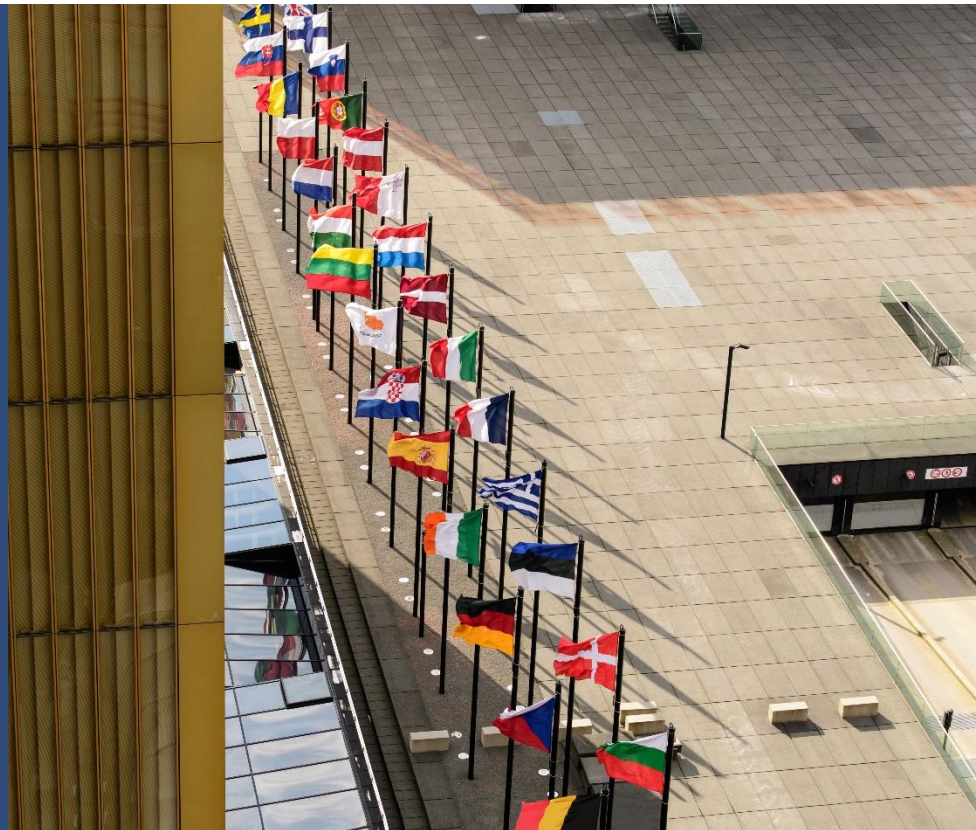




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# Recent developments in case law to the Article 11 of the Charter

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Seconded national expert*





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## *Article 11*

# Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

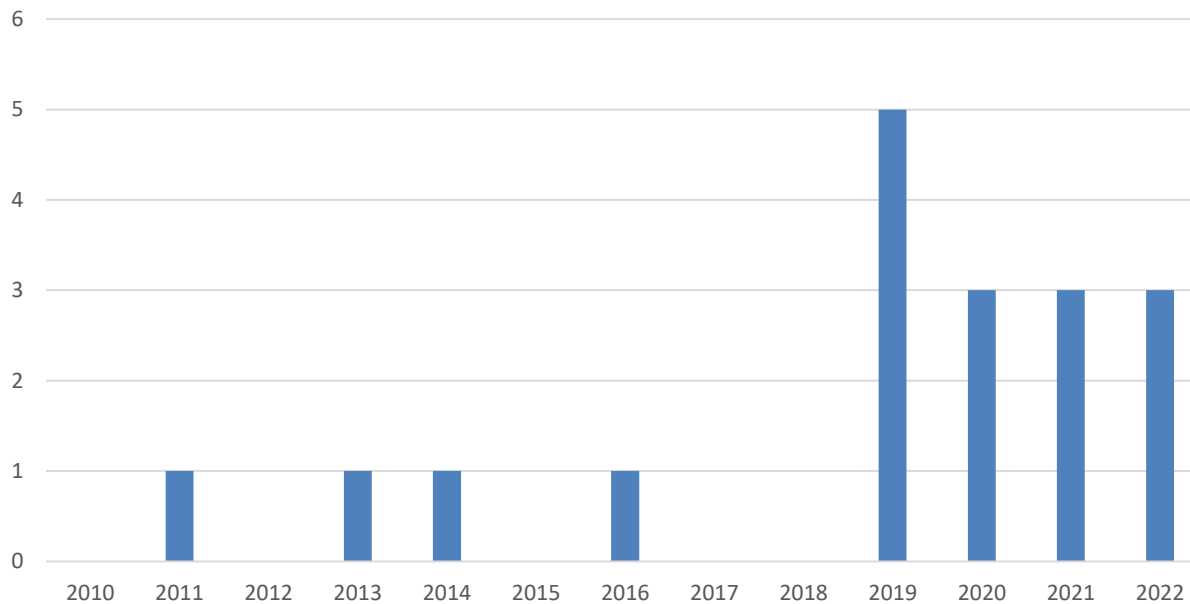
# Some statistics

Judgments and orders citing Article 11 of the Charter 2010-2022		
	Judgments	Orders
GC of the Court	18	-
Other Chambers of the Court	21	2
Court together	39	2
Tribunal	28	5
All together	67	7



# Some statistics

GC judgments citing Article 11 of the Charter 2010-2022



# GC judgments citing Article 11 of the Charter

2011	6 September 2011, Patriciello, C-163/10
2013	22 January 2013, Sky Österreich, C-283/11
2014	8 April 2014, Digital Rights Ireland and Seitlinger e.a., C-293/12
2016	21 December 2016, Tele2 Sverige, C-203/15
2019	29 July 2019, Spiegel Online, C-516/17 29 July 2019, Pelham e.a., C-476/17 29 July 2019, Funke Medien NRW, C-469/17 24 September 2019, Google (Territorial scope of delisting), C-507/17 24 September 2019, GC e.a. (Withdrawal of sensitive data), C-136/17
2020	23 April 2020, Associazione Avvocatura per i diritti LGBTI, C-507/18 6 October 2020, Privacy International, C-623/17 6 October 2020, La Quadrature du Net e.a., C-511/18
2021	2 March 2021, Prokuratuur (Conditions for access to electronic communications data), C-746/18 9 March 2021, VG Bild-Kunst, C-392/19 22 June 2021, YouTube and Cyando, C-682/18
2022	15 March 2022, Autorité des marchés financiers, C-302/20 5 April 2022, Commissioner of An Garda Síochána, C-140/20 26 April 2022, Poland / Parliament and Council, C-401/19



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# 2 main topics since 2020

## **Content sharing**

- C-682/18
- C-392/19
- C-401/19

## **Data retention**

- C-623/17
- C-511/18
- C-746/18
- C-140/20

## **Other**

- C-507/18
- C-302/20





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Judgment of the Grand Chamber of 23 April 2020,  
Associazione Avvocatura per i diritti LGBTI, C-507/18

# C-507/18 - Associazione Avocatura per i diritti LGBTI

During an interview in a radio programme, NH (who is a lawyer) stated that he would never hire a homosexual person to work in his law firm nor wish to use the services of such persons. At the time when he made those remarks, there was no current recruitment procedure open at NH's law firm.

The Associazione is an association of lawyers that defends the rights of lesbian, gay, bisexual, transgender or intersex persons (LGBTI) in court proceedings.

The Associazione brought proceedings against NH before the competent District Court.

The District Court ordered NH to pay EUR 10 000 to the Associazione in damages and ordered extracts from that order to be published in a national daily newspaper.

NH appealed.





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# C-507/18 - Associazione Avocatura per i diritti LGBTI

2 main questions:

Does the statement of NH that he would not hire a homosexual person to work in his law firm and would not wish to use the services of such persons constitute discrimination in relation to employment within the meaning of Directive 2000/78?

And if they do, is the Associazione allowed to bring proceedings against NH, in the absence of an identifiable victim?



# C-507/18 - Associazione Avocatura per i diritti LGBTI

40: [...] the Court has already ruled that Directive 2000/78 is capable of applying in circumstances that involve, in employment and occupation, statements concerning 'conditions for access to employment ... or to occupation, including ... recruitment conditions' [...]. In particular, it has found that **that concept may cover public statements** made in relation to a particular recruitment policy [...]

41: [The Court] has also held that the mere fact that statements suggestive of a homophobic recruitment policy do not come from a person who has the legal capacity directly to define the recruitment policy of the employer concerned or to bind or represent that employer in recruitment matters is not necessarily a bar to such statements falling within that employer's conditions for access to employment or to occupation.



# C-507/18 - Associazione Avocatura per i diritti LGBTI

44: [...] the relevant criteria are,

- first, the **status of the person** making the statements being considered and the capacity in which he or she made them, which must establish either
  - that he or she is a potential employer or
  - is, in law or in fact, capable of exerting a decisive influence on the recruitment policy or a recruitment decision of a potential employer,
  - or, at the very least, may be perceived by the public or the social groups concerned as being capable of exerting such influence, even if he or she does not have the legal capacity to define the recruitment policy of the employer concerned or to bind or represent that employer in recruitment matters.



# C-507/18 - Associazione Avocatura per i diritti LGBTI

45: Also relevant, second, are **the nature and content of the statements** concerned. They must relate to the conditions for access to employment or to occupation with the employer concerned and establish the employer's intention to discriminate on the basis of one of the criteria laid down by Directive 2000/78.

46: Third, the **context** in which the statements at issue were made — in particular, their public or private character, or the fact that they were broadcast to the public, whether via traditional media or social networks — must be taken into consideration.



# C-507/18 - Associazione Avocatura per i diritti LGBTI

52: Such limitations also respect the **principle of proportionality** in so far as the prohibited grounds of discrimination are listed in Article 1 of Directive 2000/78, the material and personal scope of which is defined in Article 3 of that directive, and the interference with the exercise of freedom of expression does not go beyond what is necessary to attain the objectives of the directive, in that only statements that constitute discrimination in employment and occupation are prohibited.

54: In particular, if [...] statements fell outside the material scope of that directive solely because they were made outwith a recruitment procedure, in particular in the context of an audiovisual entertainment programme, or because they allegedly constitute the expression of a personal opinion of the person who made them, the very essence of the protection afforded by that directive in matters of employment and occupation could become illusory.



# C-507/18 - Associazione Avocatura per i diritti LGBTI

55: [...] the principal selection takes place **between those who apply, and those who do not**. The expression of discriminatory opinions in matters of employment and occupation by an employer or a person perceived as being capable of exerting a decisive influence on an undertaking's recruitment policy is likely to deter the individuals targeted from applying for a post.

56: Consequently, statements which fall within the material scope of Directive 2000/78, as defined in Article 3 thereof, cannot fall outside the regime for combating discrimination in employment and occupation established by that directive on the ground that those statements were made during an audiovisual entertainment programme or that they are also an expression of the personal opinion of the person who made them regarding the category of persons to which they relate.



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# C-507/18 - Associazione Avocatura per i diritti LGBTI

65: [...] Directive 2000/78 must be interpreted as not precluding national legislation under which an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having in particular a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, automatically, on account of that objective and irrespective of whether it is a for-profit association, has standing to bring legal proceedings for the enforcement of obligations under that directive and, where appropriate, to obtain damages, in circumstances that are capable of constituting discrimination, within the meaning of that directive, against that category of persons and it is not possible to identify an injured party.





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Judgment of the Grand Chamber of 15 March 2022,  
Autorité des marchés financiers, C-302/20



# C-302/20 - Autorité des marchés financiers

Mr A is a retired journalist. Most recently, he worked for the widely read website of a British newspaper, on which he regularly published articles relaying market rumours.

Two of the articles concerned possible takeover bids on companies listed on stock exchanges and lead to an increase of the corresponding share prices after their publication.

French Financial Markets Authority (AMF) established that Mr A had telephone contact with one or more of the subsequent purchasers prior to the publication of the articles.

In at least one case, shortly after the end of the telephone conversation with Mr A, the person concerned called her broker, who then placed a buy order for the securities discussed in the articles that were published shortly afterwards.

The AMF took the view that the information at issue satisfied the conditions for classification as **inside information**. On that ground, the AMF imposed a financial penalty of EUR 40,000 on Mr A.



# C-302/20 - Autorité des marchés financiers

Directive 2003/6 (Market Abuse Directive) defines the concept of 'inside information' in point 1 of Article 1:

'... information of a **[i]** precise nature which has **[ii]** not been made public, **[iii]** relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, **[iv]** if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.'

Article 1 of the Directive 2003/124 directive defines the concept of 'inside information' more precisely:

'For the purposes of applying [point 1 of Article 1 of the Market Abuse Directive], information shall be deemed to be of a precise nature if **[i]** it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if **[ii]** it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments.



# C-302/20 - Autorité des marchés financiers

40: It should be noted at the outset that the information at issue in the main proceedings, relating to the publication of articles reporting market rumours about allegedly envisaged takeover bids, concerns **two distinct types of future events**, namely, in the first place, **the publication of the articles** and, in the second place, **the takeover bids** referred to in those articles. [...]

41: It must be held that the precise nature [...] of information relating to the forthcoming publication of a press article is closely linked to that of the information forming the subject matter of that article. Were the information to be published not to have any degree of precision, the information relating to that publication would not enable any conclusions to be drawn as to the possible effect of that publication on the prices of the financial instruments concerned [...].



# C-302/20 - Autorité des marchés financiers

50: In that context, a reference – as part of a rumour about a takeover bid relating to the securities of an issuer of financial instruments – to **the proposed price for the purchase** of those securities is likely to have an impact on the assessment of the precise nature of the information concerned. [...]

51: [...] the **reputation** of the journalist who authored the press articles and that of the media organisation which published those articles may be regarded as decisive [...]



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# C-302/20 - Autorité des marchés financiers

57: It follows from the foregoing considerations that the answer to the first question is that Article 1(1) of Directive 2003/6 must be interpreted as meaning that, for the purposes of classification as inside information, information relating to the forthcoming publication of **a press article reporting a market rumour** about an issuer of financial instruments **is capable of constituting information 'of a precise nature'** [...]



# C-302/20 - Autorité des marchés financiers

61: By its second question, the referring court asks, in essence, whether Article 21 of Regulation 596/2014 must be interpreted as meaning that the disclosure by a journalist, to one of his or her usual sources of information, of information relating to the forthcoming publication of an article authored by him or her reporting a market rumour is made **'for the purpose of journalism'**, within the meaning of that provision.

65: As regards the context and the objectives pursued by Regulation No 596/2014, [...] that regulation seeks to ensure the integrity of financial markets by prohibiting market abuse, such as insider dealing and the unlawful disclosure of inside information. It is also apparent [...] that that objective is to be pursued in compliance with the fundamental rights and principles enshrined in the Charter [...], in particular the freedom of the press and the freedom of expression in other media, as guaranteed in the European Union and in the Member States and enshrined in Article 11 of the Charter [...].



# C-302/20 - Autorité des marchés financiers

67: [...] in interpreting Article 11 of the Charter, it is necessary to take into account, pursuant to Article 52(3) thereof, the case-law of the European Court of Human Rights in relation to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms [...].

68: It follows from that case-law that not only publications but also the preparatory steps to a publication, such as the gathering of information and the research and investigative activities of a journalist are inherent components of the freedom of the press, as enshrined in Article 10 of that Convention, and are, as such, protected [...].



# C-302/20 - Autorité des marchés financiers

72: By its third and fourth questions [...] the referring court asks, in essence, whether Articles 10 and 21 of Regulation No 596/2014 must be interpreted as meaning that the lawful or unlawful nature of the disclosure of inside information by a journalist for the purpose of journalism depends on whether it was made in the normal exercise of the profession of journalist.

78: [...] **the disclosure of inside information being lawful only if it is strictly necessary for [the exercise of an employment, a profession or duties] and complies with the principle of proportionality [...].**





# C-302/20 - Autorité des marchés financiers

81: [...] the proportionality of that disclosure, must be assessed in the light of the fact that [the prohibition of disclosing information] constitutes a restriction on the fundamental right guaranteed by Article 11 of the Charter, has to be interpreted in accordance with the requirements imposed by Article 52(1) thereof.

88: [...] the disclosure of inside information undermines not only the private interests of certain investors but also, more generally, **the public interest** in ensuring full and adequate transparency of the market, in order to protect its integrity and to ensure the confidence of all investors [...].





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# Judgment of the Grand Chamber of 26 April 2022, Poland / Parliament and Council, C-401/19

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# C-401/19 - Poland v Parliament and Council

By its action, the Republic of Poland asked the Court, principally, to annul Article 17 of Directive 2019/790.

Article 17 of Directive 2019/790, entitled ‘Use of protected content by online content-sharing service providers’, is the single provision of Chapter 2, entitled ‘Certain uses of protected content by online services’, of Title IV of that directive, itself entitled ‘Measures to achieve a well-functioning marketplace for copyright’.

In order to be exempted from all liability for giving the public access to copyright-protected works or other protected subject matter uploaded by their users in breach of copyright, online content-sharing service providers are required, by reason of Article 17 of Directive 2019/790, to carry out preventive monitoring of all the content which their users wish to upload. In order to do so, those service providers must use IT tools which enable the prior automatic filtering of that content.



# C-401/19 - Poland v Parliament and Council

45: [...] the sharing of information on the internet via online content-sharing platforms **falls within the scope of** Article 10 ECHR and **Article 11 of the Charter.**

58: It must [...] be concluded that the specific liability regime [...] in respect of online content-sharing service providers, entails a **limitation** on the exercise of the right to freedom of expression and information of users of those content-sharing services, guaranteed in Article 11 of the Charter.





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## Article 52

### Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

# C-401/19 - Poland v Parliament and Council

65: As regards observance of the principle of proportionality, that principle requires that the limitations which may, in particular, be imposed by acts of EU law on rights and freedoms enshrined in the Charter do not exceed the limits of what is **appropriate** and **necessary** in order to meet the legitimate objectives pursued or the need to protect the rights and freedoms of others; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused **must not be disproportionate to the aims pursued** (see, to that effect, judgments of 13 March 2019, Poland v Parliament and Council, C-128/17, EU:C:2019:194, paragraph 94 and the case-law cited, and of 17 December 2020, Centraal Israëlitisch Consistorie van België and Others, C-336/19, EU:C:2020:1031, paragraph 64 and the case-law cited).

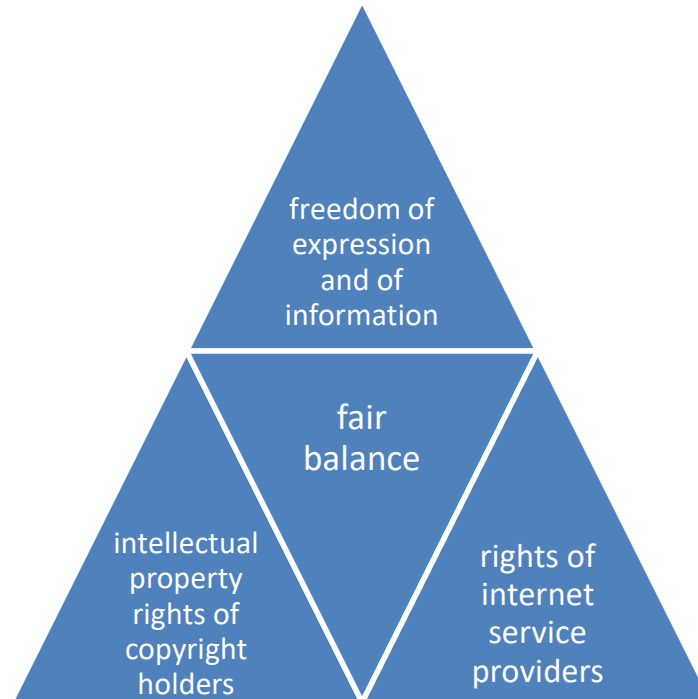


# Principle of proportionality

C-401/19	C-128/17	C-336/19
<u>the limitations</u> [...] do not exceed the limits of what is appropriate [...] in order to meet the legitimate objectives pursued or <u>the need to protect the rights and freedoms of others</u>	acts of the EU institutions be appropriate for attaining the legitimate objectives pursued	<u>the limitations</u> [...] do not exceed the limits of what is appropriate [...] in order to attain the legitimate objectives pursued
<u>the limitations</u> [...] do not exceed the limits of what is [...] necessary in order to meet the legitimate objectives pursued or <u>the need to protect the rights and freedoms of others</u>	acts of the EU institutions [...] do not go beyond what is necessary in order to achieve those objectives	<u>the limitations</u> [...] do not exceed the limits of what is [...] necessary in order to attain the legitimate objectives pursued
where there is a choice between several appropriate measures, recourse must be had to the least onerous		
the disadvantages caused must not be disproportionate to the aims pursued		



# Content sharing balancing question





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# YouTube and Cyando, C-682/18

135: The Court has held on numerous occasions that measures that consist in requiring a service provider to introduce, exclusively at its own expense, a screening system which entails general and permanent monitoring in order to prevent any future infringement of intellectual property rights were incompatible with Article 15(1) of the Directive on Electronic Commerce (see, to that effect, judgments of 24 November 2011, *Scarlet Extended*, C 70/10, EU:C:2011:771, paragraphs 36 to 40, and of 16 February 2012, *SABAM*, C 360/10, EU:C:2012:85, paragraphs 34 to 38).



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# C-401/19 - Poland v Parliament and Council

98: It follows from the findings in paragraphs 72 to 97 above that [...] the obligation on online content-sharing service providers to review, prior to its dissemination to the public, the content that users wish to upload to their platforms, resulting from the specific liability regime established in Article 17(4) of Directive 2019/790, and in particular from the conditions for exemption from liability laid down in point (b) and point (c), in fine, of Article 17(4) of that directive, has been accompanied by appropriate safeguards by the EU legislature in order to ensure, in accordance with Article 52(1) of the Charter, respect for the right to freedom of expression and information of the users of those services, guaranteed by Article 11 of the Charter, and a fair balance between that right, on the one hand, and the right to intellectual property, protected by Article 17(2) of the Charter, on the other.



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Thank you!

