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# A New Proportionality Test for Fundamental Rights?

The Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen

## Abstract

In the joined cases C-92/09 and C-93/09 Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen Judgment of 9 November 2010, not yet published,<sup>1</sup> the Court of Justice of the European Union (Court of Justice) was called upon to balance the right to respect of private life in general, and to the protection of personal data in particular, protected by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (the Charter), against the principle of transparency stated in Articles 1 and 10 of the Treaty on European Union (TEU) and in Article 15 of the Treaty on the Functioning of the European Union (TFEU).

The Court of Justice approached this problem within the context of a reference for a preliminary ruling under Article 267 TFEU. This reference, however, took the form of an indirect challenge to certain EU law provisions that, in the view of the applicants, violated the right to respect of private life and of the protection of personal data.

In this analysis the method of the Court of Justice when balancing diverging or even opposing interests protected by EU law will be scrutinised. The authors are critical of the Court's reasoning, which they consider put too little weight on the fundamental interest of transparency in the case at hand. The analysis is structured as follows. First, in section 1, the arguments of the Applicants and the respondent State respectively will be summarised, followed by the main reasoning of the Court. In section 2, the question of how to balance fundamental rights and general interests will be analysed, taking as the point of departure the question of proportionality as described by the Court. The conclusions are presented in the final section 3.

## 1 The facts and proceedings of the case

### 1.1 The Applicants and the respondent State

The applicants in the main proceedings, Volker und Markus Schecke GbR and Hartmut Eifert (the Applicants), were a legal partnership in the business

of agriculture and a full-time farmer, respectively. In 2008, the Applicants had applied for, and later received, financial aid from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). The EAGF and the EAFRD were funds set up by the European Union for the purposes of its common agricultural policy.

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<sup>1</sup> Hereinafter referred to as *Schecke*.

While their applications were pending, the Applicants brought proceedings against the *Land* of Hesse (Germany) before the Verwaltungsgericht Wiesbaden, requesting that the *Land* of Hesse be ordered to refrain from, or to be prohibited from, transmitting or publishing their names, their place of establishment or residence, the postcode of that place, and the amount of aid received. Such data on recipients of funds from the EAGF and the EAFRD was published annually on an internet website, pursuant to Articles 42(8b) and 44a of Council Regulation (EC) No. 1290/2005 of 21 June 2005 on the financing of the Common Agricultural Policy, as amended by Council Regulation (EC) No 1437/2007 of 26 November 2007, and Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation No. 1290/2005 (...). The website also provided a search tool for consultation of the data published.

In each case, the application form for the funds from the EAGF and the EAFRD contained a statement indicating the applicant's awareness that the relevant regulations required publication of information on the beneficiaries of the funds and the amounts received per beneficiary, to be effected annually at the latest by 31 March the following year.

The Applicants argued that the publication of such data relating to them was not justified by overriding public interests. The *Land* of Hesse, on its part, conceded that it was obliged under EU law to publish the data at issue, but undertook not to publish the amounts received by the Applicants.<sup>2</sup> The *Land* of Hesse also argued that the publication of data could not constitute an interference with the private life of the Applicants, as they had been informed of it in the application form and had given their consent to publication by submitting their applications.

Under these circumstances, the Verwaltungsgericht Wiesbaden came to question the validity of the EU regulations at issue, as it held that the contested publication of data relating to the Applicants constituted an unjustified interference with the fundamental right to the protection of personal data. Therefore, the Verwaltungsgericht decided to stay proceedings and

refer a number of questions to the European Court of Justice for a preliminary ruling. For the purposes of this policy analysis, we will focus on the perceived conflict between the values of respect for private life, on the one hand, and the general interest of transparency, on the other hand. The Court addressed this problem in its answer to the question as to whether the EU regulations at issue were valid.<sup>3</sup>

## 1.2 The reasoning of the European Court of Justice

The Court of Justice recognised that the right to respect of private life in general, and to the protection of personal data in particular, was protected by Articles 7 and 8 of the Charter. However, the Court further observed that these rights were not absolute, but must be considered in relation to their function in society. This holding has since been cited in Case C-543/09 *Deutsche Telekom AG v. Bundesrepublik Deutschland*, Judgment of 5 May 2011, not yet published, para 51. In particular, the Court recognised that Article 52(1) accepted limitations to the rights set forth in Articles 7 and 8, insofar as such limitations were provided for by law, respected the essence of those rights and, subject to the principle of proportionality, were necessary and genuinely met objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

The Court of Justice continued to examine whether the Union provisions at issue interfered with the rights guaranteed by Articles 7 and 8 of the Charter, and if so, whether that interference was justified having regard to Article 52 of the Charter.

In that regard, the Court of Justice recognised that the amounts received by beneficiaries from the EAGF and the EAFRD represented part of their income, often a considerable part. As the names of beneficiaries and the amounts received were made available to third parties by publication on a website, the Court held that such publication constituted an interference with the private life of beneficiaries within the meaning of Article 7 of the Charter. The Court also held that the publication of data pursuant to the Union provisions at issue was not based on the consent of beneficiaries.<sup>4</sup>

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<sup>2</sup> *Schecke*, para 29.

<sup>3</sup> Other questions referred by the Verwaltungsgericht mainly concerned the compatibility of the contested publication of data with Directive 95/46/EC (the so-called Data Protection Directive).

<sup>4</sup> The Court does not elaborate the matter of consent any further, as AG Sharpston does. She argues that "significant economic duress sufficed to render the consent non-voluntary", see Opinion of 17 June 2010, paras 82–85.

Furthermore, the Court noted, the application form only contained a statement of awareness. Therefore, the Court concluded, the contested publication of data constituted an interference with the rights recognised by Articles 7 and 8 of the Charter.<sup>5</sup>

Thus, the Court of Justice proceeded to examine whether this interference was justified having regard to Article 52(1) of the Charter. Under that Article, the exercise of rights such as those protected by Articles 7 and 8 of the Charter could be limited, as long as the limitations were provided for by law, respected the essence of those rights and freedoms, and, subject to the principle of proportionality, were necessary and genuinely met objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

Firstly, the Court of Justice held that it was common ground that the interference with the rights guaranteed by Articles 7 and 8 of the Charter caused by the Union provisions at issue was provided for by law.<sup>6</sup>

Secondly, the Court recognised that the EU regulations at issue were intended to serve the general interest of transparency stated in Articles 1 and 10 TEU and in Article 15 TFEU, contributing, inter alia, to the appropriate use of public funds. Hence, the Court held, the Union provisions at issue pursued an objective of general interest recognised by the European Union.<sup>7</sup>

Thirdly, with regard to proportionality, the Court recalled relevant case law according to which derogations and limitations in relation to the protection of personal data must apply only insofar as was strictly necessary.<sup>8</sup> The Court recognised that taxpayers had the right to be kept informed of the use of public funds, but maintained that to strike a proper balance between the conflicting interests involved it was necessary to ascertain whether publication on a website of the names of beneficiaries and the amounts received did

not go beyond what was necessary for achieving the legitimate aims pursued. This involved, in particular, having regard in particular to the interference with the rights guaranteed by Articles 7 and 8 of the Charter. In this context, the Court noted that publication was effected with no distinction with regard, e.g., to the duration, frequency, nature, or amount of aid received.<sup>9</sup>

With regard to natural persons, the Court held that it had not been shown that the Council and the Commission had sought to strike such a balance, or that they had taken into consideration alternative methods of publishing information. The Court envisaged ways of publishing data in a limited manner, providing citizens with a sufficiently accurate image of the aid granted by the EAGF and the EAFRD while at the same time causing less interference with the right to respect of private life, which appeared not to have been examined. Therefore, the Court concluded, the Council and the Commission had exceeded the limits which compliance with the principle of proportionality imposed with regard to the publication of data relating to natural persons.<sup>10</sup>

With regard to legal persons, the Court of Justice recalled that legal persons could claim the protection of Articles 7 and 8 of the Charter insofar as the official title of the legal person identifies one or more natural persons. The Court held that this was the case with regard to Volker und Markus Schecke GbR. However, the Court also observed that legal persons were already subject to a more onerous obligation in respect of the publication of data relating to them. Furthermore, the Court held that it would impose an unreasonable administrative burden on the competent national authorities if they were obliged to ascertain for each legal person whether the name of that person identified natural persons. Therefore, the Court concluded that the Union provisions at issue struck a fair balance in consideration of the respective interests at issue with regard to the publication of data relating to legal persons.<sup>11</sup>

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<sup>5</sup> *Schecke*, para 64.

<sup>6</sup> *Schecke*, para 66.

<sup>7</sup> *Schecke*, para 68.

<sup>8</sup> Case C-73/07 *Tietosuojavaltutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy* [2008] ECR I-9831, para 56. This case is hereinafter referred to as *Satamedia*.

<sup>9</sup> *Schecke*, paras 77, 79–81.

<sup>10</sup> *Schecke*, para 86.

<sup>11</sup> *Schecke*, para 87.

On those grounds, the Court of Justice ruled that the EU law provisions at issue were invalid insofar as, with regard to natural persons who were beneficiaries of EAGF and EAFRD aid, those provisions imposed an obligation to publish personal data relating to each beneficiary without drawing a distinction based on relevant criteria such as the periods during which those persons had received such aid, the frequency of such aid or the nature and amount thereof.<sup>12</sup>

## 2 What fundamental rights and for whom?

### 2.1 Introduction

The summary above shows the Court of Justice interpreting and applying the Charter, even though the facts of the case referred to events occurring in September 2008. The Charter entered into force on 1 December 2009 and at the time when the Applicants brought proceedings before the national court, it was uncertain whether or not the Charter would become legally binding. Nevertheless, the Court of Justice was satisfied with interpreting Articles 7 and 8 of the Charter – together with the clause of limitations of rights stated by Article 52(1) – and did not move beyond these articles. As we shall see, the Court’s choice of focusing on these articles rather than putting the factual circumstances of the case into a broader context of the proper application of the Charter raises issues on the future role and internal structure of the Charter. Some of these issues will be addressed below.

The role of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) and the case law of the European Court of Human Rights (the Strasbourg Court) will be highlighted in this analysis. The Court of Justice referred to case law of the Strasbourg Court when it defined the right to a private life with regard to the processing of personal data and as support for its application of the proportionality test in the present. However, just as there are important articles of the Charter that the Court chose not to consider further, there is important case law of the Strasbourg Court that the Court of Justice did not take into account. We will

return to these questions later, after having a closer look into the issue of proportionality.

### 2.2 The question of proportionality – the point of departure

In this indirect judicial review of the EU law provisions at issue, the Court of Justice used a particular proportionality test. Traditionally, when EU measures have been reviewed by the Court, the so-called “manifestly inappropriate test” has been used.<sup>13</sup> This test is comparatively lenient, as it seeks to respect the discretion of the Union legislature unless the Court considers the contested measure to be manifestly inappropriate to achieve its objectives. The same test has generally applied when national authorities implement EU law, whereas a stricter proportionality test has generally applied when the Court has reviewed measures by Member States affecting any of the fundamental freedoms.<sup>14</sup>

When applying the “manifestly inappropriate test”, the Court will review the suitability and necessity of the Union measure.<sup>15</sup> In cases where the Union measure has entailed a policy choice, the notion of “necessity” has been linked to an assessment including, in the words of Takis Tridimas, “some notion of reasonableness or arbitrary conduct”.<sup>16</sup> In other instances, the necessity test has rather involved an assessment of whether there were any less restrictive alternatives available.<sup>17</sup> In *Schecke*, the Court of Justice seems to use such a test. However, in the “manifestly inappropriate test”, the applicant will have the (heavy) onus of proving that there is an equally effective alternative.<sup>18</sup> In *Schecke*, the onus seems to have been shifted.

As mentioned in the summary above, the Court of Justice held that derogations and limitations in relation to the protection of personal data must apply only insofar as is strictly necessary, citing *Satamedia*.<sup>19</sup> The latter case revolved around a Finnish publication, which *inter alia* disclosed the surnames and annual income of some 1.2 million Finnish taxpayers. In *Schecke*, the Court cited a paragraph in *Satamedia* which concerns derogations from the right to privacy in general, and protection of personal data in particular, under Article 9 of the Data

<sup>12</sup> *Schecke*, paras 80–82.

<sup>13</sup> Takis Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> ed, Oxford University Press, Oxford 2006, p 138 with references.

<sup>14</sup> Tridimas, *op.cit.* For an early example in case law, see case 104/75 *de Peijper* [1976] ECR 613.

<sup>15</sup> Tridimas, *op.cit.*, p 144. Tridimas acknowledges that emphasis can shift between the elements of suitability and necessity, pp 146–147.

<sup>16</sup> Tridimas, *op.cit.*, p 146.

<sup>17</sup> Tridimas, *op.cit.*, p 146 with references.

<sup>18</sup> Tridimas, *op.cit.*, pp 147–148.

<sup>19</sup> Case C-73/07, above n 8. In *Schecke*, paras 77 and 86, the Court of Justice cited *Satamedia* para 56.

Protection Directive.<sup>20</sup> Under Article 9, Member States are allowed to “provide for exemptions or derogations from [certain provisions of the Directive designed to protect personal data] for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression”. In *Satamedia*, then, the Court adjusted the “necessary” of Article 9 into a “strictly necessary”, for the purposes of balancing freedom of expression against the protection of personal data to ascertain whether Finland had superseded its discretion under Article 9. The Court held that Finland had not superseded its discretion.

For the purposes of this analysis, it is noticed that *Satamedia* concerned national law derogating from the right to protection of personal data, embodied in an EU instrument (i.e., the Data Protection Directive), whereas in *Schecke* an EU instrument was challenged on the grounds that it violated the right to protection of personal data. From the traditional perspective, we would expect the “manifestly inappropriate test” to apply in *Schecke*, and a more intense proportionality review to apply in *Satamedia*. From that perspective, it is somewhat surprising to find the Court of Justice in *Schecke* citing *Satamedia* in order to transplant a “strictly necessary” criterion from one area of EU law to another.

## 2.3 Fundamental rights and the tension between transparency and privacy

### 2.3.1 Privacy as a fundamental right

Such a perspective, however, neglects the growing impact of fundamental rights in EU law. The proportionality test used by the Court of Justice in *Schecke* was, explicitly, the test enacted in Article 52(1) of the Charter.<sup>21</sup> The new element introduced by the Court was that “necessary” should be interpreted as “strictly necessary” – mirroring its approach in *Satamedia*. Both cases concerned derogations from the right to respect of private life in general, and to the

protection of personal data in particular, as protected by EU law (under Articles 7 and 8 of the Charter, and under the Data Protection Directive, respectively). The major difference between the two cases, from a fundamental rights perspective, is not the formality that they represent challenges to EU law or national law, respectively, but that in *Satamedia* the Court of Justice was called upon to balance two fundamental rights, whereas in *Schecke* it was called upon to balance a fundamental right against an objective of general interest. In the former case, the right to protection of personal data had to give way to freedom of expression, but in the latter case it prevailed over the general interest of transparency.

Hypothetically, the Court of Justice took the view that there was only one fundamental right (the right to private life in general and to protection of personal data in particular) at stake in *Schecke*, making it easier to have recourse to a “strictly necessary test”. Such an approach would at a first glance mirror the approach of the Strasbourg Court to any limitation of Article 8 of the ECHR: it must be in accordance with law and necessary in a democratic society.<sup>22</sup>

However, such a hypothesis also raises further questions. First of all, Article 8 ECHR has its own structure and has been interpreted in a very wide, almost divergent, case law. Secondly, by referring to the approach taken by the Strasbourg Court in limitations of rights – especially regarding Article 8 ECHR – one should not forget that the latter Court has developed a detailed and fine reasoning. According to the wording of Article 8(2), the interference must be “necessary in a democratic society”, that is, the rule of law must be respected and arbitrary behaviour by the State must be avoided.<sup>23</sup> The justification for the restricting measure should be narrowly interpreted. The concept of margin of appreciation forms an important part of the last criterion – “necessary in a democratic society” – and the Strasbourg Court has stated that it implies that the interference should correspond to a “pressing social need” and be proportionate to the legitimate aim pursued.<sup>24</sup> A number of factors in the specific case

<sup>20</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>21</sup> *Schecke*, para 65. At the time of the ruling of the Court of Justice in *Satamedia*, the Charter had not yet been elevated to its present status as primary EU law (cf. Article 6(1) TEU). However, the increasing importance of fundamental rights, as expressed in the Charter, in the case law of the Court dates back to 2002, at least. See Tridimas, *op.cit.*, p 138 with references, and Paul Craig, The ECJ and ultra vires action: A conceptual analysis, *Common Market Law Review*, vol 48, 2011, pp 395–437, at pp 430–433.

<sup>22</sup> Moreover, the Strasbourg Court would have had to consider the right to freedom of expression, stated in Article 10 ECHR, as discussed below in Section 2.3.2.

<sup>23</sup> *Silver and others v. United Kingdom*, Judgment of 25 March 1983, paras 88–89.

<sup>24</sup> Iain Cameron, *An Introduction to the European Convention on Human Rights*, 5<sup>th</sup> ed, Iustus förlag, 2011, p 111.

decide how great the discretion of the State will be. We can thus conclude that the transplant of “strictly necessary” from *Satamedia* to some extent could be explained by the connection to the ECHR but at the same time it is used in a way that could be – from the perspective of the ECHR – contra productive and alien to the systematic and teleological line of argumentation developed by the Strasbourg Court.

Privacy is a broad concept, including *inter alia* the right to personal autonomy, i.e., the right to develop one’s personality, and also “freedom from prying” by the State or third parties.<sup>25</sup> The Strasbourg Court has repeatedly stated that the concept of “private life” is a very broad term for which one cannot create an exhaustive definition.<sup>26</sup> Article 8 ECHR covers not only the private life of individuals, but also their professional or business life,<sup>27</sup> and even the “privacy” of legal persons.<sup>28</sup> The object and purpose of Article 8 ECHR is to protect the individual against arbitrary interference by the public authorities.<sup>29</sup> Excluded from the scope of Article 8 ECHR is the processing and disclosure of personal data which is not private in itself and not systematically stored with a focus on the data subject, and where the data subject could reasonably expect the processing or disclosure.<sup>30</sup> The Strasbourg Court has ruled in cases of data protection under Article 8 ECHR and has interpreted the concept of “private life” broadly within the context of the Council of Europe’s Data Protection Convention,<sup>31</sup> which was the source of inspiration to the Data Protection Directive.<sup>32</sup>

In EU law, a distinction can be made between privacy and data protection which is shown, for example, as they do not form one sole right according to the articles of the Charter.<sup>33</sup> And in primary law, as the Lisbon Treaty has entered into force, data protection is now part of the provisions having general application.<sup>34</sup> Article 8 ECHR is reproduced in Article 7 of the Charter, while Article 8 of the Charter has no equivalent in the ECHR. But as we have seen, data protection is to some extent part of the right to privacy according to Article 8 ECHR. This interrelationship of the right to privacy and the protection of personal data has been recognised by the Court of Justice as it has held that the processing of personal data liable to infringe the right to privacy must be interpreted in the light of fundamental rights as guaranteed by the ECHR.<sup>35</sup>

However, the two systems are not entirely parallel to each other. The scope of the Data Protection Directive can also be broader than the scope of Article 8 ECHR. Under Article 6 of the Directive, personal data may only be processed when the purpose of collecting it is specified, explicit and legitimate. When the purpose is defined, only the data that is necessary for achieving the purpose may be gathered and it should not be stored longer than necessary for the purpose to be achieved. Under Articles 10 and 11 of the Directive, the person concerned (the data subject) has the right to be informed, to have access to his or her own personal data, and also the right to object to the processing of the data.<sup>36</sup> Situations can therefore arise where disclosure of information falls outside the scope of privacy protection but within the scope of data protection.<sup>37</sup>

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<sup>25</sup> Peter Oliver, The protection of privacy in the economic sphere before the European Court of Justice, *Common Market Law Review*, vol 46, 2009, pp 1443–1483, at p 1443.

<sup>26</sup> Cf. *Pretty v. United Kingdom*, Judgment of 29 April 2002, para 61.

<sup>27</sup> *Rotaru v. Romania*, Judgment of 4 May 2000.

<sup>28</sup> *Niemitz v. Germany*, Judgment of 16 December 1992; *Steel and Morris v. United Kingdom*, Judgment of 15 February 2005 ; *Comingersoll v. Portugal*, Judgment of 6 April 2000.

<sup>29</sup> *Niemitz v. Germany*, paras 29 and 31.

<sup>30</sup> Herke Kranenborg, Access to documents and data protection in the European Union: on the public nature of personal data, *Common Market Law Review*, vol 45, 2008, pp 1079–1114 at p 1093.

<sup>31</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (ETS, No. 108). See also *Z v. Finland*, Judgment of 25 February 1997.

<sup>32</sup> Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, concerns the processing of personal data by EU institutions and bodies and has thus a close link to Directive 95/46.

<sup>33</sup> Kranenborg, *op.cit.*, p 1089.

<sup>34</sup> Article 16 TFEU.

<sup>35</sup> Joined Cases C-465/00, 138 and 139, *Österreichischer Rundfunk* [2003] ECR I-4989, paras 68–69.

<sup>36</sup> These rights are now also granted by Article 8 of the Charter and, with regard to processing of personal data by the institutions of the European Union, by Regulation 45/2001, Article 4. The processing of certain sensitive data, such as data concerning racial or ethnic origin, health, or sex life, is in principle prohibited under Article 8 of the Data Protection Directive. See also Kranenborg, *op. cit.*, p 1086.

<sup>37</sup> In Case T-194/04 *Bavarian Lager Company Ltd. v. Commission* [2007] ECR II-4523, appealed in Case C-28/08 P *Bavarian Lager*, Judgment of 29 June 2010, not yet published, the Union Courts addressed these issues when balancing Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents against Regulation 45/2001.

In *Schecke* the Court of Justice criticised the EU institutions for not paying enough attention to the requirement that legislation allowing the publication of personal data should be in line with the aims underlying Articles 7 and 8 of the Charter.<sup>38</sup> The interpretation takes EU law alone into consideration, hence not giving attention to the arguments put forward by the institutions and the intervening Member States.<sup>39</sup> It seems that the core question for the Court was the fact that the EU institutions had not sufficiently examined or explained how the publication of the personal data of recipients could be avoided or limited in order to meet the requirements of Articles 7 and 8.<sup>40</sup>

### 2.3.2 Access to information as a fundamental right – a question of legitimacy

Several legislative acts of the EU aim at giving access to EU documents in order to strengthen aspects of legitimacy and democracy in the Union.<sup>41</sup> Furthermore, transparency in the sense of access to information and access to documents is enacted in Articles 11(1) and 42 of the Charter.<sup>42</sup> Therefore, it can be argued that transparency, in this sense, which corresponds to the situation in *Schecke*, is as much a fundamental right as the right to protection of personal data. It is here suggested that the balancing performed in *Schecke* awarded too little weight to transparency. However, Articles 11(1) and 42 of the Charter, on freedom of expression including the right to information and the right to access to EU documents, respectively, were not even mentioned by the Court of Justice in *Schecke*. Thus, we remain uncertain as to whether transparency should rightly be regarded as a fundamental right of EU citizens under the Charter.

Once again, a closer study of the case law of the Strasbourg Court adds to the overall picture. Later developments in the case law of the Strasbourg Court indicate that openness and access to documents do form a part of the freedom of expression granted by Article 10 ECHR in a new way.<sup>43</sup> In order for the freedom of expression to be effective (to give information and viewpoints to other), it is inevitably necessary to have access to information.<sup>44</sup> In the ECHR, no explicit reference to a right to access to public documents is made, but such a right is included in Article 10 and in Article 8 concerning access to personal data.<sup>45</sup> Both rights can of course be limited according to the conditions set up in the second paragraph of each Article.<sup>46</sup> For decades, the Strasbourg Court has stated that political expression, which includes any expression on matters of public interest,<sup>47</sup> has a higher level of protection than other expressions covered by Article 10. Article 11(1) of the Charter is intended to have the same content as Article 10 ECHR and the silence of the Court of Justice on this point is thus regrettable.

Nevertheless, the Court of Justice did mention Articles 1 and 10 TEU and 15 TFEU in *Schecke*, even though the Court did not develop its reasoning further. These articles stress openness (Article 1 TEU), participation in the democratic life of the Union (Article 10(3) TEU), and the right to access to documents in the Union (Article 15(3) TFEU). Following the Treaty of Amsterdam, transparency and openness have gained a clearer position in EU law,<sup>48</sup> as well as in several Member States.<sup>49</sup> The Treaty of Amsterdam introduced the right to access to documents in Article 255 TEC as part of the “provisions common to several institutions”.

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<sup>38</sup> *Schecke*, paras 81, 83 and 85.

<sup>39</sup> *Schecke*, para 78.

<sup>40</sup> *Schecke*, para 81.

<sup>41</sup> Dariusz Adamski, How wide is “the widest possible”? Judicial interpretation of the exceptions to the right of access to official documents revisited, *Common Market Law Review*, vol 46, 2009, pp 521–549. The starting point for the recognition of the right of access to documents was Declaration 17 annexed to the Treaty of Maastricht, which eventually led to the new Article 255 in the EC Treaty when the Treaty of Amsterdam entered into force. With reference to this article, Regulation 1049/2001 entered into force on 3 December 2001.

<sup>42</sup> Cf. also Paul Craig, *EU Administrative Law*, Oxford University Press, Oxford 2006, pp 350–351; and Regulation 1049/2001.

<sup>43</sup> *Társág a szabadságjogokért v. Hungary*, Judgment of 14 April 2009, para 35 with reference to *Sdruženi Jihočeské Matky v. Czech Republic*, Decision of 10 July 2006.

<sup>44</sup> Thomas Bull, The right stuff? On the transformation of the protection of rights, in: Fabian Amtenbrink, and , Peter A. J. van den Berg, (Eds), *The Constitutional Integrity of the European Union*, TMC Asser Press, 2010, pp 175–200, at pp 189–190.

<sup>45</sup> Cf *Segerstedt-Wiberg v. Sweden*, Judgment of 6 June 2006.

<sup>46</sup> Cf *Leander v. Sweden*, Judgment of 26 March 1987. One should also note that from a Swedish perspective, the main rule is for more openness and wider accessibility to information than is the case in both the European legal orders.

<sup>47</sup> *Steel and Morris v. United Kingdom*, Judgment of 15 February 2005, para 88; *Niemitz v. Germany*, Judgment of 16 December 1992, para 31.

<sup>48</sup> Kranenborg, *op.cit.*, p 1087.

<sup>49</sup> Lenaerts, and Gutiérrez-Fons, *op.cit.*, p 1656. See also Kranenborg, *op. cit.*, p 1087.

Pursuant to the Treaty of Lisbon, it is now included in Article 15 TFEU, as part of the “provisions having general application”.<sup>50</sup> In *Schecke*, however, the Court held that openness does not automatically prevail over the right to protection of personal data, even in cases where considerable amounts of money are at stake.<sup>51</sup> That holding suggests a limited impact for the general interest of transparency, and right to access to information; at least when balanced against the rights enshrined in Articles 7 and 8 of the Charter.

Issues of openness and transparency with regard to the political institutions of the European Union have been scrutinised on several occasions by the courts of the EU.<sup>52</sup> In *Borax*,<sup>53</sup> for example, the General Court suggested that the right to privacy of experts, contributing in political decision-making, could serve as basis for limiting the right of the public to insight and access to information, provided that a disclosure of the information at issue would concretely and effectively undermine the decision-making process.<sup>54</sup> Unfortunately, the General Court did not mention that such experts are officially appointed to serve the public, i.e., EU citizens and others. Here, a potential conflict with the Strasbourg case law can be detected. According to the Strasbourg Court, it is clear that the interest of open debate prevails over the right of an official servant to a private life.<sup>55</sup>

From a more practical perspective, *Schecke* also points at the challenges that a modern democracy faces with regard to new technologies and the Internet. In her Opinion in *Schecke*, AG Sharpston pointed out that the Internet is today the “obvious medium of publication”.<sup>56</sup> Here another conflict appears; while striving to protect the privacy of individuals, the democratic aspect today is different from what it was ten years ago. The fact that many people use the Internet as their main (and often only) source of information might, in a wider perspective, be an important matter to take into account when handling privacy regulations.<sup>57</sup>

Thus, transparency is an important means of guaranteeing efficient control over the exercise of public power, in general, and over the work of officials serving the people, in particular.<sup>58</sup> It is also an utterly important tool for ensuring that the rule of law is respected, and enhanced, by the institutions of the Union. In this context, there is a tendency in the case law of the General Court that to some extent differs from the Court of Justice. On several occasions, the former has not hesitated to suggest that the right of access to documents is a fundamental right,<sup>59</sup> while the Court of Justice, so far, has avoided characterising it as such.<sup>60</sup> The General Court has thus paid more attention to the importance of access to information.<sup>61</sup> Such attention from the Court of Justice as well, mirroring the developments in the Treaties since Amsterdam, would be most welcome.

### 2.3.3 An alternative approach, and future issues within the field of fundamental rights

Another issue of interest in this case is what role the concept of the State’s margin of appreciation developed by the Strasbourg Court could play when the Court of Justice has to balance two fundamental rights against each other. The concept of margin of appreciation forms an important part of deciding the limits of the criterion “necessary in a democratic society” and thus what is to be considered a “pressing social need”.<sup>62</sup> In *Schecke*, the Court of Justice avoids taking these concerns into account.

If the Court of Justice had argued that the general interest of transparency entailed a fundamental right to access to information and documents, *Schecke* would have concerned the balancing of two conflicting fundamental rights. As the Court chose another approach, it lost its opportunity to give new guidance on the pressing EU law issue of how to balance conflicting rights in the Charter, and whether there is a hierarchy of rights within the Charter. Furthermore, we remain uncertain

<sup>50</sup> Cf. The heading of Title II: “Provisions having general application”, encompassing Articles 7 to 17 TFEU.

<sup>51</sup> *Schecke*, para 85.

<sup>52</sup> See, for example, Case C-345/06 *Gottfried Heinrich*, [2009] ECR I-1659.

<sup>53</sup> Case T-121/05 *Borax Europe Ltd v. European Commission*, [2009] ECR II-27.

<sup>54</sup> *op.cit.*, para 71. Compare Bull, *op.cit.*, p 192.

<sup>55</sup> *Lingens v. Austria*, Judgment of 8 July 1986. It is noteworthy that 40 per cent of the EU budget concerns the financing of the Common Agricultural Policy.

<sup>56</sup> *Schecke*, Opinion of the A.G. Sharpston of 17 June 2010, para 96.

<sup>57</sup> It is not clear in the case how accessible the information was outside Internet, in traditional (printed) sources.

<sup>58</sup> Case T-233/09, *Access Info Europe v. Council*, Judgment of 22 March 2011, not yet published, para 69.

<sup>59</sup> Joined Cases T-3/00 and 337/04, *Pitsiorlas v. Council and ECB* [2007] ECR II-4779, paras 221 and 231.

<sup>60</sup> *Schecke*, Opinion of the A.G. Sharpston of 17 June 2010, para 67.

<sup>61</sup> *Adamski*, *op.cit.*, p 548.

<sup>62</sup> *Cameron*, *op.cit.*, p 111.

as to how to balance rights in the Charter against rights in the ECHR, general principles of EU law, and rights conferred by the Treaties. For guidance, we must still return to well-known case law such as *Schmidberger*, where the fundamental right of freedom of expression was in conflict with the free movement of goods. In that case, the Court held that the *underlying interests* of the two freedoms should be balanced in order to reach a proportional outcome.<sup>63</sup> The result of such a balancing act in *Schecke*, if it had been performed, is difficult – impossible, perhaps – to foresee. Such guidance in *Schecke* would have been desirable for all who are called upon to apply EU law in concrete cases. There is no lack of sources for inspiration for such guidance: Almost all Member States have in their national legislation specific rules handling the conflict between data protection and access to documents.<sup>64</sup>

The underlying interest of access to documents has a clear connection to democracy and is a part of the general interest of transparency of government. When citizens have the right to access documents, democratic legitimacy of government is assured. It also enables citizens to control government and assures that decision-makers can be held accountable for their actions.<sup>65</sup> The right to access documents serves the general interest of democratic legitimacy of government. It enables citizens to control government and assures that decision-makers can be held accountable for their actions.<sup>66</sup> Furthermore, to safeguard the right to access to documents it is important to maintain the common rule that one does not need to give reasons for a request for access to a certain document.<sup>67</sup>

The underlying interests of data protection and the right to private life, on the other hand, are private interests of personal integrity that have become more urgent in recent years due to the threats to integrity inherent in developments of information technology and social media. Therefore, Article 8 of the Charter also specifies that there must be legitimate reasons for any processing of personal data.

The case law of the Strasbourg Court can be used as an important tool for defining the underlying principles and how to balance these against each other. Moreover,

the Strasbourg Court stresses the importance of a certain margin of appreciation for the national courts and decision makers depending on the circumstances of the specific case. Herke Kranenborg has suggested a differentiated approach, in which all circumstances of the specific case are considered, submitting that the more the disclosure of the personal data contributes to a strong and current public debate, the more necessary it is to make a test of overriding public interest. He proposes that such a test should be included in the EU legislation on data protection in order to open up for a nuanced balancing of the fundamental rights of privacy and data protection on the one hand, and the right to access to documents on the other.<sup>68</sup> If access to personal data really serves public control of the government, or another overriding public interest, and if disclosure does not constitute an unjustified interference with the right to privacy of the person concerned, it should be granted. Kranenborg's suggestion is in need of further elaboration. For instance, it is not clear under what circumstances interference would be "unjustified". However, as a starting point for a new way of structuring the act of balancing the rights involved, it is welcome.

In *Schecke*, the Court of Justice does not seem to take into consideration the argument from the Strasbourg Court that fundamental rights in situations of professional activity are given a protection that is weaker than the one given in purely personal situations.<sup>69</sup> It could be argued that the Applicants were not in a purely personal situation since they received considerable amounts of EU funds for carrying out professional activities. It is submitted that such a differentiation between the protection of personal data pertaining to private life, on the one hand, and personal pertaining to business life (even when carried out by individuals), on the other, would serve to clarify the stakes when that right is to be balanced against the general interest of transparency or the right to access to information. In *Schecke*, nevertheless, the Court of Justice omitted to adopt such a distinction while referring to the case law of the Strasbourg Court.

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<sup>63</sup> Case C-112/00 *Schmidberger* [2003] ECR I-5659. See also *Satamedia*, Opinion of A.G. Kokott of 8 May 2008, paras 50 et seq.

<sup>64</sup> See Kranenborg, *op.cit.*, p 1103.

<sup>65</sup> Cf. T-233/09, *Access Info Europe*, Judgment of 22 March 2011, not yet published, para 57.

<sup>66</sup> Cf. with T-233/09, *Access Info Europe*, Judgment of 22 March 2011, not yet published, para 57.

<sup>67</sup> See Regulation 1049/2001, Article 6. In Case C-28/08 P *Bavarian Lager*, paras 58-59, the Court of Justice criticised the General Court's reasoning (in Case T-194/04) on this matter since the General Court reached its conclusions by applying the ECHR and the case law of the Strasbourg Court, not taking into consideration specific rules stated in EU law.. See Case C-28/08 P, *Bavarian Lager*, paras 45–48.

<sup>68</sup> Kranenborg, *op.cit.*, pp 1110 and 1094.

<sup>69</sup> Cf. Oliver, *op.cit.*, p 1483.

### 3 Closing the case... and opening up for new questions

In *Schecke*, the Court of Justice had an opportunity to analyse several important questions concerning the protection of fundamental rights within EU law, and most especially, to interpret articles of the Charter. First of all, we can conclude that the Court failed to undertake a comprehensive reading of conflicting rights in the Charter and to give important guidance as to how these rights and principles shall be balanced against each other. Secondly, the Court's judgment could have shed more light on how the Charter should be understood in more general terms and on its role in EU law. It is clear that EU secondary law, as well as national law falling within the scope of EU law, must be interpreted in the light of the Charter, and that EU legislation that is in breach of an article of the Charter should be declared invalid under Article 267 TFEU.<sup>70</sup> That is also the conclusion in *Schecke* as to the conflict between Articles 7 and 8 and the secondary legislation in question.<sup>71</sup> But the Charter also elaborates general principles of EU law.<sup>72</sup> The Charter and the ECHR as interrelated promoters of fundamental and human rights were unfortunately not discussed in the Court's assessment. Unfortunately, the interrelationship of the Charter, the ECHR, and the general principles of EU law as complementary (or perhaps, at times, conflicting) sources of primary EU law, was not addressed by the Court. It does seem to follow from *Schecke*, however, that a new and stricter proportionality test will apply when there are derogations from (at least certain) fundamental rights – regardless of whether that derogation is due to a national measure or an EU measure.

The Court has shown a greater tendency to accept value diversity and to leave a certain margin of appreciation to the Member States in cases dealing with national constitutional traditions not jeopardizing the economic goals of the EU.<sup>73</sup> Arguably, Treaty developments on the

protection of fundamental rights signal that the time has come for a similarly wide margin of appreciation for the Member States in questions concerning human rights.<sup>74</sup> If a margin of appreciation is allowed, the proportionality test must be more lenient. For example, if a constitutional value is at stake and the effects of the internal market are not that profound, then it is easier for the Court to leave room for margin of appreciation. However, one has to approach these issues on a case by case basis, considering the context of facts, what right is being restricted and what kind of aims motivate the limitation of the right.<sup>75</sup>

The Court of Justice refers to Strasbourg case law and, by doing so, it finds inspiration and legitimacy for its own decisions. But the way this is done has been criticised by scholars insofar as the reasoning of the Court of Justice is neither coherent nor comprehensive.<sup>76</sup> Though the rights of the ECHR should form an integral part of EU law, the Court of Justice does not hesitate to hold a different opinion than the Strasbourg Court.<sup>77</sup> Whether or not this will change in the Court of Justice's future case law, as Articles 52(3) and 53 of the Charter aim at creating a bridge between the EU legal order and the ECHR, remains to be seen.

Arguably, the ruling in *Satamedia*, while balancing two fundamental rights against each other, is a step too far away from what (often) is said to be the main aim of the EU: the internal market.<sup>78</sup> Thus, more cases like *Satamedia* would jeopardize the coherence of the internal market, leaving too much of a margin of appreciation to the national Courts and the Member States.<sup>79</sup> These final remarks indicate another more profound legal and political question, lurking behind the wording used by the Court in its judgments. In *Schecke*, the Court faced a well-known delicate situation, as it had to assure that the EU legislators comply with primary law and the principles contained

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<sup>70</sup> Cf. Article 6(1) TEU.

<sup>71</sup> *Schecke*, para 89, and para 1 of the Operative Part.

<sup>72</sup> Koen Lenaerts and José A. Gutiérrez-Fons, The constitutional allocation of powers and general principles of law, *Common Market Law Review*, vol 47, 2010, pp 1629–1669, at p 1656.

<sup>73</sup> See, for example, Lenaerts and Gutiérrez-Fons, *op.cit.*, p 1666.

<sup>74</sup> For an argument to this end drawing on the principle of subsidiarity, see Lenaerts and Gutiérrez-Fons, *op.cit.*, p 1664, with references.

<sup>75</sup> Lenaerts and Gutiérrez-Fons, *op.cit.*, p 1666.

<sup>76</sup> Guy Harpaz, The European Court of Justice and its relations with the European Court of Human Rights: The quest for enhanced reliance, coherence and legitimacy, *Common Market Law Review*, vol 46, 2009, pp 105–141 at pp 109–110.

<sup>77</sup> Harpaz, *op.cit.*, p 110. For references dating from before the entry into force of the Charter, see n 35.

<sup>78</sup> A similar reasoning can be found in Case C-275/06, *ProMusicae v. Telefónica de España*, [2008] ECR I-271.

<sup>79</sup> Cf Oliver, *op.cit.*, pp 1482–1483.

therein, while not taking it upon itself to make the political, legislative choices that the Treaties confer upon the legislator. The closer we move toward the core values of the EU, the more intense and present is thus the question of how the Court respects the separation of powers and a potential hierarchy of norms. With the Charter now being legally binding, and the succession of the EU to the ECHR pending (further complicating an already complicated relationship to the human rights regime of the Council of Europe), these questions will not cease to gain importance.

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