal motives that triggered the previous move.

(c) Dependants

Directive 2004/38 gives rights to the Union citizen's direct descendants under the age of 21 and dependent descendants, as well as to those of the spouse or registered partner.[107] It also gives rights to the dependent ascendants (e.g., parents, grandparents) of the Union citizen and the Union citizen's spouse or registered partner.[108] In *Lebon*[109] the Court made clear that dependency was a question of fact. It said that a dependant is 'a member of the family who is supported by the worker',[110] adding that there was no need to determine the reasons why the dependant needed the worker's support or to enquire whether the dependants could support themselves by working.[111]

In *Jia*[112] the Court developed the definition of dependency in the context of dependent relatives in the ascending line (Chinese mother-in-law (Mrs Jia) of German self-employed migrant (Mrs Li) working in Sweden). It said that, in order to determine dependency, an individual assessment was necessary. This meant that the host state (Sweden) had to assess whether, having regard to the applicant's 'financial and social conditions', she was not in a position to support herself. The need for material support from the Union national or her spouse had to exist in Mrs Jia's state of origin (China) (or the country from which she came) when she applied to join the Union national.[113] The Court said that the host state could require proof of dependency, adduced by 'appropriate means',[114] but that did not necessarily mean a document from the Chinese authorities. On the other hand, a mere undertaking from a Union national or his spouse to support the family member 'need not be regarded as establishing the existence of that family member's situation of real dependence'.[115]

In respect of the Union citizen's other family members (e.g., aunts, uncles, cousins) who are dependants *or* members of his household, the state must 'facilitate their entry and residence'. The same applies to those whose 'serious health grounds strictly require the personal care of the family member of the Union citizen'.

2.3 Rights of Departure, Entry, and Return

(a) The right to depart from the home state

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[107] The children do not need to be blood relatives: Case C–275/02 *Ayaz* v. *Land Baden-Württemberg* [2004] ECR I–8765, para. 45, a case under the EU–Turkey Association Agreement which the Court said was to be interpreted in line with Reg. 492/2011 and the CRD. The Court ruled that stepchildren are also covered. The Commission's Guidance (COM(2009) 313, 5) adds that the provision includes 'relationships or minors in custody of a permanent legal guardian. Foster children and foster parents who have temporary custody may have rights under the Directive, depending upon the strength of the ties in the particular case. There is no restriction as to the degree of relatedness.'

[108] In respect of all of these categories of family members 'documentary evidence that the conditions laid down' are met is required for those seeking a right of residence: Art. 8(5)(d).

[109] Case 316/85 [1987] ECR 2811.

[110] Para. 22. The support must be material rather than emotional: COM(2009) 313, 5.

[111] Para. 22.

[112] Case C–1/05 *Jia* [2007] ECR I–1.

[113] Para. 37. The Commission's Guidance (COM(2009) 313, 5) adds 'The Directive does not lay down any requirement as to the minimum duration of the dependency or the amount of material support provided, as long as the dependency is genuine and structural in character.'

[114] Para. 41.

[115] Paras. 42–3.

National rules which preclude or deter nationals of a Member State from leaving their state of origin interfere with freedom of movement, even if they apply to all migrants.[116] Directive 2004/38 reinforces, and the case law confirms,[117] the Treaty right to depart from a Member State—not necessarily the state of origin—where Union citizens and their families currently live.[118] According to the directive, Union citizens and their family members may leave the Member State by producing a valid identity card or passport (passport only for TCN family members) which the Member State is obliged to issue or renew.[119] The passport[120] must be valid for all Member States and for any states through which the holder must pass when travelling between Member States.[121] Expiry of the identity card or passport on the basis of which the person entered the host state and was issued with a registration certificate or card (see below) is not to constitute a ground for expulsion from the host state.[122]

(b) The right to enter the host state

Host states must allow Union citizens and their families to enter their territory but, in order to find out who is on their territory,[123] host states can ask the migrant to produce an identity card or passport (passport only for TCN family members).[124] No visa or other entry formality can be demanded from Union citizens[125] but they can be demanded from a member of the worker's family who is not an EU national.[126] This is one of the many examples of the way in which the CRD distinguishes between the treatment of EU and non-EU national family members. However, in *MRAX*[127] the Court said that a refusal to allow entry due to the non-production of valid passports/identity cards, and where necessary a visa, would be disproportionate if TCN spouses were able to prove their identity and marital ties in other ways and there was no evidence that they represented a risk to public policy, security, or health. This position is now confirmed in Article 5(4) CRD.

Although Member States are entitled to check passports/identity cards (and visas where necessary) at the frontier, the compatibility of such border formalities with the notion of a 'Europe without internal frontiers' laid down in Article 26 TFEU has been questioned in two cases brought by the Commission. In the first, *Commission* v. *Belgium*,[128] non-Belgian EU nationals residing in Belgium were required to produce their residence or establishment permits in addition to their passports or

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[116] See, e.g., the workers' cases: Case C–10/90 *Masgio* v. *Bundesknappschaft* [1991] ECR I–1119, paras. 18–19; Case C–415/93 *Bosman* [1995] ECR I–4921, para. 104; and Case C–232/01 *Hans van Lent* [2003] ECR I–11525, para. 21.

[117] See Case C–33/07 *Ministerul Administratiei şi Internelor* v. *Jipa* [2008] ECR I–5157, paras. 17–20; Case C–127/08 *Metock* [2008] ECR I–6241, para. 68.

[118] Art. 4(1).

[119] Art. 4(3). No exit visa or equivalent formality may be imposed.

[120] If the passport is the only document with which the person may lawfully leave the country, it must be valid for at least five years: Art. 4(4).

[121] Art. 4(4). Having produced a passport or identity card, the Member State may not demand from the worker an exit visa or similar document (Art. 4(2)).

[122] Art. 15(2).

[123] Case C–265/88 *Messner* [1989] ECR 4209.

[124] Art. 5(1). Art. 5(4) provides that where an EU citizen or a TCN family member does not have the necessary travel documents (or visas), the Member State must give them every reasonable opportunity to obtain the documents or to corroborate or prove by other means that they are covered by the right to freedom of movement and residence.

[125] Art. 5(1), 2nd para.

[126] Art. 3(2). Case 157/79 *R* v. *Pieck* [1980] ECR 2171, para. 10. The list of third countries whose nationals need visas when crossing the external border of the Member States is determined by Council Reg. 539/2001 ([2001] OJ L81/1). Member States must grant TCN family members 'every facility' to obtain the necessary visas which must be issued free of charge and on the basis of an accelerated procedure. The Commission considers that delays of more than four weeks are not reasonable. Citing Case C–503/03 *Commission* v. *Spain* [2006] ECR I–1097, the Commission also says (COM(2009) 313, 6) that TCN family members have a right to obtain a visa on presentation of a valid passport and evidence of the family link only. Member States can also encourage integration of EU citizens and their TCN family members by offering language course on a voluntary basis but no consequence can be attached to their refusal to attend them (COM(2009) 313, 7). Possession of a valid residence card issued under Art. 10 CRD exempts family members from the visa requirement.

[127] Case C–459/99 *MRAX* v. *Belgium* [2002] ECR I–6591, para. 61.

[128] Case 321/87 *Commission* v. *Belgium* [1989] ECR 997.

identity cards. The Court said that such controls could constitute a barrier to free movement if carried out in a systematic, arbitrary, or unnecessarily restrictive manner.[129] In the second case, *Commission* v. *Netherlands*,[130] the Court ruled that national legislation requiring citizens to answer questions put by border officials regarding the purpose and duration of their journey and the financial means at their disposal was incompatible with Directive 68/360. In these two cases the Court has curtailed the level of checks that can occur at an internal frontier. Nevertheless, it said in *Wijsenbeek*[131] that, despite Article 26 TFEU (ex Article 14 EC) (on the single market) and Article 21 TFEU (on the free movement of citizens), Member States could still require individuals, whether EU citizens or not, to establish their nationality on entering a Member State at an internal frontier of the EU.[132] Therefore, a Dutch MEP was required to hand over his passport to immigration control when he arrived in the Netherlands on a flight from Strasbourg. Further, Member States could impose penalties for breach of the requirement to present an identity card or passport, provided that the penalties are comparable to those which apply to similar national infringements and are proportionate.[133]

Finally, Article 5(5) CRD permits the host Member State to require the migrant to report his/her presence to the authorities within a reasonable and non-discriminatory period of time. Failure to comply may make the migrant 'liable to proportionate and non-discriminatory sanctions'. In this regard the directive confirms the decision in *Watson and Belmann*[134] where the Court found that an Italian law providing for migrants to be deported if they failed to register with the Italian authorities within three days of entering Italy was unlawful.[135]

(c) The right to return to the home state

The right to return to the home state is not expressly dealt with by the CRD but is covered by the Treaties, as interpreted by the Court. The issue was considered in *Surinder Singh*,[136] examined in Chapter 8, and arose again in *Eind*.[137] The case concerned a Dutch worker who was employed in the UK where he was joined by his 11-year-old Surinamese daughter. The UK gave her a right to reside as a family member of a worker under what is now Article 2(2) CRD. Less than two years later, father and daughter returned to the Netherlands but Mr Eind could not work because he was ill and so received social assistance. The daughter's application for a residence permit was turned down on the ground that since her father was not economically active, he was no longer covered by Union law and so neither was she.

The Court said that while Article 2(2) gave the TCN daughter a right to install herself with the worker in the UK,[138] it did not entail an autonomous right to free movement for the family member.[139]

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129 Para. 15.

130 Case C–68/89 *Commission* v. *Netherlands* [1991] ECR I–2637.

131 Case C–378/97 *Criminal Proceedings against Florus Ariël Wijsenbeek* [1999] ECR I–6207. The facts of *Wijsenbeek* occurred in Dec. 1993 before the provisions of Title IV of Part Three of the Treaty of Amsterdam came into force (now Title V of Part Three TFEU). However, the Schengen provisions were operative at that time and these allowed for the crossing of internal borders without checks. Yet, because this freedom is subject to derogations on the grounds of public policy and national security, the Court said that until common rules were adopted checks could be made (para. 43): C. Jacqueson, 'Union citizenship and the Court of Justice: Something new under the sun? Towards social citizenship' (2002) 27 *ELRev*. 260, 264.

132 Para. 45.

133 Case C–215/03 *Oulane* [2005] ECR I–1215, para. 38.

134 Case 118/75 *Watson and Belmann* [1976] ECR 1185. In Case C–357/98 *Ex p. Yiadom* [2000] ECR I–9265, para. 25: provisions protecting Union nationals who exercise the fundamental freedom of movement under Art. 21(1) TFEU had to be interpreted in their favour.

135 See also Case C–265/88 *Messner* [1989] ECR 4209. In respect of a TCN spouse of a migrant worker, see Case C–459/99 *MRAX* [2002] ECR I–6591, para. 78.

136 Case C–370/90 [1992] ECR I–4265.

137 Case C–291/05 *Minister voor Vreemdelingenzaken en Integratie v Eind* [2007] ECR I–10719.

138 Para. 21.

139 Para. 23.

However, following references to the citizenship provisions,[140] the Court did say that the right of the migrant worker to return and reside in the Netherlands, after having been gainfully employed in the UK, was 'conferred by [Union] law, to the extent necessary to ensure the useful effect of the right to free movement for workers under Article [45]'.[141] The Court said that Eind would be deterred from exercising his right of free movement if he could not return to the Netherlands, economically active or not.[142] Likewise he would also be deterred from exercising his rights of free movement if he could not continue living together with close family members on his return to the Netherlands. So, under (unspecified) Union law, the daughter had the 'right to install herself with her father' in the Netherlands, even though her father was not economically active, provided that she was under 21 or dependent.[143]

2.4 The Right of Residence in the Host State

Not only does the directive guarantee the right to leave the home state and enter the host state, it also grants the migrant the right of residence. The directive essentially envisages three tiers of residence (see fig 12.2): up to three months; three months to five years; and (generally) five years and beyond.

(a) Right of residence for up to three months

Those resident for up to three months enjoy a 'right of residence'. According to Article 6, if Union citizens (whether economically active or not)[144] can produce a valid identity card or passport, and they wish to stay for up to three months only, Member States must grant them the right of residence.[145] The same applies to TCN family members, including TCNs accompanying or joining the Union citizen, on production of a valid passport.[146] However, this right of residence is not unlimited: apart from the general derogations, it is also subject to the condition that the migrants do not become 'an unreasonable burden on the social assistance system of the host state'.[147]

(b) Right of residence for more than three months and up to five years

(i) Citizens' and family members' rights

Those resident for more than three months but less than five years also enjoy a 'right of residence'. According to Article 7(1) CRD, all Union citizens have the right of residence on the territory of another Member State for more than three months if they are workers, self-employed,[148] have sufficient resources and medical insurance, or they are students, also with sufficient resources and medical insurance.[149] The same right also applies to family members accompanying or joining the Union citizen,[150] whether they are nationals of a Member State or not.[151] Only where the host state has a reasonable doubt as to whether a Union citizen or his/her family members satisfies these conditions can the Member States verify whether the conditions are fulfilled. This verification cannot be carried out systematically.[152]

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[140] Paras. 28–32.
[141] Para. 32.
[142] Para. 35.
[143] Paras. 38–9.
[144] In this respect the directive does not depart so much from the position under the case law when, following Case 186/87 *Cowan* [1989] ECR 195, all tourists were recipients of services.
[145] Art. 6(1).
[146] Art. 6(2).
[147] Art. 14(1). This term is considered further in Ch. 13.
[148] Union citizens retain the right of residence so long as they remain workers/self-employed persons: see Art. 7(3) considered further in Ch. 9.
[149] The conditions as to sufficient resources and medical insurance are considered in more detail in Ch. 13.
[150] A more limited range of family members can enjoy the Art. 7 rights where the Union citizen is a student: Art. 7(4).
[151] Art. 7(1)(d) and Art. 7(2).
[152] Art. 14(2).

The host state can require Union citizens to register with the relevant authorities.[153] The deadline for registration may not be less than three months from the date of arrival.[154] A registration *certificate* must then be issued[155] on production of a valid identity card or passport,[156] a confirmation of engagement from the employer or certificate of employment or proof that they are self-employed, or proof that they satisfy the conditions of being of independent means or a student.[157] Failure to comply with the registration requirement may render the person concerned liable to 'proportionate and non-discriminatory sanctions'. The issuing of a registration certificate or equivalent (see below) gives the host state the opportunity to check not only whether the migrant satisfies the conditions laid down in the CRD but also whether the migrant is a 'desirable' person. This is confirmed by Article 27(3) which provides the host state may request the Member State of origin and, if necessary, other Member States to provide information concerning any previous police record the migrant may have. However, this is the exception not the rule: the Article makes clear that the host state may request this information only if it considers it 'essential' and '[s]uch enquiries shall not be made as a matter of routine'.

A registration certificate is also issued to family members of Union citizens who are themselves Union citizens. The host Member State may, however, require the EU family members to produce not only a valid identity card or passport but also the Union citizen's registration certificate, together with documentary evidence that the family members fall within a relationship covered by Article 2(2).[158] By contrast, TCN family members must[159] be issued with a 'residence *card*'[160] provided they produce broadly equivalent documents to those required for EU national family members.[161] The residence card (but not the registration certificate) is valid for five years from the date of issue (or for the envisaged period of residence of the Union citizen if that is less than five years)[162] but will expire as a result of prolonged absences.[163] The renewal requirement makes it easier for the host state to monitor the activities of TCNs. In respect of both the registration certificate and the residence card, the host state can carry out checks on compliance with any requirement deriving from national legislation for non-nationals to carry these documents, provided the same requirement applies to their own nationals as regards identity cards.[164]

A migrant worker can reside and start working before completing the formalities to obtain a residence permit[165] because the right of residence is a fundamental right derived from the Treaties and

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153 Art. 8(1).

154 Art. 8(2).

155 Ibid. The issuing of these certificates or equivalent documents must be free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents: Art. 25(2).

156 The expiry of the identity card/passport which was the basis for entering the host state and the issuing of a registration certificate or registration card (see below) cannot constitute a ground for expulsion: Art. 15(2).

157 Art. 8(3).

158 Art. 8(5).

159 The obligation to issue the residence card is mandatory because European Union—not national—immigration law applies.

160 This exempts TCN family members from the visa requirement under Art. 5(2).

161 Arts. 9–10. The list of documents to be produced is exhaustive: recital 14 and Case C–127/08 *Metock* [2008] ECR I–6241, para. 53. Member States may require that documents be translated, notarised or legalised where the national authority concerned cannot understand the language in which the particular document is written, or have a suspicion about the authenticity of the issuing authority (COM(2009) 313, 7).

162 Art. 11(1).

163 The validity of the residence card is not affected by temporary absences not exceeding six months or longer absences up to 12 months for important reasons such as pregnancy and childbirth (Art. 11(2)).

164 Art. 26. See also Case C–327/02 *Panayotova* v. *Mininster voor Vreemdelingenzaken en Integratie* [2004] ECR I–11055, para. 27: the granting of residence permits must be based on a procedural system which is easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time, and refusals to grant a permit must be capable of being challenged in judicial or quasi-judicial proceedings. According to the Commission (COM(2009) 313, 7), the residence card for a TCN must be issued within six months.

165 Art. 25.

is not dependent upon the possession of particular documents;[166] residence permits have only probative value,[167] as *Martínez Sala*[168] shows. A Spanish national living in Germany since 1968 held various residence permits which had expired and a series of documents saying that she had applied for an extension of her permit. She then had a baby and applied for a child allowance but her application was rejected on the grounds that she had neither German nationality, nor a residence entitlement, nor a residence permit. The Court said that it was discriminatory to require a national of another Member State to produce a document (the residence permit) to obtain the benefit when its own nationals were not required to do the same.[169] In *Oulane* the Court added that since the right of residence was derived directly from the Treaties, it was not legitimate for the host state to require the EU migrant to produce a passport when he could prove his identity by other means.[170] Further, it said that detention and deportation based solely on the failure of the person to comply with legal formalities concerning the monitoring of aliens 'impair the very substance of the right' and are 'manifestly disproportionate to the seriousness of the infringement'.[171]

Once Union citizens have registered themselves, what use can the host-state authorities make of the information supplied? This question arose in *Huber*[172] concerning a centralized register held by the German authorities which contained certain personal data relating to foreign nationals who were resident in Germany for more than three months. The register was used for statistical purposes and by the security and police services and by the judicial authorities. Mr Huber, an Austrian national, worked in Germany as a self-employed insurance agent. He asked for his data to be deleted from the register, alleging discrimination since no similar database existed for German nationals.

The Court ruled that the use of a register of data for the purpose of providing support to the authorities responsible for applying the rules on residence was, in principle, legitimate and compatible with the prohibition of discrimination on grounds of nationality laid down by Article 18(1) TFEU (ex Article 12(1) EC).[173] However, the Court said that such a register should not contain any information other than what was 'necessary', within the meaning of Article 7(e)[174] of the Data Protection Directive 95/46.[175] The Court then distinguished between personal data contained in the documents referred to in Articles 8(3) (proof of (self)employment) and 27(1) CRD (derogations), which it considered was 'necessary' for applying the rules on residence,[176] and personal data containing individualized personal information for statistical purposes, which was not.[177] The Court also said that, as a citizen who had migrated under Article 21 TFEU, Mr Huber enjoyed the right to non-discrimination under Article 18 TFEU.[178] Because Union citizens were treated differently to nationals in respect of the systematic

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166 Case 118/75 *Watson and Belmann* [1976] ECR 1185, paras. 15–16. This is now confirmed in Art. 25(1) CRD and recital 11. See also Poiares Maduro AG's Opinion in Case C–524/06 *Huber* v. *Germany* [2008] ECR I–9705, para. 19.

167 To this effect, see Case 48/75 *Royer* [1976] ECR 497, para. 50. The same rule also applies to a TCN spouse of a migrant worker: Case C–459/99 *MRAX* [2002] ECR I–6591, para. 74.

168 Case C–85/96 [1998] ECR I–2691.

169 For an extension of this principle to the member of a Turkish worker's family legally residing in a Member State, see Case C–262/96 *Sürül* v. *Bundesanstalt für Arbeit* [1999] ECR I–2685.

170 Case C–215/03 *Oulane* [2005] ECR I–1215 Para. 25.

171 Para. 40.

172 Case C–524/06 *Huber* v. *Germany* [2008] ECR I–9705.

173 Para. 58.

174 'Member States shall provide that personal data may be processed only if: . . . (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed'.

175 OJ [1995] L281/31.

176 Para. 59.

177 Para. 68.

178 Para. 73.

processing of personal data for the purposes of fighting crime, this constituted discrimination prohibited by Article 18(1) TFEU.[179]

(ii) Family members' rights on the death or departure of the Union citizen or on divorce

Articles 12–13 of the Citizens' Rights Directive 2004/38 give family members the right to retain their residence in the host state on the death or departure of the EU citizen or in the event of divorce, annulment of marriage, or termination of registered partnership. In the case of the death or departure of the Union citizen, family members who are EU nationals[180] will continue to enjoy the right of residence.[181] In the case of the death (but not departure) of the EU citizen, the TCN family members retain the right of residence provided that they have been residing in the host state as family members for at least a year before the citizens' death.[182] In order to attain permanent residence they must be workers/self-employed/have independent means or be members of the family, already constituted in the host Member State, of a person satisfying these requirements.

In the case of divorce or equivalent, the CRD makes new provision for 'legal safeguards to people whose right of residence is dependent on a family relationship by marriage and who could therefore be open to blackmail with threats of divorce'.[183] Article 13(2) therefore says that TCN family members do not lose the right of residence where:

• prior to the divorce or equivalent, the marriage or registered partnership lasted at least three years including one year in the host Member State, or

• by agreement between the spouses or partners or by court order, the TCN spouse or partner has custody of the Union citizen's children, or

• this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting, or

• by agreement between the spouses or partners or by court order, the TCN spouse or partner has the right of access to a minor child, provided that the court has ruled that such access must be in the host state and for as long as is required.[184]

In addition, in order to obtain *permanent* residence the TCN family members must show that they are workers/self-employed/have independent means (but not a student) or they are members of the family already constituted in the host Member State of a person satisfying these requirements. These conditions laid down in Article 13(2) do not apply to family members who are nationals of a Member State[185] who will continue to enjoy a right of residence, no matter how short the original marriage or equivalent. However, they will also need to show they are economically active or self-sufficient or be a student or family member to obtain *permanent* residence.

Despite the strictness of the rules in relation to TCN family members, there is one important exception: if the EU citizen leaves the host state or dies his/her children will not lose their right of residence, nor will the parent with actual custody of the children irrespective of nationality, provided that the children reside in the host state and are enrolled at an educational establishment for the purposes of studying there, until the completion of their studies.[186]

(c) Right of permanent residence

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[179] Para. 80.

[180] Art. 12(1), para. 1.

[181] From the way Art. 12(1) is drafted, it would appear that the conditions to be a worker/self-employed/otherwise self-supporting/student/family member do not apply to the right of residence under Art. 7. They apply only to the right to acquire permanent residence.

[182] Art. 12(2), para. 1.

[183] COM(2001) 257, 15.

[184] Art. 13(2).

[185] Art. 12(1).

[186] Art. 12(3) reflecting the decisions in Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR I–723, Case C–413/99 *Baumbast and R* [2002] ECR I–7091.

The third 'tier' of residence rights is the right to permanent residence. There are two ways of acquiring permanent residence: (1) through five years' continuous legal residence; or (2) through a shorter period for those who were economically active either as a worker or as a self-employed person who satisfy the conditions under what was Regulation 1251/70[187] and Directive 75/34.[188] In both situations the directive considers the migrants to be so assimilated into the host state that they are regarded and treated as nationals in all but name. This is a remarkable development. We shall examine the two situations in turn.

(i) Article 16: Five years' residence

Union citizens and their family members, including TCNs,[189] who have resided legally for a continuous period of five years in the host state, have the right of permanent residence there.[190] This right is not dependent on the Union citizen being a worker/self-employed person or having sufficient resources/medical insurance,[191] albeit that in most cases[192] the migrant will have been a worker/self-employed/student/person of independent means/family member under Article 7 during the previous five years in order to accrue the five-year period of residence. The family members of a Union citizen to whom Article 12(2) (death/departure of the Union citizen) or Article 13(2) (divorce or equivalent) apply, who satisfy the conditions laid down in those Articles (e.g., the family members are workers/ self-employed etc.) will also acquire the right of permanent residence after residing legally for a period of five consecutive years in the host state.[193]

Continuity of residence is not affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.[194] On the other hand, continuity of residence is broken by any expulsion decision duly enforced against the person concerned.[195] Once acquired, the right of permanent residence is lost only through absence from the host Member State for a period exceeding two consecutive years.[196]

(ii) Article 17: Other ways of acquiring permanent residence

While five years' residence is the usual way for acquiring a right to permanent residence, it is also possible for a migrant or their family members to acquire a right to permanent residence before they have completed a continuous period of five years' residence in the situations which were originally laid down in Regulation 1251/70[197] and Directive 75/34. This made provision for workers and their family members to remain in a Member State after having been employed there. This regulation has now been repealed[198] and replaced by Article 17 of Directive 2004/38 which maintains the existing *acquis* but changes the language from the 'right to remain' to the 'right of permanent residence'. Article 17(1) provides that workers and the self-employed have the right to permanent residence in three situations:

(a) retirement at the pension age[199] or through early retirement, provided they have been employed

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187 On the right of workers to remain in the territory of the host state after having been employed there [1970] OJ L142/24.
188 On the right of the self-employed to remain [1975] OJ L14/10.
189 Art. 16(2).
190 Art. 16(1).
191 Ibid., 2nd sentence.
192 Cf. Case C–456/02 *Trojani* [2004] ECR I–7573. Cf. also Art. 12(1) para. 2 which expressly requires EU national *family members* to be economically active/student/have sufficient resources before they acquire the right of permanent residence.
193 Art. 18.
194 Art. 16(3).
195 Art. 21.
196 Art. 16(4).
197 [1970] OJ SE L142/24, 402.
198 Commission Reg. 635/2006 (OJ [2006] L112/9). Dir. 75/34 was repealed by the CRD.
199 If the law of the host state does not grant the right to an old-age pension to certain categories of self-employed persons, the age condition is deemed to have been met once the person has reached the age of 60.

in the host state for the preceding 12 months[200] and resided in the host state continuously for more than three years

(b) incapacity, provided they have resided for more than two years in the host state[201] and have ceased to work due to some permanent incapacity

(c) frontier workers, provided after three years of continuous employment and residence in the host State A, they work in an employed or self-employed capacity in State B, while retaining their residence in State A to which they return each day or at least once a week.

The conditions as to length of residence and employment in (a) and (b) do not apply if the worker/self-employed person's spouse or partner[202] is a national of the host state or has lost the nationality of the host state through marriage to the worker/self-employed person.[203]

The worker/self-employed person's family members residing with him in the host state (irrespective of nationality) are also entitled to benefit from the reduced period of residence. According to Article 17, they too can enjoy permanent residence in the host state where either (1) the worker/self-employed person is entitled to permanent residence under Article 17(1);[204] or (2) under Article 17(4) the worker/self-employed person dies during his working life but before having acquired the right to permanent residence under 17(1) and:

(a) the worker/self-employed person had resided continuously in the host state for two years at the time of death, or

(b) the death resulted from an accident at work or occupational disease, or

(c) the surviving spouse lost the nationality of the host state through marriage to the worker/self-employed person.

In *Givane*[205] the Court showed that it will interpret these requirements strictly. Givane, a Portuguese national, worked in the UK as a chef for three years before going to India for ten months. He then returned to the UK with his Indian wife and three children but died less than two years later. The Court upheld the British authorities' decision refusing Givane's family indefinite leave to remain on the grounds that Givane had not satisfied the requirements of what is now Article 17(4) which required him to have resided in the UK for the two years immediately preceding his death.[206] Such a literal reading of the requirement stands in stark contrast to the generous approach to the interpretation of other provisions of Union law based on the right to family life in cases such as *Carpenter*.[207] More striking still is the fact that the Court uses the integration argument to justify *excluding* Givane's family from the UK. It said that the two-year requirement was intended to establish a significant connection between the Member State and the worker and his family and 'to ensure a certain level of their integration in the society of that state'.[208]

As we saw above, in the case of those family members faced with the death or departure of the Union citizen in circumstances not covered by Article 17, and in the case of those family members faced with divorce or equivalent, they can acquire permanent residence only if they meet the requirements laid down in Article 7(1) (i.e., they must be workers/self-employed/persons of

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[200] Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness, or accident are to be regarded as periods of employment: Art. 17(1), para. 3.

[201] If the incapacity is due to an occupational accident or disease entitling the worker to a pension for which an institution of the state is entirely or partially responsible, then no condition to length of residence is imposed.

[202] Partner as defined in Art. 2(2)(b) CRD.

[203] Art. 17(2).

[204] Art. 17(3).

[205] Case C–257/00 *Givane and others* v. *Secretary of State for the Home Department* [2003] ECR I–345.

[206] Para. 46.

[207] Case C–60/00 *Carpenter* [2002] ECR I–6279, para. 38. See also Case C–413/99 *Baumbast* [2002] ECR I–7091; Case C–459/99 *MRAX* [2002] ECR I–6591, paras. 53–61.

[208] Para. 46.

independent means/student[209]/family member[210]) and have resided legally for a period of five consecutive years in the territory of the host state.[211]

(iii) Administrative formalities

Proof of permanent residence is given by the Member State issuing, as soon as possible, a 'document certifying permanent residence', having verified the Union citizen's duration of residence.[212] Article 21 provides that continuity of residence is attested by any means of proof in use in the host Member State. In respect of the family members who are not nationals of a Member State, the host state must issue a permanent residence card, renewable automatically every ten years,[213] within six months of the submission of the application.[214] According to Article 20(3), interruption in residence not exceeding two consecutive years will not affect the validity of the permanent residence card.

2.5 The Right to Equal Treatment

(a) Introduction

The cornerstone of the CRD is Article 24(1) laying down a general right of equal treatment (ie no direct or indirect discrimination) 'within the scope of the [Treaties]' for all Union citizens residing on the basis of the directive in the territory of the host state. The Article continues that the benefit of this right is to be extended to family members who are not nationals of a Member State but who have the right of residence or permanent residence. However, Article 24(1) expressly makes the principle of equal treatment '[s]ubject to such specific provisions as are expressly provided for in the [Treaties] and secondary law'. Therefore, it is possible to derogate from the principle of equal treatment on the grounds, *inter alia* of public policy, public security, public health and employment in the public service as well as in respect of the conditions as to sufficient resources and medical insurance found in the original 1990 Residence Directives, now replicated in the CRD (see Chapter 13).

As we saw in the Workers' Regulation 492/2011, the principle of equal treatment will apply in respect of both initial access to a job as well as the exercise of that position. It will also apply in respect of enjoyment of social advantages and tax advantages. However, here Article 24(2) contains an important limitation (see fig. 12.2). In respect of *social assistance* (defined in *Chakroun* in the context of the Family Reunification Directive 2003/86 as assistance granted by public authorities which can be claimed by individuals not having stable and regular resources sufficient to maintain himself and his family), the host state is not obliged to confer entitlement to it during the first three months of residence or, in the case of a work seeker, the period during which Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.[215] Therefore, students and persons of independent means can call on equal treatment in respect of social assistance only after the first three months of residence; job-seekers entering the state to look for work under Article 14(4)(b) will not enjoy entitlement to social assistance at all.[216] This restriction, a 'derogation from the principle of equal treatment',[217] does not apply to workers, self-employed persons, persons who retain such status and members of their families. If Union citizens do have recourse to

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[209] This does not apply to TCN family members: Art. 12(2), para. 2 concerning death or departure; Art. 13(2), para. 2 concerning divorce or equivalent.

[210] With the added condition in the case of TCN family members that they are members of the family already constituted in the host Member States, of a person satisfying those requirements: Art. 12(2), para. 2 concerning death or departure; Art. 13(2), para. 2 concerning divorce or equivalent.

[211] Art. 18 referring to Art. 12(2) concerning death or departure; Art. 13(2) concerning divorce or equivalent.

[212] Art. 19.

[213] Details of the re-application process are found in Art. 20(2).

[214] Art. 20(1).

[215] Art. 14(4)(b). See Case C–578/08 *Chakroun* [2010] ECR I–000, para. 46.

[216] Joined Cases C–22/08 and 23/08 *Vatsouras* [2009] ECR I–000, para. 35. This case also considers the meaning of the terms social assistance and social advantage, considered in Ch. 9.

[217] Ibid, para. 34.

social assistance, 'An expulsion measure shall not be the automatic consequence'.[218] Furthermore, except on the grounds of public policy, security, and health, an expulsion measure may not be adopted against Union citizens or their family members if the Union citizens are workers/self-employed/work-seekers with a genuine chance of being engaged.[219]

Fig. 12.2 Residence and equality under Dir. 2004/38. (On the meaning of equality see fig. 8.1.)

In respect of *maintenance aid* for studies, including vocational training, the host state is not obliged to give grants or student loans to Union citizens or their family members until they have acquired permanent residence except to those who are economically active and their family members.

What then is meant by the principle of equal treatment? As yet, there is no case law under Article 24(1) CRD, although there are many decisions under Regulation 492/2011 which were discussed in Chapter 9. There are, however, a number of cases decided under Article 21(1) TFEU in respect of social advantages for citizens lawfully resident[220] in the host state and it is these cases that we shall consider in determining the meaning of equal treatment.

(b) Social advantages and equal treatment

(i) Direct and indirect discrimination

Martínez Sala[221] is the first case on equal treatment in respect of social advantages decided under Article 21(1) TFEU. She was a Spanish national who had been living in Germany since 1968 when she was 12. She had various jobs and various residence permits in that time. When she gave birth in 1993 she did not have a residence permit but she did have a certificate saying that an extension of the permit had been applied for. The German authorities refused to give her a child-raising allowance on the grounds that she was neither a German national nor did she have a residence permit. If she had been a worker she would have been entitled to the benefit as a social advantage under Article 7(2) of Regulation 492/2011. Given her background, it was unlikely that she was a worker (or an employed person within the meaning of Regulation 883/04 (ex Regulation 1408/71)).[222] The Court therefore considered her situation under Part Two TFEU on non-discrimination and citizenship.

It said that, as a national of a Member State lawfully residing in the territory of another Member State,[223] Martínez Sala came within the personal scope of the citizenship provisions.[224] She therefore enjoyed the rights laid down by Article 20(2) TFEU, including the right not to suffer discrimination on grounds of nationality under Article 18 TFEU[225] in respect of all situations falling within the material scope of the Treaties.[226] This included the situation where a Member State delayed or refused to grant a benefit provided to all persons lawfully resident in the territory of that state on the ground that the claimant did not have a document (a residence permit) which nationals were not obliged to have.[227] On this basis the Court concluded that Martínez Sala was suffering from direct discrimination on the ground of nationality contrary to Article 18[228] and, since it was direct discrimination, it could not be objectively justified (see fig.12.3).[229]

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[218] Art. 14(3). If they are expelled, the procedural protection provided in Arts. 30 (notification) and 31 (judicial/administrative redress) apply to any such decision: Art. 15(1).

[219] Art. 14(4).

[220] See generally, A. P. van der Mei, *Free Movement of Persons within the European Community: Cross-border access to public benefits* (Oxford: Hart Publishing, 2003).

[221] Case C–85/96 [1998] ECR I–2691.

[222] It was for the national court to make the final decision.

[223] This was merely probative and not constitutive of the right to residence: see above n. 167.

[224] Para. 61. See the essays on this case in M. Poiares Maduro and L. Azoulai (eds), *The Past and Future of EU Law* (Oxford: Hart Publishing, 2010).

[225] It also includes the right to free movement under Art. 21(1) TFEU: Case C–221/07 *Zablocka-Wehrmüller* v. *Land Baden-Württemberg* [2008] ECR I–9029, para. 25.

[226] Para. 62.

[227] Ibid.

[228] Para. 64.

[229] Ibid.

The Court fudged the issue of what was meant by 'all situations' falling within the material scope of Union law.[230] It seems that the Court thought that because the child-raising allowance constituted a social advantage within the meaning of Article 7(2) of Regulation 492/2011[231] it fell within the material scope of Union law, even though the judgment was premised on the fact that Martínez Sala was not a worker. The Court also did not make clear on what basis Martínez Sala was lawfully resident in Germany. Although the Court of Justice left it to the national court to decide whether Martínez Sala was a worker or an employed person, she did not appear to be economically active, nor did she seem to fulfil the conditions of (then) Directive 90/364 on persons of independent means (now Article 7(1)(b) CRD). As a result, she did not appear to be lawfully resident under Union law. Her lawful residence may have derived from national law and specifically from her actual presence and that the German authorities had not requested her to leave.[232] In other words, because she was not *un*lawfully resident in Germany she was entitled to equal treatment. This view is supported by *Trojani*.[233]

Trojani was a French national who had been living in a Salvation Army hostel in Belgium where, in return for board and lodging and some pocket money, he did various jobs for about 30 hours a week. He was denied the minimex (the Belgian minimum income guarantee) on the grounds that he was neither Belgian nor a worker under Regulation 492/2011. In respect of his rights as a citizen, the Court said that while Trojani did not derive from Article 21 the right to reside in Belgium due to his lack of resources,[234] since he was lawfully resident in Belgium, as was shown by the residence permit which the Belgian authorities had issued to him, he could benefit from the fundamental principle of equal treatment laid down in Article 18 TFEU.[235] This is the significant feature of the case:[236] as the Court pointed out in *Trojani*,[237] and subsequently confirmed in *Bidar*,[238] 'a citizen of the Union who is not economically active may rely on Article [18 TFEU] where he has been lawfully resident in the host state for a certain period of time *or* possesses a residence permit'.[239] Thus, legal residence can come about in one of two ways: by having a residence permit or actual presence in the host state for a certain period of time. *Trojani* itself concerned a residence permit; *Bidar*, considered below, concerned lawful residence based on actual presence.[240]

Mr Trojani therefore suffered direct discrimination on the grounds of his nationality in respect of the minimex. The same legal issue was raised in the seminal case of *Grzelczyk* [241] which also concerned direct discrimination. Grzelczyk, a French national studying at a Belgian university, supported himself financially for the first three years of his studies but then applied for the minimex (the Belgium minimum income guarantee) at the start of his fourth and final year. While Belgian students could receive the benefit, migrant students could not,[242] and so Grzelczyk suffered (direct) discrimination contrary to Article 18 TFEU.[243] The question was whether Article 18 TFEU applied to his case. Referring to *Martínez Sala*, the Court said that because Grzelczyk, a citizen of the Union, was

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230 Para. 63.
231 See further Ch. 9.
232 [232] See also Art. 6(a) of the Council of Europe Convention on Social and Medical Assistance 1953 which provides that the Contracting Parties shall abstain from expelling an alien lawfully resident 'on the sole ground that he is in need of assistance'.
233 Case C–456/02 *Trojani* [2004] ECR I–7573.
234 Para. 36.
235 Paras. 37 and 40.
236 Para. 43.
237 Para. 37.
238 Case C–209/03 [2005] ECR I–2119. See also Case C–158/07 *Förster* [2008] ECR I–8507, para. 39.
239 Case C–456/02 *Trojani* [2004] ECR I–7573, para. 43. Emphasis added.
240 As did Case C–85/96 *Martínez Sala* [1998] ECR I–2691.
241 Case C–184/99 [2001] ECR I–6193.
242 Para. 29.
243 Para. 30.

lawfully resident in Belgium he could rely on Article 18 TFEU in respect of those situations which fell within the material scope of the Treaties,[244] including those situations involving 'the exercise of the fundamental freedoms guaranteed by the [Treaties] and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article [21(1) TFEU]'.[245] Therefore, in *Grzelczyk* the Court defined the material scope of Union law, not by reference to the fact that the benefit fell within the scope of Regulation 492/2011 as it had suggested in *Martínez Sala*,[246] but by reference to the fact that Grzelczyk had actually moved.[247] This significantly broadened the scope of the principle of equal treatment.

A question was raised whether the fact that he had applied for the minimex meant that he no longer satisfied the requirements in the Students' Directive 93/96 (now Article 7(1)(c) CRD) of having sufficient resources.[248] The Court said that the Belgian authorities had to provide some temporary support to the migrant citizen, as they would to nationals, given that there exists 'a certain degree of financial solidarity' between nationals of a host Member State and nationals of other Member States,[249] but only for so long as they do not become an unreasonable burden on public finances. While this decision could be seen as opening up social welfare systems of host Member States to migrants,[250] the actual reasoning in the case presents migrants with a dilemma: lawful residency entitles the migrant to equal treatment within the host state; but exercise of that right to equal treatment might enable the host state to consider that the claimant has become an unreasonable financial burden.[251]

Student finance was also at issue in *Bidar*,[252] this time in a case concerning indirect discrimination. It will be recalled from Chapter 9 that Bidar, a French national, had lived in the UK with his grandmother after his mother's death. He subsequently went to university but was turned down for financial assistance to cover his maintenance costs, in the form of a student loan, on the grounds that he did not satisfy the criteria of being settled in the UK nor did he satisfy the residence requirements laid down by British law. The Court found these conditions to be indirectly discriminatory since they risked placing nationals of other Member States at a disadvantage. However, the Court also accepted that while, in the organization and application of their social assistance schemes, Member States had to show a degree of financial solidarity with nationals of other Member States, it was legitimate for a Member State to grant assistance only to students who had demonstrated a certain degree of integration into the society of that state. This integration could be shown through a period of residence. The Court suggested that a three-year residence requirement was compatible with Union law[253] but that the requirement to be settled was not, since it was impossible for a student from another Member State ever to obtain settled status.[254]

In reaching this conclusion, the Court relied on *D'Hoop*[255] which concerned a Belgian national who completed her secondary education in France where she obtained the *baccalauréat* in 1991.[256] She

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[244] Para. 32.
[245] Para. 33, citing Case C–274/96 *Bickel and Franz* [1998] ECR I–7637.
[246] Although it had already established that the minimex was a social advantage (paras. 27–9): Case 249/83 *Hoeckx* [1985] ECR 973.
[247] There must be actual—as opposed to hypothetical—movement: Case C–299/95 *Kremzow* v. *Republik Österreich* [1997] ECR I–2629. Cf. E. Spaventa, 'Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects' (2008) 45 *CMLRev.* 13.
[248] This question is considered further in Ch. 13.
[249] Para. 44.
[250] S. Giubboni, 'Free movement of persons and European solidarity' (2007) 13 *ELJ* 360.
[251] M. Dougan and E. Spaventa, 'Educating Rudy and the (non-)English patient: A double bill on residency rights under Article 18 EC' (2003) 28 *ELRev*. 697.
[252] Case C–209/03 [2005] ECR I–2119.
[253] Cf. the five-year residence requirement in Art. 24(2) CRD which was upheld as proportionate in Case C–158/07 *Förster* [2008] ECR I–8507, para. 53.
[254] See generally K. Hailbronner, 'Union citizenship and access to social benefits' (2005) 42 *CMLRev*. 1245.
[255] C–224/98 *D'Hoop* v. *Office national de l'emploi* [2002] ECR I–6191.

then returned to Belgium for her university education. At the end of her university studies she applied to the Belgian authorities for a tide-over allowance—a type of unemployment benefit granted to young people who have just completed their studies and are seeking their first job. Her application was rejected on the ground that she had not received her secondary education in Belgium. The Court said that, as a Belgian national, she fell within the personal scope of the citizenship provisions,[257] and that as a free mover she fell within the material scope of the Treaty provisions. The Court therefore said that she could rely on the principle of equal treatment even against her own state after having studied abroad.[258]

But what discrimination had she suffered?[259] It could be argued that the national rule was indirectly discriminatory: in order to obtain a tide-over allowance individuals had to receive their secondary education in Belgium. This had a disparate impact on non-nationals (as well as some nationals like D'Hoop) and so breached Article 21 unless objectively justified.[260] Alternatively, the national rule could be seen as discriminatory, not on the ground of nationality but on the ground of the individual having exercised her rights of free movement. Both the Advocate General and the Court seemed to support this interpretation. Advocate General Geelhoed said that Ms D'Hoop had been 'placed at a disadvantage by discriminatory provisions of the Member States of which they are nationals, which penalise them retrospectively for a period of residence in another Member State'.[261] The Court agreed:[262]

By linking the grant of tideover allowances to the condition of having obtained the required diploma in Belgium, the national legislation thus *places at a disadvantage certain of its nationals simply because they have exercised their freedom to move* in order to pursue education in another Member State.

The Court continued that '[s]uch inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move'.[263] In subsequent cases, the Court said such disadvantage constituted a 'restriction' on free movement,[264] an analysis the Court has subsequently used, particularly where it is the rules of the home state that create the obstacles to free movement.[265] The national rule therefore breached Article 21(1) unless it could be objectively justified.

The Court examined the question of justification in *D'Hoop* even though no evidence had been submitted to it on this point. It said that since the tide-over allowance aimed at facilitating the transition from education to the employment market it was legitimate for the national legislature to ensure that a 'real link' existed between the applicant for that allowance and the geographic employment market concerned.[266] However, the Court found that the condition concerning the place of secondary education

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[256] The Court said that the provisions on citizenship of the Union were applicable as soon as they entered into force and so they applied to the present discriminatory effects of situations arising prior to the citizenship provisions coming into force (citing Case C–195/98 *Österreichischer Gewerkschaftsbund* v. *Republik Österreich* [2000] ECR I–10497, paras. 54–5, and Case C–290/00 *Duchon* v. *Pensionsversicherungsanstalt der Angestellten* [2002] ECR I–3567, paras. 43–4).

[257] Para. 27.

[258] Para. 31.

[259] See also A. Iliopoulou and H. Toner, 'A new approach to discrimination against free movers' (2003) 28 *ELRev*. 389.

[260] Para. 36.

[261] Para. 53.

[262] Para. 34, emphasis added.

[263] Para. 35. Case C–135/99 *Ursula Elsen* v. *Bundesversicherungsanstalt für Angestellte* [2000] ECR I–10409. See also Case C–28/00 *Kauer* v. *Pensionsversicherungsanstalt der Angestellten* [2002] ECR I–1343, para. 44; Case C–302/98 *Sehrer* v. *Bundesknappschaft* [2000] ECR I–4585, para. 32.

[264] See, e.g., Case C–499/06 *Nerkowska* [2008] ECR I–3993; Case C–221/07 *Zablocka-Wehrmüller* [2008] ECR I–9029, para. 35. The 'restriction' approach is considered below.

[265] M. Cousins, 'Citizenship, residence and social security' (2007) 32 *ELRev.* 386, 394.

[266] Dougan and Spaventa (above n. 251) suggest that the requirement of a 'real link' is inspired by the same spirit as the requirement in *Grzelczyk* of an 'unreasonable financial burden', recognizing that there are limits to solidarity which Union law can superimpose on national welfare states. This requirement may be generously construed in favour of the Member State.

was 'too general and exclusive in nature' and that it unduly favoured an element which was not necessarily representative of a real and effective degree of connection between the applicant for the tide-over allowance and the geographic employment market, to the exclusion of all other representative elements. It therefore went beyond what was necessary to attain the objective pursued.[267]

(ii) Discrimination caused by similar treatment

The cases considered so far all concern discrimination caused by the different treatment of similarly situated groups. *Garcia Avello*[268] concerns the opposite: discrimination arising from the fact that differently situated groups were being treated similarly. Carlos Garcia Avello, a Spanish national, married Isabelle Weber, a Belgian national, and they lived together in Belgium. They had two children, dual nationals, who were given their father's surname (Garcia Avello). He then applied to the Belgian authorities to have the children's surnames changed to Garcia Weber, reflecting the Spanish pattern for surnames which comprise the first element of the father's surname (Garcia) followed by the mother's maiden name (Weber). While Belgian law did permit a change of surname when serious grounds were given, the Belgian authorities did not apply this exception to Garcia Avello because usually 'children bear their father's surname'.

The Court confirmed that the citizenship provisions applied to this case. It noted that since Mr Garcia Avello's children held the nationality of two Member States, they enjoyed the status of citizen of the Union.[269] This meant that they enjoyed equal treatment with nationals of the host state in respect of situations falling within the material scope of the Treaties, in particular those involving the freedom to move and reside in the territory of the Member States.[270] Therefore the children could not suffer discrimination on the ground of nationality in respect of their surname. Because the Garcia Avello children, holding both Spanish and Belgian nationality, were in a different situation from Belgian nationals holding just one (Belgian) nationality,[271] they had a 'right to be treated in a manner different to that in which persons having only Belgian nationality are treated, unless the treatment in issue can be justified on objective grounds'.[272] Since the Court rejected the justifications put forward by the Belgian government (the immutability of surnames as a founding principle of the social order and integration of nationals from other Member States) the Court concluded that Articles 18 and 20 TFEU precluded the Belgian authorities from refusing a name change to the Garcia Avello children.[273]

Fig. 12.3 The restrictions approach to Art. 21

(iii) Restrictions approach

Although most of the landmark citizenship cases were decided under the non-discrimination/equal treatment model, the more general shift to a restrictions/market access based approach seen elsewhere in the free movement case law can now also be seen in the field of citizenship.[274] It was first seriously raised by Advocate General Jacobs in *Pusa*[275] where he argued that 'discrimination on grounds of nationality, whether direct or indirect, is not necessary in order for Article [21] to apply'.[276] He noted that although freedom of movement was originally guaranteed by a prohibition of discrimination on grounds of nationality, 'there has been a progressive extension of that freedom in the Court's case-law

[267] Para. 39. See also Case C–258/04 *Office national de l'empoli* v. *Ioannidis* [2005] ECR I–8275, paras. 30–3.
[268] Case C–148/02 *Carlos Garcia Avello* v. *Etat Belge* [2003] ECR I–11613, noted by T. Ackermann, (2007) 44 *CMLRev.* 141.
[269] Para. 21.
[270] Para. 24.
[271] Paras. 34 and 37.
[272] Para. 34.
[273] Para. 44. The Court may now apply the 'restrictions' approach to such cases: see, e.g., Case C–353/06 *Grunkin-Paul* [2008] ECR I–7639 considered below, n. 298.
[274] See Editorial Comments, 'Two-speed European citizenship? Can the Lisbon Treaty help close the gap?' (2008) 45 *CMLRev.* 1, 2.
[275] Case C–224/02 *Pusa* v. *Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I–5763. See also F. Jacobs, 'Citizenship of the European Union: A legal analysis' (2007) 13 *ELJ* 591.
[276] Para. 18.

so that non-discriminatory restrictions are also precluded'.[277] He said that the wording of Article 21 was not limited to a prohibition of discrimination,[278] concluding that:[279]

subject to the limits set out in Article [21] itself, no unjustified burden may be imposed on any citizen of the European Union seeking to exercise the right to freedom of movement or residence. Provided that such a burden can be shown, it is immaterial whether the burden affects nationals of other Member States more significantly than those of the State imposing it.[280]

Following the lead of its Advocate General, the Court in *Pusa*[281] appeared to move towards the restrictions/obstacle approach. It confirmed the shift in *Tas-Hagen.*[282] The case concerned a Dutch law that made payment of a benefit to civilian war victims conditional on the applicants being resident in the Netherlands at the time that they made their application. This law, said the Court, was liable to dissuade Dutch nationals such as Mrs Tas-Hagen from exercising her freedom to move and reside outside the Netherlands.[283] It therefore constituted a 'restriction on the freedoms conferred by Article [21(1)] on every citizen of the Union'.[284] The Court recognized that the Dutch law could be justified on the grounds of solidarity with the population of the Netherlands both before and after the war but thought the requirement of residence to be disproportionate. While acknowledging that, in respect of benefits not covered by Union law, Member States enjoyed a wide margin of appreciation in deciding what criteria were to be used in assessing connection to society,[285] a residence criterion was not a satisfactory indicator of the degree of connection of civilian war victims to the Netherlands when it was liable to lead to different results for individuals resident abroad whose integration into Dutch society was in all respects comparable.[286]

The careful scrutiny of the proportionality of the national rules is the hallmark of subsequent case law. For example, *Nerkowska*[287] shows how the Court has insisted that the personal circumstances of each individual be taken into account, despite the administrative burden this might entail.[288] Ms Nerkowska, a Polish national, was a product of her country's tumultuous history. Born in 1946 in the territory of present-day Belarus, her parents were deported to Siberia where they died. She was then deported in 1951 to the former USSR where she lived under 'difficult conditions'. She returned to Poland in 1957 and lived there until 1985 when she moved to Germany. She was denied payment of a disability pension granted by Poland to civilian victims of war and repression because she was resident in another Member State. The Court said that the Polish rule constituted a restriction on free movement of citizens[289] but could be justified on the grounds of (1) ensuring that there was a connection between

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277 Para. 20.
278 Ibid.
279 Para. 22.
280 See also Jacobs AG's views in Case C–96/04 *Niebüll* [2006] ECR I–3561, para. 54: 'While the practical difficulties which he is likely to encounter may not stem from discrimination on the grounds of nationality, they constitute a clear obstacle to his right as a citizen to move and reside freely.'
281 Case C–224/02 *Pusa* [2004] ECR I–5763. Compare para. 19 (restrictions based) and para. 20 (discrimination based).
282 Case C–192/05 *Tas-Hagen* v. *Raadskamer WUBO van de Pensioen- en Uitkeringsrad* [2006] ECR I–10451, paras. 30–1. See also Case C–345/05 *Commission* v. *Portugal (transfer of property)* [2006] ECR I–10633, para. 24.
283 Para. 32.
284 Para. 31.
285 Para. 36.
286 Para. 38. Cf. Case C–103/08 *Gottwald* v. *Bezirkshautmannschaft Bregenz* [2009] ECR I–000, para. 36. See further G. Davies, ' "Any place I hang my hat?" or: Residence is the new nationality' (2005) 11 *ELJ* 43 who laments challenges to a residence requirement for the damage it does to a community's ability to offer benefits to local residents.
287 Case C–499/06 *Nerkowska Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* [2008] ECR I–3993.
288 Cf. the Art. 110 TFEU (ex Art. 90 EC) case, Case C–74/06 *Commission* v. *Greece (registration tax on imported cars)* [2007] ECR I–7585, para. 29, where the Court was mindful of the administrative burden imposed in assessing the depreciation of each and every car. The Court therefore said it was sufficient to use fixed scales calculated on the basis of criteria such as a vehicle's age, mileage, general condition to determine value.
289 Para. 34.

the society of the Member State concerned and the recipient of a benefit and (2) the necessity of verifying that the recipient continued to satisfy the conditions for grant of that benefit.[290]

However, the Court found the Polish rule requiring residence throughout the period of payment of the benefit was disproportionate: the fact that a person was a national of the Member State granting the benefit and had lived in Poland for more than 20 years was sufficient to establish a connection between that State and the recipient of the benefit. Furthermore, the objective of verifying that the recipient of a disability pension continued to satisfy the conditions for its grant could be achieved by other means which, although less restrictive, were just as effective.[291]

This robust—and case-by-case—approach to proportionality was also emphasized in *Morgan*.[292] Under German law the award of education and training grants for studies in another Member State was subject to a twofold obligation (the 'first-stage studies condition'): (1) to have attended an education or training course for at least one year in Germany and (2) to continue only that same education or training in another Member State. The application of these conditions meant that Rhiannon Morgan, a German national, who moved to the UK where she worked for a year as an au pair before commencing her studies at a British university, was refused a grant by the German authorities.

The Court found that because of the personal inconvenience, additional costs and possible delays which it entailed, the first stage studies condition was liable to discourage citizens of the Union from leaving Germany in order to pursue studies in another Member State.[293] It therefore constituted a restriction on freedom of movement for citizens of the Union contrary to Article 21(1).[294] The German government put forward a number of justifications for its rule, all of which were subject to a strict proportionality review. For example, it said that the condition was justified as a way of showing integration into German society.[295] However, the Court noted the personal situation of the applicant: she had been raised in Germany and completed her schooling there. This demonstrated her integration into German society. Therefore, the first-stage studies condition as a proxy for showing integration was too general and exclusive and so was disproportionate.[296]

There is, however, a risk attendant on such an individualized approach. As the healthcare cases considered in Chapter 11 show, the emphasis on protecting the individual over the interests of the community reflects what Newdick terms an 'institutional "asymmetry" within the EU, in which the Court of Justice favours private "economic" interests over the public "welfare" policies identified by national governments'.[297] He argues that this market citizenship is consistent with inequality because individual choice, rather than government policy, is the dominant influence.

(iv) The implications of the restrictions approach

As *Tas-Hagen*, *Nerkowska*, and *Morgan* show, the Court has made effective use of the restrictions approach to strike down state rules that deter departure from the state. Traditional discrimination analysis can be difficult to apply in this context, as we saw in *D'Hoop*. The Court also recognized this in *Grunkin-Paul*.[298] Leonhard Matthias Grunkin-Paul was born in Denmark to Mr Grunkin and Dr Paul,

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[290] Paras. 37–9.

[291] Para. 46. See also Case C–221/07 *Zablocka-Wehrmüller* [2008] ECR I–9029, para. 41. Cf. Case C–103/08 *Gottwald* [2009] ECR I–000, para. 32 where the Court found that a residence criterion could be justified as a condition for the granting of a free annual road toll disc for people with disabilities in Austria and was proportionate since there was no minimum period of residence required, the term residence was interpreted broadly and the disc was also provided to non-residents who regularly travelled in Austria.

[292] Joined Cases C–11/06 and C–12/06 *Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren* [2007] ECR I–9161.

[293] Para. 30.

[294] Para. 32.

[295] See also Case C–209/03 *Bidar* [2005] ECR I–2119, paras. 56–7.

[296] Paras. 42–6.

[297] C. Newdick, 'The European Court of Justice, Trans-national health care, and social citizenship: Accidental death of a concept' (2008) 26 *Wisconsin International Law Journal* 844, 864.

[298] Case C–353/06 *Grunkin-Paul* [2008] ECR I–7639.

a German husband and wife. Their child was also German but had always lived in Denmark. The child was given the surname Grunkin-Paul which was entered on his Danish birth certificate. However, the German authorities refused to register his surname because under German law a German child cannot bear a double-barrelled surname composed of the surnames of both the father and mother. Because Grunkin-Paul and his parents were German, he could not allege discrimination on grounds of nationality, a point the Court acknowledged.[299] However, in applying the restrictions model[300] the Court may have implicitly recognized the risk that it could be all-embracing. It therefore added a threshold requirement: it said that a discrepancy in surnames is likely to result in 'serious inconvenience'[301] in the child's day-to-day life as he moved between Denmark and Germany. The Court found that the German rule could not be justified.

While the 'restrictions' approach might serve to simplify analysis, it has been used in rather unexpected ways—as *De Cuyper*[302] shows. The case concerned the withdrawal of an unemployment allowance payable by the Belgian government to a Belgium national on the ground that he no longer resided in Belgium. Article 10 of the then Social Security Regulation 1408/71[303] (now Regulation 883/04) allows certain benefits to be subject to a residence requirement and so the case should have stopped there. Instead, the Court subjected the residence requirement to review under Article 21 TFEU and found that since the Belgian legislation 'places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State [it] is a restriction on the freedoms conferred by Article [21]'.[304] However, the Court did find that the residence requirement could be justified by the need to monitor the employment and family situation of the unemployed[305] and that no less-restrictive monitoring measures existed to achieve the objective of allowing inspectors to check whether the situation of, for example, a person who had declared that they were living alone and unemployed had changed which might have an effect on the benefit granted.[306] In reaching this conclusion, the Court appeared to protect the integrity of the complex Social Security Regulation 1408/71 (Regulation 883/04 from 1 March 2010) from challenge.[307] However, subsequent cases, like *Hendrix*,[308] suggest that opening up the Social Security Regulation to review under the restrictions model has the potential to undermine the carefully negotiated settlement reached by (democratically accountable) political actors.

(v) Quantitative and qualitative approach

The Article 21(1) cases considered so far might suggest that migrant citizens who are not economically active now have the right to claim all benefits available in the host State (whether classified as social assistance or social advantages) on the same terms as nationals, unless the benefits are expressly excluded by Union law or there are objectively justified reasons why not. If this analysis is correct, then the creation of citizenship of the Union leads to what Iliopoulou and Toner describe as the 'perfect assimilation' approach, where the treatment of Union migrants is placed on an equal footing with that

[299] Paras. 19–20.
[300] Para. 21.
[301] Paras. 23 and 29.
[302] Case C–406/04 *De Cuyper* v. *Office national de l'emploi* [2006] ECR I–6947.
[303] Para. 37.
[304] Para. 39.
[305] Para. 41.
[306] Paras. 43–4.
[307] As Geelhoed AG noted in para. 116. Although cf. Joined Cases C–502/01 and C–31/02 *Gaumain-Cerri* v. *Kaufmännische Krankenkasse-Pflegekasse* [2004] ECR I–6483, para. 36.
[308] Case C–287/05 [2007] ECR I–6909 considered in Ch. 9. See also M. Dougan, 'Expanding the frontiers of European Union citizenship by dismantling the territorial boundaries of the national welfare states' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009).

of nationals of the host Member State unless Union law specifically provides otherwise.[309] But, when looked at carefully, the cases do not support the full assimilationist approach and actually suggest an incremental approach to residence and equality—the longer migrants reside in the Member State, the greater the number of benefits they receive on equal terms with nationals.

But on what basis are non-economically active migrants entitled to (financially expensive) maintenance on equal terms with nationals? Unlike migrant workers, it cannot be argued that they have contributed to the economy of the host state[310] through taxation.[311] Instead, the answer appears to lie in the degree to which the migrant is integrated into the community of the host state combined with a notion of social solidarity between members of that community.[312] At national level, welfare states are legitimized at least in part by a diffuse sense of solidarity: national taxpayers pay their taxes to help look after their fellow citizens in need. This solidarity is founded on some sense of shared interests which in turn is based on a shared nationality[313] and/or a shared identity. Thus *national* citizenship leads to the evolution of a sense of *national* solidarity. The striking feature of both *Grzelczyk* and *Bidar* is that the Court has taken the concept of *European Union* citizenship, the 'fundamental status of nationals of the Member States',[314] to justify the creation of a sense of *transnational* solidarity between (taxpaying) nationals of a host Member State and (impoverished migrant) nationals of other Member States, with the result that the migrant needs to be treated in the same way as nationals in respect of access to certain social advantages.

However, the reference in *Grzelczyk* and *Bidar* to merely 'a *certain degree* of financial solidarity'[315] indicates that the notion of solidarity is limited. *Grzelczyk* suggests that the limits to the solidarity—and thus the equality—principle are related to the degree to which the migrant is integrated into the society of the host state. *Bidar* makes this point expressly. Having referred to the need for Member States to show 'a certain degree of financial solidarity with nationals of other Member States' in the organization and application of their *social assistance* systems, the Court continued that 'In the case of assistance covering the maintenance costs of students, it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State.'[316] And length of residence is a key indicator of integration: 'the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host state for a certain length of time'.[317]

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[309] A. Iliopoulou and H. Toner (2002) 39 *CMLRev*. 609, 616. This is what Léger AG had in mind in Case C–214/94 *Boukhalfa* v. *Bundesrepublik Deutschland* [1996] ECR I–2253, para. 63. See also S. Friess and J. Shaw, 'Citizenship of the Union: First steps in the European Court of Justice' (1998) 4 *EPL* 533.

[310] Although the Court's case law on the definition workers, to include migrants who received only limited wages and work a small number of hours (e.g., Case 139/85 *Kempf* [1986] ECR 1741 and Case C–357/89 *Raulin* [1992] ECR I–1027), rather undermines the substance of this rationale.

[311] For a criticism of such arguments see Geelhoed AG's Opinion in Case C–209/03 *Bidar* [2005] ECR I–2119, para. 65.

[312] In his opinion in Case C– 70/95 *Sodemare SA* [1997] ECR I–3395, para. 29, Fennelly AG defined solidarity as the 'inherently uncommercial act of involuntary subsidization of one social group by another'. The meaning of solidarity in the EU context is considered further in C. Barnard, 'Solidarity as a tool of new governance' in G. De Búrca and J. Scott (eds.), *New Governance and Constitutionalism in Europe and the US* (Oxford: Hart Publishing, 2006).

[313] See D. Miller, 'In defence of nationality' in D. Miller, *Citizenship and National Identity* (Cambridge: Polity Press), 2000, cited in N. Barber, 'Citizenship, nationalism and the European Union' (2002) 27 *ELRev*. 241, 250 who notes that it is an observable fact that nationality is the principal source of solidarity.

[314] Case C–184/99 *Grzelczyk* [2001] ECR I–6193, paras. 30–1; Case C–148/02 *Garcia Avello* [2003] ECR I–11613, paras. 22–3 and Case C–209/03 *Bidar* [2005] ECR I–2119, para. 31.

[315] *Grzelczyk*, para. 44; *Bidar*, para. 56 (emphasis added). Case C–413/99 *Baumbast* [2002] ECR I–7091, a case decided under Dir. 90/364 (now CRD), can also be explained in terms of solidarity, as Geelhoed AG noted in *Bidar*, para. 31.

[316] Para. 57.

[317] Para. 59. See also Geelhoed AG's remarks in Case C–413/01 *Ninni-Orasche* [2003] ECR I–13187, paras. 90–1. For an emphasis on the contextual approach which takes account of length of residence and degree of integration, see Ruiz-Jarabo Colomer AG's opinion, in Case C–138/02 *Collins* [2003] ECR I–2703, paras. 65–7.

Thus, the Court seems to be adopting a 'quantitative' approach to equality:[318] the longer migrants reside in the Member State, the more integrated they are in that state and the greater the number of benefits they receive on equal terms with nationals.[319] So, the cases appear to span a spectrum: at one end is *Martínez Sala*, a long-term resident (she had lived in Germany for 25 years and had two children there), fully integrated into the host state. She enjoyed full equal treatment (the payment of the child benefit on exactly the same terms as nationals). Having spent most of her life in Germany, she benefited from the principle of solidarity, possibly even national solidarity, and thus enjoyed full equal treatment on the same terms as nationals.

At the other end of the spectrum are those migrant citizens, like *Collins*[320] who have just arrived in the host state. While Article 21(1) gives them the right to move and reside freely in the host state,[321] they are not entitled to equal treatment in respect of social assistance benefits (e.g., the minimex) because they are not yet integrated into the host state's community and thus no solidarity exists (of either the national or transnational variety), although they might receive some social advantages on a non-discriminatory basis.[322] In the middle of this spectrum lies Grzelczyk who was only partially integrated into the society of the host state and so enjoyed only limited equal treatment (he received the minimex on the same terms as nationals but only until he became an unreasonable burden on public funds when his right of residence could be terminated).[323] *Bidar* probably falls somewhere between *Martínez Sala* and *Grzelczyk* on the spectrum. Like Grzelczyk, Bidar had been resident in the UK for three years; unlike Grzelczyk his integration was qualitative as well as quantitative: his surviving family lived in the UK, he had attended a British school, and he was about to go to a British university. His life was in the UK, just as Martinez Sala's was in Germany. When viewed in this light, the decision in *Bidar* that he should enjoy access to maintenance grants and loans on the same terms as nationals seems fair and right.

The 'quantitative' approach to equality is reflected in the Citizens' Rights Directive 2004/38 which, as we have seen, envisages three groups of migrants (fig. 12.2).[324] The first group (up to three months)[325] enjoy a general right to equal treatment[326] but not in respect of social assistance and student finance.[327] The second group (three months to five years) enjoys equal treatment even in respect of social assistance (albeit subject to the justification of requiring a real link with the territory of the host state in the case of an indirectly discriminatory rule).[328] However, host Member States are not obliged to provide them with student grants or loans unless they are economically active or assimilated thereto.[329] The third group (generally those residing in the host state for more than five years) enjoy full equal treatment,[330] including equal treatment in respect of student maintenance.

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[318] This is sometimes referred to as the 'affiliation model': see O. Golynker, 'Job Seekers' Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity' (2005) 30 *ELRev*. 111, 118–119.

[319] Kokott AG, 'EU citizenship: Citoyens sans frontiers', *Durham European Law Institute European Law Lecture* 2005, 13.

[320] Case C–138/02 *Collins* [2003] ECR I–2703, especially para. 69. See esp. Ruiz-Jarabo Colomer AG's Opinion (para. 76): Union law did not require the benefit to be provided to a citizen of the Union who entered the territory of a Member State with the purpose of seeking employment while lacking any connection with the state or link with the domestic employment market.

[321] See also Geelhoed AG Case C–413/01 *Ninni-Orasche* [2003] ECR I–13187.

[322] E.g., Case C–274/96 *Bickel and Franz* [1998] ECR I–7637 translation services for a court hearing.

[323] See also Case C–413/99 *Baumbast and R* [2002] ECR I–7091.

[324] Cf. A.Somek, 'Solidarity decomposed: Being and time in European citizenship' (2007) 32 *ELRev.* 787.

[325] Art. 6.

[326] Art. 24(1).

[327] Art. 24(2).

[328] Art. 24(1). On the 'real link' test: Joined Cases C–22/08 and 23/08 *Vatsouras* [2009] ECR I–000, paras 38–40 and C. O'Brien 'Real links, abstract rights and false alarms: The relationship between the ECJ's "real link" case law and national solidarity' (2008) 33 *ELRev*. 643.

[329] Art. 24(2). The Dir. draws no distinction between those coming to the host state *qua* student and those not coming in this capacity.

[330] Art. 24(1).

The qualitative approach to integration can also be found in the directive, albeit not in the context of establishing rights to equal treatment in respect of length of residence but in respect of an expulsion decision. Under Article 28 the host State must take account of considerations such as 'how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin'[331] when deciding whether to expel an individual.

(c) Tax advantages

It was only in the mid 2000s that cases began to arise concerning EU citizens alleging that tax rules, often those of the state of origin, constituted an impediment to/restriction on their rights of free movement. These arguments coincided with a more general shift by the Court from the discrimination model towards the restrictions approach in the field of taxation, a move documented in detail in Chapters 9 and 10. As we saw above, *Pusa*,[332] a tax case, appeared to endorse this development in the field of citizenship.

Pusa concerned a Finnish pensioner living in Spain who owed money in Finland. An attachment order was made against his pension for the purpose of recovering the debt. Had he resided in Finland, the income tax he owed would have been deducted first in order to calculate what was left of his monthly pension to which an attachment order could have been made. However, since he resided in Spain, no such initial deduction was made. The Court ruled that the difference in treatment unjustifiably resulted in Mr Pusa being 'placed at a disadvantage by virtue of exercising his right to move and reside freely'[333] contrary to Article 21(1). This reasoning was also followed in *Schwarz*[334] concerning German children attending a school for the exceptionally gifted and talented in Scotland. Their parents did not get tax relief on the schooling; had the children been educated in Germany, the parents would have received the tax relief. The Court said that the German rule disadvantaged the children of nationals merely by reason of the fact that they had exercised their freedom of movement and this obstacle could not be justified.

Pusa and *Schwarz* concerned challenges by nationals who had exercised their rights of free movement against the home state; *Rüffler*[335] concerned a challenge by a migrant citizen to host state tax laws. It concerned a German claimant who retired to Poland where he lived on his German pension. Under Polish law only contributions paid to a Polish health insurance body were tax deductible. Because Mr Rüffler paid his contributions to a German body he did not benefit from the tax advantage. The Court found that the situation of a retired (German) taxpayer resident in Poland and receiving pension benefits paid under the compulsory health insurance scheme of another Member State, and that of a Polish retired person also resident in Poland but receiving his pension under a Polish health insurance scheme, were comparable since both were subject to an unlimited liability to tax in Poland. The Court then found that because the Polish rules disadvantaged taxpayers, like Mr Rüffler, who had exercised their freedom of movement to take up residence in Poland,[336] they therefore constituted 'a

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[331] See also Joined Cases C–482/01 and C–493/01 *Orfanopoulos* v. *Land Baden-Württemberg* [2004] ECR I–5257, para. 99: 'To assess whether the interference envisaged is proportionate to the legitimate aim pursued, in this instance the protection of public policy, account must be taken, particularly, of the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned.'

[332] Case C–224/02 *Pusa* [2004] ECR I–5763.

[333] Para. 31. See also Case C–520/04 *Turpeinen* [2006] ECR I–10685. See also Case C–152/05 *Commission* v. *Germany (subsidy on dwellings)* [2008] ECR I–39, para. 30

[334] Cases C–76/05 and C–318/05 *Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I–6847. See also Case C–318/05 *Commission* v. *Germany (School Fees)* [2007] ECR I–6957.

[335] Case C–544/07 *Rüffler* v. *Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu* [2009] ECR I–000.

[336] Para. 72.

restriction on the freedoms conferred by Article [21(1)] on every citizen of the Union'[337] which could not be justified.

While the restrictions approach is an effective way of subjecting national tax rules which hinder free movement to review under Union law, this model sits uncomfortably with the international tax law principles of fiscal sovereignty and territoriality. As previous chapters have shown, the Court has more recently developed its understanding of the implications of these principles for its analysis,[338] with the result that it has tended to revert to the discrimination approach. The citizenship tax cases are no exception, as *Lindfors*[339] and *Schempp*[340] made clear. In these cases the Court said that mere difference between the tax regime of one Member State and another was not sufficient to trigger Article 21(1); migrant citizens had to show that they had suffered disadvantage in comparison with nationals. *Schempp* also emphasized that the claimant and the comparator had to be similarly situated. On the facts the Court ruled that the situation of Mr Schempp, a German national, who made maintenance payments to his former spouse now resident in Austria which were not tax deductable, was not comparable with the situation of a German national who made equivalent payments to a former spouse resident in Germany which were tax deductible. There was therefore no breach of the principle of non-discrimination.

2.6 Specific Rights for Family Members

So far we have concentrated on the meaning of equal treatment in the general context of Article 24 CRD and under Article 21(1) TFEU. The CRD, together with Regulation 492/2011, lays down specific rights for families. Not only will they enjoy the right to equal treatment in respect of social advantages, as we have already seen, but also in respect of the right to work, schooling, and housing.

(a) Equal treatment and the right to work for family members

Article 23 of Directive 2004/38 permits the Union citizen's family members who have the right of residence or the right of permanent residence to take up employment or self-employment in the host state (but not in any other state[341]), irrespective of the nationality of the family member.[342] These family members will enjoy equal treatment in respect of their terms and conditions of employment, as well as dismissal rights under Article 24(1) CRD.

(b) Equal treatment and schooling

With a view to encouraging the integration of migrant children into the society of the host state,[343] Article 10 of Regulation 492/2011 requires the children of an EU national who is, or has been, employed in another Member State to be admitted to that state's general educational, apprenticeship, or vocational training courses.[344] This provision remains in Regulation 492/2011 and has not been replicated in the CRD 2004/38. Strictly speaking, the right therefore extends only to the children of *workers*.

Member States are obliged to encourage these children to attend such courses and, if necessary, make special efforts to ensure that the children can take advantage of educational and training facilities on an equal footing with nationals.[345] The reference to 'children' includes not only school age children

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337 Para. 73.
338 See further Chs. 9 and 10.
339 Case C–365/02 *Lindfors* [2004] ECR I–7183, para. 34.
340 Case C–403/33 *Schempp* v. *Finanzamt München* [2005] ECR I–6421, para. 45.
341 Case C–10/05 *Mattern* v. *Ministre du travail et de l'Emploi* [2006] ECR I–3145, para. 27.
342 Case 131/85 *Gül* v. *Regierungspräsident Düsseldorf* [1986] ECR 1573.
343 Case 9/74 *Casagrande* v. *Landeshauptstadt München* [1974] ECR 773, para. 7.
344 These are to be read disjunctively: Joined Cases 389 and 390/87 *Echternach and Moritz* [1989] ECR 723.
345 Case 9/74 *Casagrande* [1974] ECR 773, para. 8. Council Dir. 77/486/EEC ([1977] OJ L199/139) on the education of migrant workers' children requires that free tuition is available, including the teaching of the official language of the host state (Art. 2) and that the host state must promote the teaching of the children's mother tongue and culture (Art. 3). This applies equally to children with a disability: Case 76/72 *Michel S.* [1973] ECR 457, paras. 15–16.

but also those over the age of 21 who are no longer dependent on the working parent. In *Gaal* [346] the Court refused to make a link between the limitations imposed in the original Article 10 of Regulation 1612/69 (identification of family members) and the rights contained in the new Article 10 of Regulation 492/2011. It said that the principle of equal treatment required that the children of migrant workers should be able to continue their studies in order to be able to complete their education successfully.

Article 10 says that admission for migrant workers' children to education and training must be on the same conditions as for nationals. The reference to 'same conditions' is broadly construed. In the early case of *Casagrande*[347] the Court ruled that the term 'conditions' extended to 'general measures intended to facilitate educational attendance', including a grant for maintenance and training. Therefore, it was unlawful for the German authorities to refuse a monthly maintenance grant payable to school age children to the daughter of an Italian working in Germany. The right to a maintenance grant applies even where the children decide to receive their education in their state of origin. For this reason the Court ruled in *Di Leo*[348] that the German authorities could not refuse a grant to the daughter of an Italian migrant worker employed in Germany for 25 years on the grounds that she wished to study medicine in her state of origin (Italy).[349]

The importance of the right to education was emphasized in *Baumbast*[350] which concerned a German national who had been working in the UK. Relying on his rights under Regulation 492/2011 he had brought his Colombian wife and children with him to the UK. However, when he ceased working the British authorities refused to renew his residence permit or those of his family with the result that the children could not complete their education in the UK. The Court found that the UK's decision breached Article 45 because, as the Court explained, to prevent a child of an EU citizen from continuing his education in the host state might 'dissuade that citizen from exercising the rights to freedom of movement laid down in Article [45] and would therefore create an obstacle to the effective exercise of the freedom thus guaranteed by the [EU Treaties]'.[351] For much the same reason in *R*[352] the children of an American woman and her French husband who worked in the UK were entitled to carry on their education in the UK, even though the parents were divorced and the children were living with their mother (a non-EU national).[353]

If the children of migrants can continue receiving their education in the host state, then in order to be able to enjoy that right they need someone to look after them. This was confirmed in *Baumbast and R*. Reading Article 10 of Regulation 492/2011 in the light of the requirement of respect for family life under Article 8 ECHR, the Court said the right conferred by Article 10 'necessarily implies' that the child has the right to be accompanied by the person who is his primary carer and who is entitled to reside with the child during his studies,[354] notwithstanding that the carers might not have had independent rights under EU law[355] because they are TCNs.[356] This case law has now been codified by Article 12(3) CRD.

In *Ibrahim*[357] the Court put together *Gaal* and *Baumbast* to conclude that the children of a national of a Member State (Denmark), who works or has worked in the host Member State (the UK),

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346 Case C–7/94 *Landesamt für Ausbildungsforderung Nordrhein-Westfalen* v. *Gaal* [1995] ECR I–1031.
347 Case 9/74 [1974] ECR 773.
348 Case C–308/89 *Di Leo* v. *Land Berlin* [1990] ECR I–4185.
349 Para. 12.
350 Case C–413/99 [2002] ECR I–7091.
351 Para. 50.
352 Case C–413/99 [2002] ECR I–7091.
353 Paras. 60–2.
354 Para. 73.
355 Para. 71.
356 See also Case C–200/02 *Chen* v. *Secretary of State for the Home Department* [2004] ECR I–9925.
357 Case C-310/08 *London Borough of Harrow* v. *Ibrahim* [2010] ECR I–000.

and the TCN parent who is their primary carer can claim a right of residence in the UK on the sole basis of Article 10, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State. In *Teixeira*[358] the Court added that the right of residence in the host Member State of the parent who was the primary carer for a child of a migrant worker, where that child was in education in that State, was not conditional on one of the child's parents having worked as a migrant worker on the date on which the child started in education. It also said that the right of residence in the host Member State of the parent who was the primary carer for a child of a migrant worker, where that child was in education, ended when the child reached the age of majority, unless the child continued to need the presence and care of that parent in order to be able to pursue and complete his or her education.

(c) Equal treatment and housing

Originally, Article 10(3) of Regulation 1612/68 provided that workers were obliged to have available for their families 'housing considered as normal' for national workers in the region where they are employed. According to *Diatta*,[359] the purpose of Article 10(3) was both to implement public policy and to protect public security by preventing immigrants from living in precarious conditions.[360] In *Commission* v. *Germany*[361] German law required family members of EU migrant workers to have appropriate housing not only upon their arrival but also for the duration of their residence. The Court said that the German law went too far and that Article 10(3) applied solely when the worker and his family were first reunited. Once the family had been brought together the position of the migrant worker was no different from that of a national. Article 10(3) was deleted by the CRD and not replaced.

2.7 The Relationship between the CRD and the Treaties

It is clear that Directive 2004/38 lays down some significant rights for migrants and their families. However, the relationship between the CRD, the relevant Treaty provisions, and the case law is by no means clear, especially in the field of services. Of course, any interpretation of the Treaties—the principal source of rights—will prevail over the directive but, as we saw in Chapter 11, in the field of healthcare services the Court may try to steer its interpretation of the Treaties so as to bring them in line with the requirements of the directive. Alternatively, the Court might say, as it has on several occasions in respect of, for example Regulation 492/2011 on workers,[362] that the secondary measure merely makes explicit the principles formulated by the Treaties and so simply applies the Treaties.

Figure 12.4 shows how the various Treaty provisions and the directive might interact:

• If a worker's case is at issue, Article 45 is the relevant Treaty provision, supplemented by Regulation 492/2011 and, to a certain extent, the CRD.[363]

• If an establishment case is at issue, Article 49 is the relevant Treaty provision, supplemented by the CRD.

• If a services case is at issue, Article 56 is the relevant Treaty provision. Strictly speaking the CRD has no direct relevance in the field of services. However, for service providers/ recipients migrating to another Member State for less than three months, their position is indistinguishable from any other

[358] Case C-480/08 *Teixeira* v. *London Borough of Lambeth* [2010] ECR I–000.
[359] Case 267/83 [1985] ECR 567.
[360] Ibid., para. 10.
[361] Case 249/86 [1989] ECR 1263.
[362] See, e.g., Case C–278/03 *Commission* v. *Italy* [2005] ECR I–3747, para. 15; Case C–465/01 *Commission* v. *Austria* [2001] ECR I–8291, para. 25.
[363] The continued application of Reg. 1612/68 (now 492/2011) after the coming into force of the CRD is confirmed in Case C-310/08 *Ibrahim* [2010] ECR I–000, para. 45.

migrant citizen who can rely on Article 6 CRD.[364] Beyond three months, service providers could argue that they are persons of independent means and so rely on the provision in Article 7 CRD.

• If the migrant is a person of independent means or a student then they will enjoy rights under Article 21(1) TFEU and Article 7 CRD provided that they satisfy the conditions concerning sufficient resources and sickness insurance.

• A non-economically active migrant continues to be in the most precarious position. For the first three months of their stay they will enjoy the rights laid down by Article 6 CRD, albeit with limits on the rights to equality that they will enjoy (see fig. 12.3) and on condition they do not become an unreasonable burden on the social assistance system of the host state. Over and above three months but less than five years, they will be dependent on any rights given by Article 21(1) TFEU.

Fig. 12.4 Summary of the sources of legal rights for individuals who move to another Member State

This analysis suggests that the CRD fills in some of the interstices between the Treaty provisions but its coverage is far from complete. For this reason, litigants will inevitably invoke Article 21(1) in the hope that it may offer greater protection than the directive. As we have already seen, the Court has in the past been prepared to make creative use of the status of Union citizenship to ensure that it is 'not merely a hollow or symbolic concept'.[365] In particular, it has used the advent of Union citizenship to require a rethink of the orthodox case law on the Union provisions on free movement of persons,[366] as well as to strike down national rules which distinguish between nationals and migrants,[367] and between nationals who have migrated and those who have not.[368] It has also used citizenship to justify limiting the limits to the 1990 Residence Directives (now Article 7 CRD) by applying the principle of proportionality in a rigorous fashion.[369]

That said, if experience to date is anything to go by, the Court will decide cases, as far as possible, on the basis of Articles 45, 49, and 56;[370] only where this proves impossible will it resort to Articles 20 and 21(1) (e.g., *Martínez Sala*, *Grzelczyk*, *Baumbast*).[371] In some cases it provides an answer based on Articles 45, 49, or 56 in respect of economic actors and Article 21 in respect of non-economic actors (e.g., *Morgan*).[372] Yet even where the case is decided on the basis of Articles 45, 49, and 56 the Court may take into account citizenship-type principles. For example, its decision in *Carpenter*[373] (concerning the position of the Filipino wife of a British service provider), handed down shortly before *Baumbast* and *Akrich*,[374] can probably best be seen as a citizenship case, with its strong overlay of human rights protection.

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364 This is the view the Court appears to take in Case C–215/03 *Oulane* v. *Mininster voor Vreemdelingenzaken en Integratie* [2005] ECR I–115, paras. 19–20. See Art. 17(8) of the Services Dir. 2006/123 ([2006] OJ L376/36) which gives precedence to the CRD.

365 Per Geelhoed AG in Case C–209/03 *Bidar* [2005] ECR I–2119, para. 28.

366 Case C–138/02 *Collins* [2003] ECR I–2703, para. 63.

367 Case C–456/02 *Trojani* v. *CPAS* [2004] ECR I–7573.

368 Case C–224/98 *D'Hoop* [2002] ECR I–6191.

369 See also Case C–413/99 *Baumbast* [2002] ECR I–7091 and Case C–200/02 *Chen* [2004] ECR I–9925 considered in detail in Ch. 13.

370 Case C–100/01 *Olazabal* [2002] ECR I–10981, considered further in Ch. 13 where the Court noted that Art. 21 'finds specific expression in Article 45 of the [Treaties]' in relation to the free movement of workers. The Court said that since the facts of the case fell within the scope of Art. 45, it was not necessary to rule on the interpretation of Art. 21. See also Case C–348/96 *Calfa* [1999] ECR I–11, para. 30; Case C–392/05 *Alevizos* v. *Ipourgos Ikonomikon* [2007] ECR I–3505, para. 80; Case C–152/05 *Commission* v. *Germany (subsidy for housing)* [2008] ECR I–39, para. 18.

371 Although cf. Case C–274/96 *Bickel and Franz* [1998] ECR I–7637; Case C–135/99 *Elsen* [2000] ECR I–10409. See N. Reich and S. Harbacevica, 'Citizenship and family on trial: A fairly optimistic overview of recent court practice with regard to free movement of persons' (2003) 40 *CMLRev*. 615, 627.

372 See also Case C–345/05 *Commission* v. *Portugal (exemption from capital gains tax*) [2006] ECR I–10633; Case C–104/06 *Commission* v. *Sweden (deferral of capital gains tax*) [2007] ECR I–671.

373 Case C–60/00 [2002] ECR I–6279, paras. 40–1, considered further in Ch. 8; Case C–291/05 *Eind* [2007] ECR I–10719. See, in a similar vein, Case C–117/01 *KB* v. *National Health Service Pensions Agency* [2004] ECR I–541.

374 Case C–109/01 *Akrich* [2003] ECR I–9607, paras. 58–9 (where *Carpenter* was cited).

D. MEMBERSHIP

So far we have concentrated on the first strand of David Held's citizenship matrix, rights (and duties). The rights for migrants are extensive. It is, however, surprising, how little reference is made to duties for those migrants. This suggests a structural imbalance in the EU's notion of citizenship. However, it may be that some elements of the notion of duty can be detected through the third strand of citizenship, participation, particularly in respect of getting involved in the process of holding the administration to account. It is less apparent in respect of the second strand, membership to which we now turn.

As far as membership is concerned, it has a legal and psychological dimension. The formal, legal indicator of membership is nationality. Nationality demarcates the national from the alien; it is the manifestation of citizenship to the outside world and the juridical tie between the individual and the community.[375] Two consequences flow from nationality: the state assumes certain responsibilities for the individual holding its nationality and the individual is subject to the government of that particular state.

Nationality is also the principal indicator of membership for the EU. According to Article 20(1) TFEU, '[e]very person holding the nationality of a Member State shall be a citizen of the Union'. From this it is clear that it is the Member States, and not the EU, which are the gatekeepers to EU citizenship.[376] This was confirmed in *Kaur*,[377] where the Court said 'under international law, it is for each Member State, having due regard to [Union] law, to lay down the conditions for the acquisition and loss of nationality'.[378] Furthermore, the host Member State is not in a position to criticize another Member State's attribution of nationality.[379]

The significance of the additional observation made by the Court in *Kaur* that, when exercising their powers in the sphere of nationality, the Member States must have due regard to EU law, can be seen in *Rottmann*.[380] An Austrian national was accused of serious fraud in Austria. He moved to Germany and applied for naturalisation, without mentioning the proceedings against him in Austria. He was granted German nationality and, as a result, he lost his Austrian nationality under Austrian law. However, when the German authorities learned that he was the subject of judicial investigation in Austria, they sought to withdraw his naturalisation with retroactive effect. This decision risked rendering him stateless, as well as depriving him of his status as a citizen of the Union. The Court ruled:[381]

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

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375 C. Closa, 'Citizenship of the Union and nationality of Member States' (1995) 32 *CMLRev*. 487.

376 This is confirmed by the Declaration on Nationality of a Member State appended to the TEU. In the case of a person with dual nationality, the Court ruled in Case C–369/90 *Micheletti* v. *Delagación del Gobierno en Cantabria* [1992] ECR I–4239, para. 10 that if a person was able to produce one of the documents referred to in Council Dir. 73/148/EEC ([1973] OJ L172/14) (now CRD) to prove they were nationals of one Member State, other Member States were not entitled to dispute that status on the ground that the persons concerned were also nationals of a non-Member State, the nationality of which took precedence under the host state's law.

377 Case C–192/99 *R.* v. *Secretary of State for the Home Department, ex p. Kaur* [2001] ECR I–1237 noted by H. Toner (2002) 39 *CMLRev*. 881.

378 Para. 19. The conditions might include a period of residence, birth, and family ties. See J. Shaw, 'Citizenship and enlargement: The outer limits of EU political citizenship' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009) who describes the difficulties facing the substantial populations of non-nationals in the new EU states following the break-up of former states (the Soviet Union and Yugoslavia) resulting in minorities not holding national citizenship of the host state and thus not benefitting from EU rights. She also points out that in Estonia, Latvia, and Lithuania there are high barriers to becoming a national citizen for a resident non-national, including strict language tests.

379 Case C–200/02 *Chen* [2004] ECR I–9925. See also B. Kunoy, 'A union of national citizens: The origins of the court's lack of *avant-gardisme* in the *Chen* case' (2006) 43 *CMLRev*. 179.

380 Case C–135/08 *Rottmann* v. *Freistaat Bayern* [2010] ECR I–000.

381 Para. 51.

relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.
However, the Court continued that the national court had to ascertain whether the withdrawal decision observed the principle of proportionality in respect of the consequences for Rottmann in the light of EU law. It added that the principle of proportionality might include giving Rottmann a reasonable period of time to try to recover Austrian nationality.[382]

So far we have concentrated on the legal indicators of membership. The psychological dimension of membership is harder to articulate, but at its core lies a sense of belonging and identity. To a certain extent legal links can help foster a sense of 'common identity and shared destiny',[383] particularly in the EU where law has been so central to the integration process.[384] The EU has also been proactive in taking other steps to develop a sense of belonging—the EU flag, EU day (9 May), EU motto (United in diversity), and EU anthem ('Ode to Joy' from Beethoven's Ninth Symphony),[385] the red passport, the pink driving licence, town-twinning, and student mobility programmes (Erasmus/Socrates). Some commentators are dismissive of these top-down attempts to create a true European citizenship, arguing that they cannot overcome the historical legacy of market citizenship, which is essentially premised on self-interest.[386] Others are concerned that the continued emphasis on market citizenship excludes those who do not conform[387] and so, for many, citizenship undermines, rather than creates, a sense of identity at EU level. And for those who do not hold the nationality of one of the Member States exclusion may be total.

A further criticism of the creation of EU citizenship is that it comes at the expense of national or regional identity. The EU is at least aware of these concerns. Article 4(2) TEU requires the Union to respect 'the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government',[388] while Article 167 TFEU (ex Article 151 EC) requires the Union to contribute to the 'flowering of the cultures of the Member States, while respecting their national and regional diversity'.[389] Advocate General Jacobs picked up on the diversity theme in *Garcia Avello*,[390] noting that the intention of Article 21 TFEU was to allow free, and possibly repeated or even continuous, movement within a single 'area of freedom, security and justice' (AFSJ), in which 'both cultural diversity and freedom from discrimination' are ensured. The Court reached similar conclusions in the same case, reasoning that the Belgian practice of refusing to change a child's surname to reflect the Spanish pattern was 'neither necessary nor even appropriate for promoting the integration within Belgium of the nationals of other Member States'.[391]

The AFSJ introduced at Amsterdam, to which Advocate General Jacobs referred, is part of the EU's response to concerns about exclusion, especially of TCNs, and failure to recognise the diversity of states in the EU. According to Article 67(1) TFEU:

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382 Paras. 55–9.
383 Jacobs AG in Case C–92/92 and 326/92 *Phil Collins* [1993] ECR I–5145, para. 11.
384 See M. Cappelletti, M. Seccombe, and J. H. H. Weiler (eds.), *Integration through Law* (Berlin: De Gruyter, 1985).
385 These were listed in Art. I–8 of the Constitutional Treaty under the heading 'The symbols of the Union'. Many thought that the EU had gone too far with these trappings of statehood and the symbols were dropped from the Lisbon Treaty.
386 S. Douglas-Scott, *Constitutional Law of the European Union* (Harlow: Longman, 2002), 492.
387 Everson, above n. 1.
388 See also the Union's approach to subsidiarity as laid down in Art. 5(3) TEU and Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, and Protocol (No. 3) on the role of national parliaments in the European Union. See further Ch.16.
389 See also Art. 3(3) TEU: The Union shall 'respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'. In Case C–288/89 *Stichting Collectieve Antennevoorziening Gouda* v. *Commissariaat voor de Media* [1991] ECR I–4007, para. 13 the Court took the 'social, cultural, religious and philosophical' diversity of the Netherlands into account (see Case Study 11.2). See also Case 379/87 *Groener* v. *Minister for Education* [1989] ECR 3967, considered in Ch. 9.
390 Case C–148/02 *Garcia Avello* [2003] ECR I–11613, para. 72.
391 Para. 43.

The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

The subsequent paragraphs of Article 67 then consider freedom, security and justice in turn. Article 67(2) TFEU concerns freedom. It provides that the Union shall 'ensure the absence of internal border controls for persons and shall frame a common policy[392] on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'.[393] Thus 'freedom' means free movement of EU nationals as well as 'fair' Union-based migration policies for TCNs. These latter policies are considered further in Chapter 14

Article 67(3) TFEU (ex Article 29 EU) concerns security:

The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia,[394] and through measures for coordination and cooperation between police[395] and judicial authorities[396] and other competent authorities,[397] as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

As we shall see in Chapter 14, the Hague Programme 2004–9 has prioritized the security agenda and is used to justify keeping out TCNs who might pose a threat to the security of EU insiders. This exclusionary policy serves to undermine the more integrationist stance envisaged by Article 67(2). Finally, Article 67(4) concerns justice and this is considered below.

The Commission is now attempting to locate the citizen more firmly at the heart of the AFSJ. In its 2009 Communication, *An Area of freedom, security and justice serving the citizen*,[398] it outlines a programme 'building a citizen's Europe' where 'All action taken in future should be centred on the citizen', focusing on four priorities: first, 'promoting citizens rights', emphasizing the role of fundamental rights, especially respect for the 'human person and human dignity, and for the other rights enshrined in the Charter. Data protection is particularly emphasized. Secondly, the Commission talks of a 'Europe of justice'. This is considered below. Thirdly, the priority of 'a Europe that protects' emphasizes the need for a domestic security strategy. The final strand, 'Promoting a more integrated society for the citizen—a Europe of solidarity', largely concerns the position of TCNs and is considered in the next chapter. These different policy strands fed into the adoption by the European Council of the Stockholm programme 2010–14, which is considered in Chapter 14. For present purposes, it is sufficient to note the European Council's continued emphasis on security. It says: 'The challenge will be to ensure respect for fundamental rights and freedoms and integrity while guaranteeing security in Europe.'[399] It continues: 'An internal security strategy should be developed in order to further improve security in the Union and thus protect the lives and safety of European citizens

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392 This language is new but reflects the fact that the Tampere and Hague programmes have already called for this.

393 The reference to the need to be fair to TCNs is also new. The para. continues that 'For the purpose of this Title, stateless persons shall be treated as third-country nationals'.

394 See, e.g., Council Framework Decision 2008/913 ([2008] OJ L328/55) on combating certain forms and expressions of racism and xenophobia by means of criminal law.

395 See, e.g., Council Dec. 2002/630/JHA establishing a framework programme on police and judicial cooperation in criminal matters (AGIS) ([2002] OJ L203/5); Council Dec. 2003/170/JHA on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States ([2003] OJ L67/27); Council Dec. 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime ([2008] OJ L210/1 and Council Dec. 2008/616/JHA implementing Dec. 2008/615/JHA ([2008] OJ L210/12) incorporating the Prüm Treaty into EU legislation, providing indirect access to Member States' databases on fingerprints and DNA information and access to vehicle registration data. See K. Lachmeyer, 'European police cooperation and its limits: From intelligence-led to coercive measures' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009).

396 See eg the Council Framework Dec. 202/584/JHA on the European Arrest Warrant ([2002] OJ L190/20).

397 See, e.g., Council Framework Dec. 2006/960/JHA ([2006] OJ L386/89) on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States.

398 COM(2009) 262.

399 European Presidency Conclusions 11 Dec. 2009, para. 26.

and tackle organized crime, terrorism and other threats.'[400] Thus, membership means for citizens that safety is the real priority.

E. PARTICIPATION

An important way of fostering a sense of belonging comes through participation in the life of the community. This is the third strand in Held's matrix of citizenship. In the Greek city state (polis) all citizens (for which read free men with property) actively participated in the legislative process. This is the fullest, richest, and most active kind of citizenship, underpinned by ideas of equality (at least among those allowed to participate). Viewed in this light, citizenship is a status, different from nationality, which requires active involvement by the citizen in shaping the polity. In the modern state the concept of democracy has evolved from participative democracy in the republican style (with all men participating) to representative democracy (where the people elect their representatives). Now the only active participation expected of citizens is to vote and possibly to stand as a candidate in elections.[401]

1. REPRESENTATIVE DEMOCRACY

1.1 Introduction

One of the distinguishing features of the Constitutional Treaty was its expressed commitment to democracy. This has survived in the Lisbon Treaty. The title on democratic principles begins, in Article 9 TEU, with a statement of commitment to the principle of democratic equality:

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies.

Article 10(3) TEU adds 'Every citizen shall have the right to participate in the democratic life of the Union.' The centrality of representative democracy to the EU is stated in Article 10(1) TEU: 'The functioning of the Union shall be founded on representative democracy.' Article 10(2) TEU then identifies the two routes by which the citizen's voice is heard at EU level: (1) directly, through their MEPs ('Citizens are directly represented at Union level in the European Parliament'); and (2) indirectly via Member State participation ('Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national parliaments,[402] or to their citizens').

Article 10(2) thus emphasizes the multi-faceted nature of representative democracy in the EU: while recognizing that the EU gains some legitimacy through direct elections to the European Parliament, the Article makes express the parallel legitimacy derived from elections to national parliaments which hold government ministers representing Member State interests in the EU to account. This indirect route to legitimacy is important since the turnout in elections to the European Parliament is so low. Article 10(4) TEU is intended to help to address this problem by encouraging the creation of pan-European political parties. It says 'Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.' Furthermore, the extension of the use of the 'ordinary legislative procedure' which gives equal say to the Parliament and Council,[403] including in controversial areas such as most of the AFSJ and the common commercial policy, means that the European Parliament does now really does count.

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[400] Ibid., para. 29.

[401] Although cf. Dec. 2010/37/EC on the European Year of Voluntary Activities promoting Active Citizenship [2010] OJ L17/43.

[402] National parliaments, too, have a greater role, especially in respect of ensuring compliance with the principle of subsidiarity: see Arts. 5(3) and 12 TEU and Protocol (No. 1) on the Role of National Parliaments in the European Union. See further S. Weatherill, 'Competence and legitimacy' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), 30–1.

[403] The procedure is laid down in Art. 294 TFEU. The Council acts by qualified majority vote (QMV) save where Arts. 293–4 TFEU provide otherwise.

1.2 Elections to the European Parliament

The only democratically elected body in the EU is the European Parliament.[404] Article 8 of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage[405] provides that 'the electoral procedure shall be governed in each Member State by its national provisions'. However, neither the EU Treaties nor the 1976 Act defines who is entitled to vote and to stand as a candidate in elections to the European Parliament—questions which go to the core of 'the principles of democracy on which the Union is based'.[406] This was at issue in two important and complementary cases decided on the same day: *Spain* v. *United Kingdom* and *Eman*.[407] *Spain* v. *United Kingdom*, a rare example of an Article 259 TFEU (ex Article 227 EC) action, raised the question whether a Member State (the UK) was entitled to extend the right to vote in elections to the European Parliament to nationals of non-member countries resident in Europe (Gibraltar, a British Crown Colony which does not form part of the UK and to which only parts of Union law apply). The European Court of Human Rights had condemned the UK for failing to hold elections to the European Parliament in Gibraltar contrary to Article 3 of Protocol No. 1 of the Convention.[408] In response, the UK established a new electoral region which combined Gibraltar with an existing region in England (the South West) and created a special electoral register. Spain argued that the extension of the right to vote in elections to the European Parliament to people who were not citizens of the Union breached Union law. The Court disagreed. It said that the definition of those entitled to vote and stand as a candidate in elections to the European Parliament fell within the competence of each Member State and that EU law did not preclude a Member State from granting those rights to individuals who had close links to it, as well as to their own nationals or citizens of the Union resident in their territory.[409]

While *Spain* v. *UK* concerned a state extending the right to vote to non-nationals, *Eman* concerned the opposite situation: a state (the Netherlands) excluding certain categories of its own nationals resident in an overseas territory associated to the Union (OCT),[410] in this case Aruba, from the right to vote and to stand as a candidate in European elections. The Court said that individuals who held the nationality of a Member State and who lived or resided in a territory which was one of the OCTs could rely on the rights conferred on citizens of the Union.[411] However, the Court said that Article 22(2) TFEU on voting rights of *migrants* did not apply to a citizen of the Union residing in an OCT who wished to exercise his right to vote in the Member State of which he was a national.[412] On the other hand, the Court said that the Dutch authorities were nevertheless in breach of the principle of equal treatment because Dutch nationals resident in a non-member state did have the right to vote in European elections but Dutch nationals resident in the Netherlands Antilles or Aruba did not,[413] and that

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404 Art. 223 TFEU (ex Art. 190(4) EC).

405 Annexed to Council Dec. 76/787/ECSC, EEC, Euratom ([1976] OJ L278/1) as amended by Council Dec. 2002/772/EC, Euratom ([2002] OJ L283/1). See also Art. 39(2) of the Charter.

406 Tizzano AG in his Joined Opinion in Cases C–145/04 and C–300/04 *Kingdom of Spain* v. *United Kingdom of Great Britain and Northern Ireland; M.G. Eman and O.B. Sevinger* v. *College van burgemeester en wethouders van Den Haag* [2006] ECR I–7917.

407 Cases C–145/04 *Spain* v. *United Kingdom* [2006] ECR I–7917; C–300/04 *Eman and Sevinger* [2006] ECR I–8055 (noted L. Besselink (2008) 45 *CMLRev.* 787).

408 *Matthews* v. *United Kingdom*, no. 24833/94 [1999] ECHR I–251.

409 Para. 78. See also Case C–535/08 *Pignataro* [2009] ECR I–50*: the provisions on Union citizenship permit a national rule requiring a candidate for election to a regional assembly to reside in that region at the time of nomination.

410 Art. 355 TFEU (ex Art. 299(3) EC).

411 Paras. 27–9.

412 The Court justified this decision by reference to the case law of the European Court of Human Rights which had ruled that the criterion linked to residence was acceptable to determine who were entitled to the right to vote and to stand as a candidate in elections: *Melnychenko* v. *Ukraine*, no. 17707/02 ECHR 2004–X, paras. 56–7.

413 Para. 58.

the Dutch had failed to offer an objective justification for such difference in treatment.[414] For good measure, the Court also suggested that a remedy in damages should be available as a result of the breach of Union law.[415]

So far we have concentrated on the rights of *nationals* to vote and stand as a candidate in elections.[416] Article 22 TFEU permits *migrant* EU citizens to vote and stand as a candidate in elections for local[417] and European elections,[418] subject to 'derogations where warranted by problems specific to a Member State'. Two directives have been adopted to implement these rights which provide for equal treatment: migrant EU citizens have the right to vote and stand as a candidate in municipal or European elections provided they satisfy the same conditions as the host state imposes on its own nationals.[419] The flip side of the coin is that migrant citizens cannot participate in the most important elections—those for the national parliaments. This is a further example of the partial nature of EU citizenship.

1.3 Deliberative or Participatory Democracy

Many argue that, with turnout for European Parliament elections being so low, the EU still suffers from a serious democratic deficit. As part of its response, the Commission[420] issued a White Paper on Governance identifying five principles underpinning good governance: openness, participation, accountability, effectiveness, and coherence.[421] The White Paper also placed much emphasis on citizen participation as a way of supplementing representative democracy.[422] In the absence of an identifiable public space and a common language the chances of this happening are slim. More realistic is the possibility of citizen participation through alternative intermediaries, primarily 'civil society'.[423]

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414 Para. 60.

415 Para. 70.

416 Cases C–145/04 *Kingdom of Spain* v. *United Kingdom of Great Britain and Northern Ireland* [2006] ECR I–7917, para. 76.

417 See also Art. 40 of the Charter; Dir. 94/80/EC ([1994] OJ L368/38), as amended by Dir. 96/30/EC ([1996] OJ L122/14), laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals. See further J. Shaw, *The Transformation of Citizenship in the European Union: Electoral rights and the restructuring of political space* (Cambridge: CUP, 2007).

418 See also Art. 40 of the Charter; Dir. 93/109/EC ([1993] OJ L329/34) on the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals. This directive provides that entitlement to vote and to stand as a candidate in the Member State of residence is conferred on people, who are citizens of the Union but who are not nationals of the Member State where they reside and who satisfy the conditions applicable to nationals of that state in respect of the right to vote and to stand as a candidate, and are not deprived of those rights in their home Member State. See P. Oliver, 'Electoral rights under Article 8b of the Treaty of Rome' (1996) 33 *CMLRev*. 473 and H. Lardy, 'The political rights of Union citizenship' (1996) 2 *EPL* 611.

419 In practice, few take advantage of this possibility: only 11.9% of EU citizens resident in another Member State voted in the 2004 elections to the European Parliament: MEMO/06/484, Brussels, 13 Dec. 2006.

420 Partly to lay to rest its own ghosts: see, e.g., Committee of Independent Experts, *First Report on Allegations Regarding Fraud, Mismanagement and Nepotism in the EC*, presented to the EP, 15 Mar. 1999. See also A. Tomkins, 'Responsibility and resignation in the European Commission' (1999) 62 *MLR* 744 and V. Mehde, 'Responsibility and accountability in the European Commission' (2003) 40 *CMLRev*. 423. See also Commission Communication, 'On a comprehensive EU policy against corruption' (COM(2003) 317).

421 COM(2001) 428. For a detailed discussion of this document, see C. Joerges, Y. Mény, and J. H. H. Weiler (eds.), *Mountain or Molehill? A critical appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper No. 6/01 and the special edition of the *European Law Journal* (2002) vol. 8(1).

422 Commission Discussion Paper, 'Commission and non-governmental organisations: Building a stronger partnership', COM(2000) 11: 'The decision-making process in the EU is first and foremost legitimized by the elected representatives of the European people. However, NGOs can make a contribution in fostering a more participatory democracy both within the European Union and beyond.'

423 According to the Governance White Paper COM(2001) 428, 14, civil society includes the following: trade unions and employers' organizations ('social partners'); non-governmental organizations; professional associations; charities; grass-roots organizations; organizations that involve citizens in local and municipal life with a particular contribution from churches and religious communities. See K. Armstrong, 'Rediscovering civil society: The European Union and the White Paper on Governance' (2002) 8 *ELJ* 102.

According to the White Paper, it is civil society that 'plays an important role in giving voice to the concerns of citizens' and delivers 'services that meet people's needs'.[424] The value of the involvement of civil society is now acknowledged by Article 11 TEU (originally entitled 'The principle of participatory democracy' in Article I–47 of the Constitutional Treaty). Article 11(1) TEU provides that 'The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.' Article 11(2) TEU adds that the institutions must maintain an 'open, transparent, and regular dialogue with representative associations and civil society'.[425]

The Commission is now keen to formalize links with other bodies and, as part of this process, it has issued a Communication on minimum standards for consultation of interested parties by the Commission.[426] This is reinforced by Article 11(3) TEU which requires the Commission to carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.[427] In some sectors, dialogue with representative associations has already been formalized. For example, the Sixth Environment Action programme (2002–12) expressly recognized the need to empower citizens, and the measures proposed included extensive and wide-ranging dialogue with stakeholders in environmental policymaking.[428] This led to specific Union action programmes promoting non-governmental organizations active in the field of environmental policy.[429]

In the field of employment law and labour market regulation, the social partners (management and labour) are the interlocutors.[430] Their involvement was constitutionalized by Articles 154–5 TFEU[431] (ex Articles 138–9 EC) requiring the Commission to consult management and labour about whether there should be any legislation in the field and, if so, its content. Social partners can also negotiate collective agreements which can be given legislative effect by a Council 'decision'.[432] The European Parliament has no formal role in this process except the right to be 'informed'.[433] A number of directives have been adopted using this 'collective' route to legislation, including directives on parental leave, part-time work and fixed-term work.[434] When the validity of the Parental Leave Directive 96/34 was challenged in *UEAPME*[435] by an organization representing small and medium-

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[424] COM(2001) 428, 14.

[425] The Church and non-confessional organizations are singled out in Art. 17(3) TEU.

[426] Commission Communication, 'Towards a reinforced culture of consultation and dialogue: General principles and minimum standards for consultation of interested parties by the Commission' COM(2002) 704 upon which it had previously consulted (COM(2002) 277). See D. Obradovic and Alonso Vizcaino, 'Good governance requirements concerning the participation of interest groups in EU consultations' (2006) 43 *CMLRev*. 1049.

[427] See also Art. 15 TFEU: 'In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.'

[428] EP and Council Dec. 1600/2002 ([2002] OJ L242/1).

[429] See, e.g., EP and Council Dec. No. 466/2002/EC ([2002] OJ L75/1). See also Dir. 2003/35 ([2003] OJ L156/17), amending Dir. 85/337 ([1985] OJ L216/40) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and improving public participation and for provisions on access to justice contributing to the obligations arising under the Århus Convention considered in, e.g., Case C–427/07 *Commission* v. *Ireland* [2009] ECR I–000 and Case C–263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v.Stockholms kommun genom dess marknämnd* [2009] ECR I–000.

[430] C. Barnard, 'Governance and the social partners' (2002) 8 *ELJ* 80.

[431] See also Art. 152 TFEU: 'The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of the national systems. It shall facilitate dialogue between the social partners respecting their autonomy.'

[432] Art. 155(2) (ex Art. 139(2)). The term 'decision' is used in Art. 155(2) but has been interpreted to mean any legally binding act, in particular, directives.

[433] Art. 155(2) TFEU.

[434] Council Dir. 96/34/EC on Parental Leave ([1996] OJ L145/4) repealed and replaced by Council Dir. 2010/18/EU ([2010] OJ L68/13); Council Dir. 97/81/EC on Part-time Work ([1998] OJ L14/9); and Council Dir. 99/70/EC on Fixed-Term Work ([1999] OJ L175/43). See further C. Barnard, *EC Employment Law* (Oxford: OUP, 2006), Ch. 2.

[435] Case T–135/96 *Union Européenne de l'artisanat et des petites et moyennes entreprises* (*UEAPME*) v. *Council* [1998] ECR II–2335.

sized enterprises which had been excluded from the negotiation process, the General Court (formerly the Court of First Instance) endorsed this alternative 'collective' approach to lawmaking. It said that, in respect of measures adopted by the Council under the traditional legislative route, the democratic legitimacy was derived from the European Parliament's participation.[436] However, in respect of measures adopted under the collective route where the European Parliament had no role, the 'principle of democracy on which the Union is founded requires . . . that the participation of the people be otherwise ensured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council . . . with a legislative foundation at [Union] level'.[437]

But this broadening of the consultation and legislative process raises further problems of representativity (and accountability) of the interlocutors. To what extent do they really represent the views of their members and to what extent are these views more generally representative? This issue lay at the heart of UEAPME's challenge to the Parental Leave Directive.[438] The agreement on parental leave had been negotiated by the intersectoral social partners—UNICE (the European employers' association, now called BUSINESSEUROPE), CEEP (the public sector employers' association), and ETUC (the European trades union confederation). UEAPME argued that since the interests of small and medium-sized undertakings differed from those represented by UNICE, UEAPME should also have been at the negotiating table.

The General Court disagreed. It said that it was for the Commission to examine the representativity of the signatories to collective agreements and the Council had to verify whether the Commission had fulfilled this task. Where the degree of representativity was lacking the Commission and Council had to refuse to implement the agreement at Union level.[439] On the facts, the General Court found that the Commission and Council had fulfilled their task. Since the signatories were *general* cross-industry organizations with a general mandate, as distinct from cross-industry organizations representing *certain* categories of workers and undertakings with a specific mandate (the subgroup in which UEAPME was placed), they were sufficiently representative.[440] However, in the light of the problems in *UEAPME* the Commission said in its Governance White Paper that, in return for developing more extensive partnership arrangements, civil society organizations had to 'tighten up their internal structures, furnish guarantees of openness and representativity, and prove their capacity to relay information or lead debates in the Member States'.[441]

Broadening the range of actors involved in the legislative process has also been reflected in the debates leading to the two key constitutional developments in recent years, the Charter of Fundamental Rights and the Constitutional Treaty. For example, membership of the Convention, the body responsible for drafting the Charter was relatively broad, comprising representatives of the Member State governments (15), the Commission (1), the European Parliament (16), and national Parliaments (30), with observer status for representatives of the Council of Europe and the Court of Justice. Documents related to the process were available on the web, submissions were taken from NGOs, and the methods of working were more deliberative[442] (rather than secretive and intergovernmental which

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436 Para. 88.

437 Para. 89. See N. Bernard, 'Legitimising EU law: Is the social dialogue the way forward? Some reflections around the *UEAPME* case' in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Oxford: Hart Publishing, 2000).

438 See G. Britz and M. Schmidt, 'The institutionalised participation of management and labour in the legislative activities of the European Community: A challenge to the principle of democracy under Community law' (2000) 6 *ELJ* 45, esp. 66–7 and A. Adinolfi, 'Admissibility of action for annulment by social partners and "sufficient representativity" of European agreements' (2000) 25 *ELRev*. 165.

439 Para. 90.

440 Paras. 95–6.

441 COM(2001) 428, 17.

442 For an overview of the historical development of 'deliberative democracy' see 'Introduction' in J. Bohman and W. Rehg (eds.), *Deliberative Democracy: Essays on reason and politics* (Cambridge, Mass.:, MIT Press, 1997) and J. Elster, 'Introduction' in J. Elster (ed.), *Deliberative Democracy* (Cambridge: CUP, 1998).

has been characteristic of intergovernmental conferences (IGCs)).[443] However, as De Búrca notes, while the process may have been 'aimed at' the citizen, and a virtue made of the openness and novel nature of the process, this was not to be a genuinely participative process but one which, albeit deliberative in nature, was to be composed only of institutional representatives from the national and European level.[444] By contrast, the conclusion of the Lisbon Treaty bore all the hallmarks of a return to intergovernmentalism.

1.4 Direct Participation

Perhaps the most striking example of direct citizen participation is the introduction by the Lisbon Treaty of Article 11(4) TEU which provides that:

Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.[445]

Inserted as a last-minute addition to the text, this 'Citizens initiative' envisages active and direct participation of EU citizens in a way never before experienced in the EU. However, this provision itself poses a challenge to representative democracy. What if those million, a miniscule percentage of the EU's total population,[446] make a proposal (e.g., the expulsion of all black immigrants) wholly unacceptable to the liberal values on which the EU is based? Will this provision in fact expose the legislative system to unnecessary and undesirable influence?[447]

1.5 Conclusions

Despite the various attempts to make the EU more explicitly democratic many EU citizens were not convinced. The rejection of the Constitutional Treaty by the voters of France and the Netherlands in 2005 caused profound shock waves to reverberate across the EU. The voters of these two countries—founding members of the European project—sent out a strong message of their discontent. It is difficult to say for sure why the voters turned against a text whose aims were, according to the Laeken declaration,[448] to respond to citizens' calls for a 'clear, open, effective, democratically controlled [Union] approach' and to bring citizens closer to the 'European design'. Nevertheless, surveys have indicated that for those voting on the European issues (as opposed to those giving a bloody nose to the incumbent national government), their concerns ranged from specific fears generated by reading the text, in particular its perceived excessive market liberalism (i.e., it was 'too British'[449]), to more general concerns about the EU's expansion, both geographically and in terms of competence. Following a

[443] Similarly, the Convention on the Future of Europe involved in drafting the Constitutional Treaty was comprised of a president and two vice presidents, representatives of the Member States (15), the European Parliament (16), national Parliaments (30), the Commission (2), the accession countries (13) and from their Parliaments (26) and observers from the Committee of the Regions, the European ombudsman, and the social partners (13).

[444] G. de Búrca, 'The drafting of the European Union Charter of Fundamental Rights' (2001) 26 *ELRev*. 126, 131. See also A. Arnull, 'The future of the convention method' (2003) 28 *ELRev*. 573.

[445] The operational detail of this Article, including the minimum number of Member States involved, is to be fleshed out in accordance with the first para. of Art. 24 TFEU.

[446] See D. Chalmers, Editorial, 'Constitutional treaties and human dignity' (2003) 28 *ELRev*. 147 and Editorial Comments, 'Direct democracy and the European Union . . . is that a threat or a promise' (2008) 45 *CMLRev*. 929.

[447] The Commission seeks views on some of these thorny questions in its Green Paper on a European Citizens' Initiative: COM(2009) 622.

[448] <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf>.

[449] T. Garton-Ash, 'What is to be done: Blairism is the answer to Europe's ills but we need someone else to deliver it', *The Guardian*, 2 Jun. 2005, describing the French perception of the Constitutional Treaty as 'too much enlarged to include new countries, too Anglophone, and too enamoured of liberal-free market economics'.

period of reflection,[450] the states decided to repackage the Constitutional Treaty, stripping it of its most overt 'constitutional' garb, and readopt largely the same content as the Lisbon Treaty in 2007. This did not satisfy the Irish who rejected the revised Treaty in 2008. Following the second—and now positive—vote in Ireland in September 2009 and after prevarication in the Czech Republic, the Lisbon Treaty came into force in December 2009.

The whole saga does not reflect well on the Union's own democratic structures, despite various attempts by the Commission to engage with EU citizens, in particular through its 'Plan D for democracy dialogue and debate',[451] dovetailing with its 'Action plan to improve communicating Europe'.[452] This focuses on stimulating wider public debate and promoting citizens' participation in the democratic process. A decision has been adopted, now entitled 'Europe for citizens'[453] (replacing the original title 'Citizens for Europe',[454] a shift deemed psychologically significant in the light of the ratification crisis), establishing a programme promoting active European citizenship. This has been backed up by 'A citizens' agenda: Delivering results for Europe' [455] and attempts to engage the citizen in respect of social policy through the Commission's *Renewed Social Agenda: Opportunities, access and solidarity*.[456] However, many citizens remain to be convinced, a problem exacerbated by the deep financial crisis many states now find themselves in and a perception that the EU's response is not helping.

2. ACCESS TO JUSTICE

2.1 Access to Information

(a) Regulation 1049/2001

There is a further dimension to the right to participate: the need for citizens to have access to courts and other bodies to challenge decisions taken by the lawmakers.[457] First, however, they need to know what is going on. The right for citizens to gain access to information was given a Treaty basis at Amsterdam.[458] Article 15 TFEU (ex Article 255 EC) provides that any citizen of the Union *and* any natural or legal person residing or having a registered office in a Member State has a right of access to the documents of the Union institutions, bodies, offices, and agencies, whatever their medium,[459] subject to the principles laid down in Regulation 1049/2001[460] which are supplemented by rules of procedure for each institution.[461]

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[450] Declaration by the Heads of State or Government of the Member States of the European Union on the ratification of the Treaty establishing a Constitution for Europe, European Council, 16 and 17 Jun. 2005.

[451] COM(2005) 494.

[452] SEC(2005) 985.

[453] COM(2006) 542; EP and Council Dec. 1904/2006 establishing for the period 2007 to 2013 the programme 'Europe for Citizens' to promote active European citizenship ([2006] OJ L378/32), as amended.

[454] COM(2005) 116.

[455] COM(2006) 211.

[456] COM(2008) 412. See C. Barnard, 'Solidarity and the Commission's "renewed social agenda" ' in M. Ross and Y. Borgmann-Prebil (ed.), *Promoting Solidarity in the European Union* (Oxford: OUP, 2010).

[457] For the importance of this dimension, see A. Wiener and V. della Sala, 'Constitution-making and citizenship practice: Bridging the democracy gap in the EU?' (1997) 35 *JCMS* 595, 602–3.

[458] See also the Final Act of the Treaty on European Union signed at Maastricht on 7 Feb. 1992 where the Member States incorporated Decl. 17 on the right of access to information: 'The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration.' In Case C–58/94 *Netherlands* v. *Council* [1996] ECR I–2169, para. 35 the Court noted that Decl. 17 links the public's right of access to documents to the 'democratic nature of the institutions'.

[459] See also Art. 1(1) TEU; Art. 42 of the Charter of Fundamental Rights. This issue is considered further in D. Curtin, 'Citizens' fundamental right of access to EU information: An evolving digital *passepartout*' (2000) 37 *CMLRev*. 7.

[460] [2001] OJ L145/43. The regulation concerns access to *documents*, not to information more generally: Case T-264/04 *WWF European Policy Programme* v. *Council* [2007] ECR II–911, para. 76. A proposal for a revised measure can be found at COM(2008) 229. See M. de Leeuw, 'The regulation on public access to European Parliament, Council and Commission

In *Svenska Journalistförbundet*[462] the Court said that the objective of (the predecessor to) Regulation 1049/2001 was to give effect to the 'principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration'.[463] This point was emphasized in *Sweden v Council*[464] concerning the refusal by the Council to give access to an opinion of its legal service on a proposal for a directive laying down minimum standards for the reception of applicants for asylum. The General Court upheld the Council's decision; the Court of Justice set aside the General Court's judgment. In so doing, it noted the need for the Council to balance the particular interest to be protected by non-disclosure of the document against the public interest in the document being made accessible in the light of the advantages stemming 'from increased openness, in that this enables citizens to participate more closely in the decision-making process'[465] and confers 'greater legitimacy on the institutions in the eyes of European citizens'.[466] It said those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation 1049/2001, according to which wider access must be granted to documents in precisely such cases. It continued:

Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.

However, a problem may arise where the information requested relates specifically to an individual. Regulation 45/2001[467] protects individuals with regard to the processing of personal data by the Union institutions and bodies. The interaction between this regulation and Regulation 1049/2001 was considered in *Bavarian Lager*.[468] Due to exclusive purchasing contracts binding a large number of operators of pubs in the UK requiring them to obtain supplies of beer from certain breweries, Bavarian Lager was not able to sell its product and complained to the Commission. A meeting was held with British officials, who agreed to amend their rules, but the Commission refused to allow Bavarian Lager to attend. Under Regulation 1049/2001 the Commission disclosed the minutes of the meeting to Bavarian Lager but blanked out the names of five people who had attended that meeting, arguing that Bavarian Lager had not established either an express and legitimate purpose or any need for such disclosure, as was required by the Regulation on the protection of personal data, and therefore, the exception concerning the protection of private life, laid down by the regulation on public access to documents, applied. However, the General Court annulled the Commission's decision and said that while the list of participants named in the minutes contained personal data, since the people who

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documents in the European Union' (2003) 28 *ELRev*. 324. For the Commission's own perspective, see its Green Paper, 'Public access to documents held by institutions of the European Community: A review' (COM(2007) 185).

[461] In addition, the EU has given effect to the Århus Convention to Union Institutions and Bodies (Reg. (EC) No. 1367/2006 (OJ [2006] L264/13)), which guarantees the public the right of access to environmental information held by the Union institutions and bodies. These must also make environmental information available to the public in easily accessible electronic databases.

[462] Case T–174/95 *Svenska Journalistförbundet* v. *Council of the European Union* [1998] ECR II–2289.

[463] Para. 66. The europa website (<http://www.europa.eu.int/>) provides free access to information about the EU and its policies; <http://www.eur-lex.europa.eu/en/index.htm> provides free access to all legislation, consultation documents, and the judgments of the Court of Justice.

[464] Joined Cases C–39/05 and C–52/05 *Sweden v Council* [2008] ECR I–4723.

[465] Para. 45.

[466] Para. 59. See also Case C–64/05 P *Sweden* v. *Commission* [2007] ECR I–11389, para. 54. For a more sceptical perspective, see D. Curtin, 'Through the looking glass: The myths of transparency in the European Union', *Durham European Law Institute Lecture* 2004.

[467] OJ [2001] L8/1. See also Art. 16 TFEU (ex Art. 286 EC).

[468] Case T–194/04 *The Bavarian Lager Co. Ltd v Commission of the European Communities* [2007] ECR II–4523. Currently on appeal (Case C–28/08P).

participated at that meeting did so as representatives of their organizations and not in a private capacity, the protection of privacy or integrity of the persons concerned was not compromised.[469]

(b) The principle of good administration

Article 9 TEU says that citizens shall 'receive equal attention from its institution, bodies, offices and agencies'. Article 10(3) TEU adds that decision-making process needs to be based on the principles of transparency and subsidiarity. This is operationalised in Article 15(2) TFEU which says that 'The European Parliament shall meet in public, as shall the Council when it is discussing and adopting a legislative proposal.'[470] The Council has put this into practice by amending its rules of procedure.[471]

Article 41 of the Charter of Fundamental Rights, entitled 'Right to good administration',[472] is more explicit. Article 41(1) contains the general principle that 'Every person [not just an EU citizen] has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.' Article 41(2) spells out more precisely what the right includes:

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

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

• the obligation of the administration to give reasons for its decisions.

When things go wrong, Article 41(3) provides that every person has the right to have the Union make good any damage caused by the institutions or servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

2.2 Non-judicial Avenues

In practice, there are few cases where the Court has, in fact, been prepared to award compensation. This makes the non-judicial routes more important. EU citizens—together with natural or legal persons residing or having their registered office in a Member State—have the right under Article 24 TFEU (ex Article 21 EC) both to petition the European Parliament in accordance with Article 227 TFEU (ex Article 194 EC)[473] and to apply to the ombudsman in accordance with Article 228 TFEU (ex Article 195 EC).[474] They can write in any one of the Union languages and receive a reply in that language.[475] As with a complaint based on good administration under Article 41 of the Charter, a petition to the European Parliament is confined to matters affecting the complainant directly. There is no such limitation in respect of applications to the European ombudsman (nor in respect of access to information) which allows public-spirited citizens to raise matters of more general concern via this route. This range of rights and remedies is available in respect of breaches committed by *Union* institutions. The Treaty appears to offer no specific protection to citizens when faced with maladministration by *national* authorities exercising Union law powers.

2.3 Judicial Avenues

In respect of the courts, the EU envisages access at two levels: at European level to enable citizens to challenge decisions of the Union institutions and at domestic level to challenge decisions of the

[469] Paras. 125–6.

[470] See also Art. 16(8) TEU: 'The Council shall meet in public when it deliberates and votes on a draft legislative act'. By implication, the same transparency does not apply to non-legislative acts.

[471] For discussion on the merits of the change, see M. de Leeuw, 'Openness in the legislative process in the European Union' (2007) 32 *ELRev.* 295.

[472] See also Joined Cases C–154/4 and C–155/04 *R* v. *Secretary of State for Health, ex p. Alliance* [2005] ECR I–8419, para. 82.

[473] See also Art. 44 of the Charter. The Charter applies to residents as well as citizens.

[474] See also Art. 43 of the Charter. See generally K. Heede, 'Enhancing the accountability of Community institutions and bodies: The role of the European Ombudsman' (1997) 3 *EPL* 587.

[475] Art. 24(4) TFEU. See also Art. 41(4) of the Charter.

national authorities which interfere with Union law rights or to challenge the decisions of the EU institutions indirectly. In respect of remedies against national authorities, the Court has been active in guaranteeing Union rights, by developing the principles of direct effect and supremacy of Union law,[476] and the principles of effective judicial protection.[477] These proceedings complement the power to bring Article 258 TFEU (ex Article 226 EC) enforcement proceedings initiated by the Commission but often as a result of complaints by individuals about (in)action by Member States.[478] The Commission has made the complaints process more user-friendly.[479] However, the Court of Justice has been far more reticent about ensuring such full access to the Court by citizens when seeking to challenge the acts of the Union institutions directly. In its now (in)famous line of cases on *locus standi* for non-privileged applicants under Article 263 TFEU (ex Article 230 EC), the Court has ensured that only in the most exceptional circumstances will an individual be granted standing.[480] Interest groups, acting as intermediaries, have fared little better.[481] While the Court has emphasized that proceedings can be started in the national court and then a preliminary reference sought under Article 267 TFEU (ex Article 234 EC), as Advocate General Jacobs explained in *UPA*,[482] in certain circumstances this possibility is not available, leaving individuals without a remedy. While the amendments introduced by the Treaty of Lisbon to Article 263(4) have relieved the situation somewhat, in particular by allowing natural or legal persons to challenge 'regulatory acts' without having to show 'individual concern', the key phrase 'regulatory acts' remains undefined. The Lisbon Treaty has, however, re-emphasized the role of the Member States to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[483] It therefore looks like Article 267 TFEU (ex Article 234 EC) references from the national court will remain the main route for natural and legal persons to challenge legislative acts.

The AFSJ deals with a third dimension to the question of justice: access to justice in cross-border disputes. Article 67(4) TFEU says: 'The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters.'[484]

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[476] Case 26/62 *NV Algemene Transport en Expeditie Onderneming Van Gend en Loos* v. *Nederlands Administratie de Belastingen* [1963] ECR 1; Case 6/64 *Costa* v. *ENEL* [1964] ECR 585. See also Decl. 17 concerning primacy added by the Lisbon Treaty.

[477] See, e.g., Joined Cases C–6/90 and C–9/90 *Francovich and Bonifaci* v. *Italy* [1991] ECR I–5357, Case 222/84 *Johnston* v. *RUC* [1986] ECR 1651; Joined Cases C–46 and 48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I–1029; Case C–432/05 *Unibet* v. *Justitiekanslern* [2007] ECR I–2271.

[478] See, e.g., Commission's 5th Report on Citizenship: COM(2008) 85, 9 where the Commission also emphasizes the value of the SOLVIT mechanism. SOLVIT helps EU citizens and businesses find fast and pragmatic solutions to problems arising from the incorrect application of EU law by national administrations, within a deadline of ten weeks. SOLVIT's case flow has increased from 12 to 70 new cases per month. The average resolution rate is around 80%.

[479] A notice containing a standard form for complaints to be submitted to the Commission ([1999] OJ C119/5) and a consolidated version of the internal procedural rules applicable to its relations with the complainant in the context of the infringement proceedings (COM(2002) 141) have been published by the Commission.

[480] Case C–50/00P *UPA* v. *Council* [2002] ECR I–6677. Cf. the strong Opinion of Jacobs AG to the contrary and the decision of the General Court in Case T–177/01 *Jégo Quéré & Cie SA* v. *Commission* [2002] ECR I–2365. For a general discussion see A. Albors-Llorens, 'The standing of private parties to challenge Community measures: Has the European Court missed the boat?' (2003) 62 *CLJ* 72.

[481] Case C–312/95P *Stichting Greenpeace Council (Greenpeace International)* v. *Commission* [1998] ECR I–1651.

[482] Case C–50/00P *UPA* v. *Council* [2002] ECR I–6677. See also Case C–131/03P *R.J. Reynolds Tobacco Holdings Inc.* v. *Commission* [2006] ECR I–7795, paras. 81–2.

[483] Art. 19(1), 2nd para TEU.

[484] This reflected Art. 61(c) EC but is expressed in wider terms to reflect current practice. Legislation has already been adopted under this provision. See, e.g., Council Reg. 743/2002 establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters ([2002] OJ L115/1) (the UK and Ireland gave notice of their wish to participate in the adoption of the regulation; Denmark is not taking part); Council Dir. 2002/8/EC ([2003] OJ L26/41) on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. The UK and Ireland gave notice of their wish to participate in the adoption of the directive; Denmark is not taking part.

This policy strand now goes by the name of 'a Europe of justice'. In its AFSJ Communication,[485] the Commission says that priority must be given to mechanisms that facilitate people's access to the courts so that they can enforce their rights, especially their contractual rights, throughout the Union.[486]

F. CONCLUSIONS

As Preuß put it, Union citizenship began as a terminological pooling of the few rights which the individual enjoyed in other Member States. It neither generated an inner bond between the Union and the individual nor did it presuppose such an inner connection as a precondition for acquiring it.[487] The recent developments, both legislative and judicial, suggest that the time may have come to reconsider this initial assessment. While it cannot be said that these developments have generated a 'European citizenry' which could 'pave the way for the transition to a European Federal State', they have certainly enriched the status of citizenship, by creating some bonds between individuals and the Union different from (but not stronger than) those which exist between individuals and their own Member States.[488] European citizenship does now allow individuals a multiplicity of associative relations based on manifold economic, social, cultural, scholarly, and even political activities, irrespective of the traditional territorial boundaries of the European nation states, without binding individuals to a particular nationality.[489]

The principle of solidarity has been particularly influential in that regard and here we can see a process of boot-strapping taking place—citizenship (imposed from above) is used to justify taking limited steps in the name of solidarity and solidarity is being used from the bottom up to foster a growing sense of citizenship. However, the Court has shown some awareness of the sensitivities of the issue, in particular concerns about 'benefit tourism'.[490] As a result, it has allowed Member States to insist on a demonstrable link with the host state's territory before an individual becomes entitled to benefits, whether it is through a period of residence as in *Bidar*, or a genuine link with the employment market of the host state as in *D'Hoop*. If it were otherwise then any enforced equality would have the potential to generate such hostility and anti-migrant feeling among host state nationals that, far from fostering a sense of Union citizenship, it could do the reverse. There is a risk that this is already happening in the field of higher education.[491]

There are increasing signs of this alienation from the EU which citizens have expressed in various referenda, in particular the French and Danish votes on the Maastricht Treaty, the initial Irish 'no' to the Nice Treaty, the French and Dutch 'no' votes to the Constitutional Treaty, and the initial Irish 'no' to the Lisbon Treaty. Weiler puts this point succinctly: 'as the [Union] has grown in size, in scope, in reach and despite a high rhetoric including the very creation of "European citizenship" there has been a distinct disempowerment of the individual European citizen, the specific gravity of whom continues to decline as the Union grows'.[492] Is there a way forward? Weiler advocates that EU citizenship should be understood as a supranational construct grounded in belonging simultaneously to

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485 COM(2009) 262, 2.

486 See, e.g., Reg. (EC) No. 861/2007 establishing a European Small Claims Procedure ([2007] OJ L199/1); Reg. 1896/2006 creating a European order for payment procedure ([2006] OJ L399/1); Reg (EC) No. 593/2008 ([2008] OJ L177/6) on the law applicable to contractual obligations (Rome I); Reg (EC) No. 1393/2007 ([2007] OJ L324/79) on the service in the Member States of judicial and extrajudicial documents; Dir. 2008/52/EC ([2008] OJ L136/3) on certain aspects of mediation in civil and commercial maters.

487 U. Preuß, 'Problems of a concept of European citizenship' (1995) 1 *ELJ* 267.

488 Ibid., 268.

489 Ibid.

490 That is 'moving to a Member State with a more congenial social security environment': Case C–456/02 *Trojani* [2004] ECR I–7573, Geelhoed AG's Opinion, para. 13 (and see para. 18). See also his Opinion in *Bidar* in para. 66.

491 C. Barnard, 'EU citizenship and the principle of solidarity' in Dougan and Spaventa (eds.), *Social Welfare and EU Law* (Oxford: Hart Publishing , 2005). See also C. Newdick, 'Citizenship, free movement and health care: Cementing individual rights by corroding social solidarity' (2006) 43 *CMLRev.* 1645.

492 J. H. H. Weiler, 'The European Union belongs to its citizens: Three immodest proposals' (1997) 22 *ELRev*. 150.

two different *demoi* based on different subjective factors of identification.[493] At one and the same time, he argues, individuals can, say, be British nationals, based on a strong sense of cultural identification and belonging, and also European citizens, based on, first, an acceptance of the legitimacy and authority of decisions made by fellow European citizens (underpinned by the 'social contract' of the common Treaties) and, secondly, shared values which transcend ethno-national diversity. These shared values include a commitment to principles of solidarity expressed through the welfare state, the European social model,[494] and human rights as embodied in the ECHR and now the Charter. Yet his suggestions have themselves been criticized for being too assimilationist, excluding those who do not share these values.[495]

Others have argued that the EU should aim at decoupling the concepts of state, nation, national identity, and nationality in favour of a form of post-national membership radically different from a (nation) statist concept of citizenship.[496] Underpinning this idea is active participation, as well as the more traditional passive conferral of rights, and it is here that the EU is engaged in some of its most elaborate citizenship-building. The advantage of such an understanding of citizenship is that nationality becomes increasingly unimportant. In this interpretation of citizenship there should be a place for legally resident TCNs. The legal position of TCNs is the subject of Chapter 14. Before that, in Chapter 13, we shall consider the limits to the rights of free movement which, as we shall see, have been significantly influenced by the case law on citizenship.

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493 J. H. H. Weiler, 'To be a European citizen—Eros and civilization' (1997) 4 *JEPP* 495.

494 The Nice European Council offered a definition of the European social model (Annex I, para. 11): 'The European Social Model, characterised in particular by systems that offer a high level of social protection, by the importance of the social dialogue and by services of general interest covering activities vital for social cohesion, is today based . . . on a common core of values.' These values are outlined in para. 11, 'solidarity and justice as enshrined in the Charter of Fundamental Rights' and para. 23, 'Social cohesion, the rejection of any form of exclusion or discrimination and gender equality'.

495 N. Barber, 'Citizenship, nationalism and the European Union' (2002) 27 *ELRev*. 241.

496 Shaw, above n. 5, 47.

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Catherine Barnard
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CHAPTER 14: THIRD-COUNTRY NATIONALS AND THE EU

A. INTRODUCTION

According to Article 3 TEU, the Union shall 'offer its citizens an area of freedom, security, and justice without internal frontiers, in which free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.[497] Thus, in an area of freedom, security and justice (AFSJ) citizens have the right to move freely; but they also have a right to security. This is achieved principally at the external borders of the EU where there is greater emphasis on keeping out 'undesirable' third-country nationals (TCNs)[498] and managing the immigration that is permitted. The relationship between EU law and national law is complex. It used to be said that while *Union* law gives EU citizens the right to move freely, *national* immigration law determines the conditions under which TCNs can enter a Member State (either directly from the third country or from another Member State), have access to the labour market, be joined by their families, and become naturalized. However, as we shall see, increasingly EU law is occupying the traditional domain of national law, albeit subject to complicated derogations for certain Member States.

Yet, there remain key differences between Union citizens and TCNs: unlike EU citizens, TCNs generally do not enjoy free movement between Member States (secondary movement), subject to some notable exceptions (students, researchers and in future blue-card holders), and this causes fragmentation in the single market. Furthermore, for EU citizens the state's ability to exclude or expel is interpreted restrictively; for TCNs the relationship between the individual and the state is reversed. Because TCNs do not, as a rule, have a right of admission or protection from expulsion as a matter of EU law, the rights of the state to ensure security take precedence over the rights of the individual.[499]

Migration, particularly of TCNs, is also a highly emotive, politically sensitive subject.[500] Mass migration is both a threat and an opportunity. It is an opportunity because TCNs can bring much-needed skills and youth to reinvigorate an ageing population. It is a threat because an influx of the 'other' poses a significant challenge economically (to jobs for nationals and to the welfare state), culturally (different religions, different values), and socially (how to integrate the TCNs into existing communities). More recently, any discussion about migration is inevitably overlaid by concerns about security, especially in the wake of the terrorist attacks of 9/11 and the London and Madrid bombings,[501] together with more general concern about organized crime. Depending on the economic and security

[497] For detailed discussion, see, e.g., N. Walker, 'In search of the area of freedom, security and justice: A constitutional Odyssey' in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford: OUP, 2004); D. Kostakopoulou, 'The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue' in C. Barnard (ed.), *The Fundamentals of EU Law Revisited* (Oxford: OUP, 2007).

[498] Commission Communication, 'Towards integrated management of the external borders of the Member States of the European Union', COM(2002) 233, 4. For an example of the Court putting up external frontiers, see Case C–109/01 *Akrich* [2003] ECR I–9607, considered in Ch. 8.

[499] E. Guild, 'Security of residence and expulsion of foreigners: European Community law' in E. Guild and P. Minderhoud (eds.), *Security of Residence and Expulsion: Protection of aliens in Europe* (The Hague: Kluwer, 2000), 63.

[500] COM(2000) 757, 5: 'The social conditions which migrants face, the attitudes of the host population and the presentation by political leaders of the benefits of diversity and of pluralistic societies are all vital to the success of immigration policies.'

[501] Albeit that the London bombers were actually British-born. EU Council, 'European Union plan of action on combating terrorism', Council Doc. 10010/3/04, 11 Jun. 2004. The Commission says that in 2007 almost 600 failed, foiled or successfully executed terrorist attacks were carried out in 11 Member States (COM(2009) 263).

situation of the time, the political discourse ebbs and flows: from encouraging migration (see, for example, the EU–Turkey Association agreement discussed in Section D below) to discouraging migration (see, for example, the central thrust of the Hague programme governing policy in the field of freedom, security and justice for the years 2005–10, now followed by the Stockholm programme).

This basic tension between the opportunities and threats posed by TCN migration gives rise to a number of questions: should there be limits on the numbers of TCNs admitted to a Member State? Once admitted, what rights should they enjoy? Should they enjoy the right to work, to equal treatment with nationals, to move to another Member State? Should they be encouraged (or even required) to integrate? This chapter considers the Union's answer to some of these questions. However, in order to understand the EU's position and any legislation it has adopted, we need first to examine the evolving competences of the EU, including the right to opt-out for certain Member States, and the changing policy domain.

B. THE DEVELOPMENT OF AN AREA OF FREEDOM, SECURITY, AND JUSTICE

1. THE EVOLVING TREATY POSITION

1.1 Introduction

Owing largely to their colonial past, the states of the Union have always had a large number of TCNs lawfully resident on the basis of national law: in 2006 there were 18.5 million non-EU nationals resident in the EU, about 3.8 per cent of the total population.[502] In recognition of this fact, the European Union has long given TCNs certain rights, albeit on an ad hoc basis. As the previous chapters of this book have shown, since the late 1960s Union law has allowed TCN family members of migrant nationals to accompany the migrant when moving to another state, and to enjoy rights once in residence.[503] It also allows companies providing services in other Member States to use their TCN workforce.[504] However, in both situations the rights of the TCN are derived from an EU (natural or legal) person; TCNs do not enjoy their own independent rights.

In addition, the Treaties have given some rights to TCNs who do not move from one state to another. For example, Article 227 TFEU (ex Article 194 EC) on the right to petition the European Parliament and Article 15 TFEU (ex Article 255 EC) on access to documents are enjoyed by those who are legally resident, irrespective of nationality. Article 157 TFEU (ex Article 141 EC) on equal pay for men and women and Article 169 TFEU (ex Article 153 EC) on rights of consumers to information go further still. They apply to all workers and consumers—the individual does not even need to be resident.[505] Furthermore, most of the rights enumerated in the Charter of Fundamental Rights are conferred on all persons regardless of their nationality or place of residence. As the Commission notes,[506] the Charter therefore 'reflects the European Union's traditions and positive attitude to equal treatment of citizens of the Union and third-country nationals'. This view was reinforced by the adoption of the two directives under Article 19 TFEU (ex Article 13 EC): Directive 2000/43 on equal treatment irrespective of racial and ethnic origin[507] and Directive 2000/78 on equal treatment in respect of religion or belief, age, disability, and sexual orientation[508] which apply to 'all persons', irrespective

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502 COM(2009) 262.

503 See, e.g., Reg. 492/2011, discussed in Ch. 9 and Dir. 2004/38 discussed in Ch. 12.

504 Case C–113/89 *Rush Portuguesa* v. *Office national d'immigration* [1990] ECR I–1417.

505 J. D'Oliveira, 'European citizenship: Its meaning, its potential' in R. Dehousse (ed.), *Europe after Maastricht: An ever closer union*? (Munich: Law Books in Europe, 1994), 141–6 and 'Union citizenship: Metaphor or source of rights?' (2001) 7 *ELJ* 4, 7.

506 COM(2001) 127, 3.

507 Dir. 2000/43 ([2000] OJ L180/22).

508 Dir. 2000/78, the so-called horizontal directive; M. Bell, *Anti–discrimination Law and the European Union* (Oxford: OUP, 2002), R. Whittle and M. Bell, 'Between social policy and Union citizenship: The Framework Directive on equal treatment in employment' (2002) 27 *ELRev*. 677.

of nationality or residence. However, enjoyment of these EU rights is still dependent on a Member State's decision—still largely under national law—to admit a TCN to its territory in the first place and to allow them to reside and work there.

The EU has also entered various international agreements granting more favourable rights to certain TCNs. The most substantive agreement, on the European Economic Area (EEA), extends the EU's own *acquis* to Norway, Iceland, and Liechtenstein.[509] In addition, the EU has a number of agreements on migrant workers and social security with countries such as Morocco, Algeria, and Turkey.[510] Under these agreements, the Member States retain the right to admit the migrant to their territory but, once admitted, the agreements give migrants certain rights after they have been resident for a prescribed period. The most ambitious of these agreements is the one between the EU and Turkey, the key provisions of which are considered in section D below.

Title V of Part Three TFEU provides an alternative basis for the EU to regulate the position of TCNs independently of any relationship with an EU citizen. However, the sensitivities at play here mean that the relationship between EU rules and Member State discretion is complex. We turn now to consider the development of the European Union's competence to regulate immigration from third countries.

1.2 The Maastricht Treaty and the Third Pillar

Until 1992, the EU had no express competence to regulate the position of TCNs. Any legislation which affected TCNs (e.g., Regulation 492/2011 on the free movement of workers and the Posted Workers Directive 96/71 which was adopted after the Maastricht Treaty) were based on the free movement provisions in the (then) EC Treaty. However, the changing geo-political climate forced the Member States to re-examine their position. With the fall of the Berlin wall, EU Member States which had been pursuing 'zero' immigration policies became concerned about security issues caused by (potentially) mass migration from former Eastern-bloc countries.[511] Increasingly they insisted on greater controls at the external frontiers, with the result that many economic migrants sought entry to the EU either illegally or through asylum procedures.[512] In response, the Member States agreed at Maastricht that a third, intergovernmental, pillar (Title VI TEU) on cooperation in respect of justice and home affairs (JHA) should be included in the Treaty. This provided that matters concerning the crossing of external borders, immigration,[513] asylum, drug addiction, fraud, judicial cooperation in civil and criminal matters, customs, and police cooperation were matters of common interest for the Member States.[514] These were matters for EU law to which the classic Community method (CCM), including principles such as direct effect, did not apply. New powers were also added to the first pillar (i.e., the EC Treaty—areas in which the CCM did apply) to deal with migration issues, including Article 100c EC

[509] [1994] OJ L1/1; [1995] OJ L86/58.

[510] See, further, S. Peers, 'Towards equality: Actual and potential rights of third country nationals in the European Union' (1996) 33 *CMLRev*. 7.

[511] E. Guild, 'The single market, movement of persons and borders' in C. Barnard and J. Scott (eds.), *The Law of the Single European Market: Unpacking the premises* (Oxford: Hart Publishing, 2002), 296.

[512] COM(2000) 757, 13.

[513] Cf. General Dec. (No. 6) on Arts. 13–19 of the Single European Act (SEA): 'Nothing in these provisions shall affect the right of the Member States to take such measures as they consider necessary for the purposes of controlling immigration from third countries and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques', discussed in R. Plender, 'EC competence and non-Member States nationals' (1990) 39 *ICLQ* 599, 606. However, Decl. 43 annexed to the SEA did provide that the Member States would cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement, and residence of nationals of third countries. They would also cooperate in the combating of terrorism, crime, the traffic in drugs, and illicit trading in works of art and antiques.

[514] Points (1)–(3) of (then) Art. K.1. See D. O'Keeffe, 'Recasting the third pillar' (1995) 32 *CMLRev*. 893 and 'The emergence of a European immigration policy' (1995) 20 *ELRev*. 20.

which empowered the Council to determine which TCNs needed visas.[515] Article 2(3) of the Social Policy Agreement (now Article 153(1)(g) TFEU) also gave the Council the power to adopt measures concerning the conditions of employment for third-country nationals.

Prior to the Maastricht Treaty, a separate, intergovernmental process—Schengen—was already underway. Under the Schengen Agreement of 1985 and the implementing Convention of 1990,[516] the now 25 participating states agreed to remove border formalities at common frontiers, approximate visa formalities, and ensure the cooperation of law enforcement agencies, particularly in relation to drugs and firearms.[517] Often presented as the 'testing ground' for the free movement of persons, the Schengen *acquis* was intended to facilitate the application of Article 26 TFEU (ex Article 14 EC).[518]

The Schengen agreements cover all nationals of the Member States of the European Union, regardless of whether they are members of the Schengen area. All individuals are subject to the same (increased) checks when crossing one of Schengen's *external* frontiers but, once admitted to the Schengen area, they enjoy free movement across internal frontiers.[519] However, the abolition of border controls has not meant an end to the policing powers of the competent authorities, nor has it prevented individual Member States from requiring individuals to hold, carry, and present identity documents.

1.3 The Amsterdam Treaty and the AFSJ

(a) Communitarization of the third pillar

The inevitable overlaps created by the Maastricht Treaty between the Community pillar (the EC Treaty) and the third pillar (JHA) created considerable practical and legal difficulties, not least because the Court of Justice had no jurisdiction to hear immigration and asylum cases arising under the third pillar. As a result, the Heads of State agreed at Amsterdam to 'communitarize' parts of the third pillar,[520] transferring key areas concerning the free movement of persons (asylum, immigration, and the rules governing the crossing of external borders) from the third to the first pillar. These provisions were placed in a new Title IV of Part Three of the EC Treaty entitled 'Visas, asylum, immigration and other policies related to free movement of persons'. EC measures adopted in these areas where intended to 'establish progressively an area of freedom, security and justice'.[521] Police cooperation and judicial cooperation in criminal matters remained in the third pillar, renamed 'Provisions on police and judicial cooperation in criminal matters' (PJC). This continued division generated considerable difficulties, first for the legislature in determining whether the measure was a first or third pillar one,[522] and subsequently for the Court.[523] The Court of Justice now had jurisdiction to hear preliminary

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[515] Council Reg. 1683/95 of 29 May 1995 laying down a uniform format for visas ([1995] OJ L164/1). Council Reg. 2317/95 ([1995] OJ L234/1) in respect of visa requirements for TCNs, now replaced by Reg. 539/2001 ([2001] OJ L81/1). Reg. 2317/95/EC was annulled for procedural reasons: Case C–392/95 *Parliament* v. *Council* [1997] ECR I–3213. See S. Peers, 'The Visa Regulation: Free movement blocked indefinitely' (1996) 21 *ELRev*. 150; *EU Justice and Home Affairs Law* (Oxford: OUP, 2006), 69–71; and K. Hailbronner, 'Visa regulation and third-country nationals in EC Law' (1994) 31 *CMLRev*. 969.

[516] Belgium, France, Germany, Luxembourg, and the Netherlands were the original signatories to the Agreement in 1985.

[517] See, generally, J. Schutte, 'Schengen: Its meaning for the free movement of persons in Europe' (1991) 28 *CMLRev*. 549.

[518] D. O'Keeffe, 'The Schengen Convention: A suitable model for European integration?' (1991) 11 *YEL* 185.

[519] See, esp., Art. 2 'Internal borders may be crossed at any point without any checks on persons being carried out.'

[520] J. Monar, 'Justice and home affairs in the Treaty of Amsterdam: Reform at the price of fragmentation' (1998) 23 *ELRev*. 320.

[521] Art. 61 EC.

[522] This led to the adoption of what became known as the ' "double text practice", whereby the main substance of a given Community policy was included in an EC regulation or a directive (first pillar), while the criminal law aspects of such a policy were separated out and included in a separate framework decision (third pillar)' (E. Sharpston, 'The area of freedom, security and justice ("AFSJ") in the EU:– The story so far and (some of) the challenges ahead', Thomas More Lecture, delivered at Lincoln's Inn, 13 Nov. 2008).

[523] See, e.g., Case C–301/06 *Ireland* v *European Parliament and Council (retention of data)* [2009] ECR I–593. Perhaps better known is Case C–176/03 *Commission v Council (Criminal Penalties)* [2005] ECR I–7879; Case C–440/05

references concerning matters under Title IV of Part Three EC, but only from courts of last resort.[524] It also had jurisdiction to hear references on the validity and interpretation of, for example, framework decisions under the third pillar,[525] but only where Member States had specifically declared that they were prepared to accept the Court's jurisdiction.[526] Even though the Court had reduced jurisdiction, the fact that it had jurisdiction at all is significant, not least for ensuring that Community measures adopted under Title IV were compatible with fundamental rights.[527]

Given the subject matter of the disputes that did arise, the cases often needed speedy resolution. As a result, a new fast-track procedure was introduced, the *procédure préalable d'urgence* (PPU)[528] which applies to cases referred in areas covered by Title VI TEU and Title IV of Part Three of the EC Treaty[529] (now Title V, Part Three TFEU[530]).

The communitarization of the third pillar raised serious problems for three states—the UK, Ireland, and Denmark—and they successfully secured opt-outs from its provisions. These opt-outs were contained in three protocols.[531] The first permitted the UK and Ireland (as a result of its common travel area with the UK[532]) not to apply some aspects of Article 14 EC (now Article 26 TFEU) regarding the elimination of controls at internal borders.[533] In return for this concession, the protocol

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Commission v Council (Ship source pollution) [2007] ECR I–9097. To deal with the problems raised, Art. 83(2) TFEU was subsequently introduced by the Lisbon Treaty which provides: 'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.' The effect of Protocol No. 21 (see below) is that the UK can opt out from measures adopted under Art. 83(2) TFEU even in fields like criminal penalties for environmental matters (e.g., Dir. 2009/123 ([2009] OJ L280/52), in which it is currently bound.

[524] Art. 68(1) EC. In addition, Art. 68(3) EC gave the Council, the Commission, and the Member States the chance to request the Court to give a ruling on a question of interpretation of Title IV itself or acts taken under it.

[525] Art. 35(1) EU. It also had jurisdiction to review the legality of framework decisions and decisions (Art. 35(6) EU).

[526] Art. 35(2)–(3) EU. For a full discussion, see S. Peers, *EU Justice and Home Affairs Law* (Oxford: OUP, 2007).

[527] See, e.g., Case C–224/02 *Pupino* [2005] ECR I–5285, where the Court was also prepared to check the compatibility of third-pillar measures with human rights. See S. Prechal, 'Direct effect, indirect effect, supremacy and the evolving constitution of the European Union' in C. Barnard (ed.), above n. 1.

[528] Art. 1 Council Dec. 2008/79/EC, Euratom [2008] OJ L24/42; Art. 23a of the Protocol on the Statute of the Court of Justice and Art. 104b of its Rules of Procedure. The first case decided under the PPU was Case C–195/08 PPU *Inga Rinau* [2008] ECR I–5271. For discussion, see C. Barnard, 'The PPU: Is it worth the candle? An early assessment' (2009) 34 *ELRev.* 281.

[529] See the reference to the PPU in the new Art. 267(4) TFEU: 'If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.'

[530] Court of Justice's Information Note on references from national courts for a preliminary ruling', (2009/C 297/01) ([2009] OJ C297/1), para. 33.

[531] Art. 69 EC said that Title IV EC was subject to three protocols added by the Treaty of Amsterdam. See generally M. Hedemann-Robinson, 'The area of freedom, security and justice with regard to the UK, Ireland and Denmark: The "opt-in opt-outs" under the Treaty of Amsterdam' in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Publishing, 1999); J de Zwaan, 'Opting in and opting out of rules concerning free movement of persons: Problems and practical arrangements' (1998–9) 1 *CYELS* 107.

[532] If Ireland had participated in Title IV measures, the common travel area would have meant that TCNs could have entered the UK via Ireland without any restrictions. Given that about 70% of all travel from Ireland is to the UK, Ireland was not prepared to surrender its common travel area with the UK and so it also opted out of Title IV. However, in Decl. 55 by Ireland on Art. 3 of the Protocol on the position of the UK and Ireland, Ireland declared that it intended to exercise its right under Art. 3 to take part in the adoption of measures pursuant to Title IV of Part Three EC to the maximum extent compatible with the maintenance of its Common Travel Area with the UK. It added that 'Ireland recalls that its participation in the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community reflects its wish to maintain its Common Travel Area with the United Kingdom in order to maximise freedom of movement into and out of Ireland.'

[533] Protocol on the application of certain aspects of Art. 14 EC to the UK and Ireland.

permitted the other Member States to exercise border controls on people seeking to enter their territory from the UK and Ireland.[534]

The second protocol, 'The Protocol on the position of the UK and Ireland', which to a certain extent overlaps with the first, exempted the UK and Ireland from measures taken under Title IV of Part Three EC, although Article 3 of the protocol permitted the UK and Ireland to notify their desire to participate in measures taken under Title IV.[535] This opt-in had to be exercised within three months after a proposal had been presented to the Council. If, after a reasonable period of time, such a measure could not be adopted with the UK or Ireland taking part, then the Council could adopt the measure without their participation.[536] In essence, the UK has been keen to support measures taken to buttress the external frontiers of the EU while refusing to participate in measures affecting the internal borders.

The third protocol, on the position of Denmark, provided that, with the exception of rules determining the third countries whose nationals had to hold a visa when crossing the external frontiers of the Member States or measures relating to a uniform format of visas (matters which had their origin in the now repealed Article 100c EC), Title IV did not apply to Denmark. Unlike those protocols on the UK and Ireland, the Danish Protocol made no provision for Denmark to opt in to the Title IV measures.

(b) The incorporation of the Schengen *acquis*

The Amsterdam Treaty also incorporated the Schengen *acquis*[537] into the single institutional framework of the Union.[538] Until Amsterdam, Schengen was a purely intergovernmental process from which the EU's political actors were excluded. With the incorporation of Schengen by the Amsterdam Treaty, the Schengen *acquis* became part of EC and EU law. The Council determined the legal basis for each of the provisions of the Schengen Convention and the other *acquis* in the (then) EC and EU Treaties.[539] The Schengen Protocol also provided that future measures, proposals, and initiatives building on the Schengen *acquis* were to be subject to the relevant provisions of the EC and EU Treaties.

Even after the incorporation of the Schengen *acquis* into the EC and EU Treaties, it became obvious that there was a culture clash between the imperatives driving Schengen and those underpinning the single market. As Guild notes, the EC (and now EU) approach was rights-based, with the Court of Justice playing a leading role, privileging the rights of the individual to free movement over the security interests of the state to exclude individuals on public-policy, security, or health grounds. By contrast, the Schengen process has been led by interior ministries, distrustful of the Court of Justice, which are seeking to reclaim this policy area for national discretion, and so detaches immigration issues from a rights-based approach.

The situation was made yet more complex by the position taken by UK, Ireland and Denmark. The United Kingdom, which is opposed to the abolition of border controls envisaged by Schengen, and

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[534] Art. 3.

[535] Protocol on the Position of the UK and Ireland.

[536] The UK and Ireland can also sign up to the measures after they have been adopted, but in these circumstances the conditions governing general flexibility apply (Art. 4). Ireland can also denounce the protocol altogether (Art. 8).

[537] According to the annex to the protocol (repealed by the Lisbon Treaty), the Schengen *acquis* comprises the 1985 Agreement, the 1990 Convention, the Accession Protocols and Agreements, and the Decisions and Declarations adopted by the Executive Committee established by the 1990 Implementation Convention and acts adopted by bodies on which the Executive Committee has conferred powers. A more detailed list of the *acquis* subsequently appeared in Dec. 99/435/EC ([1999] OJ L176/1). The Schengen *acquis* which has been given a legal basis appears at [2000] OJ L239/1.

[538] Protocol Integrating the Schengen *Acquis* into the Framework of the EU. See S. Peers, 'Caveat emptor? Integrating the Scehngen acquis into the European Union legal order' (1999) 2 *CYELS* 87.

[539] Council Dec. 99/436 ([1999] OJ L176/17) adopted under Art. 2(1), para. 2 of the Schengen Protocol. For the practical problems associated with the integration of the Schengen *acquis*, see P. J. Kuijper, 'Some legal problems associated with the communitarization of policy on visas, asylum and immigration under the Amsterdam Treaty and incorporation of the Schengen acquis' (2000) 37 *CMLRev*. 345. In the absence of a legal basis being allocated the measures are deemed to be based on Title VI EU.

Ireland which harmonizes its position with that of the UK, were the only EU–15 Member States not to accede to the Schengen Agreements, and so they were not bound by the Schengen *acquis*. While their continued non-participation was confirmed by Article 4 of the Schengen Protocol, Article 4 also allowed them to take part in some or all of the existing Schengen *acquis*, but only with the unanimous agreement of the other states. Both states have taken advantage of this possibility[540] and, as with measures adopted under the protocol on Article 14 (now Article 26 TFEU), they have signed up to the flanking measures of the area without internal frontiers (police and judicial cooperation in criminal matters) but not those measures linked to the disappearance of internal border controls.

The Schengen Protocol also provides that, in respect of proposals and initiatives building on the Schengen *acquis* (i.e., measures adopted after Amsterdam), the UK and Ireland have a 'reasonable period'[541] in which to notify their desire to participate. In the absence of such notification, authorization for the Council to proceed without them is automatic.[542] Decisions approving the UK and Ireland's part participation in the Schengen *acquis* require the UK and Ireland to participate in further measures building on those aspects of that *acquis*. As Peers puts it, the UK and Ireland are 'locked out' of the Schengen building measure until they have opted into the underlying rules.[543] However, it seems that once they have opted into the underlying rules, the UK and Ireland cannot be regarded as locked into any participation in subsequent measures which build on them.[544]

The Schengen Protocol also made special provision for Denmark.[545] It acceded to Schengen in 1996 and so maintained its rights and obligations under the pre-Amsterdam Schengen *acquis*, even in respect of those measures which had a legal basis in Title IV EC from which, as we saw above, Denmark had an opt-out. However, in respect of *future* Schengen *acquis*, the protocol on the position of Denmark allowed Denmark to decide whether it would implement the decision in its national law. If it decided to do so, this would create an obligation under *international law* between Denmark and the other Member States, not EU law,[546] and so the Court of Justice would have no jurisdiction.

(c) The AFSJ after Amsterdam

In assessing the AFSJ in the aftermath of Amsterdam, Guild et al.[547] considered that the prevailing intergovernmental logic driving policymaking strategies led to the establishment of an AFSJ characterized by five factors: first, differentiation, flexibility and fragmentation illustrated by the opt-outs from Title IV by the UK, Ireland, and Denmark, and the diverging Schengen membership;[548] secondly, the first/third pillar divide; thirdly, alternative methods of cooperation, often not aiming at formal harmonization but at coordinating Member States' policies through the exchange of information and post evaluation mechanisms based on commonly agreed principles and goals. This approach falls

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[540] See Council Dec. 2000/365/EC ([2000] OJ L131/47) on the request of the UK to take part in some of the provisions of the Schengen *acquis* and Council Dec. 2002/192/EC ([2002] OJ L64/20) concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*.

[541] Cf. three-month period under the Title IV Protocol. These protocols are mutually exclusive: Case C–77/05 *UK* v. *Council* [2007] ECR I–11459 and Case C–137/05 *UK v. Council* [2007] ECR I–11593, noted J. Rijpma (2008) 45 *CMLRev.* 835.

[542] Art. 5(1).

[543] 'In a world of their own? Justice and home affairs opt-outs' (2007–8) 10 *CYELS* 383, 389, citing Case C–77/05 *UK* v. *Council* [2007] ECR I–11459 and Case C–137/05 *UK v. Council* [2007] ECR I–11593.

[544] See below for a discussion of the changes introduced by the revised Schengen Protocol adopted under the Lisbon Treaty.

[545] Art. 3. See below for a discussion of the changes introduced by the revised Schengen Protocol adopted under the Lisbon Treaty.

[546] Art. 5.

[547] E. Guild, S. Carrera, and A. Faure Atger, 'Challenges and prospects for the EU's area of freedom, security and justice: Recommendations to the European Commission for the Stockholm Programme', *CEPS Working Document* No. 313/Apr. 2009.

[548] See also K. Lachmeyer, 'European police cooperation and its limits: From intelligence–led to coercive measures' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009).

outside traditional EU law, relying instead on 'new governance' mechanisms, in particular the open method of coordination (OMC).[549] The fourth characteristic of the AFSJ was the 'EU law of minimums' (i.e., standards set at the lowest common denominator driven by unanimous voting in Council) which, they argued, mirrored Member State interests too closely and offered wide discretion at times of domestic transposition.

Fifthly, they argued that fundamental rights and the rule of law were being taken for granted and put into a balancing relationship with the security of the state. They argue that the human rights of TCNs were too often neglected. They also expressed concerns about the exchange of information within and outside Europe[550] for the fundamental right of data protection. Despite the Data Protection Directive 95/46,[551] they argue that the mechanisms put into place to protect the individual from the misuse of their data are 'exceedingly weak and operate badly'. Douglas-Scott goes further, expressing concern about lack of accountability and judicial control.[552] Where the Court of Justice has had the chance to rule on related issues, it too has expressed concerns about the culture of secrecy. This can be seen in *Heinrich.*[553] A passenger was stopped at the security control of Vienna Airport as his cabin baggage contained tennis racquets, considered to be prohibited articles and were listed as such in an unpublished annex to a Union regulation. The Court was robust: an act adopted by a Union institution could not be enforced against natural or legal persons in a Member State before they had an 'opportunity to make themselves acquainted with it by its proper publication in the Official Journal'. Because the annex had not been published it had no binding force on the passenger.[554]

Some, but not all, of the criticisms levelled at the EU's execution of its AFSJ policies have been addressed by the Lisbon Treaty.

1.4 The Lisbon Treaty

(a) Overview

As this brief description of the Amsterdam Treaty shows, the communitarization of parts of the third pillar, the integration of the Schengen *acquis* into the (then) EC and EU Treaties, and the desire to accommodate the diverse interests of the UK, Ireland, and Denmark, have resulted in a complex web of legal provisions which created a serious challenge to the integrity of a single market for persons. The Lisbon Treaty attempted to deal with some of these problems, essentially by 'communitarizing' third-pillar criminal matters. There is now a single Title, Title V of Part Three TFEU, with a unified set of legal bases covering border checks, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters, and police cooperation. The effect of the change is that Union action under the new AFSJ is to be conducted through a newly unified set of legal acts;[555] the specific instruments under the third pillar are to be suppressed and measures adopted in the field of PJC are no

[549] See, e.g., Commission, 'Communication on a common immigration policy for Europe, actions and tools', COM(2008) 359. For further discussion of OMC, see Ch. 16.

[550] See, e.g., the passenger name records, as revealed in Joined Cases C–317/04 and C–318/04 *Parliament* v. *Council (passenger name records)* [2006] ECR I–4721, discussed by S. Douglas-Scott, 'The EU's area of freedom, security and justice: A lack of fundamental rights, mutual trust and democracy' (2008–9) 11 *CYELS* 53, 63–73.

[551] [1995] OJ L281/31. See also Council Framework Decision 2008/977/JHA ([2008] OJ L350/60) on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. Although cf. the subsequent inclusion of Art. 16 TFEU on data protection by the Lisbon Treaty.

[552] S. Douglas-Scott, 'The rule of law in the European Union: Putting the security into the area of freedom, security and justice' (2004) 29 *ELRev.* 219, 239.

[553] Case C–345/06 *Heinrich* [2009] ECR I–1659, para. 43.

[554] Para. 63. In a similar vein, in respect of the accession states, see Case C–161/06 *Skoma-Lux sro* v. *Celní ředitelství Olomouc* [2007] ECR I–10841.

[555] M. Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts' (2008) 45 *CMLRev.* 617, 680–1.

longer prohibited *per se* from having direct effect.[556] The new AFSJ also sees a significant enhancement of the powers of the European Parliament and the use of qualified majority voting in Council: the ordinary legislative procedure[557] (broadly the old co-decision procedure under Article 251) becomes the standard. The role of national parliaments is also enhanced[558] and new governance methodology further entrenched.[559] In addition, the Lisbon Treaty extended the jurisdiction of the Court of Justice. First, the limitation on the Court hearing references only from courts of last resort under Title IV, Part Three EC has been removed, as have the more extensive restrictions on the Court's jurisdiction under the third pillar, although the Court's jurisdiction over pre-existing third-pillar acts are subject to the pre-Lisbon restrictions for five years following the entry into force of the Lisbon Treaty.[560]

Taken together, these changes lead Dougan[561] to conclude that the Lisbon reforms mean that the Union's power to act within the AFSJ is significantly strengthened and the quality of those new powers will considerably improve democratic accountability and individual rights, albeit that the transitional arrangements, particularly in respect of the Court's jurisdiction under the old third pillar, dilute the effectiveness of some of these changes at least initially.

(b) The protocols

The four protocols considered above in section 1.3—now numbered No. 19 on the Schengen *acquis* integrated into the framework of the EU, No. 20 on the application of certain aspects of Article 26 TFEU to the UK and Ireland, No. 21 on the position of the UK and Ireland in respect of the AFSJ, and

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[556] Cf. Art. 34(2) EU. However, under the Transitional provisions set out in Protocol No. 36, the legal effects of pre-existing third-pillar acts, including the exclusion of direct effect, is preserved until those acts are repealed, annulled, or amended in accordance with the new Treaties. (However, under Decl. 50 the Union institutions are encouraged to adopt, in appropriate cases and as far as possible within the five-year period referred to in Art. 10(3) of the protocol (No. 36) on transitional provisions, legal acts amending or replacing the acts referred to in Art. 10(1) of Protocol No. 36.) The Commission will also not be able to bring any enforcement proceedings against defaulting Member States in respect of pre-existing third pillar acts for a period of five years (Art. 10(1) of Protocol No. 36). Special rules apply to the UK at the expiry of the five-year period. Art. 10(4) provides that at the latest six months before the expiry of the transitional period, the UK may notify the Council that it does not accept, with respect to the old third pillar acts, the powers of the institutions referred to in para. 1 as set out in the Treaties. If the UK makes that notification, all acts referred to in para. 1 will cease to apply to it as from the date of expiry of the transitional period referred to in para. 3. Art. 10(5) allows the UK to opt into acts which have ceased to apply to it under para. 4 in accordance with the Schengen Protocol or the Protocol on the Position of the UK and Ireland, as appropriate, with full powers of the Commission and the Court of Justice applicable to those acts. As Dougan points out (below n. 65, 683), this is the first time that a Treaty has allowed a Member State the right to opt out from not just the adoption of future measures but also to repudiate its obligations under an entire corpus of pre-existing measures.

[557] Art. 289 TFEU. The procedure is laid down in Art. 294 TFEU.

[558] Art. 69 TFEU then emphasizes the specific role of national parliaments in ensuring that all measures in the field of police and judicial cooperation in criminal matters comply with the principles of subsidiarity and proportionality in accordance with the protocol (No.2) on subsidiarity and proportionality (under Art. 7(2) of Protocol (No.2) on the application of the principles of subsidiarity and proportionality, the threshold for national parliaments showing a 'yellow card' to a legislative proposal in the field of PJC is lowered to one-quarter).

[559] The new Art. 70 TFEU authorizes the continuance of new governance methodology, in particular OMC. It allows the Council to establish a peer review mechanism of Member States' implementation of Union policies in this area. The Council must also adopt measures to ensure administrative cooperation between the relevant departments of the Member States and between those departments and the Commission: Art. 74 TFEU (ex Art. 66 EC). See, e.g., Council Dec. 2002/463/EC adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum, and immigration (ARGO programme) ([2002] OJ L161/11). Measures ensuring administrative cooperation are to be adopted on a proposal from the Commission or on the initiative of a quarter of the Member States (Art. 76 TFEU). Cf. the original Art. 34(2) TEU which allowed any *one* Member State to make a proposal in the field of police and judicial cooperation.

[560] Art. 10(1) of Protocol No. 36. Art. 276 TFEU also imposes limits on the Court of Justice's jurisdiction in respect of PJC activities. See S. Peers, 'Finally "fit for purpose"? The Treaty of Lisbon and the end of the third pillar legal order' (2008) 28 *YEL* 47.

[561] M. Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts' (2008) 45 *CMLRev*. 617.

No. 22 on the position of Denmark—have been extended to the Lisbon Treaty. While all four protocols contain technical amendments reflecting the changes introduced by the Lisbon Treaty,[562] the Schengen Protocol (No. 19), Protocol No. 21 on the position of the UK and Ireland in respect of the AFSJ and the Danish Protocol (No.22) contain more substantial amendments.

The Schengen Protocol now includes the possibility of expelling the UK and Ireland from a pre-existing measure. Where the UK or Ireland has opted into an existing Schengen measure under Article 4, and a new proposal is made to build on that act, the UK or Ireland may decide, under Article 5(2), to opt out of that proposal.[563] In these circumstances Article 5(3) provides that any measure already opted into 'shall, as from the date of entry into force of the proposed measure, cease to apply to the extent considered necessary by the Council', albeit that the Council must retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen *acquis* and respecting their coherence. If by the end of four months the Council fails to take a decision, the matter is referred to the European Council;[564] and if the European Council cannot agree, the Commission must take appropriate action.[565]

Protocol No. 21 on the position of the UK and Ireland in respect of the AFSJ also contains some significant revisions. First, and most importantly, it extends the UK opt-out/opt-in to all the areas covered by Title V, Part Three (i.e., the whole of the AFSJ) and not just the matters that were previously covered by Title IV of Part Three EC. So the UK and Ireland will be able to opt-out of areas where they are currently bound, most notably third-pillar (PJC) matters. Secondly, a new Article 4a extends the UK and Ireland's ability to opt-out of measures proposed or adopted under Title V of Part Three TFEU amending an existing measure by which they are bound. However, as with the Schengen Protocol, if the UK or Ireland does this, the Council has the power to exclude them from the existing act. Thirdly, Article 6a provides that the UK and Ireland are not bound by the EU's data protection rules as regards police and judicial cooperation in respect of acts in which they do not participate. Fourthly, Ireland has given up its right to apply the opt-out to matters listed in Article 75 TFEU (ex Article 60)[566] concerning freezing of funds of terrorists or equivalent.[567] The UK has merely declared its intention to opt-into such acts.[568]

The Danish Protocol has also been amended.[569] As with Protocol No. 21 on the UK and Ireland, Denmark's opt-out extends to the whole area of AFSJ and not just to matters previously covered by Title IV EC. Denmark also benefits from the same exclusion in respect of data protection matters.

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[562] For a full discussion, see S. Peers, 'In a world of their own? Justice and home affairs opt-outs and the Treaty of Lisbon' (2007–8) 10 *CYELS* 383.

[563] See also Decl. 44 on Art. 5 of the Schengen Protocol which says that where a Member State has made a notification under Article 5(2) of the Protocol that it does not wish to take part in a proposal or initiative, that notification may be withdrawn at any moment before the adoption of the measure building upon the Schengen *acquis*. Decl. 45 on Art. 5(2) of the Schengen Protocol says that whenever the UK or Ireland indicates to the Council its intention not to participate in a measure building upon a part of the Schengen *acquis* in which it participates, the Council will have a full discussion on the possible implications of the non-participation of that Member State in that measure.

[564] Art. 5(4).

[565] See also Decl. 47 on Art. 5(3), (4), and (5) of the Schengen Protocol which provides that the Member State concerned shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in some or all of the *acquis* referred to in any decision taken by the Council pursuant to Art. 4 of the said protocol.

[566] See further Ch.15.

[567] Art. 9 of the protocol.

[568] Decl. 65 by the United Kingdom of Great Britain and Northern Ireland on Art. 75 TFEU: 'The United Kingdom fully supports robust action with regard to adopting financial sanctions designed to prevent and combat terrorism and related activities. Therefore, the UK declares that it intends to exercise its right under Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice to take part in the adoption of all proposals made under Art. 75 TFEU.

[569] See also Decl. 48 concerning the protocol on the position of Denmark: 'Denmark declares that it will not use its voting right to prevent the adoption of the provisions which are not applicable to Denmark.'

Perhaps most significantly, a new Article 8 allows Denmark to abandon its opt-out in favour of a system where it will be bound by all provisions of the Schengen *acquis* and the follow-on measures as a matter of Union, not international, law. In respect of all other measures adopted under Title V of Part Three, the Danish position will be equivalent to that of the UK and Ireland if Denmark opts to change its legal position.[570]

Returning to the criticisms levelled at the experience of the operation of the post Amsterdam version of the AFSJ by Guild et al, it can be said that while the Lisbon Treaty has more or less overcome the problems of the first/third pillar divide, differentiation, flexibility and fragmentation caused by the opt-outs for the UK, Ireland and Denmark and the diverging Schengen membership remain firmly entrenched. The emphasis on alternative methods of cooperation, noted by Guild et al have also spilled over into the Lisbon Treaty, as the next section will show.

2. THE POLITICAL STRATEGY

The newly introduced Article 68 TFEU reflects the primary role of the European Council in defining 'the strategic guidelines for legislative and operational planning' within the AFSJ. This confirms the role the European Council has long played of steering the direction of the AFSJ, first at Tampere, then at The Hague, and most recently at Stockholm.

2.1 The Tampere Programme

As we have seen, prior to the Amsterdam Treaty, the treatment of TCNs by (the then) Community law was somewhat ad hoc.[571] Title IV of Part Three EC offered a chance for greater coherence. A special European Council was held in Tampere in 1999 which considered, among other things, the implementation of Title IV of Part Three EC. It agreed on a common EU asylum and immigration policy, based on four principles. The first, partnership with the countries of origin, was intended to address political, human rights, and development issues in countries of origin and transit.[572] The idea behind this policy was that by reducing the 'push factors', countries of origin became more attractive to their own people. At Seville, the European Council introduced the stick of including a clause in any future cooperation or association agreement on joint management of migration flows and on compulsory readmission in the event of illegal immigration. It warned that '[i]nadequate cooperation by a country could hamper the establishment of closer relations between that country and the Union'.[573] The carrot comes in the form of financial and technical assistance to those third countries willing to cooperate.[574]

Secondly, the Tampere European Council envisaged a common European asylum system leading to a common asylum procedure and a uniform status for those granted asylum. This is based on the full and inclusive application of the Geneva Convention.

Thirdly, in order to integrate TCNs into the host state, the Tampere European Council insisted upon the principle of fair treatment of TCNs. This allowed TCNs admitted to the host state broadly the

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[570] See also Decl. 26 on non-participation by a Member State in a measure based on Title V of Part Three TFEU: 'the Council will hold a full discussion on the possible implications and effects of that Member State's non-participation in the measure'. It continues that any Member State may ask the Commission to examine the situation on the basis of Art. 116 TFEU.

[571] This was partly because there was an absence of clear competence for the (then) EEC to act. See, e.g., Joined Cases 281, 283–285/85 *Germany, France, Netherlands, Denmark and the United Kingdom* v. *Commission* [1987] ECR 3203, para. 10 on the use of Art. 118 EEC (Art. 156 TFEU).

[572] This requires combating poverty, improving living conditions and job opportunities, preventing conflicts, and consolidating democratic states. See Commission Communication, 'Integrating migration issues in the European Union's relations with third countries', COM(2002) 703. See also European Council: 'Global approach to migration: Priority actions focusing on Africa and the Mediterranean', Brussels, 15–16 Dec. 2005 and the Commission's follow-up: COM(2006) 735.

[573] Presidency Conclusions, Seville, 21–2 Jun. 2002, paras. 33 and 35. See also Commission Communication on the integration of migration issues in the EU's relations with third countries, COM(2003) 703.

[574] COM(2003) 355.

same rights and responsibilities as EU nationals[575] but, with the exception of a 'hard core' of rights available to migrants on their arrival,[576] these rights were to be incremental and related to the length of stay provided for in their entry conditions.[577] So, an individual would receive a (renewable) temporary work permit, followed by a permanent work permit, after a number of years to be determined, with the possibility of long-term residence status after a certain period[578] and even 'civic citizenship', comprising a common set of core rights and obligations based on the Charter of Fundamental Rights 2000, after a minimum period of years.[579]

Finally, the European Council wished to see a more efficient management of migration flows. This idea was subsequently fleshed out by the Commission in a Communication on a 'Community immigration policy'[580] which argued the case for a proactive immigration policy based on 'the recognition that migratory pressures will continue and that there are benefits that orderly immigration can bring to the EU, to the migrants themselves and to their countries of origin'.[581] At the heart of this approach lies the idea of creating a legislative framework for legal immigration into the EU by TCNs, and in particular a common policy on admission for economic reasons, backed up by information campaigns in countries of origin about the possibilities for legal immigration. Two factors influenced this policy. First, the Commission considered that the EU *needed* skilled and unskilled labour[582] to help ensure the success of the Lisbon strategy (of making the EU the most competitive and dynamic knowledge-based economy in the world),[583] to help address the demographic problems caused by an ageing population and a low birth rate,[584] and to help deal with a skills shortage in key industries.[585] Secondly, under the General Agreement on Trade in Services (GATS), the EU and the Member States committed themselves to allowing TCNs to pursue economic activities providing services in the EU, without there being any 'economic needs test'.[586]

The Tampere principles are reflected in Article 79(1) TFEU which provides:[587]

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

This demonstrates just how the tone of the debate has begun to change in recent years,[588] with a shift in focus towards facilitating legal admission of 'desirable' TCNs (those coming for short visits as tourists or on business and those wishing to remain for the longer term with skills to offer), while keeping out 'undesirable' TCNs (those threatening the security of the EU such as drug and human traffickers,

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[575] See also Tampere Presidency Conclusions, 15 and 16 Oct. 1999, para. 3 and Commission's Communication on a 'Community immigration policy', COM(2000) 757, 3. See also its earlier Communication, 'Immigration and asylum policies', COM(94) 23.

[576] Ibid., 17.

[577] Ibid., 15.

[578] Ibid., 18.

[579] Ibid., 19.

[580] COM(2000) 757. See also 'On an EU approach to managing economic migration' (COM(2004) 811).

[581] Ibid., 13.

[582] COM(2000) 757, 15.

[583] This was emphasized in the Commission's Communication on immigration, integration, and employment: COM(2003) 336, 9–17.

[584] Commission, 'The demographic future of Europe: From challenge to opportunity': COM(2006) 571.

[585] According to figures prepared by Eurostat, and reproduced by the Commission in its Communication above n. 89, the dependency ratio, i.e. the number of people aged 65 years relative to those aged from 16–64, is set to double and reach 51% by 2050, meaning that the EU will change from having four to only two persons of working age for each citizen over 65. Eurostat estimates that 40 million people will emigrate to the EU by 2050.

[586] COM(2000) 757, 15.

[587] See also Art. 67(2) TFEU.

[588] See COM(2000) 757, 6.

smugglers, and other criminals, along with those falsely claiming asylum). This is what is meant by 'managed' migration—the current vogue term.[589]

2.2 The Hague Programme

The balance that characterized the Tampere principles[590] was tipped in favour of the security agenda by the Hague Programme adopted five years later, laying down measures to be taken from 2004–9.[591] It said:[592]

The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004. The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as terrorism, organised crime, irregular migratory flows and smuggling of human beings as well as the prevention thereof. Notably, in the field of security, the coordination and coherence between the internal and external dimension has been growing in importance and needs to continue to be vigorously pursued.

It continues:[593] 'A key element in the near future will be the prevention and repression of terrorism . . . [P]reserving national security is only possible in the framework of the Union as a whole.'[594] The EU is no longer just concerned with external security but also security within the EU: 'Freedom, justice, control at the external borders, internal security and the prevention of terrorism should henceforth be considered indivisible within the Union as a whole.' But, as the subsequent documentation makes clear, security is not just about terrorism but it is also about organized crime and drugs.[595] This shift in emphasis reflects a change in perception of TCNs—they are no longer a potential benefit to the EU economy but a threat to its security.

The Hague Programme was followed up by an Action Plan put forward by the Commission[596] identifying ten specific priorities on which the Commission believed efforts should be concentrated. These included fundamental rights and citizenship; the fight against terrorism; managed migration; and integration.[597] Close on the heels of the Hague Programme came the Global Approach to Migration in 2005 and the European Migration Policy in 2006[598] based on 'solidarity, mutual trust and shared responsibility of the European Union and its Member States'. The emphasis was now on keeping out 'undesirable' TCNs through international cooperation and dialogue with third countries, strengthening cooperation among Member States in the fight against illegal immigration, improving the management of the EU's external border and only then to develop well-managed migration policies and promote integration. However, by 2008 the Commission's *Common European Immigration Policy*, showed

589 Commission, 'On an EU approach to managing economic migration': COM (2004) 811.
590 For the Commission's review of Tampere: COM(2004) 401 final.
591 EU Council, *The Hague Programme: Strengthening freedom, security and justice in the European Union*, Council Doc. 16054/04.
592 p. 3.
593 p. 4.
594 Although cf. Art. 72 TFEU (ex Art. 64 EC): 'This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to maintenance of law and order and the safeguarding of internal security.'
595 COM(2005) 184, introduction. See also the EU Action Plan on Drugs: COM(2005) 45, following the European strategy on drugs 2005.
596 COM(2005) 184. See also Commission, 'Policy plan on legal migration' COM(2005) 669; Commission, 'Implementing the Hague Programme: The way forward' COM(2006) 331; and the Commission, 'Report on implementation of the Hague Programme for 2007' COM(2008) 373.
597 Commission, 'A common agenda for integration: Framework for the integration of third country nationals in the European Union', COM(2005) 389. See also the Council's 'Common basic principles for immigrant integration policy in the EU' (Council document 14615/04). In addition, a European Fund for Integration, with €825 millions allocated for 2007–13 (Council Dec. 2007/435/E (OJ [2007] L168/18). See also the Annual Reports on Migration and Integration, e.g. COM(2007) 512.
598 Presidency Conclusions, Brussels European Council, 14–15 Dec. 2006, paras. 21 et seq.

some signs of rectifying the imbalance. Six of its ten common principles concerned non-security issues and focused on the themes of the need for clear, transparent and fair rules, matching skills with needs, integration and transparency, trust and cooperation.

2.3 The Stockholm Programme

Yet the security theme is continued through to the Stockholm Programme 2010–14.[599] In its Presidency Conclusions,[600] the European Council considers:

that the priority for the coming years should be to focus on the interests and needs of the citizens and other persons for whom the EU has a responsibility. The challenge will be to ensure respect for fundamental rights and freedoms and integrity while guaranteeing security in Europe. It is of paramount importance that law enforcement measures and measures to safeguard individual rights, the rule of law and international protection rules are coherent and mutually reinforcing.

The European Council then identified six areas of priority, broadly building on the areas identified by the Commission in its 2009 Communication *An Area of Freedom, Security and Justice Serving the Citizen*:[601] promoting citizenship and fundamental rights, creating a 'Europe of law and justice', a 'Europe that protects', and developing the role of Europe in a globalized world—the external dimension. For our purposes, the two strands of most relevance to this chapter are 'Access to Europe in a globalised world' and 'A Europe of responsibility, solidarity and partnership in migration and asylum matters'. The first concerns access to Europe for persons recognized as having a legitimate interest in accessing the EU territory. This has to be made more effective and efficient. It continues that 'At the same time, the Union and its Member States have to guarantee security for its citizens. Integrated border management and visa policies should be construed to serve these goals.' In other words, it should be made easier for desirable TCNs to have access to the EU but those who are not desirable should be kept out, a point picked up in the second strand: 'in order to maintain credible and sustainable immigration and asylum systems in the EU, it is necessary to prevent, control and combat illegal migration as the EU faces an increasing pressure from illegal migration flows and particularly the Member States at its external borders, including at its Southern borders'.

This policy strand also refers to the European Pact on Immigration and Asylum, introduced by the French presidency in 2008, as a tool to realizing well-managed migration. While the pact itself offers little that is new (it talks of organizing legal migration to take account of priorities, needs and reception capacities determined by each Member State, and encouraging immigration, controlling irregular immigration by ensuring the return of irregular aliens to their country of origin, making border controls more effective, constructing a Europe of asylum and creating a comprehensive partnership with the countries of origin and transit to encourage the synergy between migration and development), the techniques are, according to some commentators, driven more by nationalism and intergovernmentalism than by European supranationalism, prioritizing the competences of the Member States over those of an EU of 27.[602] This may not be altogether surprising given the intergovernmental antecedents of much policy in this area. However, the changes introduced by the Lisbon Treaty point somewhat in the opposite direction, with greater emphasis on the use of the 'Community', now Union method, and greater democratic input through the ordinary legislative procedure. We turn now to consider the legislation that has been proposed and adopted to date.

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[599] The full programme can be found in the minutes of the General Affairs Council, 2 Dec. 2009, doc. 17024/09, <http://www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf>. See also Commission Communication, 'Delivering an area of freedom, security and justice for Europe's citizens: Action plans implementing the Stockholm programme' COM(2010) 171.

[600] 11 Dec. 2009, para. 26.

[601] COM(2009) 262. See further Ch.12.

[602] S. Carrera and E. Guild, 'The French presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. rights?', *CEPS Policy Brief*, Sep. 2008, 4–5.

C. UNION LEGISLATION ON FREE MOVEMENT, RESIDENCE, EMPLOYMENT, AND FAMILY RIGHTS FOR TCNS

1. INTRODUCTION

Title IV of Part Three EC provided the legal bases necessary to achieve the Tampere objectives and set a timetable by which the relevant measures should be adopted (in most cases five years from the date when the Treaty of Amsterdam came into force).[603] Both Title IV of Part Three EC and now Title V of Part Three TFEU envisage a three-pronged approach to immigration policy with separate legal bases:
(1) measures concerning the physical movement of persons (i.e., travel) (Article 62 EC, Article 77 TFEU)
(2) measures on asylum (Article 63(1) and (2) EC, Article 78 TFEU)
(3) measures on immigration and integration (Article 63(3) and (4) EC, Article 79 TFEU).
Article 80 TFEU adds that EU policies in the area of asylum and immigration, together with their implementation, are to be governed by 'the principle of solidarity and fair sharing of responsibility, including its financial implications between the Member States'. Since asylum is a specialist area we shall not consider it further in this chapter.[604] Instead, we shall concentrate on the Union's approach to physical movement of persons and measures on immigration and integration.

2. BORDER CONTROL: ARTICLE 77 TFEU

There are 1,636 designated points of entry to the EU and about 900 million people cross those external frontiers a year. For the Commission, 'In an open world, with growing mobility, ensuring the effective management of the Union's external borders is a major challenge.[605] Article 77(1) (ex Article 62 EC) provides that the Union is to develop a policy with a view to:

(a) ensuring the absence of any controls on persons, whatever their nationality, when crossing *internal* borders
(b) carrying out checks on persons and efficient monitoring[606] of the crossing of *external* borders
(c) the gradual introduction of an integrated management system for external borders.

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603 The Lisbon Treaty removed this timeframe.

604 See generally, Commission Communication, 'Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum' (COM(2000) 755), and the report COM(2003) 152; Commission Communication, 'Towards more accessible, equitable and managed asylum systems', COM(2003) 315; Commission Communication, 'A policy action plan on asylum: An integrated approach across the EU' (COM(2008) 360). See now, e.g., Council Reg. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ('Dublin II') ([2003] OJ L50/1) adopted under Art. 63(1)(a) EC and the implementation rules: Reg. 1560/2003 ([2003] OJ L222/3). Ireland and the UK gave notice of their wish to participate in the adoption of this reg.; Denmark did not. See also Council Dir. 2003/9/EC laying down minimum standards on the reception of asylum seekers ([2003] OJ L31/18) adopted under Art. 63(1)(b) EC: the UK gave notice of its wish to participate in the directive. The directive does not apply to Ireland and Denmark. Dir. 2004/83 ([2004] OJ L304/12) on minimum standards for the qualification and status of TCNs and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (as interpreted in Joined Cases C–175/08–179/08 *Abdulla* v. *Germany* [2010] ECR I–000 and Case C–465/07 *Elgafaji* v. *Staatssecretaris van Justitie* [2009] ECR I–921): the UK and Ireland are participating in this measure; Denmark is not. In addition Council Dir. 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof ([2001] OJ L212/12) adopted under Art. 63(2)(a) and (b) EC: the UK and Ireland are participating; Denmark is not. Dir. 2005/85 ([2005] OJ L326/13) on minimum standards on procedures in Member States for granting and withdrawing refugee status, adopted under Art. 63(1)(d) EC: the UK and Ireland are participating in this measure; Denmark is not. Note the shift in language in Art. 78(1) TFEU from minimum standards to the development of a 'common asylum policy'.

605 COM(2009) 262, 2.

606 This reference is new in the Lisbon Treaty.

Article 77(2) then provides specific powers for the European Parliament and the Council, acting by the ordinary legislative procedure,[607] to adopt measures concerning:[608]

(a) the common policy on visas and other short-stay residence permits
(b) the checks to which persons crossing external borders are subject
(c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period
(d) any measure necessary for the gradual establishment of an integrated management system for external borders[609]
(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

Finally, Article 77(3) introduces new default powers to adopt measures under the special legislative procedure (unanimity in council, consultation of the European Parliament) concerning passports, ID cards, residence permits, or any other such document to facilitate free movement of citizens.

A lot of the groundwork on border controls had already been done by the Schengen Agreement and Convention[610]. Article 2(1) of the Schengen Convention, subsequently based on Article 62(1) EC, provides that 'Internal borders may be crossed at any point without any checks on persons being carried out' but this is subject to a public-policy/national-security derogation.[611] Since Article 2(1) necessitated the harmonization of visa policy in respect of TCNs requiring visas, this was contained in Article 10 of the Schengen Convention, which provided for the introduction of a uniform visa—valid for the entire territory—for visits not exceeding three months. Visas issued for visits of more than three months are not subject to any common Schengen rules:[612] they are largely national visas issued under national law.[613] The Convention also lays down common rules making carriers responsible for ensuring that TCNs possess the correct travel documents.[614]

In order to compensate for the loss of internal border controls, the Convention provides for a range of additional measures at the external frontiers.[615] For example, Articles 3–8 introduce strict uniform rules about crossing external frontiers which are supplemented by detailed rules issued by the Executive Committee (now replaced by the Council), particularly a common manual on border checks,[616] now the borders code (see below), and common consular instructions (CCI),[617] now replaced by the visa code, on the procedures and conditions for issuing visas. In particular, Article 5 provides that for visits not exceeding three months, entry into Schengen territory will be granted to aliens provided:

• they are in possession of a valid travel document and visa if required
• they have documents substantiating the purpose of the visit and demonstrating sufficient means of support

[607] Under the original EC Treaty the procedural requirements were unanimity and consultation with the European Parliament but the EC Treaty envisaged a phasing in of QMV and co-decision. This process was completed by 1 Jan. 2005 and this change is reflected in Art. 77(2) with its reference to the ordinary legislative procedure.
[608] A new Art. 77(4) adds that Art. 77 is not to 'affect the competence of the Member States concerning the geographical demarcation of their borders in accordance with international law'.
[609] This reference is new in the Lisbon Treaty.
[610] [2000] OJ L239. The Implementing Agreement came into force in Sep. 1993 but was not applied for the purposes of abolishing border checks until 26 Mar. 1995.
[611] Art. 2(2) of the Schengen Convention.
[612] Art. 18.
[613] Cf. Family Reunification Dir. 2003/86 considered below, and proposals for more harmonization: COM(2009) 90–1.
[614] Art. 26.
[615] D. O'Keeffe, 'The emergence of a European immigration policy' (1995) 29 *ELRev*. 20, 34.
[616] Since declassification, the Common Manual appears at [2002] OJ C313/97 with all but three of its annexes.
[617] [2000] OJ L239/317.

• they have not been reported in the Schengen Information System (SIS)[618] as a 'person not to be permitted entry'
• they are not considered to be a threat to public policy or national security or the international relations of any contracting state.
There is a presumption that entry across one Schengen external border constitutes admission to the whole territory and an assumption that a short-stay visa issued by any participating state will be recognized for entry to the common territory.[619]

The Schengen system is based on the principle of mutual recognition of national decisions rather than harmonization. This has posed a number of problems. For example, Article 96 of the Schengen Implementing Agreement provides that individuals may be entered into the SIS database by a Member State if the state deems the individual to be 'a threat to public order or national security and safety'.[620] Since these matters are assessed according to national criteria,[621] different Member States have different conceptions of what constitutes risk. And as a result of the principle of mutual recognition, an individual may be excluded by all states even where he or she satisfies the exclusion criteria of only one.[622] Therefore, a Greenpeace activist and a New Zealand national was excluded from the Netherlands on the basis of an SIS entry against her by France even though many in the Netherlands did not consider her to pose such a risk.[623]

Since the incorporation of the Schengen *acquis* into the EC and EU Treaties by the Treaty of Amsterdam, the EU has adopted legislation concerning:
• the third countries whose nationals must be in possession of visas when crossing the external borders (and those who are exempt) for an intended stay in that Member State or in several Member States of no more than three months[624]
• a uniform format for visas[625]
• a legislative framework for the implementation and operation of the Visa Information System (VIS), facilitating checks at the external border crossing points and the exchange of visa data between Member States.[626]

However, the two most important measures adopted are:
• a Community code on visas,[627] establishing the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States for periods not exceeding three months in any six

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[618] The SIS is a database of people who may pose a threat to security and of objects such as stolen cars and artworks. The legal basis for the SIS is found in Arts. 92–119. Although the UK (Dec. 2000/365/EC ([2000] L131/43) and Ireland (Dec. 2002/192 ([2002] OJ L64/20) participate in principle in the database, their participation has not yet been put into effect. See also EP and Council Reg. 1987/2006 ([2006] OJ L381/4) on the establishment, operation, and use of the second generation SIS. Council Reg. (EC) No. 1104/2008 ([2008] OJ L299/1) on the migration from the SIS I+ to the second generation Schengen Information System (SIS II). SIS II is not yet operational.

[619] Guild, above n. 15, 305 and Arts. 19–20. This also applies to an alien holding a residence permit issued by one of the Member States. No detailed criteria are provided for the grant or renewal of a residence permit (Art. 21); cf. Art. 25 on a resident permit for a person on whom an alert has been issued.

[620] See also Arts. 5–6 of the Schengen Convention. Cf. Case C–503/03 *Commission* v. *Spain (SIS)* [2006] ECR I–1097 considered in Ch. 13.

[621] See COM(2002) 233, 9–10.

[622] Guild, above n. 15, 309. Although cf. Art. 16 of the Convention.

[623] Ibid.

[624] Council Reg. 539/2001 ([2001] OJ L81/1) (as amended). This does not apply to the UK and Ireland.

[625] Council Reg. 334/2002 ([2002] OJ L53/7) based on Art. 62(2)(b)(iii) EC. This applies to the UK but not Ireland. The original Reg. 1683/95 ([1995] OJ L164/1) was adopted on the basis of Art. 100c EEC (now repealed). See also Council Reg. 333/2002 ([2002] OJ L53/4), adopted under 62(2)(b)(iii) EC on a uniform format for affixing the visa issued by Member States to persons holding travel documents not recognized by the Member State drawing up the form. This applies to the UK but not Ireland.

[626] Reg. (EC) No. 767/2008 concerning the Visa Information System (VIS) ([2008] OJ L218/60) adopted under Art. 62(2)(b)(ii) EC. Denmark, the UK, and Ireland are not taking part. The VIS Reg. is not yet applied.

• the Schengen Borders Code,[628] laying down standards and procedures states have to follow in controlling the movement of persons across internal and external EU borders. This measure allows TCNs to stay in the Member State for up to three months.
These measures all constitute a 'follow-on' from the Schengen *acquis* in accordance with the Schengen Protocol.

Secondary movement for short periods (the freedom for TCNs to travel between Member States) is also covered. According to Article 19 of the Schengen Convention, aliens who hold uniform visas and who have legally entered the territory of a Contracting Party may move freely within the territories of all the Contracting Parties during the period of validity of their visas. Article 20 provides that aliens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of three months during the six months following the date of first entry. Likewise, aliens with a valid residence permit can travel to another Member State for up to three months under Article 21. Recognizing the importance of these secondary mobility rights, the Commission had proposed a directive relating to the conditions in which TCNs would have had the freedom to travel in the territory of the Member States for periods not exceeding three months and determining the conditions of entry and movement for periods not exceeding six months.[629] However, this proposal was withdrawn.[630]

Finally, FRONTEX, the agency for coordinating border control cooperation between Member States, has been instrumental in the EU's response to securing its external borders.[631] While the responsibility for the control and surveillance of external borders lies with the Member States, the agency facilitates the application of existing and future Union measures relating to the management of external borders by ensuring the coordination of Member States' action in the implementation of those measures.[632]

3. MEASURES ON IMMIGRATION AND INTEGRATION: ARTICLE 79 TFEU

3.1 Legal Immigration

(a) Introduction
As the Tampere Council made clear, facilitating legal immigration is now a central tenet of current EU policy. The Amsterdam Treaty gave the EU the powers to achieve this. Under Article 63 EC the Council could act in the prescribed areas namely, under Article 63(3)(a) EC (now Article 79(2)(a) TFEU), immigration policy in the areas of the conditions of entry and residence, and standards on the issue of long-term visas and residence permits, including those for the purpose of family reunion;[633]

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627 Reg. (EC) No. 810/2009 establishing a Community code on visas (the Visa Code) [2009] OJ L243/1 adopted under Art. 62(2)(a) and (b)(ii) EC. The UK, Ireland, and Denmark are not taking part.
628 Reg. (EC) No. 562/2006 establishing a Community Code on the rules governing the movement of persons across borders ([2006] OJ L105/1), adopted under Art. 62(1) and (2)(a) EC. Denmark, the UK and Ireland are not taking part. This regulation was interpreted for the first time in Joined Case C–261/08 and 348/08 *Zurita Garcia* v. *Delegado del Gobierno en la Región de Murcia* [2009] ECR I–000 (a request for this case to be heard under the PPU was rejected).
629 COM(2001) 388.
630 COM(2005) 462.
631 Reg. (EC) No. 2007/2004 ([2004] OJ L349/1) establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU, based on Arts. 62(2)(a) and 66 EC. The UK, Ireland, and Denmark are not taking part. See Case C–77/05 *UK* v. *Council* [2007] ECR I–11459 on the UK's unsuccessful attempt to opt-in (considered above). On the operation of FRONTEX, see Commission, 'Report on the evaluation and future development of the FRONTEX Agency': COM(2008) 67. See also Commission, 'Examining the creation of a European border surveillance system (EUROSUR)', COM(2008) 68; and Commission 'Preparing the next steps in border management in the EU', COM(2008) 69.
632 4th recital.
633 Art. 63(3)(a) EC.

and, under Article 63(4) EC (now Article 79(2)(b) TFEU), measures defining the rights of TCNs residing legally in a Member State, including the conditions under which legally resident TCNs could move and reside in other Member States.[634] While most of the provisions in Article 63 were subject to a requirement that the Council had to act within five years following the entry into force of the Amsterdam Treaty, this was not the case with the measures listed in Article 63(3)(a) and (4) EC. As a result, only a limited number of measures have actually been adopted so far: under Article 63(3)(a) regulations have been issued on long-term visas[635] and residence permits,[636] together with an important directive on family reunification (considered below);[637] under Article 63(4) EC, Regulation 1408/71 on social security (Regulation 883/04 from 1 March 2010) was extended to TCNs;[638] and under Article 63(3)(a) and (4) EC, the Long-term Residents Directive (also considered below) and the sectoral specific directives (students, researchers and highly qualified workers), all significant measures, were adopted.

The Lisbon Treaty introduced a further change: all measures taken in the areas listed in Article 79(2) are subject to the ordinary legislative procedure.[639] Finally, the new Article 79(4) allows the European Parliament and Council, again acting under the ordinary legislative procedure, to establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of TCNs residing legally in their territories. Harmonization is expressly excluded under this provision.

(b) Family reunification

For the past twenty years, family reunification has been one of the main sources of immigration to the EU.[640] The Family Reunification Directive 2003/86[641] was the first of two measures put forward by the Commission aimed at integrating TCNs into the community of the host state and ensuring fair treatment of TCNs. The directive provides that a TCN ('the sponsor')[642] residing lawfully in the territory of a Member State, holding a residence permit issued by a Member State valid for a year or more, with reasonable prospects of obtaining the right of permanent residence, can apply for family reunification[643] (usually while the TCN family members are outside the territory).[644] As with Article 3(1) of the Citizens' Rights Directive (CRD) 2004/38, the Family Reunification Directive makes a

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634 Art. 63(4) EC. There is no Schengen *acquis* under Art. 63(4) EC.

635 Council Reg. 1091/2001 on giving rights to those TCNs wishing to move with a long-stay visa (but without a residence permit) ([2001] OJ L150/4) based on Arts. 62(2)(b)(ii) and 63(3)(a) EC. This constitutes a development of the Schengen *acquis* and does not apply to the UK or Ireland.

636 Council Reg. 1030/2002 laying down a uniform format for residence permits for TCNs ([2002] OJ L157/1). This constitutes a development of the Schengen *acquis*. The UK and Ireland are participants.

637 Council Dir. 2003/86/EC ([2003] OJ L251/12). The UK, Ireland, and Denmark are not participating in this directive.

638 Council Reg. 859/2003 extending Reg. 1408/71 on social security to TCNs ([2003] OJ L124/1) based on Art. 63(4) EC. The UK and Ireland gave notice of their desire to be bound by the regulation; Denmark did not. Declaration 14 TFEU says that the interests of a Member State should also be taken into account where a proposal under Art. 79(2) TFEU would affect fundamental aspects of its social security scheme.

639 Under the original EC Treaty the procedural requirements were unanimity and consultation with the European Parliament but the EC Treaty envisaged a phasing in of QMV and co-decision. This process was completed by 1 Jan. 2005 in respect of illegal immigration and residence. However, adoption of measures on legal migration required unanimity and simple consultation with the European Parliament after this date.

640 COM(2008) 610, 3.

641 [2003] OJ L251/12 adopted under Art. 63(3)(a) EC. The UK, Ireland, and Denmark are not taking part in this measure. See also the Commission's report on the application of the directive: COM(2008) 610.

642 The directive therefore does not apply to non-migrant nationals wanting to be joined by TCN family members (e.g., a German living in Germany wanting to be joined by his Chinese wife). This situation is covered by national law.

643 Art. 1. Under Art. 8 Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years. This provision was unsuccessfully challenged in Case C–540/03 *EP* v. *Council (Family Reunification Directive)* [2006] ECR I–5769.

644 Art. 5(3).

distinction between those family members who must be admitted (spouse and minor children[645]) and those whom the Member State has a discretion whether to admit (first-degree relatives in the direct ascending line, where they are dependent on the TCN or his or her spouse and do not enjoy proper family support in the country of origin, adult unmarried children where they cannot support themselves, and an unmarried partner (in a duly attested long-term relationship or registered partnership).[646] The list of family members entitled to join the TCN is shorter than in the case of migrant workers under the CRD. The right to reunification is also dependent on evidence of the existence of 'normal' accommodation for a comparable family in the same region, sickness insurance for the TCN and the family members, and stable and regular resources which are higher than or equal to the level of resources which are sufficient to maintain the sponsor and the family members.[647]

If these conditions are not satisfied then the family may not be reunified with the paradoxical result that a so-called 'Family Reunification' Directive actually has the opposite effect.[648] Yet, in the Parliament's challenge to the validity of the directive in *EP v EU Council (Family Reunification Directive)*,[649] the Court upheld the validity of the directive, approving the margin of discretion given to the Member States. The European Parliament had argued that the directive's provisions enabling Member States to restrict family reunification (for example, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorizing entry and residence, verify whether he or she meets an integration condition provided for by its existing legislation on the date of implementation of the directive) were contrary to fundamental rights, in particular the right to respect for family life under Article 8 ECHR and the right to non-discrimination under the EU Charter. The Court dismissed the action but did stress that fundamental human rights are binding on Member States when they implement Union rules and that they had to apply the directive's rules in a manner consistent with the requirements governing human rights protection, especially regarding family life and the principle of protecting the best interests of the child.[650]

In order to ensure the integration of the family members the directive allows Member States to require the TCN family members to comply with integration measures, such as attending language courses.[651] It also provides for family members to enjoy access to employment and self-employment,[652] education, and vocational training,[653] but not social security or social assistance. After five years the spouse and children who have reached majority have the right to an autonomous residence permit independent of that of the sponsor.[654]

(c) Rights of long-term residents

The Long-term Residents Directive 2003/109[655] was the second measure proposed by the Commission aimed at integrating TCNs into the community of the host state and ensuring their fair treatment.[656] The

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645 Art. 4(1), 2nd para., contains a derogation for a child over 12 who arrives independently from the rest of his/her family.
646 Art. 4(2).
647 Art. 7(1)(c). In Case C–578/08 *Chakroun* [2010] ECR I-000, the Court ruled that it was contrary to the Dir., for the Member State to adopt rules resulting in family reunification being refused to a sponsor who has proved that he has stable and regular resources sufficient to maintain himself and his family but who, given the level of his resources, will nevertheless be entitled to claim special assistance to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income or income support measures in the context of local authority minimum income policies.
648 For a detailed discussion, see S. Peers, 'Family reunion and Community law' in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford: OUP, 2004).
649 Case C–540/03 [2006] ECR I–5769.
650 Paras. 104–5.
651 Art. 7(2).
652 Art. 14(2) allows Member States to delay the exercise of employment/self-employment rights for up to 12 months.
653 Art. 14(1).
654 Art. 15(1).
655 [2003] L16/44, adopted under Art. 63(3)(a) and (4) EC. The directive does not apply to the UK, Ireland, and Denmark.

aim of this directive is to establish a common status of long-term resident for those TCNs who have resided 'legally and continuously' for five years in the territory of the Member State concerned.[657] A long-term residence permit, valid for at least five years, will be granted where the TCN has adequate resources and sickness insurance.[658] It is automatically renewable on expiry.[659] Member States can also require TCNs to comply with (unspecified) 'integration conditions',[660] before becoming long-term residents, tests which are usually reserved to granting an individual citizenship of a state, not merely long-term residence status.

Long-term residents enjoy not only a secure residence but also equal treatment with nationals as regards a number of matters, including access to employment (but not in respect of activities which entail even occasional involvement in the exercise of public authority or activities that are reserved to nationals under laws in force on 25 November 2003), education and training (including study grants),[661] recognition of diplomas, social protection and social assistance (including social security),[662] and access to goods and services. The individual can be expelled only on the grounds of personal conduct but not, apparently, lack of resources.[663] In addition, the long-term resident 'with reasonable prospects of obtaining the right of permanent residence' will also enjoy the right to family reunion under Directive 2003/86.[664] Both the Family Reunification Directive and the directive on long-term residents are subject to derogations on the grounds of public policy, security, and health.[665]

Long-term residents with a long-term resident permit (and their families) will also enjoy the rights of free movement to other Member States (i.e. secondary mobility). The directive provides that long-term residents (and their families) can *reside* in (but makes no provision on entry into[666]) the territory of another Member State for more than three months[667] if they are exercising an economic activity as an employed or self-employed person or studying there and have adequate resources and sickness insurance, or simply have adequate resources and sickness insurance.[668] This directive demonstrates the increasing parallelism between the rights of legally resident TCNs and those of nationals of the Member States who are citizens of the Union.[669] The logical conclusion of this process of approximating the position of long-term legally resident TCNs to that of Member State nationals is

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656 COM (2001) 127.

657 There is a long list of lawful residence in Art. 3(2) which will not entitle the TCN to long-term residence status: e.g., students, refugees, au-pairs.

658 Cf. the CRD 2004/38 which does not impose the same obligations on EU citizens who have permanent residence.

659 Art. 9 makes provision for the loss of long-term resident status including in the case of fraudulent acquisition of the status or absence from the territory for more than 12 consecutive months.

660 Art. 5(2). See the 4th recital: 'The integration of third-country nationals who are long term resident in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the [Union] stated in the [Treaties].' Yet, K. Groenendijk suggests ('The Long Term Residents Directive, denizenship and integration' in A. Baldaccini, E. Guild, and H. Toner (eds.), *Whose Freedom, Security and Justice? EU immigration and asylum law and policy* (Oxford: Hart Publishing, 2007), 448) that some Member States have taken advantage of this possibility to create a new barrier to acquiring secure status for TCNs.

661 Subject to limits in Art. 11(3).

662 Although this can be limited: Art. 11(4).

663 Art. 6.

664 Art. 3(1).

665 The 14th preambular para. of Dir. 2003/86 provides that the notion of public policy and public security covers cases in which a TCN belongs to an association which supports terrorism, supports such an association, or has extremist aspirations.

666 S. Bolaert-Souminen, 'Non-EU nationals and Council Directive 2003/109/EC on the status of third country nationals who are long-term residents: Five paces forward and possibly three paces back' (2005) 42 *CMLRev.* 1011, 1030.

667 This goes beyond the rights already provided in the Schengen *acquis* which merely gives rights to move for up to three months. See further S. Peers, 'Implementing equality? The directive on long term resident third country nationals' (2004) 29 *ELRev.* 437

668 For criticism of these provisions, see A. Kocharov, 'What intra-Community mobility for third country nationals' (2008) 33 *ELRev.* 913, 919.

669 COM(2001) 74, para. 1.7.

the opportunity to obtain the nationality of the Member State in which they reside. This was endorsed by the European Council[670] and the Commission.[671]

(d) The 'first admissions' directives

The two directives considered so far—on Family Reunification and Long-term Residents—focused on the integration of TCNs who had already been admitted to a Member State under *national* law. The Commission's other proposals have been concerned with managing legal migration flows and in particular giving certain groups a right of entry—under *Union* law—to the Member States. The first proposal, a directive on the conditions of entry and residence of TCNs for the purpose of paid employment and self-employed economic activities,[672] was seen as the 'cornerstone of immigration policy' and central to addressing the 'shortage of skilled labour in certain sectors of the labour market'.[673] It provided for the grant of a renewable 'residence permit-worker' to a TCN, subject to certain formalities, valid for three years, where a job vacancy could not be filled by an EU citizen or other TCNs already legally resident in the EU (the 'economic needs test' or 'Union preference' test). Such a permit would have allowed the TCN to enter into, and reside in, the territory of the issuing state, exercise the activities authorized by the permit, and enjoy equal treatment with nationals in a number of areas, including working conditions, recognition of qualifications, social security including health care, and access to goods and services.

Given that this proposal was merely a 'first step' in achieving a Union policy, it did not affect Member States' responsibility for deciding whether to admit economic migrants, taking into account the needs of their labour markets and their overall capacity to integrate them (a point now enshrined in Article 79(5) TFEU[674]). Nevertheless, despite the professed importance of this directive, it could not be agreed upon and the proposal was withdrawn.[675]

The Commission therefore focused instead on sectoral specific measures as part of its approach to managing legal economic migration.[676] This led to the adoption of Directive 2004/114, on the conditions of entry and residence for TCNs for the purpose of studies, pupil exchange, vocational training, or voluntary service.[677] This measure is less market-oriented than the unsuccessful proposed directive on the conditions of entry and residence of TCNs for the purpose of paid employment and self-employment because the stay of migrants covered by Directive 2004/114 is temporary and viewed as a form of 'mutual enrichment for the migrants who benefit directly from it, both for their country of origin and for the host country, while helping mutual familiarity between cultures'.[678] Despite these worthy words, the directive does have a labour-market dimension since, as the Commission notes, many Member States provide certain TCNs with the opportunity to remain after their training 'so as to remedy shortages of skilled manpower'.[679] This directive requires those covered to have adequate resources and medical insurance. Students and unremunerated trainees can also have limited access to the employment market. The directive also provides for derogations on public-policy, security, and health grounds.

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670 However, access to nationality is a matter reserved solely for national powers: COM(2001) 127, para. 5.5.
671 COM(2003) 323, 22.
672 COM(2001) 386.
673 Preambular paras. (3) and (6).
674 'This Article shall not affect the right of the Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.'
675 COM(2005) 462.
676 See, e.g., the Commission's Green Paper COM(2004) 811.
677 Council Dir. 2004/114/EC ([2004] OJ L375/12) adopted on the basis of Art. 63(3)(a) and (4) EC. The UK, Ireland, and Denmark are not taking part in the directive.
678 COM(2002) 548, 2.
679 Ibid., 3.

Directive 2004/114 was followed by Directive 2005/71 on a specific procedure for admitting third country nationals for the purposes of scientific research.[680] TCN researchers working with an approved research organization in the Member States are to be given a residence permit for a period of at least a year provided they have the relevant documentation and can show sufficient resources and medical insurance. Their family members can accompany them. The directive does allow the researchers to teach for a certain number of hours and to enjoy equal treatment with Member State nationals in respect of terms and conditions of employment, dismissal, and social security.

The directive also gives TCNs the right to carry out part of their research in another Member State. By allowing secondary mobility, these first admissions directives mark a new stage in the evolution of policy in respect of TCNs. The rationale for this is competition rather than principle: the EU was losing out to the US in attracting the brightest and the best from third countries. Secondary mobility rights are seen as a pull factor to make the EU more attractive as a destination.[681]

The final and perhaps most important of the first admissions directive is Directive 2009/50[682] on highly qualified workers (the so-called 'blue-card' directive). A TCN with a job offer for 'highly qualified' work (i.e., work requiring higher education qualifications or, where permitted by national law, five years' equivalent professional experience) in an EU Member State, who has sickness insurance and is not considered a threat to public policy, security or health, must be issued with an EU blue card.[683] Member States do not, however, need to issue a blue card where, for example, the vacancy could be filled by a member of the national or Union workforce, where the Member State deems the volume of admission of TCNs is too high, or where the job is in a sector suffering form a lack of qualified workers in the country of origin (e.g., healthcare).[684] Once in possession of a blue card, the TCNs must do the work they came for during the first two years; after that, Member States 'may grant' the persons concerned equal treatment with nationals as regards access to highly qualified employment.[685] Blue-card workers also enjoy equality in respect of other matters including working conditions, freedom of association, social security, and goods and services.[686] Directive 2003/86 also gives rights to the family members of the TCN blue-card holder. Finally, the directive allows for secondary mobility. It prescribes the right of residence (but not entry) in the second Member State for the TCN blue-card holder and their family members[687] after 18 months of legal residence in the first Member State in order to undertake highly qualified employment.

Complementing these three sectoral directives is a proposal for a Council directive on a single application procedure for a permit for TCNs to reside and work in the territory of a Member State and on a common set of rights for TCNs legally residing in a Member State.[688] There are thus two limbs to the proposal. The first, concerns those seeking to come to the EU to work. The proposal envisages a single application procedure, resulting in a single permit to work and stay. No additional permits (e.g., work permits) can then be required. The second limb of the proposal concerns those who are already legally residing in an EU Member State. Those legally working but not yet holding long-term resident status are to enjoy equal treatment in respect of employment related matters.

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680 [2005] OJ L289/15 adopted under Art. 63(3)(a) and (4) EC. Ireland has notified its wish to participate in this measure; the UK and Denmark are not participating.

681 S. Iglesias Sánchez, 'Free movement of third country nationals in the European Union? Main features, deficiencies and challenges of the new mobility rights in the area of freedom, security and justice' (2009) 15 *ELJ* 791, 799; A. Kocharov, 'What intra-Community mobility for third-country workers?' (2008) 33 *ELRev* 913, 915 who cites figures that the US attracts 55% of all skilled migrants worldwide, the EU attracts only 1/11th of that number.

682 [2009] OJ L155/17 adopted under Art. 63(3)(a) and (4) EC. The UK, Ireland, and Denmark are not taking part.

683 Arts. 5 and 7.

684 Arts. 6 and 8.

685 Art. 12.

686 Art. 15.

687 Arts. 18–19.

688 COM(2007) 638.

3.2 Illegal Immigration, Residence, and Repatriation

Europol estimates that there are 500,000 illegal—or, using the more neutral term, irregular—immigrants entering the EU each year, many employed as undeclared workers.[689] Article 63(3)(b) EC (now Article 79(2)(c) TFEU) required the Council to take measures within five years of the coming into force of the Amsterdam Treaty to deal with illegal immigration and illegal residence, including repatriation of illegal residents. The Commission began by issuing a Communication on a common policy on illegal immigration[690] followed up by an Action Plan[691] which focused on keeping illegal immigrants out of the EU, particularly through the integrated management of external borders.[692] This has been complemented by a Union Return Policy on Illegal Residents[693] which was also followed up by an Action Plan.[694] The Commission recognizes the sensitive nature of the issue of forced return but stresses that it was essential for the credibility of any policy for fighting illegal immigration. It did, however, note that it had to fit 'smoothly into a genuine management of migration issues, requiring crystal clear consolidation of legal immigration channels'.[695]

In practical terms these policy statements led to the adoption of Directive 2001/40[696] on the mutual recognition of decisions on the expulsion of TCNs. The Schengen states have also agreed Directive 2001/51 on harmonizing financial penalties imposed on carriers transporting into Member States TCNs lacking the documents necessary for admission.[697] In addition, the European Parliament and Council adopted Directive 2008/115/EC[698] on common standards and procedures in Member States for returning illegally staying third-country nationals. This lays down 'clear, transparent and fair rules'[699] for an effective return policy as a 'necessary element' of a well managed migration policy. The directive requires Member States to issue a return decision—usually accompanied by an entry ban—to any TCN staying illegally in their territory, subject to certain exceptions. The Member States must provide an appropriate period for voluntary departure, unless there is a risk of absconding or similar, followed up by enforced removal, with coercive measures, including detention, as a last resort. The

689 COM(2000) 757, 13. In COM(2009) 262 the Commission estimates that there about 8 million illegal immigrants.
690 COM(2001) 672.
691 2002/C 142/23. Commission, 'Policy priorities in the fight against illegal immigration of third country nationals': COM(2006) 402.
692 See, e.g., Commission, 'Reinforcing the management of the European Union's southern maritime borders' (COM(2006) 733) and on 'Strengthening the European neighbourhood policy', COM(2006) 726.
693 COM(2002) 564 following on from the Green Paper COM(2002) 175.
694 For a review of these measures see, e.g., the Commission's Communication on the development of a common policy on illegal immigration, smuggling, and trafficking of human beings, external borders, and the return of illegal immigrants, COM(2003) 323. There were further reviews in 2006 and 2009.
695 COM(2002) 564, 4.
696 [2001] OJ L149/34 adopted under Art. 63(3) EC. This is part of the Schengen *acquis*. The UK, but not Denmark, has agreed to participate in this measure.
697 [2001] OJ L187/45, adopted under Art. 63(3)(b) EC. This is part of the Schengen *acquis*. The UK is participating in this directive but Ireland and Denmark are not. See also Council Dir. 2003/110/EC on assistance in cases of transit for the purposes of removal by air ([2003] OJ L 321/26) adopted under Art. 63(3)(b) EC as part of the Schengen *acquis*. The UK, Ireland, and Denmark are not participating. In addition, two further measures have been adopted, again to be applied by the Schengen states, on strengthening the penal framework to prevent the facilitation of unauthorized entry and residence for TCNs (Council Framework Dec. 2002/946/JHA [2002] OJ L328/1 based on Arts. 29, 31(e), and 34(2)(b) TEU—the UK and Ireland are taking part in this Framework Dec.) and defining the facilitation of unauthorized entry, transit, and residence (Council Dir. 2002/90/EC ([2002] OJ L328/17 based on Arts. 61 and 63(3)(b) EC). The UK and Ireland are taking part in this measure, Denmark is not.
698 [2008] OJ L348/98, adopted under Art. 63(3)(b) EC and builds on the Schengen *acquis*. Denmark, the UK, and Ireland are not taking part in the adoption of this directive. This directive was interpreted by the Grand Chamber in Case C–357/09 PPU *Said Shamilovich Kazoev* [2009] ECR I–000.
699 4th recital.

directive lays down a number of procedural safeguards together with the requirement of an effective remedy.[700]

Article 79(3) TFEU gives the Union the power to conclude agreements with third countries for the readmission of TCNs to their country of origin where those TCNs do not, or no longer, fulfil the conditions for entry, presence or residence in the territory of one of the Member States. This is a new provision but reflect existing practice: readmission agreements have already been negotiated under the (then) Community's implied powers.

There is one further recent measure of considerable practical importance: Directive 2009/52/EC[701] which provides for minimum standards on sanctions against employers of illegally staying TCNs. This measure is seen as particularly important since the possibility of finding work is a pull factor for illegal immigration. Article 3(1) prohibits the employment of illegally staying TCNs. Non-compliance is subject to 'effective, proportionate and dissuasive sanctions against the employer'.[702] It is also to be a criminal offence when committed intentionally in certain circumstances.[703] To that end the directive obliges employers to require TCNs to hold a valid residence permit or authorization for their stay, to hold a copy of that document for inspection by the authorities and to notify the authorities of the employment of TCNs.

Finally, the Member States agreed a Framework Decision 2002/629/JHA under the third pillar on combating trafficking in human beings.[704] This is complemented by a directive designed to encourage the victims of people smugglers to come forward and cooperate with the authorities by giving information in return for a short-term residence permit.[705] As the Commission noted,[706] such steps were necessitated by tragic incidents, such as the one in Dover in June 2000 in which 58 Chinese nationals, trying to enter the UK illegally, died while left in a lorry exposed to the full sun with its refrigeration systems turned off. Various other measures taken under the third pillar also focus the efforts of the Member States and Europol on detecting and dismantling the criminal networks involved.[707] Competence for 'combating trafficking in persons, in particular women and children' has now been communitarized by the Lisbon Treaty and is found in Article 79(2)(d)[708] and subject to the ordinary legislative procedure.

D. THE RIGHTS OF TURKISH WORKERS AND THEIR FAMILIES IN THE EU

1. INTRODUCTION

The EEC–Turkey Association Agreement of 1963 gives the most extensive rights to TCNs legally residing in the EU,[709] other than to EEA and Swiss nationals. While it does not affect the Member

[700] See also Dir. 2002/90 defining the facilitation of unauthorized entry, transit, and residence ([2002] OJ L328/17). The UK and Ireland are taking part, Denmark is not.
[701] [2009] OJ L168/24, proposed under Art. 63(3)(b) EC. The UK, Ireland, and Denmark are not taking part in this directive.
[702] Art. 5(1).
[703] Art. 9.
[704] [2002] OJ L203/1.
[705] Council Dir. 2004/81 ([2004] OJ L261/19). The UK, Ireland, and Denmark are not participating in this legislation. There is a proposal to replace this measure: COM(2009) 136.
[706] COM(2000) 757, 6.
[707] Tampere Presidency Conclusions, para. 23.
[708] See also Art. 83(1) TFEU on criminal offences and sanctions.
[709] For a full discussion, see M. Hedemann-Robinson, 'An overview of recent legal developments at Community level in relation to third country nationals resident within the European Union, with particular reference to the case law of the European Court of Justice' (2001) 38 *CMLRev*. 525.

State's right to decide whether to admit a Turkish national,[710] nor the conditions under which they may take up their first employment, (subject to the application of the legislation outlined above in particular the Family Reunion Directive and the Long-term Residents Directive)[711] it does give Turkish workers an increasing number of rights the longer they are employed in the host state. The Agreement also does not give Turkish nationals the right to move between one EU state and another[712] but, unlike any other Union agreement (apart from the EEA and the EU/Swiss Treaty on free movement of persons), Article 12 of the Turkey Association Agreement envisages eventual free movement of persons between the Union and Turkey, guided by the principles laid down in Articles 45–7 TFEU.[713] This objective has influenced the Court's interpretation of the Agreement and the secondary legislation,[714] particularly Decision 1/80 of the Association Council on the development of the Association. This prompted the Court to observe in *Kurz*[715] that the aim and broad logic of Decision 1/80 is to 'seek to promote the integration of Turkish workers in the host Member State'. In this chapter we shall focus on the most litigated of the rules, those concerning the right to work for Turkish workers and their family members. We shall focus on these rules by way of comparison to the rights enjoyed by EU workers under Article 45 TFEU.

2. EMPLOYMENT RIGHTS

2.1 Introduction

For the purposes of this chapter the relevant secondary legislation is Decision 1/80[716] fleshing out the rights of Turkish workers already legally resident and employed in the EU. Article 6(1) provides that a Turkish worker, duly registered as belonging to the labour force of a Member State, is entitled to:

• the renewal of his permit to work for the same employer, if a job is available, after *one year's* legal employment

• respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that state, for the same occupation, after *three years* of legal employment and subject to the priority to be given to workers of the Member States of the Union

• free access in that Member State to any paid employment of his choice, after *four years* of legal employment.

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[710] Case C–237/91 *Kus* v. *Landeshauptstadt Wiesbaden* [1992] ECR I–6781, para. 25; Case C–434/93 *Ahmet Bozkurt* v. *Staatssecretaris van Justitie* [1995] ECR I–1475, para. 21.

[711] Cf. the EU legislation outlined above which increasingly gives the EU competence over these matters. For discussion, see S. Peers, 'EC immigration law and EC association agreements: Fragmentation or integration?' (2009) *ELRev*. 628 discussing Case C–228/06 *Soysal* [2009] ECR I–1031.

[712] Case C–171/95 *Tetik* v. *Land Berlin* [1997] ECR I–329, para. 29; Case C–325/05 *Derin* v. *Landkreis Darmstadt-Dieburg* [2007] ECR I–6495, para. 66. See M. Cremona, 'Citizens of third countries: Movement and employment of migrant workers within the EU' [1995/2] *LIEI* 87, 94.

[713] Art. 12 is not directly effective since it sets out a programme and its provisions are not sufficiently precise and unconditional: Case 12/86 *Demirel* v. *Stadt Schwäbisch Gmünd* [1987] ECR 3719, paras. 23 and 25. Art. 36 of the additional protocol annexed to the Association Agreement lays down the timetable for the progressive attainment of freedom of movement of workers. This is also not directly effective: Case 12/86 *Demirel* [1987] ECR 3719, paras. 23 and 25.

[714] See, e.g., Case C–1/97 *Birden* v. *Stadtgemeinde Bremen* [1998] ECR I–7747. See also Case C–416/96 *El-Yassini* v. *Secretary of State for the Home Department* [1999] ECR I–1209 where the Court found that its interpretation of the EEC–Turkey Association Agreement did not apply to the EEC–Morocco agreement because the Morocco Agreement did not provide for consideration of Morocco's accession to the EU, nor was it aimed at progressively securing freedom of movement for workers.

[715] Case C–188/00 [2002] ECR I–10691, para. 45.

[716] This is directly effective: Case C–192/89 *Sevince* v. *Staatssecretaris van Justitie* [1990] ECR I–3461, para. 26. For a statement of the supremacy of Dec. 1/80 see Case C–188/00 *Kurz* [2002] ECR I–10691, para. 68.

This shows that while Member States retain the competence to regulate both the entry to their territory and the conditions under which Turkish nationals take up their first employment,[717] Article 6(1) of Decision 1/80 applies after the first year's employment.[718] The basic premises under Article 6(1) is that the longer Turkish workers are employed, the more integrated they are considered in the host state and so the greater the rights they enjoy under that Decision. This means that after four years employment the individual is no longer dependent on the continuing existence of the conditions for access to the rights laid down in the three indents. This means s/he enjoys much greater freedom, including temporarily interrupting the employment relationship.[719] By contrast, those still building up the four years must be engaged in legal employment for one, three, or four years, without any interruption, except for that provided in Article 6(2). This provides that annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness are treated as periods of legal employment. By contrast, periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness are not to be treated as periods of legal employment, but are not to affect rights acquired as the result of the preceding period of employment.[720]

2.2 The Criteria under Article 6(1)

The rights laid down in Article 6(1) are conditional on (1) being a worker, (2) being 'duly registered as belonging to the labour force of a Member State', and (3) on a period of 'legal employment'. The Court enforces these specific requirements of Article 6(1) with some rigour so as not to 'undermine the coherence of the system set up by the Association Council with a view to gradually consolidating the position of Turkish workers in the host Member State'.[721]

The first condition, being a worker, is interpreted consistently with the equivalent term in Article 45 TFEU[722] and so we shall not discuss it further here. The second condition, 'duly registered as belonging to the labour force of a Member State', requires the national courts to consider whether the legal relationship of employment can be located within the territory of a Member State, or retains a sufficiently close link with that territory, taking account of the place where the person was hired, the territory on or from which the paid employment was pursued, and the applicable national legislation in the field of employment and social security law.[723]

In *Altun*[724] the Court elaborated further. It said the concept of being 'duly registered' as belonging to the labour force embraced all workers who have met the conditions laid down by law or regulation in the host Member State and who were thus entitled to pursue an occupation in its territory. It said that notwithstanding a temporary interruption of the employment relationship, a Turkish worker continued to be duly registered as belonging to the labour force in the host Member State during a period reasonably necessary for him to find other paid employment, regardless of the cause of the absence of the individual from the labour force, provided that that absence is temporary. Therefore workers and apprentices are considered duly registered as belonging to the labour force[725] as is an individual, like Mr Altun, who is involuntary unemployed following the declaration of insolvency of

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[717] Case C–294/06 *R (ex p. Payir*) v. *Secretary of State for the Home Department* [2008] ECR I–203.
[718] Case C–237/91 *Kus* [1992] ECR I–6781, para. 25; Case C–434/93 *Bozkurt* [1995] ECR I–1475, para. 21.
[719] Case C–230/03 *Sedef* v. *Freie und Hansestadt Hamburg* [2006] ECR I–157, para. 46.
[720] Case C–4/05 *Güzeli* v. *Oberbürgermeister der Stadt Aachen* [2006] ECR I–10279 confirms that if one of these situations occurs (i.e., involuntary unemployment or long-term sickness), this does not affect the rights that the Turkish worker has already acquired owing to preceding periods of employment. Note in Case C–230/03 *Sedef* [2006] ECR I–157 the lenient and practical approach the Court took to the phrase 'involuntary unemployment duly certified by the relevant authorities' in the case of a Turkish seaman employed in Germany for 15 years.
[721] Case C–230/03 *Sedef* [2006] ECR I–157, para. 37.
[722] See Ch. 9: Case C–1/97 *Birden* [1998] ECR I–7747, para. 23; Case C–188/00 *Kurz* [2002] ECR I–10691, para. 30; Case C–294/06 *ex p. Payir* [2008] ECR I–203; Case C-14/09 *Genc* v. *Land Berlin* [2010] ECR I-000, para. 27.
[723] Case C–98/96 *Ertanir* [1997] ECR I–5179, para. 39; Case C–4/05 *Güzeli* [2006] ECR I–10279, para. 37.
[724] Case C–337/07 *Altun* v. *Stadt Böblingen* [2008] ECR I–10323, paras. 23–6.
[725] Case C–188/00 *Kurz* [2002] ECR I–10691, para. 45.

the undertaking in which he was working. A Turkish worker is excluded from the labour force only if he no longer has any chance of rejoining the labour force or has exceeded a reasonable time limit for finding new employment after the end of the period of inactivity.

In respect of the third condition, 'legal employment', the Court has said that the phrase 'presupposes a stable and secure situation as a member of the labour force'[726] and the existence of an undisputed right of residence.[727] The Court has so far found that there was no legal employment in two situations: first, in *Sevince*[728] where a Turkish worker was able to continue in employment only by reason of the suspensory effect deriving from his appeal against deportation and, secondly, in *Kol*[729] where a Turkish national was employed under a residence permit issued to him as a result of fraudulent conduct (he had entered a marriage of convenience with a German national), for which he was subsequently convicted.

The Court has also strictly enforced the periods of time laid down in the three indents of Article 6(1). This can be seen in *Eroglu.*[730] A Turkish worker worked lawfully for employer A for one year. She then worked for employer B. Subsequently, she sought an extension of her work permit in order to work for employer A again. The Court said that she was not entitled to do this under Article 6(1) because this would allow the worker to change employers under the first indent before the expiry of the three years prescribed in the second indent.[731]

The third indent of Article 6(1) concerns those Turkish workers who are duly integrated into the labour market. They have the right to give up one job to seek any other job.[732] The key feature here is that the worker must be deemed still to be a member of the labour force during any periods of absence from work. Therefore, in *Bozkurt*[733] the Court ruled that a Turkish national was not entitled to remain in the host state if he had reached retirement age or had suffered an industrial accident which left him totally and permanently unfit for further employment, since he was considered to have left the workforce for good. However, where the incapacity was only temporary and did not affect his fitness to continue exercising his right to employment he could still enjoy the right to join the labour force. In *Nazli*[734] the Court took this one stage further and said that a temporary break caused by detainment pending trial did not cause the Turkish worker to forfeit his rights under the third indent of Article 6(1), provided that he found a new job within a reasonable period after his release. In *Dogan*[735] the Court extended the ruling in *Nazli* to a Turkish worker imprisoned for four years. The Court said that the effectiveness of the rights to employment and residence conferred on Turkish workers by the third

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726 Ibid., para. 30.

727 Ibid., para. 48. This even includes short periods during which the Turkish worker did not hold a valid residence or work permit: Case C–98/96 *Ertanir* [1997] ECR I–5179, para. 69.

728 Case C–192/89 *Sevince* [1990] ECR I–3461, para. 32. In a similar vein, see also Case C–237/91 *Kus* [1992] ECR I–6781, para. 18 where the Court ruled that a worker did not fulfil the requirement of 'legal employment' where a right of residence was conferred on him only by the operation of national legislation permitting residence in the host country pending completion of the procedure for the grant of the residence permit, on the ground that he had been given the right to remain and work in that country pending a final decision on his right of residence.

729 Case C–285/95 *Kol* v. *Land Berlin* [1997] ECR I–3069, para. 25. See in a similar vein Case C–37/98 *R.* v. *Secretary of State for the Home Department, ex p. Savas* [2000] ECR I–2927, para. 67 concerning a Turkish national unlawfully present in the host Member State.

730 Case C–355/93 *Eroglu* v. *Land Baden-Württemberg* [1994] ECR I–5113, para. 14. See also Case C–386/95 *Eker* v. *Land Baden-Württemberg* [1997] ECR I–2697 where the Court ruled that if the worker left employer A before the expiry of one year to work for employer B, the worker had to work for a full year for employer B before he was entitled to the renewal of work and residence permits.

731 See also Case C–4/05 *Güzeli* [2006] ECR I–10279, para. 45, where the Court said that eight months' employment was insufficient under the first indent.

732 Case C–340/97 *Nazli* v. *Stadt Nürnberg* [2000] ECR I–957, para. 35.

733 Case C–434/93 *Bozkurt* [1995] ECR I–1475, paras. 39–40.

734 Case C–340/97 *Nazli* [2000] ECR I–957, para. 41.

735 Case C–383/03 *Dogan* v. *Sicherheitsdirektion für das Bundesland Vorarlberg* [2005] ECR I–6237.

indent applied regardless of the cause of absence from the labour force, provided that the absence was temporary.[736]

The decision in *Bozkurt* highlights the unfavourable position in which Turkish nationals find themselves in the absence of express legislation, equivalent to what was Regulation 1251/70 on the right to remain for EU nationals (now the Citizens' Rights Directive (CRD)), which protects their position. While the Long-term Residents Directive 2003/109 may now cover some Turkish workers in this position, the rights of residence under the Turkey Association Agreement, while among the most extensive of all the Union agreements, are still firmly tied to the exercise of economic activity (actual employment) and are far from matching the general rights of residence available to Union citizens.[737]

Although the Court has been strict in the application of the criteria laid down in Article 6(1) to Turkish workers, it has also required the Member States to satisfy their side of the agreement. So, Member States cannot deprive Turkish workers of the rights laid down by Article 6(1) nor 'impede the exercise' of such rights.[738] So, in *Ertanir*[739] the Court said that a German rule permitting specialist chefs to reside in Germany for no more than three years was incompatible with Article 6(1).[740] In *Sevince*[741] the Court said that the employment rights of Turkish workers laid down by Article 6(1) necessarily implied a right of residence because, in the absence of such a right, access to the labour market and the right to work would be deprived of all legal effect.[742]

2.3 Other Rights

Once they are duly registered as belonging to the labour market of the host state, Turkish workers do enjoy equal treatment with Union workers in respect of remuneration and other conditions of work under Article 10 of Decision 1/80.[743] In *Wählergruppe Gemeinsam Zajedno*[744] the Court interpreted the phrase 'other conditions of work' to include the right for Turkish workers to stand as candidates in elections to bodies representing the legal interests of workers. Therefore, Austrian rules restricting eligibility for election to a body such as a chamber of workers to Austrians only breached Article 10.

Worker representation is one of three areas where Turkish workers have more rights than those TCNs covered by the Long-term Residents Directive 2003/109 (considered above). The other two areas are protection from expulsion and access to employment. However, in respect of access to social assistance and equal treatment, Directive 2003/109 offers more favourable rights than Decision 1/80. As Groenendijk points out,[745] the Long-term Residents Directive grants Turkish citizens and other TCNs the right to look for work, to live and work in other Member States and the Directive on Family Reunification gives them the right to family reunion. In this way the directives complement and supplement the provisions under Decision 1/80.

3. FAMILY RIGHTS

3.1 The Right to Employment

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736 Para. 20.
737 Considered in Ch. 12.
738 Case C–188/00 *Kurz* [2002] ECR I–10691, para. 67. The rights in Art. 6(1) are also directly effective: Case C–188/00 *Kurz* [2002] ECR I–10691, para. 26.
739 Case C–98/96 *Ertanir* [1997] ECR I–5179, para. 34: despite the wording of Art. 6(3): 'The procedures for applying paragraphs 1 and 2 shall be those established under national rules.'
740 See also Case C–36/96 *Günaydin* v. *Freiestaat Bayern* [1997] ECR I–5143, paras. 36–8.
741 Ibid., para. 29.
742 See also Case C–237/91 *Kus* [1992] ECR I–6781, para. 23.
743 This provision is directly effective: Case C–171/01 *Wählergruppe Gemeinsam Zajedno/Birklikte Alternative und Grüne GewerkschafterInnen/UG* [2003] ECR I–4301, para. 57.
744 Ibid.
745 K. Groenendijk, above n. 164, 442.

The first paragraph of Article 7 of Decision 1/80 provides that the members of the family of a Turkish worker who is 'duly registered as belonging to the labour force of a Member State'[746] (with no reference this time to the concept of 'legal employment' which appears in Article 6(1) of Decision 1/80) and who have been 'authorized to join him' are, subject to the priority to be given to workers of Member States of the Union, entitled to:[747]

• respond to any offer of employment after they have been legally resident for at least three years in that Member State

• enjoy free access to any paid employment of their choice provided that they have been legally resident there for at least five years.[748]

According to *Kadiman*,[749] the purpose of this first paragraph is to 'create conditions conducive to family unity', first by enabling family members to be with a migrant worker and then by consolidating their position by granting them the right to obtain employment in the host state (and a concomitant right of residence[750]). Therefore, the host state could require actual cohabitation by the Turkish workers[751] and their family members during the first three years, even where there were accusations of domestic violence, subject to absences for a reasonable period and for legitimate reasons in order to take holidays or visit family in Turkey.[752] The Court said that the co-habitation requirement was intended to prevent Turkish nationals from evading the stricter requirements laid down in Article 6 by entering sham marriages and then taking advantage of the generous requirements of Article 7.[753]

However, the Court has made clear that cohabitation does not necessarily mean marriage (unlike the approach adopted under Article 10 of Regulation 1612/68, now Articles 2–3 CRD). In *Eyüp*[754] a Turkish couple living in Austria divorced but continued to live together. During this period of cohabitation they had a further four children. He was a worker and she looked after the children. They then remarried and continued to cohabit. Since they constantly maintained a common legal residence within the meaning of Article 7 the Court said that the period of cohabitation counted towards calculating the periods of legal residence. In *Ayaz*[755] the Court drew on the definition of family members under Regulation 1612/68 (now the CRD) to help determine the meaning of the equivalent term in Decision 1/80. It ruled that the phrase did not require a blood relationship: stepchildren were also covered.

However, Article 7 does not affect the power of the Member State to authorize family members to join the Turkish worker,[756] to regulate their stay until they become entitled to respond to any offer of employment, and, if necessary, to allow them to take up employment before the expiry of the initial

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746 This is interpreted in the same was as the equivalent phrase in Art. 6(1): Case C–337/07 *Altun* [2008] ECR I–000, para. 28.

747 The first para. of Art. 7 is directly effective: Case C–351/95 *Kadiman* v. *Freiestaat Bayern* [1997] ECR I–2133, para. 28. See, generally, G. Barratt, 'Family matters: European Community Law and third country family members' (2003) 40 *CMLRev*. 369.

748 Case C–373/03 *Aydinili* v. *Land Baden-Württemberg* [2005] ECR I–6181: a Turkish national who has resided for five years did not forfeit rights under this provision due to prolonged absence from the labour market due to imprisonment.

749 Case C–351/95 *Kadiman* [1997] ECR I–2133, para. 33.

750 Case C–325/05 *Derin* [2007] ECR I–6495, para. 47.

751 The Turkish workers themselves had to be duly registered as belonging to the labour force of that state: Case C–337/07 *Altun* [2008] ECR I–10323, para. 32.

752 Ibid., para. 48.

753 Ibid., para. 38.

754 Case C–65/98 *Safet Eyüp* v. *Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg* [2000] ECR I–4747.

755 Case C–275/02 *Ayaz* v. *Land Baden-Württemberg* [2004] ECR I–8765, para. 45.

756 Case C–467/02 *Cetinkaya* v. *Land Baden-Württemberg* [2004] ECR I–10895, para. 26: Art. 7 also applies to family members actually born in the host state. The position of a Turkish worker's family members is therefore less favourable than an EU worker's family members who enjoy an unconditional right to install themselves with the migrant Union workers under *Union* law, not national law: Case C–325/05 *Derin* [2007] ECR I–6495, paras. 61–3. However, the Family Reunification Dir. 2003/86 may now affect the Member State's powers.

period of three years,[757] always subject to the provisions of the European Convention on Human Rights.[758] Union law requires only that during the three-year period members of the worker's family must be granted a right of residence.[759] Once those three years have expired, Member States can no longer attach conditions to the residence of a member of a Turkish worker's family.[760] Once five years have expired, the person derives 'an individual employment right directly from Decision 1/80' and 'a concomitant right of residence'.[761]

3.2 The Position of a Turkish Worker's Children

The second paragraph of Article 7,[762] which is more favourable than the first paragraph,[763] provides that children of Turkish workers who have completed a course of vocational training[764] in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided that one of their parents has been legally employed in the Member State for at least three years. Since this paragraph is not intended to create conditions conducive to family unity, the Court said in *Akman*[765] that the child's right to respond to any offer of employment was not conditional on the Turkish worker parent residing in the host Member State at the time when the child wished to take up employment following vocational training. In *Eroglu*[766] the Court extended its rulings in *Sevince* and *Kus* to the second paragraph of Article 7, saying that 'any offer of employment necessarily implies the recognition of a right of residence for that person'.[767]

Finally, in *Derin*[768] the Court considered how the rights under Article 7 could be lost. One way would be because the individual constitutes, on account of his own conduct a 'genuine and sufficiently serious threat to public policy, public security or public health', in accordance with Article 14(1). The second way is that the individual has left the territory of the host state for a significant length of time without legitimate reason. The Court has emphasized that these are the only ways that an individual can lose their rights under Article 7. Therefore, a Turkish national cannot be deprived of his rights either because he was unemployed on account of being sentenced to a term of imprisonment, even one of several years' duration, or because he never acquired rights relating to employment and residence pursuant to Article 6(1) of that decision, or because he was 'not active on the labour market for several years' (i.e., he attended various training course but never completed them).[769]

4. DEROGATIONS

[757] Case C–351/95 *Kadiman* [1997] ECR I–2133, para. 32.
[758] Case C–325/05 *Derin* [2007] ECR I–6495, para. 64.
[759] Ibid., para. 29.
[760] Case C–329/97 *Ergat* v. *Stadt Ulm* [2000] ECR I–1487.
[761] Ibid., para. 40. See also Case C–467/02 *Cetinkaya* [2004] ECR I–10895, paras. 32–3. Failure to obtain a residence permit in time can be punished, but only by penalties which are proportionate and comparable to those for minor offences committed by nationals but, as with Union nationals, this does not include deportation which would deny the very right of residence (Case C–467/02 *Cetinkaya* [2004] ECR I–10895, paras. 56–7). Therefore, administrative documents such as a residence permit are only 'declaratory of the existence of those rights and cannot constitute a condition for their existence' (Case C–434/93 *Bozkurt* [1995] ECR I–1475, para. 30).
[762] The 2nd para. of Art. 7 is directly effective: Case C–355/93 *Eroglu* [1994] ECR I–5113, para. 17.
[763] Case C–325/05 *Derin* [2007] ECR I–6495, para. 42.
[764] See also Art. 9, which gives Turkish children residing legally in a Member State access to education and training courses on the same terms as nationals as well as possible access to 'benefit from advantages provided for under the national legislation in that area'. According to Case C–374/03 *Gürol* v. *Bezirksregierung Köln* [2005] ECR I–6199, Art. 9 is directly effective and the 'advantages' include grants.
[765] Case C–210/97 *Akman* v. *Oberkreisdirektor des Rheinisch-Bergischen-Kreises* [1998] ECR I–7519, paras. 43–4. See also Case C–462/08 *Bekleyen* [2010] ECR I–000.
[766] Case C–355/93 *Eroglu* [1994] ECR I–5113.
[767] Para. 20.
[768] Case C–325/05 *Derin* [2007] ECR I–6495, para. 54.
[769] Case C–453/07 *Er* v. *Wetteraukreis* [2008] ECR I–7299, para. 31.

Article 14(1) allows states to derogate from the rights provided on the grounds of public policy, public security, and public health.[770] The Court interprets these provisions consistently with those under the EU Treaties (e.g. Article 45(3) TFEU),[771] as far as possible.[772] In *Derin*[773] the Court set out the framework according to which the national authorities could act: they are 'obliged to assess the personal conduct of the offender and whether it constitutes a present, genuine and sufficiently serious threat to public policy and security, and in addition they must observe the principle of proportionality'. In particular, a measure ordering expulsion based on Article 14(1) may be taken only if the personal conduct of the person concerned indicates a specific risk of new and serious prejudice to the requirements of public policy. Consequently, such a measure cannot be ordered automatically following a criminal conviction and with the aim of general deterrence.

E. CONCLUSIONS

This chapter started with the basic dichotomy of insiders versus outsiders, with insiders—nationals of one of the Member States—being in a favoured position. However, on closer examination the rules on EU citizens and those on TCNs show that this picture is less accurate than would at first appear. EU nationals who do not migrate or who are not economically active may find themselves marginalized by the application of rules which prioritize those who exercise their (economic) freedom of movement, while TCNs now may find that, as a result of developments under Title V of Part Three TFEU, they begin to enjoy something of a quasi- or civic citizenship.[774] Of course, this characterization is also not complete. Decisions of the Court of Justice, in particular in *Grzelczyk*[775] and *Baumbast*,[776] have done much to give rights to migrant citizens who are not economically active while the advent of the Charter and developments in the field of social, consumer, and environmental policy have benefited citizens who do not migrate. Meanwhile, the measures which have the most inclusive effect on TCNs still fall far short of Held's three-stranded definition of citizenship (considered in detail in Chapter 12): while legally resident TCNs have some rights, owing to the absence of any clear Union competence they have no ability to participate in the political process in the host state; nor do they have a strong sense of membership. As we have seen, it has already proved difficult for the EU to foster a sense of membership among EU nationals; this task may prove harder in respect of TCNs who come from extraordinarily diverse backgrounds.[777]

However, it is striking that two principles have been used to combat the sense of exclusion experienced by both EU nationals and TCNs: integration and, to a limited extent, solidarity. The language of integration underpinned the Court of Justice's justification for broadening the rights enjoyed by EU migrant workers and their families. It is the same language which has been used by the Heads of State at Tampere, by the Commission in its two Communications[778] and now by the Lisbon Treaty in the concept of 'fair treatment' in respect of TCNs. However, when considering the position of TCNs the Commission makes clear that integration entails bilateral commitments:[779]

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[770] Art. 14(1). This is an exhaustive list: Case C–502/04 *Torun* v. *Stadt Augsburg* [2006] ECR I–1563.
[771] See further Ch. 13.
[772] Case C–467/02 *Cetinkaya* [2004] ECR I–10895, para. 39, which also confirms that the case law on derogations under Dir. 64/221 (now CRD) also applies to Dec. 1/80. Three cases are currently pending on whether the same applies to the provisions of the CRD. See also Case C–136/03 *Dörr* v. *Sicherheitsdirektion für das Bundesland Kärnten* [2005] ECR I–4759; Case C–349/06 *Polat* v. *Rüsselsheim* [2007] ECR I–8167, para. 29 Case C–97/05 *Gattoussi* v. *Stadt Rüsselsheim* [2006] ECR I–11917, para. 41 (in the context of the Eur-Mediterranean Agreement).
[773] Case C–325/05 *Derin* [2007] ECR I–6495, para. 74.
[774] COM(2003) 336, 30 and N. Reich, 'Union citizenship: Metaphor or source of rights?' (2001) 4 *ELJ* 4, 18.
[775] Case C–184/99 [2001] ECR I–6193.
[776] Case C–413/99 *Baumbast and R* [2002] ECR I–7091.
[777] For a critique, see N. Barber, 'Citizenship, nationalism and the European Union' (2002) 27 *ELRev*. 241.
[778] COM(2000) 757 and COM(2003) 336.
[779] COM(2003) 336, 17–18.

integration should be understood as a two way process based on mutual rights and corresponding obligations of legally resident third country nationals and the host society which provides for full participation of the immigrant.
It continued that this implies on the one hand that it is the responsibility of the host society to ensure that the formal rights of immigrants are in place so that the individual can participate in economic, social, cultural, and civil life but, on the other, 'that immigrants respect the fundamental norms and values of the host society and participate actively in the integration process, without having to relinquish their own identity'. In this respect the Union is expecting more of TCNs than it does of migrant EU citizens.[780]

Solidarity has also been used to justify giving rights to both migrant citizens and TCNs.[781] The language of solidarity was used by the Court in *Grzelczyk* to justify giving limited social advantages to a migrant student. It is also used in the Commission's Communication on illegal immigration[782] to justify operational cooperation, and thus financial cooperation, between the Member States to keep illegal immigrants out of the EU or to return them to their Member States, language which is repeated in the strongest terms in the Lisbon Treaty.[783] In this way solidarity is being used to attain both inclusionary and exclusionary results.

[780] See also EU Council, *The Hague Programme: Strengthening freedom, security and justice in the European Union*, Council Doc. 16054/04, 11.
[781] Ibid., 4.
[782] COM(2003) 323, 17.
[783] Art. 80 TFEU.