Protection of Fundamental Rights in the EU (PFR)

Main Institutions and main sources of EU law

- Council, Commission, European Parliament, European Council
- Treaties, regulations, directives, decisions

Basic concepts of EU law

- Direct and indirect effect of EU law ➔ 26/62 van Gend en Loos/ individuals as subject of the new legal order of international law
- Primacy of EU law ➔ 6/64 Costa v ENEL

Legal protection in the EU

- Domestic courts
- Court of Justice of the European Union (CJEU) – interpretation of EU law and review of legality
  - Preliminary ruling
  - Opinion on international agreements
  - Infringement action
  - Action for annulment
  - Action for failure to act
  - Action for damages
PFR in the Treaties after Lisbon

Art. 2 TEU

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. (…)

Sources of fundamental rights

Article 6 TEU

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.
The emphasis on the protection of HRs is nowadays strong

It was however excluded from the scope of the original the EC’s range of activities

Left to the CJEU to develop
Fundamental rights protected as general principles of EU law ➔ ground-breaking judgments

Original legal basis for incorporation of general principles into EU law ➔ art. 263 TFEU, art. 340 (2) TFEU, art. 19 TEU

29/69 Stauder v City of Ulm/ human dignity, privacy/
subsidized butter scheme for welfare recipients

Decision of the Commission „contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court”

11/70 Internationale Handelsgesellschaft (1970)/ validity of the EU measures can only be judged in the light of EU law, Costa v ENEL and Stauder confirmed
3 Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law.

The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question.

Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

4 However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded.

In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.

The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.

⇒ The case returned to German administrative court ⇒ the court was of the opinion that the principle of proportionality had been violated by the EU deposit system ⇒ referred to German Federal Constitutional Court
BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß 29 May 1974

proceedings i.a. for consideration of constitutionality of the obligation to export, established in Article 12 (1) (iii) of EEC Council Regulation 120/67, of 13 June 1967 lined with the lodging of a deposit and its forfeiture if the export has not been processed during the period of validity

As long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights of the Basic Law.

DECISION:

EEC regulations do not breach the German Basic Law
Sources of rights: Traditions common to the MSs

A way to minimise the conflict

11/70 Internationale Handelsgesellschaft

4/73 Nold v Commission

The CJEU is bound to draw inspiration from constitutional traditions common to the MSs, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States

44/79 Hauer v Land Rheinland-Pfalz

20 Therefore, in order to be able to answer that question, it is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States.

One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, Article 14 (2), first sentence), to its social function (Italian constitution, Article 42 (2)), to the subordination of its use to the requirements of the common good (German Grundgesetz, Article 14 (2), second sentence, and the Irish constitution, Article 43.2.2°), or of social justice (Irish constitution, Article 43.2.1°).

In all the Member States, numerous legislative measures have given concrete expression to that social function of the right to property.

Thus in all Member States there is legislation on agriculture and forestry, the water supply, the protection of the environment and town and country planning, which imposes restrictions, sometimes appreciable, on the use of real property.
Which approach: maximalist?

46/87 & 227/88 *Hoechst v Commission* / right to the inviolability of the home and business premises

155/79 AM & *S Europe v Commission* / professional privilege/ confidentiality of the documents exchanged between lawyer-client


- the requirement of independence/ the role of lawyers in administration of justice/

- 155/79 AM confirmed/ no predominant trend may be discerned in the legal systems of the Member States

*C-36/02 Omega Spielhallen v Oberbürgermeisterin der Bundesstadt Bonn* (2004)

protection of fundamental values laid down in the national constitution – ‘Playing at killing’
The CJEU held:

- **respect for human dignity is a general principle of law/ the objective of protecting human dignity is thus compatible with Community law**

- **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

- restrictions on 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**

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. (...)
The CJEU draws only occasionally on national constitutional traditions/ ECHR much safer ground

Sources of rights: ECHR and other international human rights treaties

A way to minimise the conflict

4/73 Nold v Commission

- international treaties for the protection of human rights o which the MSs have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law

44/79 Hauer v Land Rheinland-Pfalz

The CJEU relied as well on the ECHR ➔ the right to property is not absolute

⇒ restrictions imposed by the regulation correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference with the property rights of the owner

⇒ The prohibition of the new planting of vines land down for a limited period of time by regulation no 1162/76 was justified by the objectives of general interest pursued by the Community, namely the reduction of production surpluses and the restructuring of the European wine industry. It did not therefore infringe the substance of the right to property.
63/83 *R v Kirk*/ the principle of non-retroactivity of penal measures/
art. 7 ECHR

The CJEU asserts the autonomy and supremacy of EU

- not bound by the ECHR but special significance ➔ art. 6 para 3 TEU

- retained the freedom to go beyond the ECHR

- art. 52 para 3 Charter of Fundamental Rights (ChFR):

  Insofar 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.
The CJEU only occasionally draws on other international instruments

*C-149/77 Defrenne v Sabena (No.3)*

Elimination of sex discrimination is a fundamental EU right ➔ to support this conclusion ➔

Moreover, the same concepts are recognized by the European Social Charter of 18 November 1961 and by Convention No 111 of the International Labour Organization of 25 June 1958 concerning discrimination in respect of employment and occupation (pkt 28)

*C-249/96 Lisa Jacqueline Grant v South-West Trains Ltd* (1998)

46. Furthermore, in the communication referred to by Ms Grant, the Human Rights Committee, which is *not a judicial institution* and whose findings have no binding force in law, confined itself, as it stated itself without giving specific reasons, to noting (…) *that in its view* the reference to sex in Articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

47. Such an observation, which *does not in any event appear to reflect the interpretation so far generally accepted of the concept of discrimination based on sex* which appears in various international instruments concerning the protection of fundamental rights, *cannot in any case constitute a basis for the Court to extend the scope of Article 119 of the Treaty*. That being so, the scope of that article, as of any provision of Community law, is to be determined only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context. It follows from the considerations set out above that *Community law as it stands at present does not cover discrimination based on sexual orientation*, such as that in issue in the main proceedings.

*The CJEU’s emphasis on the EU’s constitutional autonomy and its relative disconnection from the wider international human rights system is criticized*
The relationship between international law and EU law

Kadi 2005

T-306/01 Yusuf and Al Barakaat International Foundation v Council and Case T-315/01 Kadi v Council and Commission

the MSs are bound to comply with the resolutions of the UN Security Council/ the Charter of the United Nations/ the EU is bound too

An international treaty prevails over EU law

The CJEU has no jurisdiction to review the validity of the regulation at issue (except in respect of certain overriding rules of international law known as *jus cogens*)

The judgment was set aside ➔

Kadi 2008

Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission

The EU – autonomous legal order built on the rule of law and respect of fundamental human rights

The CJEU has jurisdiction to review measures adopted by the EU giving effect to the UN SC resolutions

International treaty has primacy over secondary law but not over primary law
Challenges to EU legislation – Kadi Saga

On Council regulations imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban

**Kadi 2005**  
T-306/01 *Yusuf and Al Barakaat International Foundation v Council* and  
Case T-315/01 *Kadi v Council and Commission*

No jurisdiction (except in respect of certain overriding rules of international law known as *jus cogens*) to review the validity of the regulation at issue, given that the Member States are bound to comply with the resolutions of the Security Council according to the terms of the Charter of the United Nations, an international treaty that prevails over Community law.

**Kadi 2008**  
Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*

Setting aside the judgments of the CFI, the Court rules that the Community judicature has jurisdiction to review measures adopted by the Community giving effect to resolutions of the Security Council of the United Nations. In exercising that jurisdiction, it considers that the regulation freezing their funds, infringes Mr Kadi and Al Barakaat’s fundamental rights under Community law/ regulation annulled in respect to them, but in force for additional three months.

Primacy of international treaty does not extend to EU primary law.

**Kadi 2010**  
T-85/09 *Yassin Abdullah Kadi v Commission*

The regulation was adopted in breach of Mr Kadi’s rights of defence and constitutes an unjustified restriction of his right to property

**Kadi 2013**  
C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council, United Kingdom v Yassin Abdullah Kadi*
Challenges to EU administrative action

EU staff regulations cases

130/75 Prais v Council

13 When the competition is on the basis of tests, the principle of equality necessitates that the tests shall be on the same conditions for all candidates, and in the case of written tests the practical difficulties of comparison require that the written tests for all candidates should be the same. (…)

16 If a candidate informs the appointing authority that religious reasons make certain dates impossible for him the appointing authority should take this into account in fixing the date for written tests, and endeavour to avoid such dates.

17 On the other hand if the candidate does not inform the appointing authority in good time of his difficulties, the appointing authority would be justified in refusing to afford an alternative date, particularly if there are other candidates who have been convoked for the test.
C-404/92 P, X v. Commission

The Court of First Instance upheld the Commission decision informing the appellant that he did not satisfy the conditions as to physical fitness for recruitment.

The CJEU:

23 However, the right to respect for private life requires that a person's refusal be respected in its entirety. Since the appellant expressly refused to undergo an Aids screening test, that right precluded the administration from carrying out any test liable to point to, or establish, the existence of that illness, in respect of which he had refused disclosure.

However, it is apparent from the findings made by the Court of First Instance that the lymphocyte count in question had provided the medical officer with sufficient information to conclude that the candidate might be carrying the Aids virus.

24 In those circumstances, the contested judgment must be annulled to the extent to which it held that, in view of the abnormalities found in the anamnesis and clinical examination, the medical officer was entitled to request that a T4/T8 lymphocyte count be carried out (…).

The CJEU annulled the Commission decision
Mr Connolly, a high-ranking Community official published a book entitled *The Rotten Heart of Europe The Dirty War for Europe's Money* while he was on leave, not asking for the permission required under staff regulations

The CJEU ➔ **Community officials clearly enjoy right to freedom of expression**, which, is circumscribed, subject to judicial review, by observance of the duties and responsibilities implicit in their work
Competition proceedings


Corporate privacy protection was considered a fundamental principle of Community law/ art. 8 ECHR does not apply to business premises

The CJEU ➔ there was a general principle of Community law that any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and provide protection against arbitrary or disproportionate intervention

*The CJEU criticized by not taking into account Chappell v. The United Kingdom 10461/83/ ECtHR judgement of 30 March 1989*

C-94/00 Roquette Frères SA and Directeur général de la concurrence, de la consommation et de la répression des fraudes v Commission

29. For the purposes of determining the scope of that principle in relation to the protection of business premises, **regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in Hoechst**. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment of 16 April 2002 in Colas Est and Others v. France, not yet published in the Reports of Judgments and Decisions, § 41) and, second, **the right of interference established by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities or premises were involved** than would otherwise be the case (*Niemietz v. Germany, cited above, § 31).*
Summary

− In the period 1970s – 2009 (ChFR became binding) the two main sources of inspiration – MSs constitutional traditions and the ECHR

− No “maximum universal standard” based on the highest level of protection nor “lowest common denominator” ➔ case-by-case approach to identify the scope and content of particular rights

− The EU is not bound by the ECHR, but respects the rights/ more and more references to the ECtHR case-law

− Rights-based review of EU legislation ➔ anti-terrorism measures/ and administrative action (staff disputes, competition law)
The CJEU review of MSs action

a/ MSs applying EU act which is based itself on human rights

36/75 Roland Rutili v Minister of the Interior/ free movement of workers/ limitations

Taken as a whole, the limitations on the right of Member-States to restrict the freedom of entry, residence and movement within their territory of Community nationals which are found in Articles 2 and 3 of Directive 64/221 and Article 8 of Regulation 1612/68 are a specific manifestation of the more general principle, contained in Articles 8, 9, 10 and 11 of the European Convention on Human Rights and Article 2 of its Protocol 4, which provide in identical terms that no restrictions in the interests of national security or public safety shall be placed on those rights other than such as are necessary for the protection of those interests ‘in a democratic society’. (pkt 32)

Any person enjoying the protection of the procedural provisions of Directive 64/221 must be entitled to the double safeguard of
(a) notification to him of the grounds on which a measure restrictive of his free movement has been adopted and
(b) the availability of a right of appeal.

Consequently, the authorities, when notifying an individual of a restrictive measure taken against him, must give him a precise and comprehensive statement of the grounds for the measure, so as to enable him to take effective steps to prepare his defence. (pkt 37, 39)
The principle of effective judicial control laid down in Article 6 of Council Directive 76/207, a principle which underlies the constitutional traditions common to the Member States and which is laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and fundamental freedoms, does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purposes of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts. The provision contained in Article 6 to the effect that all persons who consider themselves wronged by discrimination between men and women must have an effective judicial remedy may be relied upon by individuals as against a Member State which has not ensured that it is fully implemented in its internal legal order.
b/ MSs as agents of the EU

**MSs when implementing or enforcing EU measures are bound by the same general principles of EU law which bind institutions in their action.**

5/88 *Wachauf* [1989]/ milk quota scheme which confused ownership of land and entitlement to subsidies for milk production/ whether he was entitled to compensation under the German version of the 1984 scheme

(…) Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order.

**Those requirements are also binding on the Member States when they implement Community rules.**

In the context of the transmission, on expiry of the lease of a tenanted holding, of reference quantities attached to the holding and exempt from the additional levy on milk, Regulation No 857/84 leaves the competent national authorities a sufficiently wide margin of appreciation to enable them to ensure that that regulation is applied in a manner consistent with the requirements of the protection of fundamental rights, either by giving the lessee the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively.
c/ MSs derogating from EU rules or restricting EU rights
⇒ extension of the CJEU jurisdiction

C-260/89  ERT [1991] ⇒ when a state is derogating from a Community obligation, it must respect human rights standards:

42. As the Court has held (…), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law.

On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.

43. In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.

44. It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.
Article 51 (1) ChFR

„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.”

Explanations to the CHFR

„As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 ERT [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 Annibaldi [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: ‘In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...’ (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.”
C-309/96 Annibaldi

21 Against that background, it is clear, first of all, that there is nothing in the present case to suggest that the Regional Law was intended to implement a provision of Community law either in the sphere of agriculture or in that of the environment or culture.

22 Next, even if the Regional Law be capable of affecting indirectly the operation of a common organization of the agricultural markets, it is not in dispute that, the park having been created to protect and enhance the value of the environment and the cultural heritage of the area concerned, the Regional Law pursues objectives other than those covered by the common agricultural policy, or that the Law itself is general in character.

23 Finally, given the absence of specific Community rules on expropriation and the fact that the measures relating to the common organization of the agricultural markets have no effect on systems of agricultural property ownership, it follows from the wording of Article 222 of the Treaty that the Regional Law concerns an area which falls within the purview of the Member States.

24 Accordingly, as Community law stands at present, national legislation such as the Regional Law, which establishes a nature and archaeological park in order to protect and enhance the value of the environment and the cultural heritage of the area concerned, applies to a situation which does not fall within the scope of Community law.

25 The Court therefore has no jurisdiction to answer the questions referred by the Pretura Circondariale di Roma.
Controversial ➔ „act in the scope of Union law”/ purely internal situations

12/86 Demirel ➔ MSs are not obliged to comply with the general principles of the EU law in situations which fall outside the scope of EU law

8 (…) although it is the duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law. In this case, however, as is apparent from the answer to the first question, there is at present no provision of Community law defining the conditions in which Member States must permit the family reunification of Turkish workers lawfully settled in the Community. It follows that the national rules at issue in the main proceedings did not have to implement a provision of Community law. In those circumstances, the Court does not have jurisdiction to determine whether national rules such as those at issue are compatible with the principles enshrined in Article 8 of the European Convention on Human Rights.

C-159/90 The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others / freedom to provide services - prohibition on the distribution of information on clinics carrying out voluntary terminations of pregnancy in other MSs/ students were not exercising an EU freedom,

C-299/95 Kremzov v. Austria [1997]
C-60/00 Mary Carpenter [2002]
C-328/04 Attila Vajnai [2005]
Protection of human rights constitutes a legitimate interest which will justify the restriction on free movement rights

C-112/00 Schmidberger v Austria

closure of trade routes between Austria and Italy to allow demonstration – is not incompatible with free movement of goods

conflict between free movement rights and fundamental rights (freedom of expression) – weighting of interests involved – necessary

The fact that the competent authorities of a Member State did not ban a demonstration by protesters which resulted in the complete closure of a major transit route between Member States for a given period is not incompatible with Articles 30 and 34 of the Treaty (now Article 34, 35 TFEU), read together with Article 5 of the Treaty (now Article 4 para TEU) provided that that restriction of trade in goods between Member States is justified by the legitimate interest in the protection of fundamental rights, in this case the protesters' freedom of expression and freedom of assembly, which applies both to the Community and the Member States.