

The EU Charter of Fundamental Rights

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The Charter of Fundamental Rights

- The full legal status accorded to the Charter is probably the single most important change contained in the new post-Lisbon treaty framework.
- The Charter contains 54 articles and six titles:
 1. Dignity, articles 1-5
 2. Freedoms articles, 6-19 (this is where most of the ECHR rights are to be found)
 3. Equality, articles 20-26
 4. Solidarity, articles 27-38
 5. Citizens' rights, articles 39-46
 6. Justice rights, articles 47-50.

The Charter

What are the sources of the Charter rights?

- This is set out in the Explanations:
- The ECHR is the source of 17 rights; the EU's Social Chapter which provides the basis for the chapter on solidarity covering Art. 27 to Art. 35; the other rights have their origins in international treaties, national constitutions and the case law of the European Court of Justice.

The Charter – Art 51(1)

- Article 51 (Scope)

“1. The provisions of this Charter are addressed to the institutions and bodies 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.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”
- The key word is “implementing Union law”.
- Article 6 (1), TEU post-Lisbon: The Charter is to be interpreted with due regard to the Explanations.
- Is the phrase ‘implementing Union law’ synonymous with ‘scope of Community law’ as used by the ECJ in most of its ‘common law’ on the extent of the ECJ’s power to review national law for its compliance with rights acknowledge in EC law.
- It is unlikely that the phrase “implementing Union law” as interpreted in the light of the Explanations will restrict the application of the Charter and prevent it from being applied to national law, at least to national law in so far as it is deemed to be connected with EU law in some sense. 15 years of post Keck case law suggest that the four freedoms will continue to provide a vehicle for revising a wide range of national measures with a view to ensuring compliance with EU law. A good recent example is the Country Alliance case where the House of Lords opined that articles 38 and 49 Charter were at least potentially engaged by the Hunting Act.

The Charter – Art. 52(5)

- Article 52(5) – Rights/principles

“The provisions of this Charter which contain principles may be implemented by legislature 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.**”

- Art. 52(5) was added at the behest of the UK government, and it is very unclear how principles can be meaningfully distinguished from rights.
- This was part of a more general problem concerning the relationship between Charter rights and rights as general principles of EU law
- David Anderson has suggested that a potential solution to this problem might be to treat the Charter as *lex specialis*.

Case 126/86 Fernando Zaera v Institut Nacional

Summary

- 1 . ARTICLE 2 OF THE TREATY DESCRIBES THE TASK OF THE EUROPEAN ECONOMIC COMMUNITY . THE AIMS LAID DOWN IN THAT PROVISION ARE CONCERNED WITH THE EXISTENCE AND FUNCTIONING OF THE COMMUNITY; THEY ARE TO BE ACHIEVED THROUGH THE ESTABLISHMENT OF THE COMMON MARKET AND THE PROGRESSIVE APPROXIMATION OF THE ECONOMIC POLICIES OF MEMBER STATES, WHICH ARE ALSO AIMS WHOSE IMPLEMENTATION IS THE ESSENTIAL OBJECT OF THE TREATY .
- **THE PROMOTION OF AN ACCELERATED RAISING OF THE STANDARD OF LIVING, IN PARTICULAR, WAS ONE OF THE AIMS WHICH INSPIRED THE CREATION OF THE EUROPEAN ECONOMIC COMMUNITY AND WHICH, OWING TO ITS GENERAL TERMS AND ITS SYSTEMATIC DEPENDENCE ON THE ESTABLISHMENT OF THE COMMON MARKET AND PROGRESSIVE APPROXIMATION OF ECONOMIC POLICIES, CANNOT IMPOSE LEGAL OBLIGATIONS ON MEMBER STATES OR CONFER RIGHTS ON INDIVIDUALS .**
- 2 . THE FACT THAT THE OBJECTIVES OF SOCIAL POLICY LAID DOWN IN ARTICLE 117 ARE IN THE NATURE OF A PROGRAMME DOES NOT MEAN THAT THEY ARE DEPRIVED OF ANY LEGAL EFFECT . **THEY CONSTITUTE AN IMPORTANT AID FOR THE INTERPRETATION OF OTHER PROVISIONS OF THE TREATY AND OF SECONDARY COMMUNITY LEGISLATION IN THE SOCIAL FIELD . THE ATTAINMENT OF THOSE OBJECTIVES MUST NEVERTHELESS BE THE RESULT OF A SOCIAL POLICY WHICH MUST BE DEFINED BY THE COMPETENT AUTHORITIES .**

The Charter – The Protocol applicable to Poland and the UK

- Protocol 7 applicable to Poland and the UK

“Article 1

1. The Charter does not extend the ability of the Court of Justice, or any court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law.”

“Article 2

To the extent that a provision of a Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.”

Observations:

- The first paragraph **will ensure that no court – neither the national court nor the ECJ – will be able annul any provision of UK national law on the grounds that it is in breach with any of the Charter rights.**
- The Protocol is **often wrongly described as an opt-out**, implying that whereas in most other EU Member States the Charter will generally apply not only to EU law but likewise to all national law implementing obligations under EU law, the UK’s position governed as it is by **Protocol 7 of the Treaty of Lisbon** must somehow be different from that of other M.St.s.

There are several reasons why such a scenario is extremely unlikely:

- 1. The Court of Justice will not merely use the Charter to annul EU law or implementing national legislation. It will **also refer to the Charter as a source for interpreting the EC and EU Treaties as well as Community legislation** adopted under the treaties. If the ECJ gives a ruling in a case arising outside the UK on a measure which also applies in the UK, **the duty to interpret the measure in accordance with the ruling arises, not under the Charter, but under the UK’s other Treaty obligation.**

The Charter – The Protocol II

- **2. The ECJ may also invoke the ‘duty of loyal cooperation’ under old Art. 10 EC (now Art. 4 TEU)**
- **3. Does the previous case law of the ECJ on accepted Community rights survive the incorporation of the Charter. If so, the ECJ remains capable of reviewing all UK implementing legislation in so far as such laws might conflict with rights deemed immanent in Community law.**
- **4. Finally, at the same time the principle of the uniform application of Community law which is well-established and entrenched in Community law since the early days of the Community, will prevent the Court from developing two lines of interpretation for Community law – one based on the Charter for most other Members States and a Charter-free interpretation for the UK.**
- **In summary, even if the ECJ will draw on the Charter as a new source for interpreting measures of Union law such as Directives, the resulting interpretation would be binding in the UK, because of the UK’s treaty obligations, notably the duty of loyal cooperation under Art 10 EC and, in a more restricted sense, also under Article 3 TEU. These obligations are not excluded by the Protocol. On the contrary, and as the recitals make clear, the Protocol is subject to those obligations. Indirectly, therefore, the Charter will affect law in the UK – it will do so simply by influencing the interpretation of Community law which is directly applicable or directly effective within the UK.**

The Charter – Accession to the ECHR

- Rationale: the Member States have transferred more and more powers to the EU but the latter is not answerable to Strasbourg for the powers it has acquired.
- Case examples: *Matthews*, and *Bosphorus v. Ireland*, paras 55-6, 115
- With the *Bosphorus* judgment, the ECtHR also introduced a new theory for justifying interference with human rights by Member States when applying Community acts. The Court had always emphasized that it is sufficient *in abstracto* that an act has been adopted by an international organization that provides an equivalent standard of human rights protection compared to the ECHR. In the *Bosphorus* judgment, **the Court applied a more concrete test to conclude to the general equivalence of human rights protection at Community level by reviewing the Community's substantive guarantees and procedural mechanisms for potential 'manifest deficiency'**. On the one hand, the ECtHR clarified its ambition to examine the specific circumstances of future cases in order to effectively review potential shortcomings in the protection of human rights at Community level. On the other hand, this also indicates that the Court will not fully review Community acts, but rather engage in a general abstract review of the Community system.
- **Accession** is now rendered possible by the Treaty of Lisbon. However, accession would pose the following big questions:
 - what would happen to the *Solange* doctrine,
 - would the EU continue to profit from a presumption of compliance,
 - should there continue to be a lower level of scrutiny for the EU?
- A problem would arise in particular, if a Member State were taken to Strasbourg over a breach of the Convention by a national law implementing EU law. Who would be held responsible? Could EU law continue to enjoy the *Bosphorus* presumption when the reason for the presumption has gone?

The Charter – Parallel jurisdiction of ECJ and ECtHR

- An important consequence of giving the Charter legally binding status will be that the ECJ will be increasingly, and more often even than so far, asked to interpret the ECHR, given that many Charter rights are derived from that instrument. The **risk is that a difference in approach may develop between the Strasbourg and Luxembourg Courts**, including differences over criminal matters.
- Cases:
 - KB v NHS [2004] Case C-117/01 ECR-I – 541
 - Grant v South West Trains Case C-249/96
 - P v S Cases C-13-94For all these, see Craig/de Burca, EU law, 4th ed, pp. 408-09
- Key Problem: **How to avoid divergence!**
- Article 52(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 the 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.”
- Analogy:

Human Rights 1998: Duty of UK courts to take account of the jurisprudence of the ECtHR.
- **Proliferation of HR regimes in Europe**

The problem of Overlapping/Parallel HR jurisdiction also exists in the relationship between the national legal orders of Member States and the ECJ and ECtHR respectively, esp in the two courts’ respective relationship with national constitutional courts, where the proliferation of human rights jurisdictions in Europe may likewise lead to conflicting jurisdictional claims and rights interpretations.

In the UK: litigants may challenge national law both on Charter and HRA grounds provided the measures can be shown to have some tenuous relationship with EU law. What will happen if national courts and the ECJ disagree about whether the national law in question can be regarded as ‘implementing Union law’?

The Charter – Other problems and effects

- **The conflict between Fundamental Freedoms and Charter rights**
- Traditionally the four freedoms and the prohibitions of sex and national discrimination were the constitutional rights of the EU legal order.
- The Treaty of Lisbon accords the Charter the same legal status as the treaties so that there exists no hierarchy of norms between the freedoms and the charter.
- How will the emerging conflict between fundamental freedoms versus charter rights be resolved by the Court of Justice?
- **Greater Legal Uncertainty**
Recent ECJ case law suggests that human rights in the EU legal order tend to make decisions more unpredictable in cases where HRs conflict with each other and with other principles of Community law.
- *Schmidberger v Austria* Case C-112/00
ECJ: freedoms of expression and of assembly as recognized by the Charter and the ECHR may take precedence over the Community free movement principle
- *Omega Spielhallen* Case C-36/02
ECJ: right to human dignity may likewise justify restriction of the freedoms to provide trans-national services and of establishment.
- *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* Case C-438/05
ECJ appears to suggest that the Charter right to strike may only justify restriction of the free movement of goods if it meets additional conditions, esp.
if it represents overriding reasons of public interest, such as the protection of certain works, and the principle of proportionality.
- Possible Interpretations:
- Some commentators suggest the Viking/Laval may be the beginning of the ECJ's development of two classes of rights doctrine similar to the distinction between unqualified/qualified rights in the ECHR.
- The more realistic view may be that recent cases including *Viking/Laval* indicate that the Court was developing its line in *Schmidberger* which confirms that there is **no clear hierarchy**. The Court appears to take the view that the two sets of provisions **should be made to co-exist pragmatically and as best as possible on a case-by-case basis**.

The Charter - **C-112/00 Schmidberger v Republik Österreich**

- 68 ... account should thus be taken solely of the **objective** pursued by the national authorities ... to authorise or not to ban the demonstration in question.
- 69 ... the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution.
- 70 In its order for reference, the national court also raises the question whether the principle of the free movement of goods guaranteed by the Treaty prevails over those fundamental rights.

- 71 According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States, .. from ... international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, *inter alia* , Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41).
- 73 It follows that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community (see, *inter alia* , *ERT* , cited above, paragraph 41, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14).
- 74 Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights **is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.**

- 76 In the present case, the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty.
- 77 The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.
- 78 First, whilst the **free movement of goods** constitutes one of the fundamental principles in the scheme of the Treaty, **it may, in certain circumstances, be subject to restrictions** for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgment in Case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649.

- 79 Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, to that effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42, and Eur. Court HR, *Steel and Others v. The United Kingdom* judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 101).
- 80 **Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose.** Consequently, **the exercise of those rights may be restricted, provided** that the restrictions in fact correspond to **objectives of general interest** and do not, taking account of the aim of the restrictions, constitute **disproportionate and unacceptable interference**, impairing the very substance of the rights guaranteed (see, to that effect, Case C-62/90 *Commission v Germany* [1992] ECR I-2575, paragraph 23, and Case C-404/92 *P X v Commission* [1994] ECR I-4737, paragraph 18).
- 81 In those circumstances, the interests **involved must be weighed having** regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.
- 82 The competent authorities **enjoy a wide margin of discretion** in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.

- 83 As regards the main case, it should be emphasised at the outset that the circumstances characterising it are clearly distinguishable from the situation in the case giving rise to the judgment in *Commission v France* , cited above, referred to by Schmidberger as a relevant precedent in the course of its legal action against Austria.
- 84 By comparison with the points of fact referred to by the Court at paragraphs 38 to 53 of the judgment in *Commission v France* , cited above, it should be noted, first, that the demonstration at issue in the main proceedings took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it.
- 85 Second, because of the presence of demonstrators on the Brenner motorway, traffic by road was obstructed on a single route, on a single occasion and during a period of almost 30 hours. Furthermore, the obstacle to the free movement of goods resulting from that demonstration was limited by comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in the case giving rise to the judgment in *Commission v France* , cited above.
- 86 Third, it is not in dispute that by that demonstration, citizens were exercising their fundamental rights by manifesting in public an opinion which they considered to be of importance to society; it is also not in dispute that the purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source. By contrast, in *Commission v France* , cited above, the objective pursued by the demonstrators was clearly to prevent the movement of particular products originating in Member States other than the French Republic, by not only obstructing the transport of the goods in question, but also destroying those goods in transit to or through France, and even when they had already been put on display in shops in the Member State concerned.
- 87 Fourth, in the present case various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic. Thus, in particular, those authorities, including the police, the organisers of the demonstration and various motoring organisations cooperated in order to ensure that the demonstration passed off smoothly. Well before the date on which it was due to take place, an extensive publicity campaign had been launched by the media and the motoring organisations, both in Austria and in neighbouring countries, and various alternative routes had been designated, with the result that the economic operators concerned were duly informed of the traffic restrictions applying on the date and at the site of the proposed demonstration and were in a position timeously to take all steps necessary to obviate those restrictions. Furthermore, security arrangements had been made for the site of the demonstration.

- 89 Finally, concerning the other possibilities envisaged by Schmidberger with regard to the demonstration in question, taking account of the Member States' wide margin of discretion, in circumstances such as those of the present case the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public.
- 90 The imposition of stricter conditions concerning both the site — for example by the side of the Brenner motorway — and the duration — limited to a few hours only — of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope. Whilst the competent national authorities must endeavour to limit as far as possible the inevitable effects upon free movement of a demonstration on the public highway, they must balance that interest with that of the demonstrators, who seek to draw the aims of their action to the attention of the public.
- 91 An action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.
- 92 In that regard, the Republic of Austria submits, without being contradicted on that point, that in any event, all the alternative solutions which could be countenanced would have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, confrontation between supporters and opponents of the group organising the demonstration or acts of violence on the part of the demonstrators who considered that the exercise of their fundamental rights had been infringed.

- 93 Consequently, **the national authorities were reasonably entitled, having regard to the wide discretion** which must be accorded to them in the matter, **to consider that the legitimate aim of that demonstration could not be achieved** in the present case by measures less restrictive of intra-Community trade.
- 94 In the light of those considerations, the answer to the first and fourth questions must be that the fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the Treaty, read together with Article 5 thereof.
- The conditions for liability of the Member State
- 95 It follows from the answer given to the first and fourth questions that, having regard to all the circumstances of a case such as that before the referring court, the competent national authorities cannot be said to have committed a breach of Community law such as to give rise to liability on the part of the Member State concerned.

The Charter - C-36/02 Omega Spielhallen v Oberbürgermeisterin der Bundesstadt Bonn

- 23 By its question, the referring court asks, first, whether the prohibition of an economic activity for reasons arising from the protection of fundamental values laid down by the national constitution, such as, in this case, human dignity, is compatible with Community law, and, second, whether the ability which Member States have, for such reasons, to restrict fundamental freedoms guaranteed by the Treaty, namely the freedom to provide services and the free movement of goods, is subject, as the judgment in *Schindler* might suggest, to the condition that that restriction be based on a legal conception that is common to all Member States.
- 24 As a preliminary issue, it needs to be determined to what extent the restriction which the referring court has found to exist is capable of affecting the freedom to provide services and the free movement of goods, which are governed by different Treaty provisions.
- 25 In that respect, this Court finds that the contested order, by prohibiting Omega from operating its 'laserdrome' in accordance with the form of the game developed by Pulsar and lawfully marketed by it in the United Kingdom, particularly under the franchising system, **affects the freedom to provide services which Article 49 EC guarantees both to providers and to the persons receiving those services** established in another Member State. Moreover, in so far as use of the form of the game developed by Pulsar involves the use of specific equipment, which is also lawfully marketed in the United Kingdom, the prohibition imposed on Omega is likely to deter it from acquiring the equipment in question, thereby infringing the free movement of goods ensured by Article 28 EC.

- 26 However, **where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms** if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it (see, to that effect, *Schindler*, paragraph 22; *Canal Satélite Digital*, paragraph 31; Case C-71/02 *Karner* [2004] ECR I-0000, paragraph 46).
- 27 In the circumstances of this case, the aspect of the freedom to provide services prevails over that of the free movement of goods.
- 28 Concerning justification for the restriction of the freedom to provide services imposed by the order of 14 September 1994, Article 46 EC, which applies here by virtue of Article 55 EC, allows restrictions justified for reasons of public policy, public security or public health. In this case, the documents before the Court show that the grounds relied on by the Bonn police authority in adopting the prohibition order expressly mention the fact that the activity concerned constitutes a danger to public policy. Moreover, reference to a danger to public policy also appears in Paragraph 14(1) of the OBG NW, empowering police authorities to take necessary measures to avert that danger.
- 29 In these proceedings, it is undisputed that the contested order was adopted independently of any consideration linked to the nationality of the providers or recipients of the services placed under a restriction. In any event, since measures for safeguarding public policy fall within a derogation from the freedom to provide services set out in Article 46 EC, it is not necessary to verify whether those measures are applied without distinction both to national providers of services and those established in other Member States.

- 32 In this case, **the competent authorities took the view that the activity concerned by the prohibition order was a threat to public policy by reason of the fact that, in accordance with the conception prevailing in public opinion, the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity.** According to the Bundesverwaltungsgericht, the national courts which heard the case shared and confirmed the conception of the requirements for protecting human dignity on which the contested order is based, that conception therefore having to be regarded as in accordance with the stipulations of the German Basic Law.
- 33 It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71).
- 34 As the Advocate General argues in paragraphs 82 to 91 of her Opinion, **the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.**

- 35 Since both the Community and its Member States **are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law**, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services (see, in relation to the free movement of goods, *Schmidberger*, paragraph 74).
- 36 However, **measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests** which they are intended to guarantee and only in so far as those objectives **cannot be attained by less restrictive measures** (see, in relation to the free movement of capital, *Église de Scientologie*, paragraph 18).
- 37 It is **not indispensable in that respect for the** restrictive measure issued by the authorities of a Member State **to correspond to a conception shared by all Member States as regards the precise way** in which the fundamental right or legitimate interest in question is to be protected. Although, in paragraph 60 of *Schindler*, the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.

- 38 On the contrary, **as is apparent from well-established case-law subsequent to *Schindler*, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection** different from that adopted by another State (see, to that effect, *Läärä*, paragraph 36; *Zenatti*, paragraph 34; Case C-6/01 *Anomar and Others* [2003] ECR I-0000, paragraph 80).
- 39 In this case, it should be noted, first, that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany. It should also be noted that, by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus ‘play at killing’ people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.
- 40 In those circumstances, the order of 14 September 1994 cannot be regarded as a measure unjustifiably undermining the freedom to provide services.
- 41 In the light of the above considerations, **the answer to the question must be that Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy** by reason of the fact that that activity is an affront to human dignity.

The Charter - C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti

Judgment

- Paras 33-37, 55: On a proper interpretation of Article 43 EC, **collective action initiated by a trade union or a group of trade unions against a private undertaking** in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it **from exercising freedom of establishment, does not in principle fall outside the scope of that article.**

Article 43 EC (Art 49 TFEU-freedom of establishment) **applies not only to the actions of public authorities but extends also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.** Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by that article to acts of a public authority would risk creating inequality in its application. Since the organisation of collective action by trade unions must be regarded as covered by the legal autonomy which those organisations, which are not public law entities, enjoy pursuant to the trade union rights accorded to them, inter alia, by national law, and since those collective actions are inextricably linked to the collective agreement which the trade unions are seeking to conclude, those collective actions fall, in principle, within the scope of Article 43 EC.

Paras 43-47:

- The right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, to which, moreover, express reference is made in Article 136 EC, and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted in 1948 by the International Labour Organisation, and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted in 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union.

Although that right, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

In that regard, even if the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, the exercise such rights does not fall outside the scope of the provisions of the Treaty and must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.

It follows that **the fundamental nature of the right to take collective action is not such as to render Article 43 EC inapplicable to** such an action, initiated against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment.

Paras 72 – 74, 90:

- Article 43 EC is to be interpreted to the effect that collective actions which seek to induce a private undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitute restrictions within the meaning of that article.

Such collective action has the effect of making less attractive, or even pointless, the exercise by an undertaking of its right to freedom of establishment, inasmuch as it prevents that undertaking from enjoying the same treatment in the host Member State as other economic operators established in that State. Similarly, such collective action, seeking to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, **must be considered to be at least liable to restrict an undertaking's exercise of its right of freedom of establishment.**

Those restrictions may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

Justification of the restrictions

- 75 It is apparent from the case-law of the Court **that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest.** But even if that were the case, it would still have to **be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it** (see, inter alia, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Bosman*, paragraph 104).
- 76 ITF, supported, in particular, by the German Government, Ireland and the Finnish Government, maintains that the restrictions at issue in the main proceedings are justified since they are necessary to ensure the protection of a fundamental right recognised under Community law and their objective is to protect the rights of workers, which constitutes an overriding reason of public interest.
- 77 In that regard, it must be observed that the right to take collective action for the protection of workers **is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty** (see, to that effect, *Schmidberger*, paragraph 74)
- 78 It must be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

- 79 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.
- 87 As regards the question of whether or not the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, **it is for the national court to examine, in particular, on the one hand, whether**, under the national rules and collective agreement law applicable to that action, **FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking, and, on the other, whether that trade union had exhausted those means before initiating such action.**

- 90 In the light of those considerations, the answer to the third to tenth questions must be **that Article 43 EC is to be interpreted to the effect that collective action** such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article. **That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.**

The Charter - C-341/05 Laval v Svenska Byggnadsarbetareförbundet

- 89 According to the observations of the Danish and Swedish Governments, the right to take collective action constitutes a fundamental right which, as such, falls outside the scope of Article 49 EC and Directive 96/71.
- 90 In that regard, it must be recalled that the right to take collective action is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter,... and Convention No 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers... , and the Charter of Fundamental Rights of the European Union.
- 91 **Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.**
- 92 Although it is true, as the Swedish Government points out, that the right to take collective action enjoys constitutional protection in Sweden, as in other Member States, nevertheless as is clear from paragraph 10 of this judgment, under the Swedish constitution, that right – which, in that Member State, covers the blockading of worksites – may be exercised unless otherwise provided by law or agreement.
- 93 In that regard, **the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods** (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).
- 95 It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services.

- 96 It must therefore be examined whether the fact that a Member State's trade unions may take collective action in the circumstances described above constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified.
- 101 It is clear from the case-law of the Court that, since the freedom to provide services is one of the fundamental principles of the Community (see, inter alia, Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 17, and Case 252/83 *Commission v Denmark* [1986] ECR 3713, paragraph 17), a **restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it (Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 37,**
- 102 The Swedish Government and the defendant trade unions in the main proceedings submit that the restrictions in question are justified, since they are necessary to ensure the protection of a fundamental right recognised by Community law and have as their objective the protection of workers, which constitutes an overriding reason of public interest.
- 103 In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping **may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty** (see, to that effect, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33, 104 It should be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

- 105 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty **on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy**, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.
- 107 In that regard, it must be observed that, **in principle**, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers.
- 108 **However, as regards the specific obligations**, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which **that collective action forms cannot be justified with regard to such an objective**.

- 110 However, **collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay** (see, to that effect, *Arblade and Others*, paragraph 43).
- 111 In the light of the foregoing, the answer to the first question must be that Article 49 EC and Directive 96/71 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.
- On those grounds, the Court (Grand Chamber) hereby rules:
- **1. Article 49 EC and Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.**

The Charter – Other problems and effects

- **Further legal uncertainty resulting from the full incorporation of the Charter**

Relationship between EU and international law

- *Kadi Case C-402/05*

The Court has ruled that human rights under Community law may take precedence over international law. The Court held that the Council Decision should be declared invalid on the grounds that it is in breach of the right to property under the Charter and the ECHR.

Review of EU acts, especially self-executing acts

- **Commission decisions and competition enforcement procedures in particular may now be open to challenges under the Charter either in the national courts or via extended access under Art 263 TFEU**

Review of EU criminal law

- **The full legal effect of the Charter and its application to national implementing Union law with the extension of the ECJ's jurisdiction to EU criminal legislation means that in principle all national legislation implementing EU Framework Decisions and future directives and other measures will be open to J.R. on the grounds of alleged non-compliance with the Charter.**
- **Nb: Transitional provisions esp. in relation to the UK**

More info

- Overview of Treaty:
http://www.europa.eu/lisbon_treaty/glance/index_en.htm
- Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union
<http://www.consilium.europa.eu/showPage.aspx?id=1296&lang=en>
- http://www.europa.eu/lisbon_treaty/faq/index_en.htm#2
- BBC summary: <http://news.bbc.co.uk/2/hi/europe/6928737.stm>
- Commons European Scrutiny Committee:
<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf>
- Foreign Office guide to the treaty:
<http://www.fco.gov.uk/en/global-issues/institutions/britain-in-the-european-union/eu-lisbon-treaty1/what-the-lisbon-treaty-will-do>