THE CHARTER OF FUNDAMENTAL RIGHTS, THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE FUTURE OF HUMAN RIGHTS IN EUROPE

1. INTRODUCTION

1.1 Since the coming into force of the Lisbon Treaty provisions according the Charter of Fundamental Rights of the European Union ("CFR" or "the Charter") with "the same legal value as the Treaties" (Article 6 TEU), the Court of Justice of the European Union ("CJEU") now, as a matter of course, refers to provisions of the Charter in its judgments.

1.2 A recent search of the CURIA database reveals that the Charter of Fundamental Rights has been referred to in Judgments of the Court of Justice of the European Union as a whole in almost 300 cases. The Court of Justice itself has referred to the Charter in over 150 of its judgment. The remaining references to the Charter are to be found in decisions of the General Court and of the EU's Civil Service Employment Tribunal. This does not take into account the times when the Charter has been referred to and relied upon in Opinions of the Advocates General or in any interlocutory Orders of the Luxembourg Courts.

1.3 It is clear, therefore, that any understanding of the intent and effect of EU law has now to be done against a background of an understanding of the terms of the EU Charter of Fundamental Rights, as interpreted by the CJEU.

1.4 And, of course, a proper understanding of the Charter's provisions also necessarily requires a proper understanding of the relevant Strasbourg jurisprudence since Article 52(3) of the Charter requires that those Charter rights which correspond to rights already guaranteed by the ECHR be given the same meaning and scope as, and no lesser degree of protection than, provided under the ECHR. In *J McB v LE* the CJEU ruled that where

Charter rights paralleled ECHR rights, the Court of Justice should follow any clear and constant jurisprudence of the European Court of Human Rights, noting that:

> It is clear that the said Article 7 [of the EU Charter] contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. *Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights* (see, by analogy, Case C-450/06 *Varec* [2008] ECR I-581, paragraph 48). [1]

1.5 This, it is suggested, will inevitably have the result that EU law and ECHR law will increasingly come to be seen as "a single, converging legal system" (see for example the *Handbook on European non-discrimination law*[2], which has been produced by the EU's Agency for Fundamental Rights together with the European Court of Human Rights with the express purpose of drawing together Strasbourg and Luxembourg equality law case law).

1.6 A brief survey of the ever burgeoning Charter jurisprudence shows that the CJEU uses the Charter as a source of general principles of the EU against which provisions of EU Directives and Regulations (and provisions of EU soft law) have to be interpreted and applied. Indeed, the rights set out in the Charter appear to be being treated by the Court of Justice as the paramount provisions of the EU against which even primary provisions of the EU law in the Treaties may be measured and assessed.

1.7 And unsurprisingly, perhaps, given the Court of Justice's continuing history of "discovering" fundamental rights as unwritten general principle of EU law,[3] the express provisions of the Charter are not seen as *confining* the Court of Justice. Instead the Luxembourg Court maintains its "dynamic" approach, with the express rights set out in the Charter being seen as the starting point of any consideration of EU law, rather than an end-point of discussions as to the nature, extent and effect of EU law.

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[1] Case C-400/10 PPU *J McB v LE*, 5 October, [2010] ECR I-nyr at paragraph 53

[2] Available at http://fra.europa.eu/fraWebsite/attachments/FRA-CASE-LAW-HANDBOOK_EN.pdf)

[3] See for example: Case C-114/04 *Mangold* [2005] ECR I-9981; Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co KG*, 31 January[2010] ECR I-nyr; and Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH* 7 June [2012] ECR I-nyr on age discrimination as an unwritten general principle of EU law, albeit now reflected in the terms of the Equality at Work Directive 2000/78/EC and Artcile 21 CFR

1.8 The Court of Justice has confirmed that the provisions of the Charter may be prayed in aid flowing against the authorities of the Member States whenever they implement EU law,[4] or in a situation where a "national measure… is connected in any other way with EU law".[5] Where such a connection has been established the CJEU claims jurisdiction to rule on all and any Charter issues which might arise in a preliminary ruling, including on the issue of what is required of the Member State to comply with the individual's fundamental EU Charter right to an effective remedy.

1.9 To illustrate the impact of the Charter we may look at a selection of cases from Luxembourg in the course of the past 12 months or so, where the Charter has been referred to and relied upon by the Court.

2. CHARTER COMPATIBILITY AS INTERPRETATIVE AID AND/OR A CONDITION OF VALIDITY?

2.1 In *Interseroh Scrap and Metals Trading GmbH* the CJEU confirmed - under reference to Articles 15(1), 16 and 17 CFR which provide, respectively, for the right to engage in work and to pursue a freely chosen or accepted occupation, the freedom to conduct a business and the right to property - that the protection of business secrets is a general principle of EU law.[6] But the Court observed that even if a particular requirement under a secondary provision of EU law might be said to constitute a breach of the protection of the business secrets of dealers, that could not have the consequence of restricting the scope of a provision of secondary law that is clear and unconditional. It would appear that the Court considered that provisions of, or derived from, the Charter could not be relied upon indirectly to affect the interpretation of EU law provisions holding instead that:

> "any unjustified breach of the protection of business secrets, assuming it were established, would not be such as to limit the scope of Article 18 of Regulation No 1013/2006, but rather

[4] See orders in the following cases among others: Case C-339/10 *Asparuhov Estov and Others* [2010] ECR I-nyr, paragraph 13; Case C-457/09 *Chartry* [2011] ECR I-nyr, paragraph 25; and order of 14 December 2011 in Joined Cases C-483/11 and C-484/11 *Boncea and Others*, paragraph 29

[5] Case C-27/11 *Vinkov v Nachalnik Administrativno-nakazatelna deynost* 7 June [2012] ECR I-nyr at para 59

[6] See Case C-450/06 *Varec* [2008] ECR I-581, paragraph 49 and the case-law cited

to call into question the validity of that provision. The national court has not, however, asked the Court of Justice to rule on the validity of Article 18 of Regulation No 1013/2006, or even expressed any doubt in that regard, and the Court does not have sufficient facts before it to enable it to assess the validity of that provision."[7]

2.2 On the other hand in *DR, TV2 Danmark A/S v NCB - Nordisk Copyright Bureau* which concerned the interpretation of the phrase contained in Article 5(2)(d) of the Copyright Directive 2001/29/EC, "regulations for ephemeral recordings made by a broadcasting organisation by means of its own facilities and used for its own broadcasts", the Court used the terms of the Charter as an interpretative aid, observing as follows:

"[I]n the assessment of the choices of interpretation available to the Court, that approach finds support in the fact that it ensures that broadcasting organisations have a greater enjoyment of the freedom to conduct a business, set out in Article 16 of the Charter of Fundamental Rights of the European Union, while at the same time not adversely affecting the substance of copyright." [8]

2.3 And in *Health Service Executive v S.C. and another* concerning the proper interpretation of the Brussels II Regulation on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in the matters of parental responsibility, the Court observed that:

"For the purposes of the interpretation and application of the Regulation, decisions should be made that respect the criterion of the best interests of the child, in the light of Article 24 of the Charter." [9]

2.4 And in *NS v. Home Office* the Grand Chamber of the CJEU confirmed that:

"[T]he 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)."[10]

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[7] Case C-1/11 *Interseroh Scrap and Metals Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM)* 29 March [2012] ECR I-nyr at para 46

[8] Case C-510/10 *DR, TV2 Danmark A/S v NCB - Nordisk Copyright Bureau* 26 April [2012] ECR I-nyr at para 57

[9] Case C-92/12 PPU *Health Service Executive v S.C. and another* 26 April [2012] ECR I-nyr

[10] Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department* 21 December [2011] ECR I-nyr at para 77

3. HEARING THE OTHER SIDE AND GIVING REASONS – ARTICLES 41 CFR AND 47 CFR

3.1 In *French Republic v. People's Mojahedin Organization of Iran*[11] the Court of Justice upheld that fundamental right, expressly affirmed in Article 41(2)(a) CFR, to be given prior notification of incriminating evidence and of the right to make representations before the adoption of restrictive measures (in this case an asset freezing order). The purpose of the rule was both to ensure the authority concerned effectively took into account all relevant information and to allow the addressee to correct any errors or produce such information relating to his personal circumstances as would tell in favour of the decision's not being adopted.

3.2 In *AJD Tuna Ltd* [12], in the context of a challenge to an emergency regulation limiting tuna catches under and in terms of the Common Fisheries Policy, the Court confirmed that the Article 41 CFR right to be heard (*audi alteram partem*) applied only in relation to individual administrative decisions and *not* to regulations of general application.

3.3 But the principle of stating reasons for the acts of public authorities - as laid down by the second paragraph of Article 296 of the Treaty on the Functioning of the European Union ("TFEU") and Article 41(2)(c) CFR - applied both in relation to individual administrative acts and acts of general legislation. In relation to reasons given for adopting particular general legislation the Court observed in *AJD Tuna Ltd* as follows:

> "58. …. [T]he statement of reasons required by Article 296(2) TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296(2) TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, to that effect, inter alia Case C-5/01 *Belgium* v *Commission* [2002] ECR I-11991, paragraph 68; Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 73; and judgment of 5 March 2009 in Case C-479/07 *France* v *Council*, paragraph 49).
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> 59 It is also clear from settled case-law that the scope of the obligation to state reasons depends on the nature of the measure in question and that, in the case of measures of general application, the statement of reasons may be confined to indicating the general situation which led to its adoption and the general objectives which it is intended to achieve. In that

[11] Case C-27/09 P *French Republic v. People's Mojahedin Organization of Iran* 21 December [2011] ECR I-nyr

[12] Case C-221/09 *AJD Tuna Ltd v Direttur tal-Agrikoltura u s-Sajd* 17 March [2011] ECR I-nyr

context, the Court has ruled in particular that if the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made (see, inter alia, Case C-168/98 *Luxembourg* v *Parliament and Council* [2000] ECR I-9131, paragraph 62; Case C-361/01 P *Kik* v *OHIM* [2003] ECR I-8283, paragraph 102; and Case C-304/01 *Spain* v *Commission* [2004] ECR I-7655, paragraph 51).

60 The Court has also held that the obligation to state reasons laid down in Article 296(2) TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (see, to that effect, Case C-113/00 *Spain* v *Commission* [2002] ECR I-7601, paragraph 47, and *France* v *Council*, paragraph 50)."[13]

3.4 Similarly, in *Fulmen and Fereydoun Mahmoudian v. Council* the CJEU observed:

"87 The principle of effective judicial protection is a general principle of European Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and in Article 47 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1).

The effectiveness of judicial review means that the European Union authority in question is bound to communicate the grounds for a restrictive measure to the entity concerned, so far as possible, either when that measure is adopted or, at the very least, as swiftly as possible after that decision, in order to enable the entity concerned to exercise, within the periods prescribed, their right to bring an action.

Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the courts of the European Union, and also to put the latter fully in a position to carry out the review of the lawfulness of the measure in question which is the duty of those courts." [14]

3.5 And in *Aitic Penteo* the General Court affirmed that:

"[T]he duty to give reasons for individual decisions [set out in Article 296 TFEU and Article 41(2)(c) CFR] has two purposes: to allow interested parties to know the justifications for the measure so as to enable them to protect their rights and to enable the Union judicature to exercise its power to review the legality of the decision. Whether a statement of reasons satisfies those requirements is a question to be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question (see Joined Cases T-124/02 and T-156/02 *Sunrider* v *OHIM – Vitakraft-Werke Wührmann and*

[13] C-221/09 *AJD Tuna Ltd v Direttur tal-Agrikoltura u s-Sajd* 17 March [2011] ECR I-nyr at paras 57-60

[14] Joined Cases T-439/10 and T-440/10 *Fulmen and Fereydoun Mahmoudian v. Council* 21 March [2012] ECI-nyr at para 87

Friesland Brands (VITATASTE and METABALANCE 44) [2004] ECR II-1149, paragraphs 72 and 73 and the case-law cited).[15]

4. DRIVING LICENCES AND FUNDAMENTAL RIGHTS

4.1 *Hofmann v Bavaria*[16] concerned a refusal by the German DVLA to recognise the validity of a driving licence issued by Czech Republic to a German national who had been disqualified in Germany from driving following his conviction there for drink-driving. The formal legal issue for the CJEU was whether such a refusal by the German authorities was permitted under and in terms of the provisions of Directive 2006/126, which establishes a single model EU driving licence designed to replace the various driving licences in existence in the Member States.[17] It was argued by the German DVLA that one of the main aims of this Directive was to combat "driving licence tourism" which might allow an individual to circumvent the comparatively strict conditions on fitness applicable in Germany after a withdrawal of the German driving licence,[18] in effect favouring national standards of road safety over principles of free movement and mutual recognition of other States driving licence regimes.

4.2 The Court of Justice dismissed these argument holding instead that the only basis on which a driving licence issued by another Member State might not be recognised would be if the holder thereof did not in fact have his normal residence in the other State at the

[15] Case T-585/10 *Aitic Penteo, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* 22 May 2012 at para 37

[16] Case C-419/10 *Wolfgang Hofmann v Freistaat Bayern*, 26 April [2012] ECR I-nyr

[17] Article 11(4) of Directive 2006/126 reads:

> "A Member State shall refuse to issue a driving licence to an applicant whose driving licence is restricted, suspended or withdrawn in another Member State.
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> A Member State shall refuse to recognise the validity of any driving licence issued by another Member State to a person whose driving licence is restricted, suspended or withdrawn in the former State's territory.
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> A Member State may also refuse to issue a driving licence to an applicant whose licence is cancelled in another Member State."

[18] The German rules required that at the end of the period of a driving ban the disqualified driver had to apply for the issuing of a new licence to the competent German authority, which had to check whether it was necessary to make return of the licence subject to a new driving test (in order to establish his capacity to drive), or to a compulsory medico-psychological test (in order to establish his fitness to drive motor vehicles).

time of obtaining his driving licence. In coming to this view the Court rejected arguments by the German Government that Charter considerations – in particular the right to life, the right to integrity of the person and the right to property, reaffirmed in Articles 2, 3 and 17 CFR – were sufficient to give a Member State the authority to refuse to recognize the validity of an individual's driving licence on the basis of considerations of road safety. In this it followed the earlier decision of *In Baris Akyüz v. Germany*[19] where the driver, a German national, had obtained a Czech driving licence after he had apparently been involved in a road rage incidents in Germany.

5. RIGHT OF EXIT FROM MEMBER STATES

5.1 In *Petar Aladzhov* [20] the Court considered the lawfulness of a prohibition under Bulgarian law on a Bulgarian national leaving Bulgarian territory because of non-payment of a tax liability of a company of which he was a director. Reference was made by the referring court to the right to freedom of movement under Articles 20 TFEU and 21 TFEU and Article 45(1) of the Charter of Fundamental Rights of the European Union. Under the terms of the Citizenship (Free Movement) Directive 2004/38/EC [21] (which consolidates, in a single text, the EU legislation governing the right of EU citizens and their family members to move and reside freely within the territory of the Member States) an EU citizen has the right to leave the territory of a Member State to travel to another member State, Article 4 of the Directive stating:

> **Article 4 - Right of exit**
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> 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."

5.2 This "right of exit" was found by the Court in *Aladzhov* (at paragraphs 24-7) to be a directly effective EU law right which may be claimed by an EU citizen against the Member State of his or her own nationality (at paragraphs 24-27). Thus the Member

[19] Case C-467/10 *Baris Akyüz v. Germany* 12 March [2012] ECR I-nyr

[20] Case C-434/10 *Petar Aladzhov v Zamestnik direktor na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti* 17 November [2011] ECR I-nyr

[21] [2004] OJ L158/77

State can only exercise its powers to impede this right of its own national and that of other EU citizens to exit from their territory in a manner which confirms to the requirements and general principles of EU law, as the CJEU noted in *Gaydarov*:

> "32. …[I]t is clear from settled case-law that, while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the European Union context and particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union (see, *inter alia*, Case C-33/07 *Jipa* [2008] ECR I-5157 paragraph 23).
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> 33 The Court has thus stated that the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (see, inter alia, *Jipa*, paragraph 23 and case-law cited).
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> 34 In that context, the derogations from the free movement of persons that are capable of being invoked by a Member State imply in particular, as stated in Article 27(2) of Directive 2004/38, that if measures taken on grounds of public policy or public security are to be justified they must be based exclusively on the personal conduct of the individual concerned and that justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention cannot be accepted (*Jipa*, paragraph 24)…."[22]

6. RIGHT TO EXPEL EU NATIONALS FROM MEMBER STATE

6.1 The only lawful basis on which a EU citizen worker, self-employed person or jobseeker (or his family members) may be denied leave to enter or reside in a Member State, or indeed be expelled from the host State in which he has exercised his EU free movement rights in taking up residence, is on the narrowly interpreted[23] public policy or public security grounds set out in Articles 27 and 29 of the Citizenship (Free Movement) Directive.[24] The remedy of expulsion may be taken only if it is shown to be proportionate,[25] taking into account factors including:

a) the degree of integration of the persons concerned in the host State;

b) the length of their residence in the host Member State;

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[22] Case C-430/10 *Hristo Gaydarov v Direktor na Glavna direktsia 'Ohranitelna politsia' pri Ministerstvo na vatreshnite raboti* 17 November [2011] ECR-nyr at paras 32-4

[23] Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337.

[24] These provisions do not apply to partial residence bans, restricting movement within the territory of a Member State: Case 36/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219.

[25] See Case 30/77 *R v Bouchereau* [1977] ECR 1999.

c) their ages;

d) their state of health, family and economic situation; and

e) the links with their country of origin.[26]

In summary, the greater the degree of integration of EU citizens and their family members in the host Member State, the greater will be their protection against expulsion.[27]

6.2 Thus it would only be in exceptional circumstances – where, for example, there are imperative grounds of public security – that an expulsion measure might lawfully be taken against an EU citizen who has resided for many years in the territory of the host Member State: in view of the emphasis on personal conduct, a desire on the part of the authorities to deter other people from committing similar crimes is not an acceptable basis justifying expulsion.[28]

6.3 However, in *Tsakouridis,*[29] the Grand Chamber of the CJEU ruled that the war against drugs was sufficient to justify the expulsion from Germany of a Greek national who had been born in Germany and had lived there for over 30 years, notwithstanding his attempt to claim the protection of the Charter's provisions on respect for established family life.

6.4 In *P.I.* the Grand Chamber of the CJEU considered the Charter compatibility of a decision by a German authority to strip a convicted child rapist - who was an Italian national who had lived in Germany for 25 since moving there aged 22 - of his right of entry and residence in Germany and ordering him to leave Germany (failing which he would be deported to Italy). In emphasising that the sexual abuse and sexual exploitation of children is a matter which violates the fundamental rights of the child recognised under the Charter, the Grand Chamber advised the refereeing court that the public security grounds specified under the Directive could in principle justify an expulsion measure in the circumstances of this case provided that:

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[26] Cases 115-116/81 *Adoui and Cornuaille v Belgium* [1982] ECR 1665.

[27] See Case C-50/06 *Commission v The Netherlands* [2007] ECR I-4383.

[28] Case 67/74 *Bonsignore v Oberstadtdirektor der Stadt Köln* [1975] ECR 297.

[29] In Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis*, 23 November [2010] ECR I-nyr

> "The issue of any expulsion measure is conditional on the requirement that the personal conduct of the individual concerned must represent a genuine, present threat affecting one of the fundamental interests of society or of the host Member State, which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future. Before taking an expulsion decision, the host Member 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 that State and the extent of his/her links with the country of origin."[30]

7. DATA PROTECTION AND PRIVATE DATABASES

7.1 In *ASNEF v. Spain* the Court relied upon the Article 7 CFR right to respect for private life and Article 8(1) CFR which states that "[e]veryone has the right to the protection of personal data concerning him or her", to find that the implementation in Spain of the Data Protection Directive was defective in that it applied only to information kept in specified public data bank rather than more generally to public and private databases, on the basis that:

> "the processing of data appearing in non-public sources necessarily implies that information relating to the data subject's private life will thereafter be known by the data controller and, as the case may be, by the third party or parties to whom the data are disclosed. This more serious infringement of the data subject's rights enshrined in Articles 7 and 8 of the Charter must be properly taken into account" (See also Case C-543/09 *Deutsche Telekom AG v. Germany* 5 May [2011] ECR I-nyr)" [31]

8. NO STANDING FOR CONSUMER ASSOCIATIONS TO CHALLENGE MERGER CLEARANCE DECISIONS BY THE COMMISSION

8.1 In *Association belge des consommateurs test-achats ASBL v Commission* the General Court yet again rejected a challenge to its restrictive standing rules, this time brought by a consumer association who sought to challenge, on behalf of consumers, a clearance decision of the Commission allowing a merger between two undertakings to take place. The General Court rejected the consumer association's argument that the Treaty and Charter provisions (Article 38 CFR), which require consumer-protection considerations to be taken into account in defining and implementing other EU policies and activities and for those EU policies to ensure a high level of consumer protection, meant that it should

[30] Case C-348/09 *P. I. v Oberbürgermeisterin der Stadt Remscheid* 22 May [2012] ECR I-nyr at para 34

[31] Joined cases C-468,9/10) *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and another v. Spain* 24 November [2011] ECR I-nyr at para 45.

be recognised to have sufficient interest in a merger on behalf of consumers affected by it. Instead the General Court stuck to its narrow definition of standing in the usual terms:

> "65. Since the applicant does not meet either the conditions governing admissibility laid down in the *Plaumann* judgment or those applicable to actions that seek to safeguard procedural rights, it must be concluded that the applicant lacks standing to bring an action against the clearance decision.
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> 66 That conclusion cannot be called into question by the arguments of the applicant relating to its right to effective judicial protection, the importance of which is emphasised by the Lisbon Treaty, in particular by the binding force acquired by the Charter of Fundamental Rights of the European Union, and by certain developments in the legal systems of several Member States.
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> 67 Indeed, suffice it to point out that, in accordance with settled case-law, the conditions for admissibility of an action for annulment cannot be set aside on the basis of the applicant's interpretation of the right to effective judicial protection (Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 64, and order of 26 November 2009 in Case C-444/08 P *Região autónoma dos Açores* v *Council*, not published in the ECR, paragraph 70). Accordingly, an individual to whom a Commission decision is not of direct and individual concern, and whose interests are therefore unaffected by that measure, cannot invoke the right to judicial protection in relation to that decision (see order in Case C-483/07 P *Galileo Lebensmittel* v *Commission* [2009] ECR I-959, paragraph 60 and the case-law there cited)." [32]

9. EQUAL TREATMENT, SOCIAL SECURITY AND NON-EU NATIONALS

9.1 *Kamberaj v Autonomous Province of Bolzano* the Grand Chamber of the CJEU confirmed that the reference made by Article 6(3) TEU to the European Convention for the Protection of Human Rights and Fundamental Freedoms does not require the national court, in case of conflict between a provision of national law and the ECHR, to apply the provisions of the ECHR since the intent of this Treaty provision is simply to reflect the settled case-law of the Court according to which fundamental rights form an integral part of the general principles of law the observance of which the Court ensures.[33] The CJEU also considered the application of the principles regarding the elimination of social exclusion and poverty contained in Article 34 CFR to the issue of the entitlement of third-country nationals who were lawfully long-term residents to social benefits. The issue was whether or not such individuals were able to rely upon this Charter provision to claim equal treatment with other EU nationals with regard to social security, social assistance

[32] Case T-224/10 *Association belge des consommateurs test-achats ASBL v Commission supported by Électricité de France (EDF)* 12 October [2011] ECR II-nyr at paras 65-7

[33] See, inter alia, Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-nyr, paragraph 112

and social protection, in particular housing benefit for low income tenants. The Grand Chamber stated:

> "when determining the social security, social assistance and social protection measures defined by their national law and subject to the principle of equal treatment enshrined in Article 11(1)(d) of Directive 2003/109, the Member States must comply with the rights and observe the principles provided for under the Charter, including those laid down in Article 34 thereof. Under Article 34(3) of the Charter, in order to combat social exclusion and poverty, the Union (and thus the Member States when they are implementing European Union law):
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> > 'recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by European Union law and national laws and practices'…..
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> [A]ccording to Article 34 of the Charter, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. It follows that, in so far as the benefit in question in the main proceedings fulfils the purpose set out in that article of the Charter, it cannot be considered, under European Union law, as not being part of core benefits within the meaning of Article 11(4) of Directive 2003/109. [34]

9.2 It is to be noted that Article 34 CFR falls within Title IV of the Charter concerning "Solidarity". Article 1(2) of Protocol 30 to the Lisbon Treaty provides, however, that:

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

9.3 The terms of Protocol 30 were briefly considered by the CJEU in its judgment in *N. S. v Secretary of State for the Home Department* where it observed that:

> "119. 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) [35] explains Article 51 of the Charter with regard to the scope thereof *and does not intend to exempt the Republic of Poland*

[34] Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES)* 24 April [2012] ECR I-nyr at para

[35] Article 1(1) to Protocol 30 states:

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)." [36]

9.4 The tenor of this judgment suggests that it would be unlikely, should the issue ever come directly before it again, for the CJEU to attribute any greater legal weight to Article 1(2) (or any other provisions) of Protocol 30. Protocol 30 may now perhaps best be seen as a time-specific political face-saving measure, rather than any form of binding legal opt-out for the UK or Poland from any substantive Charter provision, even those concerning Solidarity.

10. ACCESSION OF THE EU TO THE ECHR

10.1 There remains an impression after this survey, that notwithstanding the increasing dominance of fundamental rights talk on the part of the CJEU in the interpretation and application of EU law, it is not always clear that the CJEU is willing to apply the requirements of fundamental rights with any particular rigour against the EU institutions themselves, most clearly as regards the EU Courts and their procedures and hallowed practices. See, for example, S*weden v API and Commission*:

"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. *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.*" [37]

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

[36] Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department* 21 December [2011] ECR I-nyr at para 77

[37] C-514/07 P, C-528/07 P and C-532/07 P S*weden v API and Commission* 21 September [2010] ECR I-nyr; [2011] 2 AC 359, ECJ at paras 92-93

10.2 These observations were then applied to merger control administrative procedures before the Commission in *Sweden v European Commission*:

> "[A]dministrative procedures, especially in the area of the control of concentrations, are subject to strict time-limits, compliance with which would be jeopardised if the Commission was required to deal with reactions to its internal communications in the course of the procedure. *Consequently, it must be ensured, as in court proceedings, that administrative procedures also take place in an atmosphere of total serenity*. It is necessary to avoid exposing administrative activities to external pressure, albeit only in the perception of the public, which would disturb the serenity of the proceedings". [38]

10.3 It is precisely this kind of attitude which may be thought to be one of the main reasons behind the long pressure for the EU itself to become a signatory to the ECHR, with the consequence that the CJEU would in effect fall under the jurisdiction of the ECtHR.

10.4 Article 218(6)(a)(ii) TFEU provides that the Council of Europe, on a proposal by the negotiator, shall adopt a decision concluding the agreement on Union accession to the ECHR after obtaining the consent of the European Parliament. Further, Article 218(8) TFEU requires the Council of Europe to act unanimously for the agreement on accession of the EU to the ECHR, and that:

> "the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements."

10.5 These Treaty provisions are supplemented by Protocol No 8 TEU, Article 1 of which provides that the agreement relating to the accession of the Union to the ECHR shall make provision for preserving the "specific characteristics" of the EU and EU law. Mention is made, in this regard, of "specific arrangements" which might be made for the EU's possible participation in the "control bodies" of the ECHR, and of "mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate".

10.6 Article 2 of Protocol No 8 TEU also requires that the EU accession to the ECHR "shall not affect the competences of the Union or the powers of its institutions" and that the position of individual Member States, notably in relation to individual States' Article 15 or Article 37 reservations to the ECHR, should not be prejudiced by such EU accession.

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[38] Case C-506/08 P *Sweden v European Commission* 22 July [2011] ECR I-nyr at paras 66-7

10.7 Article 3 of Protocol No 8 TEU further provides that the agreement for the accession of the EU to the ECHR shall not affect the Member States' existing EU obligation under Article 344 TFEU not to submit a dispute concerning the interpretation or application of the European Treaties to any method of settlement other than those provided for within the EU legal order itself.

10.8 The post-Lisbon amended European Treaties conclude the issue of EU accession to the ECHR with a Declaration No 2 on Article 6(2) TEU, which is in the following terms:

> "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."

10.9 The required European Treaty bases for the accession of the EU to the ECHR are, at least from the perspective of EU law, now in place. But while the CJEU's initial veto on EU accession to the ECHR[39] may have been removed by these Treaty amendments, any accession Treaty to the ECHR still requires the CJEU's approval as being consistent with the requirements of EU law.

10.10 One should note in this regard the earlier Opinion 1/91 *Re a Draft Treaty on a European Economic Area* when the CJEU vetoed the establishment of an EEA court hierarchy to provide a system of judicial supervision over the whole EEA beyond the EU. The proposed new court structure consisted of an independent EEA Court, functionally integrated with the CJEU, and an EEA Court of First Instance. The new EEA courts were to consist of a number of judges from the CJEU and the Court of First Instance (now the General Court) sitting together, with judges appointed from the various EFTA Member States. The Court of Justice found that such a system of judicial supervision proposed under the draft EEA Treaty was not lawful on the grounds, *inter alia*, that the proposed system of EEA courts might undermine the autonomy of the EU legal order in pursuing its own particular objectives, going so far as to claim:

[39] Opinion 2/94 *Re Accession by the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759

> "Article 238 of the EEC Treaty [now, after amendment, Art 218 TFEU] does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty [now, after amendment, Art 19(1) TEU] *and, more generally, with the very foundations of Community law*. For the same reasons, an amendment of Article 238 in the way indicated by the Commission could not cure the incompatibility with Community law of the system of courts to be set up by the agreement." [40]

10.11 To similar effect was the more recent Opinion 1/09 *Re draft agreement on the European and Community Patents Court* where the CJEU noted:

> "[T]he envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law. Consequently, the CJEU (Full Court) gives the following Opinion: the envisaged agreement creating a unified patent litigation system (currently called "European and Community Patents Court") is not compatible with the provisions of the EU Treaty and the FEU Treaty.' [41]

10.12 It was reported that discussions were entered into directly between the CJEU and the ECtHR with a view to the *two courts* formulating a common position to put to the negotiating parties as to whether and how the EU legal system could be integrated within the Strasbourg system for the protection of European human rights. In a Joint Statement from the then Presidents of the European Court of Human Rights (Judge Costa) and of the Court of Justice of the European Union (Judge Skouris) issued in late January 2011, it was suggested by the judges that it would be expedient for the contracting parties to make provision in any agreement between the EU and the Council of Europe for a "flexible procedure" to allow for the prior involvement of the Court of Justice in all cases where an application to the Strasbourg alleges that a provision of EU law is incompatible with the ECHR. The two presiding judges seem to envisage the possibility of some kind of "preliminary reference" down from the Strasbourg Court to the CJEU, in applications from individuals complaining of an incompatibility between EU law and the ECHR, so as to allow the CJEU to exercise an "internal review" on the issue before the European Court of Human Rights exercises its "external review" under the Convention. This

[40] Opinion 1/91 *Re a Draft Treaty on a European Economic Area* [1991] ECR I-6079 at paras 70–71 (emphasis added).

[41] Opinion 1/09 *Re draft agreement on the European and Community Patents Court*, 9 March, [2011] ECR I-nyr at para 89:

suggestion from the European judges has been taken up in the provisions of Article 3(6) of the draft accession agreement of the working group which provides that:

> "6. In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

10.13 But, the requirement of unanimity in the Council of Europe, the consent of the European Parliament and ratification by each of the Member States before such an accession agreement can be concluded creates a whole new series of potential hurdles within the EU system. Accordingly, whether the powers granted under the European Treaties are ever acted upon and an accession agreement concluded, will require serious political will and impetus from all of the Member States and the other EU institutions.

10.14 Protocol 14 ECHR, which eventually entered into force on 1 June 2010, made provision for the possibility of EU accession to the Council of Europe by amending the ECHR to include a new Article 59(2), which states that "the European Union may accede to this Convention". But any actual accession of the EU to the ECHR will require further amendment of the constituting treaties of the Council of Europe (to deal with issues such as the participation of the EU in the Committee of Ministers of the Council of Europe and the possibility of delegates from the European Parliament participating in the sittings of the Parliamentary Assembly of the Council of Europe). Any such treaty amendment brings with it a requirement for the acquiescence and cooperation of all the other non-EU contracting States of the Council of Europe, most notably Russia (whose previous non-cooperation in the matter of allowing for the Protocol 14 ECHR rationalisation of procedures before the European Court of Human Rights has already been the cause of significant delays). As the Lord Chancellor and Secretary of State for Justice, Kenneth Clarke MP candidly admitted in his oral evidence on 7 September 2011 to the House of Commons European Scrutiny Committee:

> "Even if we were all desperately anxious to get this through tomorrow, my experience of 47 Governments negotiating documents of this kind is you can be into years and years. I am more anxious to see progress on the procedures of the court in Strasbourg, but my big problem there is: a majority is easy; 47 unanimous may take a little time."

10.15 So the much talked of accession of the EU to the ECHR may never happen in the face of (passive) resistance from the CJEU and lack of political interest in the issue from the Member State governments of the EU and separately the other contracting states to the ECHR.

10.16 As the European Court of Human Rights recently complained in Preliminary opinion of the European Court of Human Rights in preparation for the Brighton Conference (Adopted by the Plenary Court on 20 February 2012) at paragraph 40:

> "*Following the submission of a draft accession treaty to the Committee of Ministers in October 2011, the process now seems to be stalled. After some thirty years of discussion all that appears to be lacking is the political will to overcome the last obstacles.* The Court would therefore urge the Member States to seize the opportunity provided by the Brighton Conference to take forward the process to completion in compliance with the Lisbon treaty."

10.17 In other words, this show ain't over if the fat ladies won't sing.

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