# THE APPLICABILITY OF THE EU CHARTER OF FUNDAMENTAL RIGHTS: NATIONAL MEASURES

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**Abstract**

*After the entry into force of the Lisbon Treaty on 1 December 2009, the European Union's Charter of Fundamental Rights ('the Charter') has found a place among the formal sources of EU law, and has become a standard of review for the validity of EU acts. It became legally binding for EU institutions, bodies, offices and agencies of the Union, but also to the Member States.*

*Even after the entry into force of the Charter', some doubts regarding its legal effects are still looming large. Among them is whether, and to what extent, the Charter applies to national measures that are connected to EU law but are not intended to implement it directly. This legal uncertainty affects the position of individuals seeking to assert their fundamental rights before a national judge. In particular, whereas the application of the Charter warrants disapplication of the conflicting national measures, the same remedy is often not available when plaintiffs rely only on other fundamental rights instruments (like the European Convention on Human Rights or national constitutions). There is no doubt that the borderline between EU law and national law is not always easy to establish in a concrete case.*

*This article discusses theoretical and practical problems arising out of the application and interpretation of Article 51(1) of the Charter, according to which the Charter is addressed to the Member States 'only when they are implementing Union law'.*

**Keywords**: *Charter of Fundamental Rights; European Union Law; Fundamental Rights; European Union; Competences of the European Union; Court of Justice of European Union; Applicability of EU Charter at National Level.*

## Introduction

After the entry into force of the Lisbon Treaty, the European Union's Charter of Fundamental Rights (the Charter)[1] has found a place among the formal sources of EU law, and has become a standard of review for the validity of European Union (EU) acts.

The original purpose of the European Union's Charter was to consolidate those fundamental rights applicable at the EU level into a single text "*to make their overriding importance and relevance more visible to the Union's citizens*". As such, it should have served as a showcase of the achievements of the EU in the field of human rights protection.[2]

With the entry into force of the EU's Lisbon Treaty on 1 December 2009, the Charter became legally binding for EU institutions and national governments, just like the EU Treaties themselves - the legal bedrock on which the EU's actions are based.[3]

One of the sticking-points in the negotiations on the Charter of the European Union[4] was the question of its applicability at national level. The Charter is addressed, first and foremost, to the EU institutions. It complements national systems and does not replace them. Member States are subject to their own constitutional systems and to the fundamental rights set out in these. Member States need only have regard to the Charter when their national measures implement EU law,[5] as stipulated in Article 51 of the Charter.[6]

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[1] Official Journal of the European Communities, C 364/1.

[2] This effort was premised on the reassuring assumption that the rights listed would not entail additional State duties; the modest purpose of the Charter, as reflected in the Preamble, was that of "*making those rights more visible*,"*i.e.* not to create them anew (nor to extend the existing ones). An accurate reconstruction of the origin of each right is provided in the Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), accounting for the "conservative" value of the Charter. A full list of the sources of the rights included in the Charter is set out in the updated "explanations" of Presidium. See OJ 2007 C 303/17.

[3] The Treaty of Lisbon not only makes the Charter a legally binding document but also endows it with the status of Union primary law. According to Article 6(1) TEU, as amended by the Treaty of Lisbon, the Charter 'shall have the same legal value as the Treaties'. It is noteworthy that Article 6(1) TEU also provides that the Charter shall be interpreted 'with due regard' to the Explanations which were drawn up as a way of providing guidance in its interpretation. The Explanations have been published as an annex to the Charter as adapted in 2007, [2007] OJ C303/717. See, e.g. Case C-279/09 *DEB*, judgment of 22 December 2010 nyr, para 32.

[4] The Charter was first proclaimed by the European Parliament, the Council and the Commission as an instrument of soft law, [2000] OJ C364/1. Article 6(1) of the TEU, as amended by the Treaty of Lisbon, refers to a slightly modified version ('as adapted at Strasbourg, on 12 December 2007'), reprinted in [2010] OJ C83/389, and makes it clear that the adapted Charter 'shall have the same legal value as the Treaties', in other words, have the status of Union primary law.

[5] The link between an alleged violation of the Charter and EU law will depend on the situation in question. For example, a connecting factor exist: when national legislation transposes and EU Directive in a way contrary to fundamental rights, when a public authority applies EU law in a manner contrary to fundamental rights, or when a final decision of national court applies or interprets EU law in a way contrary to fundamental rights.

[6] See Rosas, A.; Armati, L. EU Constitutional Law: An Introduction. Oxford: Hart Publishing, 2010, p. 147−151; Rosas, A.; Armati, L. EU Constitutional Law: An Introduction. 2nd rev edn. Oxford: Hart Publishing, 2012, p. 164−168 (forthcoming); Rosas, A.; Kaila, H. L'application

As is well known, the introduction of a fundamental rights regime into EU law is essentially a story of judge-made law. In 1969, the European Court of Justice (ECJ) recognised the importance of fundamental rights by holding that they form part of the general principles of Community law whose observance the Court ensures.[7] Some landmark judgments of the early 1970s developed and refined this approach.[8]

Later developments include political declarations made by the then Community institutions and the gradual insertion of fundamental rights and human rights clauses in the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC).[9]

Decisive steps have been taken towards a Europe of fundamental rights. The Charter has become legally binding[10] and the Union is going to accede to the European Convention on Human Rights (ECHR).[11]The European Parliament[12] and the European Council[13] have made promotion of fundamental rights in the Union one of their priorities for the future of the area of justice, freedom and security. There is now a member of the Commission with specific responsibility for the promotion of justice, fundamental rights and citizenship, and the members of the European Commission promised, in a solemn undertaking before the ECJ, to uphold the Charter.[14] More generally, the Lisbon Treaty is a major step forward in that it has extended the co-decision procedure, removed the pillar structure set up under the earlier Treaty, given the Court of Justice general responsibility in the field of freedom, security and justice, and confirmed the place of human rights at the heart of the Union's external action.

In addition, The Union's accession to the ECHR[15] was made obligatory by the Lisbon Treaty (Article 6(2) TEU) and will complement the system to protect fundamental rights by making the European Court of Human Rights competent to review Union acts. This external judicial review should further encourage the Union to follow an ambitious policy for fundamental rights: the more the Union tries to ensure that its measures are fully compliant with fundamental rights, the less likely it is to be censured by the European Court of Human Rights.

Finally, it should be noted that Article 6(3) TEU, as amended by the Treaty of Lisbon, preserves the idea, expressed in the case law of the ECJ since 1969, that fundamental rights constitute general principles of Union law. This arguably will mean that the rather open-ended list of sources of inspiration which the Court has relied upon to 'find' the general principles of Union law, including other human rights conventions than the European Convention, as well as the constitutional traditions common to the Member States, will not lose its relevance altogether. On the other hand, the Charter will arguably be much more important in guiding both the Union legislator and the EU Courts.[16]

### 1. The Charter and its content

The European Communities (now the European Union) were originally created as an international organization with an essentially economic scope of action. Initially, therefore, there was no perceived need for rules concerning respect for fundamental rights.

However, once the Court of Justice affirmed the principles of direct effect and of primacy of European law, according to which Community law takes

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de la Charte des droits fondamentaux par la Cour de justice: un premier bilan. Il diritto dell'Unione Europea. 2011, XVI: 19−20; Ladenburger, C. European Union Institutional Report. In: Laffranque, J. (ed.) The Protection of Fundamental Rights Post-Lisbon, Reports of the XXV FIDE Congress Tallinn 2012. Vol 1.

[7] Case 29/69 *Stauder* [1969] ECR 419.

[8] See, in particular, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold* [1974] ECR 491.

[9] See the preamble of the Single European Act of 1987 (http://www.civitas.org.uk/eufacts/FSTREAT/TR2.php) and Art. F of the TEU (later to become Art. 6 TEU), established by the Treaty of Maastricht of 1992 (Official EN Journal of Wuropean Union C 326/13)

[10]Article 6(1) of the TEU. In addition, Article 6(3) reaffirms that fundamental rights as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States are general principles of EU law.

[11] Article 6(2) TEU.

[12] European Parliament resolution of 25 November 2009 on the Communication from the Commission – An area of freedom, security and justice serving the citizen – Stockholm programme, P7_TA(2009)0090.

[13] Stockholm Programme, OJ C 115, 4.5.2010.

[14] Text of the solemn undertaking:

I solemnly undertake:

- to respect the Treaties and the Charter of Fundamental Rights of the European Union in the fulfilment of all my duties;
- to be completely independent in carrying out my responsibilities, in the general interest of the Union;
- in the performance of my tasks, neither to seek nor to take instructions from any Government or from any other institution ,body, office or entity;
- to refrain from any action incompatible withmy duties or the performance of my tasks.

I formally note the undertaking of each Member State to respect this principle and not to seek to influence Members of the Commission in the performance of their tasks. I further undertake to respect, both during and after my term of office, the obligation arising there from, and in particular the duty to behave with integrity and discretion as regards the acceptance, after I have ceased to hold office, of certain appointments or benefits.

[15] See http://human-rights-convention.org.

[16] The term 'Union Courts' refers, apart from the ECJ, to the General Court (previously the Court of First Instance) and the EU Civil Service Tribunal, which are all seated in Luxembourg. Here, the term does not refer to national courts of the EU Member

States, although they may be viewed as EU courts in the large sense or at least as courts which are part of the EU judicial system.

precedence over domestic law,[17] certain national courts began to express concerns about the effects which such case-law might have on the protection of constitutional values.[18] In response to this, in 1974 the German[19] and Italian[20] constitutional courts each adopted a judgment in which they asserted their power to review European law in order to ensure its consistency with constitutional rights.

At the same time, the ECJ developed its own case-law on the role of fundamental rights in the European legal order. As early as 1969 it recognized that fundamental human rights were 'enshrined in the general principles of Community law' and, as such, protected by the Court itself.[21] Its subsequent reaffirmation of the same principle eventually led the German Constitutional Court to adopt a more nuanced approach, recognizing that the ECJ ensured a level of protection of fundamental rights substantially similar to that required by the national constitution, and, thus, that there was no need to verify the compatibility of every piece of Community legislation with the constitution.[22]

For a long time, the protection of fundamental rights against action by the Communities was therefore left to the ECJ, which elaborated a catalogue of rights drawn from the general principles of Community law and from the common constitutional traditions of the Member States. [23]

The Charter did not invent any new rights, but certainly smuggled into the Union some that had not been previously contemplated as Union rights *per se*. The drafters put together civil, political and cultural rights, on the one hand, and a selection of social and economic rights, on the other hand.[24]

This approach had been deliberately avoided in previous codification efforts[25]). The classic (and simplistic) view is that civil rights and liberties mostly require that States abstain from acting against them (a negative obligation), whereas economic and social rights impose a positive obligation on States to provide their citizens with tangible benefits, through which the enjoyment of those rights is possible. Accordingly, States are reluctant to enter into commitments.[26]

In fact, the reality now might be a little different, and the issue of enforceability of positive obligations might indeed arise. Concern about the direct invocability of certain norms is, in fact, visible in the Charter itself, which specifies that its provisions can be either rights or principles (or both). The main purpose of this distinction was clearly to single out those clauses that could not be deemed directly enforceable, and Art. 52(5) – a clause that was introduced at the request of the United Kingdom – tries to make this point painstakingly clear.

However, in order for this distinction to be relevant a head-count would be necessary: which of the provisions are rules and which are principles? The

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[17] Costa v. ENEL, Case 6/64.

[18] If European law was to prevail even over domestic constitutional law, it would become possible for it to breach the fundamental rights granted by national constitutions.

[19] See Solange I - Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel, decision of 29 May 1974, BVerfGE 37, 271 [1974] CMLR 540.

[20] See *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372. The *Frontini* case (1973) is of key significance, primarily for what has become known as the "Frontini Re serve". In this case, the CCI proclaimed that limitations on Italian state sovereignty imposed by the EC, are legitimate only in areas which are explicitly set out in the 1956 EC Treaty. More specifically, the *Frontini* case declared that European law can force the Italian national courts to revoke national laws that contradict European law; but, importantly, that this cannot apply to national laws that regulate the basic principles of the Italian constitution.

[21] Ibid. Supra 8.

[22] See Solange II - Wünsche Handelsgesellschaft decision of 22 October 1986, BVerfGE 73, 339, case number: 2 BvR 197/83, Europäische Grundrechte-Zeitschrift, 1987, 1, [1987] 3 CMLR 225, noted by Frowein (1988) 25 CMLRev 201.

[23] However, the absence of an explicit, written catalogue of fundamental rights, binding on the European Community and easily accessible to citizens, remained an issue of concern. Two main proposals were made on repeated occasions with the aim of filling this legislative gap. The first was that the European Community could accede to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), an already existing regional instrument aimed at protecting human rights, whose correct application by States Parties is supervised by the European Court of Human Rights. This option, however, was ruled out after the Court of Justice rendered an Opinion [2/94], according to which the Community lacked the competence to accede to the Convention. As a consequence, this avenue could only be pursued after the Treaties had been amended. The necessary amendments were finally adopted with the entry into force of the Treaty of Lisbon. Article 6 TEU now requires the Union to accede to the ECHR.The other proposal was that the Community should adopt its own Charter of Fundamental Rights, granting the Court of Justice the power to ensure its correct implementation. This approach was discussed on a number of occasions over the years and was proposed again during the 1999 European Council meeting in Cologne. See Conclusions of the European Council in Tampere, 15 and 16 October 1999, Annex ("Composition, Method of Work and Practical Arrangements for the Body to Elaborate a Draft EU Charter of Fundamental Rights, As Set Out in the Cologne Conclusions"). Meetings of the body responsible for preparing the draft Charter (renamed the "Convention") took taken place from December 1999 until the autumn of 2000. After agreement by the Convention of a final text of the Charter, the Presidents of the European Parliament, the Council of the European Union and the European Commission proclaimed the Charter on the 7th December 2000 on the fringes of the Nice European Council. See [2000] OJ C 364/8, 18 December 2000.

[24] The Charter, as now contained in the Constitution, is divided into seven parts: Title I: Dignity (Articles 11-61 to 11-65); Title II: Freedoms (Articles 11-66 to 11-79); Title III: Equality (Articles 11-80 to 1-86); Title IV: Solidarity (Articles 11-87 to 11-98); Title V: Citizens' Rights (Articles 11-99 to 11-106); Title VI: Justice (Articles 11-107 to 11-110); and Title VII: Final Dispositions (Articles 11-111 to 11-114). It includes not only restatements of traditional rights, but also innovations.

[25] ECHR is mostly concerned with the former kind of rights, but consider also the separation of the 1966 UN Covenants Namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

[26] Instead, the concept that no new State obligations could be derived from the Charter prevented at the outset the trite debate about negative and positive obligations, and defused concerns that positive rights, once written into the Charter, might give rise to obligations enforceable in courts.

Charter is silent more ambivalent on this point, and the Presidium's explanations failed to establish clear distinctions.[27] Ultimately, it seems to be something for case-law to decide upon; the courts will clarify which principles deserve direct application, *i.e.* which economic rights impose, except where otherwise noted content on this site is licensed under a Creative Commons 2.5 Italy License E – 26 positive obligations on Member States.[28]

### 2. Interpretation of the EU Charter

In order to understand the impact of the Charter on EU law the scope of it has to be determined, both regarding when it is applicable and how the provisions within it should be interpreted. According to Article 51 para 1 of the Charter, the provisions of the Charter are addressed to the Member States only when they are implementing Union law. Explanations relating to the Charter ,[29] which (according to the Article 6 of the TEU and Article 52 para 7 of the Charter) provide guidance in the interpretation of the Charter, state that as regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law. The Explanations are used to show that case-law pre-dating the Charter is applicable in interpreting the meaning of the provisions. The Court of Justice confirmed this case-law in the following terms:

'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...'.[30] This case-law includes two situations where the Charter imposes obligations on the member states, in accordance with Article 51 of the Charter. The first one is when there is an EU obligation that requires the member states to take actions; the second one is when a member state derogates from EU law. When the member states implement legislation that does not follow from an EU law obligation the Charter is not applicable.

In *Wachauf*[31] and *Karlsson*[32], which both dealt with fundamental rights based on the general principles, the CJEU held that those rights where binding upon the member states when applying a normative scheme put in place by the EU legislator.[33] According to Lenaerts the *ERT* case[34] shows, contrary to the view of other scholars, that the Charter in fact does apply when the member states derogate from EU law.[35] The *ERT* case is mentioned explicitly in the Explanations concerning Article 51, which supports that the fundamental rights in the Charter must be respected when member states derogate from EU law.

Following the rules relating to the application of the Charter, the Charter shall not be applicable as to the "exclusive Member States competences" or belonging to their "reserved domain". But even in the fields where Member States remain competent to regulate while the Union is not competent to lay down rules, the Member States must exercise their competence with regard to Union law.[36]

ECJ in the cases of *Melloni*[37] and *Åkerberg Fransson*[38] have received due attention. Both cases dealt with the interpretation of the Charter, and hence with the future course fundamental rights protection at the EU level is likely to take. In *Melloni*, first, the ECJ ruled that in principle Member States are allowed to apply (higher) national fundamental rights standards in matters falling within the reach of EU law, but only 'provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not

[27] A very accurate appraisal of the Praesidium's explanations, which also accounts for their ambiguity on the right/principle divide, is provided in Sciarabba: 2005.

[28] On the similar duty as undertaken by the ECtHR (through the expansive use of Arts. 2, 3, and 8 of the Convention, and through the development of new safeguards for non-discrimination and procedural fairness (Arts. 6 and 14).

[29] Explanations relating to the Charter of Fundamental Rights. OJ C 303, 14.12.2007, p. 17 - 36. The Explanations relating to the Charter are not legally binding but an interpretative tool. The interpretative value of the Explanations should be higher than that of *travaux préparatoires* since the authors to the Treaty of Lisbon and those of the Charter has stressed the importance of the Explanations. Hence, in practice the CJEU cannot interpret the Charter contrary to the Explanations without engaging in judicial activism.

[30] Judgment of 13 April 2000 in a case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds. This rule applies to the central authorities of the Member States as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

[31] Case 5/88 [1989].

[32] Case C-292/97 [2000].

[33] As regards the derogation situation Lord Goldsmiot (The Charter of Rights, Freedoms and Principles, Common Market Review 38: 1201-1216, 2001) and former Advocate General Jacobs (J.G Jacobs, Human Rights in the European Union: The role of the Court of Justice, European Law Review, No. 4, 331-341, 2001) among others have argued that the Charter should not apply, while the general principles should apply.

[34] Case C-260/89 [1991].

[35] In the *ERT* case the ECJ states that when deciding whether rules that obstruct the freedom to provide services can be justified according to EU law it has to be 'interpreted in the light of general principles of law and in particular of fundamental rights'. The *ERT* case also confirms that fundamental rights were considered general principles before the Charter was adopted. When member states derogate from EU law, the general principles demand that the fundamental rights are respected.

[36] See, for example: Judgment of the Court of Justice of 2 October 2003 in case *C-148/02 Carlos Garcia Avello v Belgian State*, European Court reports 2003 Page I-11613, paragraph 25. Judgment of the Court of Justice of 12 May 2011 in a case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, paragraph 63.

[37] Case C-399/11 [2013].

[38] Case C-617/10 [2013].

thereby compromised'.[39] Secondly, in *Åkerberg Fransson* the ECJ opted for a wide interpretation of Article 51(1) of the Charter. This section holds that the provisions of the Charter are addressed 'to the Member States only when they are implementing Union law'.[40]

According to Article 6 of the TEU, the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Article 51 para 2 of the Charter confirms that the Charter may not have the effect on extending the field of application of Union law beyond the powers of the Union as defined in the Treaties. But, extending the scope of application of the Charter by the way of extending the scope of application of EU law is not excluded by these provisions. It follows that in order the Charter to be applied the link with EU law has to be established. Whenever a link can be established between a national measure and the application of the provisions of EU law (e.g., with respect to EU law on European citizenship, by moving to or visiting another Member State – cross-border link), the protection of fundamental rights at EU level is activated and thus the Charter of Fundamental rights should be applied. If, such a link is not found, the Charter will not apply. Extending the field (scope) of application of the Union law has the effect of extending the scope of application of the Charter.

Finally, the relationship between ECHR and the Charter is mainly regulated in Article 52(3) which "is intended to ensure the necessary consistency between the Charter and the ECHR", "without thereby adversely affecting the autonomy of [EU] law and of that of the [ECJ]". The autonomy of EU law could mainly be grounded on the principle "of the more extensive protection", which means that the provisions formally affirm that the level of protection maintained under EU law could never be lower than that guaranteed by the ECHR. In light of the Explanations relating to the Charter the provisions are formulated in a way allowing the Union to guarantee more extensive protection and never offer a lower protection of the rights than contained in ECHR.

As a final point, the Charter does not pose a serious threat towards the national constitutions. The implementation of the Charter does not alter the division of competence between the Union and the member states. Also, the existence of the Charter is not aimed to extend the competence of the EU institutions, especially that of the ECJ.[41]

**Applicability of the Charter to the Member States**

The question of application of Union fundamental rights at Member States' level has caused more discussion and concerns. When should national courts and authorities apply the Charter, and Union fundamental rights in general, rather than fundamental rights recognised in the national constitution and in international human rights instruments binding on the Member State in question?

In the light of the above, it should not have come as a surprise to anyone when the ECJ, in *Wachauf*, confirmed that Union fundamental rights 'are also binding on the Member States when they implement Community rules'.[42] In *ERT* and subsequently, the test was formulated as a requirement that the national measures 'fall within the scope of Community law'.[43] Contrary to what some of the discussions at the Convention which prepared the Charter of Fundamental Rights appeared to assume,[44] the Court did not launch any radical new principle in these judgments but simply stated the obvious.

That said, it has not always been easy to draw the line separating those national rules that fall within the scope of Union law from those falling outside that scope. In some cases, the ECJ has concluded that the link between the national measures and Union law was not sufficiently direct or strong and that the national measure thus fell outside the scope of Union law (perhaps the most well-known case concerned a prisoner who attempted to invoke his Union law right to move and reside freely as a basis for contesting his prison sentence).[45] A number of examples best illustrate the issues that can arise.[46]

[39] Para 60.

[40] However, in *Åkerberg* theECJ did not consider this reason to refrain from reviewing an issue concerning an offence of national value-added tax evasion and the application of the *ne bis in idem* principle in Sweden.

[41] It is also worth noting that the translations to the Charter are not coherent between the language versions. This will lead to problems when it comes to how the Charter should be interpreted in practice when the formulations are dissimilar between the member states. For how the ECJ handles this issue, see the recent judgment in *Åklagare v. Hans Åkerberg Fransson* (Case C-617/10 [2013]).

[42] Case 5/88 *Wachauf* [1989] ECR 2607, para 19. See also Case 36/75 *Rutili* [1995] ECR, 1219; Case 63/83 *Kent Kirk* [1984] ECR 2689; Case 249/86 *Commission v. Germany* [1989] ECR 1263.

[43] Case C-260/89 *Elliniki Radiophonia Tileorassi* (ERT) [1991] ECR I-2925. See also Case C-159/90 *Grogan* [1991] ECR I-4605, para. 31.

[44] Rosas, A. Is the EU a Human Rights Organisation? *CLEER Working Papers 2011/1.* The Hague: T.M.C Asser Institute, 2011.

See, e.g. de Búrca, G. The Drafting of the European Union Charter of Fundamental Rights. *European Law Review.* 2001, 26: 126, 136; Eeckhout, P. The EU Charter of Fundamental Rights and the Federal Question. *Common Market Law Review.* 2002, 39: 945, 954.

[45] Case C-299/95 *Kremzov* [1997] ECR I-2405. See also Case C-159/90 *Grogan, supra* note 19; Case C-306/96 *Annibaldi* [1997] ECR I-7493.

[46] See Case C-60/00 *Carpenter* [2002] ECR I-6279, paras 37–40; Case C-117/01 *KB* [2004] ECR I-541, paras 30–34. In the case of *Goodwin v UK* and *I v UK*, judgment of 11 July 2002, the European Court of Human Rights had held that the fact that it was impossible for a transsexual to marry a person of the sex to which he or she had belonged prior to gender reassignment was a breach of the right to marry; Case C-71/02 *Karner* [2004] ECR I-3025; Case C-144/04 *Mangold* [2005] ECR I-9981; Case C-555/07 *Kücükdeveci* [2010] ECR I-365. In *Kücükdeveci*, the problem did not arise in the same way as the deadline for the implementation of Directive 2000/78 had expired. These two cases also raise the question of horizontal application of Union fundamental rights; and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed term work concluded by ETUC, UNICE and CEEP, [1999] OJ L175/43.

National judges are increasingly aware of the Charter's impact, and they seek guidance from the Court on its application and interpretation under the preliminary rulings procedure.[47] To determine whether a situation falls within the scope of the Charter, as defined in its Article 51, the Court examines, in particular, whether the relevant national legislation is intended to implement a provision of EU law, the nature of the legislation, whether it pursues objectives other than those covered by EU law, and also whether there are specific rules of EU law on the matter or which may affect it.[48]

Three recent cases are good examples of situations where the Court held that the Member States were not implementing EU law, and thus where the Charter did not apply.

First, in *Pringle*[49]*Pringle*4, the Court held that when Member States established a permanent crisis resolution mechanism for the Eurozone countries, they were not implementing EU law. The Treaties do not confer any specific competence on the EU to establish such a mechanism. Consequently, Member States were not implementing EU law within the meaning of Article 51, and the Charter did not apply.

Second, in *Fierro and Marmorale*[50],*Marmorale*5, the Court examined Italian legislation which requires a deed of sale of real estate to be annulled if the real estate was modified without regard to town planning laws. Such automatic annulment hampers the exercise of the right to property (Article 17[51]). The Court declared the case inadmissible as there was no link between national laws on town planning and EU law.

Third, in *Cholakova*[52], the Court examined a situation where the Bulgarian police had arrested Mrs Cholakova because she had refused to present her identity card during a police check. The Court held that, as Mrs. Cholakova had not shown an intention to leave Bulgarian territory, the case was of a purely national nature. The Court held that it was not competent to deal with the case and declared it inadmissible.

There are currently three situations in which it is clear that the application of the Charter is triggered.

First, 'implementing EU law' covers a Member State's legislative activity and judicial and administrative practices when fulfilling obligations under EU law. This is the case, for instance, when Member States ensure effective judicial protection for safeguarding rights which individuals derive from EU law, as they are obliged to do under Article 19 (1) TEU. The Free Movement Directive[53] permits Member States to restrict the freedom of movement of EU citizens on grounds of public policy, public security or public health. The Court held in the *ZZ* case that the basis for such a refusal must be disclosed to the person concerned.[54] In this case, the grounds for a decision refusing entry into the UK were not disclosed for reasons of national security. The Court confirmed that a person has the right to be informed of the basis for a decision to refuse entry, as the protection of national security cannot deny the right to a fair hearing, rendering the right to redress ineffective (Article 47).

Second, the Court established that the Charter applies when a Member Stat authority exercises a discretion that is vested in it by virtue of EU law. In *Kaveh Puid*[55], the Court confirmed its previously established case-law[56]and held that a Member State must not transfer an asylum seeker to the Member State initially identified as responsible if there are substantial grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment, in violation of Article 4 of the Charter.

Finally, national measures linked to the disbursement of EU funds under shared management may constitute implementation of EU law. In *Blanka Soukupová*[57]*Soukupová*12, the Court held that in implementing Council Regulation 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund Member States are required to respect the principles of equal treatment and nondiscrimination, enshrined in Articles 20, 21(1) and 23 of the Charter. When providing early retirement support for elderly farmers, Member States are required to ensure equal treatment between women and men, and to prohibit any discrimination on grounds of gender.

**Conclusion**

The Charter is binding on the Member States when they act within the scope of application of Union law. Member States are binding by the provisions of the Charter whenever the link with EU law is established. In such case, national measures, even the ones falling within the exclusive competences of the Member States, has to respect the provisions of the Charter.

[47] See Article 267 TFEU.
[48] ECJ, C-309/96 *Annibaldi* 18.12.1997, §§ 21 to 23, and C-40/11 *Iida*, 8.11.2012, § 79.
[49] ECJ, C-370/12, *Thomas Pringle*, 27.11.2012.
[50] ECJ, C-106/13, *Francesco Fierro and Fabiana Marmorale v Edoardo Ronchi and Cosimo Scocozza*, 30.5.2013.
[51] Subsequent articles referred to in brackets are Charter articles.
[52] ECJ, C-14/13, *Gena Ivanova Cholakova*, 6.6.2013.
[53] Directive 2004/38/EC, OJ 2004 L 158, p. 77.
[54] ECJ, C-300/11 *ZZ v Secretary of State for the Home Department*, 4.6.2013.
[55]ECJ, C-4/11 *Bundesrepublik Deutschland v Kaveh Puid*, 14.11.2013.
[56] ECJ, joined cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department*, 21.12.2011.
[57] ECJ, C-401/11 *Blanka Soukupová*, 11.04.2013.

In 2013 the Court dealt with a large number of cases concerning the Charter's applicability at national level. This highlights the Charter's increasing interaction with national legal systems. In this context, the *Åkerberg Fransson* judgment plays an important role in further defining the Charter's application in the Member States by national judges, even though the case law in this respect is still evolving and likely to be continuously refined. National judges are key actors in giving concrete effect to the rights and freedoms enshrined in the Charter, as they directly ensure that individuals obtain full redress in cases where fundamental rights within the scope of EU law have not been respected.

EU institutions have made significant efforts to ensure the consistent application of the Charter's provisions since it gained legally binding force as primary EU law. Any impact on fundamental rights needs to be carefully considered during legislative procedures, especially at the stage of elaborating final compromise solutions. A strong inter-institutional commitment is required to achieve this goal. EU legal acts can also be challenged before the Court for any infringements of fundamental rights. The Court's scrutiny extends to Member States as well, but only where they implement EU law. Outside that area, Member States apply their own national fundamental rights systems. This is a clear and deliberate choice made by the Member States when designing the Charter and the Treaty. The EU institutions must go further than merely respecting the legal requirements following from the Charter. They must continue fulfilling the political task of promoting a fundamental rights culture for all, citizens, economic actors and public authorities alike. The fact that the Commission has received more than 3 000 letters from the general public regarding the respect of fundamental rights indicates that individuals are aware of their rights and demand respect for them. The Commission supports their endeavours.[58]

It is not yet clear how far the ECJ will go to interpret the Charter favourably in the application of EU law, whether it will engage with principles in a normative fashion or actually add nothing to the existing law. However it has already started to use the Charter in its consideration of cases, both indirectly and upon application.

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