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# Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights

Elizabeth F. Defeis\*

## I. Introduction

The Treaty of Amsterdam, which came into force in 1999, affects both the substantive content of human rights and the mechanisms available to protect human rights in the European Union. The human rights policy of the European Union is two-fold. It affects all community actions and national action and legislation that implement community law. It also affects the external relations of the European Union by addressing human rights concerns in its dealings with nations who are not members of the European Union.<sup>1</sup>

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1. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. (C 340) [hereinafter *Amsterdam Treaty*], incorporated into the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992).

The Treaty of Amsterdam, Article 49:

Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

See Barbara Brandtner & Allan Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, available at <http://www.EJIL.org/Journal/Vol9/No3/Art2.html> (last modified November 9, 1999).

The protection of human rights as a fundamental principal of the European Union, although a relatively recent phenomenon, is one that is now firmly entrenched in European Union policy and law. The main focus of the Treaty of Rome of 1957, [hereinafter EEC Treaty] which established the European Union, was economic integration, albeit with political overtones. Since it was necessary to harmonize the work force throughout the community the treaty addressed workers' rights including the right to equal pay based on gender.<sup>2</sup> Subsequent treaties, primarily designed to strengthen a single internal market and foster monetary integration, acknowledged the goal of promoting democracy on the basis of fundamental rights.<sup>3</sup> Although the European Court of Justice early recognized human rights as a fundamental aspect of community law, its approach to human rights, while rigorous as compared to other European Union institutions was *ad hoc* and lacked a coherent policy. For example, although it ruled that the content of human rights protections derived from the constitutional traditions of member states<sup>4</sup> and later to international agreements to which states are party,<sup>5</sup> it did not initially apply the provisions of the European Convention on Human Rights to cases before it nor did it refer to the decisions of the European Court of Human Rights in its opinions. Although more recently, it has referred to decisions of the European Court of Human Rights, it has also ruled that without an amendment to the EEC Treaty, the EU could not itself become a party to the European Convention on Human Rights.<sup>6</sup>

In 1999, the Treaty of Amsterdam came into force and explicitly incorporated the human rights standards set out in the European Convention on Human Rights into European Union law. Article 6(2) provides that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms." Further

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2. Treaty of Rome, March 25, 1957, 298 U.N.T.S. 11, (1957).

3. Single European Act, February 17, 1986, 1987 O.J. (L 169) 1, 2, [1987] C.M.L.R. 741. Preamble states: "Determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."

4. Case 29/69, *Stauder v. Ulm Sozialamt*, 1969 E.C.R. 419, at 427 [1970] 10 C.M.L.R. 112 (1970).

5. Case 4/73, *Nold, Kohlen-und BaustoffsgroBhandlung v. Commission*, 1974 E.C.R. 491, [1974] 2 C.M.L.R. 338 (1974).

6. Case 2/94, *Re: the Accession of the Community to the European Human Rights Convention*, 2 C.M.L.R. 265 (1996). See *Grant v. South-West Trains*, (C 249/96) [1998] 1 C.M.L.R. 993.

the European Court of Justice is now required, whenever it has jurisdiction, to apply these human rights standards in relation to acts of the European Union institutions and to actions of member states implementing European Union Law.<sup>7</sup> The Treaty of Amsterdam has also expanded the jurisdiction of the European Court of Justice and the potential for overlapping subject matter jurisdiction with the European Court of Human Rights, the court that has jurisdiction over claimed violations of the European Convention on Human Rights has thus been increased. This presents the potential for possible conflicts between the decisions given by the European Court of Justice and the European Court of Human Rights on human rights issues that will be decided.

This article will explore the development of the human rights jurisprudence of the European Union and note the conflicts that might occur due to overlapping jurisdiction of the European Court of Justice and the European Court of Human Rights. It will then explore the options that might be explored to create a harmonious and integrated approach to human rights in the European Union.

## II. History

Incorporating human rights as a fundamental principle of European Union law has been achieved through a series of amendments to European Union treaties, through Council and Commission action and through decisions of the European Court of Justice. More recently the European Parliament, the only democratically elected institution has taken a leadership role with respect to articulating human rights concerns in the European Union.<sup>8</sup>

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7. Art. 46(d), Treaty of Amsterdam:

The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall only apply to the following provisions of this Treaty:

(d) Article 6(2) with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty.

Article 6(2): The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on November 4, 1950 and as they result from the Constitutional traditions common to the Member States, as general principles of Community Law.

8. Resolution of the Commission adopting the declaration of fundamental

When the European Union [hereinafter EU] was first established in 1957, its primary goal was the attainment of economic integration.<sup>9</sup> Although the Treaty of Rome does contain a Social Chapter which gives limited mention to human rights and the protection of workers' rights, its primary focus is to improve working conditions on a harmonized basis throughout the Community.<sup>10</sup> Specific individual rights that the EEC Treaty protects include the freedom of movement and freedom from discrimination on the basis on nationality and gender.<sup>11</sup> Beyond the mention of these principles, however, the EEC offers little to no protection in other areas of human rights nor does it contain any specific provisions to enforce these rights.<sup>12</sup>

While the Single European Act [hereinafter SEA] of 1987, like the Treaty of Rome, deals primarily with the completion of a single internal market, the SEA exemplifies a stronger concern for fundamental rights.<sup>13</sup> The SEA Preamble declares that all the Member States are "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality, and social justice."<sup>14</sup>

The Treaty on the European Union (TEU), adopted in 1992, is a further step in integrating human rights concerns in EU law, policy and regulation. It converts this concern for human rights into an obligation of the Union to "respect freedoms, fundamental

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rights and freedoms of Apr. 12, 1989, 1989 O.J. C/120; Joint Declaration by the European Parliament, the Council and the Commission of 5 April 1977, 1977 O.J. C/103 27.4; 1996 O.J. (L 185) 24.7, at 5 (July 15, 1996) (Council, acting under Art. K3 of the TEU, adopted laws to fight racism and xenophobia). Parliament has repeatedly adopted resolutions on respect for human rights in the European Union. These have included calls for the EU to accede to the EHRC and for abolition of the death penalty in Member States that had not yet done so. See Alston and Weiler, *infra* note 23.

9. Elizabeth F. Defeis, *The Treaty of Amsterdam: The Next Step Towards Gender Equality?*, 23 B.C. INT'L & COMP. L. REV. 1, 2, (1999).

10. EEC Art. 3 (ex Art. C)-Title III Social Policy. Moreover, its provisions were aspirational and called upon member states to promote improved working conditions and an improved standard of living.

11. Article 39 (ex Art. 48) provided that freedom of movement shall be secured within the Community. Article 141 (ex Art. 119) provided "each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."

12. Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11 (1957).

13. Single European Act, July 1987, 2 C.M.L.R. 741 (1987).

14. Single European Act, July 1987, 2 C.M.L.R. 741 (1987) at Preamble.

human rights, in accordance with the protections afforded by the European Convention for the Protection of Human Rights and Fundamental Freedoms, as those that arise from the constitutional traditions common to the Member States as general principles of Community law.”<sup>15</sup> However, this treaty did not address the jurisdiction of the ECJ. At the same time, however, the European Court Justice was continuing to develop a firm jurisprudential underpinning for its position that respect for fundamental rights is one of the general principles of European Community law and must be applied by the court.<sup>16</sup> Additionally, although some member states wanted the European Union itself to adhere to the European Convention on Human Rights others disagreed because of the possible conflict of jurisdictions between the ECJ and the European Court of Human Rights [hereinafter ECHR] in Strasbourg.<sup>17</sup>

### III. Treaty of Amsterdam

By amending much of the TEU as well as the other previous treaties, the Amsterdam Treaty adopted in 1999 now formally incorporates fundamental human rights into the institutions of the European Union. In addition, it affirms the European Union’s commitment to fundamental social rights as defined in the European Social Charter, signed at Turin on October 18, 1961, and in the 1989 Community Charter of the Fundamental Social Rights of Workers.<sup>18</sup> The Amsterdam Treaty introduces a number of elements that play a key role in the European Union’s development of a coherent human rights policy. For the first time the treaty provides that the European Union is specifically founded on the principles of liberty, democracy, human rights, and the rule of law

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15. Treaty on the European Union, *available at* <http://europa.eu.int/en/record/mt/top.html> (last visited July 5, 2001).

16. The White Paper on the Amsterdam Treaty, *available at* <http://booleweb.ucc.ie/search/subject/offpub/opcedc.htm> at 4.5. (last modified October 1996).

17. *Id.* The European Court of Human Rights sits in Strasbourg, and individuals, as well as Member States, may take complaints of human rights violations directly before the court. Jurisdiction over Member States is compulsory. All Member States of the European Union and most potential members, such as Russia, Latvia, Lithuania, and Macedonia have ratified the Convention. The European Court of Human Rights is separate and apart from the ECJ and the mechanisms of the European Union, such as the Commission, Parliament, and the European Council. See Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?* 8 *TRANSNAT’L L. & CONTEMP. PROB.* 313, 313-17 (1998). See also, Tara C. Stever, *Protecting Human Rights in the European Union*, 20 *FORDHAM INT’L L.J.*, 919, at 999 (1997).

18. Treaty of Amsterdam, Preamble.

and provides further that the "Union . . . shall respect fundamental rights, as guaranteed by the European Convention [on Human Rights] as they result from the Constitutional traditions common to Member States as general principles of Community law." The ECJ is now required, whenever it has jurisdiction, to apply human rights standards as set out in the ECHR to the acts of Community institutions.<sup>19</sup> The concept of discrimination, originally introduced in the Treaty of Rome, has been expanded and the Community's institutions are now authorized to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.'<sup>20</sup> The Equal Pay provision now incorporates the comparable worth principle and requires equal pay for work of equal value and specifically allows affirmative action programs.<sup>21</sup> Additionally, in reforming the Third Pillar's policies and judicial cooperation in criminal matters, the jurisdiction of the European Court of Justice has been expanded to include matters relating to immigration, asylum, visas, border crossings, and police and judicial criminal cooperation. Thus, it seems clear that the case docket of the ECJ will increasingly include human rights issues.<sup>22</sup>

The external human rights policy of the European Union has been clarified and the treaty provides that all nations seeking to accede to the Community must respect the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law while current Member States that violate these fundamental principles face possible sanctions and suspension of their rights.<sup>23</sup>

Although Parliament's position that a Charter of Fundamental Social Rights should be integrated in the Treaty was not adopted in

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19. *Id.* at Art. 6.2 (ex Art. F).

20. *Id.* at Art. 13 (ex Art. 6a).

21. The White Paper, *supra* note 16, at 11, 46. The requirement of equal pay for work of comparable value, equal treatment and permissible limits of affirmative action were originally contained in the Equal Treatment Directive of 1976. (76/207/EEC) European Communities Council Directive of 9 Feb. 1976.

22. See The Future of the Judicial System of the European Union. Cited in Update memo to ECJ.

23. Treaty of Amsterdam Art. 7 (ex Art. F.1). See Philip Alston & J.H.H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy*, 9 E.J.I.L. 658, at 672. Alston and Weiler continue by noting how "strange" it looks to have these policies in the Treaty while, at the same time, an overall policy to promote human rights within the Community still does not exist. They explain that there seems to be the fear that "empowering the Community in the field of human rights would be an invitation to a wholesale destruction of the jurisdictional boundaries between the Community and its Member States."

the Treaty of Amsterdam it appears likely that such a charter will soon be presented for consideration.<sup>24</sup> However, Parliament's plea for the EU to accede to the Council of Europe's social charter was not."<sup>25</sup> Nevertheless, the Amsterdam Treaty contains a number of innovations that will enhance the role of Parliament in Human Rights matters. They include the change from cooperation to co-decision as the basis for decision-making in relation to a number of important issues, such as discrimination on grounds of nationality, the right of establishment for foreign nationals, equal opportunities and equal treatment, consumer protection and data protection.<sup>26</sup> It also requires consultation in relation to issues of discrimination on all of the prohibited grounds, except for nationality and gives a role to the Parliament in any procedure under Article 7 of the TEU<sup>27</sup> to

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24. The concept of a catalogue of Bill of Rights for the European Union has been debated for as long as 1997 and it now appears that a Charter of Fundamental Rights for the European Union will soon be presented for consideration. See Louis Henkin, *New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 3 (Michel Rosenfeld ed., 1994).

25. European Parliament Fact Sheet, *supra* note 68.

26. See generally, Treaty of Amsterdam.

27. Art. 7 (ex Art. F.1) states:

1. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.
2. Where such a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.
3. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 2 in response to changes in the situation which led to their being imposed.
4. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 1. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community.  
This paragraph shall also apply in the event of voting rights being



suspend the rights of a Member State for a “serious and persistent breach” of Human Rights.

#### IV. European Court of Justice and Human Rights

##### A. Introduction

While the treaties themselves are general and lack specificity with regard to human rights, the Commission has issued numerous directives and statements on human rights in areas such as gender equality and privacy.<sup>28</sup> The newly invigorated Parliament has taken the lead in requiring greater protection for human rights.

However, it is the European Court of Justice which until now has taken the lead with respect to infusing human rights concerns into the fabric of community law and indeed the treaty amendments reflecting human rights concerns embody the principles already established in the case law of the ECJ.<sup>29</sup> Early on the court recognized human rights as part of Community law and developed principles protecting fundamental rights by referring to the Constitutional traditions of member states<sup>30</sup> as well as the European Convention on Human Rights and Fundamental Freedom and other international treaties.<sup>31</sup> However, although it has referred to the decisions of the European Court of Human Rights the organ principally charged with interpreting and enforcing the European Convention, the ECJ has yet to rule that it is bound by the decisions of the European Court of

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suspended pursuant to paragraph 2.

5. For the purposes of this Article, the European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its members.

28. Council Directive 75/117, 1975 O.J. (645) 19 (principle of equal pay); Council Directive 76/207, 1976 O.J. (L 39) 40 (no discrimination on the basis of pregnancy, maternity, or in working conditions); Council Directive 79/7, 1979 O.J. (L 6) 24 (progressive implementation of the principle of equal treatment in matters of social security is permissible). In order to remove the obstacles to the free movement of data while guaranteeing the protection of the right to privacy, Directive 95/46/EC aims at harmonizing the national provisions in this field. The right to privacy of citizens will therefore have equivalent protection across the Union. The fifteen Member States of the EU are required to put their national legislation in line with the provisions of the directive by October 24, 1998. Furthermore, on July 12, 2000, the Commission authored a proposal for a Directive of the European Parliament and of the Council “[o]n a common regulatory framework for electronic communications networks and services.”

29. See Alston and Weiler, *supra* note 23, at 709.

30. Case 29/69, Stauder v. Ulm Sozialamt, 1969 E.C.R. 419, at 427, [1970] 10 C.M.L.R. 112 (1970).

31. Case 4/73, Nold, Kohlen-und BaustoffsgroBhandlung v. Commission, 1974 E.C.R. 491 ¶ 13, [1974] 2 C.M.L.R. 338 (1974).

Human Rights. Further, it has ruled that absent amendment to the treaty, the European Union lacked the competence to accede to the Convention thereby subjecting the institution to the jurisdiction of the European Court of Human Rights.<sup>32</sup> Finally, a 1998 ruling of the ECJ cast into doubt the legal basis for much of the funding provided for human rights and democracy related activities potentially as they related to the external human rights policy of the Union.<sup>33</sup>

### B. *ECJ Decisions and Human Rights*

A noted scholar of the European Union, Phillip Alston has stated "the ECJ deserves immense credit for pioneering the protection of fundamental human rights within the legal order of the Community when the Treaties themselves were silent on this matter."<sup>34</sup> Indeed this observation is well founded.

As early as 1964, in *Costa v ENEL*, the ECJ established the principle of supremacy of Community law over the domestic law of member states in order to ensure application of Community law throughout the community.<sup>35</sup> However, the supremacy doctrine was met with resistance particularly in the area of human rights. While the EEC treaty contained very limited human rights provisions, the constitutions of the member states were for the most part adopted subsequent to World War II and contained human rights guarantees modeled on documents such as the Universal Declaration of Human Rights, the United States Bill of Rights and the French Declaration on the Rights of Man.<sup>36</sup> Thus, it was unacceptable to some member states to implement community legislation without scrutinizing it through the lens of their own constitutional guarantees of fundamental rights.<sup>37</sup> And indeed, the German Constitutional Court in 1967 held that since the Community legal order lacked specific protection of human rights, the transfer of powers from the German legal system to the Community had to be measured against domestic constitutional provisions.<sup>38</sup>

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32. Case 2/94, Re: the Accession of the Community to the European Human Rights Convention, 2 C.M.L.R. 265 (1996).

33. Case 106/96, United Kingdom v. Commission, 1998 E.C.R. I-2729, at ¶ 32.

34. See Alston and Weiler, *supra* note 23, at 709.

35. *Costa v. ENEL*, 1964 E.C.R. 585, at ¶ 4.

36. LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 32-33 (1978).

37. Jean-Marie Henckaerts, *The Protection of Human Rights in the European Union: Overview and Bibliography*, 22 INT'L J. LEGAL INFO., 228, 231 (1994).

38. Bundesverfassungsgerichtshof, order of Oct. 18, 1967, BverfGE, 1967, 223.

In the face of this challenge to the supremacy of community law, the ECJ attempted to clarify its position and give assurances to member states in the area of fundamental rights. In the 1969 case of *Stauder v. Ulm*<sup>39</sup> the court noted that it was required by specific treaty provisions to ensure that in the interpretation and application of the Treaty, the law is observed.<sup>40</sup> This law, the court made clear, includes the “fundamental rights of individuals enshrined in the general principles of Community law and protected by the court.”<sup>41</sup> However, the court did not specify the rights that were protected nor did it provide guidance with respect to determining principles of Community law that require the observance of such rights.<sup>42</sup>

One year later, the court explained that basic human rights form part of the community law and is “inspired” by the Constitutional tradition of the member states.<sup>43</sup> In *Internationale Handelsgesellschaft*, the court ruled that Community laws might be annulled if they violate fundamental rights found in the constitutions of Member States, as long as a guarantee of those rights is contained in the objectives and structure of the Community law.<sup>44</sup> In other words, the ECJ determined that its inspiration for protecting human rights derives from the Member States’ constitutional traditions but that the Community still had the obligation and authority to ensure those rights within the structure and objectives of the Community.<sup>45</sup> However, some member states, particularly Germany, were concerned that the European Community had not developed a system for the protection of human rights and continued to rely on domestic constitution guarantee.

The court then further refined its definition of human rights. In *Nold v. Commission*<sup>46</sup> it declared that in addition to constitutional provisions, rights found in international agreements

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39. See *Stauder*, *supra* note 4, at 424.

40. Treaty of Amsterdam, Art. 220 (ex Art. 164). Article 220 provides: “[t]he Court of Justice shall ensure that in the interpretation and application of the Treaty the law is observed.”

41. See *Stauder*, *supra* note 4, at 424.

42. See *Stauder*, *supra* note 4, at 424.

43. See Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr-und-Vorratsstelle fur Getreide und Futtermittel*, 1970 E.C.R. 1125, at ¶ 2; [1972] C.M.L.R. 255.

44. See *id.*

45. See *Henckaerts*, *supra* note 37, at 231-32.

46. See Case 4/73, *Nold, Kohlen-und Baustoffsgro Bhandlung v. Commission of the European Communities*, 1974 E.C.R. 491.

which the Member States had collaborated in or were a party to are relevant in the court's analysis of fundamental rights.<sup>47</sup> One year later, this declaration was taken a step further in *Rutili v. Minister for the Interior*,<sup>48</sup> where for the first time the European Convention on Human Rights was referred to explicitly.<sup>49</sup> In evaluating a member state's argument that restriction of an alien's movement were justified on grounds of public policy, the court applied the EEC provision and characterized the limitation permitted under community law as specific manifestations of more general principles enshrined in the European Convention on Human Rights and Fundamental Freedoms.<sup>50</sup> The court stated:

Taken as a whole, these limitations placed on the powers of Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by all the Member States, and in Article 2 of the Protocol No 4 of the same Convention, signed in Strasbourg on 16 September 1963, which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted Articles other than such as are necessary for the protection of those interests 'in a democratic society.'<sup>51</sup>

Thus, following *Rutili*, the Member States' public policy derogation from Community law could be reviewed by the ECJ under clear human rights standards articulated not only in constitutional provisions of member states, but also under the provisions of the ECHR.<sup>52</sup>

In *Hauer v. Land Rheinland-Pfalz*, the court reaffirmed this principle and reviewed a community measure that restricted the use of property.<sup>53</sup> The court examined the Community measure not

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47. *Id.* at ¶ 2.

48. Case 36/75, Roland Rutili v. Minister for the Interior, 1975 E.C.R. 1219.

49. Henckaerts, *supra* note 37, at 233.

50. *E.g.*, under Article 48(1) of the treaty, Freedom of Movement for workers is to be secured within the Community. However, Article 48(3) reserves to the state the right to limit such movement if justified on grounds of public policy. The court relied on Articles 8, 9, 10, and 11 of the ECHR and on Article 2 of the Prologue to define the limits of the public policy exception.

51. Case 36/75, Rolan Rutili v. Minister for the Interior, 1975 E.C.R. 1219, at ¶ 32 (1975).

52. *Id.*

53. Case 44/79, Liselotte Hauer v. Land Rheinland-Pfalz, 1979 E.C.R. 3727. In *Hauer*, appellant was the owner of land in the district of Bad Durkheim. *Id.* at 1. Appellant applied to plant wine-growing vines on her land. *Id.* at 1. The

only against the German Constitution and constitutions of other member states, but also against the right of property contained in the ECHR and the public interest exception to the ECHR.<sup>54</sup> The court concluded that the limitation did not entail any undue limitation on the right to property.<sup>55</sup> Finally, in *Kent Kirk* the ECJ itself for the first time introduced a reference to the ECHR and ruled that retroactive penal provisions violate Community law.<sup>56</sup>

More recently, the court has looked to the case law of the ECJ for guidance concerning the scope of fundamental rights guaranteed by the convention.<sup>57</sup> In *ERT AE v. DEP & ANOR* the ECJ was asked to rule, *inter alia*, on the question of whether the grant of exclusive rights to operate a television station to one company violated a competitor's right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights.<sup>58</sup> In his opinion, Advocate General Lenz acknowledged that it was the ECHR that has primary responsibility to judge the adherence of member states to the ECHR and that it was not a function of the ECJ to examine the compatibility of the rules of member states with the ECHR.<sup>59</sup> However, while he acknowledged that the ECHR could supply guidelines that should be followed within the framework of Community law he concluded that, with respect to Article 10, the practice of the Commission on Human Rights and the Court of Human Rights "yields nothing additional" to an analysis of the legitimacy of the television monopoly under the relevant provisions of the EEC Treaty.<sup>60</sup>

The court ruled that Community Law does not prevent the granting of a monopoly but emphasized that "the European Convention on Human Rights has special significance" and that "the Community cannot accept measure which are incompatible

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Rheinland-Pfalz denied the authorization as unsuitable for wine-growing. *Id.* at 1.

54. *Id.* at ¶ 7-10.

55. These developments in the Community's human rights protections were considered adequate by the German Constitutional Court that overruled its earlier decision in holding that it will not exercise jurisdiction to rule on the applicability and sufficiency of Community law. See Bundesverfassungsgericht, 3 C.M.L.R. 225 (1987). See also, Tara C. Stever, *Protecting Human Rights in the European Union*, 20 *FORDHAM INT'L L.J.* 919, at 967 (1997).

56. *Regina v. Kent Kirk*, [1084] E.C.R. 2689, [1084] 3 C.M.L.R. 522.

57. *ERT AE v. DEP & ANOR* (Case-C-260/89).

58. The main issues related to whether a television monopoly held by a single company to which a member state had granted exclusive rights was permissible under Community Law and whether the rules on the free movement of goods in particular Art. 9, 30 and 36 of the Treaty precluded such a monopoly.

59. *ERT AE v. DEP & ANOR* (Case-C-260/89).

60. *Id.*

with adherence of human rights thus recognized and guaranteed.”<sup>61</sup> The court ruled that, the public policy, health, and security exceptions argued by the TV station with the monopoly must be looked at in the light of the principles of freedom of expression based in Article 10 of the European Convention of Human Rights.<sup>62</sup>

The aspect of human rights that the court has dealt with most exhaustively is the general principle of equal treatment (or nondiscrimination). This principle was firmly established in Article 141 (ex Article 119) of the EEC, which guarantees equal pay for equal work based on gender<sup>63</sup> and the court has developed a fairly extensive jurisprudence with respect to gender equality in the workplace. Perhaps because of its explicit treaty foundation and the frequent requests for preliminary rulings and subsequent council directives the principle of equal treatment based on gender appears to be the most frequent human rights issue addressed by the court.<sup>64</sup> The court has also ruled on provisions in secondary legislation dealing with civil, social, and economic rights,<sup>65</sup> discrimination based on nationality, groups in the agricultural sector, and affirmative action.<sup>66</sup>

Initially, the ECJ's emphasis on human rights was implemented through “negative integration” in which Community institutions were prohibited from acting in any way that could lead to a violation of the fundamental principles of human rights much in the same way that the court developed its protection of the Community's four freedoms—goods, workers, service, and capital. However, the European Court of Justice has been instrumental in developing an evolving jurisprudence with respect to human rights and has recognized the numerous rights that must be respected.<sup>67</sup> The Parliament has noted that these rights include:<sup>68</sup>

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61. *Id.*

62. See Benjamin L. Apt, *The Right to Freedom of Expression in the European Union*, 1998 Parker School of Foreign and Comparative Law, 4 COLUM. J. EUR. L. 69, 89. See also, *Lentia v. Austria*, 17 Eur. Ct. H.R. (Ser. A) at 93 (1994). Although it recognized that freedom of expression is a fundamental right and must be recognized, it failed to provide guidance concerning the impact of Article 10 on Community law.

63. Treaty of Amsterdam.

64. See generally Elizabeth F. Defeis, *The Treaty of Amsterdam: The Next Step Towards Gender Equality?*, 23 B.C. INT'L & COMP. L. REV. 1 (1999).

65. Flaherty & Lally-Green, *Fundamental Rights in the European Union*, DUQ. L. REV., 249, at 304-05, nn.338-340 (1998).

66. See *id.* at 306, nn.350-53.

67. See generally, Alston and Weiler, *supra* note 23.

68. European Parliament Fact Sheet 2.1.0., *Respect for Fundamental Rights in the Union*, (1999), available at [www.europa.eu.int/abc/cit1\\_en.htm](http://www.europa.eu.int/abc/cit1_en.htm) (last modified

Non-discrimination<sup>69</sup>  
 Freedom of association<sup>70</sup>  
 Freedom of religion and confession<sup>71</sup>  
 Privacy<sup>72</sup>  
 Medical secrecy<sup>73</sup>  
 Property<sup>74</sup>  
 Freedom of profession<sup>75</sup>  
 Freedom of trade<sup>76</sup>  
 Freedom of industry<sup>77</sup>  
 Freedom of competition<sup>78</sup>  
 Respect for family life<sup>79</sup>  
 Entitlement to effective legal defense and a fair trial<sup>80</sup>  
 Inviolability of residence<sup>81</sup>  
 Freedom of expression and publication<sup>82</sup>

However, while there has been a gradual expansion of the ECJ's protection of fundamental rights within the European Union, the ECJ has placed limits on the protection of these rights as well. In *Internationale Handelsgesellschaft*, for example, even though the ECJ declared that fundamental rights might be utilized as the basis for annulling Community laws, "such rights are not granted without restraint but must be compatible with the Community's structure and objectives."<sup>83</sup> They must always be "considered with regard to the social function of the protected activity."<sup>84</sup> Additionally, "[the principle of proportionality and the guarantee of essential content are further constraints. Consequently where the Community

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Nov. 16, 2000 and visited on Apr. 4, 2001).

69. *Defrenne v. Sabena*, 1976 E.C.R. 455.

70. *Gewerkschaftsbund, Massa et al.* 1974 E.C.R. 917, 925.

71. *Prais*, 1976 E.C.R. 1589, 1599.

72. *National Panasonic*, 1980 E.C.R. 2033, 2056 et seq.

73. *Commission v. Federal Republic of Germany*, 1992 E.C.R. 2575.

74. *Hauer*, 1979 E.C.R. 3727, 3745 et seq.

75. *Id.*

76. *International Trade Association*, 1970 E.C.R. 1125, 1135 et seq.

77. *Usinor*, 1984 E.C.R. 4177 et seq.

78. *France*, 1985 E.C.R. 531.

79. *Commission v. Germany*, 1989 E.C.R. 1263.

80. *Johnston v Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651 et seq.; *Pecastaing v. Belgium*, 1989 E.C.R. 691 et seq., 716.

81. *Hoechst AG v. Commission*, 1989 E.C.R. 2919.

82. *VBVB, VBVB*, 1984 E.C.R. 99 et seq.

83. *Case 11/70, Internationale Handelsgesellschaft GmbH v. Einfuhr-und-Vorratsstelle fur Getreide und Futtermittel*, 1970 E.C.R. 1125; 1972 C.M.L.R. 255.

84. European Parliament Fact Sheet 2.1.0., *Respect for Fundamental Rights in the Union*, (1999), available at [www.europa.eu.int/abc/cit1\\_en.htm](http://www.europa.eu.int/abc/cit1_en.htm) (last modified Nov. 16, 2000 and visited on Apr. 4, 2001).

intervenes in the protected sphere of a fundamental right it may neither violate the principle of proportionality nor affect the essential content of that right.”<sup>85</sup>

Although the court has taken a strong position with respect to ensuring that Community actions adhere to human rights standards, it is much more deferential when national legislation is in issue. The court is reluctant to address claims of human rights violations in national legislation that implicate Community law.

Thus, in *Cinetheque*, the Court declined to review French legislation under Article 10 of the ECHR to determine whether a French law that prohibited the sale of videotapes during their first year of release violated one’s freedom of expression.<sup>86</sup> The Court stated: “Although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.”<sup>87</sup>

Similarly, in *Kremzow v. Austria*,<sup>88</sup> the ECJ was asked for a preliminary ruling on the question of whether the Austrian court’s failure to implement a decision of the ECHR concerning a violation of a defendant’s right to defend himself in a criminal proceeding violated his rights under Community law. The defendant argued that the Austrian court violated his right to freedom of movement under community law by unlawful detention.<sup>89</sup>

The court rejected Kremzow’s interpretation of the freedom of movement provision of the EC Treaty.<sup>90</sup> Although the deprivation of liberty prevents a person from exercising freedom of movement, the court did not find a sufficient connection with Community law to justify the application of Community provisions.<sup>91</sup> The court said: “where national legislation is concerned with a situation which, as in the case at issue in the main proceedings, does not fall within the field of application of Community law, the court cannot, in a reference for a preliminary ruling, give the interpretive guidance necessary for the national court to determine whether that

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85. *Id.* See also Case 265/87 Schrader v. Hauptzollamt Gronau, 1989 E.C.R. 2237 (1989).

86. Cases 60-61/84, *Cinetheque S.A. and Others v. Federation Nationale des Cinemas Francais*, 1985 E.C.R. 2605.

87. *Id.* at 2627.

88. Case C/29919, *Kremzow v. Republik Osterrich*, [1997] 3 S.M.L.R. 1289.

89. *Id.*

90. *Id.*

91. *Id.*



national legislation is in conformity with the fundamental rights whose observance the court ensures, such as those deriving in particular from the Convention."<sup>92</sup> Similarly, in *SPUC v. Grogan*, the court refused to offer an opinion on whether the dissemination of information about abortion services abroad violated the Article 10 guarantee of freedom of expression contained in the ECHR.<sup>93</sup>

Perhaps the ECJ's most notable limitation on the incorporation of fundamental rights in the Community is its refusal to incorporate the ECHR as a directly operative source of law. In 1996, in *Re: the Accession of the Community to the European Human Rights Convention* [hereinafter EHRC], the court held that unless the EEC is amended the Community does not have the power to accede to the Convention.<sup>94</sup> The court noted that no treaty provision conferred any general power to the Community to enact rules regarding human rights or the power to conclude the relevant international conventions effective on Community institutions.<sup>95</sup> Furthermore, the ECJ found that, in the absence of any such treaty provision, accession by the Community to the European Convention on Human Rights is beyond its power since, it would result in a substantial change to the Community's system for protection of human rights, entailing the Community's integration into an institutional system where the provisions of the ECHR would be incorporated into the Community law.<sup>96</sup>

In a recent decision of the ECJ, the court cast doubt on the legal basis for the funding that is provided for the Commission for Human Rights and for democracy-related activities.<sup>97</sup> As a result of the judgment in *United Kingdom v. Commission*, many projects were frozen and the unsatisfactory legal basis for much of the activities necessary to monitor and promote the respect for human rights in the Community became apparent.<sup>98</sup>

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92. Dimple D. Dhabalia, *The European Court of Justice: An Active Enforcer of Freedom, or a Passive Player in the EC Game?*, 27 DENV. J. INT'L L. & POL'Y. 567, at 571, (1999). See also, Cases 60-61/84, *Cinetheque S.A. and Others v. Federation Nationale des Cinemas Francais*, 1985 E.C.R. 2605.

93. *SPUC v. Grogan*, (Case C-159/90). See *infra* text accompanying notes 163-173.

94. Case 2/94, *Re: the Accession of the Community to the European Human Rights Convention*, 2 C.M.L.R. 265 (1996).

95. See *id.*

96. See *id.*

97. Case C-106/96, *United Kingdom v. Commission*, (1998), available at [www.curia.eu.int/en/jurisp/index.htm](http://www.curia.eu.int/en/jurisp/index.htm) (last updated on May 25, 2001).

98. Alston & Weiler, *supra* note 23, at 663.

### C. *Potential Clash Between ECJ and ECHR Jurisdiction*

Until now, the European Court of Justice derived its human rights standards primarily from the constitutions of member states and Community law, but it also referred to the Convention on Human Rights and other international treaties. Although it has referred to decisions of the ECJ, it has not specifically ruled that the decisions of the ECHR are controlling on matters of interpretation of human rights but looks to their cases for guidance.<sup>99</sup> The European Court of Justice and the European Court of Human Rights have sometimes interpreted the rights outlined in the Convention on Human Rights differently. Now that the Amsterdam Treaty defines fundamental rights as those in the European Convention on Human Rights and grants the European Court of Justice the explicit task of expounding upon these rights, there exists a possible conflict between the European Court of Justice's interpretation and that of the European Court of Human Rights.

In the past, the ECJ has taken several approaches when faced with deciding human rights issues that were to come before the ECHR or which had already been decided by that court. Some cases involve actual conflict based upon differing interpretation of the relevant provisions of the Convention, other cases appear inconsistent in result, but where the court based its decision on an analysis of a different fundamental right and those cases that recognized that a fundamental right guaranteed by the ECHR was involved but in which the court avoided ruling on the content of that right.

An example of the first category is in the area of privacy rights. At the center of the possible conflict lies the differing interpretation of Article 8 of the Convention on Human Rights guarantee of the right to "privacy in the home and in correspondence."

The European Court of Justice has interpreted the right to privacy of Article 8 as not encompassing business activities.<sup>100</sup> In

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99. See *ERT AE v. DEP & ANOR* (Case C/260/89).

100. In *Hoechst*, the EC Commission adopted a series of decisions requiring various businesses to submit to investigations into their possible participation in agreements or concerted practices that fixed prices and quotas or sales objectives of PVC and polyethylene in the European Community. *Hoechst* (Case 46/87) refused to submit to the investigation and only permitted the investigation after a search warrant was issued. *Hoechst* applied to the court for a declaration that the series of decisions were void for infringement of the fundamental right to the inviolability of the home. The court held, that Article 8(1) of the European Convention on Human Rights is concerned primarily with the development of

*Hoechst*, the defendant challenged the decision of the EC Commission that required various businesses to submit to investigations into their possible participation in agreements or concerted practices that fixed prices and quotas or sales objectives of goods in the European Community.<sup>101</sup> Hoechst refused to submit to the investigation and only permitted the investigation after a search warrant was issued.<sup>102</sup> Hoechst argued that the actions of the Commission were void in that they infringed on the fundamental right to the inviolability of the home.<sup>103</sup> The court held that “[a]rticle 8(1) of the European Convention on Human Rights is concerned primarily with the development of individual’s personal freedom and may not therefore be extended to business premises.”<sup>104</sup>

Two years later, the European Court of Human Rights held that a “search of professional activities and premises” constitutes a violation of the right to privacy.<sup>105</sup> The applicant was a lawyer whose offices were searched by the German police pursuant to a search warrant issued by the Munich District Court.<sup>106</sup>

The applicant complained that the search had violated his right to respect for his home and correspondence as guaranteed by Article 8.<sup>107</sup> The court held that: interpreting the terms ‘private life’ and ‘home’ as encompassing certain professional or business activities or premise is consonant with the object and purpose of Article 8 and such an interpretation would not unduly hamper the ability of the states to conduct a search.<sup>108</sup>

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individual’s personal freedom and may not therefore be extended to business premises. *Hoechst*, 4 C.M.L.R. 410 (1991).

101. *Hoechst*, [1991] 4 C.M.L.R. 410 at I. A.

102. *Id.*

103. *Id.*

104. *Id.* Article 8 provides in relevant part:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

105. *Niemietz v. Germany*, 16 E.H.R.R. 97 ¶ 33 (1993).

106. *Id.* The warrant ordered the search in order to obtain information that would reveal the identity and possible whereabouts of a third party who was the subject of criminal investigation by the State.

107. *Id.* at ¶ 46.

108. *Id.* at ¶ 31.

A similar conflict is presented in the interpretations of the right against self-incrimination as found in Article 6. The European Court of Justice held that Article 6 only applies to criminal investigations, not to administrative procedures.<sup>109</sup> In *Orkem*, the applicant was requested to produce documents in connection with an E.C. commission's request for information in connection with an investigation of the applicant for infringements of competition law.<sup>110</sup> The court held that: "the right not to give evidence against oneself only applied to a person charged with an offense in criminal proceedings."<sup>111</sup> The court further held that individuals might not rely on this right against self-incrimination when questioned with infringements in the economic sphere.<sup>112</sup>

Yet, in a subsequent case, the European Court of Human Rights reached a different result.<sup>113</sup> In *Funke*, after a search by French customs officials failed to produce sufficient evidence to lead to criminal proceedings for currency and capital transfer offenses, the applicant was asked to produce certain specific documents.<sup>114</sup> When he refused, he was prosecuted and ordered to pay a fine and also a daily penalty until he complied.<sup>115</sup> The European Court of Human Rights held that a person is entitled under Article 6 to remain silent and not incriminate himself, and any attempt to use pecuniary sanction to force him to produce self-incriminating documents was a breach of Article 6.<sup>116</sup>

The second category, namely, where the respective courts focus on different rights to resolve the issue before it, can be illustrated by the treatment of homosexuals by the courts. In *Grant v. South-West Trains*, the European Court of Justice held that prohibition of discrimination based on sex, a fundamental principal of Community Law, did not cover discrimination on the grounds of sexual orientation.<sup>117</sup> In that case, an employer granted concessionary travel tickets to members of its staff for one legal spouse or for one "common law opposite sex spouse" subject to a statutory declaration being made that a "meaningful relationship" had existed for a period of two years or more. Ms. Grant applied for travel concessions for her female partner with whom she

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109. *Orkem SA v. EC Commissions*, E.C.R. 3283, 4 C.M.L.R. 502 (1989).

110. *See id.*

111. *Id.* at 503

112. *See id.*

113. *Funke v. France*, 1 C.M.L.R. 897 (1993).

114. *Id.* at ¶ 9.

115. *Id.* at ¶ 11.

116. *Id.* at ¶ 44.

117. Case 249/96, *Grant v. South-West Trains*, 1 C.M.L.R. 993 (1998).

declared she had a “meaningful relationship” for over two years. South-West Trains refused the application, stating that the non-married concession only applied to partners of the opposite sex. The court held that this denial of benefits does not constitute discrimination prohibited by Article 141 (ex Article 119) or Council Directive 75/117.<sup>118</sup>

In so ruling, the court disregarded the opinion of the Advocate General who suggested that the policy of SWT regarding travel concessions for same-sex couples violated Article 141 (ex Article 119) of the EC Treaty.<sup>119</sup> Rather, the court focused on “the present state of the law within the Community”<sup>120</sup> and noted that although the European Parliament declared that it deplores all forms of discrimination based on an individual’s sexual orientation, the Community itself had not adopted “rules providing for such equivalence.”<sup>121</sup> It also looked at decisions of the European Court on Human Rights and the Commission on Human Rights to determine the present state of the law with the Community and deferred to national legislators to address discrimination based on sexual orientation.<sup>122</sup>

In its more recent opinions, the European Court of Human Rights has taken a different approach and issued two separate opinions in which it struck down the investigation and discharge for homosexuality of individuals in the English Armed Forces.<sup>123</sup> In *Smith and Grady v. United Kingdom*<sup>124</sup> and *Lustig-Prean & Beckett v. United Kingdom*, the applicants complained that the investigation

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118. Council Directive 75/117 states:

The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called ‘principle of equal pay,’ means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

119. This in itself was unusual because the Court follows the opinion of the Advocate General in more than 75% of the cases. See Heather Hunt, *Diversity and the European Union: Grant v. SWT, The Treaty of Amsterdam and the Free Movement of Persons*, 27 DEN. J. INT’L L. & POL’Y 633, at 642 (1999).

120. Grant, *supra* note 117.

121. *Id.*

122. See, e.g., X, Y, and Z v. United Kingdom, (1997) 4 E.H.R.R. 143.

123. Smith and Grady v. United Kingdom, 33985/96 & 33986/96 Sept. 27, 1999.

124. In *Smith*, an unidentified woman informed the Royal Air Force authorities that the appellant Ms. Smith was a homosexual, Smith admitted, without interrogation, that she was a homosexual and she was discharged. The second applicant, Mr. Graeme Grady, joined the Royal Air Force on August 12, 1980 as an aircraftman. Following the disclosure that Grady was a homosexual, investigators searched applicant’s electronic diary and home for information revealing homosexual conduct. After applicant admitted to being a homosexual, he was administratively discharged.

into their homosexuality and their discharge from the military on the sole ground that they are homosexual constituted violations of Article 8 of the Convention, right to respect for private and family life, taken alone and in conjunction with Article 14, non-discrimination rights.

In *Smith*, the European Court of Human Rights held that the investigations by the military police into the applicants' homosexuality, which included detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices as well as the administrative discharge constituted a direct interference with the applicants' right to respect for their private lives. The court stated: "the Government has not offered convincing and weighty reasons to justify the policy against homosexuals in the armed forces."<sup>125</sup> Also, "neither the investigations conducted into the applicants' sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defense policy, were justified under Article 8, § 2 of the Convention."<sup>126</sup> The court held that such investigation and discharge constitutes a violation of the right to privacy as contained in Article 8 of the Convention on Human Rights.

*Lustig-Prean* also involved a challenge to the policy of excluding homosexuals from the military. The court found that the investigations were conducted solely because of the sexual orientation of the applicants and that "the interrogation process was particularly intrusive."<sup>127</sup>

Although the issue of a violation of the non-discrimination guarantee was raised in both cases, the court grounded its decision on a violation of privacy rights. Thus, although not directly conflicting with the ECJ decision in *South-West*, it clearly exemplifies a different sensitivity to issues of homosexual discrimination.<sup>128</sup>

These decisions were followed by a decision by the European Court of Human Rights that held that it was a violation of both Article 8 (respect for private and family life) and Article 14 (prohibition against discrimination) of the Convention to take away parental responsibility from the father of a child due to the fact he

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125. *See id.* at 40.

126. *See id.* at 42. Also, *Lustig-Prean & Beckett v. United Kingdom*, 31417/96 & 32377/96, Sept. 27, 1999.

127. *Lustig-Prean & Beckett v. United Kingdom*, 31417/96 & 32377/96, at ¶ 83 & 84, Sept. 27, 1999.

128. Their reasoning has been criticized because it evaded ruling on the issue of discrimination. *See, Recent Cases*, 113 HARV. L. REV. 1563 (2000).

was homosexual.<sup>129</sup> In *Salgueiro v. Portugal*, the Lisbon Court of Appeal denied parental responsibility to the father of a child, despite an agreement to the contrary reached at the time of the divorce.<sup>130</sup> The court based its decision on two factors, namely the best interest of the child and the fact that the applicant was a homosexual living with another man. The Lisbon Court of Appeal reasoned, “the child must live in a traditional Portuguese family”<sup>131</sup> and that “homosexuality is an abnormality and children must not grow up in the shadow of abnormal situations.”<sup>132</sup> The European Court of Human Rights overturned this verdict, holding that there had been a violation of Article 8 (right to respect for private and family life) taken together with Article 14 (prohibition against discrimination).<sup>133</sup>

The Amsterdam Treaty addresses the issue of sexual orientation and allows the Council to take action to combat discrimination based on sexual orientation. However, such action would require unanimous consent of the Council.<sup>134</sup>

Treatment of transsexuals is another area in which the rulings of these two courts present potential for conflict. The European Court of Justice has decided only one case involving transsexuals and has ruled that the equal treatment directive that prohibits discrimination based on sex includes transsexuals.<sup>135</sup> In *P v. S and Cornwall County Council*, a transsexual was dismissed from her job after informing her employer of her intention to undergo a male to female gender reassignment operation.<sup>136</sup> She challenged the dismissal as a violation of the Equal Treatment directive of 1976.<sup>137</sup> In a carefully reasoned opinion, Advocate General Tessauro urged the court to “take a courageous decision,” one in accord with

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129. *Salgueiro v. Portugal*, App. Nos. 33290/96 (1999).

130. *See id.*

131. *See id.*

132. *See id.*

133. *Salgueiro v. Portugal*, App. Nos. 33290/96 (1999).

134. The Amsterdam Treaty provides that: “The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” Treaty of Amsterdam Art. 13 (ex Art. 6a).

135. Case 13/94, *P v. S and Cornwall County Council*, 2 C.M.L.R. 247 (1996).

136. *Id.*

137. The Equal Treatment Directive provides in relevant part: “Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.” Council Directive 76/207/EEC.

“social justice,” and to rule that such discrimination violated Community law.<sup>138</sup> He also discussed the case law of the ECHR.<sup>139</sup>

The court held that the dismissal violated the directive, which required that “there should be no discrimination whatsoever on grounds of sex.”<sup>140</sup> In so ruling, the court stated that the directive is the expression of “one of the fundamental principles of Community law.”<sup>141</sup> Moreover, “the right not to be discriminated against is one of the fundamental human rights where observance the court has a duty to ensure.”<sup>142</sup> The court quoted from the European Court of Human Rights’ description of transsexuals that concluded, “Transsexuals who have been operated on thus form a fairly well-defined and identifiable group” and held that the directive prohibiting discrimination based on “sex” also encompasses discrimination arising out of gender reassignment.<sup>143</sup> The court held that, “where unfavorable treatment of a transsexual is related to (or rather is caused by) a change of sex, there is discrimination by reason of sex or on grounds of sex.”<sup>144</sup> “To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the court has a duty to safeguard.”<sup>145</sup>

The European Court of Human Rights on the other hand, has issued several opinions relating to the legal recognition of a transsexual’s new gender and has not taken the broad approach suggested by the ECJ. Rather, it has allowed states a wide margin of appreciation with respect to recognizing rights of transsexuals. The court has permitted this wide margin of appreciation, because in its view, there exists “little common ground between the contracting states” and states thus enjoy “a wide margin of appreciation” in their response to the request for legal rights of transsexuals.<sup>146</sup> Thus, in *Cossey v. United Kingdom*,<sup>147</sup> the United

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138. *Id.*

139. Case 13/94, *P v. S and Cornwall County Council*, 2 C.M.L.R. 247 (1996).

140. *Id.* at ¶ 2.

141. *Id.* at ¶ 18.

142. *Id.* at ¶ 22.

143. Case 13/94, *P v. S and Cornwall County Council*, 2 C.M.L.R. 247, at ¶ 16 (1996).

144. *Id.* at ¶ 19.

145. *Id.* at ¶ 22.

146. The doctrine of margin of appreciation, or deference to national legislators, is rooted in national case law concerning judicial review of legislative action. See P. VAN DIJK & G. J. H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 585-89. The margin of appreciation doctrine is premised on two assumptions. First, even in democratic societies, what is necessary to further the state interest may vary from state to state; second, the



Kingdom refused to issue a birth certificate to a person born male indicating that she was female, nor to permit her to marry a man.<sup>148</sup> Over a vigorous dissent, the ECHR held that there had been no violation of either Article 8 or Article 12 of the Convention.<sup>149</sup> The court noted that “although some contracting States would now regard as valid a marriage between a person in Ms. Cossey’s situation and a man,” there was no general abandonment of the traditional concept of marriage.<sup>150</sup> Thus, the United Kingdom was within its margin of appreciation in rejecting the request.<sup>151</sup> Nevertheless, the ECHR indicated that it had become “conscious of the seriousness of the problems facing transsexuals and the distress they suffer.”<sup>152</sup> Since the Convention always has to be interpreted and applied in light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review.”<sup>153</sup>

Seven years later in *Sheffield and Horsham v. United Kingdom*, the United Kingdom refused to give to male-to-female post-

states’ own view of what is necessary is entitled to some deference by an international court.

In *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976), the court discussed the margin of appreciation doctrine as follows:

It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinion on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them. Nevertheless, it is for the national authorities to make initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context.

Consequently, Article 10(2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (“prescribed by law”) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.

*Id.* at 753-55.

147. *Cossey v. United Kingdom*, (A/184): (1991) 13 E.H.R.R. 622 (1991). The court had earlier dealt with this issue in *Rees v. U.K.*, 9 E.H.R.R. 203 (1986), it decided that it would reexamine the point to ascertain whether a departure from the previous decision was warranted.

148. *Id.*

149. *Id.*

150. *Cossey*, 13 E.H.R.R. 622 (1991).

151. *Id.*

152. *Id.*

153. *Cossey*, 13 E.H.R.R. 622 (1991).

operation transsexuals legal recognition of their status as women.<sup>154</sup> The court examined legislation trends in Member States and found that a common European approach to problems created by the recognition in law of post-operation gender status did not exist and thus refused to depart from the *Cossey* opinion.<sup>155</sup> In so doing, it noted the decision of the ECJ in *P v. S and Cornwall County*, but refused to follow it.<sup>156</sup>

In fact, the ECHR has been inconsistent with respect to respecting the rights of transsexuals. The court has required that an annotation be added to a birth certificate to reflect the male to female gender change and distinguished its cases on this issue,<sup>157</sup> but has held that the state need not allow transsexuals to change their birth certificates.<sup>158</sup> It also did not require a state, the U.K., to register a female-to-male transsexual as the father of a child developed through AID born to a female with whom a long-term stable relationship existed.<sup>159</sup> The applicants asserted that such a refusal violated their privacy rights under Article 8 of the Convention on Human Rights.<sup>160</sup> The European Court of Human Rights held that Article 8 did not require states to formally recognize a transsexual as the biological father of a child to which that individual did not father.<sup>161</sup> In this ruling, the court expressed concern for the state's interest in control over traditional marriages as well as disruption of the state's method of registering births and marriages.<sup>162</sup>

In the third category of potential conflicts, the ECJ has avoided ruling on a fundamental rights question that arose in a sensitive context and in which the sensibilities of a member state

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154. See *Sheffield & Horsham*, 27 Eur. H.R. Rep. at Judgment paras. 40-61, 71-77.

155. *Id.*

156. *Id.*

157. *B v. France*, 16 E.H.R.R. 1, 2 (1993).

158. *Rees v. United Kingdom*, (A/184) (1991) 13 ECHR 622. For further discussion of these cases: Larry Catá Backer, *Harmonization, Subsidiarity, and Cultural Difference, an Essay on the Dynamics of Opposition Within Federation and International Legal Systems*, 4 TULSA J. COMP. & INT'L L. 185 (1997); Philip Britton, *The Rainbow Flag, the European and English Law: New Development on Sexuality and Equality*, 8 IND. INT'L & COMP. L. REV. 261 (1998).

159. *X, Y, and Z v. United Kingdom*, (1997) 4 E.H.R.R. 143. In *X, Y, and Z*, the court examined whether a transsexual could be registered as the father of a child developed through AID. *X*, a female-to-male transsexual, lived in a permanent relationship with *Y* since 1979. In 1992, after AID treatment, *Y* gave birth to *Z*. *Id.*

160. *Id.* at ¶ 29.

161. *Id.* at ¶ 52.

162. *Id.* at ¶ 47.

was involved. This category is best illustrated by *SPUC v. GROGAN* in which a violation of freedom of expression was alleged in addition to violation of Community law.

In *Grogan*, an injunction was sought by the Society for the Protection of Unborn Children against the activities of various students' organizations who provided information on abortion clinics in the UK without charging a fee.<sup>163</sup> The question referred to the ECJ was whether abortion clinics constitute services within the meaning of Article 60 of the EEC Treaty and, if so, whether the Treaty provisions on the freedom to supply services precluded a national law that prohibited the provision of information concerning abortion services legally carried on in another Member state. It was also alleged that the ban on the provision of such information violated Article 10 of the ECHR.

Advocate General Van Gervan offered the opinion that the service provided by abortion clinics is a trans-border service that falls within the scope of Article 60 of the EEC Treaty, prohibiting any restriction on the provision of services. He also opined that, consistent with Article 10 of the ECHR, a state could prohibit the dissemination of information about such services.<sup>164</sup> In so doing, he balanced the right to life as defined by the Member State against the freedom of expression and because no uniform moral consensus concerning the protection of the unborn existed between member states the member states must be allowed a fairly considerable margin of appreciation.<sup>165</sup> In balancing the fundamental rights

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163. *SPUC v. Grogan*, (Case C-159/90).

164. *See id.* Article 10 of the ECHR provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

165. *See id.*

involved, the Advocate General found that the prohibition on the dissemination of information could be justified as "necessary in a democratic society" as required by Article 10(2).<sup>166</sup>

However, the European Court of Justice was faced with a dilemma. A similar case, *Open Door Counseling and Dublin Well Woman v. Ireland*, would soon be decided by the ECHR in which the Article 10 question was squarely presented. If the decision rendered by the ECJ was inconsistent with the subsequent ruling of the ECHR, the doctrine of supremacy of Community law would be cast into doubt. Moreover, a ruling that the injunction violated Article 10 of the Convention would further exacerbate relations with Ireland.

The ECJ thus took a different approach from that advocated by the Advocate General. The court held consistent with its prior opinions, that medical termination of pregnancy performed in accordance with the law of the state in which it is carried out constitutes a service within the meaning of Article 60 of the EEC Treaty.<sup>167</sup> However, the court found that the link between the activities of the students and the medical services performed in another state was "too tenuous" to be regarded as a restriction within the meaning of Article 59 of the Treaty pertaining to restrictions on the prohibition of services.<sup>168</sup> The court based its holding on the fact that the students were not acting on behalf of the out of state medical providers or as the court termed it "on behalf of an economic operator established in a member state."<sup>169</sup> Because the challenged rule fell outside the scope of Community law, the court reasoned that it was not appropriate for the court to assess the compatibility of the national rule with fundamental rights, in particular, those specified in the European Convention on Human Rights. Thus, the court declined to rule on the issue of whether the prohibition on the dissemination of information on medical services in another country violated Article 10 of the ECHR. The ruling was widely criticized both by legal scholars and commentators.<sup>170</sup>

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166. *See id.*

167. *Luisi and Carbone v. Ministero del Tesoro*, joined cases 121/85 (1986).

168. *See generally*, Grogan, *supra* note 163.

169. *See generally*, Grogan, *supra* note 163.

170. Siofra O'Leary, *The Court of Justice as a Constitutional Adjudicator: an Examination of the Abortion Information Core*, 17 EUR. L. REV. 138 (1992); Cathleen M. Colvin, Comment, *Society for the Protection of Unborn Children (Ireland) LTD. v. Grogan: Irish Abortion Law and the Free Movement of Services in the European Community*, 15 FORDHAM INT'L L.J. 476 (1991-1992); Deidra Curtin, *SPUC v. Grogan*, 29 COMMON MKT. L. REV. 585-603 (1992).

Just one year later, the European Court of Human Rights was squarely presented with the precise issue presented in the *Grogan* Case, namely whether an injunction prohibiting the furnishing of information by a non-profit organization concerning the availability of out of state abortion services violated Article 10 of the ECHR, and the court in Strasbourg ruled that it did. In *Open Door Counseling and Dublin Well Women*, the court held that an injunction imposed by the Irish court restricting clinical staff from imparting information to pregnant women concerning abortion facilities outside Ireland by way of non-directive counseling constituted a restraint on freedom to impart information and violated Article 10 of the ECHR.<sup>171</sup> The court considered whether the injunction was necessary in a democratic society as permitted by Article 10(2) of the Convention and acknowledged that the aim of the national rule was legitimate, that is, the protection of morals as reflected in Irish law. At the outset, it noted that freedom of expression also applies to ideas or information that might offend or shock the government of a segment or any population.<sup>172</sup> Without this pluralism, tolerance and broad-mindedness there would not exist a democratic society.<sup>173</sup>

The court emphasized that the absolute nature of the injunction, which imposed perpetual restraint regardless of age, health, or reason for seeking canceling or terminating pregnancy, was disproportionate. Thus, the court invalidated the injunction in a situation similar to the one avoided by the ECJ earlier. The strong dissenting opinion in the case underscores the controversial nature of the issue that both courts were faced with deciding.

One might speculate as to how the ECJ would rule if faced with the issue again, albeit in a slightly different factual setting. Clearly, to follow the ruling of the ECHR would exacerbate the already tenuous relation with a member state. The larger question remains however, would it consider itself bound to follow the decision of the ECHR.

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171. Although the applicants also alleged a violation of privacy rights guaranteed by Article 8 of the Convention; the Court found it unnecessary to decide this issue. Further, the injunction itself was ineffective because it did not prevent large numbers of women from continuing to obtain abortions abroad.

172. The court cited *Handyside v. United Kingdom* I-E.H.R.R. 737 para. 49. For a discussion of the case, see Angela Thompson, *International Protection of Women's Rights: An Analysis of Open Door Counseling L&B and Dublins Well Women Centers v. Ireland*, 12 B.U. INT'L L.J. 371 (1994).

173. See generally, *Grogan*, *supra* note 163.

*D. Expanded Jurisdiction of the ECJ and Human Rights.*

Without question, the European Union will play an increasingly important role in the area of human rights, both in its external and internal policies.<sup>174</sup> The Treaty of Amsterdam has expanded the jurisdiction of ECJ to include matters relating to immigration, asylum, visas, border-crossings, and police and judicial cooperation. Further, the concept of discrimination has been expanded to include not only discrimination based on sex, but also to discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation. The ECHR has already developed an extensive jurisprudence in areas such as rights of the accused, freedom of expression, privacy rights and non-discrimination rights, areas that the ECJ will undoubtedly be called upon increasingly to rule upon in the future.

The Amsterdam Treaty provides no direction concerning the proper way to reconcile conflicting decisions that might arise from the overlapping jurisdiction nor does it provide any direction concerning the precedential effect of ECHR decisions with respect to provisions of the European Convention on Human Rights.

Several proposals have been put forth with respect both to strengthening human rights protections within the European Union and with developing a more comprehensive and integrated system for the protection of human rights.<sup>175</sup>

Early on it was argued that the EU should join the ECHR as a member in its own right. However, the decision of the ECJ in *Re: Accession of the Community to the European Human Rights Convention* makes clear that absent treaty modification, the EU could not accede to the ECHR because it would result in a fundamental change in the community system. While the opinion itself was widely criticized there appears to be little momentum with respect acceding to the Convention at the present time.

It has also been suggested the Union itself enact a catalogue of rights that would be uniform throughout the Union. Indeed, in June 1999 the European Council requested that a Charter of Fundamental Rights of the European Union be drawn up and presented. It specified that the Charter should contain the fundamental rights and freedoms guaranteed by the ECHR as well as those derived from the Constitutional traditions common to

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174. Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible With Reinforcement?* 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 313 (1998).

175. Alston & Weiler, *supra* note 23, *generally*.

member states as general principles of community law. It also requested that the Charter take account of economic and social rights as contained in the European Social Charter and the Community Charter of Fundamental Social Rights of Workers.<sup>176</sup> The Charter was to be printed in December 2000 and the Parliament acknowledged that it was in accord with the drafting of such a document. To date, however, the Charter has not been accepted. At the same time, the Parliament continues to advance the position that the Union become a party to the ECHR. While the drafting of such a Charter, which will have legal force, is itself now underway, its adoption and integration into the treaties must still be accomplished.<sup>177</sup> One commentator has called the adoption of a Charter of Fundamental Freedoms the worst possible scenario, since it would establish a dual system of human rights protection in Europe and a splitting up of rights which would undermine the authority of the Convention and the Convention system.<sup>178</sup>

Another option proposed is to incorporate all substantive provisions of the European Convention as a separate title to the EEC Treaty, as an amendment to the Charter and to include the protection of human rights and fundamental freedoms as an objective of the Community and the Union. The jurisdiction of the ECJ would be enlarged to encompass human rights issues not only as they pertain to community action, but also to actions of member states. All member states of the EU would then withdraw from the Convention leaving the ECJ as ultimate guarantors of human rights in the European Union. This approach would drastically alter the nature of the EU and appears to have gained little support.<sup>179</sup>

Others have suggested that when an issue pertains to human rights, the matter should be referred to the ECHR for a preliminary ruling by the ECHR that would be binding on the ECJ. For the same reasons advanced in the accession case, it seems unlikely that the ECJ would allow the ECJ to be subjected to the decisions of another international institution.<sup>180</sup>

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176. See European Social Charter, Oct. 18, 1961; see also, The Community Charter of the Fundamental Social Rights of Workers, available in LEXIS, Europe Library, EURSCP File.

177. European Council decision on the drawing up of a Charter for fundamental rights of the European Union, available at <http://europa.eu.int/ABC/doc/off/bull/en/9906/1064> (last updated on Sep. 7, 1999).

178. Akos G. Toth, *The European Union and Human Rights: The Way Forward*, 34 COMMON MKT. L. REV. 491-92 (1997).

179. *Id.*

180. Opinion 2/94 (1996) 2 C.M.L.R. at 279-80, at SV, Para. 3 (submission of the Portuguese Government).

Former Advocate General Frances G. Jacobs has suggested that the court has been most effective in advancing human rights throughout the Community and foresees little change in the future.<sup>181</sup> However the present system has been severely criticized and warrants reform at this time.

## V. Conclusion

While the momentum for a Charter of Fundamental Freedoms progresses, the jurisdictional conflict remains unresolved. Clearly, what is needed is a more holistic approach to the protection of fundamental rights in the European Union. However, the ECJ in the past has shown leadership in the area of protecting human rights, even without specific textual authorization in the ECC Charter. It has taken positions on human rights that are in some instances broader than the position taken by the ECHR. In addition, increasingly, both courts look to decisions and jurisprudence of the other for guidance. While neither will consider itself bound by the other court's decision, there is clearly deference and one can expect closer cooperation between the two courts as the jurisdiction of the ECJ expands with respect to human rights. It is a basic principle of European Union Law that a community national who travels to a member state and exercises Treaty rights, such as to work, enjoys the right to be treated to the same living and working conditions as nationals of the host state. Community nationals should also be entitled to assume that throughout the European Union, they will enjoy fundamental human rights, in particular those set forth in the ECHR, that are interpreted and administered uniformly throughout the Union. In other words, as Advocate General Jacobs has said, the new European citizen should be able to say 'civic Europeus sum' and to invoke that status in order to oppose any violation of his fundamental rights."<sup>182</sup> As the jurisprudence of both the ECJ and the ECHR continue to develop, this should be the case.

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181. Francis G. Jacobs, Symposium: *The European Union and the US: Constitutional Systems in Evolution, Judicial Doctrines for the Protection of Basic Human Rights*, Fordham University School of Law Center on European Union Law and International Antitrust. (February 1998)

182. *Id.*



