



# *EU fundamental rights protection within and beyond the EU Single Market*

*EU Charter, free movement & citizenship*

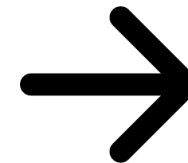
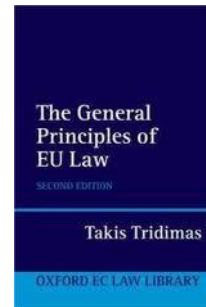
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# *I. Introduction to EU fundamental rights*



# Development of Fundamental Rights within the EU legal order

## EU FR as General Principles of EU Law

- “Respect for fundamental rights an integral part of the general principles of Community law” (Case 11/70, Internationale Handelsgesellschaft)
  - ✓References to constitutional traditions common to MS
  - ✓References to ECHR
- Lisbon Treaty: FR in the Treaty and binding EU Charter



# Fundamental Rights in the Treaties (a)

## Article 2 TEU

‘The Union is founded on [...] the rule of law and respect for human rights [...]. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance [...] and equality between women and men prevail.’

## Article 3(3) TEU

- Social market economy
- Combating social exclusion & discrimination
- Equal treatment
- Protecting the rights of children

## Article 6 TEU

- Sources of EU fundamental rights

# **Fundamental Rights in the Treaties (b)**

## **Article 7 TEU**

- Council may suspend voting rights and other rights of MS
- In case of serious & persistent breach of Article 2 TEU

**Article 19 TEU: effective legal protection & independence of the judiciary**

**Article 49 TEU: accession to the EU**

**Articles 7-10 TFEU: integration clauses**

**Article 18 TFEU: principle of non-discrimination**

**Article 19 TFEU: general principle of non-discrimination**

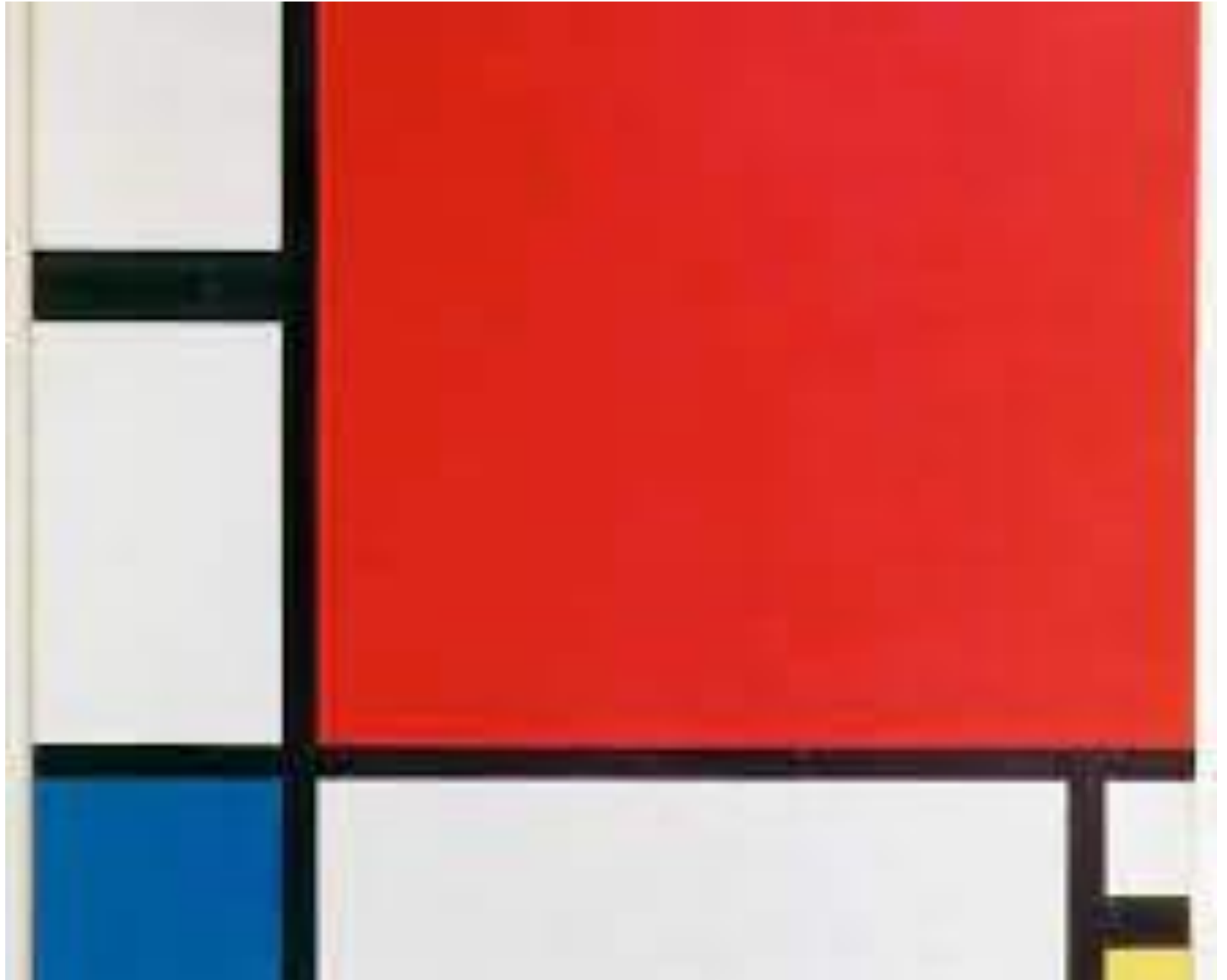
**Article 157 TFEU: principle of equal pay**

# EU Charter of Fundamental Rights - Scope

## Article 51(1)

- EU Institutions & FR
- Member States & FR
- ✓ NB Only when MS *implement* EU law → when MS act within *the scope* of EU law (case law ECJ)
- **Private parties**
- ✓ Joined Cases C-569 & 570/16, Bauer et al
- ✓ Case C-131/12, Google Spain

Towards a self-standing obligation to respect FR?



# EU Charter of Fundamental Rights - Content

Modern catalogue → mixed approach

- No classic distinction between political, civil, economic and social rights
- Innovative character
- Distinction between rights & principles (Article 52(5))

Corresponding to ECHR?

- ECHR minimum standard, but autonomous interpretation CJEU

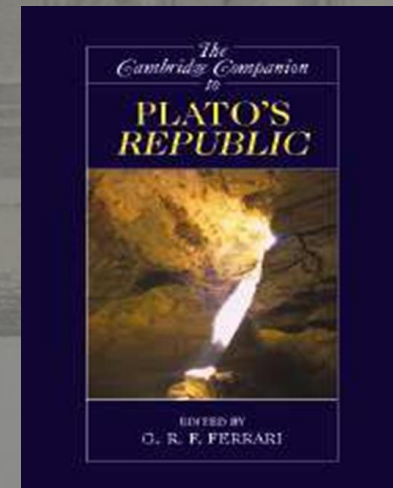




## *II. Fundamental rights and the EU Single Market*



Pompei - Casa del Poeta.





# Fundamental Rights **strengthening** Four Freedoms

**Point of departure:** development of fundamental rights within the slipstream of the EU Single Market

## **Treaty freedoms**

- ✓ **Case C-390/12, Pfleger:** para. 57 ‘National legislation that is restrictive from the point of view of Article 56 TFEU [...] is also capable of limiting the freedom to choose an occupation, the freedom to conduct a business and the right to property enshrined in Articles 15 to 17 of the Charter.’

## **EU internal market legislation**

- ✓ **Case C-70/10, Scarlet Extended** (next week): paras 46 & 47 ‘[...] national authorities and courts must, in particular, strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of **the freedom to conduct a business** enjoyed by operators such as ISPs pursuant to Article 16 of the Charter. [...] An injunction would result in a serious infringement of the freedom of the ISP concerned to conduct its business since it would require that ISP to install a complicated, costly, permanent computer system at its own expense [...]



1



2



Court of Justice of the European Union  
**PRESS RELEASE No 125/20**  
Luxembourg, 6 October 2020

Judgment in Case C-66/18  
Commission v Hungary

Press and Information

**The conditions introduced by Hungary to enable foreign higher education institutions to carry out their activities in its territory are incompatible with EU law**

In its judgment in *Commission v Hungary (Higher education)* (C-66/18), delivered on 6 October 2020, the Grand Chamber of the Court of Justice upheld the action for failure to fulfil obligations brought against Hungary by the European Commission. The Court held, first, that, by making the exercise, in Hungary, of teaching activities leading to a qualification by higher education institutions situated outside the European Economic Area (EEA) subject to the existence of an international treaty between Hungary and the third country in which the institution concerned has its seat, Hungary has failed to comply with the commitments in relation to national treatment given under the General Agreement on Trade in Services (GATS), concluded within the framework of the World Trade Organisation (WTO).<sup>1</sup> That requirement is also contrary to the provisions of the Charter of Fundamental Rights of the European Union ('the Charter') relating to academic freedom, the freedom to found higher education institutions and the freedom to conduct a business.<sup>2</sup>



# Fundamental Rights **softening** Four Freedoms – Clashes & tensions (a)

## Treaty freedoms – Different approaches

- ✓ **Case C-112/00, Schmidberger:** Restriction as a result of a demonstration by environmentalists justified and proportionate in the interest of freedom of expression – true balancing test (para. 89)
- ✓ Margin of discretion for the Member State
- ✓ **BUT: Case C-438/05, Viking Line:** “If [...] the national court came to the conclusion that, in liable to be adversely affected by the reflagging of the *Rosella* are in fact jeopardised or under serious threat, it would then have to ascertain whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.” (para. 84)
- ✓ Very strict proportionality review → little margin of discretion for Trade Unions

# Fundamental Rights **softening** Four Freedoms – Clashes & tensions (b)

## EU internal market legislation – Different approaches

- ✓ **Case C-283/11, Sky Österreich**: balancing different conflicting rights: free movement of services, freedom to conduct a business, pluriformity of media, freedom of expression (paras 45-46 a.f.)
- ✓ **Case C-131/12, Google Spain** (para 97): ‘the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held [...] that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject’s name.’

## Fundamental Rights in the EU Digital Single Market

noch keinen einzigen Cent mit ehrlicher Arbeit verdient, aber unser Steuergeld diesen eingeschleusten Invasoren in den Allerwertesten blasen. Verbietet doch endlich diese grüne Faschistenpartei.

 oe24.at   
3. April · 

 Seite gefällt mir

Gegen blau-schwarze Pläne: "Wir werden alles daran setzen, das auch rechtlich zu bekämpfen".

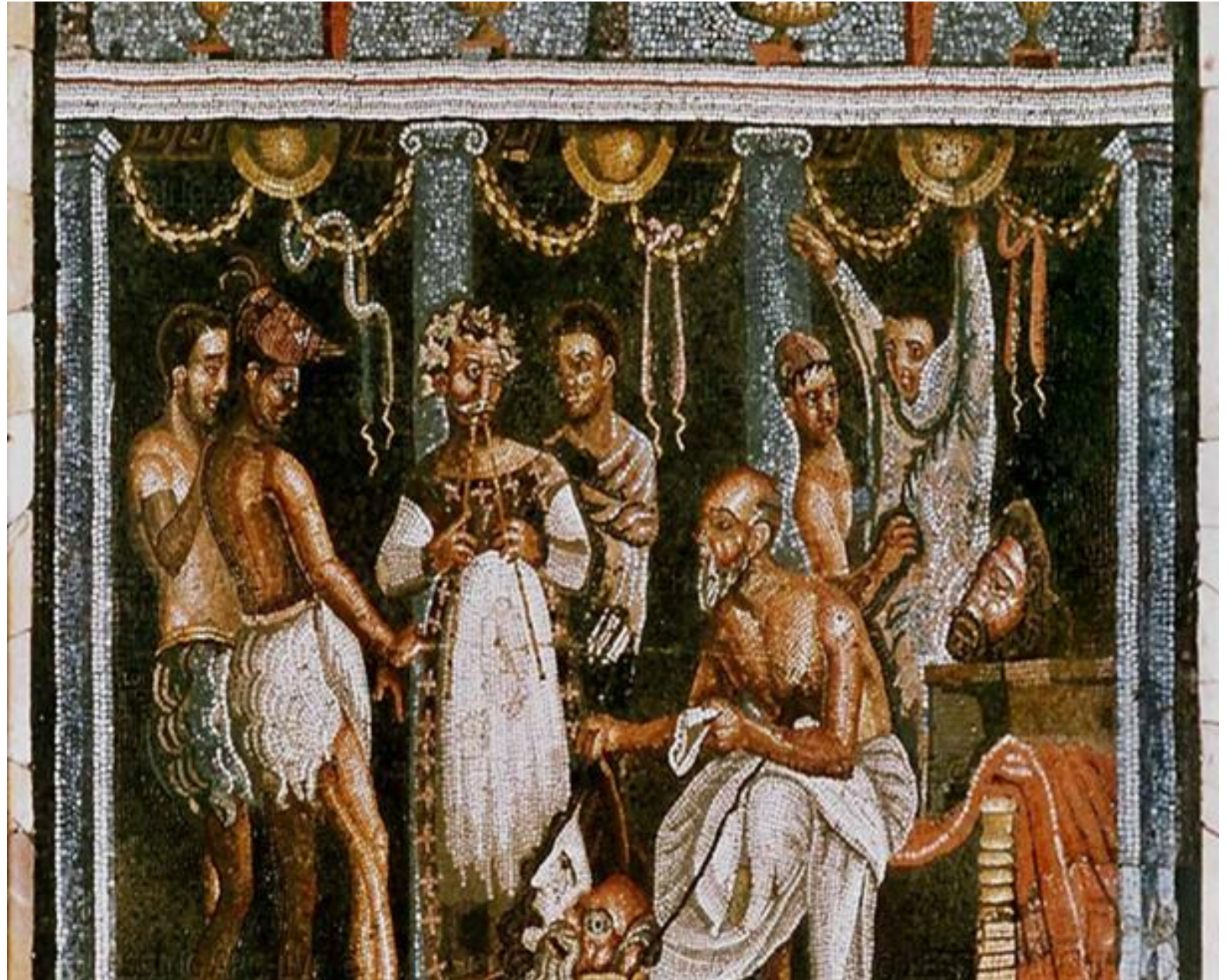


"Lousy traitor. This corrupt tramp has never earned a penny fairly but keeps sending our tax money to infiltrated invaders. Please prohibit this green Fascist party".

- E.g. Case C-18/18, Eva Glawischnig-Pieszcsek v Facebook
- GDPR
- Copyright Directive
- Proposals for:
  - ✓ Digital Services Act
  - ✓ Digital Markets Act
  - ✓ AI Regulation
  - ✓ Data Governance Act

# Concluding observations

- **No a priori hierarchy** between fundamental rights and economic freedoms
- **But:** the Internal Market rules constitute the normative framework for the assessment of FR → this is different for the ECHR
- ✓ Is this narrative apt to deal with FR?
- ✓ Is the reasoning of the Court sometimes flawed?
- ✓ Is the toolbox of the Court sufficient to deal with FR?
- ✓ Are social rights more second division?
- **And:** certain FR play a particularly important role in the context of the EU
- ✓ Rights to privacy & data protection
- ✓ Hence: what about other FR?





# *III. Beyond the EU Single Market - EU citizenship & (Fundamental) Rights*



# What is EU citizenship?

- Article 20(1) TFEU

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

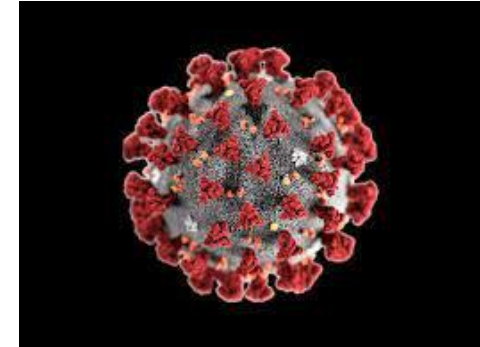
- CJEU (case law)

- Citizenship of the Union is intended to be the fundamental status of nationals of the Member States





# EU citizenship rights (I)



## Legal Framework (Legislation & Treaty)

- **Market access rights** for economically active citizens (Treaty provisions on free movement -> workers, self-employed, service providers and recipients)
- **Migration rights**: since April 2006: Directive 2004/38 on the free movement of persons (broad personal scope: economically active and non-active Union citizens and TCN)
- ✓ **Impact of Covid-19 on migration rights unprecedented**
- Specific citizenship rights in the TFEU and the Charter on Fundamental rights

# EU citizenship rights (II)

## Articles 18 to 24 TFEU

- The right to move and reside freely
- Electoral rights: equal treatment EP and ME
- (Equal) diplomatic protection in TC
- Petition to EP and Ombudsman
- New: citizens' initiative: 1 million citizens from a significant amount of MS
- ✓ <http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing>

# EU citizenship rights (III)

## Multiple sources of fundamental rights

### ➤ Article 6 TEU

- ✓ EU Charter
- ✓ General principles of EU law
- ✓ ECHR/International law
- ✓ national constitutions
- ✓ specific national and EU legislation
- ✓ Par. 2: The EU shall accede to the ECHR...

### ➤ Beyond market citizenship?

# EU citizenship & Fundamental Rights (I)

Limited scope of the EU Charter → Article 51(1) Charter

- Link with free movement: derogations and restrictions to free movement
- Link with the right to reside - Article 20 TFEU?



# EU citizenship & Fundamental Rights (II)

## Link with free movement

- E.g. Case 60/00, Carpenter
- Article 21 TFEU & Directive 2004/38
- ...BUT... Case C-333/13, Dano

## Link with Article 20 TFEU

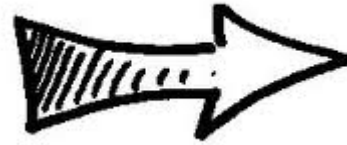
- Ruiz Zambrano....
- Von Bogdandy: Article 2 TEU and Article 20 TFEU
- Commission: Rule of Law procedure: Article 7 TEU
- Court of Justice: Article 19 TEU, Article 47 EU Charter & Article 2 TEU: Protecting independence of judiciary (Case C-619/18, Commission v Poland)



## *IV. EU Citizenship & Right to Family Life*



# EU citizenship & Right to Family Life (a)



**Case C-34/09, Ruiz Zambrano:** Zambrano's have the Colombian nationality live with their two children having the Belgian nationality in Belgium. They are threatened to be expelled. Do you think EU citizenship would be able to help/of added value to the family?

## EU citizenship & Right to Family Life (b)



**Case C-34/09, Ruiz Zambrano:** ‘Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the **genuine enjoyment of the substance of the rights** conferred by virtue of their status as citizens of the Union’



# EU citizenship & Right to Family Life (c)



**Case C-256/11, Dereci** ‘Effectiveness of Union citizenship’  
‘the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.’

# EU citizenship & Right to Family Life (d)

## Case C-133/15, Chavez-Vilchez

Article 20 TFEU (mixed family)

- ✓the Dutch parent is (partly) unable to take care of the children
- ✓TCN-parent is able to take care of the children
- ✓CJEU refers to the EU Charter

‘The fact that the other parent, an EU citizen, could assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but is not in itself a sufficient ground to refuse a residence permit. It must be determined that there is not, between the child and the third-country national parent, such a relationship of dependency that a decision to refuse a right of residence to that parent would compel the child to leave the EU.’

**‘[...] the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter.’**



# *V. A more citizenship-based system of protection of FR?*



# Three layers of FR protection

- National level
- ECHR level
- EU level

## ➤ CJEU in the case of Dereci

“if the referring court considers (...) that the situation of the applicants in the main proceedings is covered by European Union law, it must examine (...) the right to respect for private and family life provided for in **Article 7 of the Charter**. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination **in the light of Article 8(1) of the ECHR.**”

## ➤ BUT → Chavez-Vilchez

- ✓ Application of EU Charter

# Composite citizenship (Van Eijken, 2014)?



- Composed of different entitlements – responsibilities of authorities & fundamental rights protection
- Challenge (I): limited scope of the EU Charter
  - Market citizenship & free movement extremely relevant
  - In exceptional circumstances: FR protection for static EU citizens
- Challenge (II): serious and systematic breach of fundamental rights (Article 7 TEU, Article 2 TEU and Article 20 TFEU)
  - Political agreement difficult
  - BUT → Important case law of the Court



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*Thank you for your attention*

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