CHAPTER 8 The EU dimension based on other EU rights and obligations

A Relevance of EU rights and obligations for Education for Democratic Citizenship

238 Two widening movements

The question of Part three was: how does EU law impact on the components of EDC to empower citizens living in the EU? What content is relevant for the EU dimension in mainstream EDC in application of the four criteria? To recapitulate: firstly, the EU dimension of the components of EDC was set out based on the classic EU citizenship rights listed in Articles 20–24 TFEU (Chapter six). Secondly, this list was broadened to include the participation rights based on Title II TEU (Chapter seven). Thirdly, in this Chapter eight, also other rights derived from EU law will be considered. In application of EDC standards, *all the democratic rights and responsibilities* enjoyed by citizens must be taken into account (EDC component c-1) and, moreover, the perspective should be opened up to include *all persons*, not only citizens. These two widening movements, to include all rights and all persons, add further substance to the EU dimension of EDC. As recognised, the status of the individual in EU law is ambiguous. Personhood in the EU is not uniform. EU primary law mentions several categories of rights holders, using expressions such as 'nationals of a Member State', 'citizen of the Union', 'nationals of their countries', 'workers', 'any natural or legal person', etc. In secondary law, legal instruments have varying personal scope and the categories of rights holders change over time.[1782] For the purposes of EDC—which starts from the learner's perspective—*all* rights guaranteed by EU law are relevant to the EU dimension: rights linked to the status of EU citizenship, EU rights of citizens, and EU rights

1782 See Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights', 121–4 ('citizenship-foreigner-cleavage'; changes over time); Thym, 'Citizens' and 'Foreigners' in EU Law: Migration Law and its Cosmopolitan Outlook'. See also D Thym, 'Frontiers of EU Citizenship: Three Trajectories and Their Methodological Limitations' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).

of every person, including third country nationals, with corresponding responsibilities. In short, the EU dimension of EDC relates to all aspects of the individual's life which come within the ambit of EU law.

239 EU citizens as holders of all rights deriving from EU law (EU rights)

The commonly used name for Directive 2004/38, the 'Citizens' Rights Directive', may (wrongly) suggest that the rights of EU citizens are essentially those of the mobile citizen based on Article 21 TFEU.[1783] EU citizenship is much more than this admittedly quite 'thin' citizenship, which is much discussed in legal literature.[1784] In EU law, it is usual to associate EU citizenship with entitlement to the rights set out in Articles 20–24 TFEU. However, EU citizenship cannot be reduced to entitlement to the rights based on the classic citizenship provisions in the TFEU, even when those are broadened to include the rights based on Title II TEU. How far the legal category of citizenship of the Union stretches to engender rights 'attaching to the status' (apart from other legal categories) is a matter of debate,[1785] but for the purposes of EDC, this legal discussion is not so relevant. In the context of EDC standards, the focus shifts from EU citizenship rights (in a narrow sense, i.e. deriving from the status of citizenship of the Union) to 'EU rights', defined as all rights deriving from EU law, irrespective of the legal category on which these rights are based (they could be called citizenship rights in a broad sense).[1786]

The expression 'EU rights' appears in legislation and in various documents adopted by the institutions, yet the terminology used and the categorisation of rights of citizens is at times inconsistent.[1787] In Commission reports under Article 25 TFEU, entitled 'On progress towards effective EU

1783 The full name is Directive 2004/38 'on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' (n 1353).

1784 Text to n 1017.

1785 The legal effect of citizenship of the Union beyond Arts 20–25 TFEU is 'a vital question that has not been properly resolved', see Nic Shuibhne, 'The Resilience of EU Market Citizenship', 1616–7. See thesis of Kochenov, *EU Citizenship and Federalism: The Role of Rights* 27 ff; Kochenov, 'Ius tractum of many faces: European citizenship and the difficult relationship between status and rights'. Also text to n 1691.

1786 Further text to n 1793.

1787 Regulation 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020 [2013] OJ L354/62, Arts 2 and 4, see also recitals 1, 13, 14, distinguishing *rights deriving from citizenship of the Union* and *rights deriving*

citizenship', the Commission explains developments with regard to equality rights in legislation based on Article 19 TFEU (combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation).[1788] In the 2017 report, under the heading of Article 22 TFEU, the development in *Delvigne* is reported as well as action for the efficient conduct of European Parliament elections (even though this does not concern citizenship rights under Articles 20–24 TFEU). The opening up of the perspective beyond the rights of mobile citizens and the narrow list in Articles 20–24 TFEU appears even more pronounced in the accompanying EU citizenship report.[1789] The European Commissioner for Justice, Consumers and Gender Equality, and the European Commissioner for Migration, Home Affairs and Citizenship have set out priorities for further 'strengthening *citizenship rights*'. A wide range of rights are mentioned, whereby the expression 'EU rights' is used, including transparency

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from Union law, i.a. but not only, for individuals in their capacity as consumers or entrepreneurs in the internal market. See also Decision 1093/2012/EU of the European Parliament and of the Council of 21 November 2012 on the European Year of Citizens (2013) [2012] OJ L325/1; Commission Recommendation of 17 September 2013 on the principles governing SOLVIT [2013] OJ L249/10, I(A): 'SOLVIT aims to deliver fast, effective and informal solutions to problems individuals and businesses encounter when their *EU rights in the internal market* are being denied by public authorities' (emphasis added); Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1, Annex I, concerning EU rights applying to package travel contracts. Case C-206/13 *Cruciano Siragusa* ECLI:EU:C:2014:126, para 26 ('fundamental EU rights'; context of the CFR); Joined Cases C-411/10 and C-493/10 *NS* ECLI:EU:C:2011:865, Opinion of AG Trstenjak, para 173; Case C-282/10 *Dominguez* ECLI:EU:C:2012:33, Opinion of AG Trstenjak, para 98 ('fundamental EU rights'); Case C-61/14 *Orizzonte Salute* ECLI:EU:C:2015:655, Opinion of AG Jääskinen, paras 35, 37.

1788 Commission Report under Article 25 TFEU 'Progress towards effective EU Citizenship 2007-2010' COM(2010) 602 final; Commission Report under Article 25 TFEU 'On progress towards effective EU Citizenship 2011-2013' COM(2013) 270 final; Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final. Citizenship reports under Art 25 TFEU (regarding the application of Part Two TFEU, Non-discrimination and citizenship of the Union).

1789 Commission Citizenship Report 'Strengthening Citizens' Rights in a Union of Democratic Change EU Citizenship Report 2017' COM(2017) 030 final/2, i.a. 11, 12, 36, 46.

rights, consumer rights, rights of victims and procedural rights in the area of freedom, security and justice. For information on 'EU rights', the Commission refers to the Your Europe web portal, which also relates to many sectors of the daily life of static citizens and encompasses many different rights.[1790] The Commission has published a handbook 'Did you know? 10 *EU rights* at a glance', with the aim of presenting 'in a clear, concise and readable way, the *rights attached to EU citizenship*', designed for use in schools, particularly in citizenship education programmes.[1791] The 10 *EU rights* in the handbook (a small brochure of 23 pages) are entitled: 'European and local elections, making your voice heard, free movement, health, consumer rights, travel, telecoms, cross-border divorces and separations, crime victims' rights and a fair trial, and information and guidance'.[1792]

240 Empowering for the exercise of all EU rights (not only citizenship rights)

Reading EU law in conjunction with EDC standards, I adopt the wider view of rights of EU citizens (first widening movement). To ensure consistency in terminology, they will not be called EU citizenship rights, but EU rights. EU citizens have more points of contact with the EU than just their status as nationals of a Member State. There are other connecting factors than just nationality which bring their situation within the scope of application of EU law and trigger EU rights and responsibilities in addition to those listed in Articles 20–24 TFEU and in Title II TEU.[1793] EU rights

1790 Ibid, 11. See <europa.eu/youreurope> (Travel, Work & Retirement, Vehicles, residence formalities, Education & Youth, Health, Family, Consumers).

1791 Commission EU Citizenship Report 2013: EU citizens: your rights, your future COM(2013) 269, 20. See Did you know? 10 EU rights at a glance (European Commission Publications Office 2014) (some of them are for static citizens, especially buying/selling products, consumer protection). Commission Citizenship Report 'Strengthening Citizens' Rights in a Union of Democratic Change EU Citizenship Report 2017' COM(2017) 030 final/2, 25, 46: 'Action 12', 'promoting EU citizens' awareness of their *EU citizenship rights*, and in particular their electoral rights, by launching on Europe Day in May 2014 a handbook presenting those *EU rights* in clear and simple language' (emphasis added).

1792 The so-called update of the handbook is more oriented towards the internal market: 'Your Europe, your rights: A practical guide for citizens and businesses on their rights and opportunities in the EU's single market (European Commission, 2015).

1793 Shaw, 'The many pasts and futures of citizenship in the European Union', 557: The 'formal legal existence of Union citizenship' includes 'a set of rights within the Treaties located not only in Part Two of the E.C. Treaty (Article 8 et seq. E.C.), but also in the free movement provisions and the institutional sec-

include the EU citizenship rights, rights attaching to the status of EU citizenship.

Pursuant to paragraph 2 of the Charter on EDC/HRE, EDC aims to empower learners 'to exercise and defend their democratic rights and responsibilities in society' (c-1). On a combined reading with Article 20 TFEU, which states that citizens of the Union shall enjoy 'the rights and be subject to the duties provided for in the Treaties', the EU dimension of EDC should empower the citizen to exercise and defend the rights and to take up the duties provided for in the Treaties. That includes not only those rights listed in Articles 20–24 TFEU, but encompasses *all* rights under the TEU, TFEU and CFR. The *ratio legis* of the EDC standards, as set out in Part one, is not to empower citizens in respect of a limited legal category of rights. Nor would such a restricted aim match the compulsory aims of education laid down in international agreements (such as enabling effective participation in a free society). A contextual interpretation of EU citizenship as that term is used in the Treaties and CFR confirms that EU citizenship is more than entitlement to the rights attaching to the status of EU citizenship. Article 1 TEU states that the aim is to create a Union 'in which decisions are taken as openly as possible and as closely as possible to the citizen'.[1794] The CFR 'places the individual at the heart of [the EU's] activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice' (preamble). These provisions are clearly not only addressed to the mobile citizen or the citizen as a political actor. EDC standards aim to empower citizens to exercise rights and responsibilities irrespective of the legal sources from which they stem. In a society based on the rule of law, seen from the perspective of its citizens, it is irrelevant at which level of governance rights and obligations originate. Citizens must be empowered to exercise and respect them all. The EU citi-

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tions of the Treaty, and elsewhere within the Treaty framework including Article F(2) TEU which guarantees fundamental rights protection within the Union'; at 564: Rights can also be drawn from diverse 'hard' and 'soft' law instruments in the various fields of Union policy. Citizenship of the Union can only be fully understood by reference to a broader theory of citizenship and the dynamic, open-ended nature of that process. It leads to 'a recognition of citizenship as an integral part of the Union polity understood as a dynamic governance structure'. Further S Seubert and others (eds), *Moving Beyond Barriers: Prospects for EU Citizenship* (Edward Elgar 2018).

1794 See i.a. Presidency Conclusions of the Birmingham European Council of 16 October 1992, Birmingham Declaration 'A Community close to its citizens', Bull EC 10-1992.

zen lives in a legal space where several public authorities exercise public power together in a multilevel system of governance. He or she is a citizen *of* the Union and a citizen *in* the Union.[1795] Citizens' rights do not originate solely in national law anymore. The various (integrated) levels of governance produce rights and imply responsibilities. It is this interconnected set of rights and responsibilities based on Member State law interlinked with EU law, which must form the basis for EDC content. Acceptable and adaptable education ensures that EU citizens learn about this interconnected set of rights, and thus prepares them to live responsibly and participate effectively in a free society.[1796] The EU dimension of EDC will highlight those rights and responsibilities originating at EU level.

By way of parenthesis, this wider approach of looking at EU rights as citizenship rights in the broad sense helps to surmount an impasse pointed out by some scholars. Viewing the right in Article 21 TFEU as the core right of EU citizenship and the EU citizen as essentially mobile, leads to a cleavage between the mobile and the stayers. Academic writers reflect on ways of resolving this.[1797] I propose to look at EU law as a whole, beyond the provisions of Articles 20–24 TFEU, in order to bridge the cleavage. On a holistic approach, citizens derive far more rights from EU law than those narrowly attached to their status by the 1992 Maastricht Treaty. EU law does not only matter for the mobile, as many examples in the next section will illustrate.[1798]

To conclude, looking through the lens of EDC standards, the EU citizen is the holder of all rights and the bearer of all responsibilities which flow from EU law.

241 Empowering every person (not only EU citizens)

Non-citizens are not asked to leave the classroom when 'citizenship' education starts. EDC standards are intended to apply to every person, not only to citizens in the legal sense of own nationals (second widening movement). The Council of Europe Charter on EDC/HRE stipulates that member states should have the 'aim of providing *every person* within their territory with the opportunity of education for democratic citizenship and human rights education'.[1799] In the Reference Framework of Competences

1795 N 1650.
1796 Text to n 1015.
1797 See i.a. GLOBALCIT forum debate: M Ferrera and R Bauböck (eds), *Should EU Citizenship Be Duty-Free?* (EUI Working Paper RSCAS 2017/60, 2017).
1798 Text to nn 1917 ff.
1799 Para 5(a), emphasis added.

for Democratic Culture, the term 'citizens' does not only refer to 'those who hold legal citizenship and the passport of a particular state', but denotes 'all individuals who are affected by democratic decision-making and who can engage with democratic processes and institutions'.[1800] International agreements and other normative instruments consistently grant the right to education to every person.[1801] The rights of the child, to which EDC has been linked,[1802] do not depend on the citizenship or nationality of the child.

In practice, EDC learners are residents of Member States. All learners need to be prepared for the EU dimension in society. Social cohesion in society presupposes education for all, not only for EU citizens, and not only about the rights and responsibilities of EU citizens. The EU legal order also impacts on third country nationals. They derive rights and responsibilities from EU law, e.g. in the area of freedom, security and justice, or with regard to equality, food safety, etc.[1803] Learners—ideally—should understand the whole catalogue of rights and the corresponding

1800 Conceptual model in Competences for democratic culture: Living together as equals in culturally diverse democratic societies (CoE 2016), 15. See also Commission/EACEA/Eurydice, Citizenship Education at School in Europe (2017), 19 ('Normally, students are subject to citizenship education regardless of whether they are formal citizens of the country they live in').

1801 Art 26 UDHR; Art 13 ICESCR; Art 28 CRC ('the child', defined in Art 1 as every human being below the age of 18); Art 2 Protocol No 1 ECHR; Art 14 CFR. Further: UNESCO World Declaration on Education For All (Jomtien, Thailand, 1990); World Conference on Human Rights, Vienna Declaration and Programme of Action (25 June 1993) A/CONF.157/23; UNESCO The Dakar Framework for Action (Education for All) - Education for All: Meeting our Collective Commitments, adopted at the World Education Forum (Dakar, 26-28 April 2000); UNESCO World Education Forum 2015, Incheon Declaration - Education 2030: Towards inclusive and equitable quality education and lifelong learning for all. For applications, see K Willems and J Vernimmen, 'The fundamental human right to education for refugees: Some legal remarks' (2017) 17 EERJ 219, 224 (right to education for all, also refugee children). Other example: the German Federal Agency for Civic Education gives guidance by 'providing citizenship education and information on political issues to *all people in Germany*' (emphasis added).

1802 Part one, i.a. CoE Committee of Ministers, Council of Europe Strategy for the Rights of the Child (2016-2021): Children's human rights (3 March 2016) CM(2015)175 final.

1803 E.g. third-country nationals with an employment contract in a Member State have rights and obligations under the directives based on Art 19 TFEU. See i.a. Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights'; Thym, 'Citizens' and 'Foreigners' in EU Law: Migration Law and its

responsibilities flowing from EU law. Inclusive 'citizenship education' means education about rights in all their diversity, of varying personal and material scope, citizenship rights and human rights. Inequalities between EU citizens and third country nationals, and inequalities between EU citizens in crossborder or in wholly internal situations (reverse discrimination) should not be hidden.[1804] Pupils have interesting viewpoints. All learners, EU citizens and non-EU citizens, should be empowered to exercise their rights and responsibilities (c-1), to value diversity (c-2), and to use the existing channels of democratic participation (c-3), preparing for responsible life in European society and striving to uphold the values of Article 2 TEU.[1805] Statistically, the group of learners will largely consist of EU citizens, which is of relevance for the political participation rights in Title II TEU. Only a small minority will be third country nationals.[1806]

Having widened the perspective, this section will explore the relevance of EU rights in general as content for the EU dimension of EDC in mainstream education, on the basis of the four criteria (i-iv). In section B, some examples (stories) will illustrate relevant content as well as the method proposed in Chapter five for EU learning at school. When referring to EDC, the word citizen may sometimes be used in a non-technical sense, applying to every person.[1807]

Cosmopolitan Outlook'. For critical thinking with pupils, see MA Becker, 'Managing diversity in the European Union: inclusive European citizenship and third-country nationals' (2004) 7 Yale Human Rights and Development Law Journal 132 (proposal that third country nationals should also be able to acquire EU citizenship status).

1804 Text to n 1938.

1805 See i.a. reflections of D Thym, 'The Failure of Union citizenship beyond the Single Market' in B De Witte, R Bauböck and J Shaw (eds), *Freedom of movement under attack: Is it worth defending as the core of EU citizenship?* (EUI Working Paper RSCAS 2016/69, 2016) 5.

1806 <ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics>.

1807 In the same sense: Commission EU Citizenship Report 2013: EU citizens: your rights, your future COM(2013) 269, 2 ('in this report, the term citizens can also refer to any person who resides within the EU in accordance with EU primary and seondary law').

1. Additional content

242 The EU dimension of EDC based on direct effect and primacy of EU law

The following citation taken from settled ECJ case law is a crucial argument for incorporating EU rights into the EU dimension of EDC:

> EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States ... and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.[1808]

The principles of direct effect and primacy of EU law—essential features of the EU legal order—underscore in general how EU law provides binding additional content for national citizenship, satisfying the first relevance criterion for EDC (i). Combined with the principle of effective judicial protection, direct effect and primacy require EU rights to be included in component (c-1) for EDC to be adequate and consistent with EU law. Acceptable and adaptable education should take the EU dimension into account, based on the EU's autonomous legal order. Citizens should know the whole story, not only the national part. In political science, the perception persists that EU citizenship is almost entirely 'isopolitical', i.e. relating to the equal treatment of citizens who move to another Member State.[1809] Yet, EU citizenship gives rise to many more rights, including 'sympolitical' rights, i.e. relating to the binding decisions of a common authority for all members of the participating communities.[1810]

Firstly, many EU law provisions directly grant rights to citizens, independently of Member State law *(direct effect)*. On a superficial reading, the Treaties are addressed to Member States. Many provisions contain obliga-

1808 EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, para 166. Settled case law, i.a. Case 26-62 *Van Gend & Loos* ECLI:EU:C:1963:1; Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66; *Opinion 1/09* ECLI:EU:C:2011:123, para 65; Case 11-70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114, para 3; Case C-399/11 *Melloni* ECLI:EU:C:2013:107, para 59; Case C-573/17 *Popławski II* ECLI:EU:C:2019:530, para 52.

1809 See Kick off contribution of M Ferrera in Ferrera and Bauböck, *Should EU Citizenship Be Duty-Free?*, p 3; cp A rejoinder, p 72; also contribution of P Van Parijs, p 61.

1810 For the distinction between isopolitical and sympolitical rights, see P Magnette, 'How can one be European? Reflections on the Pillars of European Civic Identity' (2007) 13 ELJ 664, 669, 674 (isopolitical rights are horizontal; sympolitical rights are vertical).

tions or prohibitions for Member States.[1811] Yet, it is firmly established in EU law that provisions containing obligations or prohibitions for Member States directly confer rights on citizens when certain conditions are satisfied (if the provisions are clear, precise, and unconditional).[1812]

The fact that EU rights are directly relevant to the EU dimension of EDC is shown by this statement by the ECJ in *Van Gend & Loos* (1963):

> the [European Union] constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, [EU] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[1813]

From the Treaty prohibition preventing Member States from introducing new custom duties or increasing them (standstill obligation in Article 12 EEC) the ECJ derived rights for citizens (citizens in the broad sense, Van Gend & Loos was an importer).[1814] Article 12 EEC had direct effect and created individual rights which national courts must protect. The impact of the judgment was considerable: 'by heralding the doctrine of direct effect, the *Van Gend en Loos* ruling demonstrated that the EU is a rights-based legal order'.[1815] EU law imposes obligations and creates rights which become part of the legal position of individuals: 'Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the [Union] institutions'.[1816] Since the 1963 judgment, Member States have limited their sovereign

1811 I.a. Arts 18, 28, 30, 34–37, 45 TFEU.

1812 On direct effect, direct applicability, and conditions, see Lenaerts and Van Nuffel, *European Union Law* 810–12; B de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order' in G De Búrca and P Craig (eds), *The Evolution of EU Law* (Oxford University Press 2011).

1813 Case 26-62 *Van Gend & Loos* ECLI:EU:C:1963:1.

1814 For the customs union, see now Art 28 TFEU.

1815 K Lenaerts, 'Some thoughts on the State of the European Union as a rights-based legal order' [2015] Il Diritto dell'Unione Europea 5, with further considerations on limits to rights, balancing, and the role of the ECJ.

1816 Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* ECLI:EU:C:1991:428, para 31.

rights in ever wider fields, and the ECJ continues to uphold the same principle.[1817]

The conferral of rights on individuals through directly effective provisions of EU law adds significant content to EDC. It creates a personal sphere of self-determination free from State interference.[1818] In many areas of EU law, EU rights can be invoked by individuals vis-à-vis public authorities (vertical direct effect) and sometimes vis-à-vis other individuals (horizontal direct effect).[1819] In this way, the EU pervades the daily life of citizens, whether they move or not (iv). In addition to several Treaty provisions recognised by the ECJ as having direct effect,[1820] regulations are directly applicable in all Member States, binding in their entirety, and lead to the setting aside of conflicting national legislation (Article 288 TFEU).[1821] Directives, too, can directly create rights: 'individuals are entitled, as against public bodies, to rely on the provisions of a directive which are unconditional and sufficiently precise'.[1822] When a Member State fails to correctly implement a directive, the *nemo auditur propriam turpitudinem allegans* principle leads to vertical—not horizontal— direct effect. While EU law with direct effect is a direct source of EU rights and obligations, it becomes an indirect source of EU rights and obligations when directives are implemented in national law and national norms are interpreted consistently with EU law.[1823]

Secondly, the *primacy* of EU law over the laws of the Member States indicates even more strongly that EU rights add content to the EDC compo-

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1817 See i.a. B de Witte, 'The Continuous Significance of *Van Gend en Loos*' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 11.

1818 E.g. the right to move; Lenaerts, 'Some thoughts on the State of the European Union as a rights-based legal order', 7.

1819 Edward and Lane, *Edward and Lane on European Union Law* 296 ff. Example: Case 43/75 *Defrenne II* ECLI:EU:C:1976:56.

1820 de Witte, 'The Continuous Significance of *Van Gend en Loos*', 10: the contribution of *Van Gend en Loos* is that the ECJ decides on the direct effect of specific Treaty provisions. For enumeration of articles granted direct effect, Lenaerts and Van Nuffel, *European Union Law* 811 fn 293.

1821 For direct effect of decisions, see e.g. Case 9/70 *Grad (Leberpfennig)* ECLI:EU:C:1970:7); Lenaerts and Van Nuffel, *European Union Law* 917.

1822 Case 41/74 *van Duyn* ECLI:EU:C:1974:133; Case C 578/08 *Chakroun* ECLI:EU:C:2010:117, paras 41–43, 52; Case C-404/13 *ClientEarth* ECLI:EU:C:2014:2382, paras 54–5. See also case in text to n 2033.

1823 I.a. Case C-282/10 *Dominguez* ECLI:EU:C:2012:33, paras 30–3; see also cases *CHEZ* (n 1945); *Lindqvist* (n 1964); *Folk* (n 2048).

nent (c-1)—rights and responsibilities—independently of national legislation. Primacy is a cornerstone principle of EU law, proclaimed by the ECJ in *Costa v ENEL* and confirmed since then.[1824] Because of its special and original nature, stemming from the Treaties as an independent source of law, EU law cannot be overridden by domestic legal provisions, however framed, without being deprived of its character as EU law: 'The transfer by the States from their domestic legal system to the [Union] legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights'.[1825] A later act which is unilaterally adopted and incompatible with the concept of the EU, cannot prevail. The principle of primacy is a corollary of the general principle of equality of Member States (Article 4(2) TEU). In accordance with the principle of primacy, provisions of the Treaties and directly applicable measures adopted by EU institutions automatically render conflicting provisions of national law inapplicable and preclude the adoption of new conflicting national legislation.[1826] The ECJ added in *Popławski II* that 'in order to ensure the effectiveness of *all* provisions of EU law, the primacy principle requires, inter alia, national courts to interpret, to the greatest extent possible, their national law in conformity with EU law and to afford individuals the possibility of obtaining redress where their rights have been impaired by a breach of EU law attributable to a Member State'.[1827] Some constitutions expressly refer to the direct effect and primacy of EU law.[1828]

If indeed, as Lenaerts writes, the EU is a rights-based legal order and 'the very essence of EU law is the principle that the individual rights it creates are directly enforceable before national courts and prevail over conflicting national norms',[1829] the consequence is that acceptable and adaptable education needs an additional EU dimension to EDC to empower the individual to exercise these EU rights (c-1). Understanding EU rights and obliga-

1824 Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66; Case C-399/11 *Melloni* ECLI:EU:C:2013:107, para 59. See Declarations concerning provisions of the Treaties: Declaration 17 concerning primacy (the Conference recalls settled ECJ case law and attaches the Opinion of the Council Legal Service of 22 June 2007). Some EU law provisions have direct effect, all EU law has primacy: de Witte, 'The Continuous Significance of *Van Gend en Loos*'.

1825 Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

1826 Case 106/77 *Simmenthal II* ECLI:EU:C:1978:49, para 17; Case C-573/17 *Popławski II* ECLI:EU:C:2019:530, paras 53, 64–68.

1827 *Popławski II,* para 57 (emphasis added).

1828 Text to n 1150 ff.

1829 Lenaerts, 'Some thoughts on the State of the European Union as a rights-based legal order', 7.

tions is, moreover, relevant to valuing diversity (c-2) and prepares citizens for active participation in democratic life (c-3).[1830]

243 The EU right to effective judicial protection

Because EDC aims to empower individuals to exercise their rights, the right to effective judicial protection is pivotal. Article 19(1) TEU obliges Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law and requires the ECJ to 'ensure that in the interpretation and application of the Treaties the law is observed'.[1831] The Treaties have established a complete system of legal remedies.[1832] The linchpin of the EU as a rights-based legal order is Article 47 CFR, protecting the individual's right to an effective remedy and to a fair trial. The EU standard of effective judicial protection under Article 47 of the CFR is composite, coherent, and autonomous.[1833]

The ECJ has ruled that 'the guardians of [the EU] legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States'.[1834] For the courts to be able to fulfil their role as guardian, citizens must be empowered to bring cases before them. This presupposes that an EU dimension of EDC will provide knowledge about EU rights and a basic understanding of the interlocking system in which national judges assume the role of EU judge. The fact that the Member States ensure judicial protection of an individual's rights

1830 Illustrations in section B, stories.

1831 Ibid: 'For every EU right, there must also be a judicial remedy. It is on this constitutional axiom that the entire EU system of judicial protection is based'. See Case C-362/14 *Schrems* ECLI:EU:C:2015:650, para 95: 'The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law'. Also Case C-64/16 *Juízes Portugueses* ECLI:EU:C:2018:117; and n 1863.

1832 Joined Cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461, para 281; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625, paras 90–2; Case C-456/13 P *T & L Sugars* ECLI:EU:C:2015:284, para 45.

1833 M Safjan and D Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU' (2014) 33 Yearbook of European Law 3 (composite, as the different levels of EU law adjudication complement each other through the protection they respectively grant; autonomous definition of what exactly constitutes effective legal protection in a shared legal order based on loyal cooperation and mutual trust).

1834 *Opinion 1/09* ECLI:EU:C:2011:123, para 66. See also Case C-64/16 *Juízes Portugueses* ECLI:EU:C:2018:117, paras 32–4.

under EU law is an expression of the principle of sincere cooperation.[1835] How many citizens know that national judges enforce the rights they derive from EU law? Case teaching in particular can illustrate how citizens can take action in court to protect their EU rights. Examples of proactive citizens who win their cases, may motivate others to take an interest in EU norms and monitor the use of public power.

244 Obligations of EU citizens

EDC does not only aim to empower learners to defend their rights, but also to assume their responsibilities in society (c-1).[1836] Which additional responsibilities are linked to EU citizenship? In contrast with statal traditions, EU citizens have no duty to serve an EU army or pay direct EU taxes on their income. EU primary law contains many obligations which are addressed to the institutions and Member States. Article 20(2) TFEU states in general terms that citizens of the Union shall enjoy the rights and be subject to 'the duties provided for in the Treaties'. However, in the list which follows ('inter alia'), no duties appear. Nor does Title II TEU mention the duties of citizens. Some EU citizens have an obligation to vote for the European Parliament, but this is based on national electoral law (e.g. Belgium). Academic writers continue to debate whether the absence of legal duties (obligations) is a weakness of EU citizenship and they formulate proposals for the future.[1837]

In my view, EU citizens already do have duties under EU law. As explained, the perspective must be widened from EU citizenship rights and obligations attaching to citizenship status, to include EU rights and obliga-

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1835 Case C 432/05 *Unibet* EU:C:2007:163, para 38; Case C-404/13 *ClientEarth* ECLI:EU:C:2014:2382, para 52.

1836 On the importance of including duties in EDC, see n 225; also CoE Reference Framework of Competences for Democratic Culture, Vol 2: Descriptors of competences for democratic culture (2018), key descriptors 37, 39–43, 118, descriptors 701–710, and possible EU dimension to define.

1837 Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' (text to fn 11); J Shaw (ed) *Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?* (EUI Robert Schuman Centre for Advanced Studies Paper 62, 2011); Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration'; D Kochenov, 'EU Citizenship without Duties' (2014) 20 ELJ 482; R Bellamy, 'A Duty-Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights' (2015) 21 ELJ 558; Ferrera and Bauböck, *Should EU Citizenship Be Duty-Free?* : see proposals in Kick off contribution of M Ferrera, 'to add stuff to the container' of EU citizenship, and following discussions (food for critical thinking with pupils).

tions deriving from EU law in general. The values of the rule of law and of respect for fundamental rights on which the EU is based (Article 2 TEU and CFR) imply the duty to respect EU law, including EU fundamental rights.[1838] EU law provisions set out a number of obligations for persons within their scope, in addition to the obligations resulting from national citizenship. Citizens are under the obligation to respect EU law vis-à-vis public authorities, and—sometimes—also have duties vis-à-vis other citizens. Such obligations may be based on the horizontal direct effect of EU primary law and of secondary law. Regulations with direct effect contain obligations which individuals must respect, including horizontally.[1839] EU rules on free movement of persons (workers), on freedom to provide services, and on non-discrimination on grounds of nationality (Articles 18, 45 and 56 TFEU) create EU rights for citizens, rights which must be respected by the State (defined broadly) and by non-public organisations laying down collective rules.[1840] When given horizontal direct effect, they imply obligations between individuals. In *Angonese*, the ECJ found that Article 48 EC was designed to ensure the absence of discrimination on the labour market and that the prohibition of discrimination therefore applies to private persons.[1841] However, to deduce generalised EU obligations between individuals from these provisions would be premature. It is still unclear whether the non-discrimination provisions in the Treaties lead to generalised horizontal EU obligations which can be relied upon between private persons.[1842] Some concrete examples of legal EU obligations follow in section B.[1843]

1838 See i.a. text to n 1887.

1839 Lenaerts and Van Nuffel, *European Union Law* 812.

1840 E.g. Case 36/74 *Walrave and Koch* ECLI:EU:C:1974:140, para 21–2 (prohibition of discrimination applying to the rules of a sporting federation); also Case C-415/93 *Bosman* ECLI:EU:C:1995:463, para 84. For trade unions, see Case C-438/05 *Viking* ECLI:EU:C:2007:772, para 61 (a private undertaking can rely on Art 43 EC against a trade union or association of trad unions); also Case C-341/05 *Laval* ECLI:EU:C:2007:809.

1841 Case C-281/98 *Angonese* ECLI:EU:C:2000:296, paras 33–6 (between Mr Angonese and a private bank, now Art 45 TFEU). See in relation to Art 119 EEC, *Defrenne* (n 1940).

1842 Lenaerts and Van Nuffel, *European Union Law* 230; Craig and de Búrca, *EU Law: Text, Cases, and Materials* 799. See i.a. Joined Cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871.

1843 See i.a. in section B Stories: obligations corresponding to equality rights, social rights, privacy rights, and consumer rights (i.a. text to n 2043). See also responsibilities above in § 194 (rights of economically inactive EU citizens to social benefits).

Responsibilities may, furthermore, flow from a contextual or teleological interpretation of provisions of EU law. Employers and posted workers, for instance, have responsibilities regarding social rights. In *Altun*, the ECJ allowed a national court to disregard certificates obtained fraudulently in another Member State.[1844] It is the basic civic duty of citizens in the EU not to abuse EU rights. The Commission observes that EU citizens are not always aware that 'benefiting from the rights stemming from EU citizenship also entails some responsibilities', e.g. EU citizens must report the loss and theft of their identity and travel documents promptly to reduce the risks of fraud.[1845] Other illustrations of responsibilities are to be found in the Area of Freedom, Security and Justice (AFSJ). Individuals committing acts punishable under the law of one Member State cannot escape their responsibilities by fleeing to another Member State. They must answer for their deeds in the Member State where they committed the act in question.[1846] In the case of serious crime, or suspicion of serious crime, a European arrest warrant (EAW) may be issued anywhere in the EU: a person can be arrested in one Member State and surrendered to another Member State for the purposes of criminal prosecution or the enforcement of a custodial sentence or detention order there.[1847] Mutual recognition of judicial decisions in civil and criminal matters is a cornerstone of the AFSJ.[1848] Here EU law replaces classic international law (under which States can refuse to surrender their own nationals to another State). Free movement cannot lead to impunity.

1844 Case C-337/07 *Altun* ECLI:EU:C:2018:63. Further Dir 2018 of the EP and the Council amending Dir 96/71/EC concerning the posting of workers in the framework of the provision of services, i.a. recitals 22, 25, 28. See also Directive 2004/38, Art 35 on abuse of rights, or Art 34 on information concerning the rights and obligations of Union citizens on subjects covered by the Dir.

1845 Commission Citizenship Report 'Strengthening Citizens' Rights in a Union of Democratic Change EU Citizenship Report 2017' COM(2017) 030 final/2, 11.

1846 See i.a. Case C-66/08 *Kozłowski* ECLI:EU:C:2008:437 and Opinion of AG Bot.

1847 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision 2002/584/JHA [2002] OJ L190/1 (Art 1: EAW is a judicial decision issued by a Member State). Facts for pupils: persons surrendered under the EAW system include 'a failed London bomber caught in Italy; a German serial killer tracked down in Spain; a suspected drug smuggler from Malta extradited from the UK; a gang of armed robbers sought by Italy whose members were then arrested in six different EU countries'. See <ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm>.

1848 Arts 67, 81(1) and 82(1) TFEU.

Finally, beyond legal duties (obligations), there are social responsibilities which flow from membership of a community, the EU.[1849] Admittedly, EU citizenship is not like 'romantic citizenship', implying allegiance and loyalty, dying for one's country, and military duties,[1850] in contrast to national citizenship and national identity, which evolved in the 19th century.[1851] However, EU citizenship is not only about claiming one's EU rights, either. As academic writers suggest, it should be associated with moral duties too, such as striving for justice, equality and solidarity within the EU.[1852] The EU is not a 'take the money and run' project, an opportunity to extract advantages for one's own Member State and leave problems to other Member States (e.g. immigrant flows at their external borders). Article 2 TEU sets out the ethical foundations of the Union. Using EU primary law as a pillar for the EU dimension of EDC at school should be accompanied by reflection about the responsibilities inherent in those foundational values, for instance through case teaching.[1853]

245 An EU 'dimension', not an 'ad hoc' supplement

The word 'additional' as used in criterion (i) (relevant content should be 'additional content' for national EDC) corresponds to Article 9 TEU which states that EU citizenship is 'additional' to national citizenship and does

1849 See i.a. Schuman (n 1890); Peters, 'European democracy after the 2003 Convention', 77 (on European identity: 'it must be admitted that such a collective identity is not in itself a pre-requisite of democratic culture, but consists in the virtues which ostensibly flow from it, namely *responsibility*, solidarity, a willingness to compromise, trust, and tolerance. (...) The formation and growth of these virtues however, require citizens to have minimum ethical and cognitive capacities'). Emphasis added.

1850 See A Sangiovanni in Ferrera and Bauböck, *Should EU Citizenship Be Duty-Free?*, 18 (and exclusion of foreigners, the others).

1851 See authors on construction of nation states, i.a. Anderson, Hobsbawm (n 1034); also Brubaker, *Citizenship and nationhood in France and Germany*.

1852 I.a. A Sangiovanni in Ferrera and Bauböck, *Should EU Citizenship Be Duty-Free?*. Cp Kochenov, 'EU Citizenship without Duties', pleading that EU citizenship is based on rights, with no room for duties. See Bellamy, 'A Duty-Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights', arguing that a 'thicker' kind of EU citizenship entails developing civic duties towards the EU; at 565: 'to the degree that the EU has become already and develops in the future as a juridical order distinct from the Member States, then so one can expect the duties of EU citziens to support and control it to grow'. See, e.g., academic writers on equality (n 368), on solidarity (n 1959); also, the issue of citizenship rights of economically inactive citizens.

1853 Cases such as *Dano*, *Chez*, *Omega Spielhallen*, etc.

not replace it. The use of this word should not create the false impression that the EU dimension is additional in the sense of an extra layer added on at the end, like a topping added to a cake. In reality, the EU *dimension* is not *on* the cake but *in* the cake, in the kneading of the dough.

The word 'dimension' must be given its full weight. The complications of Brexit and the undoing of integration in the EU illustrate this only too well. There is no neat separation between EU rights and national rights. Citizens derive rights from national legislation implementing EU directives and these 'national rights' have to be interpreted in the light of EU directives, making them simultaneously 'EU rights', originating at EU level.[1854] National and EU law are intertwined and EDC should reflect this throughout the school curriculum. In order to effectively educate citizens for democracy, the EU dimension should ideally pervade the curriculum across the board, in a wide range of subjects (history, geography, economics, languages, sciences, information and communication technology, media, climate, environment, values, moral education, etc.). The EU dimension can be part of developing the eight key competences for lifelong learning.[1855] Member States are in the EU, but, more significantly, the EU is in the Member States, part of their very fabric. Authentic EU learning cannot be ticked off with an odd chapter added ad hoc to the last pages of a school textbook.[1856]

2. Significant content

246 EU fundamental rights

EU rights and obligations provide significant content for the EU dimension in EDC in different ways, satisfying the second criterion for relevance for mainstream education (ii). The fundamental rights protected by EU

1854 E.g. Case C-149/15 *Wathelet* ECLI:EU:C:2016:840, text to n 2024.

1855 Council Recommendation of 22 May 2018 on key competences for lifelong learning; Commission/EACEA/Eurydice, Developing Key Competences at School in Europe: Challenges and Opportunities for Policy (2012). See also Editorial Comments, 'EU law as a way of life' (2017) 64 CMLRev 357; and on a holistic approach: Opinion of the European Economic and Social Committee on 'Education about the European Union' SOC/612 (21 March 2019), para 1.2.

1856 In history textbooks, the EU often appears as an isolated chapter added after the chapter on WWII; in geography textbooks, a chapter on the EU will figure next to chapters on China or the Middle East (as if they were comparable subjects).

law are paramount examples. Consistency with EU law requires the inclusion of an EU dimension in both EDC and HRE.[1857] The Charter on EDC/HRE describes HRE as 'concerned with the broader spectrum of human rights and fundamental freedoms in every aspect of people's lives'.[1858] In various areas of life, the fundamental rights based on the CFR or on general principles of EU law (Article 6(3) TEU) add an EU dimension to national fundamental rights (i). Within the scope of application of the Treaties, the CFR applies.[1859] The examples in the next section will highlight the significance of fundamental rights, and their relationship with foundational values, objectives and principles (ii), and illustrate that the EU dimension of fundamental rights affects the daily life of many people (iv).[1860] Education about EU fundamental rights will enhance the social legitimacy of the EU. Fundamental rights protection is an essential part of the social contract of the citizens with the EU.[1861]

The significance of the EU dimension of HRE for mainstream education is, furthermore, underscored by a specific feature of the EU: mutual trust.

247 Mutual trust presupposes an EU dimension in mainstream EDC and HRE

Mutual trust is based on the fundamental premiss that Member States share a set of common values on which the EU is founded, as stated in

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1857 Because of the interconnectedness of EDC and HRE, the term 'EDC' used alone in the study has automatically implied HRE as well. Here, a specific focus is needed on HRE. See text to n 183. See Council Recommendation of 22 May 2018 on key competences for lifelong learning, Annex: A European Reference Framework, 6: Citizenship competence: 'Respect for human rights as a basis for democracy lays the foundations for a responsible and constructive attitude.'.

1858 Para 3.

1859 Art 51(1) CFR. See i.a. Case C-399/11 *Melloni* ECLI:EU:C:2013:107; Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:280. On the the link between citizenship and fundamental rights in the CFR, see already Commission Fourth Report on Citizenship of the Union (1 May 2001—30 April 2004) COM(2004) 695 final, 9; Commission EU Citizenship Report 2010 'Dismantling the obstacles to EU citizens' rights COM(2010) 603 final, 2. See also Commission 2017 Annual Report on the Application of the EU Charter of Fundamental Rights COM(2018) 396 final ('It has never been more important to highlight that respect for the Charter of Fundamental Rights is not an option but an obligation for EU institutions and the Member States when implementing EU law').

1860 E.g. cases on human dignity, equality, privacy (section Stories).

1861 O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* 314: protection of the individual is 'the central element of the Community's social contract with Member States and their nationals'.

Article 2 TEU.[1862] The principle of mutual trust, a specific characteristic of the EU, includes the presumption that other Member States comply with EU law and particularly with the fundamental rights recognised by EU law. Member States 'may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU' (save in exceptional cases).[1863] This specific feature of EU law has far-reaching implications. Mutual trust should not just be proclaimed, a legal fiction, leaving realities as they are, hoping for the best. For mutual trust to be deserved, a substratum must be built by educating citizens in the Member States according to the same (minimum) standards. If mutual trust is a specific feature of the EU, it should be prepared for and worked at. Mutual trust requires more than informing national civil servants about fundamental rights. It requires EDC and HRE for the entire population, leading to a human rights culture, including in its EU dimension.[1864] To be credible and effective, mutual trust presupposes a minimal level of education of EU citizens about EU fundamental right standards, based on the composite constitutional structure.[1865] Respect for EU (fundamental)

1862 See n 1183.

1863 EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, paras 191–2. See also Case C-64/16 *Juízes Portugueses* ECLI:EU:C:2018:117, para 30; Case C-216/18 PPU *LM* ECLI:EU:C:2018:586, paras 35–37. Further Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198: When a judicial authority is asked to surrender an individual, it must assess whether the fundamental right guaranteed by Art 4 CFR will be respected, seek information, and not surrender if the conditions for detention of the individual in the issuing Member State expose him to a real risk of inhuman or degrading treatment. In exceptional circumstances, this limits the principles of mutual trust and mutual recognition, EU characteristics which the ECJ put centre stage in Opinion 2/13. See paras 78, 85, 88, 93 ff (evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated; existence of a real risk that the individual concerned will be subject to inhuman and degrading treatment in the issuing Member State). Also Editorial [JS], 'Is Opinion 2/13 Obsolescent?' (2017) 42 ELRev 449; Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust'; H van Eijken and TP Marguery, 'The Federal Entrenchment of Citizens in the European Union Member States' Criminal Laws: Or How EU Citizenship Is Shaping Criminal Law' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017); and text to n 1207.

1864 Some analogy with the argument in Minow, 'What the rule of law should mean in civics education: from the "Following Orders" defence to the classroom' (n 1246).

1865 § 167 and text to n 1155.

rights and the need to strengthen the substratum for mutual trust directly touch the foundations of the EU (ii).

248 Counterargument: the EU mammoth

A frequent objection levelled against the EU dimension of EDC and the alleged significance of its content, is that it is illusory to assume that the individual citizen can influence the EU.[1866] The participation of the individual citizen seems meaningless in a mammoth polity with some 500 million citizens. In popular language: 'Everything is decided at the top by the large Member States and by the Commission bureaucracy. Adding an EU dimension to EDC is wasted energy. It is better for education policies to focus on the nation state.'

Robert Dahl (Yale) underlined the dilemma in these terms:

> Although enlarging the boundaries of a political system may make it more effective in dealing with problems of importance to citizens—defence, environmental issues, and trade, for example—the larger political system will also be more remote from citizens, less accessible, and less participatory.[1867]

In the face of this challenge, every reasonable measure must be taken. One of them is to enlighten citizens through citizenship education, as emphasised by Dahl,[1868] and in the EU this implies the incorporation of an EU dimension in EDC. Responding to the 'mammoth' objection, it should be noted here that—in addition to their input via democratic participation as developed in previous sections—individuals have in the past significantly contributed to shaping the face of the EU through court actions. Casebooks on EU law bear witness to the importance of judicial action taken by the ordinary citizen for the construction of the EU legal order. Preliminary rulings of the ECJ which have started with steps taken by an individual have an impact *erga omnes*: the EU norm as interpreted by the ECJ is

1866 Cf Standard Eurobarometer 89, Public Opinion in the European Union (June 2018) (D72.1): In response to the statement 'My voice counts in the EU', on average 45% of respondents agree (13% agree, 32% tend to agree) and 49% of respondents disagree (e.g. agree in DK 66%, in SE and DE 65%; disagree in EL 73%, EE 70%, CZ 67%). Positive evolution: Eurobarometer Survey 91.5 of the European Parliament, The 2019 post-electoral survey: Have European elections entered a new dimension? (September 2019), 89: 56% of Europeans agree that their voice counts in the EU.

1867 RA Dahl, 'Justifying democracy' (1998) 35 Society 386, 392. See also Aristotle on democracy in the polis: size matters (n 95).

1868 Part one, text to n 565.

binding throughout the EU.[1869] Adding EU rights to national EDC is therefore significant.

249 David and Goliath: the power of the individual defending EU rights

The names of hundreds of individuals have become shortcuts for denoting EU norms clarified in case law, often milestones in EU law and part of EU 'mythology'.[1870] Compliance with EU law is enforced not only by the infringement actions brought by the Commission against Member States (Article 258 TFEU), but also from below through the action of individuals.[1871] As long ago as *Van Gend en Loos* (1963) the ECJ acknowledged that the vigilance of individuals in protecting their rights amounted to effective supervision supplementing supervision by the Commission and the Mem-

1869 Craig and de Búrca, *EU Law: Text, Cases, and Materials* 464 ff; Lenaerts, 'Cogito ergo civis europaeus sum: Discours à l'occasion de l'attribution du titre de docteur honoris causa de l'Université de Poitiers' (The cardinal principles of the EU legal order were established in cases referred to the Court of Justice by national courts in proceedings between individual citizens and national authorities).

1870 Some individuals who impacted on the EU legal order: Hans Åkerberg Fransson; Nazifa Alimanovic; Roman Angonese; Ms Baumbast; Horst Otto Bickel and Ulrich Franz; Dany Bidar; Nabiel Peter Bogendorff von Wolffersdorff; Jean-Marc Bosman; Céline Bressol and Nicolas Chaverot; Calfa Donatella; HC Chavez-Vilchez; Mario Costeja González; Flaminio Costa; Nathalie D'Hoop; Elisabeta and Florin Dano; Gabrielle Defrenne; Erich Stauder; Paola Faccini Dori; Gert Folk; Andrea Francovich and Danila Bonifaci; Carlos Garcia Avello; Arthur Gottwald; Françoise Gravier; Anita Groener; Stefan Grunkin and Dorothee Regina Paul; Rudy Grzelczyk; Liselotte Hauer; Nimco Hassan Ibrahim and Maria Texeira; Ms H Jippes; Yassin Abdullah Kadi; Servet Kamberaj; Karl Robert Kranemann; Dieter Kraus; Seda Kücükdeveci; Deborah Lawrie-Blum; Bodil Lindqvist; Werner Mangold; María Martínez Sala; Shirley McCarthy; Ms CPM Meeusen; Stefano Melloni; Aleksei Petruhhin; Thomas Pringle; Alfredo Rendón Marín; Janko Rottman; Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn; Ilonka Sayn Wittgenstein; Volker and Markus Schecke and Hartmut Eifert; Maximillian Schrems; Roland Schumacker; Michael Schwarz; Christopher, Gabriel and Alana Sturgeon; Michel Trojani; Kari Uecker and Vera Jacquet; Yvonne Van Duyn; Yvonne Watts; Gerardo Ruiz Zambrano; Kunqian Catherine Zhu and Man Lavette Chen; and many more. Some of them were truly active EU citizens.

1871 E.g. Shaw, 'Education and the Law in the European Community', 422 (about *Gravier*): 'This is a classic example of the enforcement and promotion of Community law from below so as to foster the interest of integration against the interests of nationalism, acting, in a sense, as the primary law-making power at supra-national level.'.

ber States.[1872] These forms of enforcement prove that EU law is a source of additional content to national EDC, protecting rights different from those in national law (i). In a system based on the rule of law (ii), judicial participation is a crucial form of participation. Empowering EU citizens to exercise their rights and responsibilities is beneficial for citizens, for Member States and for the EU. Various policy areas in EU law rely on private enforcement.[1873]

Several cases have taken the form of a 'David versus Goliath' battle. An air hostess, a student, a father, a business man, and many more vigilant citizens (a farmer, a teacher, a footballer, ...) have proactively defended their EU rights in court (assisted by lawyers, certainly), obtained satisfaction in terms of their personal interests, and achieved large scale beneficial effects for others (in civic republican terms, effects for the common good).[1874]

Individuals have caused EU institutions and Member States to adapt legislation, to recognise judicial interpretations, and to change their practices. When courts are the agents of social change, the process is quite often initiated by citizens. In this way, citizens have an impact on EU and Member State policies, even on the norms in force on other continents.[1875] Defrenne, Schrems, Gutiérrez Naranjo, and Costeja González were—by the way—all static citizens.

It can be concluded that individuals are important actors, key to the EU system.[1876] The EU can only function adequately under the control of the citizen. If individuals are to ensure accountability and respect for EU law

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1872 Calliess and Hartmann, *Zur Demokratie in Europa: Unionsbürgerschaft und europäische Öffentlichkeit* 148, citizens mobilised to enforce EU law.

1873 Examples in administrative law, Hofmann, Rowe and Türk, *Administrative law and policy of the European Union* 702–03.

1874 *Defrenne*, *Schrems*, *Gutiérrez Naranjo*, *Costeja González (Google Spain)*, *Schecke*, *Groener*, *Bosman*, ... Also Joined Cases C-402/07 and C-432/07 *Sturgeon* ECLI:EU:C:2009:716; Case T-540/15 *De Capitani* ECLI:EU:T:2018:167 (Emilio De Capitani wins against the European Parliament, which was supported by the Commission and the Council; as a result, the institutions have to change their practices and increase access to documents).

1875 E.g. effects of Case C-362/14 *Schrems* ECLI:EU:C:2015:650 (text to n 963); Case C-131/12 *Google Spain* ECLI:EU:C:2014:317 (text to n 1969).

1876 On the role of citizens, see further Shaw, 'The many pasts and futures of citizenship in the European Union', 559; Maas, 'Unrespected, unequal, hollow? Contingent Citizenship and Reversible Rights in the European Union', 274; Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights', 118–9.

by the institutions and public authorities in the Member States via judicial action, they need to be empowered. It is about rights, and at the same time, about much more. EU rights are linked to the DNA of the EU. They reflect the foundational values, objectives and principles. Beyond the atomist defense of their own rights and interests, individuals point out the challenges facing European society, e.g. regarding the values of equality, freedom, or solidarity. In short, in addition to democratic participation mechanisms (as argued above), citizens' action in courts is significant. As Lenaerts observes:

> À mon sens, l'un des principaux ennemis du progrès, que ce soit au niveau régional, national ou européen, réside dans l'apathie citoyenne. Si les citoyens ne sont pas prêts à défendre leurs propres droits, la flamme de la démocratie, de la solidarité et de la justice risque de s'éteindre lentement mais sûrement.[1877]

From that perspective, EU rights can provide significant content to add to national EDC in component (c-1), of relevance for mainstream education. Including an EU dimension engages and empowers citizens, even in the face of 'the mammoth'.

EU rights also add significant content to EDC component (c-2), learning to value diversity.

3. Inviting critical thinking

250 Valuing diversity in the EU

Many EU rights and obligations invite critical thinking in the classroom. Satisfying the third criterion (iii), they provide relevant content for the EU dimension in EDC in mainstream education. Diversity is an appropriate theme for exercising critical agency in the classroom. EDC standards aim

1877 K Lenaerts, 'Au droit citoyen: Discours à l'occasion de l'attribution du titre de docteur honoris causa de l'Université de Namur' (50 ans de la Faculté de Droit de Namur, 13 October 2017) : tr 'In my view, one of the principal enemies of progress—be it at regional, national, or European level—is apathy on the part of citizens. If citizens are not prepared to defend their own rights, the flame of democracy, solidarity and justice is likely to be extinguished slowly but surely.' See also on active citizenship: Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' 753, 781.

to empower learners to value diversity (c-2).[1878] Both diversity and unity are EU objectives, reflected in the European motto 'United in diversity'. Because the EU is a Union of 27 Member States, the EU dimension intrinsically includes diversity. Pupils readily engage in discussions, e.g. about national sensitivities or traditions.

Respect for diversity is a foundational principle, expressed in various ways in the Treaties and CFR, and further developed in secondary law. As a result, many EU rights and obligations relate to EDC component (c-2). Article 2 TEU mentions among the values on which the EU is founded 'respect for human rights, including the rights of persons belonging to minorities' and refers to 'a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'. Among the foundational objectives of the EU, Article 3(3) TEU provides that the Union shall combat social exclusion and discrimination, promote social justice and protection, equality between women and men, and solidarity between generations. It 'shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'. One of the foundational principles is respect for the equality of the Member States as well as their national identities, inherent in

1878 Charter on EDC/HRE paras 2, 5(f), and 13, explanatory memorandum para 40. See also Art 13 ICESCR; Art 29 CRC; UNESCO World Education Forum 2015, Incheon Declaration - Education 2030: Towards inclusive and equitable quality education and lifelong learning for all, UN Sustainable Development Goal (SDG) 4. The EU also sets out objectives with regard to valuing diversity in education: see i.a. Joint Report of the Council and the Commission on the implementation of the strategic framework for European cooperation in education and training (ET 2020) — New priorities for European cooperation in education and training [2015] OJ C 417/25; EU Education Ministers and the Commissioner for Education, Culture, Youth and Sport, Paris Declaration on Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education (17 March 2015); Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on Inclusion in Diversity to achieve a High Quality Education For All - Council Conclusions (17 February 2017); Council Recommendation of 22 May 2018 on key competences for lifelong learning, Annex: A European Reference Framework, 6: Citizenship competence. See also academic writers, e.g. Osler and Starkey, 'Citizenship Education and National Identities in France and England: Inclusive or exclusive?'; Banks and others, *Democracy and diversity: principles and concepts for educating citizens in a global age*; Osler and Starkey, 'Education for democratic citizenship: a review of research, policy and practice 1995–2005'; Osler, 'Teacher interpretations of citizenship education: national identity, cosmopolitan ideals, and political realities'; Nussbaum, 'Teaching patriotism: love and critical freedom'.

their fundamental political and constitutional structures (Article 4(2) TEU). In all its activities, the Union must observe the principle of the equality of its citizens (Article 9 TEU). Discrimination on grounds of nationality and based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation is prohibited (Articles 18–19 TFEU, Article 21 CFR). Respect for diversity is also mentioned in several areas of Union policy: cultural and linguistic diversity in education policy (Article 165 TFEU), national and regional diversity and promoting cultural diversity in cultural policy (Article 167 TFEU), taking account of the diversity of situations in the various regions of the Union in environment policy (Article 191 TFEU).[1879] The CFR confirms that the EU must respect cultural, religious and linguistic diversity (Article 22). The many 'Freedoms' in Title II CFR lead to respect for diversity through, inter alia, freedom of thought, conscience and religion, freedom of expression, freedom and pluralism of the media, and freedom of assembly and association.

All these expressions of 'valuing diversity' are illustrated in the case law of the ECJ.[1880] Case teaching provides opportunities for highlighting the

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1879 See also taking diversity into account in Art 152 (role of social partners) and 207(4)(a) TFEU (common commercial policy).

1880 E.g. Case C-36/02 *Omega Spielhallen* ECLI:EU:C:2004:614 (text to n 1921 ff); Case C-110/05 *Commission v Italy* ECLI:EU:C:2009:66 (safe motocycling in Italy); Case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806; and Case C-438/14 *Bogendorff von Wolffersdorff* ECLI:EU:C:2016:401 (surnames, see also text to nn 1347-1349); Case C-81/12 *Accept* ECLI:EU:C:2013:275 and Case C-673/16 *Coman* ECLI:EU:C:2018:385 (same sex marriage); Case C-379/87 *Groener* ECLI:EU:C:1989:599; and Case C-202/11 *Las* ECLI:EU:C:2013:239 (languages). On languages, see Van Bossuyt, 'Is there an effective European legal framework for the protection of minority languages? The European Union and the Council of Europe screened'; van der Jeught, 'Conflicting Language Policies in the European Union and its Member States'. Further Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 760–761; A Levade, 'Citoyenneté de l'Union européenne et identité constitutionnelle' [2011] 1 Law & European affairs 97; G van der Schyff, 'The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU' (2012) 37 ELRev 563; E Cloots, *National Identity in EU Law* (Oxford University Press 2015). Debate is possible about the ECI 'Minority SafePack— one million signatures for diversity in Europe', asking the EU 'to improve the protection of persons belonging to national and linguistic minorities and strengthen cultural and linguistic diversity in the Union'. The Commission refused registration. See Case T-646/13 *Bürgerausschuss für die Bürgerinitiative Minority SafePack — one million signatures for diversity in Europe* ECLI:EU:T:2017:59, and Case T-391/17 *Romania v Commission* ECLI:EU:T:2019:672.

core principles and, at the same time, invites critical thinking in the classroom (iii). Valuing diversity in specific situations sometimes makes it necessary to strike a difficult balance between different rights. Should the freedom to conduct a business prevail, or the freedom and pluralism of the media and the freedom of EU citizens to receive information?[1881] Should the right to free movement of goods prevail, or the right to freedom of expression when disagreement takes the form of protests which disrupt the normal functioning of society?[1882] Case law also respects diversity by leaving a margin of discretion to Member States in certain fields or by making assessments on a case-by-case basis.

Consequently, EU law adds significant content (i, ii) to EDC components (c-1) and (c-2), preparing citizens living in a single area without internal frontiers—including static citizens (iv)—to value diversity and to reflect on it (iii). If an essential element of all EDC is 'the promotion of social cohesion and intercultural dialogue and the valuing of diversity and equality' (as paragraph 5(f) of the Charter on EDC/HRE provides), then the EU dimension has a natural place in this. The importance of valuing diversity in citizenship education is also underlined in other normative instruments. The 2006 Recommendation on key competences for lifelong learning includes in its description of civic competence the awareness of diversity and cultural identities in Europe, as well as full respect for equality, as a basis for democracy. Social competence includes intercultural communication, respect, and being prepared to overcome prejudices.[1883] While democracy is based on the opinions of the majority, minorities must also be protected. Here again, EDC is necessarily interlinked with HRE.[1884]

251 Valuing unity in the EU

Upholding the motto 'United in diversity' is quite challenging in an open area without internal frontiers. A multilevel system of governance is characterised by tensions between unity and diversity.[1885] Choices must be

1881 Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28, para 59.

1882 Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333.

1883 Further Council Recommendation of 22 May 2018 on key competences for lifelong learning: diversity is a recurring theme in several competences. Also Commission, Preparing teachers for diversity: the role of initial teacher education, Publications Office of the European Union (2017).

1884 See § 27 .

1885 Maas, 'The Origins, Evolution, and Political Objectives of EU Citizenship', 818.

made on the basis of democratic processes with the input of enlightened citizens. Where society is fractured by the presence of opposing forces, social cohesion is a constant aim.[1886] The Venice Commission states that the rule of law can only flourish when inhabitants 'feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture'.[1887] In order to build a supportive legal culture in European society, aiming at the peaceful coexistence of 27 different Member States, 500 million inhabitants, numerous regions, languages, religions, traditions, and—accordingly—different expectations, elementary legal literacy must be included as part of EDC.[1888] There needs to be, at least, an 'agreement that the law must be obeyed, plus a shared understanding of what the law is and how it can be changed'.[1889] An EU dimension should introduce pupils to basic EU rights and obligations.

Schuman stated that reconciling nations in a supranational association would 'safeguard the diversities and aspirations of each nation while coordinating them'. He saw the European spirit as a unifying force: '[t]he European spirit signifies being conscious of belonging to a cultural family and

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1886 See Council Recommendation of 22 May 2018 on key competences for lifelong learning, Annex: A European Reference Framework, combining unity and diversity in the description of citizenship competence: 'Knowledge of European integration as well as an awareness of diversity and cultural identities in Europe and the world is essential. This includes an understanding of the multi-cultural and socioeconomic dimensions of European societies, and how national cultural identity contributes to the European identity'. See also E-W Böckenförde, *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht* (Suhrkamp 1991); M Kunkler and T Stein (eds), *Ernst-Wolfgang Böckenförde. Constitutional and political theory: selected writings* (Oxford University Press 2017), on the need for a unifying ethos, a sense of community; the state plays a major regulatory role in creating relative homogeneity.

1887 CoE European Commission for Democracy through Law (Venice Commission), Rule of law checklist (11-12 March 2016), paras 42–3.

1888 Civic competences include legal literacy (see also public consultations before the adoption of the 2018 Recommendation on key competences for lifelong learning, i.a. p 63). Further Oberreuter, 'Rechtserziehung'; Reinhardt, *Teaching Civics: A Manual for Secondary Education Teachers* i.a. 46.

1889 CoE Report of the Group of Eminent Persons of the Council of Europe, *Living together: combining diversity and freedom in 21st century Europe*, 33, para 1. See for reflection also Bauböck, 'Still United in Diversity? The State of the Union Address'; and *Lautsi and Others v Italy* no 30814/06 (ECtHR 18 March 2011), paras 68–69: Europe is characterised by great diversity, but invoking a tradition cannot relieve States of their obligation to respect the ECHR.

to have a willingness to serve that community in the spirit of total mutuality, without any hidden motives of hegemony or the selfish exploitation of others'.[1890] The EU dimension of EDC, while valuing diversity, seeks to educate citizens in the core values of the EU formulated in the Treaties and CFR. The EU is a Union of transnational values, where the common value basis leads to homogeneity. Article 2 TEU sets out a constitutional core, a 'Verfassungskern' for the EU.[1891] Common values have a legitimising effect.[1892] In the EU, Rawls' overlapping consensus is expressed in the values of Article 2 TEU. However, the third caveat with regard to citizenship education (Part one) should not be forgotten: to what extent can citizenship education educate for the common good without becoming a despotism over the mind?[1893] The aim in including an EU dimension in EDC is not to define and delineate the core values of the EU (who can?) but to increase pupils' awareness of them and encourage reflection.[1894]

In addition to the 'constitutional' consensus on the core values in EU primary law and the legislative consensus in secondary law, judicial interpretation strikes a balance between values in concrete cases. The balance sought also concerns 'European commonality' versus 'national particularism', the twin objectives of European unity and diversity. Moderate 'constitutional pluralism' implies that the ECJ ensures uniformity with regard to the 'core nucleus of key shared values vital to the Union's integrity',[1895] but that beyond this core, the Court exercises a degree of judicial deference with regard to national constitutional traditions and their cultural, histori-

1890 Strasbourg, 16 May 1949: 'The 19th century saw feudal ideas being opposed and, with the rise of a national spirit, nationalities asserting themselves. Our century, that has witnessed the catastrophes resulting in the unending clash of nationalities and nationalisms, must attempt and succeed in reconciling nations in a supranational association. This would safeguard the diversities and aspirations of each nation while coordinating them in the same manner as the regions are coordinated within the unity of the nation.'.

1891 Calliess, 'EU-Vertrag (Lissabon) Art 2', Rn 7, 10–11. It can be connected to the search for the essence of fundamental rights in ECJ case law.

1892 Calliess, 'Europe as Transnational Law: The Transnationalization of Values by European Law', 1368, 1371.

1893 §73 n 590.

1894 Commission Citizenship Report 'Strengthening Citizens' Rights in a Union of Democratic Change EU Citizenship Report 2017' COM(2017) 030 final/2, 12: 'Union citizenship also means benefiting from equal treatment and sharing in a system of common values which the Union upholds, including respect for human dignity, equality and human rights, and inclusion, tolerance and respect for diversity'.

1895 Lenaerts and Gutiérrez-Fons, 'The Role of General Principles of EU Law', 197.

cal and social heritage.[1896] The *Omega Spielhallen* case (a story for case teaching in the next section) will illustrate this respect for diversity.[1897] In several areas, significant moral, religious and cultural differences between the Member States are accepted. Another example of diversity is gambling. In the absence of harmonisation, each Member State can determine what is required to protect the interests at stake in accordance with its own scale of values.[1898] Yet, national diversity must be compatible with the foundational values and principles of the Treaties and the CFR, upheld by the ECJ. The ECJ did not accept the German diversity regarding (so it was argued) 'consumer protection' and 'health' in the *Cassis de Dijon* case. The German rule fixing a minimum alcohol content in alcoholic beverages (higher than the alcohol percentage required in France and thereby excluding imports of Cassis de Dijon) was incompatible with the Treaty provisions on free movement of goods, a fundamental freedom in the internal market.[1899]

In the balancing of values, it is the legislator who has the last word, not the courts. The European Parliament and the Council decide where the balance between unity and diversity is to be struck, on the basis of democratic processes.

> Striking the right balance between European unity and national diversity has largely been achieved through the judicial protection of the individual rights contained in EU law, but is ultimately a task for the political process, with the representative democracy as a touchstone.[1900]

1896 Lenaerts, 'Some thoughts on the State of the European Union as a rights-based legal order', 23. See also Lenaerts, 'EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection'.

1897 See text to n 1921. On legal effects of values and how to resolve conflicts, see Calliess, 'Europe as Transnational Law: The Transnationalization of Values by European Law', 1379 (value conflicts may turn into competence conflicts).

1898 Case C-42/07 *Liga Portuguesa de Futebol Profissional* ECLI:EU:C:2009:519, para 57.

1899 Case 120/78 *Rewe-Zentral (Cassis de Dijon)* ECLI:EU:C:1979:42.

1900 Lenaerts, 'Some thoughts on the State of the European Union as a rights-based legal order', at 6 (the three EDC elements can, by the way, be recognised in the three parts of this article: rights, valuing diversity, participation). Norms clarified in ECJ case law have been incorporated in several legislative instruments, e.g. Dir 2004/18, see also text to n 1977. Further reflection: de Witte, 'Democratic Adjudication in Europe: How Can the European Court of Justice Be Responsive to the Citizens?'.

In order to participate in these democratic processes, EU citizens need to be enlightened about EU rights and responsibilities, EU values and objectives, and the challenges in achieving them. The EU dimension in EDC components (c-1), (c-2) and (c-3) is interlinked. When fundamental choices about rights and responsibilities (c-1) and diversity (c-2) have to be made, citizens must be involved through democratic participation (c-3). In short, the ultimate balancing of values in the EU must be the result of a democratic process, which presupposes the involvement of enlightened citizens, which—in turn—presupposes the incorporation of an EU dimension in EDC.

4. Affecting the large majority of citizens

252 EU rights and obligations in many EU policy fields

EU law generates rights and obligations in various policy areas. The examples are practically endless. Many of them are relevant for static citizens, and thus satisfy the fourth relevance criterion for content for the EU dimension of EDC in mainstream education (iv).

EU rights and obligations include all rights and obligations deriving from EU law irrespective of the legal category. They may be based on status as a citizen of the Union, but also on a person's capacity as a buyer or seller of goods in the internal market, a provider or receiver of services, a worker, a tourist, a pensioner, a third country national, a refugee, etc. They may be EU fundamental rights, potentially affecting all individuals. Ideally, the EU dimension of EDC will empower individuals to exercise all their rights and responsibilities flowing from EU law, whenever their situation comes within the personal and substantive scope of EU law.

The Charter on EDC/HRE describes EDC as focusing 'primarily on democratic rights and responsibilities and active participation, in relation to the civic, political, social, economic, legal and cultural spheres of society'.[1901] The EU has an impact in all these spheres of society because of the competences which the Member States conferred on it in the Treaties (exclusive, shared or supporting, Articles 3–6 TFEU). The EU's policies and internal actions are set out in the 25 Titles of the TFEU. The enumeration of these policy fields in EU primary law in itself proves that the EU is not just a market but exercises public power in many fields affecting many EU

1901 Para 3.

citizens. The 25 Titles include the internal market; free movement of goods; agriculture and fisheries; free movement of persons, services and capital; the area of freedom, security and justice; transport; competition; taxation and harmonisation; economic and monetary policy; employment; social policy; education, vocational training, youth and sport; culture; public health; consumer protection; trans-European networks; industry; economic, social and territorial cohesion; research and technological development; environment; energy; tourism; civil protection; and administrative cooperation.

253 EU crossborder rights

Crossing borders (even briefly) as a citizen or as an actor in the internal market triggers a range of EU rights (Articles 20, 21, 45, 49, 56 TFEU). Freedom of establishment, for instance, includes the right to take up and pursue activities as a self-employed person and to set up and manage an undertaking.[1902] All EU citizens live in the internal market, 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured' (Article 26(2) TFEU). Pupils should understand the EU rights related to the internal market and the foundational objectives and principles necessary to make this single area function, such as the principle of mutual recognition or the need for harmonisation, and be aware of the challenges in balancing market and other objectives.[1903]

Linked to the four freedoms of the internal market are the EU policies protecting additional EU rights. Mobile citizens have, for instance, social security rights (e.g. patients' rights to cross-border healthcare); rights to the recognition of educational, academic and professional qualifications; passenger rights (for travel by air, rail, ship, bus, or coach); consumer rights (e.g. package holidays); rights when registering a vehicle or exchanging a driving licence; rights related to the end of roaming charges; etc.[1904]

1902 Art 49 TFEU.

1903 Story for the classroom: Case 120/78 *Rewe-Zentral (Cassis de Dijon)* ECLI:EU:C:1979:42. See also Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 [2019] OJ L 91/1.

1904 SOLVIT deals with crossborder problems in various legal areas: Commission Communication 'Compliance Package- Action plan on the Reinforcement of SOLVIT: Bringing the benefits of the Single Market to citizens and businesses' COM(2017) 255 final, p 5, in diminishing order of intervention: social security, free movement of persons and right to reside, recognition of professional qualifications, taxation and customs, vehicles and driving licences, free move-

Even when they do not cross borders, citizens enjoy EU rights.

254 EU rights at home

Static citizens enjoy EU rights relevant for mainstream education. The EU dimension of life at home is often unnoticed. True, EU law on free movement rights does not apply in wholly internal situations: a crossborder element is needed to ensure a nexus with EU law. Yet, the crossborder element does not necessarily have to involve a mobile citizen; it is sufficient if goods or services cross the border. Citizens at home buy products originating in other Member States on a daily basis and often take advantage of crossborder services. Here the 'market citizen' can be linked with the 'genuine EU citizen', in the sense of any national of a Member State.[1905] EU rights related to free movement of goods and services (and capital) have implications for all residents. The setting-up of an area without internal frontiers includes many measures which affect citizens at home, contributing to the EU dimension of life *within* the Member State. EU rights to gender equality or working time rights, for example, affect all citizens. As early as 1995, O'Leary observed:

> The effect of Community Law is thus mostly felt by Member State nationals internally in their own Member State, or when resident in another Member State, via directives and national implementing legislation, and Community law therefore affects the relationship which the individual traditionally enjoys with his or her own Member State of origin or residence and does not generally give rise to a direct relationship between Member State nationals and the Community or Union.[1906]

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ment for goods, services, workers, access to education. SOLVIT publishes examples of individual cases on its website (text to n 1299). EU rights follow from e.g. Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/45 (Patients' Mobility Directive); or Commission Implementing Regulation (EU) 2016/2286 of 15 December 2016 laying down detailed rules on the application of fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment [2016] L344/46.

1905 Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' 297. See Maduro, i.a. Case C-72/03 *Carbonati Apuani* ECLI:EU:C:2004:506, Opinion of AG Maduro, para 58.

1906 O'Leary, 'The relationship between Community citizenship and the protection of fundamental rights in Community law' 530.

Citizens at home are also affected by EU action in the AFSJ. A foundational objective of the Union is to 'offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' (Article 3(2) TEU). Crime and terrorism are matters of concern to all citizens. Victims, including victims of terrorism, have EU rights (e.g. the right to receive information, the right to interpretation and translation, the right to be heard, to legal aid).[1907]

255 Harmonisation affects the lives of all citizens

Of particular relevance for all EU citizens, including those at home, are EU harmonisation measures. The EU has the competence to harmonise national law, to eliminate disparities between the Member States when they form obstacles to free movement in the internal market, or to achieve certain objectives. In order to guarantee fair competition in the internal market, EU measures aim at creating a level playing field. Measures concerning health, safety, environmental protection, and consumer protection are based on a high level of protection. In addition to the general legal bases for harmonisation (Articles 114 and 352 TFEU), specific legal bases give the EU the competence to formulate its own policies, e.g. in agriculture, transport, economic policy, or social policy.[1908]

Where there has been EU harmonisation, the primacy of EU law requires non-application of conflicting Member State law.[1909] EU rights are, to that extent, not just additional to national rights (i), but even

1907 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] L315/57 (Victims' Rights Directive). See also Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1 (Anti-Trafficking Directive); Commission Citizenship Report 'Strengthening Citizens' Rights in a Union of Democratic Change EU Citizenship Report 2017' COM(2017) 030 final/2, Action 7 p 43. For reflection, see i.a. E Herlin-Karnell, 'Is the Citizen Driving the EU's Criminal Law Agenda?' in M Dougan, NN Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012).

1908 Arts 40–41, 91, 121, 153 TFEU.

1909 As to levels of harmonisation, see, e.g., text to n 2041; Lenaerts and Van Nuffel, *European Union Law* 296; Craig and de Búrca, *EU Law: Text, Cases, and Materials* 625.

replace national rights, a fortiori of relevance for EDC. Living in one area, all residents feel the effects of EU rules on food safety and market surveillance, product safety, or on standards for passports and travel documents.[1910] It is worthwhile discussing with pupils how far EU uniformity or standardisation (and protection) should go, for instance in the context of the safety of toys.[1911]

From the general overview in section A, the conclusion can be drawn that many EU rights and obligations satisfy the four criteria (i-iv) and provide relevant content for the EU dimension of EDC. These rights and obligations reach into the deeper layers of values, objectives and principles of the EU and widen the perspective beyond law, as the following examples will illustrate.

B Stories for case teaching

256 Islands of knowledge; reflection on values

In the analysis of relevant content for the EU dimension of EDC in mainstream education, it is impossible to comprehensively list all the rights and responsibilities which EU citizens derive from EU law (c-1), to cover all aspects of valuing diversity (c-2), just as it was impossible to comprehensively analyse the various ways EU citizens can participate in democratic life (c-3). However, examples can provide 'islands of knowledge' for the EU dimension and foster values within the 'citizenship competence' as recommended by the 2018 Council Recommendation on key competences

1910 Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States [2004] OJ L385/1; for continued action in the context of terrorism and security, see Commission Communication 'Action plan to strengthen the European response to travel document fraud' COM(2016) 790 final, 31; Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement [2019] OJ L 188/67.

1911 Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys [2009] OJ L170/1. Applying the New Approach principles (Council Resolution of 7 May 1985 on a new approach to technical harmonisation and standards), it sets out only the essential safety requirements for toys. See also n 1909.

for lifelong learning.[1912] The intention is to trigger pupils' interest in the EU dimension of citizenship. Examples show that the EU dimension can provide useful knowledge enabling citizens to enforce their EU rights. At the same time, beyond the personal benefits, the examples aim to provide some insight into the role and purpose of the EU as a whole. Questions arise as to the significance of EU rights and obligations for the common good. What type of society do pupils (want to) live in? What is the concrete meaning of the values in Article 2 TEU and the CFR? Paradoxically, the concrete reveals the abstract: the study of actual cases may be necessary to disclose the underlying values and principles. A specific story and the parties' viewpoints are a medium for understanding EU rights and lead to reflection about the DNA of the EU, its foundational values, objectives and principles. Pupils can discuss the rationale and added value of EU norms for the individual, for the Member State, and for the EU. Understanding EU rights and obligations and reflection on Treaty values prepares them for effective participation and responsible life in a free society, which are compulsory aims of education.[1913]

ECJ case law is extensive and includes many captivating stories. Some cases have already been described in the previous chapters, e.g. the stories of Françoise Gravier, Nathalie D'Hoop, or Elisabeta Dano.[1914] The following examples have been chosen in the light of the guidelines set out above for case teaching.[1915] Furthermore, they illustrate that—contrary to common perceptions—the citizen whose rights are protected in EU law, is not necessarily a market citizen nor a mobile citizen.[1916] Most citizens in the examples are static.[1917]

1912 Council Recommendation of 22 May 2018 on key competences for lifelong learning, para 2.7, and Annex: A European Reference Framework, 6: Citizenship competence.

1913 Arts13 ICESCR and 29 CRC.

1914 Text to nn 1420, 1426; 1375; 1385.

1915 Text to n 1291 ff.

1916 Cp Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator'.

1917 Other interesting cases for stories are Case C-189/01 *Jippes* ECLI:EU:C:2001:420; Case C-388/01 *Commission v Italy* ECLI:EU:C:2003:30 (equal admission rates in museums); Case C-109/04 *Kranemann* ECLI:EU:C:2005:187; Case C-42/07 *Liga Portuguesa de Futebol Profissional* ECLI:EU:C:2009:519; Case C-103/08 *Gottwald* ECLI:EU:C:2009:597; Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21; Case C-236/09 *Test-Achats* ECLI:EU:C:2011:100; Case C-673/16 *Coman* ECLI:EU:C:2018:385.

In order to provide the EU dimension in an objective, critical and pluralistic manner, with no aim of indoctrination, the cases will be linked to EU primary law (the first and second pillar of the proposed learning method).[1918] They provide the 'educational substance'[1919], the legal material which educators can turn into stories adapted to the curriculum, interest, and educational level of the pupils.

1. Free movement rights and fundamental rights

257 Free movement of services balanced against the right to human dignity: Omega Spielhallen

The story of playing at killing

The right to human dignity is the basis of all fundamental rights: 'Human dignity is inviolable. It must be respected and protected' (Article 1 CFR).[1920] That this universal human right has an interesting EU dimension in its application in the Union, is illustrated in *Omega Spielhallen*, an excellent example for case teaching in secondary schools.[1921] Building respect for human dignity is an essential part of EDC standards.[1922]

> Omega is a German company setting up a laserdrome in Bonn (Germany). To practice laser sport, 'guns' are used (gun-type laser targeting

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1918 Text to n 1080 ff.

1919 Reinhardt, *Teaching Civics: A Manual for Secondary Education Teachers* 120.

1920 See also Case C-377/98 *The Netherlands v Parliament and Council* ECLI:EU:C:2001:523, para 70 (on 'the fundamental right to human dignity and integrity', general principle of Community law); C Dupré, 'Article 1: Human Dignity' in S Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014); C Dupré, 'Re-Thinking European Constitutionalism: Dignity, Humanism, Democracy' in *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart 2015). Human dignity is a central value in international human rights sources (e.g. Art 1 UDHR, Art 10 ICCPR, Art 13 ICESCR, Art 28, 37 CRC, Art 3 ECHR; and in many national constitutions.

1921 Case C-36/02 *Omega Spielhallen* ECLI:EU:C:2004:614.

1922 CoE Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (11 May 2010), para 5(f). See also EU Education Ministers and the Commissioner for Education, Culture, Youth and Sport, Paris Declaration on Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education (17 March 2015), and an increased focus on citizenship education to prevent radicalisation, see § 127 .

devices) to hit sensory tags fixed in the firing corridors or on the jackets of players. Omega obtains this equipment from the British company Pulsar. Even before the opening of the laserdrome, part of the population of Bonn manifest their opposition to the project. The Bonn police authority examines the situation and warns Omega that it will prohibit the game if sensory tags are fixed to the players' jackets, because this would result in 'playing at killing'. Omega does not comply with this condition. The Bonn police authority issues an order prohibiting the game, on pain of DEM 10 000 for each game played by firing a laser beam at human targets. The Bonn police considers this game to be a danger to public order: the simulation of homicide and the trivialisation of violence are contrary to fundamental values prevailing in public opinion. In court, Omega invokes its EU right of freedom to provide services (now Article 56 TFEU), since the laserdrome uses equipment from the British company Pulsar. In reply to a preliminary question from the Federal Administrative Court, the ECJ rules that the order prohibiting Omega from operating the game is indeed a restriction on the freedom to provide services. Such a restriction can be justified for reasons of public policy (Article 62 TFEU). What constitutes public policy cannot be unilaterally determined by each Member State without EU control. It requires 'a genuine and sufficiently serious threat to a fundamental interest of society'. Yet, the ECJ acknowledges that the competent authorities have a margin of discretion. The justification on grounds of public policy is acceptable because according to a prevailing conception (public opinion and national courts) the commercial exploitation of games involving the simulated killing of human beings infringes a fundamental value enshrined in the national constitution, namely human dignity (Article 1 in the German Basic Law). The restriction is not disproportionate simply because one Member State chooses a system of protection different from that of another Member State (in the UK, the game is allowed). The ECJ concludes that EU law allows a Member State to prohibit the commercial exploitation of a game simulating acts of homicide on grounds of public policy because it is contrary to human dignity.

Based on the Reinhardt manual for teaching civics,[1923] questions can be used to guide the case analysis through four steps: the outside perspective (*what is the issue? who is involved? what is the EU dimension of the situation of citizens living in Bonn? which EU rights and fundamental principles are concerned? why is the EU right limited? what are the aims?*), the inside perspective (*what would you do in the role of ...? how do the actors feel? do you think the measure is excessive, or is it proportional to the aim?)*, a political judgment (*what is the broader significance of this problem? should legislation be adapted? by whom?*), and generalisation (*do the parties represent groups in society? what is the significance of this story for the Member States, for the EU? what do we mean by human dignity?*).[1924] Human dignity is protected differently in Germany (mindful of its role in two World Wars) and in the UK, where the game is not deemed to be contrary to public policy. While the core fundamental right of human dignity is universal, Member States have a margin of discretion to determine its limits in specific applications. A specific EU dimension appears in EDC component (c-1) exercising rights and responsibilities and in component (c-2) valuing diversity (in considering the justification of restrictions in the internal market). This case illustrates the value attributed to diversity in the EU, even in the context of a fundamental Treaty freedom, namely the freedom to provide services (a market freedom). No uniform concept of public policy is imposed on the Member States. The ECJ recognises that justification on grounds of public policy 'may vary from one country to another and from one era to another'.[1925] The economic objectives of the EU are balanced against national constitutional traditions and perceptions among the population.[1926]

1923 Reinhardt, *Teaching Civics: A Manual for Secondary Education Teachers* 122, 130. Compare steps for case study (at 125). Sibylle Reinhardt is Prof em of Social Science Studies Education at the Institute of Political Sciences, Martin-Luther-University, Halle, Germany. Her book is regarded as a seminal text in the German speaking world and translated into English. The steps for case analysis are applicable to all the following illustrations, but I have not systematically worked through them (they may be developed by teachers or in teaching materials for the EU dimension).

1924 See also recurrent reasoning scheme in n 1265.

1925 Para 31; Case 41/74 *van Duyn* ECLI:EU:C:1974:133, para 18. See also gambling (n 1898).

1926 Lenaerts, 'Some thoughts on the State of the European Union as a rights-based legal order'. On disagreements on the level of protection of fundamental rights in Member States, see N de Boer, 'Addressing rights divergences under the Charter: Melloni' (2013) 50 CMLRev 1083.

Cases such as *Omega Spielhallen* help to answer the question raised in Part one: how do we balance liberal and civic republican views on citizenship education?[1927] The essence of human dignity has to be respected. The hard core of this fundamental right is not in question, but critical discussion is allowed at the margins.[1928] Article 52(1) CFR provides guidance in the debate.

Another excellent example for balancing freedoms in the internal market with fundamental rights is the *Schmidberger* case. Balancing free movement of goods against freedom of expression provides food for lively debate in the classroom.[1929]

2. Equality rights and obligations

258 Prohibition of discrimination on any ground

Education to promote equality is an essential element of EDC standards.[1930] The Charter on EDC/HRE states that equality education and EDC overlap and interact.[1931] For people living in the Member States,

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1927 Third caveat, § 73 (i.a. on the GEC of Ute Frevert).

1928 See Callan on a sphere of respectable contention (n 1257).

1929 Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333; J Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution' (2006) 12 ELJ 15. Other cases related to the internal market could be 'la guerre des fraises', or concern 'the Polish plumber' (i.a. Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36: provisions for the 'exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services' (Art 1)). Balancing interests, furthermore, in Case C-438/05 *Viking* ECLI:EU:C:2007:772; Case C-341/05 *Laval* ECLI:EU:C:2007:809. Further: S de Vries, 'Grondrechten binnen de Europese interne markt: een tragikomisch conflict tussen waarden in de "Domus Europaea"' (2016) 64 SEW - Tijdschrift voor Europees en economisch Recht 99 (highlighting the legal foundations of EU construction, legitimacy, and the importance of clear reasoning by the ECJ in balancing interests). Also LW Gormley, 'Keeping EU Citizens out is wrong' (2013) 21 Journal de droit européen 316.

1930 On the essential role of equality in citizenship education, see i.a. EU Education Ministers and the Commissioner for Education, Culture, Youth and Sport, Paris Declaration on Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education (17 March 2015). Also G Liu, 'Education, Equality, and National Citizenship' (2006) 116 The Yale Law Journal 330 (duty of US Congress to ensure educational adequacy for equal citizenship). See also Nussbaum in caveat 3, text to n 579 (one factor in

equality has an important EU dimension, providing relevant content for mainstream education and satisfying the four criteria. 'Equality' is expressed in various ways in the foundational values, objectives and principles of the EU (i.a. Articles 2, 3(3) and 9 TEU, 18–19 TFEU). Article 19 TFEU allows the Council to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. The CFR prohibits '[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation' (Article 21) and states that equality between women and men must be ensured in all areas, including employment, work and pay (Article 23). Various instruments in secondary legislation implement the principle of non-discrimination and set out equality rights, justiciable in court.[1932] As

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getting 'the good out of patriotic education without the bad', is awareness of the constitutional rights of minorities).

1931 Charter on EDC/HRE, para 1.

1932 I.a. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Racial Equality Directive); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (the Employment Equality Directive, prohibiting discrimination in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 (Directive on Gender Equality); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23 (legal basis ex Art 141(3) TEC, now Art 157 TFEU, equal pay for equal work); Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L 180/1; Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency [2014] OJ L 69/112. See also Commission Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive) COM(2014) 2 final. For promotion of equality in programmes and European Year, see i.a. Regulation 1381/2013 of the European

reiterated in settled case law, the general principle of equality requires that similar situations are not treated differently, unless differentiation is objectively justified.[1933] For EU norms on equality to apply, situations must fall within the scope of the Treaties or secondary law. The Commission reports on the transposition of the Racial Equality Directive, the Employment Equality Directive, and the Directive on Gender Equality[1934] by the Member States, but warns that the main challenge is to raise awareness of the rights and protection in practice.[1935] This echoes Condorcet: 'Les lois

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Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020 [2013] OJ L354/62 (legal basis Arts 19(2), 21(2), 114, 168, 169 and 197 TFEU): 'an area where equality and the rights of persons as enshrined in the TEU, in the TFEU, in the Charter and in the international human rights conventions to which the Union has acceded, are promoted'; earlier Decision 771/2006/EC of the European Parliament and of the Council of 17 May 2006 establishing the European Year of Equal Opportunities for All (2007)—towards a just society [2006] OJ L146/1 (legal basis ex Art 13(2) TEC, now Art 19 TFEU). Further E Ellis and P Watson, *EU Anti-Discrimination Law* (2 edn, Oxford University Press 2012); Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 892–963; LS Rossi and F Casolari, *The Principle of Equality in EU Law* (Springer International 2017); E Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (Oxford Studies in European Law, OUP 2018). Also G Davies, *Nationality discrimination in the European internal market* (European Monographs 44, Kluwer Law International 2003); J Shaw, 'Mainstreaming Equality and Diversity in the European Union' (2005) 58 Current Legal Problems 255; V Guiraudon, 'Equality in the making: implementing European non-discrimination law' (2009) 13 Citizenship Studies 527; L Potvin-Solis, 'La liaison entre le principe de non-discrimination et les libertés et droits fondamentaux des personnes dans les jurisprudences européennes' (2009) 20 Revue trimestrielle des droits de l'homme 967; Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal'.

1933 Joined Cases 117/76 and 16/77 *Ruckdeschel* ECLI:EU:C:1977:160, para 7.

1934 N 1932. See also Commission Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008) 426 final (Horizontal Anti-Discrimination Directive); Commission Citizenship Report 'Strengthening Citizens' Rights in a Union of Democratic Change EU Citizenship Report 2017' COM(2017) 030 final/2, 34: to ensure a level playing field in terms of equality throughout the Union, it is vital to conclude the negotiations on the proposed Horizontal Anti-Discrimination Directive.

1935 Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final, 2–3. Websites provide information (see i.a. <ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination_en>, including on members of the LGBTI community (Lesbian, Gay, Bisexual, Transgender, Intersex).

prononcent l'égalité dans les droits, les institutions pour l'instruction publique peuvent seules rendre cette égalité réelle.'[1936] Case teaching is an appropriate tool for promoting equality, inclusion, and tolerance, which are common values of EU citizens.

Non-discrimination on grounds of *nationality* (mentioned in the context of citizenship rights) has interesting applications when linked with internal market freedoms.[1937] In purely internal situations, outside the scope of the fundamental freedoms, problems of reverse discrimination may arise, which may be suitable material for reflection at advanced levels of EDC.[1938] Pupils will also be able to debate the issue of financial solidarity and the economic cost of upholding the principle of non-discrimination on grounds of nationality.[1939]

Non-discrimination on grounds of *gender* has been an objective of the EU since the very beginning (EEC) to ensure a level playing field in the common market. Many cases illustrate the principle of gender equality, i.a. the landmark case *Defrenne* on equal pay for equal work (the story of the stewardess).[1940] The Council of Europe recommends gender mainstreaming in education. This essential part of EDC standards undeniably has an

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1936 Condorcet, *Cinq mémoires sur l'instruction publique* , 29, see also 52 (Laws may enshrine the principle of equality, but only the institutions responsible for public instruction can turn it into reality). Condorcet's humanistic ideal saw the transmission of basic knowledge as a unifying force for all citizens, religious or secular, noblemen or workers, in city or rural localities. Above all, Condorcet aimed at progress through reason and enlightenment towards a better mankind. Real equality and real freedom, and effective rights are central objectives of Condorcet's system of citizenship education.

1937 For interesting stories related to the internal market (recognising tourists as recipients of services brings situations within the scope of Art 18 TFEU), see i.a. Case 186/87 *Cowan* ECLI:EU:C:1989:47 (the story of a tourist in Paris); Case C-111/91 *Commission v Luxembourg* ECLI:EU:C:1993:92 (preferential rates for nationals for admission to museums, monuments, galleries, archaeological digs, parks and gardens classified as public monuments, discriminating against non-nationals). For non-discrimination as a citizenship right, see i.a. § 188 .

1938 On reverse discrimination, text to n 1467.

1939 *Grzelczyk* Case C-184/99 ECLI:EU:C:2001:458 (para 44); *Dano* (text to n 1426).

1940 EU primary law provisions on equality may have horizontal direct effect, e.g. Article 157 TFEU (ex Article 119 EC), which requires that male and female workers receive equal pay for equal work or for work of equal value. Case 43/75 *Defrenne II* ECLI:EU:C:1976:56, para 39. Also Case 149/77 *Defrenne III* ECLI:EU:C:1978:130; S Prechal, 'Defrenne: de Europese gelijkebeloningsaga met verstrekkende gevolgen' in Schutgens and others (eds), *Canon van het recht* (Ars Aequi Libri 2010); Lenaerts and Van Nuffel, *European Union Law* 811.

important EU dimension.[1941] The EU dimension of the principle of gender equality adds content to national citizenship (Ms Defrenne's case is evidence of this), is significant, invites critical thinking, and affects all citizens (i-iv). The huge impact of the principle of gender equality on society and daily life of EU citizens demonstrates that EU citizenship encompasses far more than the list of classic citizenship rights suggests. This broader view on the scope of EU citizenship implies taking account of all rights enjoyed by virtue of EU law by both static and mobile citizens.

Furthermore, EU law establishes the right to non-discrimination on grounds of *age, religion, sexual orientation, and disability*.[1942] These are topics which readily engage pupils' interest and cause them to reflect on the EU dimension. Different angles of the same case can be discussed, e.g. on the question whether the employer can prohibit employees from wearing any visible signs of their political, philosophical or religious beliefs in the workplace. In *Egenberger* and *Cresco*, the Court of Justice confirmed: 'The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law'.[1943]

There are many stories which are suitable for case teaching on equality and a number were mentioned in Chapter six.[1944] The following case illustrates the prohibition of discrimination on grounds of *ethnic origin*.

1941 Gender equality in EDC standards, see CoE Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (11 May 2010), para 5(f); CoE Recommendation Rec(2002)12 of the Committee of Ministers to member states on education for democratic citizenship (16 October 2002), para 2. See also CoE Recommendation CM/Rec(2007)13 of the Committee of Ministers to member states on gender mainstreaming in education (10 October 2007).

1942 Art 19 TFEU.

1943 Case C-193/17 *Cresco* ECLI:EU:C:2019:43, para 76; Case C-414/16 *Egenberger* ECLI:EU:C:2018:257, para 76.

1944 Above in §§ 190 to 194 (non-discrimination on the basis of *nationality*). Examples of non-discrimination on the basis of *gender*: Case C-236/09 *Test-Achats* ECLI:EU:C:2011:100. For age: Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21, paras 50–6 (EU law precludes national legislation which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal; the national court, hearing proceedings between individuals, must ensure compliance with the principle of non-discrimination on grounds of age, as given

259 The right to equal treatment irrespective of racial or ethnic origin: CHEZ

The story of Roma and the electricity meters on pylons

The *CHEZ* case illustrates (once more) the EU dimension of the daily life of citizens at home in their own Member State, in this case Bulgaria. EU norms on non-discrimination can apply in internal situations in the Member States (only involving nationals and lacking crossborder elements), yet falling within the scope of EU legislation.[1945] The case concerns the Racial Equality Directive, which implements the principle of equal treatment between persons irrespective of racial or ethnic origin.[1946]

> Ms Nikolova runs a grocer's shop in a Bulgarian town. Most inhabitants of the particular town district are of Roma origin. She complains that she cannot check the correctness of her electricity bills because CHEZ, the electricity distributor, has installed the electricity meters on pylons at a height of six or seven meters to avoid fraudulent tampering by Roma. In other districts, the meters are placed at a height of less than 2 meters. The Bulgarian Commission for Protection against Discrimination orders CHEZ to end this discriminatory practice. The Administrative Court of Sofia refers preliminary questions to the ECJ concerning the Racial Equality Directive. CHEZ argues that the EU has not laid down any rule about the height of electricity meters. The ECJ recalls that the Directive is an expression of the general principle of equality in EU law and that its scope cannot therefore be defined restrictively. The Directive forbids direct and indirect discrimination

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expression in Dir 2000/78, if necessary by disapplying any contrary provision of national legislation; the ECJ grants horizontal direct effect to this general principle of EU law (see also Art 21 CFR)). Further Lenaerts and Van Nuffel, *European Union Law* 811. See also Case C-144/04 *Mangold* ECLI:EU:C:2005:709 ('general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78'). For non-discrimination on the basis of *religion*, see Cases C-157/15 and C-188/15 188 *Achbita and Bougnaoui* ECLI:EU:C:2017:203 (related to Dir 2000/78); on the basis of *sexual orientation*, Case C-81/12 *Accept* ECLI:EU:C:2013:275 (a patron of a football club excludes hiring a homosexual); Case C-673/16 *Coman* ECLI:EU:C:2018:385; on the basis of *disability*, Case C-354/13 *FOA (Kaltoft)* ECLI:EU:C:2014:2463 (dismissal on grounds of obesity; static citizen in Denmark); non-discrimination of a *transgender*, Case C-451/16 *MB* ECLI:EU:C:2018:492.

1945 Case C-83/14 *CHEZ (Nikolova)* ECLI:EU:C:2015:480.

1946 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Racial Equality Directive) (legal basis ex Art 13 TEC, now Art 19 TFEU) (n 1932). See also Case C-54/07 *Feryn* ECLI:EU:C:2008:397.

based on racial or ethnic origin, i.a. in relation to 'access to and supply of goods and services which are available to the public'. As this covers the supply of electricity, the situation falls within the scope of the Directive.[1947] The ECJ holds that the concept of 'discrimination on grounds of ethnic origin' applies in the circumstances of the case: while Ms Nikolova is not of Roma origin herself, the fact remains that it is the Roma origin of most of the other inhabitants of the district which has given rise to her complaint. The Court indicates elements which the Bulgarian Court must consider when assessing the existence of discrimination, direct or indirect, based on the Directive. The practice of installing high meters in the district is compulsory, widespread and lasting, irrespective of whether individual meters have been tampered with or have given rise to unlawful connections, and is still applied 25 years after it was first introduced. This practice is of an offensive and stigmatising nature, suggesting that the inhabitants of the district are considered as a whole to be potential perpetrators of unlawful conduct. The practice constitutes direct discrimination if such less favourable treatment in comparable situations is related to the ethnic origin common to most of the inhabitants of the district. If the practice is indirect discrimination (an apparently neutral practice putting persons of an ethnic origin at a particular disadvantage), it may be objectively justified by a legitimate aim.[1948] CHEZ contends that the practice was necessary to prevent fraud and abuse, because in that district, electricity meters had been frequently damaged, tampered with, and unlawfully connected. The ECJ accepts that these aims are legitimate, yet the risks must be proven and cannot be based on 'common knowledge'. The Administrative Court in Sofia must assess whether the practice is appropriate, necessary to achieve the legitimate aims, and is not disproportionate. Other electricity distribution companies have restored all meters to a normal height and used other techniques to achieve the same aims.

A case such as *CHEZ* is a colourful story for teaching the EU dimension of EDC. It provides additional content (i) to EDC component (c-1) exercising rights and responsibilities (national law is to be interpreted in the light of

1947 Para 42; Racial Equality Dir Art 3(1)(h); applicable (i.a.) in relation to conditions for access to employment, social protection, education, or the supply of public goods and services in the Member State. See also Case C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291.

1948 Paras 84, 86, 87, 91; Racial Equality Dir Art 2 (a) and (b).

directives) as well as (c-2) valuing diversity. The content is significant (ii), because it relates to foundational values, objectives and principles of the EU Treaties and CFR. The case shows how EU objectives and legislation seeking to realise these objectives have effects for the large majority of citizens, including static citizens (iv). In a climate of increased intolerance and racism,[1949] the case invites critical thinking (iii), with application of the principle of proportionality.[1950] The four criteria for relevance for mainstream education are satisfied.

3. Social rights and obligations

260 Rights regarding working time: Günther Fuss

The story of the fireman

EU competences in the field of social policy are defined in Title X TFEU.[1951] EU legislation creates social rights in the working place. The Working Time Directive lays down minimum safety and health requirements for the organisation of working time. The content affects the large majority of citizens (iv), as the Directive is applicable to all sectors of activity, public and private. The Directive determines EU rights regarding daily rest, breaks, weekly rest periods, maximum weekly working time, annual leave, night work, etc., which must be guaranteed by the Member States through the transposition of the Directive in national law. Every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period. Where the working day is longer than six hours, every worker is entitled to a rest break. Per seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest. The average working time for each seven-day period, including over-

1949 Communication Report on the Application of the EU Charter of Fundamental Rights COM(2017) 239 final, 6; see action concerning Roma at 7. See Special Eurobarometer 493, 'Discrimination in the EU (including LGBTI)' (October 2019).

1950 Further Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States [2013] OJ C378/1. On action concerning Roma, see Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final, 3.

1951 See Arts 151–161 TFEU.

time, cannot not exceed 48 hours. Every worker is entitled to paid annual leave of at least four weeks.[1952]

> Mr Günther Fuss is a fire fighter employed by the City of Halle (Germany). As a Station Fire Officer in an operational service, he has to work more than 48 hours per week. He requests the City of Halle to ensure that his weekly working time no longer exceeds the maximum average limit of 48 hours laid down in the Working Time Directive. As a result, the City of Halle (his employer) transfers him to a non-operational service, where the working time limit is respected. Mr Fuss contests this compulsory transfer: he prefers to continue to work in the operational service, yet subject to the working time limit. The ECJ interprets the Directive and holds that the Directive precludes such a compulsory transfer.[1953]

Mr Fuss' EU rights were additional to those enjoyed under German law.[1954]

Why can the EU lay down rules about working time? The interests of the various parties and diverging viewpoints should be considered.[1955]

Social rights and solidarity (an Article 2 TEU value) are fertile subjects for discussions about the EU dimension of citizenship. The rights listed in the European Pillar of Social Rights[1956] are the subject of a shared commitment by the EU, the Member States and the social partners, to be imple-

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1952 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9, Arts 3–7.

1953 Case C-243/09 *Fuß* ECLI:EU:C:2010:609.

1954 See also Commission Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time COM(2017) 254 final.

1955 Another suitable case for discussion, illustrating the great relevance of EU law to static citizens is *CCOO v Deutsche Bank Case* C-55/18 ECLI:EU:C:2019:402 (on employers' obligation to set up a system to measure the duration of time worked each day by each worker). Also Joined Cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871 (on the right to paid annual leave and horizontal effects).

1956 Commission Recommendation (EU) 2017/761 of 26 April 2017 on the European Pillar of Social Rights [2017] OJ L113/56, i.a. paras 2, 3, 6, 7, 16, 20: Everyone has the right to equal treatment and opportunities—regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation—regarding employment, social protection, education, and access to goods and services available to the public. Other social rights and principles concern access to the labour market, fair working conditions, and social pro-

mented within their respective spheres of competence. Some of the rights are already part of the Union *acquis*, but much still remains to be done.[1957] They provide material for reflection, e.g. through cases such as *Viking*, *Laval*, or *Altun*, which highlight rights as well as obligations.[1958] Citizenship cases discussed in Chapter six, such as *Dano*, *Gravier* or *Bressol*, also fit into this context.[1959]

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tection and inclusion, e.g. workers have the right to fair wages that provide for a decent standard of living and the right to be informed in writing at the start of employment about their rights and obligations, including during a probationary period; everyone has the right to timely access to affordable, preventive and curative health care of good quality; and a right of access to essential services of good quality, including water, sanitation, energy, transport, financial services and digital communications.

1957 See i.a. Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L 186/105; and Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L 188/79.

1958 Case C-438/05 *Viking* ECLI:EU:C:2007:772; Case C-341/05 *Laval* ECLI:EU:C:2007:809; Case C-337/07 *Altun* ECLI:EU:C:2018:63. See in EU law i.a. Arts 151, 152, 157, 168 TFEU; and case law relating to Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16 ; Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L68/13.

1959 Text to nn 1420, 1426; 1375; 1385. For further reflection on solidarity and social policy, see i.a. Art 222 TFEU (solidarity clause in case of terrorist attack or disasters); example of concrete action: Regulation (EU) 2018/1475 of the European Parliament and of the Council of 2 October 2018 laying down the legal framework of the European Solidarity Corps and amending Regulation (EU) No 1288/2013, Regulation (EU) No 1293/2013 and Decision No 1313/2013/EU [2018] OJ L 250/1. Further C Barnard, 'EU "Social" Policy: from Employment Law to Labour Market Reform' in P Craig and G de Búrca (eds), *The evolution of EU law* (Oxford University Press 2011); M Ross, 'The Struggle for EU Citizenship: Why Solidarity Matters' in A Arnull and others (eds), *A Constitutional Order of States: Essays in EU Law in Honour of Alan Dashwood* (Hart 2011); I Domurath, 'The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach' (2012) 35 Journal of European Integration 459; Lenaerts, 'EU Citizenship and the Social Solidarity

4. Privacy rights and obligations

261 EU fundamental rights to privacy

The EU fundamental rights to privacy are entrenched in EU primary law: 'Everyone has the right to respect for his or her private and family life, home and communications' (Article 7 CFR) and 'Everyone has the right to the protection of personal data concerning him or her' (Articles 8(1) CFR, 16 TFEU). These rights are not absolute, but must be considered in relation to their function in society.[1960] Because a balancing of interests is involved, case teaching related to EU privacy rights encourages pupils to think critically (iii) and at the same time reveals some of the essentials of the EU (ii). Protection of privacy has to be balanced against economic objectives, security objectives (terrorism), or transparency objectives (public administration and use of tax money).[1961] Privacy is a concern affecting the personal lives of pupils; the possibility that 'big brother is watching

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Link'; S O'Leary, 'The Charter and the Future Contours of EU Social and Employment Law' in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU judicial systems: essays in honour of Pernilla Lindh* (Hart 2012); Habermas, 'Democracy, Solidarity and the European Crisis'; I Pernice, 'Solidarität in Europa: Eine Ortsbestimmung im Verhältnis zwischen Bürger, Staat und Europäischer Union' in C Calliess (ed), *Uberlegungen im Kontext der Krise im Euroraum* (Mohr Siebeck 2013); A Sangiovanni, 'Solidarity in the European Union' (2013) 33 Oxford Journal of Legal Studies 1; C Barnard, 'EU employment law and the European social model: the past, the present, and the future' (2014) 67 Current Legal Problems 199; P Eleftheriadis, 'The Content of European Citizenship' (2014) 15 German Law Journal 777 (EU citizenship 'is best understood as a form of transnational solidarity which gives effect to the moral responsibilities of Member States and their peoples under a principle of fairness'). Also text to n 1416. Further Special Eurobarometer 471, Fairness, inequality and inter-generational mobility (December 2017). Early, Marshall, *Citizenship and Social Class*.

1960 Joined Cases C-92/09 and C-93/09 *Schecke and Eifert* ECLI:EU:C:2010:662, para 48; Case C-291/12 *Schwarz* ECLI:EU:C:2013:670, para 33.

1961 *Schecke* (n 1967). On balancing privacy/security, see i.a. Joined Cases C-203/15 and C-698/15 *Tele2 Sverige and Watson and others* ECLI:EU:C:2016:970; L Colonna, 'Schrems vs. Commissioner: A Precedent for the CJEU to Intervene in the National Intelligence Surveillance Activities of Member States?' (2016) 2 Europarättslig tidskrift 208. On balancing privacy/freedom of expression, see Case C-345/17 *Buivids* ECLI:EU:C:2019:122. See also CoE Recommendation CM/Rec(2018)7 of the Committee of Ministers to member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment (4 July 2018), i.a. the need for appropriate education (para 13), and link with the right to education (para 40).

you' is an easily understood peril. The criterion of subjective involvement is respected (or the Beutelsbacher consensus requirement of giving weight to the personal interests of pupils).[1962] Most EU citizens—including those at home—are 'digital citizens', users of the internet.[1963] Case teaching contributes to empowering them to exercise their rights and responsibilities in the additional EU dimension (i). The following stories all concern static citizens (iv): a Swedish lady living in Sweden, German farmers in Germany, a Spanish businessman in Spain, an Austrian student in Austria. Faced with concrete problems at home, their EU rights and obligations made the difference (i).

262 EU obligations: Lindqvist

The story of the catechist in Sweden

The fact that privacy rights deriving from EU law also imply responsibilities for citizens was something Ms Lindqvist experienced for herself.[1964]

> As a catechist in a parish in Sweden, Ms Lindqvist sets up internet pages to inform parishioners about preparation for confirmation. On the webpages, which are linked to the Swedish Church website, she includes (probably with the best of intentions) information about 18 colleagues in the parish: their names or first names, jobs, hobbies, family circumstances, phone numbers, and information about the foot injury of one colleague, who is therefore working halftime on medical grounds. Ms Lindqvist has to pay a large fine, because she has infringed Swedish law on personal data, i.a. for processing personal data without prior written notification and sensitive (medical) personal data without authorisation. This Swedish law implements the

1962 Wehling, 'Der Beutelsbacher Konsens: Entstehung und Wirkung' ('Pupils must be put in a position to analyse a political situation and to assess how their own personal interests are affected as well as to seek means and ways to influence the political situation they have identified according to their personal interests').

1963 Figures in Salamońska and Recchi, *Europe between mobility and sedentarism: Patterns of cross-border practices and their consequences for European identification*; a third of Europeans share their profiles and their ideas on general social media. Also Flash Eurobarometer 443, e-Privacy (July 2016). A lot of literature on privacy in the EU, i.a. B Petovka, 'Data Privacy Rights and Citizenship: Notes on Federalism All the Way Up' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017). See also <ec.europa.eu/info/strategy/justice-and-fundamental-rights/data-protection_en>.

1964 Case C-101/01 *Lindqvist* ECLI:EU:C:2003:596.

Data Protection Directive.[1965] Ms Lindqvist argues that she is not guilty of any infringement, that she was not carrying out an economic activity, and that EU law was not applicable. As Swedish law must be interpreted consistently with the Directive, the Swedish Court asks a preliminary question. The ECJ answers that the essential objective of the Directive is to eliminate obstacles to the functioning of the internal market deriving from disparities between different national legislation. It would therefore not be appropriate to require that, in each individual case, it is determined whether free movement is concerned. The charitable or religious activities of Ms Lindqvist do not fall under any exception in the Directive. The ECJ recalls that the Directive aims at balancing, on the one hand, the establishment and functioning of the internal market which leads to the increase of cross-border flows of personal data, and, on the other hand, protection of that data. Ms Lindqvist's freedom of expression on the internet pages must be weighed against the protection of the private life of the colleagues about whom she has placed data on the website. Sanctions must be proportionate. On the basis of these guidelines, the ECJ invites the national court to ensure a fair balance in the concrete circumstances of the case.

Studying a case like *Lindqvist* in EDC draws the attention of pupils to their responsibilities. Living in a system based on the rule of law means that citizens must also respect obligations flowing from EU law. Responsible use of interactive media requires awareness of underlying legal and ethical principles. This fits in with learning to develop digital competence, increasingly important for empowering citizens in society.[1966] Digital competence has an essential EU dimension. The case may also trigger reflection

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1965 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (as amended). Legal basis ex TEC Art 100a (ex Art 95 EC, now Art 114 TFEU). Dir repealed by the GDPR (n 1999).

1966 Council Recommendation of 22 May 2018 on key competences for lifelong learning, Annex: A European Reference Framework, 4: Digital competence ('Digital competence involves the confident, critical and responsible use of, and engagement with, digital technologies for learning, at work, and for participation in society'). See in the same vein earlier: Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning. See further Commission Communication on the Digital Education Action Plan COM(2018) 22 final.

on the foundational principle of conferral (*why does privacy have an EU dimension?*)

263 *Balancing the right to protection of personal data with transparency: Schecke*

The story of the angry farmers

The problem in *Schecke* provoked commotion and indignation among static (local) citizens. Case analysis makes it possible to distinguish clear steps in the reasoning.[1967]

> Volker und Markus Schecke have an agricultural firm in the *Land* of Hesse in Germany. Together with the farmer, Mr Eiffert, they receive funds under the EU common agricultural policy. Their problem is that their names and the precise amounts they receive are published on the website of a German Federal Agency and the information is available to everybody (a global website with a search function). They ask the *Land* Hesse to withdraw the personal data, but Hesse refuses, referring to an obligation in an EU Regulation to publish the information. In the first step of its reasoning, the ECJ decides that publication of the data without consent is a limitation of the rights enshrined in Articles 7 and 8 CFR (respect for private and family life and protection of personal data). In the second step of its reasoning, the Court examines whether this limitation can be justified. The conditions of Article 52(1) CFR must be fulfilled. Here, the interference is provided for by law (Regulation) and meets an objective of general interest recognised by the EU, i.e. increasing the transparency of the use of EU funds in the common agricultural policy (reinforcing public control of the use of the money and thus accountability in a democratic system). Publication is an appropriate means of attaining the objective, yet the measure goes beyond what is necessary to achieve the objective with regard to natural persons (proportionality test). A proper balance is to be struck between the privacy rights guaranteed by Articles 7 and 8 CFR and the transparency objective: limitations on the right to protection of personal data can only apply in so far as they are strictly necessary.[1968] The ECJ declares the Regulation partly invalid, i.e. to the extent that its

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1967 Joined Cases C-92/09 and C-93/09 *Schecke and Eifert* ECLI:EU:C:2010:662. Text to n 1265.

1968 *Schecke*, paras 77, 86; Case C-73/07 *Satakunnan Markkinapörssi Oy and Satamedia* ECLI:EU:C:2008:727, para 56. See also Case C-291/12 *Schwarz* ECLI:EU:C:2013:670, paras 34 and 46 (Art 52 CFR).

provisions impose an obligation to publish personal data of natural persons without distinction as to periods, frequency, nature or amount. In the case of legal persons, the publication obligation does not go beyond what is necessary to achieve the objective.

The facts provide a basis for critical discussion as to how the right balance should be struck: *should citizens know how public money is used (EU principle of transparency) or should the EU right to privacy prevail?* The principle of proportionality can be a guide for such a discussion.

264 The right to be forgotten: Google Spain

The story of the Spanish businessman and Google

Another interesting case encouraging pupils to think independently is *Google Spain*.[1969] Opposing interests are weighed against one another in the light of foundational values.

Mario Costeja González is a Spanish citizen who resides in Spain. When his name is entered into the Google search engine a link appears to an article published ten years earlier in a widely circulated Spanish newspaper (*La Vanguardia*). The article mentions his social security debts and the public sale of his property (real-estate auction) necessary to pay off the debts. Mr Costeja González asks the newspaper to remove the e-article, arguing that the debt proceedings have in the meantime been resolved and have become irrelevant for the reader. The newspaper refuses. He then requests Google Spain to remove the links. Google Spain forwards the request to Google Inc. in the US. Mr Costeja González takes his complaint to the Spanish Data Protection Agency, who requires Google Spain and Google Inc. to withdraw the data. Google Spain and Google Inc. bring actions in the Spanish National High Court. Uncertain about the interpretation of the Data Protection Directive, the High Court refers preliminary questions to the ECJ. One of them is: can the data subject (Mr Costeja González) require the operator of a search engine to remove from the list of results certain information which he wishes to be 'forgotten' after a certain time? Google Spain, Google Inc., the Greek, Austrian and Polish Governments, and the Commission contend that there should not be any such right to be forgotten. Mr Costeja González, the Spanish and the Italian Governments, on the other hand, argue that the fundamental rights to the protection of personal data and to privacy encom-

1969 Case C-131/12 *Google Spain* ECLI:EU:C:2014:317.

pass the right to be forgotten.[1970] Interpreting the Data Protection Directive, the ECJ upholds a right to be forgotten (without calling it that), in particular where the Directive states that Member States shall guarantee every data subject the right to obtain from the controller the rectification, erasure or blocking of incomplete or inaccurate data, and the right to object to the processing of his data on compelling legitimate grounds.[1971] Even if the information causes no prejudice, the data subject has the right, after a certain time, to request that certain personal information is erased from the list of search results linked to his name, because in the course of time, data may become inadequate, irrelevant, or excessive in relation to the purposes of the processing (here, 16 years later, the debts have been paid and the public sale of property for that end is no longer relevant to the general public).[1972] The Court balances several interests: the economic interest of the operator of the search engine, the fundamental rights of the data subject under Articles 7 and 8 CFR, and the interest of internet users in having access to information. The fundamental rights in Article 7 and 8 CFR '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 having access to that information upon a search relating to the data subject's name'. In specific cases, the ECJ adds, the balance may be different, e.g. where the data subject plays a role in public life.[1973] The ECJ holds that even if the newspaper has not withdrawn the information from its webpages, the operator of the search engine can be obliged to remove the links to these webpages of the newspaper in certain circumstances.

Case teaching based on *Google Spain* is attractive for several reasons.

The story of a conflict between a citizen and Google easily captures the interest of pupils. It triggers animated debate in the classroom on the question of which right should prevail: the right to be forgotten and privacy rights, or the right to freedom of expression and freedom of information. The case shows how EU fundamental rights reflect foundational values on which all seem to agree, but which may lead to disagreement when

1970 Para 90.

1971 See conditions in Art 12(b), 'as appropriate'; and Art 14.

1972 Paras 92–94, 99.

1973 See paras 81, 91, 99. See also Art 7(f), requiring balancing of interests (the legitimate interests of the controller, third parties, or parties to whom the data are disclosed, can be overridden by interests or fundamental rights of the data subject).

applied in practice. *Do people searching Google have the right to* all *the information about somebody, or should some degree of privacy be respected?* Public debate starts in the classroom. Reasonable people may have different viewpoints. In his Opinion in the case Advocate General Jääskinen defended the opposite view to that taken by the ECJ. He was not prepared to limit the pivotal rights to freedom of expression and information when balancing them against the right to protection of private life. Acknowledging a right to be forgotten on a case by case basis, he argued, would moreover lead to an unmanageable number of requests.[1974] The issues in *Google Spain* provide an opportunity for exercising skills throughout different phases of problem based learning: defining the problem and its causes, understanding which interests are affected, understanding the viewpoints of the parties in the case, creatively finding a solution, formulating one's own opinion and listening with respect to other opinions, and foreseeing the consequences of proposed solutions.[1975] In the 'judgment' phase (or 'generalisation' of the case analysis), *Google Spain* demonstrates how an individual can defend his rights in court and thus have an impact on the evolution of the EU legal order. Triggered by the action taken by Mr Costeja González, a static and active EU citizen, the *Google Spain* ruling provoked increased awareness worldwide of privacy rights in social media.[1976] The case shows how, in the end, fundamental choices fall to be made through the political process. In 2016, the EU legislator, i.e. the European Parliament and the Council, on a proposal from the Commission, decided how to balance the fundamental rights in question.[1977] They codified the right to be forgotten in Article 17 of the new General Data Protection Regulation: the right to erasure.[1978]

1974 Opinion of Advocate General Jääskinen in Case C-131/12 *Google Spain* ECLI:EU:C:2014:317, paras 128, 133, 137. Among the innumerable comments on the judgment in legal literature, i.a., D Stute, 'Privacy Almighty? The CJEU's Judgment in Google Spain SL v AEPD' [2015] Michigan Journal of International Law 649.

1975 Reinhardt, *Teaching Civics: A Manual for Secondary Education Teachers* 96–102.

1976 Rules in various legal instruments worldwide have been adapted to include the right to be forgotten (see comments in wikipedia on Google Spain).

1977 Lenaerts, 'Some thoughts on the State of the European Union as a rights-based legal order', on legislative consensus. See a comparable question in another field, van den Brink, 'The Court and the Legislators: who should define the scope of free movement in the EU?'.

1978 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing

The case provides an occasion for explaining concepts of EU legislation. A regulation is directly applicable, confers rights and obligations which are directly effective in daily life, and has primacy over national rules. The case shows the EU institutions in action,[1979] highlighting their role in the adoption of EU legislation and the interaction between judges and the legislator. The case demonstrates that citizens are actors in both judicial processes (defending their case in court) and legislative processes (i.a. as participants in—European and national parliament—elections or in public debate). For both processes, citizens need knowledge of their rights and awareness of problems in society. An EU dimension to EDC empowers them to exercise their rights (c-1) and to play an active part in democratic life (c-3).

In general, *Google Spain* illustrates that on a combined reading of EDC standards and EU law, it is not sufficient for pupils to learn about the history of the European Communities or the geography of Europe. The EU dimension of EDC is a source of many other fascinating subjects, of fresh and stimulating content for young EU citizens.

265 *Fundamental rights to respect for private life, protection of personal data, and to an effective remedy: Schrems*

The story of the student and Facebook

The *Schrems* case is a thought-provoking and quite spectacular case, appropriate for advanced levels of EDC.[1980] Since pupils use social media on a daily basis, they will have no difficulty engaging with the facts (subjective involvement). The relevant EU primary law provisions are Articles 7, 8 and 47 CFR and Article 16 TFEU.

Directive 95/46/EC [2016] OJ L119/1 (General Data Protection Regulation), Art 17: 'The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies: (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed ...', see also recitals 65–66.

1979 Reinhardt, *Teaching Civics: A Manual for Secondary Education Teachers* 119: 'The innovation of case teaching is that we no longer have to oppose teaching by cases to teaching about institutions: students can learn about institutions by studying current cases. Specific cases show institutions in action, thereby helping learners grasp their structure and function by way of example and in context'. The case here is content and not simply a hook.

1980 Case C-362/14 *Schrems* ECLI:EU:C:2015:650. For details on the procedural steps, see Max Schrems' website <europe-v-facebook.org/EN/en.html>.

Maximillian Schrems is a student at the University of Vienna. He is an Austrian national and lives in Austria. When he created his Facebook account in 2008, he ticked the box to agree with the general conditions for use and thus concluded—like all Facebook subscribers in the EU—a contract with Facebook Ireland (a subsidiary of the parent company Facebook US). The data of European subscribers are transferred to servers in the US and kept there. In 2013, Maximillian learns of the revelations of Edward Snowden: the National Security Agency (NSA) has unrestricted access to European mass data stored on the servers (via PRISM, a US intelligence service programme). A month later, Maximillian lodges a complaint with the Irish Data Protection Commissioner, claiming that the law and practices of the US do not offer real protection of his data stored in the US. The Commissioner refuses to examine the complaint, because of a lack of evidence that the NSA accesses Mr Schrems' data, and because of the 2000 Safe Harbour Decision of the European Commission.[1981]

In the *Safe Harbour Decision*, the European Commission established that the US ensured an adequate level of protection of transferred personal data. Under this Decision, more than 3000 US companies self-certified that they adhered to the Safe Harbour Privacy Principles issued by the US Department of Commerce. Among them were Google, Facebook, Microsoft, Apple, and Yahoo, who transferred the personal data of hundreds of millions of users in Europe to the US. Yet, a significant number of the self-certifying companies did not comply in practice. US law also allowed large-scale collection and processing of personal data beyond what was strictly necessary and proportionate for national security.[1982] This seemed to contrast with the EU *Data Protection Directive*, on which the Safe Harbour Decision was based. The *Data Protection Directive* protects the fundamental right to privacy with respect to the processing of personal data.[1983] Processing of personal data includes collection, storage, consultation, or disclo-

1981 Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce [2000] OJ 2000 L215/7.

1982 *Schrems*, paras 21–25, with reference to Communication COM(2013) 847 final.

1983 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (as amended) (see n 1965).

sure of personal data.[1984] The principle is that Member States shall provide that the transfer to a third country of personal data intended for processing after transfer, may only take place if the third country ensures an *adequate level of protection* (Article 25). The Commission may conclude that the third country ensures this by reason of its domestic law or of international commitments (Article 25(6)). Moreover, each Member State shall establish a supervisory authority, a public authority responsible for monitoring the application of the Directive within its territory and acting with complete independence.[1985]

Maximillian contests the refusal of the Irish Data Protection Commissioner to examine his complaint in the High Court of Ireland. The High Court considers that surveillance and interception of personal data serves legitimate counter-terrorism objectives, but that the mass and undifferentiated accessing of personal data by the NSA interferes disproportionally with the right to privacy guaranteed by the Irish constitution. Based on Irish law, the Commissioner could not have refused to examine Mr Schrems' complaint. However, the High Court concludes that it cannot decide the case based on Irish law, as it concerns the implementation of EU law (Article 51 CFR), and refers a preliminary question to the ECJ.

The ECJ reads Article 25(6) of the Directive in the light of the fundamental right to respect for private life (Article 7 CFR), to protection of personal data (Article 8 CFR) and to effective judicial protection (Article 47 CFR).

First, the Court rules on the powers of the supervisory authority. The establishment of an independent supervisory authority is an essential component of the protection of individuals with regard to the processing of personal data (as Article 16(2) TFEU requires). This authority must ensure a fair balance between the right to privacy and economic interests. Member States cannot adopt measures contrary to the Safe Harbour Decision of the Commission (a decision is a legal act of the Union and is binding on all the Member States to which it is

1984 Arts 1 and 2 Dir: personal data is defined as 'any information relating to an identified or identifiable natural person'; processing is 'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'.

1985 Art 28 Dir.

addressed).[1986] However, this does not prevent the national supervisory authority from examining the claim of a person who contends that there is not an adequate level of protection in the processing of his personal data. Otherwise, that person would be denied his fundamental rights. It is, moreover, settled case-law that the EU is 'a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular the Treaties, general principles of law and fundamental rights'.[1987] The Commission cannot escape such review of the validity of its Safe Harbour Decision.

Then, the ECJ examines whether that Decision is valid. An adequate level of protection in a third country must essentially be equivalent to the level of protection in the EU legal order.[1988] In the EU, restrictions on the rights in Articles 7 and 8 CFR must be laid down in clear and precise rules and only apply in so far as is strictly necessary (proportionality principle).[1989] The Court considers that legislation permitting public authorities to have access on a generalised basis to the content of electronic communications compromises the essence of the fundamental right to respect for private life (Article 7 CFR).[1990] Moreover, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to his personal data, or to obtain their rectification or erasure, does not respect the essence of the fundamental right to effective judicial protection (Article 47 CFR).[1991] The Court declares the Safe Harbour Decision invalid.

While—admittedly—the full story is not suitable for younger students in secondary education, the advantages of case teaching based on *Schrems* at more advanced levels are multiple.[1992]

1986 Para 52; Art 288 TFEU.

1987 Para 60 (settled case law). Also text to n 1831 ff.

1988 Para 73.

1989 Para 92.

1990 Para 94. Also Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, para 39.

1991 Para 95: 'The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law' (settled case law).

1992 The case can be schematised into its essential principles (also visually in slides), adapted to the level of students (see for instance, a version for a not necessarily legally trained audience: Lenaerts, 'Cogito ergo civis europaeus sum: Discours à l'occasion de l'attribution du titre de docteur honoris causa de l'Université de Poitiers'). The notion of adequacy (an adequate level of protection) is abstract, but pupils of 17- 18 can grasp it.

Firstly, the case can motivate pupils to engage in active citizenship, as it demonstrates the potentially high impact of the action of a simple citizen. Maximillian Schrems, a student (like Françoise Gravier[1993]) has, by taking legal action, shaken established systems in society, mobilising many important actors in the EU and even worldwide. While his immediate adversary in Court was the Irish Data Protection Commissioner (joined by Digital Rights Ireland), observations were also submitted by Ireland, the governments of Belgium, the Czech Republic, Italy, Austria, Poland, Slovenia, and the UK, plus the European Parliament, the European Commission, and the European Data Protection Supervisor. The Court's judgment had consequences for EU-US trade and even beyond. The end of Safe Harbour provoked reactions in the press, among politicians and scholars.[1994] Various EU and US industry associations and companies expressed their concern in an open letter to Commission President Juncker. Because data transfers are an integral part of commercial exchanges between the EU and the US, the Commission immediately devised an alternative system to ensure the continuity of transatlantic trade.[1995] Data transfers from the EU to other third countries were questioned, as they were based on comparable conditions to those declared invalid. Intensive talks with the US Government were needed to ensure that a new system would provide an equivalent level of protection.[1996] In 2016, a new framework was established, the *EU-US Privacy Shield*, as a response to the conditions set out by the ECJ in *Schrems*,[1997] to ensure an adequate level of protection.[1998] The Data Protection Directive was repealed and replaced by the *General Data Protection*

1993 Text to n 1377.

1994 See numerous notes in Eurlex.

1995 Commission Communication on the Transfer of Personal Data from the EU to the United States of America under Directive 95/46/EC following the Judgment by the Court of Justice in Case C-362/14 (Schrems) COM(2015) 566 final, 1.

1996 Ibid, 3, 14.

1997 Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield [2016] OJ L 207/1.

1998 See also European Parliament Resolution of 6 April 2017 on the adequacy of the protection afforded by the EU-US Privacy Shield ; Commission Report on the first annual review of the functioning of the EU–US Privacy Shield COM(2017) 611 final; Commission Communication 'Exchanging and Protecting Personal Data in a Globalised World' COM(2017) 07 final: 'The protection of personal data is part of Europe's common constitutional fabric and is enshrined in Article 8 of the EU Charter of Fundamental Rights.'.

Regulation (GDPR, based on Article 16 TFEU).[1999] This Regulation aims to strengthen citizens' fundamental rights and lays down rules for companies in the digital single market. It directly grants EU rights to data subjects (persons), such as the right of access, to rectification, etc.[2000] The GDPR refers to several elements of the *Schrems* judgment.[2001] Maximillian Schrems' legal action is ongoing.[2002]

Furthermore, case teaching based on *Schrems* provides an opportunity for reinforcing the EU dimension of (inter alia) digital, social and citizenship competence.[2003] Cognitive structures are deepened (concepts such as directives, decisions, third country, precedent; role of institutions such as the Commission; interaction between national and EU law, national and EU courts). The skills of nuanced and critical thinking are exercised (learning to balance conflicting objectives). The case illustrates how EU rights provide additional (i) and significant (ii) content to national EDC. The Irish High Court solves the case, not just on the basis of the Irish constitution, but also in the light of EU law. *Schrems* shows how the abstract foundational values, objectives and principles of the EU have concrete outcomes in practice. Through a story, pupils in the classroom experience what being a Union 'based on the rule of law' and 'respecting fundamental

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1999 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1 (General Data Protection Regulation), adopted by the ordinary legislative procedure. See also legal basis in Art 39 TEU. More in P Valcke, 'General Report' in JL da Cruz Vilaça and others (eds), *The internal market and the digital economy*, vol 1 (XXVIII FIDE Congress Lisbon/Estoril (23-26 May 2018), Almedina 2018)143 ff and national reports. Simplified information (pupils), see <ec.europa.eu/info/law/law-topic/data-protection/reform/rights-citizens/my-rights/what-are-my-rights_en>. See on impact beyond the EU, 'New EU privacy rules to benefit Facebook users globally' <euobserver.com/digital/141520>: 'The GDPR is unique in the world, but has the possibility of setting a global standard because it will apply to any internet company that targets European consumers. Facebook's boss implied that non-Europeans will also benefit from the new rules. "We intend to make all the same controls and settings available everywhere, not just in Europe," he said.'.

2000 I.a. Arts 15 ff, including the right to be forgotten, to restriction of processing, to data portability, to object, etc.

2001 See e.g. recital 104 and 117. See also Regulation (EU) 2018/1725.

2002 Case C-311/18 *Facebook Ireland and Schrems* pending. See also Case C-498/16 *Schrems* ECLI:EU:C:2018:37 (concept of consumer, and class action).

2003 Council Recommendation of 22 May 2018 on key competences for lifelong learning (n 1966).

rights' actually means. The fundamental rights of individuals (the right to private life and data protection, the right to an effective remedy) are grounds for the ECJ to declare a decision of the Commission invalid.[2004]

Finally, questions for the 'political judgment' and 'generalisation' phase of the case analysis can be discussed: *Why can the EU act in this field? What is the added value of EU action? Can privacy and personal data be sufficiently protected by a Member State acting alone? Schrems* is an opportunity for explaining the foundational principles of conferral, subsidiarity and proportionality. Without EU cooperation, a Member State's privacy rights do not carry any weight against US law and practices. *Schrems* encourages reflection on the added value of EU action in a globalised world (speaking with one voice, the EU can require the US to offer equivalent protection to EU privacy rules) and, at the same time, invites critical thinking. Pupils become aware of the risks of inadequate EU legislation and policies. (This may motivate them to take part in the democratic life of the Union, in addition to attentively monitoring respect for their own individual EU rights.) The internet, free movement in the internal market (e.g. of services) and the expansion of international trade inevitably lead to a cross-border flow of personal data, including that of the static citizen. The foundational objectives of the EU have to be reconciled in the light of the principle of proportionality: an economic union with a free flow of data, on the one hand, and a right to privacy and data protection, on the other hand. The judicial balancing of interests in *Schrems* has been continued in legislative action: the GDPR aims to contribute to an area of freedom, security and justice *and* to an economic union, to economic *and* social progress, to economies in the internal market *and* to the well-being of persons.[2005] In a Union based on mutual trust it is necessary to develop a culture of human rights; discussing cases such as *Schrems* at school can contribute to such a culture.

266 EU obligations: Schwarz

The story of the fingerprints

As a final note, to counterbalance the success story of *Schrems*, the case of Mr Schwarz may add a touch of realism. It shows pupils that invoking EU rights is not a *deus ex machina* automatically leading to system changes.

2004 Also Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238.

2005 Recital 2 GDPR.

> When Michael Schwarz applies to the Stadt Bochum for a passport, he refuses to have his fingerprints taken. He argues that this infringes his EU right to privacy and personal data protection (Articles 7 and 8 CFR) and disputes the validity of the EU Regulation setting out the obligation to take the fingerprints of persons applying for passports. The ECJ rules that this indeed is a limitation of privacy rights but recalls that privacy rights are not absolute. They must be considered in relation to their function in society. Taking fingerprints is justified by the legitimate aim of preventing fraudulent use of passports, and is proportional, as it does not go beyond what is necessary to achieve this objective.[2006]

In conclusion, privacy is an appropriate topic to include in the EU dimension of EDC, relevant for mainstream education (satisfying criteria i-iv). Five stories have illustrated how (static) active citizens enforced their EU rights (*Schecke*, *Google Spain*, and *Schrems*) or were obliged to respect their EU obligations (*Lindqvist*, *Schwarz*).

5. Consumer rights and obligations

267 Relevance for EDC

Consumer rights and obligations based on EU law are relevant to mainstream education. They provide additional content to national EDC (i) and are significant (ii), relating to foundational values, objectives and principles. Competence has been conferred on the EU to promote consumers' interests and ensure a high level of consumer protection. To achieve these objectives, the EU 'shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests' (Article 169(1) TFEU). The EU can adopt harmonisation measures in the internal market (Article 114 TFEU) or use its supporting competence (Article 169(2)(3) TFEU). When defining and implementing other Union policies and activities, consumer protection requirements must be taken into account (Art 12 TFEU). The CFR confirms in the Title 'Solidar-

2006 Case C-291/12 *Schwarz* ECLI:EU:C:2013:670; Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States [2004] OJ L385/1, as amended by Regulation (EC) No 444/2009 of the European Parliament and of the Council of 6 May 2009 [2009] OJ L142/1.

ity' that 'Union policies shall ensure a high level of consumer protection' (Article 38).[2007]

Case teaching in the field of consumer protection connects with the sense of fairness felt by teachers and pupils (subjective involvement) and leads to critical thinking (iii). *How is it possible to achieve the foundational EU objective of combating social exclusion and discrimination, and promoting social justice (Article 3 TEU)?* Finally, consumer protection reveals an EU dimension to everyday situations which is relevant to all citizens (iv). Static citizens have EU consumer rights; local sellers of goods or suppliers of services must also respect EU obligations. Rights and obligations deriving from EU law on consumer protection concern (logically) all consumers, irrespective of nationality, residents in Member States' territories or abroad (export).

Case teaching about EU consumer rights can be based on a wide range of cases. Shopping online, product safety, telecoms, transport, energy, financial services, etc. often include crossborder elements. Citizens also enjoy important EU rights in so-called wholly internal situations (situations where all relevant elements are confined within a single Member State), as will appear in the following examples. Consumer interests are protected by an extensive body of EU secondary law.[2008]

2007 To be implemented by EU institutions and Member States within the scope of EU law (Art 52(5) CFR).

2008 See Art 3(1) of Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L 345/1: 'Union laws that protect consumers' interests' means the Regulations and the Directives, as transposed in the internal legal order of the Member States, which are listed in the Annex. The Annex contains 26 regulations and directives. See i.a. Regulation (EC) No 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives [2008] OJ L354/16; Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys [2009] OJ L170/1; Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 [2011] OJ L55/1; Regulation (EU) 2017/826 of the European Parliament and of the Council of 17 May 2017 on establishing a Union programme to support specific activities enhancing the involvement of consumers and other financial services end-users in Union policy-making in the area of financial services for the period of 2017-2020 [2017] OJ L129/17. On the EU right to compensation from the air carrier for a delayed flight: Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing

268 *Rights protecting against unfair terms in consumer contracts: Gutiérrez Naranjo*

The story of unfair interest rates

Consumers derive EU rights from the Directive on unfair terms in consumer contracts. This Directive, adopted in 1993, illustrates that the internal market cannot function without the harmonisation of certain issues. The Directive aims to protect consumers and to avoid the distortion of competition resulting from disparities in national legislation on consumer protection.[2009] The large majority of citizens sign pre-formulated standard contracts (including general conditions often printed in lower case letters).[2010] A contractual term which has not been individually negotiated is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.[2011] The story of Mr Gutiérrez Naranjo illustrates once more the power of the individual citizen who takes legal action. By exercising his EU rights, he obtained satisfaction of his own claims and, at the same time, created added value for large groups of citizens all over the EU.

> Like numerous other Spanish citizens, Mr Francisco Gutiérrez Naranjo concludes a mortgage loan with his bank containing a 'floor clause' in the general conditions. 'Floor clauses' in loan agreements fix a minimum rate below which the variable rate of interest cannot fall. When market interest rates rise, consumers must pay higher rates (variable), but when the rates go down (even significantly), they cannot benefit from the lower rates as they must pay the contractual minimum rate, which is to the advantage of the banks. Mr Francisco

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common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1; Joined Cases C-402/07 and C-432/07 *Sturgeon* ECLI:EU:C:2009:716; Joined Cases C-581/10 and C-629/10 *Nelson and TUI Travel* ECLI:EU:C:2012:657; Case C-315/15 *Pešková and Peška* ECLI:EU:C:2017:342. Examples in Did you know? 10 EU rights at a glance (European Commission Publications Office 2014). Consumer (pupils) friendly information on <europa.eu/youreurope/citizens/consumers/index_en.htm>.

2009 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (before the EU was given the competence to protect consumers; legal basis in Art 100a EEC: approximation of provisions for the establishing and functioning of the internal market).

2010 Ibid (still in force).

2011 Art 3.

Gutiérrez Naranjo and three other citizens take legal action to protest.[2012] The Spanish Supreme Court applies the Directive on unfair terms in consumer contracts and decides that the 'floor clauses' are fair in the formal sense, i.e. grammatically intelligible for consumers, but not in the substantive sense because they are not transparent 'due to insufficient information for the borrowers as to the material consequences of their application in practice'.[2013] The Supreme Court declares the unfair 'floor clauses' void, but only with effect for the future, invoking reasons of legal certainty and the risk of serious economic repercussions. As a result, hundreds of thousands of Spanish consumers cannot claim reimbursement of the amounts of money overpaid to the banks. Several national lower courts refer preliminary questions to the ECJ on this temporal limitation of the effects of the judgement. Spanish newspapers follow the Luxembourg case closely (which indicates the relevance of this additional EU dimension for national citizens). The ECJ rules that the temporal limitation does not comply with EU law to the extent that it affects the substance of the right enjoyed by the consumer under the Directive, that is, the right not to be bound by unfair clauses. The objective of the Directive is to achieve more effective protection of consumers through the adoption of uniform rules of law on unfair terms, rules applicable to all contracts concluded between sellers or suppliers and consumers.[2014] A finding that a term is unfair 'must allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed, by inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier on the basis of that unfair term'.[2015] Not granting reimbursement for the period before the judgment amounts to incomplete and insufficient protection and does not prevent the continued

2012 Joined Cases C-154/15 and C-307/15 *Gutiérrez Naranjo and Others* ECLI:EU:C:2016:980. The three joined cases concerned floor clauses in a mortgage loan of (1) Mr Francisco Gutiérrez Naranjo with Cajasur Banco SAU, (2) Ms Ana María Palacios Martínez with Banco Bilbao Vizcaya Argentaria SA, and (3) Mr Emilio Irles López and Ms Teresa Torres Andreu concluded with Banco Español SA.

2013 Para 21. For assessment of fairness, see Art 4(2) Dir 93/13 (terms must be in 'plain intelligible language').

2014 Recital 10 Dir 93/13.

2015 Para 66.

use of those types of terms.[2016] The ECJ interprets the Directive in such a way that when a national court makes a finding of unfairness, it cannot limit the restitutory effects to amounts overpaid *after* that finding.[2017]

Active citizenship was rewarding. The action taken by Mr Francisco Gutiérrez Naranjo and three other citizens leading to the ruling that unfair 'floor clauses' are also retroactively invalid, had wide repercussions. The Spanish national judiciary had to adapt their case-law and financial institutions all over the EU were obliged to adapt contracts and change their practices.

Other stories involving consumer rights are probably more directly related to the daily lives of pupils than mortgage loans, e.g. **renting an apartment**.

Dirk and Katarina (Asbeek Brusse and de Man Garabito) are private persons living in the Netherlands. They rent a residential property from a commercial company for EUR 875 per month. The tenancy agreement is based on the standard terms of a professional real-estate association and includes a penalty clause: if they fail to pay in time, 1% interest is due per month and 25 EUR per day. The couple do not pay the rent agreed and after some months receive a bill of EUR 13 897 from the commercial company. Dirk and Katarina consider this excessive and contest the bill in court. The ECJ (preliminary ruling) holds that the national court must examine of its own motion whether a contractual term is unfair, without being asked to do so by the consumer. This compensates for the imbalance between the consumer and the seller or supplier.[2018] The ECJ (on the basis of a teleological interpretation) draws attention to the objective of the Directive, i.e. to raise the standard of living and the quality of life throughout the EU.[2019] The rules are similar to national rules of public policy. If the national court finds that a penalty clause in a tenancy agreement is unfair, it may not merely reduce the amount of the penalty but must exclude the application of that clause in its entirety (as a deterrent).[2020]

2016 Art 7(1) Dir 93/13.
2017 Para 75. See contrary Opinion of AG Mengozzi.
2018 Case C-488/11 *Asbeek Brusse and de Man Garabito* ECLI:EU:C:2013:341, paras 38- 40.
2019 Paras 43–4.
2020 Paras 59–60. See Art 6(1) Dir (the contract continues to bind the parties if this is possible without the unfair term).

Pupils may reflect on the question: *why is there an EU dimension in this wholly internal situation?*[2021]

269 Rights of buyers and obligations of sellers: Sabrina Wathelet

The story of the second-hand car

Problems related to buying a car may appeal to pupils. The following example concerns Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees.[2022] Sellers have an EU obligation to deliver goods in conformity with the contract of sale.[2023]

> In Belgium, Ms Sabrina Wathelet purchases a second-hand car at a local garage and pays EUR 4000 to the garage. The car breaks down. She refuses to pay EUR 2000 for the repair. It appears then that, in fact, the garage had acted as an intermediary and sold the car on behalf of a private owner, without saying so. The Belgian court applies provisions of Belgian law (Civil Code), which are intended to implement the Directive and must therefore be interpreted in the light of the Directive. Doubting whether the garage is a 'seller' in the sense of the Directive, the Belgian court asks a preliminary question.[2024] The ECJ recalls that the need for the uniform application of EU law requires that the concept of 'seller' is given an independent and uniform interpretation throughout the EU ('seller' is an autonomous concept of EU law). Taking account of the context and the objective of the EU law provision[2025] the Court then concludes that the concept of 'seller' cov-

2021 Link to the principle of conferral. See preamble; also nn 2009 and 2039 (functioning of the internal market and consumer protection).

2022 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12. See now Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28.

2023 Art 2(1). In the case of lack of conformity, the consumer has the right to a free of charge repair or replacement (unless this is impossible or disproportionate), to an appropriate price reduction, or rescission of the contract (unless the lack of conformity is minor). See Art 3.

2024 Case C-149/15 *Wathelet* ECLI:EU:C:2016:840. Dir 1999/44 defines the seller as 'any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession' (Art 1(2)(c)). In Belgian law, seller is 'any natural or legal person who sells consumer goods in the course of his trade, business or profession' (implementation of Dir).

2025 Paras 28–9.

ers a trader who acts as an intermediary on behalf of a private owner, even if he has not duly informed the consumer of that fact.[2026]

The *Wathelet* case deepens knowledge (directive, conferral) and provides an opportunity to discuss the implications of the internal market, including for those at home. Many other stories can be selected from case law according to the interests of pupils and teachers.[2027]

270 The right of withdrawal in distance contracts: Faccini Dori

The story of the lady who made an impulsive purchase at a railway station

Consumers have an EU right of withdrawal when concluding distance or off-premises contracts.[2028] An early case was *Faccini Dori*.[2029]

> Ms Paola Faccini Dori is waiting for her train at Milan Central Railway Station and is approached by someone selling English language correspondence courses. She agrees on the spot to conclude a contract. Some days later, she regrets her action and writes a letter to cancel her order. The company refuses and claims payment. She initiates proceedings before an Italian court, relying on the right of cancellation for a period of at least seven days, a right provided for by the Directive.[2030] The Italian court doubts whether the Directive can be relied on directly, given that Italy has failed to transpose it in time in national law, and asks a preliminary question. The ECJ rules that Ms Paola Faccini Dori cannot rely on a right of cancellation provided for by the

2026 Para 45 (irrespective of the question as to whether the intermediary is remunerated for this service or not).

2027 E.g. the story of Ms Duarte Hueros who purchases a car with a sliding roof (Spain), but finds rain water leaking in through the roof, which is impossible to repair (Case C-32/12 *Duarte Hueros v Autociba SA and Automóviles Citroën España SA* ECLI:EU:C:2013:637); the story of Mr Wittmer in Germany who buys tiles for the roof of his house, but when two thirds of the tiles have been laid, he notices shading on the tiles (Joined Cases C-65/09 and C-87/09 *Weber and Others* ECLI:EU:C:2011:396). In the field of copyright, the appealing story of 'Suske en Wiske' (Spike and Suzy) illustrates another autonomous concept in EU law, i.e. 'parody' (Case C-201/13 *Deckmyn and Vrijheidsfonds v Vandersteen and Others* ECLI:EU:C:2014:2132).

2028 Directive 2011/83 on consumer rights, Art 9 (period of 14 days to withdraw from a distance or off-premises contract, without giving any reason).

2029 Case C-91/92 *Faccini Dori* ECLI:EU:C:1994:292.

2030 The (then applicable) Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31.

Directive vis-à-vis the trader with whom she concluded the contract. A directive cannot directly impose obligations on an individual. However, the national court must interpret national law as far as possible in the light of the wording and purpose of the Directive.[2031] If this is impossible, Ms Faccini Dori can ask the Italian State to make good the loss she suffered. If Member States fail to transpose a directive, EU law requires them to make good the damage caused to individuals, in accordance with the conditions for State liability.[2032]

The facts of the case are easy for pupils to relate to. The relevance of EU law for the static citizen is demonstrated once more (iv). The story provides an opportunity for explaining that directives contain obligations for Member States (Article 288 TFEU). If a Member State does not transpose a directive in time, individuals can rely on their rights under the directive in their relationship with the Member State (vertical direct effect), because the State cannot take advantage of its own failure to comply with EU law. However, directives do not impose obligations on individuals (no horizontal direct effect).[2033] This is, admittedly, content which is only suitable for advanced levels of EDC. Still, it illustrates specific features of the EU legal order and shows how EU law functions as a multilevel system, thus providing additional content to national citizenship (i).

271 Rights in the Digital Single Market: Content Services

The story of so-called 'free' software

The Digital Single Market is another interesting theme for pupils. When shopping online, the static citizen is protected by EU consumer rights (iv).[2034] The *Content Services* case illustrates the challenges, the need to

2031 Para 30.

2032 Para 27. Conditions in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* ECLI:EU:C:1991:428, paras 39–41.

2033 Case 152/84 *Marshall* ECLI:EU:C:1986:84, para 48; Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21, para 46; Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2, para 36. See text to n 1822. Condition of clear, precise and unconditional provisions.

2034 I.a. Commission EU Citizenship Report 2013: EU citizens: your rights, your future COM(2013) 269, 5; see n 2008; also JL da Cruz Vilaça and others (eds), *The internal market and the digital economy*, vol 1 (XXVIII FIDE Congress Lisbon/Estoril (23-26 May 2018), Almedina 2018). 'The Digital Single Market ensures free movement of persons, services and capital and allows individuals and businesses to access seamlessly and to exercise online activities under conditions of fair competition, high level of consumer and personal data protec-

enhance consumer trust, and the response in the form of EU norms.[2035] Pupils and teachers will recognise this situation: when downloading 'free' software from the internet, they fill in a registration form, tick a box to accept the general conditions, and then receive a message of welcome to the community of subscribers... with the contractual obligation to pay.

> 'Free' downloading is possible on the website of Content Services, a company operating in Germany and accessible in Austria (in German). The problem is that by accepting the general conditions, the internet users—unknowingly—waive their right of withdrawal. They receive an email with their username and password to access the website, followed by an invoice of EUR 96 for 12 months. The invoice states that there is no option of cancelling the contract as the user has waived the right of withdrawal. An Austrian body protecting the rights of consumers challenges this practice in court in Vienna. Austria has implemented EU Directive 97/7 on the protection of consumers in respect of distance contracts, which requires information on the right of withdrawal to be provided to the consumer.[2036] On the Content Services website this information is only accessible by clicking on a hyperlink on the sign-up page or in the email. The ECJ recalls that the purpose of the Directive is to afford consumers extensive protection by giving them a number of rights in relation to distance contracts, i.a. to avoid a reduction of the information provided to the consumer.[2037] The ECJ interprets the Directive to the effect that a business practice making the required information accessible only via a hyperlink on a website is not sufficient, since that information is neither 'given' by that under-

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tion, irrespective of nationality or place of residence', in <ec.europa.eu/commission/priorities/digital-single-market_en>.

2035 Commission Communication 'A Digital Single Market Strategy for Europe' COM(2015) 0192 final; European Parliament Resolution of 26 May 2016 on the Single Market Strategy [2018] OJ C76/112; Commission Communication on the Mid-Term Review on the implementation of the Digital Single Market Strategy: A Connected Digital Single Market for All COM(2017) 228 final. See also Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L 345/1.

2036 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19, Art 5(1).

2037 Dir 97/7, recital 11; Case C-49/11 *Content Services Ltd* ECLI:EU:C:2012:419, para 36.

taking nor 'received' by the consumer and a website is not a 'durable medium' as required by the Directive.[2038]

Consumer rights, including those related to distance contracts, are currently to be found in the Consumer Rights Directive (2011).[2039] The Directive is imperative in nature: contractual terms which waive or restrict the rights resulting from the Directive cannot be binding on the consumer.[2040] The Member States cannot provide for a different level of consumer protection, neither more nor less (i).[2041] An evaluation report by the Commission points to the lack of awareness among consumers and traders of the Directive's provisions (one of the factors limiting its effectiveness).[2042] In addition to pilot projects to raise awareness of EU consumer rights and trader responsibilities,[2043] I propose to incorporate EU consumer rights in the EU dimension of EDC in mainstream education. This is in keeping with EDC standards (c-1). Empowered consumers are, moreover, a significant driver of growth.[2044] The EU's supporting competence can be used via

2038 Para 51.

2039 Directive 2011/83 on consumer rights, Art 1 (legal basis Art 114 TFEU); 'through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders'.

2040 Consumer Rights Dir, Art 25. On the right of withdrawal, Art 9 (and Ch III). Other possible case for EDC: Case C-112/11 *ebookers.com Deutschland* ECLI:EU:C:2012:487.

2041 Consumer Rights Dir, Art 4 (level of harmonisation).

2042 Commission Report on the application of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights COM(2017) 259 final, i.a. point 5; Commission Staff working document Evaluation of the Consumer Rights Directive Accompanying the document Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights SWD(2017) 169 final, i.a. points 4.3 and 6.1.1 (low and uneven enforcement is linked to consumers' and traders' low level of awareness about their rights and duties).

2043 Commission Report on the application of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights COM(2017) 259 final, point 6, conclusion.

2044 Commission Staff working paper 'Consumer Empowerment in the EU' SEC(2011) 469 final: empowered consumers intensify competition and innovation; 'Consumer empowerment depends not only on good cognitive skills, but also on knowledge of consumer rights and information, well-known and effective non-governmental organisations and public authorities, an active media and simple and accessible means of redress.'.

a contextual interpretation of the legal bases in Articles 165 juncto 169 TFEU.[2045]

6. Environmental rights and obligations

272 The right to clean water: Folk

The story of the Austrian fisherman

Cases such as *Folk* and *ClientEarth* illustrate the influence of static citizens proactive with regard to the environment (iv). Whether they act alone (*Folk*) or in an environmental organisation (*ClientEarth*), citizens play an essential role in making their own governments comply with EU directives protecting the environment.

> Gert Folk likes fishing in his part of the river Mürz in Austria. He has fishing rights on a stretch of the river about 12 km long. To his regret, a hydroelectric powerplant situated upstream causes significant variations in the water level. Some areas normally submerged under water dry up rapidly, small and young fish are trapped and cannot follow the downstream flow of the river, and die. He submits a complaint about environmental damage resulting in the increased mortality of fish to the Austrian authorities. The authorities reject the claim of environmental damage, because the Governor of the Land (Styria) has issued an authorisation for the operation of the hydroelectric plant in accordance with Austrian law. On appeal, Mr Folk claims that Austrian law is incompatible with the Environmental Liability Directive. This Directive is based on the 'polluter-pays' principle in order to prevent and remedy environmental damage.[2046] Mr Folk argues that the existence of damage to water cannot be denied on the grounds that it is covered by an authorisation under national law, but that water damage must be defined in accordance with the Directive, i.e. any damage which has a significant adverse effect on the ecological, chemical or

2045 See § 282 .

2046 Directive of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56, as amended (The Environmental Liability Directive), Art 1, recital 2 ('an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable').

quantitative status or ecological potential of the water.[2047] In answer to a preliminary question on the interpretation of the Directive, the ECJ rules that the definition of water damage in the Directive precludes national law which excludes, generally and automatically, water damage from being categorised as environmental damage just because it is covered by an authorisation.[2048] Moreover, the Directive grants individuals a right to a review procedure. Persons affected by environmental damage have the right to submit observations about that damage (or an imminent threat of such damage) and to request the competent authority to take action.[2049] The ECJ rules that national law cannot deny the right to initiate a review procedure—following environmental damage—to persons holding fishing rights.[2050]

This case clearly illustrates how EU law provides additional content to the rights which Gert Folk derives from national law (i). This content is of actual relevance to all citizens, including those who do not cross borders, like the man fishing in his local river (iv). It concerns several foundational objectives and principles of the EU (ii). The Union shall work for the sustainable development of Europe, aiming at a high level of protection and improvement of the quality of the environment (Article 3 TEU, developed in Article 191(1) TFEU).[2051] These aims must be integrated into the policies of the EU (Article 37 CFR). The foundational principles on which environmental policy is based are the precautionary principle and the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay (Article 191(2) TFEU). *Folk* illustrates the principle of conferral (the legal basis for the Environmental Liability Directive is Article 192 TFEU).[2052] Environmental rights invite critical thinking (iv). *Can an individual person*

2047 Art 2(1)(b).
2048 Case C-529/15 *Folk* ECLI:EU:C:2017:419, para 34.
2049 Environmental Liability Dir, Art 12.
2050 Para 49.
2051 See also Art 3(5), Art 21(2)(d-f) TEU (external action); and Art 114 TFEU (harmonisation).
2052 Then Art 175 TEC. See on that legal basis also: Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' [2013] OJ L354/171 (the 7th Environment Action programme); Regulation (EU) No 1293/2013 of the European Parliament and of the Council of 11 December 2013 on the establishment of a Programme for the Environment and Climate Action (LIFE) and repealing Regulation (EC)

complain about environmental damage by a company, even when the company has been given a national authorisation? If a Member State allows a company to act within its territory, can the EU impose more stringent EU standards?

Furthermore, *Folk* illustrates how individuals, like a simple fisherman, can successfully defend their rights, even against powerful opponents (Member States and a hydroelectric powerplant) and thus contribute to the achievement of foundational EU objectives.[2053]

273 The right to clean air: ClientEarth

The story of air quality plans

By the deadline set by the Air Quality Directive,[2054] the pollutants in the ambient air in the UK have exceeded limit values. The UK omits to fulfil its obligation to apply for postponement of the deadline by submitting an air quality plan, setting out appropriate measures to keep the exceedance period as short as possible. ClientEarth, a non-governmental organisation for the protection of the environment, asks the Secretary of State for revised air quality plans to see how conformity with the nitrogen dioxide limit values will be achieved, but the claim is dismissed in court. In response to a preliminary question from the UK Supreme Court, the ECJ rules that natural or legal persons who are directly concerned by the exceeded limit values, must be in a position to require the competent authorities to establish an air quality plan complying with the Directive, if necessary by bringing an action in court. Individuals can rely on unconditional and sufficiently precise provisions of a directive against public bodies (vertical direct effect). This applies particularly in respect of a directive whose objective is to reduce atmospheric pollution and to protect public health.[2055] Pursuant to the principle of sincere cooperation, Member States must ensure judicial protection of an individual's rights based on EU law.[2056]

No 614/2007 [2013] OJ L347/185 ; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1 (amended by Directive 2014/52/EU).

2053 See also Case C-723/17 *Craeynest and Others* ECLI:EU:C:2019:533.

2054 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/1, especially Art 23(1). Dir based on Art 175 TEC, in force.

2055 Case C-404/13 *ClientEarth* ECLI:EU:C:2014:2382, paras 54–5.

2056 Arts 4(3) and 19(1) TEU; Case C 432/05 *Unibet* EU:C:2007:163, para 38.

The battle for clean air continues.[2057] Empowered citizens, taking action to exercise their EU rights—even procedural rights—have an impact on environmental protection. In *Schmidberger*, the right to freedom of expression and freedom of association of an environmental association in the Tirol was able—proportionally to the objective—to limit an internal market freedom.[2058] Alongside citizens, the Commission, too, enforces Member States' obligation to respect environmental directives.[2059] Member States cannot evade EU obligations by issuing national authorisations. The EU acts as a neutral observer to monitor environmental protection in the regions of Europe and guards the application of elementary Treaty-based principles, such as 'the polluter pays'.

Climate change and the added value of EU action can also be discussed in the classroom on the basis of cases such as *Air Transport Association of America* (involving major US airlines in Europe) and the Kyoto Protocol.[2060] The Directive establishing the scheme for greenhouse gas emission allowance trading was adopted to comply with commitments made by the EU and the Member States under the Kyoto Protocol.[2061] While an individual Member State alone may be quite powerless against a global actor

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2057 I.a. Commission Decision (EU) 2019/1565 of 4 September 2019 on the proposed citizens' initiative entitled 'Actions on Climate Emergency' [2019] OJ L 241/8. National case law and media, e.g. <euobserver.com/environment/140764>.

2058 Text to n 1929.

2059 I.a. Case C-441/17 *Commission v Poland* ECLI:EU:C:2018:255: the Commission claims that Poland has failed to fulfil its obligations under the Habitats Directive and Birds Directive (Dir 92/43/EEC and Dir 2009/147/EC) in its forest management plan for the Białowieża Forest District.

2060 Case C-366/10 *Air Transport Association of America and Others* ECLI:EU:C:2011:864, involving also American Airlines Inc., Continental Airlines Inc. and United Airlines Inc.

2061 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32. The EU approved the Kyoto Protocol (its provisions thus are an integral part of the EU legal order). In *ATAA*, the ECJ finds no factor affecting the validity of Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009] OJ L8/3. See, as an example for the classroom in the field of technology, Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No

like the US, objectives may be more easily achieved through cooperation in the EU context. The EU is better placed to uphold the foundational values, objectives and principles in a globalised world, and its added value is clear—but so are the ongoing challenges it faces.[2062]

274 The EU dimension of education for sustainable development

The State Parties to the Convention on the Rights of the Child agree that education shall be directed to the 'development of respect for the natural environment' (Article 29(e)).[2063] In EU Member States, this compulsory educational aim cannot be achieved without an EU dimension. Clear water and clean air do not stop at national borders. EU citizens should be empowered to act to protect the natural environment and have some notion of the EU's competences in this field (conferral). Citizens who want to have a say about a wind turbine project (EU funded) in their local area, struggle to identify the authority responsible.[2064] In a complex governance structure, accountability problems arise. All reasonable steps are must be taken to increase transparency, including adding a basic EU dimension to EDC. The environment is an important concern of young

510/2011 [2019] OJ L 111/1 (both civic competences and competences in science and technology have an EU dimension, in that regard overlapping competences); see n 1051.

2062 See also Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council [2018] L 328/1. Further J Scott, 'Can the EU Deliver on Citizen Expectations in the Fight against Climate Change?' in M Dougan, NN Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012).

2063 UN ComRC 'General Comment No 1 (2001)- Article 29(1): The Aims of Education' Doc CRC/GC/2001/1, para 13. See further UNGA Res 70/1 'Transforming our world: The 2030 Agenda for Sustainable Development' (25 September 2015) A/RES/70/1; and SDG 4. See for operationalisation, CoE Reference Framework of Competences for Democratic Culture, Vol 2: Descriptors of competences for democratic culture (2018), key descriptor 122, also 2043.

2064 Commission White paper of 1 March 2017 on the future of Europe COM(2017) 2025 final, scenario 5.

citizens.[2065] Education for sustainable development overlaps and interacts with EDC and, to that extent, comes within the scope of the Charter on EDC/HRE and of EDC standards in general.[2066] An adequate EU dimension empowers citizens to exercise their rights and responsibilities regarding the environment (c-1) and to participate in democratic life with those aims in mind (c-3).

275 Many other examples

The foundational principles such as conferral, subsidiarity, proportionality, or sincere cooperation, and the role of the European Parliament, the Council, or the Commission as constitutional actors, can be illustrated in cases such as *Council v Commission*, *Tobacco Advertising*, or *Commission v Austria*.[2067] Case law also illustrates the role of the EU in resolving tensions between Member States (in accordance with the foundational objective of peace, Article 3(1) TEU).[2068] Disagreement with regard to refugee quotas, for instance, were the object of *Slovakia and Hungary v Council*.[2069]

2065 See Flash Eurobarometer 455, European Youth (January 2018) (50% of respondents finds that protection of the environment and the fight against climate change should be a priority for the EU); confirmed by consistent action of the European Youth Climate Movement. See also Lindfelt, 'Article 44: Right to Petition', 1158 (environment is the most important concern in their exercise of the right to petition; 'This is hardly surpising as the division of labour between the EU and the Member States as to competences is by no means clear to the citizen').

2066 Charter on EDC/HRE, explanatory memorandum para 33. See also H Lödén, MS McCallion and P Wall, 'Teaching Citizenship: What if the EU Is Part of the Solution and Not the Problem?' (2014) 10 Journal of Political Science Education 386, choosing environmental issues to show how EU education can be part of citizenship education.

2067 Case C-409/13 *Council v Commission* ECLI:EU:C:2015:217 (withdrawal of legislative proposal); Case C-376/98 *Germany v Parliament and Council ('Tobacco Advertising')* ECLI:EU:C:2000:544; *Commission v Austria* (n 1382). Other: Case C-295/90 *European Parliament v Council* ECLI:EU:C:1992:294; Case C-65/93 *Parliament v Council* ECLI:EU:C:1995:91; Case C-411/06 *Commission v Parliament and Council* ECLI:EU:C:2009:518; Case C-540/03 *Parliament v Council* ECLI:EU:C:2006:429; Case C-128/17 *Poland v Parliament and Council* ECLI:EU:C:2019:194. See also the role of the institutions in *Schrems* and its follow-up.

2068 E.g. Case C-145/04 *Spain v UK* ECLI:EU:C:2006:543; Case C-364/10 *Hungary v Slovak Republic* ECLI:EU:C:2012:630; Case C-457/18 *Slovenia v Croatia* pending; Case C-591/17 *Austria v Germany* ECLI:EU:C:2019:504.

2069 Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631.

It should be emphasised that—in all the examples cited—the aim is not to technically 'explain' the cases to pupils, but to give context so that pupils engage with the issues at stake. Diverging viewpoints, complexities, criticism of EU action, and uncertainties as to how to uphold the foundational values of Article 2 TEU should be addressed.[2070] The aim is to empower EU citizens by developing citizenship competences in the fullest sense (knowledge, skills, attitudes) and increasing awareness of the common values of Article 2 TEU.

Conclusion to Part three

276 *A combined reading of EDC standards and EU law leads to substantial content for the EU dimension of EDC in mainstream education*

In the search for balanced 'EU citizenship education', the discomfort caused by statal thinking has been resolved by using the consensual concept of EDC of the Council of Europe Charter on EDC/HRE and by pragmatically determining relevant content for its components based on EU law in interaction with Member State law. To respect EU primary law and Member State constitutions, existing national EDC should be extended by a genuine 'EU dimension', adapting it to the multilevel system of governance in which citizens in the EU live (adaptation perspective).[2071] Four criteria have been identified for determining relevant content for the EU dimension of EDC in mainstream education: (i) additional content for national EDC, (ii) significant content, i.e. relating to foundational (EU primary law) values, objectives and principles, (iii) inviting critical thinking and (iv) affecting the large majority of EU citizens, including static citizens (those at home).

The effects of a combined reading of EDC standards and EU law are considerable. EU law impacts so definitively and specifically on the EDC components that EDC of EU citizens is no longer adequate if it lacks an

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2070 See e.g. the story of *Dano* (text to n 1426), *Gravier* and *Bressol* (text to n 1381). Various cases have led to conflicting observations of Member States and of commentators—which is healthy in a democracy (e.g. *Viking*, *Laval*, *Deutsche Bank*, etc). In particular, austerity cases can illustrate complexity, e.g. *Anagnostakis* (n 1557); Joined Cases C-8/15 P to C-10/15 P *Ledra* ECLI:EU:C:2016:701. See C Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts" (2015) 35 Oxford Journal of Legal Studies 325' (2015) 35 Oxford Journal of Legal Studies 325.

2071 § 151 .