Between Unity and Diversity

The Application of the Charter of Fundamental Rights in the Light of the Principle of Subsidiarity

University of Helsinki
Faculty of Law
Master's Thesis in EU Law
October 2015
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Tiedekunta/Osasto Fakultet/Sektion – Faculty	Laitos/Institution – Department
Faculty of Law	European Law

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Työn nimi/Arbetets titel – Title
Between Unity and Diversity – The Application of the Charter of Fundamental Rights in the Light of the Principle of Subsidiarity

Oppiaine/Läroämne – Subject
EU Law

Työn laji/Arbetets art – Level	Aika/Datum – Month and year	Sivumäärä/Sidoantal – Number of pages
Master's Thesis	October 2015	LIV + 124

Tiivistelmä/Referat – Abstract

The aim of this study is to examine the application of the Charter of Fundamental Rights of the European Union in the light of the principle of subsidiarity in EU law. The Charter constitutes a point of intersection of subsidiarity and fundamental rights, brought together by their common purpose of guiding the exercise of public powers and reconciling a diversity of Member State values with the need for European unity. With a particular focus on the case law of the Court of Justice of the European Union, the study embraces the principle of subsidiarity for the purpose of interpreting the legal nature of the Charter and systemising its application.

The formal link between subsidiarity and fundamental rights under the Charter is found in Article 51(1). In order to clarify the legal nature of the Charter and the context in which it operates, the study looks into how fundamental rights and subsidiarity have developed in EU law as well as how they are interrelated. The subsidiary nature of EU fundamental rights law is demonstrated by the restrictive personal and material scope of the Charter. Similarly, the principle of subsidiarity is used to analyse the Charter's minimum and maximum level of protection.

The Court's application of the Charter is analysed by examining the expressions that the principle of subsidiarity takes when the Charter is balanced with economic freedoms, applied in conjunction with other norms, used to invalidate EU norms or called to set aside national legal acts. In addition to this, the analysis considers the role of subsidiarity in cases where the Charter was not applied, either because the Court lacked jurisdiction or remained silent on its applicability.

The study demonstrates how the legal nature of the Charter to a great extent can be explained through the principle of subsidiarity. However, the EU legal order has its proper understanding of subsidiarity in relation to fundamental rights. Fundamental rights protection is only one of several EU objectives that need to be balanced when determining the appropriate level of action. Ultimately, the application of the Charter is triggered by the need to preserve the primacy, unity and effectiveness of EU law. Only in exceptional circumstances, these requirements may be overridden with reference to the principle of legal certainty, as recognised by the Charter. Conversely, subsidiarity as an interpretative principle of EU fundamental rights law may also contribute to enhanced legal certainty regarding the application of the Charter.

Avainsanat – Nyckelord – Keywords
European Union; European integration; EU law; Fundamental rights; Charter of Fundamental Rights of the European Union; Subsidiarity; Principle of subsidiarity; Primacy; Effectiveness; Unity; Diversity; Constitutional pluralism; Human rights

Säilytyspaikka – Förvaringställe – Where deposited
Helsinki University Library, Main Library, Law

Muita tietoja – Övriga uppgifter – Additional information

Tiedekunta/Osasto Fakultet/Sektion – Faculty Juridiska fakulteten	Laitos/Institution – Department Europarätt

Tekijä/Författare – Author
Smedman Joakim

Työn nimi/Arbetets titel – Title
Between Unity and Diversity – The Application of the Charter of Fundamental Rights in the Light of the Principle of Subsidiarity

Oppiaine/Läroämne – Subject
EU-rätt

Työn laji/Arbetets art – Level	Aika/Datum – Month and year	Sivumäärä/Sidoantal – Number of pages
Magisteravhandling	Oktober 2015	LIV + 124

Tiivistelmä/Referat – Abstract

Syftet med denna avhandling är att undersöka tillämpningen av Europeiska unionens stadga om de grundläggande rättigheterna i ljuset av den EU-rättsliga subsidiaritetsprincipen. Stadgan utgör en skärningspunkt för subsidiaritet och grundläggande rättigheter, vilka förenas av en gemensam strävan att reglera utövningen av offentlig makt och sammanjämka medlemsstaternas mångfacetterade värderingar med behovet av europeisk gemenskap. Med särskilt fokus på rättspraxis från Europeiska unionens domstol antar undersökningen subsidiaritetsprincipen som ett led i uttolkningen av stadgans rättsliga status och systematiseringen av dess tillämpning.

Den formella kopplingen mellan subsidiaritet och grundläggande rättigheter återfinns i artikel 51(1) i stadgan. Avhandlingen undersöker hur de grundläggande rättigheterna och subsidiaritetsprincipen har utvecklats inom EU-rätten samt deras inbördes förhållande, i syfte att klargöra stadgans rättsliga status och den kontext i vilken den verkar. Den subsidiära karaktär som EU-rättens grundläggande rättigheter besitter framgår av stadgans begränsade personkrets och tillämpningsområde. Subsidiaritetsprincipen kan även tillämpas på analysen av minimi- och maximinivån på det skydd som stadgan erbjuder.

Domstolens tillämpning av stadgan analyseras med utgångspunkt i de uttryck som subsidiaritetsprincipen tar när stadgan vägs mot de ekonomiska friheterna, tillämpas i kombination med andra rättsnormer, används för att ogiltigförklara EU-rättsliga normer eller åberopas för att åsidosätta nationell lagstiftning. Därtill beaktas betydelsen av subsidiaritetsprincipen i rättsfall där stadgan inte tillämpats, antingen eftersom domstolen saknat behörighet eller låtit bli att uttala sig om dess tillämplighet.

Avhandlingen visar hur stadgans rättsliga status i stor utsträckning kan förklaras med hjälp av subsidiaritetsprincipen. EU-rätten har emellertid en särpräglad tolkning av subsidiaritetsprincipen i förhållande till grundläggande rättigheter. Skyddet för de grundläggande rättigheterna är endast en av EU:s många målsättningar som måste vägas mot varandra när domstolen fastställer på vilken nivå en åtgärd ska anses ändamålsenlig. Särskilt behovet att bevara EU-rättens företräde, enhetlighet och verkan kan ses som utlösande faktorer för tillämpningen av stadgan. Endast i undantagsfall kan dessa förutsättningar åsidosättas med hänvisning till individens rättssäkerhet som erkänns i stadgan. I egenskap av tolkningsprincip för EU:s grundläggande rättigheter kan subsidiaritetsprincipen samtidigt också anses bidra till ökad förutsebarhet vad gäller stadgans tillämplighet.

Avainsanat – Nyckelord – Keywords
Europeiska unionen; europeisk integration; EU-rätt; grundläggande rättigheter; Europeiska unionens stadga om de grundläggande rättigheterna; subsidiaritet; subsidiaritetsprincipen; unionsrättens företräde; verkan; enhetlighet; diversitet; konstitutionell pluralism; mänskliga rättigheter

Säilytyspaikka – Förvaringställe – Where deposited
Helsingfors universitets bibliotek, huvudbiblioteket, juridik

Muita tietoja – Övriga uppgifter – Additional information

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C-41/74 Judgment in Case *Yvonne van Duyn v Home Office* [4.12.1974] ECR 1337, ECLI:EU:C:1974:133 ('*Van Duyn*').

C-36/75 Judgment in Case *Roland Rutili v Ministre de l'intérieur* [28.10.1975] ECR 1219, ECLI:EU:C:1975:137 (‘*Rutili*’).

C-43/75 Judgment in Case *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [8.4.1976] ECR 455, ECLI:EU:C:1976:56 (‘*Defrenne I*’).

C-13/76 Judgment in Case *Gaetano Donà v Mario Mantero* [14.7.1976] ECR 1333, ECLI:EU:C:1976:115 (‘*Donà*’).

C-51/76 Judgment in Case *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1.2.1977] ECR 113, ECLI:EU:C:1977:12 (‘*Verbond*’).

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C-149/77 Judgment in Case *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [15.6.1978] ECR 1365, ECLI:EU:C:1978:130 (‘*Defrenne II*’).

C-31/78 Judgment in Case *Francesco Bussone v Ministro dell'agricoltura e foreste* [30.11.1978] ECR 2429, ECLI:EU:C:1978:217 (‘*Bussone*’).

C-120/78 Judgment in Case *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [20.2.1979] ECR 649, ECLI:EU:C:1979:42 (‘*Cassis de Dijon*’).

C-148/78 Judgment in Case *Criminal proceedings against Tullio Ratti* [5.4.1979] ECR 1629, ECLI:EU:C:1979:110 (’*Ratti*’).

C-175/78 Judgment in Case *The Queen v Vera Ann Saunders* [28.3.1979] ECR 1129, ECLI:EU:C:1979:88 (‘*Saunders’*).

C-44/79 Judgment in Case *Liselotte Hauer v Land Rheinland-Pfalz* [13.12.1979] ECR 3727, ECLI:EU:C.1979:290 (‘*Hauer*’).

C-149/79 Judgment in Case *Commission of the European Communities v Kingdom of Belgium* [26.5.1982] ECR 1845, ECLI:EU:C:1982:195 (‘*Workers’ Nationality*’).

C-152/82 Case *Sandro Forcheri and his wife Marisa Forcheri, née Marino, v Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées - Ecole Ouvrière Supérieure* [13.7.1983] ECR 1983, ECLI:EU:C:1983:205 (‘*Forcheri*’).

C-218/82 Judgment in Case *Commission of the European Communities v Council of the European Communities* [13.12.1983] ECR 4063, ECLI:EU:C:1983:369 (‘*Commission v Council I*’).

C-222/82 Judgment in Case *Apple and Pear Development Council v K.J. Lewis Ltd and Others* [13.12.1983] ECR 4083, ECLI:EU:C:1983:370 (‘*Apple*’).

C-14/83 Judgment in Case *Sabine Von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [10.4.1984] ECR 1891, ECLI:EU:C:1984:153 (‘*Von Colson’*).

C-15/83 Judgment in Case *Denkavit Nederland BV v Hoofdproduktschap voor Akkerbouwprodukten* [17.5.1984] ECR 2171, ECLI:EU:C:1984:183 (‘*Denkavit*’).

C-16/83 Judgment in Case *Criminal proceedings against Karl Prantl* [13.3.1984] ECR 1299, ECLI:EU:C:1984:101 (‘*Prantl*’).

C-63/83 Judgment in Case *Regina v Kent Kirk* [10.7.1984] ECR 2689,

ECLI:EU:C:1984:255 (‘*Kirk’*).

C-240/83 Judgment in Case *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [7.2.1985] ECR 531, ECLI:EU:C:1985:59 (‘*Bruleurs*’).

C-294/83 Judgment in Case *Parti écologiste "Les Verts" v European Parliament* [23.4.1986] ECR 1339, ECLI:EU:C:1986:166 (‘*Les Verts*’).

C-60/84 & 61/84 Judgment in Joined Cases *Cinéthèque SA and Others v Fédération nationale des cinémas français* [11.7.1985] ECR 2605, ECLI:EU:C:1985:329 (‘*Cinéthèque*’).

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C-12/86 Judgment in Case *Meryem Demirel v Stadt Schwäbisch Gmünd* [30.9.1987] ECR 3719, ECLI:EU:C:1987:400 (‘*Demirel*’).

C-31/86 & 35/86 Judgment in Joined Cases *Levantina Agricola Industrial SA (LAISA) and CPC España SA v Council of the European Communities* [28.4.1988] ECR 2285, ECLI:EU:C:1988:211 (’*LAISA*’).

C-222/86 Judgment in Case *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and Others* [15.10.1987] ECR 4097, ECLI:EU:C:1987:442 (‘*Heylens*’).

C-249/86 Judgment in Case *Commission of the European Communities v Federal Republic of Germany* [18.5.1989] ECR 1263, ECLI:EU:C:1989:204 (‘*Appropriate Housing*’).

C-302/86 Judgment in Case *Commission of the European Communities v Kingdom of Denmark* [20.9.1988] ECR 4607, ECLI:EU:C:1988:421 (‘*Danish Bottles*’).

C-379/87 Judgment in Case *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [28.11.1989] ECR 3967, ECLI:EU:C:1989:599 (‘*Groener*’).

C-5/88 Judgment in Case *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [16.7.1989] ECR 2609, ECLI:EU:C:1989:32 (‘*Wachauf*’).

C-143/88 & 92/89 Judgment in Joined Cases *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [21.2.1991] ECR I-415, ECLI:EU:C:1991:65 (’*Zuckerfabrik*’).

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C-106/89 Judgment in Case *Marleasing SA v La Comercial Internacional de Alimentacion SA* [13.11.1990] ECR I-4135, ECLI:EU:C:1990:395 (‘*Marleasing*’).

C-260/89 Judgment in Case *lliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others* [18.6.1991] ECR 2925, ECLI:EU:C:1991:254 (‘*ERT*’).

C-314/89 Judgment in Case *Siegfried Rauh v Hauptzollamt Nürnberg-Fürth* [21.3.1991] ECR I-1647, ECLI:EU:C:1991:143 (‘*Rauh*’).

C-6/90 & 9/90 Joined Cases *Andrea Francovich and Danila Bonifaci and Others v Italian Republic* [19.11.1991] ECR I-5357, ECLI:EU:C:1991:428 (‘*Francovich*’).

C-62/90 Judgment in Case *Commission of the European Communities v Federal Republic of Germany* [8.4.1992] ECR I-2575, ECLI:EU:C:1992:169 (‘*Medicinal Products*’).

C-159/90 Judgment in Case *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and Others* [4.10.1991] ECR I-4685, ECLI:EU:C:1991:378 (’*Grogan*’).

C-332/90 Judgment in Case *Steen v Deutsche Bundespost* [28.1.1992] ECR I–341, ECLI:EU:C:1992:40 (’*Bundespost*’).

C-2/91 Judgment in Case *Criminal proceedings against Wolf W. Meng* [17.11.1993] ECR I-5751, ECLI:EU:C:1993:885 (’*Meng*’).

C-13/91 & 113/91 Judgment in Joined Cases *Criminal proceedings against Michel Debus* [4.6.1992] ECR I-3617, ECLI:EU:C:1992:247 (’*Debus*’).

C-156/91 Judgment in Case *Hansa Fleisch Ernst Mundt GmbH & Co. KG v Landrat des Kreises Schleswig-Flensburg* [10.11.1992] ECR I-5567, ECLI:EU:C:1992:423 (’*Hansa Fleisch*’).

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C-317/91 Judgment in Case *Deutsche Renault AG v AUDI AG* [30.11.1993] ECR I-6227, ECLI:EU:C:1993:908 (’*Audi*’).

C-2/92 Judgment in Case *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock* [24.3.1994] ECR I-955, ECLI:EU:C:1994:116 (’*Bostock*’).

C-11/92 Judgment in Case *The Queen v Secretary of State for Health, ex parte Gallaher Ltd, Imperial Tobacco Ltd and Rothmans International Tobacco (UK) Ltd* [22.6.19993] ECR I-3545, ECLI:EU:C:1993:262 ('*Gallaher*').

C-52/92 Judgment in Case *Commission of the European Communities v Portuguese Republic* [22.5.1993] ECR I-2961, ECLI:EU:C:1993:216 ('*Commission v Portugal*').

C-404/92 P Judgment in Case *X v Commission of the European Communities* [5.10.1994] ECR I-4737, ECLI:EU:C:1993:216 ('*X*').

C-46/93 & 48/93 Judgment in Joined Cases *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* [5.3.1996] ECR I-1029, ECLI:EU:C:1996:179 ('*Brasserie du Pêcheur*').

C-280/93 Judgment in Case *Federal Republic of Germany v Council of the European Union* [5.10.1994] ECR I-4973, ECLI:EU:C:1994:367 ('*Germany v Council*').

C-321/93 Judgment in Case *José Imbernon Martínez v Bundesanstalt für Arbeit* [5.10.1995] ECR I-531, ECLI:EU:C:1995:306 ('*Martinéz*').

C-415/93 Judgment in Case *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [15.12.1995] ECR I-4921, ECLI:EU:C:1995:463 ('*Bosman*').

C-426/93 Judgment in Case *Federal Republic of Germany v Council of the European Union* [9.11.1995] ECR I-4845, ECLI:EU:C:1995:367 ('*Germany* v *Council*').

C-430/93 & 431/93 Joined Cases *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [14.12.1995] ECR I-4705, ECLI:EU:C:1995:441 ('*Schijndel*').

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C-55/94 Judgment in Case *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [30.11.1995] ECR I-4165, ECLI:EU:C:1995:411 ('*Gebhard*').

C-84/94 Judgment in Case *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [12.11.1996] ECR I-5755, ECLI:EU:C:1996:431 ('*UK v Council*').

C-150/94 Judgment in Case *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [19.11.1998] ECR I-7235, ECLI:EU:C:1998:547 ('*China Toys*').

C-192/94 Judgment in Case *El Corte Inglés SA v Cristina Blázquez Rivero* [7.3.1996] ECR I-1281, ECLI:EU:C:1996:88 ('*Corte Inglés*').

C-209/94 P Judgment in Case *Buralux SA, Satrod SA and Ourry SA v Council of the European Union* [15.2.1996] ECR I-615, ECLI:EU:C:1996:54 ('*Buralux*').

C-233/94 Judgment in Case *Federal Republic of Germany v European Parliament and Council of the European Union* [13.5.1997] ECR I-2405, ECLI:EU:C:1997:231 ('*Germany v EP & Council*').

C-321/94 – 324/94 Judgment in Joined Cases *Criminal proceedings against Jacques Pistre, Michèle Barthes, Yves Milhau and Didier Oberti* [7.5.1997] ECR I-2343, ECLI:EU:C:1997:229 ('*Pistre*').

C-11/95 Judgment in Case *Commission of the European Communities v Kingdom of Belgium* [10.9.1996] ECR I-6757, ECLI:EU:C:1996:316 ('*Commission v Belgium*').

C-18/95 Judgment in Case *F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/ Ondernemingen buitenland* [26.1.1999] ECR I-345, ECLI:EU:C:1999:22 ('Terhoeve').

C-68/95 Judgment in Case *T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung* [26.11.1996] ECR I-6065, ECLI:EU:C:1996:452 ('*Port*').

C-91/95 P Judgment in Case *Roger Tremblay, Harry Kestenberg and Syndicat des exploitants de lieux de loisirs (SELL) v Commission of the European Communities* [24.10.1996] ECR I-5547, ECLI:EU:C:1996:407 ('*Tremblay*').

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C-265/95 Judgment in Case *Commission of the European Communities v French Republic* [9.12.1997] ECR I-6959, ECLI:EU:C:1997:595 ('*Commission v France*').

C-299/95 Judgment in Case *Friedrich Kremzow v Republik Österreich* [29.5.1997] ECR I-2629, ECLI:EU:C:1997:254 ('*Kremzow*').

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C-51/96 & 191/97 Judgment in Joined Cases *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée* [11.4.2000] ECR I-2549, ECLI:EU:C:2000:199 ('*Deliège*').

C-64/96 & 65/96 Joined Cases *Land Nordrhein-Westfalen v Kari Uecker* and *Vera Jacquet v Land Nordrhein-Westfalen* [5.6.1996] ECR I-3171, ECLI:EU:C:1997:285 ('*Uecker*').

C-186/96 Judgment in Case *Stefan Demand v Hauptzollamt Trier* [17.12.1998] ECR I-8529, ECLI:EU:C:1998:609 ('*Demand*').

C-249/96 Judgment in Case *Lisa Jacqueline Grant v South-West Trains Ltd* [17.2.1998] ECR I-621, ECLI:EU:C:1998:63 ('*Grant*').

C-309/96 Judgment in Case *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [18.12.1997] ECR I-7493, ECLI:EU:C:1997:631 ('*Annibaldi*').

C-376/96 Judgment in Case *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL* [23.11.1999] ECR I-8453, ECLI:EU:C:1999:575 ('*Leloup*').

C-36/97 & 37/97 Judgment in Joined Cases *Hilmar Kellinghusen v Amt für Land- und Wasserwirtschaft Kiel* and *Ernst-Detlef Ketelsen v Amt für Land- und Wasserwirtschaft Husum* [22.10.1998] ECR I-6337, ECLI:EU:C:1998:499 ('*Ketelsen*').

C-273/97 Judgment in Case *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [26.10.1999] ECR I-7403, ECLI:EU:C:1999:523 ('*Sirdar*').

C-292/97 Judgment in Case *Kjell Karlsson and Others* [13.4.2000] ECR I-2737, ECLI:EU:C:2000:202 ('*Karlsson*').

C-17/98 Judgment in Case *Emesa Sugar (Free Zone) NV v Aruba* [8.2.2000] ECR I-665, ECLI:EU:C:2000:70 ('*Emesa Sugar*').

C-281/98 Judgment in Case *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [6.6.2000] ECR I-4139, ECLI:EU:C:2000:296 ('*Angonese*').

C-285/98 Judgment in Case *Tanja Kreil v Bundesrepublik Deutschland* [11.1.2000] ECR I-69, ECLI:EU:C:2000:2 ('*Kreil*').

C-300/98 & 392/98 Judgment in Joined Cases *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH* and *Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* [14.12.2000] ECR I-11307, ECLI:EU:C:2000:688 ('*Dior*').

C-376/98 Judgment in Case *Federal Republic of Germany v European Parliament and Council of the European Union* [5.10.2000] ECR I-8419, ECLI:EU:C:2000:544 ('*Germany v EP & Council*').

C-377/98 Judgment in Case *Kingdom of the Netherlands v European Parliament and Council of the European Union* [9.10.2001] ECR I-7079, ECLI:EU:C:2001:523 ('*Netherlands v EP & Council*').

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C-173/99 Judgment in Case *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [26.6.2001] ECR I-4881, ECLI:EU:C:2001:356 ('*BECTU*').

C-274/99 P Judgment in Case *Bernard Connolly v Commission of the European Communities* [6.3.2001] ECR I-1611, ECLI:EU:C:2001:127 ('*Connolly*').

C-309/99 Judgment in Case *J.C.J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap* [19.2.2002] ECR I-1577, ECLI:EU:C:2002:98 ('*Wouters*').

C-413/99 Judgment in Case *Baumbast and R v Secretary of State for the Home Department* [17.9.2002] ECR I-7091, ECLI:EU:C:2002:493 ('*Baumbast*').

C-453/99 Judgment in Case *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [20.9.2001] ECR I-6297, ECLI:EU:C:2001:465 ('*Courage*').

C-20/00 & 64/00 Judgment in Joined Cases *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers* [10.7.2003] ECR I-7411, ECLI:EU:C:2003:397 ('*Aqualculture*').

C-50/00 P Judgment in Case *Unión de Pequeños Agricultores v Council of the European Union* [25.7.2002] ECR I-6677, ECLI:EU:C:2002:462 ('*Pequeños Agricultores*').

C-60/00 Judgment in Case *Mary Carpenter v Secretary of State for the Home Department* [11.7.2002] ECR I-6279, ECLI:EU:C:2002:434 ('*Carpenter*').

C-62/00 Judgment in Case *Marks & Spencer plc v Commissioners of Customs & Excise* [11.7.2002] ECR I-6325, ECLI:EU:C:2002:435 ('*Marks & Spencer*').

C-112/00 Judgment in Case *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [12.6.2003] ECR I-5659, ECLI:EU:C:2003:333 ('*Schmidberger*').

C-442/00 Judgment in Case *Ángel Rodríguez Caballero v Fondo de Garantía Salarial (Fogasa)* [12.12.2002] ECR I-11915, ECLI:EU:C:2002:752 ('*Caballero*').

C-453/00 Judgment in Case *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [13.1.2004] ECR I-837, ECLI:EU:C:2004:17 ('*Kühne*').

C-465/00, C-138/01 & 139/01 Judgment in Joined Cases *Rechnungshof v Österreichischer Rundfunk and Others* and *Christa Neukomm and Joseph Lauermann v Österreichischer Rundfunk* [20.5.2003] ECR I-4989, ECLI:EU:C:2003:294 ('*Rundfunk*').

C-101/01 Judgment in Case *Criminal proceedings against Bodil Lindqvist* [6.11.2003] ECR I-12971, ECLI:EU:C:2003:596 ('*Lindqvist*').

C-103/01 Judgment in Case *Commission of the European Communities v Federal Republic of Germany* [22.5.2003] ECR I-5369, ECLI:EU:C:2003:301 ('*Firefighters' Equipment*').

C-108/01 Judgment in Case *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd* [20.5.2003] ECR I-5121, ECLI:EU:C:2003:296 ('*Asda*').

C-109/01 Judgment in Case *Secretary of State for the Home Department v Hacene Akrich* [23.9.2003] ECR I-9607, ECLI:EU:C:2003:491 ('*Akrich*').

C-114/01 Judgment in Case *AvestaPolarit Chrome Oy* [11.9.2003] ECR I-8725, ECLI:EU:C:2003:448 ('*Chrome*').

C-117/01 Judgment in Case *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [7.1.2014] ECR I-541, ECLI:EU:C:2004:7 ('*K.B.*').

C-186/01 Judgment in Case *Alexander Dory v Bundesrepublik Deutschland* [11.3.2003] ECR I-2479, ECLI:EU:C:2003:146 ('*Dory*').

C-224/01 Judgment in Case *Gerhard Köbler v Republik Österreich* [30.9.2003] ECR I-10239, ECLI:EU:C:2003:513 ('*Köhler*').

C-397/01 – 403/01 Judgment in Joined Cases *Bernhard Pfeiffer, Wilhelm Roith, Albert Süß, Michael Winter, Klaus Nestvogel, Roswitha Zeller, and Matthias Döbele v*

Deutsches Rotes Kreuz, Kreisverband Waldshut eV [5.102004] ECR I-8835, ECLI:EU:C:2004:584 ('*Pfeiffer*').

C-482/01 & 493/01 Judgment in Joined Cases *Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg* [29.4.2004] ECR I-5257, ECLI:EU:C:2004:262 ('*Orfanopoulos*').

C-491/01 Judgment in Case *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [10.12.2002] ECR I-11453, ECLI:EU:C:2002:741 ('*Imperial Tobacco*').

C-36/02 Judgment in Case *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [14.10.2004] ECR I-9609, ECLI:EU:C:2004:614 ('*Omega*').

C-71/02 Judgment in Case *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [25.3.2004] ECR I-3025, ECLI:EU:C:2004:181 ('*Karner*').

C-148/02 Judgment in Case *Carlos Garcia Avello v Belgian State* [2.10.2003] ECR I-11613, ECLI:EU:C:2003:539 ('*Avello*').

C-200/02 Judgment in Case *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [19.10.2004] ECR I-9925, ECLI:EU:C:2004:639 ('*Zhu*').

C-441/02 Judgment in Case *Commission of the European Communities v Federal Republic of Germany* [27.4.2006] ECR I-3449, ECLI:EU:C:2006:253 ('*Expulsion Orders*').

C-105/03 Judgment in Case *Criminal proceedings against Maria Pupino* [16.6.2005] ECR I-5285, ECLI:EU:C:2005:386 ('*Pupino*').

C-131/03 P Judgment in Case *R.J. Reynolds Tobacco Holdings, Inc. and Others v Commission of the European Communities* [12.9.2006] ECR I-779, ECLI:EU:C:2006:541 ('*Reynolds*').

C-176/03 Judgment in Case *Commission of the European Communities v Council of the European Union* [13.9.2005] ECR I-7879, ECLI:EU:C:2005:542 ('*Commission v Council II*').

C-470/03 Judgment in Case *A.G.M.-COS.MET Srl v Suomen valtio and Tarmo Lehtinen* [17.4.2007] ECR I-2749, ECLI:EU:C:2007:213 ('*COS.MET*').

C-540/03 Judgment in Case *European Parliament v Council of the European Union* [27.6.2006] ECR I-5769, ECLI:EU:C:2006:429 ('*Parliament v Council*').

C-144/04 Judgment in Case *Werner Mangold v Rüdiger Helm* [22.11.2005] ECR I-9981, ECLI:EU:C:2005:709 ('*Mangold*').

C-145/04 Case *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland* [12.9.2006] ECR I-7917, ECLI:EU:C:2006:543 ('*Spain v UK*').

C-154/04 & 155/04 Judgment in Joined Cases *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health and The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales*

[12.7.2005] ECR I-6451, ECLI:EU:C:2005:449 (’*Natural Health*’).

C-234/04 Judgment in Case *Rosmarie Kapferer v Schlank & Schick GmbH* [16.3.2006] ECR I-2585, ECLI:EU:C:2006:178 (’*Kapfere*’).

C-310/04 Judgment in Case *Kingdom of Spain v Council of the European Union* [7.9.2006] ECR I-7285, ECLI:EU:C:2006:521 (’*Spain v Council*’).

C-317/04 & 318/04 Judgment in Joined Cases *European Parliament v Council of the European Union and Commission of the European Communities* [30.5.2006] ECR I-4721, ECLI:EU:C:2006:346 (’*Passenger Name Records*’).

C-328/04 Judgment in Case *Criminal proceedings against Attila Vajnai* [6.10.2005] ECR I-8577, ECLI:EU:C:2005:596 (’*Vajnai*’).

C-432/04 Case *Commission of the European Communities v Édith Cresson* [11.7.2006] ECR I-6385, ECLI:EU:C:2006:455 (’*Cresson*’).

C-344/04 Judgment in Case *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [10.1.2006] ECR I-403, ECLI:EU:C:2006:10 (’*IATA*’).

C-392/04 & 422/04 Judgment in Joined Cases *i-21 Germany GmbH and Arcor AG & Co. KG v Bundesrepublik Deutschland* [19.9.2006] ECR I-8559, ECLI:EU:C:2006:586 (’*Arcor*’).

C-423/04 Judgment in Case *Sarah Margaret Richards contre Secretary of State for Work and Pensions* [27.4.2006] ECR I-3585, ECLI:EU:C:2006:256 (’*Richards*’).

C-81/05 Judgment in Case *Anacleto Cordero Alonso v Fondo de Garantía Salarial (Fogasa)* [7.9.2006] ECR I-7569, ECLI:EU:C:2006:529 (’*Alonso*’).

C-119/05 Judgment in Case *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* [18.7.2007] ECR I-6199, ECLI:EU:C:2007:434 (’*Lucchini*’).

C-229/05 Judgment in Case *Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK) and Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v Council of the European Union* [18.1.2007] ECR I-439, ECLI:EU:C:2007:32 (’*PKK*’).

C-303/05 Judgment in Case *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [3.5.2007] ECR I-3633, ECLI:EU:C:2007:261 (’*Wereld*’).

C-305/05 Judgment in Case *Ordre des barreaux francophones et germanophone and Others v Conseil des ministers* [26.6.2007] ECR I-5305, ECLI:EU:C:2007:383 (’*Ordre des barreaux*’).

C-306/05 Judgment in Case *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [7.12.2006] ECR I-11519, ECLI:EU:C:2006:764 (’*SGAE*’).

C-380/05 Judgment in Case *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* [31.1.2008] ECR I-349, ECLI:EU:C:2008:59 (’*Europa*’).

C-402/05 P & 415/05 P Judgment in Joined Cases *Yassin Abdullah Kadi and Al Barakaat*

International Foundation v Council of the European Union and Commission of the European Communities [3.9.2008] ECR I-6351, ECLI:EU:C:2008:461 ('*Kadi*').

C-411/05 Judgment in Case *Félix Palacios de la Villa v Cortefiel Servicios SA* [16.10.2007] ECR I-8531, ECLI:EU:C:2007:604 ('*Palacios de la Villa*').

C-438/05 Judgment in Case *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [11.12.2007] ECR I-10779, ECLI:EU:C:2007:772 ('*Viking*').

C-341/05 Judgment in Case *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [18.12.2007] ECR I-117/67, ECLI:EU:C:2007:809 ('*Laval*').

C-440/05 Judgment in Case *Commission of the European Communities v Council of the European Union* [23.10.2007] ECR I-9097, ECLI:EU:C:2007:625 ('*Commission v Council III*').

C-212/06 Judgment in Case *Government of Communauté française and Gouvernement wallon v Gouvernement flamand* [1.4.2008] ECR I-1683, ECLI:EU:C:2008:178 ('*Walloon*').

C-244/06 Judgment in Case *Dynamic Medien Vertriebs GmbH v. Avides Media AG* [14.2.2008] ECR I-505, ECLI:EU:C:2008:85 ('*Dynamic Medien*').

C-267/06 Judgment in Case *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [1.4.2008] ECR I-1757, ECLI:EU:C:2008:179 ('*Maruko*').

C-268/06 Judgment in Case *Impact v Minister for Agriculture and Food and Others* [15.4.2008] ECR I-2483, ECLI:EU:C:2008:223 ('*Impact*').

C-275/06 Judgment in Case *Productores de Música de España (Promusicae) v Telefónica de España SAU* [29.1.2008] ECR I-271, ECLI:EU:C:2008:54 ('*Promusicae*').

C-301/06 Judgment in Case *Ireland v European Parliament and Council of the European Union* [10.2.2009] ECR I-593, ECLI:EU:C:2009:68 ('*Ireland & Slovak Republic*').

C-341/06 P & 342/06 P Judgment in Joined Cases *Chronopost SA and La Poste v Union française de l'express (UFEX) and Others* [1.7.2008] ECR I-4777, ECLI:EU:C:2008:375 ('*Chronopost*').

C-361/06 Judgment in Case *Feinchemie Schwebda GmbH and Bayer CropScience AG v College voor de toelating van bestrijdingsmiddelen* [22.5.2008] ECR I-3865, ECLI:EU:C:2008:296 ('*Schwebda*').

C-409/06 Judgment in Case *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [8.9.2010] ECR I-8015, ECLI:EU:C:2010:503 ('*Wetten*').

C-427/06 Judgment in Case *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [23.9.2008] ECR I-7245, ECLI:EU:C:2008:517 ('*Bartsch*').

C-94/07 Judgment in Case *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [17.7.2008] ECR I-5939, ECLI:EU:C:2008:425 ('*Raccanelli*').

C-139/07 P Judgment in Case *European Commission v Technische Glaswerke Ilmenau*

GmbH [29.6.2010] ECR I-5885, ECLI:EU:C:2010:376 ('*Glaswerke*').

C-188/07 Judgment in Case *Commune de Mesquer v Total France SA and Total International Ltd.* [24.6.2008] ECR I-4501, ECLI:EU:C:2008:359 ('*Mesquer*').

C-213/07 Judgment in Case *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* [16.12.2008] ECR I-9999, ECLI:EU:C:2008:731 ('*Michaniki*').

C-378/07 – 380/07 Judgment in Joined Cases *Kiriaki Angelidaki and Others v Organismos Nomarchiakis Autodioikisis Rethymnis*, *Charikleia Giannoudi v Dimos Geropotamou* and *Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou* [24.3.2009] ECR I-3071, ECLI:EU:C:2009:250 ('*Angelidaki*').

C-385/07 P Judgment in Case *Der Grüne Punkt - Duales System Deutschland GmbH v Commission of the European Communities* [16.7.2009] ECR I-6155, ECLI:EU:C:2009:456 ('*Grüne Punkt*').

C-402/07 & 432/07 Judgment in Joined Cases *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH* and *Stefan Böck and Cornelia Lepuschitz v Air France SA* [19.11.2009] ECR I-1923, ECLI:EU:C:2009:716 ('*Sturgeon*').

C-465/07 Judgment in Case *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [17.2.2009] ECR I-921, ECLI:EU:C:2009:94 ('*Elgafaji*').

C-555/07 Judgment in Case *Seda Kücükdeveci v Swedex GmbH & Co. KG* [19.1.2010] ECR I-365, ECLI:EU:C:2010:21 ('*Kücükdeveci*').

C-570/07 & 571/07 Judgment in Joined Cases *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios* and *Principado de Asturias* [1.6.2010] ECR I-4629, ECLI:EU:C:2010:300 ('*Pérez*').

C-28/08 P Judgment in Case *European Commission v The Bavarian Lager Co. Ltd* [29.6.2010] ECR I-6055, ECLI:EU:C:2010:378 ('*Lager*').

C-51/08 Judgment in Case *European Commission v Grand Duchy of Luxemburg* [24.5.2011] ECR I-4235, ECLI:EU:C:2011:336 ('*Commission v Luxembourg*').

C-58/08 Judgment in Case *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [8.6.2010] ECR I-4999, ECLI:EU:C:2010:321 ('*Vodafone'*).

C-101/08 Judgment in Case *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* [15.10.2009] ECR I-9823, ECLI:EU:C:2009:626 ('*Audiolux*').

C-115/08 Judgment in Case Land Oberösterreich v ČEZ as [27.10.2009] ECR I-10265, ECLI:EU:C:2009:660 ('*ČEZ*').

C-127/08 Judgment in Case *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [25.7.2008] ECR I-6241, ECLI:EU:C:2008:449 ('*Metock*').

C-135/08 Judgment in Case *Janko Rottman v Freistaat Bayern* [2.3.2010] ECR I-1449, ECLI:EU:C:2010:104 ('*Rottman*').

C-147/08 Judgment in Case Jürgen Römer v Freie und Hansestadt Hamburg [10.5.2011] ECR I-3591, ECLI:EU:C:2011:286 ('*Römer*').

C-227/08 Judgment in Case *Eva Martín Martín v EDP Editores SL* [17.12.2009] ECR I-11939, ECLI:EU:C:2009:792 ('*Martín*').

C-229/08 Judgment in Case *Colin Wolf v Stadt Frankfurt am Main* [12.1.2010] ECR I-1, ECLI:EU:C:2010:3 ('*Wolf*').

C-271/08 Judgment in Case *European Commission v Federal Republic of Germany* [15.7.2010] ECR I-7091, ECLI:EU:C:2010:426 ('*Commission v Germany*').

C-314/08 Judgment in Case *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu* [19.11.2009] ECR I-11049, ECLI:EU:C:2009:719 ('*Filipiak*').

C-341/08 Judgment in Case *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [12.1.2010] ECR I-47, ECLI:EU:C:2010:4 ('*Petersen*').

C-407/08 P Judgment in Case *Knauf Gips KG v European Commission* [1.7.2010] ECR I-6371, ECLI:EU:C:2010:389 ('*Knauf*').

C-518/08 Judgment in Case *Fundación Gala-Salvador Dalí and Visual Entidad de Gestión de Artistas Plásticos (VEGAP) v Société des auteurs dans les arts graphiques et plastiques (ADAGP) and Others* [15.4.2010] ECR I-3091, ECLI:EU:C:2010:191 ('*Salvador Dali*').

C-578/08 Judgment in Case *Rhimou Chakroun v Minister van Buitenlandse Zaken* [4.3.2010] ECR I-1839, ECLI:EU:C:2010:117 ('*Chakroun*').

Opinion 1/09 *Creation of a unified patent litigation system* [8.3.2011] ECR I-1137, ECLI:EU:C:2011:123.

C-27/09 P Judgment in Case *French Republic v People's Mojahedin Organization of Iran* [21.12.2010] ECR I-13427, ECLI:EU:C:2011:853 ('*PMOI*').

C-34/09 Judgment in Case *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [8.3.2010] ECR I-1177, ECLI:EU:C:2011:124 ('*Zambrano*').

C-45/09 Judgment in Case *Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH* [12.10.2010] ECR I-9391, ECLI:EU:C:2010:601 ('*Rosenbladt*').

C-92/09 & 93/09 Judgment in Joined Cases *Volker und Markus Schecke GbR and Hartmut Eifert (C-93/09) v Land Hessen* [9.11.2010] ECR I-11063, ECLI:EU:C:2010:662 ('*Schecke*').

C-104/09 Judgment in Case *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [30.9.2010] ECR I-8661, ECLI:EU:C:2010:561 ('*Alvarez*').

C-145/09 Judgment in Case *Land Baden-Württemberg v Panagiotis Tsakouridis* [23.11.2010] ECR I-11979, ECLI:EU:C:2010:708 ('*Tsakouridis*').

C-162/09 Judgment in Case *Secretary of State for Work and Pensions v Taous Lassal* [7.10.2010] ECR I-9217, ECLI:EU:C:2010:592 ('*Lassal*').

C-176/09 Judgment in Case *Grand Duchy of Luxemburg v European Parliament and Council of the European Union* [12.5.2011] ECR I-3727, ECLI:EU:C:2011:290

(’*Luxembourg v EP & Council*’).

C-208/09 Judgment in Case *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [22.12.2010] ECR I-136/93, ECLI:EU:C:2010:806 (’*Sayn-Wittgenstein*’).

C-221/09 Judgment in Case *AJD Tuna Ltd v Direttur tal-Agrikoltura u s-Sajd and Avukat Generali* [17.3.2011] ECR I-1655, ECLI:EU:C:2011:153 (’*Tuna*’).

C-232/09 Judgment in Case *Dita Danosa v LKB Līzings SIA* [11.11.2010] ECR I-11405, ECLI:EU:C:2010:673 (’*Danosa*’).

C-236/09 Judgment in Case *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministers* [1.3.2011] ECR I-773, ECLI:EU:C:2011:100 (’*Test-Achats*’).

C-250/09 & 268/09 Judgment in Joined Cases *Vasil Ivanov Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv* [18.11.2010] ECR I-11869, ECLI:EU:C:2010:699 (’*Georgiev*’).

C-279/09 Judgment in Case *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [22.12.2010] ECR I-13849, ECLI:EU:C: 2011:811 (’*DEB*’).

C-343/09 Judgment in Case *Afton Chemical Limited v Secretary of State for Transport* [8.7.2010] ECR I-7027, ECLI:EU:C:2010:419 (’*Afton*’).

C-391/09 Judgment in Case *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [12.5.2012] ECR I-3787, ECLI:EU:C:2011:291 (’*Wardyn*’).

C-434/09 Judgment in Case *Shirley McCarthy v Secretary of State for the Home Department* [5.5.2011] ECR I-3375, ECLI:EU:C:2011:277 (’*McCarthy*’).

C-447/09 Judgment in Case *Reinhard Prigge and Others v Deutsche Lufthansa AG* [13.9.2011] ECR I-8003, ECLI:EU:C:2011:573 (’*Prigge*’).

C-457/09 Judgment in Case *Claude Chartry v Belgian State* [1.3.2011] ECR I-819, ECLI:EU:C:2011:101 (’*Chartry*’).

C-483/09 & 1/10 Judgment in Joined Cases *Criminal proceedings against Magatte Gueye and Valentín Salmerón Sánchez* [15.9.2011] ECR I-8263, ECLI:EU:C:2011:583 (’*Gueye*’).

C-550/09 Judgment in Case *Criminal proceedings against E and F* [29.6.2010] ECR I-6213, ECLI:EU:C:2010:382 (’*E & F*’).

C-20/10 Judgment in Case *Vino Cosimo Damiano v Poste Italiane SpA* [11.11.2011] ECR I-148, ECLI:EU:C:2010:667 (’*Vino I*’).

C-34/10 Judgment in Case *Oliver Brüstle v Greenpeace eV* [18.10.2011] ECR I-9821, ECLI:EU:C:2011:669 (’*Brüstle*’).

C-69/10 Judgment in Case *Brahim Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration* [28.7.2011] ECR I-7151, ECLI:EU:C:2011:524 (’*Samba*’).

C-70/10 Judgment in Case *Scarlet Extended SA v Société belge des auteurs, compositeurs*

et éditeurs SCRL (SABAM) [24.11.2011] ECR I-11959, ECLI:EU:C:2011:771 (’*Scarlet*’).

C-149/10 Judgment in Case *Zoi Chatzi v Ypourgos Oikonomikon* [16.9.2010] ECR I-8489, ECLI:EU:C:2010:534 (’*Chatzi*’).

C-188/10 & 189/10 Judgment in Joined Cases *Aziz Melki and Sélim Abdeli* [22.6.2010] ECR I-5667, ECLI:EU:C:2010:363 (’*Melki*’).

C-267/10 & 268/10 Order in Joined Cases André Rossius and Marc Collard (C 268/10) v Belgian State - Service public fédéral Finances [23.5.2011] ECR I-81, ECLI:EU:C:2011:332 (’*Rossius*’).

C-282/10 Judgment in Case *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* [24.1.2012] ECR I-0000, ECLI:EU:C:2012:33 (’*Dominguez*’).

C-297/10 & 298/10 Judgment in Joined Cases *Sabine Hennigs v Eisenbahn-Bundesamt* and *Land Berlin v Alexander Mai* [8.9.2011] ECR I-7965, ECLI:EU:C:2011:560 (’*Hennigs*’).

C-314/10 Order in Case *Hubert Pagnoul v Belgian State* [22.9.2011] ECR I-136, ECLI:EU:C:2011:609 (’*Pagnoul*’).

C-339/10 Order in Case *Krasimir Asparuhov Estov and Others v Ministerski savet na Republika Bulgaria* [12.11.2010] ECR I-11465, ECLI:EU:C:2010:680 (’*Asparuhov*’).

C-355/10 Judgment in Case *European Parliament v Council of the European Union* [5.9.2012] ECR I-0000, ECLI:EU:C:2012:516 (’*Frontex’*).

C-360/10 Judgment in Case *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [16.2.2012] ECR I-0000, ECLI:EU:C:2012:85 (’*SABAM*’).

C-386/10 P Judgment in Case *Chalkor AE Epexergasias Metallon v European Commission* [8.12.2011] ECR I-13085, ECLI:EU:C:2011:815 (’*Chalkor*’).

C-393/10 Judgment in Case *Dermod Patrick O’Brien v Ministry of Justice* [1.3.2012] ECR I-0000, ECLI:EU:C:2012:110 (’*O’Brien*’).

C-400/10 PPU Judgment in Case *J. McB. v L. E.* [5.10.2010] ECR I-8965, ECLI:EU:C:2010:582 (’*McB*’).

C-411/10 & 493/10 Judgment in Joined Cases *N. S. v Secretary of State for the Home Department* and *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [21.12.2011] ECR I-13905, ECLI:EU:C:2011:865 (’*N.S.*’).

C-430/10 Judgment in Case *Hristo Gaydarov v Director na Glavna direktsia "Ohranitelna politsia" pri Ministerstvo na vatreshnite raboti* [17.11.2011] ECR I-11637, ECLI:EU:C:2011:749 (’*Gaydarov*’).

C-434/10 Judgment in Case *Petar Aladzhov v Zamestnik director na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti* [17.11.2011] ECR I-11659, ECLI:EU:C:2011:750 (’*Aldazhov*’).

C-468/10 & 469/10 Judgment in Joined Cases *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) v Administración del Estado* [24.11.2011] ECR I-12181, ECLI:EU:C:2011:777 ('*ASNEF*').

C-482/10 Judgment in Case *Teresa Cicala v Regione Siciliana* [21.12.2011] ECR I-14139, ECLI:EU:C:2011:868 ('*Cicala*').

C-489/10 Judgment in Case *Criminal proceedings against Łukasz Marcin Bonda* [5.6.2012] ECR I-0000, ECLI:EU:C:2012:319 ('*Bonda*').

C-491/10 PPU Judgment in Case *Joseba Andoni Aguirre Zarraga v Simone Pelz* [22.12.2010] ECR I-14247, ECLI:EU:C:2010:828 ('*Pelz*').

C-500/10 Judgment in Case *Ufficio IVA di Piacenza v Belvedere Costruzioni Srl* [29.3.2012] ECR I-0000, ECLI:EU:C:2012:186 ('*Belvedere*').

C–544/10 Judgment in Case *Deutsches Weintor eG v Land Rheinland-Pfalz* [6.9.2012] ECR I-0000, ECLI:EU:C:2012:526 ('*Weintor*').

C-571/10 Judgment in Case *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [24.4.2012] ECR I-0000, ECLI:EU:C:2012:233 ('*Kamberaj*').

C-581/10 & 629/10 Judgment in Joined Cases *Emeka Nelson and Others v Deutsche Lufthansa AG* and *TUI Travel plc and Others v Civil Aviation Authority* [23.10.2012] ECR I-0000, ECLI:EU:C:2012:657 ('*Nelson*').

C-584/10 P, 593/10P & 595/10 P Judgment in Joined Cases *European Commission and Others v Yassin Abdullah Kadi* [18.7.2013] ECR I-0000, ECLI:EU:C:2013:518 ('*Kadi II*').

C-617/10 Judgment in Case *Åklagaren v Hans Åkerberg Fransson* [26.2.2013] ECR I-0000, ECLI:EU:C:2013:105 ('*Åkerberg Fransson*').

C-619/10 Judgment in Case *Trade Agency Ltd v Seramico Investments Ltd* [6.9.2012] ECR I-0000, ECLI:EU:C:2012:531 ('*Trade Agency*').

C-12/11 Judgment in Case *Denise McDonagh v Ryanair Ltd* [31.1.2013] ECR I-0000, ECLI:EU:C:2013:43 ('*McDonagh*').

C-27/11 Judgment in Case *Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost* [7.6.2012] ECR I-0000, ECLI:EU:C:2012:326 ('*Vinkov*').

C-40/11 Judgment in Case *Yoshikazu Iida v Stadt Ulm* [8.11.2012] ECR I-0000, ECLI:EU:C:2012:691 ('*Iida*').

C-59/11 Judgment in Case *Association Kokopelli v Graines Baumaux SAS* [12. 7.2012] ECR I-0000, ECLI:EU:C:2012:447 ('*Kokopelli*').

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Abbreviations

AG	Advocate General
CECE	Comité d'études pour la Constitution européenne
CFR, the Charter	Charter of Fundamental Rights of the European Union
CJEU, the Court	Court of Justice of the European Union
Commission	European Commission
CoR	Committee of the Regions
Council	European Council
EEC, the Community	European Economic Community
EESC	European Economic and Social Committee
ECHR, the Convention	European Convention on Human Rights
ECR	European Court Reports
ECSC	European Coal and Steal Community
ECtHR	European Court of Human Rights
EDC	European Defence Community
EP	European Parliament
EPC	European Political Community
EU, the Union	European Union
EurAtom	European Atomic Energy Community
OJ	Official Journal of the European Union
SEA	Single European Act
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
EU, the Union	European Union

INTRODUCTION: A Charter 'with Due Regard to the Principle of Subsidiarity'?

'United in diversity' – the motto of the European Union – not only sends a message of tolerance and dignity, but also reflects the Union's constant need to reconcile European values with respect for the particularities of its Member States.[1] In a multicultural system of multi-layered governance, such as the EU, the legitimate use of power must balance supranational interests with national, local and individual ones. In the quest for a just equilibrium between the autonomy of the Union legal order, the sovereignty of the Member States and the self-determination of individuals, the principles of subsidiarity and respect for fundamental rights have come to play an important role.[2]

This continuous struggle to strike a balance between unity and diversity, on the one side, and integration and integrity, on the other, can be linked to the constitutionalisation of the Union legal order. Unmistakably, the process of European integration has reached a point where the construction of an internal market can no longer in itself legitimate the EU as a venture for peace, democracy, prosperity and the well-being of its peoples. To enhance its legitimacy and justify its expanding powers, the Union has found it necessary to resort to a constitutional framework. Along with the principle of conferred competences, the principles of subsidiarity and respect for fundamental rights regulate and condition the exercise of the powers of the Union and its Member States. In this sense, they represent important cornerstones in the process of European multilevel constitutionalism.[3]

At the intersection of subsidiarity and fundamental rights, the Charter of Fundamental Rights of the European Union constitutes an important step in the constitutional process of the Union. Its drafting history, legal nature and interpretation all express a constant balancing-act between Union and Member State interests, on the one hand, and general and individual interests, on the other.[4] In the words of its Preamble, the Charter reaffirms the 'indivisible, universal' and 'common values' of the Union, whilst 'respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of

[1] The motto of the EU was first unofficially introduced in May 2000 and later made official in 2004 with Article I-8 of the draft Treaty establishing a Constitution for Europe. The Treaty of Lisbon, however, contains no such provision, but the motto is mentioned in Declaration No. 52 on the symbols of the EU, affirmed by 16 of the Member States. *See* e.g. NEERGARD U. – NIELSEN R. (2011): p. 131.
[2] WEILER J.H.H. (1999): p. 103-104; ESTELLA A. (2002): p. 6; CAROZZA P.G. (2003): p. 38; CAROZZA P.G. (2004): p. 36-37; SCHIEK D. (2012): p. 222; SEMMELMANN C. (2012): p. 6-9; BENGOETXEA J. (2014): p. 150-151.
[3] CAROZZA P.G. (2003): p. 49; PERNICE I. – KANITZ R. (2004): p. 5; ARMSTRONG K. (et.al.) (2008): p. 417; TUORI K. (2010): p. 11-12; SARMIENTO D. (2012a): p. 288; TANASESCU E.S. (2013): p. 207-210; DUBOUT E. (2014): p. 211.
[4] LENAERTS K. – DE SMIJTER E. (2001): p. 274; VON DANWITZ T. (2001): p. 290; CAROZZA P.G. (2004): p. 35-37; PERNICE I. – KANITZ R. (2004): p. 4; KAILA H. (2012): p. 292; LEBECK C. (2013): p. 19-20; WALKILA S. (2015): p. 145.

the Member States'. Despite its objective of 'creating an ever closer union', it still aims to place 'the individual at the heart of its activities' and respects Member State 'authorities at national, regional and local levels'.

In essence, the Charter 'reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result' from the Union legal order. Undeniably, the Charter embodies a culmination of fundamental rights under EU law, but all the same it may have created more questions than it actually answers. In particular, its references to subsidiarity give scope for a stimulating discussion on the relation between fundamental rights under the Charter and the principle of subsidiarity in EU law. Is the Charter applied 'with due regard to the principle of subsidiarity'?

1 A Study of the Charter in the Light of the Principle of Subsidiarity

1.1 Defining Subsidiarity, Fundamental Rights and Their Interconnection

1.1.1 Subsidiarity as a Means of Finding Unity in Diversity

Subsidiarity derives from the Latin word *subsidium*, originally referring to supporting military actions of assisting, subordinate or secondary nature.[5] In societal organisation, embryonic ideas of subsidiary can be traced back to the philosophical theories of Aristotle and Thomas Aquinas.[6] Throughout history, however, a plurality of sources can be identified as having contributed to the development of subsidiarity as a principle of governance. Historical milestones of governance through subsidiarity include the Peace of Westphalia of 1648 with its commitment to respect the sovereignty of States, the Constitution of the United States of America introducing subsidiarity as an underlying principle of federalism as of 1791, as well as the Catholic Church introducing in 1891 subsidiarity as a means of reconciling individualism with collectivism in its teachings.[7]

Given the diversity of sources from which subsidiarity has evolved, the concept cannot easily nor unambiguously be defined.[8] Despite this conceptual ambivalence, its fundamental characteristic remains the distribution of powers between a bigger central entity and various smaller member units at a more local level, in order to determine the appropriate level of intervention in a given situation.[9] In essence, the principle suggests that the central authority should assist lower level entities in addressing social issues at the most immediate level of governance. Questions should be dealt with at the central level of governance only to the extent that decentralised entities cannot adequately attain the desired objectives. In a spirit of cooperation, subsidiarity aims to achieve the envisaged objectives efficiently, whilst preserving the division of powers between the different levels of governance.[10]

Even though the principle of subsidiarity seeks to balance the different levels, it primarily favours a more direct level of governance. By presuming local intervention, the

[5] The Oxford English Dictionary (2004), definitions for 'subsidiary' and 'subsidiarity'.
[6] MILLON DELSOL C. (1992): p. 15-45.
[7] SCHÜTZE R. (2009a): p. 245; EDWARD D. (2012): p. 93.
[8] ESTELLA A. (2002): p. 75-77.
[9] FOLLESDAL A. (2011): p. 6.
[10] CAROZZA P.G. (2003): p. 38, 66; FOLLESDAL A. (2011): p. 6.

competences of the central organisation are restrained. This understanding of the concept can be referred to as *negative subsidiarity*. Nonetheless, the principle may as well take expressions in favour of a higher level of governance. From the perspective of *positive subsidiarity*, the central authority has the opportunity to act on the condition that it can better achieve the expected result than its associated local authorities. In this sense, subsidiarity both limits and justifies State intervention, depending on the circumstances and the means available.[11]

Irrespective of whether positive or negative subsidiarity is prioritised in a given situation, the fundamental nature of the principle lies in its reconciliation of unity with diversity.[12] While respecting national values and the sovereignty of States, supranational intervention can be legitimately justified in order to achieve a common good.[13] The presumption of a necessary degree of freedom at all levels of society is, thus, inherent to subsidiarity. In spite of their diversity, individual entities are perceived as united by their ultimate strive towards human dignity.[14]

Although difficultly defined, the principle of subsidiarity unmistakably takes the expression of both a value and an instrument, as it simultaneously embodies moral and social functions.[15] Broadly, subsidiarity has been described as an objective of good governance attributable to philosophical, sociological and political theory.[16] As a functional principle without any clear content, however, subsidiarity has sometimes been argued to be of limited legal and normative significance – or even 'a-legal' as a principle.[17]

Regardless of whether subsidiarity is understood as a concept of non-interference, federalism, good governance or public morality, the EU has integrated the principle into its legal and political discourse.[18] Despite the Union's awareness that the principle might be of a rather political nature, subsidiarity still occupies a prominent place in the Treaties and ranks among the constitutional principles of the Union.[19] It has become an ethos of the Union, mediating 'the interests of integration and differentiation, of harmonisation and

[11] ENDO K. (2001): p. 6; CAROZZA P.G. (2003): p. 44, 79; ESTELLA A. (2002): p. 80-81.
[12] SCHÜTZE R. (2009a): p. 245.
[13] ESTELLA A. (2002): p. 80, 134-135; CARTER W.M. (2008): p. 320; FOLLESDAL A. (2011): p. 7; CRAIG P. (2012a): p. 73; DELMAS-MARTY M. (2013): p. 335.
[14] ENDO K. (1994): p. 2026-2029; CAROZZA P.G. (2003): p. 43-45.
[15] SCHLÜTTER B. (2010): p. 5.
[16] ESTELLA A. (2002): p. 2, 96; LEBECK C. (2013): p. 37.
[17] ESTELLA A. (2002): p. 2, 74-75, 89; BIONDI A. (2012): p. 213.
[18] EDWARD D. (2012): p. 94.
[19] CAROZZA P.G. (2003): p. 38; LEBECK C. (2013): p. 36. *See* Commission Report to the European Council on the Adaption of Community Legislation to the Subsidiarity Principle, COM(93) 545, p. 2; Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02, 23.9.2002, p. 2.

diversity, of centralisation and localisation'.[20] As expressed by the Committee of Regions, 'developing a culture of subsidiarity could make a decisive contribution to strengthening public confidence in European cooperation'.[21]

Establishing a presumption of subsidiary Union intervention, the principle of subsidiarity is consolidated in Article 5 TEU and the attached Protocol on subsidiarity.[22] In essence, the principle provides that the Union should act only to the extent that the Member States cannot better achieve a given objective.[23] Keeping in mind the negative and the positive dimensions of subsidiarity, the principle may function either as a limit to or as a justification for intervention at EU level.[24] Although simplified, the question of whether the Union should act or not can accordingly be answered either *ex ante* in the light of *procedural* subsidiarity as part of the political and legislative process of the EU, or *ex post* from the perspective of *material* subsidiarity under judicial review.[25] Ultimately, the principle of subsidiarity in EU law embodies the search for a fair balance between unity and diversity in the process of European integration.[26]

1.1.2 Fundamental Rights as Protection of Diversity and Legitimacy for Unity

As a link between morality and law, fundamental human rights comprise a plurality of motives that coincide with the affinities of the subsidiarity principle. Like subsidiarity, human rights can be understood as a relational concept, departing from the individual. In this sense, the rationale of *dignity* is fundamental to both subsidiarity and human rights. Human dignity places the individual at the centre of society and preconditions the validity of any social construction. The belief that all human beings are free and equal supports the vision of human rights as inherent to democratic societies and the rule of law. Albeit embodying common values of humanity, human rights still need to ensure respect for diversity. Therefore, it is critical to consider the question of *who* defines the universality of rights. A universal understanding of rights must not only reflect the values of the dominant, but also protect minorities against majoritarian tyranny.[27]

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[20] DE BÚRCA G. (1999): p. 21.
[21] CoR Opinion on Guidelines for the Application and Monitoring of the Subsidiarity and Proportionality Principles, 2006/C 115/08, 16.5.2006, section. 1.4
[22] Protocol No. 2 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of Lisbon. *See* ESTELLA A. (2002): p. 5.
[23] JOUTSAMO K. (et.al.) (2000): p. 43; RAITIO J. (2013): p. 243.
[24] Commission Report to the European Council on the Adaption of Community Legislation to the Subsidiarity Principle, COM(93) 545, p. 2; BIONDI A. (2012): p. 214; DELMAS-MARTY M. (2013): p. 332.
[25] MURPHY D.T. (1994): p. 74; ESTELLA A. (2002): p. 105; SCHLÜTTER B. (2010): p. 3.
[26] ESTELLA A. (2002): p. 134-135.
[27] WEILER J.H.H. (1999): p. 103; BREMS E. (2001): p. 3-5; CAROZZA P.G. (2003): p. 46-47; LEINO-SANDBERG P. (2005): p. 38; PALOMBELLA G. (2006): p. 1-6; WALKILA S. (2015): p. 95-97, 116.

Due to their inviolable nature, human rights are normatively fundamental to society. Through a vertical approach to governance, they create ideals and expectations for individuals in relation to the State. Like subsidiarity, human rights aim to regulate the exercise of public powers against the individual. On the one hand, human rights set standards that limit and condition the use of powers, thus protecting the individual against arbitrary use of authority. On the other hand, the State's respect for such standards also legitimates and justifies its actions.[28] For these reasons, human rights constitute an important constitutional element. While authority is needed to guarantee the rights and freedoms of the people, these rights and freedoms conversely precondition the existence of such authority. Only a free people can lawfully submit itself to a public power.[29]

The conviction that human rights are fundamental to governance can be traced back to historical documents of positive law, such as the Magna Carta of 1215, the American Declaration of Independence of 1776, the French Declaration of the Rights of Man and of the Citizen of 1789 as well as the United Nations Universal Declaration of Human Rights of 1948.[30] Already in these early constitutive instruments, human rights are indirectly linked to subsidiarity, through the obligation of the State to not intervene in the lives of its people more than what is necessary.[31]

Albeit simplistic, human rights are traditionally divided into three different generations of rights, described as entailing either negative or positive obligations. The first generation refers to the civil and political rights, opposing the individual against the State. These rights constitute *negative obligations* for the State to respect the freedom of individuals through the non-intervention with their guaranteed rights. The second generation refer to economic, social and cultural rights, giving rise to positive obligations for the State to actively intervene to guarantee these rights to the members of society.[32] This idea of non-interference versus interference is fundamentally similar to the concept of subsidiarity.[33]

Notwithstanding this dichotomy of generational rights, it must be emphasised that such a categorisation can never be completely accurate. The effects of rights may vary according to content and context. As demonstrated by the third generation of rights,

[28] BESSELINK L.F.M. (1998): p. 669; TUORI K. (2000): p. 247; CHALMERS D. (2010): p. 140; SCHLÜTTER B. (2010): p. 3-4; DUBOUT E. (2014): p. 195.
[29] WEILER J.H.H. (1999): p. 103; PERNICE I. (2008): p. 237; TUORI K. (2010): p. 13-15.
[30] SZABO I. (1982): p. 11-23; JANIS M.W. (et.al) (2008): p. 4-12; PERNICE I. (2008): p. 237.
[31] CAROZZA P.G. (2003): p. 46.
[32] VASAK K. (1990): p. 301-303; CAROZZA P.G. (2003): p. 48-49; CRAIG P. (2012c): p. 218; SCHIEK D. (2012): p. 220-222; ROSAS A. – ARMATI L. (2012): p. 172; FOMERAND J. (2014): p. 290; WALKILA S. (2015): p. 98-99, 181, 229-230.
[33] CAROZZA P.G. (2003): p. 39.

comprising guarantees such as the right to peace, development and the environment, some rights may entail both positive and negative obligations of the State. Not only positive obligations require State action, but also the inaction of the State may lead to a breach of a negative obligation. Neither are human rights necessarily individual, but they may as well be collective. In addition to this, human rights do not always govern vertical relations between individuals and the State, but may additionally have a horizontal influence on relations between private parties.[34]

In principle, human rights are fundamental rights.[35] In the EU context, however, the term *fundamental rights* is preferred, designating their distinctive sources and restrictive scope. While the term human rights rather refers to the Union's 'relations with the wider world', fundamental rights – influenced by the economic fundamental freedoms of European integration – designate the standards of protection under EU law.[36] Applicable to both serious and obvious violations of rights as well as to complicated matters of everyday life, the fundamental rights of the EU today permeate its entire legal order and is characterised by a plurality of sources.[37]

Under the Treaty of Lisbon, Article 2 TEU proclaims that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.' Further to this, Article 7 TEU establishes the possibility for the Union to impose sanctions against 'a serious and persistent breach by a Member State of the values' of the Union. Article 6 TEU, in turn, identifies the three components of the EU fundamental rights system, comprising the Charter together with the common constitutional traditions of the Member States and the ECHR as general principles of EU law. The proclamation of the Charter has come to mark an important step in the constitutionalisation of the Union legal order, shedding new light on fundamental rights as normative foundations of the EU.[38]

[34] VASAK K. (1990): p. 301-303; CAROZZA P.G. (2003): p. 48-49; CRAIG P. (2012c): p. 218; MICKLITZ H.-W. (2012): p. 360-363; ROSAS A. – ARMATI L. (2012): p. 172; FOMERAND J. (2014): p. 290; WALKILA S. (2015): p. 98-99, 181, 229-230.
[35] PALOMBELLA G. (2006): p. 3-4.
[36] *See* Article 5(3) TEU in relation to Articles 2 and 21 TEU, regarding the promotion of human rights in the EU's international relations.
[37] PARMAR S. (2001): p. 355-356; DUTHEIL DE LA ROSCHÈRE J. (2009): p. 121-122; CHALMERS D. (2010): p. 140; KUMM M. (2010): p. 107; ROSAS A. – ARMATI L. (2012): p. 164; LEBECK C. (2013): p. 47; DUBOUT E. (2014): p. 195.
[38] LINDFELT M. (2007): p. 292; JÄÄSKINEN N. (2008): p. 69-70; PERNICE I. (2008) p. 240, 252; BRYDE B.-O. (2010): p. 119-120; ROSAS A. – ARMATI L. (2012): p. 54-59, 161; CHRONOWSKI N. (2014): p. 13; WALKILA S. (2015): p. 237, 275.

1.2 Examining the Charter as an Intersection of Fundamental Rights and Subsidiarity

1.2.1 Fundamental Rights and Subsidiarity in the EU Context

The drafting of the Charter and its transformation into primary law, have sparked more doctrinal and political discussion than four decades of fundamental rights adjudication before the Court of Justice of the European Union.[39] What triggered the debate were not concerns over shortcomings in EU fundamental rights law, but rather resistance against a too dominant influence of the EU in fundamental rights protection.[40] The universal nature of fundamental rights made Member States fear that a legally binding Charter would have a centralising impact, resulting in the imposition of a federal fundamental rights standard, leading to the inevitable increase in powers of the Union, at the expense of Member State sovereignty and national constitutions.[41] Undeniably, grand moments of federal State history have proven that a Bill of Rights may indeed have both constitutionalising and federalising effects.[42]

At the heart of resistance against the Charter lie two colliding interests of constitutional nature, namely the protection of fundamental rights and the allocation of competences between the Union and its Member States.[43] A too broad interpretation of EU competences under the label of fundamental rights protection could have the latent effect of extending the Union's powers into areas in which it has previously had only a limited influence, if any at all. Whilst fundamental rights have traditionally filled a function of limiting the use of public powers, in the case of the Charter they could, in fact, have the adverse effect. As a consequence, they would be liable to affect the vertical constitutional equilibrium of Union and Member States powers. For these reasons, the Charter has been vested with another constitutional feature, namely the principle of subsidiarity.

Originally, the concept of subsidiarity was introduced into the EU legal system as a constitutional principle aimed at limiting the powers of the Union, thus mitigating the federalising effects of European integration.[44] Its more recent incorporation into the Charter serves a two-fold purpose. On the one hand, the subsidiarity principle aims to

[39] DE WITTE (2001): p. 84.
[40] CAROZZA P.G. (2004): p. 38; MUTANEN A. (2015): p. 65.
[41] LENAERTS K. (2000): p. 21; GROUSSOT X. (et.al.) (2013): p. 99; CARTABIA M. (2012): p. 259-262, 272; WALKILA S. (2015): p. 271-272.
[42] DE BÚRCA G. (2001): p. 127; EECKHOUT P. (2002): p. 945, 951; DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 372; ROSSI L.S. (2008) p. 77; KAILA H. (2012): p. 294; LENAERTS K. (2012) p. 275; MUIR E. (2014): p. 238; WALKILA S. (2015): p. 131.
[43] CAROZZA P.G. (2004): p. 39-40, 54-57; ARMSTRONG K. (et.al.) (2008): p. 417; SAFJAN M. (2012): p. 1, 14; DUBOUT E. (2014): p. 193-196, 211.
[44] ESTELLA A. (2002): p. 74-82; SCHÜTZE R. (2009a): p. 242-243, 247; AZOULAI L. (2014): p. 9.

balance the competences of the EU and its Member States in the area of fundamental rights protection. On the other hand, it enhances the legitimacy of Union action when needed. This understanding of subsidiarity as an underlying principle of EU fundamental rights law is reflected in Article 51(1) CFR, providing that '[t]he provisions of this Charter are addressed to the […] Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'

1.2.2 Subsidiarity as a Principle of EU Fundamental Rights Law?

Through its Preamble and Article 51(1), the Charter officially introduces subsidiarity as a principle of EU fundamental rights law. Nevertheless, its reference to subsidiarity risks to give rise to more questions than answers. It is true that the strength of both the subsidiarity and fundamental rights concepts lies in their ambition to reconcile unity with diversity, but it is equally true that therein also lies their challenge. This ambiguity raises the question of whether the introduction of subsidiarity into the Charter will only water down its constitutional impact, or if it will actually contribute to striking a fair balance between fundamental rights protection at Union and Member State levels.[45]

Against the background of subsidiarity as an ethos of European integration, this study departs from the protection of fundamental rights under the Charter. The underlying question is whether the Union should intervene in fundamental rights protection, and if so, to what extent.[46] In other words, it is a question of '*whose understanding* of [fundamental] rights will be protected, and *by whom*.'[47] The aim is to examine the influence that the principle has on the balance of powers between the Union and the Member States in the area of fundamental rights. Does the literal presence of subsidiarity in the Charter have a function to fulfil, or will it remain 'a subsidiary principle of European constitutionalism'?[48] The examination of subsidiarity as a principle of EU fundamental rights law is not only concerned with the values it represents, but also with the actions it justifies.[49]

It is submitted that the Charter endorses *subsidiarity as an interpretative principle of EU fundamental rights law*. As a consequence, the study revolves around the application of the Charter by the CJEU. The intersection of different-level systems of fundamental rights protection is liable to result in conflicts that ultimately have to be resolved by the Court.[50]

[45] *See* e.g. OJANEN T. (2003): p. 679; LINDFELT M. (2007): p. 303.
[46] WILLIAMS A. (2007): p. 74.
[47] CAROZZA P.G. (2004): p. 39.
[48] SCHÜTZE R. (2009a): p. 256; SCHÜTZE R. (2009b): p. 526.
[49] WILLIAMS A. (2007): p. 82.
[50] MURPHY D.T. (1994): p. 95; WEILER J.H.H. (1999): p. 102; BIONDI A. (2012): p. 214; MUIR E. (2012): p. 9.

Hence, in the light of the principle of subsidiarity, this study aims to examine *how* the Charter is applied when the Court balances competing fundamental rights standards and interests, in order to find unity in diversity.

In essence, this study of the relation between subsidiarity and the Charter has two dimensions. In the first place, focus lies on how the subsidiarity principle operates with respect to the Charter as a legal instrument. *What expressions does the principle of subsidiarity take in relation to the Charter?* In the second place, the study examines how subsidiarity can be seen in the Court's fundamental rights review under the Charter. *How is the principle of subsidiarity observed by the CJEU in its application of the Charter?*

1.3 Approaching the Charter from the Perspective of Subsidiarity

1.3.1 Sources of Subsidiarity and Fundamental Rights in EU Law

Subsidiarity and the respect for fundamental rights both form part of the constitutional principles of the Union legal order and are elevated to the status of primary law through the Charter and the Treaties.[51] In this sense, the study is primarily situated in the uppermost part of the EU hierarchy of norms, revolving around the legally binding Charter, the Treaties and general principles of EU law.[52]

EU primary law provides a legal basis for EU secondary legislation and conditions its legitimacy and validity.[53] With the Charter at the heart of the investigation, EU secondary law will play a secondary role in this study.[54] In the same way as the Charter complements their interpretation and application, legislative acts will mainly be used as a complementary source, primarily in connection to the analysis of relevant case law on the application of the Charter. Furthermore, historical and contemporary EU documents of a political and soft-law nature will contribute to a contextual understanding of how the principle of subsidiarity and the Charter have evolved, respectively and in parallel.[55]

Given the crosscutting nature of subsidiarity and fundamental rights within the Union legal order, the case law of the CJEU is essential for understanding the Charter. As the ultimate interpreter of EU law, the Court has an important influence on the EU constitutional framework, including issues such as the conferral of competences,

[51] LINDFELT M. (2007): p. 292.
[52] On the hierarchy of norms in EU law, *see* e.g. Cases C-294/83 *Les Verts*, para. 23; C-402/05 P & 415/05 P *Kadi*, para. 305. *See also* VON DANWITZ T. (2001): p. 292; ESTELLA A. (2002): p. 169; RAITIO J. (2003): p. 6, 83; ROSAS A. – ARMATI L. (2012): p. 52-53; LEBECK C. (2013): p. 23, 32.
[53] RAITIO J. (2003): p. 7; CRAIG P. – DE BÚRCA G. (2011): p. 103; ROSAS A. – ARMATI L. (2012): p. 52-53.
[54] Regulations, Directives and Decisions form the body of EU secondary legislation under Article 289 TFEU.
[55] RAITIO J. (2003): p. 8-10; NEERGAARD U. – NIELSEN R. (2011): p. 99.

subsidiarity and respect for fundamental rights. Historically, the Court played a decisive role in the development of EU fundamental rights, and therefore its interpretation of the Charter is of particular relevance also for this study.[56] Rulings delivered after 1 December 2009, when the Charter became legally binding, are especially significant, irrespective of whether they resulted from preliminary references under Article 267 TFEU, or appeals and direct actions under Article 258, 259 or 263 TFEU.[57] Even so, the Court has not yet explicitly pronounced itself on the principle of subsidiarity for the purpose of the Charter.

Lastly, the EU legal doctrine has likewise remained relatively silent on the relation between subsidiarity and the respect for fundamental rights. The issue has scarcely been addressed, neither in the research on EU fundamental rights law, nor in the study of the function of the subsidiarity principle in EU law.[58] Only a few studies explicitly – albeit only in part – examine the impact of the subsidiarity principle on fundamental rights protection in EU law.[59] The views expressed are both diverse and dispersed, and thus provide a fertile basis for further research on the topic.

1.3.2 Methods for Understanding the Relation between Subsidiarity and Fundamental Rights

The examination of the Charter and its application in the light of the principle of subsidiarity departs from a *sui generis* understanding of the EU as an autonomous legal order, distinct from both national and international laws.[60] In this sense, the methodological point of departure could be characterised as an internal perspective on EU law, focusing on its proper legal sources and the case law of the CJEU.[61] Nevertheless, the investigation also has *inter-systemic* features, in the sense that it considers the effects of European constitutional pluralism on EU fundamental rights protection.[62] This relational approach is inherent to both subsidiarity and fundamental rights. Whilst the confrontations

[56] RODRÍGUEZ IGLESIAS G.C. (1995): p. 179; WIKLUND O. (1997): p. 96; RAITIO J. (2003): p. 94; ROSAS A. – ARMATI L. (2012): p. 53; LEBECK C. (2013): p. 45; DUBOUT E. (2014): p. 196; WALKILA S. (2015): p. 254, 270.
[57] LEBECK C. (2013): p. 45.
[58] On the rare occasions when overtly pronounced, the question of subsidiarity in EU fundamental rights law has been described as 'quite unsettled', 'unclear', 'most unclear' and even 'incomprehensible'. *See* MURPHY D.T. (1994): p. 76-77; CURTIN D. – VAN OOIK R. (2001): p. 105; CAROZZA P.G. (2003): p. 39; MUIR E. (2014): p. 240.
[59] Most notably, *see* MURPHY D.T. (1994): 'Subsidiarity and/or Human Rights' in *University of Richmond Law Review*, 29/1994, pp. 67-97; BESSELINK L.F.M. (1998): 'Entrapped by the Maximum Standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union' in *Common Market Law Review*, 35, pp. 629-680; CAROZZA P.G. (2003): 'Subsidiarity as a Structural Principle of International Human Rights Law' in *American Journal of International Law*, 97(1), pp. 38-79; JIRÁSEK J. (2008): 'Application of the Principle of Subsidiarity in Decision Making of the ECJ in the Area of Fundamental Rights Protection' in Dny práva – 2009 – Days of Law: the Conference Proceedings (Brno, Masaryk University), pp. 1-13; MUIR E. (2014): 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' in *Common Market Law Review*, (51)1, pp. 219-245.
[60] *See* e.g. Cases C-26/62 *Van Gend*, section B; C-6/64 *Costa*, para. 3. *See also* RAITIO J. (2003): p. 6; WALKILA S. (2015): p. 16.
[61] KIIKERI M. (2001): p. 1; RAITIO J. (2003): p. 5; MYLLY T. (2009): p. 100, 121-122.
[62] POIARES MADURO M. (2007): p. 1-2; MYLLY 2009 (2009): p. 100, 122; TUORI K. (2010): p. 3-4; BENGOETXEA J. (2014): p. 149-150, 160-161; BESSON S. (2014): p. 175-176; MUTANEN A. (2015): p. 10. According to SARMIENTO D. (2012b): p. 342, '[c]onstitutional pluralism is a methodology that explains why and how legitimacy in the European Union is a shared enterprise, the result of the pooled sovereignty that the Union shares with Member States.'

between different fundamental rights standards of the Union and the Member States set the scope for the analysis, the subsidiarity nature of international human rights law serves as a source of inspiration for the exercise of balancing unity and diversity.

Despite its normative integrity, the study of EU law is not characterised by any common legal method, but rather a vast variety of approaches can be said to exist.[63] Still, the objective of this study, namely to interpret and systematise the interrelations of subsidiarity and the Charter, finds its inspiration in traditional *legal dogmatics*.[64] This does not imply, however, that the venture would represent a purely legalistic understanding of the EU legal system. On the contrary, it is recognised that the constant push and pull between universalism and particularism in European integration necessitates a dynamic approach to Union law. Given the moral, cultural, historical, political and legal connotations that both subsidiarity and fundamental rights entail, their impact on EU law cannot be understood without the context in which they have evolved.[65] In other words, the investigation approaches EU law not only as a positive legal system on the surface but also as legal practice with a particular legal culture and a normative depth.[66]

A dynamic approach to EU law is especially useful in the analysis of the case law of the CJEU. Even though the Court has never explicitly referred to the subsidiarity principle in fundamental rights adjudication, the limited possibilities of a literal analysis do not rule out the significance of the principle for the Charter.[67] Instead, in the absence of literal references to subsidiarity, it is possible to resort to other interpretational models of the Court, such as functional, teleological and analogical arguments. The reasoning of the CJEU is characterised by references to concepts such as the effectiveness of EU law and the common objectives of integration, as well as the use of creative and flexible interpretations.[68] The abstract but flexible nature of subsidiarity and fundamental rights as general principles may also contribute to a dynamic and purposive interpretation of Union law.[69]

Rather than focusing on subsidiarity as a mere technicality of the Charter, the study

[63] HÄYHÄ J. (1997): p. 29; VAN GESTEL R. – MICKLITZ H.-W. (2011): p. 67; WALKILA S. (2015): p. 14.
[64] AARNIO A. (1978): p. 52-53; AARNIO A. (1997): p. 36-37; WIKLUND O. (1997): p. 59; TUORI K. (2000): p. 160-162.
[65] KLAMI H.T. (1997): p. 12; ESTELLA A. (2002): p. 4; DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 364; RAITIO J. (2003): p. 7; WILLIAMS A. (2007): p. 72; RAITIO J. (2013): p. 353; WALKILA S. (2015): p. 26.
[66] TUORI K. (2000): p. 160-162. TUORI's theory on critical legal positivism has been applied to EU law e.g. in NEERGAARD U. – NIELSEN R. (2011): p. 100-104.
[67] CAROZZA P.G. (2003): p. 39.
[68] BENGOETXEA J. (1993): p. 250-260; KLAMI H.T. (1997): p. 12; ESTELLA A. (2002): p. 163; RAITIO J. (2003): p. 7, 86; CRAIG P. (2009): p. 91; NEERGAARD U. – NIELSEN R. (2011): p. 108-148.
[69] JÄÄSKINEN N. (2008): p. 95; ROTH W.-H. (2011): p. 92-93; WALKILA S. (2015): p. 16.

recognises the transversal nature of fundamental rights and subsidiarity in EU law.[70] Departing from a theoretic framework on the coincidence of subsidiarity and fundamental human rights, the study ultimately seeks to examine whether a subsidiary approach to the Charter is operational in fundamental rights cases before the CJEU. Subsidiarity may be put to test by examining *when* and *how* the Charter is applied by the Court in concrete cases.[71] Nonetheless, the Charter's subsidiary makes it equally relevant to examine situations where the Court has *not* applied the Charter. Silence in legal reasoning offers a look into whether the Court actually 'means what it says and says what it means'.[72]

In the end, the question of whether subsidiarity functions as an interpretational principle of the Charter can be described as an investigation of the discrepancy between 'rights in principle' and 'rights in practice'.[73] For the purpose of interpreting and systematising the application of the Charter, the study submits that subsidiarity may be used as a methodological approach to EU fundamental rights law.

1.4 Scoping the Study of Charter Subsidiarity

1.4.1 Delimitations Regarding Procedural Subsidiarity and Material Rights

Focusing on subsidiarity as an interpretative principle of fundamental rights under the Charter, this study excludes material questions relating to the actual content of the substantive rights that the Charter guarantees. Instead, the study is concerned with the method of applying Charter provision as well as their status and scope.[74] Similarly, the *ex ante* procedural dimensions of the subsidiarity principle in EU legislative procedures has been ruled out from the study. Likewise, questions relating to the balancing of opposing material fundamental rights and interests, their respective proportionality as well as temporal questions and damages resulting from disproportionate measures fall outside the scope of this research.

Given the importance of judicial adjudication in the field of EU fundamental rights law, the application of the Charter is mainly studied through the case law of the CJEU.[75] By analogy, cases where the Court has applied the principle of subsidiarity or other general principles, will also be relevant. However, the application of the Charter by national courts

[70] ESTELLA A. (2002): p. 2.
[71] CAROZZA P.G. (2003): p. 78.
[72] SANKARI S. (2013): p. 10. *See also* SARMIENTO D. (2012a): p. 292-305.
[73] LANDMAN T. (2004): p. 927; WILLIAMS A. (2007): p. 83.
[74] ROSAS A. – ARMATI L. (2012): p. 164.
[75] SCHLÜTTER B. (2010): p. 31.

in the Member States of the Union will not be considered. Similarly, the case law of the ECtHR is merely used for comparison, where this is considered to contribute to the discussion. Neither will the accession of the EU to the ECHR be outlined in detail, albeit relevant for the protection of fundamental rights within the Union.

The objective is not to examine the effects of EU fundamental rights in general, but the interpretation and application of the Charter in particular. Still, it is necessary to also situate the Charter in relation to other concepts and elements of Union law. However, the narratives over the development of fundamental rights, the Charter and the principle of subsidiarity in EU law must not be understood as thorough. Likewise, the comparison of rights and principles as legal concepts, as well as the description of the relation between the Charter and fundamental rights as general principles, do not aspire to be exhaustive. Primarily, their purpose is to contribute to a deeper understanding of the legal environment in which the Charter operates. After all, at the heart of the study lies the application of the Charter, with due regard to the principle of subsidiarity.

1.4.2 A Structure Embracing the Transversal Nature of Fundamental Rights and Subsidiarity

For the purpose of examining the relation between the Charter and the principle of subsidiarity, the first chapter (1) of this study aims to set out its theoretical framework, comprising its research object, scope, sources and methods applied. As demonstrated, the investigation is focused on two concepts of EU law, namely fundamental rights and subsidiarity, and their intersection under the Charter. Throughout the study, other concepts of EU law are introduced and considered in relation to these, such as the principles of primacy, direct effect, indirect effect and effectiveness of EU law.

The second chapter (2) looks into the legal nature of the Charter a well as the context in which it operates. The formal connection between subsidiarity and fundamental rights is found in Article 51(1) CFR. Nevertheless, this provision cannot be isolated, but must be examined in relation to other general provisions of the Charter and with regard to place the Charter occupies in the EU legal landscape.[76] By illustrating how fundamental rights have developed within the EU legal system, the study offers a deeper understanding of the legal heritage that the Charter represents. In order to bring further clarity to the conditions in which the Charter is applied, theoretical insight is provided into the relation between

[76] WARD A. (2014): p. 1449.

Charter rights and principles, as well as the similarities and differences between the Charter and the general principles of EU law.

In the third chapter (3), the Charter's many intersections of subsidiarity and fundamental rights are examined. Common denominators of the subsidiarity principle and the Charter are uncovered by looking into how they developed and operate in parallel within the EU legal system. The relation between the subsidiarity principle and EU fundamental rights is analysed, on the one hand, with respect to the level of protection under the Charter, and on the other, with regard to the Charter's personal and material scope.

Lastly, the fourth chapter (4) analyses the application and interpretation of the Charter by the CJEU. In the light of the principle of subsidiarity, the different forms of Charter adjudication before the Court are examined. In this regard, the study aims to investigate what expressions subsidiarity takes when the Charter is balanced with economic freedoms, applied in conjunction with other norms or used to invalidate EU norms or set aside national legal acts. As a complement to this, the analysis also considers the role of the subsidiarity principle in cases where the Court has not applied the Charter.

In conclusion, the study aims to demonstrate how subsidiarity operates as an interpretative principle of the Charter, when applied by the CJEU. Consequently, the principle of subsidiarity may be used to systemise the application of the Charter, which in turn could enhance legal certainty in EU fundamental rights adjudication.

2 The Charter and Its Legal Context

2.1 Developments towards a Fundamental Rights Document of the EU

2.1.1 The Gradual Emergence of Fundamental Rights in EU Law

In the genesis of early initiatives for European integration – contrarily to what is sometimes believed – fundamental rights were envisaged as an essential component in the construction of what came to develop into the present EU. In parallel with the founding of the Council of Europe in 1949, a movement for European unity and integration emerged in 1948.[77] Supportive of the European Coal and Steal Community established in 1951 and the European Defence Community negotiated in 1952, the European movement in March 1952 set up a working group named Comité d'études pour la Constitution européenne. The aim of the working group was to explore the possibilities of drafting a Statute for a European Community associating the ECSC with the EDC.[78] According to its Resolutions declared in November 1952, 'constitutional order, democratic institutions and fundamental freedoms' should be among the primary objectives of this new European Community.[79]

These initial fundamental rights visions of the CECE were partly recycled when the EDC and the ECSC in September 1952 entrusted an Ad Hoc Assembly comprising a Constitutional Committee with the drafting of a Treaty establishing a European Political Community (EPC). Article 2 of the Draft Treaty outlined 'the protection of human rights and fundamental freedoms in Member States' as one of the objectives of the new Community.[80] Unlike the CECE's vision of Member States themselves being primarily responsible for fundamental rights, the Constitutional Committee in its draft also addressed the obligation of the Community to respect fundamental rights.[81]

In March 1953 the Ad Hoc Assembly adopted the EPC Treaty as drafted by the Constitutional Committee. Due to the failure of the ratification of the EDC Treaty in August 1954, the process for establishing a new European Community was nevertheless disrupted. Still, these early strivings to promote European political unity came to influence how the institutionalisation of continued European integration unfolded.[82]

[77] PELLONPÄÄ M. (2007): p. 1.
[78] PREDA D. (2003): p. 15; DE BÚRCA G. (2012): p. 467-469.
[79] Resolutions of the Comité d'études pour la Constitution européenne (1952). Resolution 1, sections A and B.7.
[80] Draft Treaty embodying the Statue of the European Community (1953).
[81] PREDA D. (2003): p. 14-15; COHEN A. (2007): p. 121-123; DE BÚRCA G. (2012): p. 472-473.
[82] PREDA D. (2003): p. 18; COHEN A. (2007): p. 123.

The more moderate Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community that followed in March 1957 both remained silent on the topic of fundamental rights protection. With the vision of a common market, the protection of fundamental rights was reduced to a question of national constitutional order for the Member States to determine.[83] Aimed at promoting the common market, the Treaties nevertheless contained provisions of fundamental rights character, such as the prohibition of discrimination on grounds of nationality in Article 7 and the principle of equal pay for women and men in Article 119 of the EEC Treaty.[84]

Following the Treaty of Lisbon, the principle of respect for fundamental rights is today enshrined in Articles 2, 6 and 7 TEU. Nevertheless, more than three decades had to pass, since the early attempts in 1952, before the protection of fundamental rights at Treaty level would formally reappear on the agenda of European integration. Some early signs could be observed in 1987 in the Preamble to the Single European Act. Later, in 1992, Article F of the Maastricht Treaty recognised fundamental rights as an integral part of the EU legal order. By stipulating that the Union was founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, the amended Article F of the Amsterdam Treaty in 1997 further emphasised the Union's commitments to uphold fundamental rights.[85] With the amendment of Article L, the competences of the CJEU were also extended to cover the judicial review of Union actions with regard to its commitment to respect for fundamental rights under the amended Article F.[86]

Initially, scrutiny for the CJEU to review fundamental rights was held to fall outside the scope of the integration process, because it was believed to constitute a threat against the autonomy of the Community legal order.[87] The absence of fundamental rights in the founding Treaties was echoed in the early judgements of the CJEU. In *Stork* the Court rejected the claim that Community law was in breach with the right to occupation as guaranteed under national law.[88] Accordingly, in *Geitling*, the Court held that 'Community law […] does not contain any general principles, express or otherwise, guaranteeing the maintenance of vested rights' provided for under national constitutions. In its ruling, the

[83] DE BÚRCA G. (2012): p. 474-476.
[84] DE VRIES S.A. (2012): p. 10.
[85] Article F of the Maastricht Treaty, as amended by the Amsterdam Treaty, currently corresponds to Article 6(3) TEU under the Lisbon Treaty.
[86] ROSAS A. (1999): p. 913; LYONS C. (2000): p. 97-99; ALONSO GARCÍA R. (2002): p. 493-494; CHALMERS D. (2010): p. 145; DE BÚRCA G. (2012): p. 480; WALKILA S. (2015): p. 111-112.
[87] ROSAS A. (2007): p. 33; ROSAS A. (2009): p. 457; CUNHA RODRIGUES J.N. (2010): p. 89-90; AZOULAI L. (2012): p. 207-208; SCHMAUCH M. (2012): p. 466; RAITIO J. (2013): p. 345.
[88] Case C-1/58 *Stork*, p. 24.

Court likewise declared inadmissible the argument that the Community legal order in itself would protect the right to property.[89] Finally, in *Sgarlata*, it was held that not even the right to an effective remedy as a fundamental principle common to all the Member States could override the application of a Treaty provision.[90]

Eventually the hostile attitude towards fundamental rights became unsustainable under the doctrines of direct effect and primacy. The principle of direct effect, introduced in *Van Gend*, established that individuals may be directly affected by Community law.[91] Further to this, the principle of primacy, originating from *Costa*, entitled Community law to override provisions of national law.[92] As a result of the growing powers and influence of the Community legal order over the Member States, the Community had to legitimate itself through the introduction of its proper fundamental rights mechanisms.[93]

With the introduction of fundamental rights as general principles of Community law in *Stauder*, the respect for fundamental rights was no longer solely the responsibility of each Member State.[94] As subsequently concluded by the Court in *Handelsgesellschaft* – 'whilst inspired by the constitutional traditions common to the Member States' – the protection of fundamental rights as general principles still had to be 'ensured within the framework of the structure and objectives of the Community'.[95] Alongside the identification of common constitutional traditions, as a source of inspiration for the general principles of Community law, the Court later in *Nold* added that also international human rights instruments could provide guidance, most notably the ECHR.[96] '[A] possible infringement of fundamental rights by a measure of the Community institutions' nevertheless remained a question to be appreciated solely in the light of Community law, as established in *Hauer*.[97]

Through the case law of the CJEU, fundamental rights considerations continued to gain ground, in particular by the emphasis on Community law as an integral part of the legal orders of the Member States.[98] Implicitly, the scope of application of fundamental rights under Community law was first addressed in *Rutili*, where the Court concluded that the scope of derogations from the principle of equal treatment cannot be 'determined

[89] Cases C-36/59 – 38/59 & 40/59 *Geitling*, p. 438-439.
[90] Case C-40/64 *Sgarlata*, p. 227.
[91] Case C-26/62 *Van Gend*, section B.
[92] Case C-6/64 *Costa*, para. 3.
[93] DE WITTE B. (1999): p. 863; VON DANWITZ T. (2001): p. 292; PERNICE I. (2008): p. 238-240; BRYDE B.-O. (2010): p. 119-120; KUMM M. (2010): p. 107; KÜHN Z. (2010): p. 152; DE BÚRCA G. (2012): p. 478; ROSAS A. – ARMATI L. (2012): p. 161; SCHIEK D. (2012): p. 225-227; VAN BOCKEL B. – WATTEL P. (2013): p. 873.
[94] Case C-29/69 *Stauder*, para. 7.
[95] Case C-11/70 *Handelsgesellschaft*, para. 4.
[96] Case C-4/73 *Nold*, paras. 12-13.
[97] Case C-44/79 *Hauer*, paras. 15-17. *See* RODRÍGUEZ IGLESIAS G.C. (1995): p. 172; DE WITTE B. (1999): p. 863-867.
[98] ROSAS A. (1999): p. 911; RODRÍGUEZ IGLESIAS G.C. (1995): p. 171, 177.

unilaterally by each Member State without being subject to control by the institutions of the Community.'[99] It was not until *Johnston*, however, that equal treatment and the right to obtain an effective remedy, in their capacity of general principles, were explicitly extended to obligate also Member States acting within the scope of Community law.[100] This decisive conclusion was later confirmed and further developed in *Wachauf* and *ERT*, where the Court held that Member States are bound by fundamental rights as general principles when they implement as well as derogate from Community law.[101]

In parallel with the emerging case law, the Community continued to further develop the normative framework on fundamental rights. This process came to be characterised by a veritable inventory of rights, which culminated in the drafting of the Charter.[102]

2.1.2 Writing a 'Bill of Rights' for the EU

In parallel to the CJEU and its elaboration of fundamental rights as general principles, a vision of formally incorporating fundamental rights into the legal order of the Community successively emerged.[103] Calls for an explicit Community commitment to fundamental rights came from different stakeholders engaged in the debate, such as national constitutional courts[104], groups of experts[105] and the Community institutions,[106] most prominently the Parliament. As early as 1975 in the Report on European Union, the idea of a 'list of specified rights' was introduced, and later the same year echoed in the Resolution on European Union, where the Parliament called for a 'Charter of the rights of the peoples of the European Community' to be drawn up. [107]

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[99] Case C-36/75 *Rutili*, para. 27. With *Defrenne II*, however, this development was disrupted for almost a decade, as the Court held that the Community principle of equal treatment did not cover relations subject to national law. *See* Case C-149/77 *Defrenne II*, paras. 26-33.
[100] Case C-222/84 *Johnston*, paras. 17-21. *See also* Cases C-201/85 & 202/85 *Klensch*, paras. 8-12; C-249/86 *Appropriate Housing*, paras. 12-24.
[101] Cases C-5/88 *Wachauf*, paras. 17-22; C-260/89 *ERT*, paras. 41-43.
[102] DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 368; ROSAS A. – ARMATI L. (2012): p. 56; WALKILA S. (2015): p. 11, 110.
[103] DOMINICK M.F. (1991): p. 641-644; RODRÍGUEZ IGLESIAS G.C. (1995): p. 169-170; DE WITTE B. (1999): p. 891; S'DA R.M. (1999): p. 56-79; DE BÚRCA G. (2001): p. 128-130; VON DANWITZ T. (2001): p. 289-290; CONTE A. (2012): p. 9-22.
[104] Deutsche Bundesverfassungsgericht in *Solange I*, 2 BvL 52/71, 37 BVerfGE 271 [1974]; Corte Costituzionale Italiano in *Frontini v Ministero delle Finanze* 183/73, Giust. civ. 1974-IlI, 410l [1974]; Deutsche Bundesverfassungsgericht in *Solange II,* 2 BvR 197/83, 73 BVerfGE 339 [1974].
[105] Comité des Sages (1996): *For a Europe of Civic and Social Rights*; European University Institute (1998): *Leading by Example: a Human Rights Agenda for the EU for the year 2000*; SIMITIS S. (et.al.) (1999): *Affirming Fundamental Rights in the European Union: Time to Act*; EP Directorate General for Research (1999): *Fundamental Social Rights in Europe*.
[106] EP Resolution of 4 April 1973 concerning the protection of the fundamental rights of Member States' citizens when Community law is drafted; EP Resolution of 10 July 1975 on European Union; EP Resolution of 15 June 1976 on the primacy of Community law and the protection of fundamental rights; Commission report on the protection of fundamental rights, COM(76) 37 final; BERNHARDT R. (1976): *The problems of drawing up a catalogue of fundamental rights for the European Communities*, p. 18-69; EP Resolution of 4 October 1976 on the report of the Commission on the protection of fundamental rights; EP Resolution of 16 November 1977 on the granting of special rights to the citizens of the European Community in implementation of the decision of the Paris Summit of December 1974; Joint Declaration of 5 April 1977 by the European Parliament, the Council and the Commission on the protection of fundamental rights; EESC Opinion of 22 February1989 on basic Community social rights; EP Resolution of 22 November 1989 on the Community Charter of Fundamental Social Rights; EP Resolution of 22 November 1990 on the Intergovernmental Conferences in the context of the European Parliament's strategy for European Union OJ C 324, 24.12.1990, p. 219; EP Resolution 10 February 1994 on the Constitution of the European Union, OJ C 61, 28.2.1994, p. 155.
[107] Report on European Union, COM(75) 400 final, p. 26; EP Resolution of 10 July 1975 on European Union.

In 1977, the Parliament, together with the Commission and the Council, made a declaration on their commitment to respect fundamental rights when acting on behalf of the Community.[108] However, the first steps of the European institutions towards actively promoting fundamental rights had to wait until 1989 when the Parliament issued its Declaration of Fundamental Rights and Freedoms.[109] Later that same year, the Council adopted a Community Charter of Fundamental Social Rights of Workers, as drafted by the Commission.[110] These two political instruments were not legally binding, but still underlined the growing importance of fundamental rights within Community law.

Another early aspiration to strengthen the formal status of fundamental rights within the legal order of the Community was the vision of Community accession to the ECHR.[111] Before the Community was even established, a possible accession had been envisaged in the 1953 EPC draft Treaty.[112] Still, Council of Europe standards were not recognised until 1975, when the CJEU for the first time found inspiration from the ECHR in interpreting Community law in *Rutili*.[113] The question of accession was later touched upon in a Resolution from the Parliament in 1977 and a report from the Commission in 1979.[114] The question of accession has ever since been subject to European political declarations.[115] With the Maastricht Treaty, a reference to the ECHR and the Union's commitment to respect the fundamental rights therein, was inserted into Article F.2. The question of accession was nevertheless temporarily put on hold as a result of the lack of political unanimity combined with the Opinion of the CJEU in 1996 declaring the EU incompetent to accede to the ECHR on the basis of the Treaties.[116]

As the accession procedure to the ECHR stagnated, the vision of a fundamental rights catalogue proper to the Union once again grew.[117] In 1996, the Commission nominated

[108] Joint Declaration of 5 April 1977 by the European Parliament, the Council and the Commission on the protection of fundamental rights.
[109] EP Resolution of 12 April 1989 adopting the Declaration of fundamental rights and freedoms.
[110] Community Charter of Fundamental Social Rights of Workers, COM(89) 471 final.
[111] DOMINICK M.F. (1991): p. 643-647; S'DA R.M. (1999): p. 57-58; VON DANWITZ T. (2001): p. 295; WALKILA S. (2015): p. 124-125.
[112] Secretariat of the Constitutional Committee (1953): Draft Treaty embodying the Statue of the European Community. Article 3 of the draft provided that the rights guaranteed under the European Convention on Human Rights were to become integrated as part of the EPC Treaty. Interestingly, already in 1952 the first Resolution (Section B.7) of the *Comité d'études pour la Constitution européenne* also contained a reference to the respect for human rights as defined in the ECHR.
[113] Case C-36/75 *Rutili*, para. 27. The first reference to the case law of the ECtHR was made by the CJEU in Case C-13/94 *P v S*, para. 16.
[114] EP Resolution of 16 November 1977 on the granting of special rights to the citizens of the European Community; Accession of the Communities to the European Convention on Human Rights, COM(79) 210 final.
[115] EP Resolution of 16 November 1977 on the accession of the European Community to the European Convention on Human Rights; EP Resolution of 29 October 1982 embodying the opinion of the EP on the memorandum from the Commission on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms; EP Resolution of 22 November 1989 on Community accession to the European Convention on Human Rights.
[116] CJEU Opinion 2/94. With the Lisbon Treaty, it was established in Article 6(2) TEU that the EU 'shall accede' to the ECHR. However, this progression was once again adjourned as a result of the CJEU Opinion 2/13, in which the CJEU held that draft agreement providing for the accession of the EU to the ECHR was not compatible with Article 6(2) TEU.
[117] ROSAS A. (1999): p. 909, 919; S'DA Rose M. (1999): p. 57, 82; WHITE R.C.A. (2000): p. 97; DE BÚRCA G. (2001): p. 132;

experts for a Comité des Sages to work on a proposal on how the fundamental rights of the Union could be consolidated. The report resulted in a call for an EU fundamental rights agenda, which was followed by another report from the Expert Group on Fundamental Rights, emphasising the indivisibility of civil, political and social rights.[118]

The idea to officially draft a Charter of Fundamental Rights of the European Union was eventually launched by the German Presidency in April 1999.[119] The Cologne European Council in June 1999 subsequently established a body, mandated to create a catalogue comprising the fundamental rights of the Union.[120] The Tampere European Council in October 1999 further outlined the composition and work methods of the body, stating that it should be characterised by a transparent and participatory drafting process.[121] Continuous support in favour of the elaboration of a Charter also came from the Parliament.[122] Above all, however, the political mandate given to the drafters was one of 'revelation rather than creation, compilation rather than innovation.'[123]

The drafting body gave itself the constituent name 'Convention' and presented a first complete draft already in July 2000.[124] A revised final draft of the Charter was later approved by the Biarritz Informal European Council in October 2000.[125] Eventually, the Charter was solemnly proclaimed in Nice on 7 December 2000 by the Council, together with the Parliament and the Commission.[126] In order to clarify the scope as well as the sources of each of the Charter provisions, an explanatory memorandum was also published by the Secretariat of the Council.[127]

MENÉNDEZ A.J. (2002): p. 471; DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 373-374; CHALMERS D. (2010): p. 145-146; CONTE A. (2012): p. 24; WALKILA S. (2015): p. 125-126.

[118] Comité des Sages (1996): *For a Europe of Civic and Social Rights*, SIMITIS S. (et.al.) (1999): *Affirming Fundamental Rights in the European Union: Time to Act*.

[119] Conference 'Eine europäische Charta der Grundrechte – Beitrag zur gemeinsamen Indentität' organised by the German Ministry of Justice and the representation of the European Commission in Germany in Cologne on 27 April 1999.

[120] Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union, Annex IV to the Presidency Conclusions of the Cologne European Council on 3-4 July 1999.

[121] The Convention consisted of thirty members of the national Parliaments, sixteen members of the European Parliament, fifteen Member State Government representatives and one representative of the Commission. Observer status to the Convention was admitted to three representatives of the EESC, two representatives of the CoR, two representatives of the CJEU and the European Ombudsman. Two observers were admitted on behalf of the Council of Europe, including one from the ECHR. *See* the Annex of the Presidency Conclusions of the Tampere European Council on 15-16 October 1999 and Annex IV of the Presidency Conclusions of the Cologne European Council on 3-4 June 1999. *See also* DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 382.

[122] EP Resolution of 16 September 1999 on the establishment of the Charter of Fundamental Rights; EP Resolution of 16 March 2000 on the drafting of a European Union Charter of Fundamental Rights.

[123] Commission Communication on the Charter of Fundamental Rights of the European Union, COM(2000) 559 final, p. 3. *See* DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 368.

[124] Draft Charter, CHARTE 4422/00, CONVENT 50, 28.7.2000.

[125] Draft Charter, CHARTE 4487/00 CONVENT 50, 28.9.2000. *See* EP Decision approving the draft Charter of Fundamental Rights of the European Union, C5-0570/2000, OJ C 223, 8.8.2001, p. 74. *See also* D'SA R.M. (1999): p. 82. Besides linguistic revision, the most remarkable addition to the final draft was the inclusion of two new articles, namely Article 22 on cultural, religious and linguistic diversity and Article 25 on the rights of the elderly.

[126] Charter of Fundamental Rights of the European Union, OJ C 364/1, 18.12.2000.

[127] Draft Charter, CHARTE 4473/00 CONVENT 49, 11.10.2000, p. 1-51. The amended explanations can be found in Explanations relating to the Charter of Fundamental Rights of the European Union, 14.12.2007, OJ C 303/02.

2.2 The Legal Status of the Charter

2.2.1 The Early Use of the Charter by the European Courts

As a result of a political compromise, the compilation of rights proclaimed in the Charter did not become a legally binding source of EU law.[128] As expressed already in the conclusions from the Cologne European Council, the purpose had been to draft 'a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens.'[129] Early in the process, it was stressed that the mandate given to the Convention was not to amend or change the responsibilities of the Union, but merely to draw up a list of existing fundamental rights applicable within the scope of EU law.[130] The proclaimed Charter was supposed to strengthen the Union's commitment to fundamental rights and enhance the legal certainty in fundamental rights adjudication. However, the judicial significance of the Charter was left for the CJEU to decide.[131]

Before the CJEU, the AGs paved the way for making use of the Charter in their legal argumentation.[132] As early as two months after its proclamation, the AGs Alber and Tizzano made references to the Charter as a means of reinforcing the reasoning in their Opinions.[133] Four months later, AG Léger further examined the status of the Charter in *Hautala*, stating that despite its lack of legal force, it still expressed the 'highest level of values common to the Member States' and thus ought to be considered 'a source of guidance as to the true nature of the Community rules'.[134] This call for interpretation of EU law in the light of the Charter was nevertheless disregarded by the CJEU in its judgement.

The CJEU remained reluctant to the appreciation of Charter-based arguments and it was not until June 2006 that a situation arose in which the consideration of the Charter and its legal value was inevitable for the Court.[135] In *Parliament v Council*, the Court had to interpret Directive 2003/86 on family reunification in relation to the right to respect for family life and the child's best interest as guaranteed under Articles 7 and 24 CFR.[136] It held that while the Charter did not have binding legal force, the legislature still

[128] The Charter was not included in the Treaty of Nice, but only communicated in the C-series of the Official Journal instead of published in the L-series reserved for legislation. *See* ANDERSON D. – MURPHY C.C. (2011): p. 2. *See also* EECKHOUT P. (2002): p. 946.
[129] Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union, Annex IV to the Presidency Conclusions of the Cologne European Council on 3-4 July 1999. *See also* Commissions communication on the Charter of Fundamental Rights of the European Union, COM(2000) 559, 13.9.2000, p. 3.
[130] Record of the first meeting of the Body to draw up a Draft Charter, CHARTE 4105/00, 17.12.1999, p. 1-2.
[131] RODRÍGUEZ IGLESIAS G.C. (1995): p. 179; MENÉNDEZ A.J. (2002): p. 477.
[132] KOKOTT J. – SOBOTTA C. (2010): p. 1.
[133] Opinion of AG ALBER in Case C-340/99 *TNT Traco*, para. 94; Opinion of AG TIZZANO in Case C-173/99 *BECTU*, para. 28.
[134] Opinion of AG LÉGER in Case C-353/99 P *Hautala*, paras. 80-83. *See* WALKILA S. (2011): p. 814.
[135] KOKOTT J. – SOBOTTA C. (2010): p. 1.
[136] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

acknowledged its importance by stating in Recital 2 of the Preamble of the Directive that it observed the principles recognised in the Charter.[137]

Given the Court's early references to the Charter as of mere secondary relevance, its legal nature remained uncertain.[138] The Cologne European Council had intentionally left the question of the formal legal status of the Charter to be dealt with for later. After its proclamation in Nice, it was to be considered 'whether, and if so, how, an integration of the Charter into the treaties could take place'.[139] Hence, the Charter had already from the beginning been drafted 'as if' it would be integrated into the Treaties.[140]

As a result of the Nice Declaration on the future of the Union in December 2000 and the Laeken European Council in December 2001, a European Convention was entrusted with the inclusion of the Charter into the Treaties, as part of the elaboration of a Constitution of Europe.[141] Together with the continued discussions on EU accession to the ECHR, the issue of the legally binding status of the Charter thus came to be closely associated with the debate on the constitutionalisation of the Union.[142] However, when the ratification process of the Treaty establishing a Constitution for Europe eventually failed in 2005, also the legal binding incorporation of the Charter was adjourned for a period of reflection.[143]

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[137] Case C-540/03 *Parliament v Council*, para. 38. Prior to the judgement of the CJEU, the General Court had referred to the Charter already in February 2001, in Case T-112/98 *Mannesmannröhren*, paras. 15, 76. *See also* Case T-54/99 *max.mobil*, paras. 48, 57, where the General Court for the first time found interpretative support in the Charter. The ECtHR, in turn, made its first reference to the Charter in July 2002, in ECtHR Case 28957/95 *Goodwin v United Kingdom*, paras. 58, 100. *Also, see* ECtHR Case 36022/97 *Hatton & Others v United Kingdom*, where an even earlier reference to the Charter was made in the Separate Opinion of Judge Costa. Some years later, in October 2006, the Civil Service Tribunal of the EU made its first reference to the Charter in Case F-1/05 *Landgren*, paras. 70-72

[138] MENÉNDEZ A.J. (2002): p. 475. Interestingly, the Commission in its Communication on the legal nature of the Charter of Fundamental Rights of the European Union, COM(2000) 644 final, p. 6, stated that 'It can reasonably be expected that the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of Community law.' Furthermore, the European Parliament had decided to consider itself bound by the Charter through EP Resolution of 3 October 2002 on the European Union Charter of Fundamental Rights. Earlier on the European Parliament had called on other Union institutions to respect the Charter in its Resolution of 31 March 2001 on the Treaty of Nice and the future of the European Union,.

[139] Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union, Annex IV to the Presidency Conclusions of the Cologne European Council on 3-4 July 1999.

[140] Commission Communication on the legal nature of the Charter of Fundamental Rights of the European Union, COM(2000) 644 final, p. 4. *See also* DE BÚRCA G. (2001): p. 128; DE WITTE (2001): p. 80; DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 365; ANDERSON D. – MURPHY C.C. (2011): p. 2; WALKILA S. (2015): p. 122. In support of a legally binding Charter, the Commission and the Parliament declared their intentions to embrace the Charter as a standpoint conditioning their proper actions. *See* Commission Communication on the Charter, COM(2000) 559 final; Commission Communication of the Legal Nature of the Charter, COM(2000) 644 final; EP Resolution of 15 March 2007 on the compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring. Also, *see* LINDFELT M. (2007): p. 235; KAILA H. (2012): p. 309

[141] Council Declaration on the Future of the Union, Annex 23 to the Treaty of Nice, p. 77; Leaken Declaration – Challenges and Reforms in a Renewed Union: towards a Constitution for European Citizens, Annex II to the Presidency Conclusions of the Laeken European Council on 14-15 December 2001, p. 36; European Convention Final report of Working Group II on the Incorporation of the Charter/Accession to the ECHR, CONV 354/02, WG II 16, 22.10. 2002. *See* DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 370.

[142] DE WITTE (2001): p. 87; MICKLITZ H.-W. (2012): p. 362.

[143] Treaty establishing a Constitution for Europe, OJ C 310, 16.12.2004, p. 1-474. The Charter was to be included in Part II, but the Treaty was rejected by the French and Dutch referendums on 29 May and 1 June 2005 respectively. For the aftermath of the Constitutional Treaty, *see* Declaration by the Heads of State or Government of the Member States of the European Union on the ratification of the Treaty establishing a Constitution for Europe, Brussels European Council of 16-17 June 2005; EP Report of 16 December 2005 on the period of reflection: the structure, subjects and context for an assessment of the debate on the European Union; EP Resolution of 19 January 2006 on the period of reflection. *See also* ANDERSON D. – MURPHY C.C. (2011): p. 3; CONTE A. (2012): p. 37.

2.2.2 The Increasing Application of the Legally Binding Charter after Lisbon

With the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter eventually gained full legal effect. Article 6(1) of the TEU establishes that the Union recognises the rights, freedoms and principles set out in the Charter, which shall have the same legal value as the Treaties. In other words, the Charter has gained the status of primary law, which in turn has opened up for new possibilities of fundamental rights adjudication within the legal order of the Union.

Initially the legal recognition of the Charter was envisaged through incorporation into the Treaties. However, when the enactment of the Constitution for Europe failed, it was suggested the Charter instead become legally binding by cross-reference. For this purpose the numbering and provisions on the interpretation and application of the Charter were slightly revised and its explanatory memorandum was updated. It is thus the amended Charter, as reproclaimed by the Council, the Commission and the Parliament on 12 December 2007, that has been given full legal effect by the Treaty of Lisbon.[144]

The original intention had been to draft a Charter with the potential of eventually gaining binding legal status. Interestingly, however, the explanatory memorandum was never drafted with the intention of having legal significance. Still, it seems to have acquired a 'hybrid status'.[145] Article 52(7) CFR presently states that the Explanations, drawn up as a way of providing guidance in interpretation, shall be given due regard by the EU Courts and the courts in the Member States. This is further emphasised in Article 6(1) TEU, providing that the rights, freedoms and principles in the Charter shall be interpreted with due regard to these Explanations. Although the Explanations 'do not as such have the status of law' the explanatory memorandum describes itself as 'a valuable tool of interpretation intended to clarify the provisions of the Charter'. For instance, in *DEB*, *Åkerberg Fransson* and *Alemo*, the CJEU has relied on the Explanations for the interpretation of the Charter, which confirms their strengthened position post-Lisbon. Guiding its interpretation, the explanatory memorandum is susceptible of furthering a harmonised application of the Charter within the Union.[146]

Even though the Charter had existed for almost a decade, the transition towards a

[144] Charter of Fundamental Rights of the European Union, OJ C83/389, 30.3.2010.
[145] CRAIG P. – DE BÚRCA G. (2011): p. 398; DASHWOOD A. (et.al.) (2011): p. 385; SCMAUCH M. (2012): p. 474.
[146] Cases C-279/09 *DEB*, para. 32; C-617/10 *Åkerberg Fransson*, para. 20; C-426/11 *Alemo*, para. 32. *See* ROSAS A. – KAILA H. (2011): p. 13; KAILA H. (2012): p. 300-301.

legally binding document was not without political compromise.[147] In order to reach consensus regarding the general provisions in Articles 51 to 54 and the applicability of the Charter, Poland and the UK were eventually accorded special guarantees assuring its restrictive interpretation, as agreed in Protocol No. 30 attached to the Lisbon Treaty.[148] Aimed at 'clarifying' the application of the Charter, Article 1 of the Protocol states that the 'Charter does not extend the ability of the Court […] to find that [national measures] are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.'

Today the Charter enjoys the same legal status as the TEU and the TFEU.[149] The Lisbon Treaty has thus been crucial when it comes to the reinforcing of the legal effects of the Charter.[150] As early as two months after its entry into force, the CJEU in *Kücükdeveci* made a first reference to the legally binding Charter and thus implied its potential as an influential source of Union law.[151] Concerning the prohibition of discrimination based on age in Article 21 CFR, the Court held that 'it is to have the same legal value as the Treaties.'[152] Less than a year later, in *Schecke* the Court declared an act of secondary Union legislation void because of its incompliance with the fundamental rights standards under the Charter.[153] In the pre-Lisbon era, the CJEU had never invalidated a piece of secondary legislation in a similar way, which makes the strengthened status of the Charter after Lisbon even more evident.[154]

Through the consolidation of fundamental rights, the post-Lisbon Union has equipped itself with a legally binding 'Bill of Rights'. By making the rights guaranteed more apparent to all, the Charter aspires to lower the threshold for individuals to invoke fundamental rights-based arguments in adjudication.[155] The broad scope of rights contained in the Charter also contributes to an increased number of right-based claims.[156] Moreover, the 'depillarisation' that came with the Lisbon Treaty might further expand the application of the Charter, as the area of freedom, security and justice was included in the structure of the general legal order of the EU. As of 1 December 2014, the CJEU has

[147] In fact, national concerns over a too broad scope of application had been present already during the drafting process, which resulted in the compromise of the general provisions in Articles 51 to 54 of the Charter, guiding its application. DE BÚRCA G. (2001): p. 136; CAROZZA P.G. (2004): p. 44; LENAERTS K. – GUTIERREZ-FONS J.A. (2010): p. 1656; WALKILA S. (2012): p.620; WARD A. (2014): p. 1413; WALKILA S. (2015): p. 159-161.
[148] Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, annexed to the Treaty of Lisbon. *See* ANDERSON D. – MURPHY C.C. (2011): p. 2, 10; KAILA H. (2012): p. 293.
[149] CRAIG P. – DE BÚRCA G. (2011): p. 394; DASHWOOD A. (et.al.) (2011): p. 361.
[150] WALKILA S. (2015): p. 141.
[151] ANDERSON D. – MURPHY C.C. (2011): p. 16; WALKILA S. (2011): p. 817; WALKILA S. (2015): p. 142.
[152] Case C-555/07 *Kücükdeveci*, para. 22.
[153] Cases C-92/09 & 93/09 *Schecke*, paras. 87-89
[154] ROSAS A. – ARMATI L. (2012): p. 172; MIETTINEN S. (2015): p. 20; WALKILA S. (2015): p. 142-143.
[155] Commission Communication on the Charter of fundamental rights of the European Union, COM/2000/0559 final, 13.9.2000, points 7 and 8. *See also* Opinion of AG BOT in Case C-555/07 *Kücükdeveci*, para. 90.
[156] CRAIG P. (2009): p. 92-93.

jurisdiction in these areas, which is likely to step up the rate of claims regarding violations of fundamental rights.[157]

The strengthened access to legal protection can be seen in the development of the case law of the Court. As a consequence of the solemn proclamation of the Charter in 2000, the fundamental rights-related caseload before the Court grew, only to further expand after the recognition of the Charter as primary law in December 2009.[158] Throughout almost a decade of soft law status, the CJEU referred to the Charter in 142 of its judgements.[159] This can be compared to the five time increase of references within the Charter's first five years of legally binding effect, a period during which the CJEU cited the Charter in 422 judgements.[160] Today, the legally binding Charter is one of the most prominent sources of fundamental rights adjudication within the EU.[161]

2.3 The Distinction between Rights, Freedoms and Principles

2.3.1 Substantive Rights and Freedoms under the Charter

The Charter has been described as a creative catalogue of rights, because it combines traditional civil and political rights with economic, social and cultural ones. In addition to this, it introduces fundamental rights of a more innovative nature, such as principles of bioethics. The Preamble insists on its modern character, aiming to 'strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments'. By placing all the rights guaranteed on the same level, it not only presents an indivisible and horizontal understanding of fundamental rights, but also a represents a creative combination of provisions touching upon all three generations of fundamental rights.[162]

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[157] Article 10 of Protocol No. 36 on transitional provisions, annexed to the Treaty of Lisbon. *See* CRAIG P. (2009): p. 93; BRYDE B.-O. (2010): p. 126; CHALMERS D. (2010): p. 144; WALKILA S. (2015): p. 143. Nevertheless, under Article 276 TFEU, the CJEU has no jurisdiction to review the exercise, validity or proportionality of the Member States' law-enforcement in the area of freedom, security and justice. *See* PERNICE I. (2008): p. 246.

[158] CARTABIA M. (2012): p. 269-270; SAIZ ARNAIZ A. – TORRES PÉREZ A. (2012): p. 9-10; WALKILA S. (2012): p. 616-634; DE BÚRCA G. (2013): p. 170; WALKILA S. (2015): p. 132.

[159] Search in the Curia database on 3 June 2015. Search command identifying all judgements from the CJEU between 7 December 2001 and 30 November 2009 containing the phrase 'Charter of Fundamental Rights'.

[160] Search in the Curia database on 3 June 2015. Search command identifying all judgements from the CJEU between 1 December 2009 and 1 December 2014 containing the phrase 'Charter of Fundamental Rights'.

[161] Joint Communication of Presidents COSTA and SKOURIS from the European Court of Human Rights and the CJEU of the European Union, 24.1.2011, p.1; Commission Report on the application of the EU Charter of Fundamental Rights 2012, COM(2013) 271 final, p. 7. *See also* ROSAS A. – KAILA H. (2011): p. 9; WALKILA S. (2011): p. 817; SAIZ ARNAIZ A. – TORRES PÉREZ A. (2012): p. 9-10; DE VRIES S.A. (2013b): p. 74; DOUGLAS-SCOTT S. (2013): p. 161; GROUSSOT X. (et.al.) (2013): p. 103; WALKILA S. (2015): p. 141-146. *Cf* e.g. Case C-279/09 *DEB*, paras. 29, 59 with Cases C-386/10 P *Chalkor*, paras. 51-52; C-199/11 *Otis*, paras. 46-47, where the CJEU referred to Article 47 CFR, prior to Article 6(1) ECHR. As a consequence, it is possible that the protection of fundamental rights within the EU has been strengthened, since the Charter guarantees *at least* the same level of protection as the ECHR.

[162] LINDFELT M. (2007): p. 303; ANDERSON D. – MURPHY C.C. (2011): p. 5; CRAIG P. – DE BÚRCA G. (2011): p. 395; DASHWOOD A. (et.al) (2011): p. 361; LADENBURGER C. (2012): p. 143; ROSAS A. – ARMATI L. (2012): p. 172; DE VRIES S.A. (2013b): p. 71; WALKILA S. (2015): p. 127, 133.

Drawing inspiration from the case law of the CJEU, international human rights instruments, constitutional traditions common to the Member States as well as EU primary and secondary law, the Charter comprises 54 Articles, divided into seven different Titles covering the themes of Dignity (Title I: Articles 1-5), Freedoms (Title II: Articles 6-19), Equality (Title III: Articles 20-26), Solidarity (Title IV: Articles 27-38), Citizens' Rights (Title V: Articles 39-46) and Justice (Title VI: Articles 47-50). In addition to the Titles outlining the material fundamental rights provisions, the Charter entails one last Title containing some General Provisions (Title VII: Articles 51-54) regarding the scope of application of the Charter as well as its interpretation and level of protection.[163]

In accordance with Article 6(1) TEU, the Union recognises the rights, freedoms and principles set out in the Charter. Yet, the EU assembles all its fundamental rights in one catalogue, under one common denominator, namely that of fundamental *rights*.[164] This 'language of rights' emphasises the autonomy of the individual and entitles its addressees to invoke their rights against other legal subjects, thus resulting in legal obligations for the adversaries.[165] However, the notion of 'rights' is ambiguous, because not all rights in EU law are fundamental.[166] Still, the inclusion of a right in the Charter allows for the presumption that it constitutes a *fundamental* right.[167] Notwithstanding this presumption, the categorisation of fundamental rights still remains complicated due to their character as underlying principles of EU law.[168] Indeed, the notion of fundamental rights is not a mere issue of formal denomination, but above all a question about normative function, effectiveness and constitutional significance.[169] It follows, that the Charter's notion of rights is more complex than what appears at a first glance.

As a fact, the Charter does not keep up a very rigorous distinction between fundamental rights and freedoms. Provisions laying down fundamental *freedoms* can be found in Title II on 'Freedoms' (Articles 6-19). Still, only some of these are literally designated as freedoms (Articles 10-13 and 15-16), whereas others are rather described as rights (Articles 6-9, 14, 17 and 18). Also, one additional freedom can be found in Article 45. Furthermore, several of the Articles combine the concepts of rights and freedoms (Articles 10-12, 14-15, 45), some even formulated in terms of a 'right to freedom' (Articles 10-12).

[163] OJANEN T. (2003): p. 676; DASHWOOD A. (et.al.) 2011: p. 361-362.
[164] Opinion of AG VILLALÓN CRUZ in Case C-176/12 *AMS*, para. 44.
[165] DWORKIN R. (1977): p. 14, 172, 185.
[166] PRECHAL S. (2005): p. 99-100; WALKILA S. (2015): p. 22-23.
[167] *See* e.g. Opinion of AG TIZZANO in Case C-173/99 *BECTU*, para. 28; Opinion of AG TRSTENJAK in Cases C-350/06 & 520/06 *Schultz-Hoff*, para. 38; Opinion of AG TRSTENJAK in Case C-282/10 *Dominguez*, para. 75.
[168] RAITIO J. (2003): p. 175.
[169] WALKILA S. (2015): p. 26.

Hence, a part from the different semantics, there appears to be no legally relevant distinctions between fundamental rights and freedoms contained in the Charter.[170] This is also supported by the case law of the CJEU, which has treated freedoms under the Charter as equivalent to fundamental rights.[171]

What rather causes polemic and uncertainty is the Charter's distinction between rights (and freedoms), on the one hand, and provisions giving expression to *principles*, on the other. Although the inclusion of social rights into the Charter provoked some resistance, such a distinction was not envisaged when the non-binding Charter was first drafted.[172] It was not until later, when the Charter became legally binding, that Article 52(5) with its legal distinction between rights and principles was introduced.[173] For obvious reason, the posterior introduction of such a distinction is likely to cause ambiguous results.

According to the Preamble and Article 51(1) CFR, rights shall be 'respected', whereas principles are only to be 'observed'. This is further developed in Article 52(5), which emphasises that provisions containing principles must be implemented by legislative and executive acts of the Union or the Member States, before they become 'judicially cognisable'. However, the Article places no such restrictions on the rights and freedoms guaranteed under the Charter. *A contrario*, the Charter implies that only provisions held to constitute rights are capable of being invoked and enforced before a court of law.[174]

Based on the wording of the Charter, Articles 2-3, 6-12, 14-15, 17-18, 24-31, 33-35, 39-45, 47-48 and 50 contain explicit references to rights. Out of these, however, the Explanations to the Charter point out Articles 25 and 26 as examples of principles. It must therefore be assumed that a literal interpretation of the Charter does not significantly contribute to the identification of what substantive fundamental rights it guarantees.

2.3.2 Programmatic Principles under the Charter

The Charter's distinction between rights and principles must not be confused with the concept of fundamental rights as general principles of EU law.[175] Rather, the division into rights and principles should be understood in the light of the theoretical distinction

[170] ANDERSON D. – MURPHY C.C. (2011): p. 6; ANDERSON D. – MURPHY C.C. (2012): p. 161.
[171] *See* e.g. Cases C-71/11 & 99/11 *Y & Z*, paras. 56-60 (Article 10 CFR); C-314/12 *Telekabel*, paras. 49, 55 (Articles 11 and 16 CFR); C-611/12 P *Giordano*, para. 47 (Article 15 CFR).
[172] Nevertheless, the drafting Convention of the Charter still held that all of '[t]he rights to be guaranteed are not of the same kind.' *See* CHARTE 4111/00, Body 3, 20.1.2000, para. 20. *See also* Opinion of AG VILLALÓN CRUZ in Case C-176/12 *AMS*, para. 47.
[173] CRAIG P. – DE BÚRCA G. (2011): p. 398; ANDERSON D. – MURPHY C.C. (2012): p. 151; LENAERTS K. (2012): p. 399; WARD A. (2014): 1416.
[174] ANDERSON D. – MURPHY C.C. (2011): p. 6; CRAIG P. (2012c): p. 219.
[175] WALKILA S. (2015): p. 243.

between legal rules and principles. A basic distinction between the two can be made on the basis of generality. Principles are held to be of a more general nature than rules.[176] In comparison to rules, principles are qualitatively different, being more flexible, but also more vague.[177] Whereas rules either apply or do not apply to a given situation, principles apply either more or less, thus comprising a 'dimension of weight or importance'. As a consequence, principles do not dictate any specific outcome for their application, but merely indicate the direction that decisions should take.[178]

Whether rules validly apply is determined by their proper content. Principles, on the contrary, are more dependent on the specific circumstances of the situation at hand.[179] With regard to its normative content, a rule is either relevant or irrelevant to the subject matter. Conversely, several principles can simultaneously apply to a given situation.[180] While the application of rules primarily take the form of interpretation, the application of principles also comprises a balancing act, where different principles and values are weighed against each other.[181] In this sense, principles can also be understood as commands of optimisation, requiring their underlying visions to be carried out as far as possible under the given the circumstances. In other words, the objective of a principle must always be satisfied to the highest degree possible.[182] Exceptions can be made to rules, but principles never completely lose their impact.[183]

The solemn proclamation of the Charter inspired hope for a more effective enforcement of social rights at European level.[184] Contrary to the ideal of indivisible rights, however, Article 52(5) introduced a distinction between rights and principles.[185] As a result of this legal separation, it has been suggested that the Charter's notion of rights primarily refers to civil and political rights and the negative obligations they impose on the Union and the Member States. However, the drafters of the Charter nor the CJEU never implied such a prioritisation.[186] Still, the remedial capacity of social rights appears weaker, something that is further emphasised by Protocol No. 30, stating that 'nothing in Title IV [on 'Solidarity'] creates justiciable rights […] except in so far as Poland or the United Kingdom has

[176] ALEXY R. (2002): p. 45-46; RAITIO J. (2003): p. 285. *See* WALKILA S. (2015): p. 43-44 for further references.
[177] ALEXY R. (2002): p. 354.
[178] DWORKIN R. (1977): p. 22-35.
[179] TOLONEN H. (2008): p. 32; WALKILA S. (2015): p. 44.
[180] DWORKIN R. (1977): p. 27.
[181] AARNIO A. (1997): p. 179-183; RAITIO J. (2003): p. 288.
[182] ALEXY R. (2000): p. 295, 300; ALEXY R. (2002): p. 47-48;
[183] DWORKIN R. (1977): p. 24-25.
[184] DE WITTE B. (2001): p. 86; WARD A. (2004): p. 131.
[185] OJANEN T. (2003): p. 675.
[186] OJANEN T. (2003): p. 676; CRAIG P. – DE BÚRCA G. (2011): p. 398; ROSAS A. – ARMATI L. (2012): p. 210-211; DE VRIES S.A. (2013b): p. 72; LEBECK C. (2013): p. 288. *Cf.* CRAIG P. (2012c): p. 218.

provided for such rights in its national law.'[187]

The distinction between rights and principles in the Charter reflects a traditional distinction between constitutional provisions that may be judicially enforced, on the one hand, and those that may not, on the other.[188] As established by Article 52(5) CFR, provisions that contain principles have limited invocability as they 'shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. As a result, they may be reviewed by a the CJEU or by a national court only once they have been 'implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, [or] by acts of Member States when they are implementing Union law, in the exercise of their respective powers.'[189]

Notwithstanding the implementation criteria, the Union and its Member States retain their normative discretion, since Article 52(5) CFR does not contain any requirement to legislate. As set out in the Explanations to the Charter, principles are rather programmatic and do not 'give rise to direct claims for positive action by the Union's institutions or Member States authorities.'[190] It may be added, that Charter principles appear to express not only supporting arguments for rights, but also policy arguments.[191] The concept of policies can be understood as referring to collective goals, as opposed to individual rights.[192] Charter provisions like Articles 35-38 on health care, services of general economic interest, environmental and consumer protection, could arguably qualify as such policies. While neither policies nor principles establish any substantive rights or give rise to any obligation to legislate, they may still have an influence on EU policy-making.[193] However, should the Union wish to concretize certain rights and principles of the Charter through further legislation, it can do so only within its competences under the Treaties.[194]

Albeit ambiguous, the Explanations intend to give guidance on how to identify principles among the provisions of the Charter. For illustration, Articles 25, 26 and 37 are listed as examples of principles. Out of these, however, only Article 37 is situated under Title IV on 'Solidarity', which Protocol No. 30 explicitly identifies as nonjusticiable

[187] Article 1(2) of Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, annexed to the Treaty of Lisbon. *See* ANDERSON D. – MURPHY C.C. (2011): p. 11; LEBECK C. (2013): p. 288.
[188] WALKILA S. (2015): p. 241.
[189] OJANEN T. (2003): p. 675; ANDERSON D. – MURPHY C.C. (2011): p. 6; SCMAUCH M. (2012): p. 474-475. *See also* Opinion of AG VILLALÓN CRUZ in Case C-176/12 *AMS*, paras. 60-72.
[190] Explanations to Article 52(5) CFR. *See* CRAIG P. (2012c): p. 219-220; PECH L. (2012): p. 1861-1863; WALKILA S. (2015): p. 245.
[191] SORIANO L.M. (2003): p. 322; GROUSSOT X. (2006): p. 137; WALKILA S. (2015): p. 18-20, 205.
[192] DWORKIN R. (1977): p. 22, 82-84.
[193] DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 364; WILLIAMS A. (2007): p. 90; DUTHEIL DE LA ROSCHÈRE J. (2009): p. 124; FOLLESDAL A. (2011): p. 20; ANDERSON D. – MURPHY C.C. (2012): p. 174; ROSAS A. – ARMATI L. (2012): p. 211-212; FONTANELLI F. (2013): p. 317.
[194] CHRONOWSKI N. (2014): p. 14.

rights.[195] Further to this, 'the field of social law' is cited as a source of principles, but the two other Articles, cited as examples, still refer to 'rights'. Moreover, the Explanations refer to pre-Charter case law on the principles of precaution and reasonable expectations, but none of these principles are found among the provisions of the Charter.[196]

In an attempt to clarify the notion of principles, it has been suggested that provisions containing references to EU legislation or national laws and practices, like Articles 16, 27-28, 30 and 34-36, are likely to express principles. However, this is not a decisive characteristic of principles, because Article 37 is the only example of such a principle that is also mentioned by the Explanations.[197] The character of imposing obligations on the Union and its Member States, rather than creating individual rights, has been brought forth as another way of identifying potential principles among the provisions of the Charter.[198]

The Explanations suggest that the distinction between rights and principles should be understood in the light of the case law of the CJEU. Still, this interpretational guidance hardly clarifies the ambiguity of the Charter. Based on its title, for instance, Article 49 is the only provision designated as a 'principle'. Nevertheless, the Court has long ago established that the legality and proportionality of criminal offences and penalties that the Article enshrines, in fact constitutes a substantive right.[199] In a similar manner, Article 23 lays down a 'principle of equality', although the Court has confirmed that professional equality between women and men may be judicially enforced as a substantive right.[200]

In addition to this, the Explanations specify that some provision of the Charter, such as Articles 23, 33 and 34, may simultaneously express 'both elements of a right and of a principle'. In other words, Article 23 is held to express both a 'principle of equality' and a 'right to equality' between women and men.[201] Indeed, a fundamental standard may sometimes be interpreted as a right and sometimes as a principle, depending on its form and the situation to which it applies.[202] This correlates with the understanding of fundamental standards as capable of expressing both rules and principles. The core content of a right may be thought of as a concrete rule, operating on the surface of the legal order. Its more peripheral elements, on the contrary, operate as abstract principles, influencing

[195] ROSAS A. – ARMATI L. (2012): p. 178-179.
[196] Cases C-265/85 *Van den Bergh*; T-13/99 *Pfizer*.
[197] PERNICE I. – KANITZ R. (2004): p. 9; ANDERSON D. – MURPHY C.C. (2011): p. 6.
[198] ROSAS A. – ARMATI L. (2012): p. 178-179. *See also* Opinion of AG VILLALÓN CRUZ in Case C-176/12 *AMS*, paras. 50-51.
[199] E.g. Case C-63/83 *Kirk*, para. 22. *See* DE WITTE B. (2001): p. 86; ANDERSON D. – MURPHY C.C. (2011): p. 6; ANDERSON D. – MURPHY C.C. (2012): p. 162.
[200] Case C-43/75 *Defrenne I*, paras. 24, 39. *See* ANDERSON D. – MURPHY C.C. (2012): p. 162.
[201] ANDERSON D. – MURPHY C.C. (2011): p. 6.
[202] DWORKIN R. (1977): p. 27; RAITIO J. (2003): p. 286.

and conditioning the entire legal system, from the deepest structure of the law, through the legal culture and up to the legal activities at the surface of the legal order.[203] The more peripheral elements of a right are also more likely to be influenced by the particularities of Member States, whereas core-rights to a larger extent are capable of expressing universal values.[204]

Ultimately, the question of whether Charter provisions qualify as rights or principles, has to be answered by the CJEU *in casu*. In *Dominguez*, AG Trstenjak identified the right to annual paid leave under Article 31(2) CFR as a social fundamental right, based on a literal and systematic approach, but found that it cannot be directly applied in disputes between private parties.[205] AG Villalón Cruz in *AMS* argued that 'Article 27 of the Charter, given specific substantive and direct expression in Article 3(1) of Directive 2002/14, may be relied on in a dispute between individuals' in order to invoke the right of workers to information and consultation.[206] Still, the CJEU ruled that it was 'clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law.'[207] Equivalently in *Glatzel*, the Court held that Article 26 on the integration of people with disabilities 'cannot by itself confer on individuals a subjective right which they may invoke as such'.[208] Seemingly, not only must EU norms be interpreted in accordance with the Charter, but also must the Charter itself to some extent be interpreted in the light of other EU norms in order to take effect.[209] In this sense, the distinction between rights and principles in Article 52(5) contributes to the subsidiary nature of the Charter.

In the end, no clear-cut criteria exist to determine whether a Charter provision expresses a fundamental right or principle.[210] A valid observation that nevertheless can be made relates to nature of the provisions. In fact, the problem is not one of definition, but rather pertains to the norm's 'effectiveness in concrete terms'.[211] For a provision to give rise to a substantive right, it must be 'sufficient in itself'.[212] This autonomous sufficiency must be determined based on the content of the provision, the context in which it operates and the

[203] TUORI K. (2000): p. 99,
[204] CARTABIA M. (2012): p. 276.
[205] Opinion of AG TRSTENJAK in Case C-282/10 *Dominguez*, paras. 75-79. *See also* Opinion of AG TRSTENJAK in Case C-101/08 *Audiolux*, para. 77.
[206] Opinion of AG VILLALÓN CRUZ in Case C-176/12 *AMS*, para. 80.
[207] Case C-176/12 *AMS*, para. 45.
[208] Case C-356/12 *Glatzel*, para. 78.
[209] LEBECK C. (2013): p. 26.
[210] ANDERSON D. – MURPHY C.C. (2012): p. 162.
[211] Opinion of AG VILLALÓN CRUZ in Case C-176/12 *AMS*, para. 36.
[212] Case C-176/12 *AMS*, para. 47.

circumstances of the case. The more concrete and ascertainable the Article is in itself, the more likely it is to give rise to a substantive right.[213] As to the 'process for giving specific expression to the content' of less substantial provisions, it is for the CJEU to 'delimit the justiciability of the 'principles' of the Charter, indicating both to the public authorities and to citizens the type of review which courts can carry out, and within what limits.'[214]

2.4 The Charter and the General Principles of EU Law

2.4.1 Fundamental Rights as General Principles

There is no formal definition of *general principles* in EU law.[215] At the outset, however, these normative standards may be understood with respect to their generality and character as principles. The general nature of principles reflects their abstract but omnipresent character within the EU legal system. They apply to a broad variety of situations that cannot be quantitatively or qualitatively anticipated.[216] As general standards, they also express a certain degree of transversality.[217] Albeit referred to as principles, they are also characterised by a certain judicial force. General principles of EU law may, in fact, function as concrete rules in certain situations, as opposed to Charter principles.[218]

A great variety of general principles exist within the EU legal system and may thus be categorised in different ways. As a point of departure, general principles can be identified as either stemming from the prerequisites of governance through the rule of law, or from the autonomous character of the EU legal order. Principles such as legal certainty, proportionality, access to justice and a fair trial can be understood as inherent to the rule of law, whereas the principles of conferral, subsidiarity, primacy and direct effect are structural principles characteristic to the EU.[219] Alternatively, an administrative distinction can be made regarding the general principles. According to such a grouping, legal certainty and proportionality are material principles, access to justice and a fair trial are procedural principles, primacy and direct effect are interpretative principles, while conferral and subsidiarity are principles governing the competences of the Union.[220]

Although difficultly classified, the general principles of EU law can also be grouped

[213] PRECHAL S. (2005): p. 98-100; PRECHAL S. (2007): p. 37; WALKILA S. (2015): p. 243, 249.
[214] Opinion of AG VILLALÓN CRUZ in Case C-176/12 *AMS*, para. 78.
[215] LEBECK C. (2013): p. 23; WALKILA S. (2015): p. 47-48.
[216] HARBO T.-I. (2010): p. 159.
[217] RAITIO J. (2003): p. 101-102; TRIDIMAS T. (2006): p. 1-3; LEBECK C. (2013): p. 23.
[218] GROUSSOT X. – LIDGARD H.H. (2008): p. 159; ROSAS A. – ARMATI L. (2012): p. 178.
[219] TRIDIMAS T. (2006): p. 4-5.
[220] MÄENPÄÄ O. (2011): p. 243-249.

according to their sources.[221] Firstly, general principles can be derived from the Treaties, such as the principles of conferral, subsidiarity and proportionality. Secondly, general principles like legal certainty, access to justice and the right to a fair trial, originate from the common constitutional traditions of the Member States, from the ECHR and other international legal instruments. Thirdly, general principles have been elaborated through the case law of the CJEU, such as the principles of primacy and direct effect.[222] Nevertheless, any categorisation is liable to remain an incomprehensive simplification, not only due to the open and continuously evolving nature of the general principles, but also due to the difficulties in defining the EU competences and the scope of EU law itself.[223]

Notwithstanding the lack of a clear-cut and exhaustive categorisation of the general principles of EU law, some observation can still be made about their sources. On the one hand general principles exist regardless of whether they have been codified or not.[224] On the other hand, this does not exclude the possibility of their anterior or posterior codification in either primary or secondary Union law.[225] Generally understood as part of EU primary law, the CJEU has even held that 'the general principles of Community law have constitutional status'.[226] As a result, the general principles constitute a normative source of primary importance within EU law and its constitutional order.[227] Above all, they contribute to the consistency and coherence of the Union legal order through their capacity to promote a harmonious interpretation of the law. Nevertheless, the flexibility of general principles also favour the dynamic and teleological nature of EU law, thus adding to its unity and effectiveness by filling normative gaps in the legal order.[228]

General principles fulfil an important function in the practice of the CJEU. Not only has the Court actively participated in their development, but also it actively applies general principles to develop the EU legal order.[229] Due to the incomplete nature of EU law, the Court is likely to recourse to general principles in its interpretation. Supported by Article 19 TEU, according to which it 'shall ensure that in the interpretation and application of the Treaties the law is observed', the Court engages in a creative and evolutive apprehension

[221] KOSKENNIEMI M. (1998): p. 1187; RAITIO J. (2003): p. 93-95, 117; RAITIO J. (2013): p. 223-224.
[222] GROUSSOT X. (2006): p. 123-124; TRIDIMAS T. (2006): p. 19-20; GROUSSOT X. – LIDGARD H.H. (2008): p. 159.
[223] TUORI T. (1998): p. 1008; RAITIO J. (2003): p. 103-104, 120.
[224] GROUSSOT X. (2006) p. 42-46; KUMM. M. (2010): p. 111; ROSAS A. – ARMATI L. (2012): p. 43; LEBECK C. (2013): p. 49.
[225] LEBECK C. (2013): p. 50.
[226] Case C-101/08 *Audiolux*, para. 63; *See* ROSAS A. – ARMATI L. (2012): p. 56. *See* LINDFELT M. (2007): p. 292; LEBECK C. (2013): p. 23, 29; WALKILA S. (2015): p. 48. *Cf.* CRAIG P. – DE BÚRCA G. (2011): p. 103, 109, situating general principles in between EU primary and secondary law.
[227] ROSAS A. – ARMATI L. (2012): p. 43; WALKILA S. (2015): p. 41.
[228] LOUIS J.-V. (1980): p. 68; WIKLUND O. (1997): p. 104-105; RAITIO J. (2003): p. 101-104; GROUSSOT X. (2006): p. 9-10, 139; TRIDIMAS T. (2006): p. 4-5, 20-25; RAITIO J. (2008): p. 47-48; LEBECK C. (2013): p. 25, 49; WALKILA S. (2015): p. 37-42.
[229] *See* e.g. Cases C-6/64 *Costa*, para. 3; C-14/68 *Walt*, para. 6, establishing the principle of primacy, and Cases C-26/62 *Van Gend*, section B; C-41/74 *Van Duyn*, para. 12, introducing the principle of direct effect.

of the EU legal order with the help of the general principles.[230] This appeal to general principles offers interpretative limits, but all the same equips the Court with considerable authority and a certain degree of judicial law-making which could all the same be criticized as a rule of judges.[231] In order to 'establish the existence of a general principle' the Court nevertheless, according to AG Léger, 'takes a critical approach and gives the answer which is most appropriate in relation to the structure and aims' of the EU.[232]

The CJEU played a primordial role in the introduction, development and constitutionalisation of fundamental rights as general principles of EU law.[233] Through these principles it was possible to integrate fundamental rights, while still preserving the autonomous nature of the Union legal order.[234] Against this evolution, the rights-creating and -protecting capacity of the general principles also becomes evident.[235] As confirmed by the Court, 'fundamental rights form an integral part of the general principles' of EU law, whose observance the Court ensures.[236]

The respect for fundamental rights as general principles of EU law is enshrined in Article 6(3) TEU. As a consequence, the EU has to respect fundamental rights in all its actions. It follows, that Member States or their nationals may base fundamental rights claims against the Union on the general principles. This can be done either for the purpose of invalidating secondary EU legislation or to invoke a violation of fundamental rights because the EU institutions failed to take certain measures. Similarly, failure to respect fundamental rights may be invoked against the Member States, either as a result of their implementation of or derogation from Union law.[237]

Prior to the ruling in *Wachauf* and the line of cases that followed, the CJEU had not explicitly confirmed the general obligation of Member States to comply with fundamental rights within the Union legal order. In its judgement, the Court eventually established that the obligation to protect fundamental rights is 'binding on the Member States when they

[230] BENGOETXEA J. (1993): p. 44; RODRIGUEZ IGLESIAS G.C. (1999): p. 15-16; GROUSSOT X. (2006): p. 138; HERDEGEN M. (2008): p. 353; ROSAS A. – ARMATI L. (2012): p. 43; LEBECK C. (2013): p. 23, 49; WALKILA S. (2015): p. 42.
[231] RAITIO J. (2003): p. 119; HERDEGEN M. (2008): p. 344-345, 353; CRAIG P. – DE BÚRCA G. (2011): p. 109-110; WALKILA S. (2015): p. 42.
[232] Opinion of AG LÉGER in Case C-87/01 P *CEMR*, para. 64, referring to Case C-11/70 *Handelsgesellschaft*, para. 4.
[233] RODRÍGUEZ IGLESIAS G.C. (1995): p. 171-178; DE WITTE B. (1999): p. 863-869; GROUSSOT X. (2006): p. 105; TUORI K. (2010): p. 18-21; DE BÚRCA G. (2012): p. 477-480; WALKILA S. (2015): p. 104-107. *See* e.g. Cases C-29/69 *Stauder*, para. 7; C-11/70 *Handelsgesellschaft*, paras. 3-4; C-4/73 *Nold*, paras. 12-13; C-36/74 *Walrave*, paras. 6-7, 16-17, 28; C-149/77 *Defrenne II*, paras. 26-27; C-222/84 *Johnston*, paras. 17-21; C-415/93 *Bosman*, para. 8.
[234] BESSELINK L.M.F. (2012): p. 72; WALKILA S. (2015): p. 42.
[235] RAITIO J. (2003): p. 104; GROUSSOT (2006): p. 165-175; WILLIAMS A. (2007): p. 77; ROSAS A. – ARMATI L. (2012): p. 56; LEBECK C. (2013): p. 49; SANKARI S. (2013): p. 59; WALKILA S. (2015): p. 18.
[236] CJEU Opinion 2/94, para. 33.
[237] RAITIO J. (2003): p. 101-104; RAITIO J. (2008): p. 48; WALKILA S. (2015): p. 49

implement' rules of the EU.[238] As a result, situations where Member States either through implementation, application or enforcement of EU measures act as an agent on behalf of the Union came to be considered as falling within the scope of EU law and the ambit of its fundamental rights standards. In *ERT* and subsequent rulings, the Court further increased its influence over fundamental rights through the general principles, as it held that national measures must comply with fundamental rights also when lawfully derogating from EU law.[239] Although Member States might enjoy a certain degree of discretion under Union law, national measures incompatible with EU fundamental rights will be set aside.[240]

2.4.2 The Relation between the Charter and Fundamental Rights as General Principles

Although different from the concept of fundamental rights as general principles of EU law, the Charter still shares some common features with these principles. Above all, the general principles and the Charter may be considered to originate from the same sources. Furthermore, general principles with a character of fundamental rights have been codified in the Charter with the objective of rendering EU fundamental rights more visible.[241] Conversely, the Charter may also constitute a source of inspiration for fundamental rights as general principles within the Union legal order.[242]

In *BECTU*, AG Tizzano held that 'the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.'[243] AG Poiares Maduro further develop the significance of the Charter in *Ordre des barreaux*, by explaining that first 'it may create the presumption of the existence of a right' and then prove useful 'for determining the content, scope and meaning to be given to that right'.[244] In cases such as *Viking* and *Kücükdeveci*, the CJEU referred to the Charter although eventually rendering its judgments based on fundamental rights as general principles of EU law.[245]

The Charter and the general principles have a similar legal status within the EU. To a

[238] Case C-5/88 *Wachauf*, paras. 17-22. *See also* Cases C-2/92 *Bostock*, paras. 11-20; C-186/96 *Demand*, para. 35; C-292/97 *Karlsson*, para. 37; C-20/00 & 64/00 *Aqualculture*, paras. 88-93; C-442/00 *Caballero*, para. 30.
[239] Case C-260/89 *ERT*, paras. 42-43. *See also* Cases C-368/95 *Familiapress*, para. 24; C-60/00 *Carpenter*, paras. 39-41; C-482/01 & 493/01 *Orfanopoulos*, para. 97; C-441/02 *Expulsion Orders*, para. 108.
[240] ROSAS A. (1999): p. 911-912; WEILER J.H.H. – FRIES S.C. (1999): p. 161; BESSELINK L.F.M. (2001): p. 78; CHALMERS D. (2010): p. 140-141; FONTANELLI F. (2014): p. 199; RAITIO J. (2014): p. 113.
[241] BESSELINK L.F.M. (1998): p. 633; DE WITTE (2001): p. 84; GROUSSOT X. (2006): p. 131; WALKILA S. (2015): p. 164.
[242] GROUSSOT X. (2006): p. 106; HERDEGEN M. (2008): p. 351-352; PERNICE I. (2008): p. 249; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2010): p. 1656; ANDERSON D. – MURPHY C.C. (2011): p. 15-16; CARTABIA M. (2012): p. 271-272; KAILA H. (2012): p. 311; DE VRIES S.A. (2013b): p. 74; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1576; WALKILA S. (2015): p. 77.
[243] Opinion of AG TIZZANO in Case C-173/99 *BECTU*, para. 28. *See* MENÉNDEZ A.J. (2002): p. 475.
[244] Opinion of AG POIARES MADURO in Case C-305/05 *Ordre des barreaux*, para. 48. *See* ANDERSON D. – MURPHY C.C. (2012): p. 173.
[245] Cases C-438/05 *Viking*, para. 44; C-555/07 *Kücükdeveci*, para. 22. *See* ANDERSON D. – MURPHY C.C. (2011): p. 15-16.

large extent, they also share the same content. In accordance with its Preamble, the Charter reaffirms fundamental rights as they result from the Union legal order. Nevertheless, the general principles continue to exist independently of the Charter, as confirmed by Article 6(3) TEU. Therefore, it cannot be ignored that these two sources of fundamental rights also account for some differences.[246] Whilst the Charter sets out a delimited catalogue of rights, some of which would not by definition pass as general principles of EU law, the general principles represent an abstract, unwritten and continually evolving source.[247]

Although fulfilling similar functions, the general principles have existed as an aid to interpretation and as a basis for judicial review of EU norms, long before the Charter.[248] For the purpose of filling normative lacunae in the Union legal order, it is argued that the Charter has a more limited role to play. It does not represent an exhaustive compilation of rights, but rather appears to be complementary to the general principles.[249] As the Preamble of Protocol No. 30 points out, 'the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.' Article 51(1) CFR also stresses the observance of the principle of subsidiarity in its application. As a result, the general principles, through the CJEU, retain their creative capacity to further develop EU fundamental rights protection.[250]

Notwithstanding their creative function, fundamental rights as general principles 'do not operate in the abstract', as explained by AG Sharpston in *Bartsch*.[251] They do not by themselves bring the subject matter within the scope of Union law, but in the first place, they must demonstrate a sufficient connection to a substantive EU norm governing the situation at hand.[252] It follows, that the field of application of the general principles is tied to the scope of Union law itself.[253] Given that the Charter seeks to codify pre-existing fundamental rights within the EU legal system, it is therefore suggested that its material field of application coincides with that of the general principles of EU law.[254]

Any other interpretation would unavoidably lead to a dual and asymmetric regime of fundamental rights protection within the EU. If the Charter's scope of application under

[246] Opinion of AG TRSTENJAK in Case C-282/10 *Dominguez*, para. 127.
[247] PRECHAL S. (2010): p. 21; KAILA H. (2012): p. 295; LEBECK C. (2013): p. 55; WALKILA S. (2015): p. 166.
[248] LENAERTS K. – GUTIÉRREZ-FONS J.A. (2010): p. 1656; ANDERSON D. – MURPHY C.C. (2011): p. 19; LENAERTS K. (2012): p. 82; KAILA H. (2012): p. 311; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1575-1576; WALKILA S. (2015): p. 142.
[249] MUIR E. (2012): p. 8; LEBECK C. (2013): p. 55; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1575.
[250] MUIR E. (2012): p. 8; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1575-1576.
[251] Opinion of AG SHARPSTON in Case C-427/06 *Bartsch*, para. 69. *See also* TRIDIMAS T. (2006): p. 36-42.
[252] *See* e.g. Cases C-36/75 *Rutili*, para. 25; 222/84 *Johnston*, paras. 17-19; C-12/86 *Demirel*, para. 28; C-222/86 *Heylens*, paras. 14-15; C-299/95 *Kremzow*, paras. 15-19. *See* SHARPSTON E. (2012): p. 270.
[253] GROUSSOT X. (et.al.) (2013): p. 97; WALKILA S. (2015): p. 51.
[254] SAFJAN M. (2012): p. 13; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1576; WALKILA S. (2015): p. 164-169.

Article 51(1) was interpreted restrictively, it could lead to a narrower protection than the one offered by the general principles. In consequence, the general principles would offer a more extensive protection, in situations when the Charter does no longer apply.[255] Such a double standard with separate systems of protection would be liable to violate not only Article 19 TEU and Article 47 CFR on effective legal remedies, but also Article 53 stating that nothing in the Charter 'shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised' by Union law.[256] In its recent case law, the CJEU also appears to confirm that the application of the Charter and fundamental rights as general principles are governed by the same material scope.[257]

Despite the presumed equivalence between the material scope of the general principles and the Charter, the relation between their personal scopes appears more ambiguous. The Charter primarily governs the vertical relation between the Union and its Member States on the one side and their nationals on the other, whereas fundamental rights as general principles may have both vertical and horizontal impact if deemed sufficiently precise.[258] Even though fundamental rights as general principles of EU law have mainly been relied on in the sphere of public law, they are increasingly invoked in relations governed by private law.[259] In cases like *Mangold* and *Kücükdeveci*, the CJEU found that the prohibition of age discrimination – although general in nature – was given sufficient expression in EU secondary legislation to be considered a general principle of law with direct effect in a dispute between private parties.[260]

The Charter's presumed codification of the general principles, together with the Court's subtle references to the Charter in cases such as *Viking* and *Kücükdeveci*, regarding the horizontal impact of fundamental rights, has sparked a debate on whether provisions of the

[255] DOUGAN M. (2008): p. 664-665; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2010): p. 1658-1659; KAILA H. (2012): p. 307; LENAERTS K. (2012) p. 384; DE VRIES S.A. (2013b): p. 73; GROUSSOT X. (et.al.) (2013): p. 118; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1576; WALKILA S. (2015): p. 165-167;
[256] Opinion of AG BOT in Case C-108/10 *Scattolon*, para. 120.
[257] Case C-617/10 *Åkerberg Fransson*, para. 19, where the CJEU held that 'the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.' *See* FONTANELLI F. (2013): p. 323; HANCOX E. (2013): p. 1412; VAN BOCKEL B. – WATTEL P. (2013): p. 871; FONTANELLI F. (2014): p. 216; WARD A. (2014): p. 1451. *See also* Case C-40/11 *Iida*, para. 32, where the CJEU declared inadmissible the referred question of whether 'the "unwritten" fundamental rights […] developed in the Court's case-law […] [can] be applied in full even if the Charter is not applicable in the specific case; in other words, [whether] the fundamental rights […] continue to apply as general principles of Union law under Article 6(3) TEU […] autonomously and independently alongside the new fundamental rights laid down in the Charter'. *See* DE VRIES S.A. (2013b): p. 73.
[258] LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1578; WALKILA S. (2015): p. 84. *See* e.g. Cases C-29/69 *Stauder*, para. 7 (vertical effect against Member States); C-4/73 *Nold*, paras. 12-13 (vertical effect against EU institutions); C-149/77 *Defrenne II*, paras. 26-33 (horizontal effect against private parties).
[259] Regarding direct horizontal effect of general principles, *see also* e.g. Cases C-281/98 *Angonese*, paras. 30-36; C-144/04 *Mangold*, paras. 74-76; C-411/05 *Palacios de la Villa*, paras. 49-50; C-94/07 *Raccanelli*, paras. 41-46; C-555/07 *Kücükdeveci*, paras. 20-21; C-45/09 *Rosenbladt*, para. 52.
[260] GROUSSOT X. – LIDGARD H.H. (2008): p. 172-174; GROUSSOT X. (et.al.) (2013): p. 109; WALKILA S. (2015): p. 78-87.

Charter may also entail horizontal direct effect.[261] While uncertainty still pertains, it may at least be noted that the Charter's horizontal impact is not unlimited, since the Court in *AMS* held that an individual cannot rely directly on Article 27 CFR in a dispute against another private party.[262] Interestingly, AG Trstenjak in *Dominguez* adopted an even stricter interpretation, as she argued that a fundamental right guaranteed under the Charter cannot have direct horizontal effect even if applied as a general principle of EU law in parallel to the Charter, because this would be 'to circumvent the restriction on the addressees of fundamental rights provided by the EU legislature in the Charter' under Article 51(1).[263] The underlying question hereto appears to relate to the implications that the subsidiarity principle may have on the Charter, which will be further examined in the following.

[261] Cases C-438/05 *Viking*, para. 44; C-555/07 *Kücükdeveci*, para. 22. *See* ANDERSON D. – MURPHY C.C. (2011): p. 15-16; PECH L. (2012): p. 1858-1879; LECZYKIEWICZ D. (2013): p. 483-492; TRSTENJAK V. (2013): p. 307-309; LAZZERINI N. (2014): p. 921-932; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1578; WALKILA S. (2015): p. 77-79.
[262] Case C-176/12 *AMS*, paras. 45-48. *See* LENAERTS K. (2011): p. 90; WARD A. (2014): p. 1430; MIETTINEN S. (2015): p. 229; WALKILA S. (2015): p. 243-245, 248.
[263] Opinion of AG TRSTENJAK in Case C-282/10 *Dominguez*, para. 128. *See* WARD A. (2014): p. 1429.

3 The Principle of Subsidiarity and the Charter

3.1 Subsidiarity as a Principle of EU Law

3.1.1 The Development of the Subsidiarity Principle

Subsidiarity was introduced into EU law as a principle of environmental protection through the Single European Act in 1987.[264] Nevertheless, subsidiarity as a concept of European integration had been invoked already in the 1970's.[265] In 1975, the Commission in its Report on European Union for the first time made explicit reference to the principle by suggesting the Union 'be given responsibility only for those matters which the Member States are no longer capable of dealing with efficiently.'[266]

'Intending to entrust common institutions […] only with those powers required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently', the Parliament included a formal definition of subsidiarity in its Draft Treaty on European Union in 1984.[267] As a means of legitimating the expansion of Community competences brought by the SEA, the principle continued to be supported as a future concept of enhanced cooperation between the European institutions and the Member States in the early 1990's.[268] However, it was not until 1992 and the adoption of the Maastricht Treaty that the scope of subsidiarity was broadened and gained the status of a *general principle* of the EU and its legal system.[269]

The Treaty of Maastricht established the Union and consolidated the subsidiarity principle as an expression of the Member State's limited conferral of powers to the EU. In the spirit of integration and cooperation, the Preamble of the Treaty affirmed 'the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.'

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[264] Article 130r(4) SEA: 'The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States. […].'
[265] ESTELLA A. (2002): p. 85; SCHÜTZE R. (2009a): p. 247-248.
[266] Commission Report on European Union, COM(75) 400 final, p. 10. Also the Tindeman Report to the European Council in 1975 implicitly referred to subsidiarity. *See* TINDEMAN L. (1975): *Report on European Union*, p. 12.
[267] Preamble and Article 12(2) of the EP Draft Treaty establishing the European Union, 14.2.1984.
[268] Reports of the Committee of Institutional Affairs on the principle of subsidiarity, Interim Report A3-163/90, 12.6.1990, Interim Report A3-163/90/Part B, 4.7.1990 and Final Report A3-0267/90, 31.10.1990. EP Resolution of 12 July 1990 on the principle of subsidiarity; EP Resolution of 21 November 1990 on the principle of subsidiarity; Presidency Conclusions of the Rome European Council of 14-15 December 1990; Presidency Conclusions of the Edinburgh European Council of 11-12 December 1992; Interinstitutional Declaration on democracy, transparency and subsidiarity by the Commission, the Council and the European Parliament of 25 October 1993. *See* ESTELLA A. (2002): p. 37-38.
[269] PERNICE I. (1996): p. 406; DE BÚRCA (1998): p. 218-220; DE BÚRCA (1999): p. 13-14, 38; ESTELLA A. (2002): p. 85-96; SCHÜTZE R. (2009a): p. 249-250; SCHÜTZE R. (2009b): p. 526; HORSLEY T. (2012): p. 268-269.

Article 3b(2) TEC, however, limited the applicability of the principle to the area of competences shared between the Union and the Member States. In line with the concept of positive subsidiarity, the opportunity for the Union to take action was recognised in situations where the common objectives could be 'better achieved' at EU level. [270]

Under the Maastricht era, the principle of subsidiarity nevertheless remained a rather theoretical and formal concept with few practical implications.[271] As a result, the Treaty of Amsterdam strived to clarify the significance of subsidiarity as a functional principle regulating the exercise of the EU competences. In the attached Protocol on subsidiarity, the procedural nature of the principle in the legislative context was emphasised.[272] Also, substantive criteria were formulated in an attempt to outline the conditions under which an objective more efficiently could be attained by the Union. With the ultimate aim of strengthening the legal character of subsidiarity, all European institutions were obliged to ensure that their actions were consistent with the principle.[273]

The Amsterdam Treaty not only clarified the content of the subsidiarity principle, but also raised the question of its judicial review before the CJEU. Although the Court already under the Maastricht Treaty had confirmed the justiciability of subsidiarity, its judicial control remained ineffective.[274] As a reaction to the limited possibilities to monitor the observance of subsidiarity, the Amsterdam Treaty aimed to extend the possibilities of *ex post* review before the CJEU.[275] The principle could be reviewed under actions for annulment as well as under requests for preliminary rulings on interpretation or validity. Mistrust towards its credibility as a legal principle nevertheless persisted, despite the Amsterdam codification of subsidiarity's justiciability.[276] The Court's cautious approach to the principle similarly prevailed.[277] Even though subsidiarity was invoked in a number of cases,[278] the Court only ruled directly on the basis of subsidiarity in a limited number of cases.[279] In fact, still today a plea for annulment of a legislative act on grounds of

[270] ESTELLA A. (2002): p. 87; SCHÜTZE R. (2009a): p. 249; EDWARD D. (2012): p. 95.
[271] ESTELLA A. (2002): p. 98-99; ROSSI L.S. (2012): p. 95.
[272] Protocol No. 30 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of Amsterdam.
[273] ESTELLA A. (2002): p. 101, 106, 114; SCHÜTZE R. (2009a): p. 251-252; EDWARD D. (2012): p. 95.
[274] Cases C-84/94 *UK v Council*; C-233/94 *Germany v EP & Council*. *See also* the Communication of the CJEU of 20 December 1990 on the principle of subsidiarity, following the Intergovernmental Conference on Political Union on 15 December 1990.
[275] ESTELLA A. (2002): p. 6, 10; SCHÜTZE R. (2009a): p. 253; ROSAS A. – ARMATI L. (2012): p. 29; ROSSI L.S. (2012): p. 96; DELMAS-MARTY M. (2013): p. 331.
[276] ESTELLA. A (2002): p. 75, 141.
[277] CRAIG P. (2012a): p. 80; GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 244.
[278] *See* e.g. Cases C-430/93 & 431/93 *Schijndel*; C-321/93 *Martinéz*; C-415/93 *Bosman*; C-209/94 P *Buralux*; C-192/94 *Corte Inglés*; C-11/95 *Commission v Belgium*; C-91/95 P *Tremblay*; C-36/97 & 37/97 *Ketelsen*; C-150/94 *China Toys*; C-376/96 *Leloup*.
[279] Cases C-376/98 *Germany v EP & Council*; C-377/98 *Netherlands v EP & Council*; C-103/01 *Firefighters' Equipment*; C-491/01 *Imperial Tobacco*; C-154/04 & 155/04 *Natural Health*; C-310/04 *Spain v Council*; C-58/08 *Vodafone*; C-176/09 *Luxembourg v EP & Council*. *See* ESTELLA A. (2002): p. 140.

subsidiarity has never been successful in the case law of the Court.[280]

Rather than clarifying the justiciability of the principle of subsidiarity, the Treaty of Lisbon reinforced its procedural character.[281] Article 5(3) TEU states that 'the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.' However, the new Protocol on subsidiarity attached to the Lisbon Treaty is less specific on the substantive conditions of subsidiarity than the previous Amsterdam Protocol.[282] Instead, it introduces new mechanisms for subsidiarity control. [283] According to Article 6 of the Protocol, national parliaments can *ex ante* review subsidiarity compliance of EU draft legislation. Furthermore, Article 8 affirms that the CJEU has jurisdiction in *ex post* infringement proceedings on grounds of subsidiarity brought by Member States or the Committee of Regions under Article 263 TFEU.

Subsidiarity under the Lisbon Treaty still remains a concept of more regulatory than legal nature.[284] Yet, the enforced justiciability of the principle of subsidiarity illustrates its evolving judicial application.[285] Even if the CJEU has been reluctant to apply the principle to political choices of the Union,[286] it is argued that it should take the judicial application of subsidiarity more seriously both as a procedural and material condition of review.[287] Indeed, the Court has already for a long time continuously applied the principle of proportionality, which can be considered to be no less political than subsidiarity.[288] Especially the inclusion of the principle of subsidiarity in the Preamble and Article 51(1) CFR raises the question of the extent to which the CJEU itself is bound by the principle and how it can use subsidiarity in its interpretation of Union law.

[280] JIRÁSEK J. (2008): p. 4; GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 244-245; MIETTINEN S. (2015): p. 451-452; MUTANEN A. (2015): p. 77. *See also* Commission Report on subsidiarity and proportionality, COM/2012/373 final, 10.7.2012, p. 2. However, in Case T-183/07 *Poland v Commission* (appeal denied in C-504/09 P), the CFI made a reference to the subsidiarity principle (paras. 83 and 104) before entirely annulling a Commission Decision in the area of environmental protection. Similarly, *see* Case T-263/07 *Estonia v Commission*. *See also* BIONDI A. (2012): p. 225-226.
[281] SCHÜTZE R. (2009a): p. 243; BIONDI A. (2012): p. 214-215; SCHÜTZE R. (2012): p. 177-178; MIETTINEN S. (2015): p. 456.
[282] ROSAS A. – ARMATI L. (2012): p. 29; MIETTINEN S. (2015): p. 457.
[283] BIONDI A. (2012): p. 222; CRAIG P. (2010): p. 186.
[284] BIONDI A. (2012): p. 214-215.
[285] GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 244-245.
[286] In Case C-84/94 *UK v Council*, paras. 23, 58, the CJEU held that 'it is not the function of the Court to review the expediency of measures adopted by the legislature' and '[j]udicial review […] must therefore be limited to examining whether [the discretion of the legislator] has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion'. *See also* ESTELLA A. (2002): p. 139, 156, 166; BIONDI A. (2012): p. 213.
[287] Opinion of AG POIARES MADURO in Case C-58/08 *Vodafone*, para. 34. *See also* BIONDI A. (2012): p. 213-220, 227.
[288] STEINER J. (1994): p. 62-63. JIRÁSEK J. (2008): p. 5; KUMM M. (2010): p. 110; BIONDI A. (2012): p. 227.

3.1.2 Subsidiarity as a Limit and Justification to the Powers of the EU

Together with fundamental rights, attributed powers and other general principles, such as proportionality, subsidiarity is part of the constitutional framework that governs the scope, limits and exercise of the powers of the Union.[289] The designation, delimitation and regulation of the EU competences contribute to the legal certainty of individuals and the autonomy of the Member States.[290] While constituting a limitation of the Member States' sovereignty and a transfer of their powers to the Union, the principle of conferral still emphasizes the Member States as the source of EU competences.[291]

By introducing a stricter control and more detailed distribution of powers between the Union and its Member States, the Lisbon Treaty has contributed to the constitutionalisation of the EU legal order.[292] The attribution of powers to the Union is dictated by the principle of conferral as enshrined in Articles 3(6), 4(1), 5(1-2) TEU and Article 7 TFEU. In essence, the Union shall act only within the limits of the enumerated competences conferred on it by the Member States in order to attain the objectives set out therein. Competences not conferred on the Union remain with the Member States. In other words, the principle governs the question of whether the Union is competent to legitimately take action in a given policy area.[293]

In reality, however, inconsistencies can be found between the formal enumeration of competences in the Treaties and the actual scope of EU actions. The open nature of the attributed competences, together with their normative interpretations by the European institutions and their expressions given in secondary legislation, all contribute to blurring the division of powers between the Union and its Member States.[294] No exhaustive list of competences exists, as the Union adopts a rather broad teleological interpretation of its powers as means of reaching its objectives.[295]

According to Article 5(3) TEU, the principle of subsidiarity is to be observed by the Union 'in areas which do not fall within its exclusive competence', thus primarily in the

[289] WIKLUND O. (1997): p. 359; DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 363; AZOULAI L. (2014): p. 1, 6.
[290] TANASESCU E.S. (2013): p. 208.
[291] MUTANEN A. (2015): p. 75-76. *See* Case C-6/64 *Costa*, p. 593.
[292] ROSAS A. – ARMATI L. (2012): p. 22; ROSSI L.S. (2012): p. 85, 93; AZOULAI L. (2014): p. 2. *See also* e.g. Case C-294/83 *Les Verts*, para. 23, in which the CJEU referred to the Treaties as the 'basic constitutional charter' of the EU.
[293] RAITIO J. (2003): p. 98; CRAIG P. (2012c): p. 156; MICKLITZ H.-W. (2012): p. 364-365; WHEATHERILL S. (2013): p. 35.
[294] CRAIG P. (2010): p. 155-156; CRAIG P. (2012b): p. 12; ROSAS A. – ARMATI L. (2012): p. 20; AZOULAI L. (2014): p. 2-3.
[295] *See* e.g. Articles 114 and 352 TFEU, which empower the Union to legislate in order to achieve an objective set out in the Treaties even though the necessary powers would not have been explicitly provided for therein. *See* ROSAS A. – ARMATI L. (2012): p. 20, 26; ROSSI L.S. (2012): p. 86, 90, 98; SCHÜTZE R. (2012): p. 184. Above all, however, the nature of the Union's jurisdiction is dependent on whether the competences in a specific policy area are exclusive (Articles 2(1) and 3 TFEU), shared (Articles 2(2) and 4 TFEU) or supporting, coordinating and supplementing (Articles 2(5) and 6 TFEU). *See* ROSAS A. – ARMATI L. (2012): p. 24; SCHÜTZE R. (2012): p. 184; AZOULAI L. (2014): p. 1, 10-11.

area of competences shared with the Member States. The principle areas are listed in Article 4(2) TFEU, mentioning e.g. the internal market, social policy and the area of freedom, justice and security. Conversely, the shared competences are negatively defined in Article 4(1) TFEU as other areas than those referred to in Articles 3 and 6 TFEU. In accordance with the principle of pre-emption in Article 2(2) TEU, 'the Member States shall exercise their competence to the extent that the Union has not exercised its competence.' Similarly, the principle of sincere cooperation expressed in Article 4(3) TEU is of relevance for the exercise of shared competences, as the Member States shall 'refrain from any measure which could jeopardise the attainment of the Union's objectives.' [296]

While the principle of conferral relates to the attribution of powers and the question of *if* the Union has a competence that it can exercise, the principle of subsidiarity sets out the conditions for *who* (the EU or the Member States) should exercise its competence as well as *when*.[297] Subsidiarity is a dynamic principle in the sense that the Union shall act only when and to the extent that its objectives cannot be sufficiently achieved by the Member States alone. EU intervention is justified only as long as it is required by the given circumstances.[298] Strictly defined, the Union should act only if it is obvious that the Treaty objectives envisaged cannot be satisfactorily attained at national level.[299]

Similarly to the complementarity of the principles of conferral and subsidiarity, there is also a certain degree of interdependence between subsidiarity and proportionality.[300] While the principle of subsidiarity *stricto sensu* strives to answer the question of *whether* the Union has competence to act (*who* and *when*), proportionality governs the issue of *how* this competence should be exercised. Under the principle of proportionality, as defined in 5(4) TEU, 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.' In fact, subsidiarity compliance often has taken the expression of proportionality review before the CJEU.[301]

For these reasons, it has been suggested that the proportionality review of EU measures is inherent to the subsidiarity control. Article 5(3) TEU, according to which the Union shall act 'only if and in so far as' the objectives cannot be sufficiently achieved by the

[296] ROSAS A. – ARMATI L. (2012): p. 22-25; RAITIO J. (2013): p. 243-245.
[297] ESTELLA A. (2002): p. 91; CRAIG P. (2010): p. 184; EDWARD D. (2012): p. 96-97; ROSSI L.S. (2012): p. 95; GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 236.
[298] ESTELLA A. (2002): p. 103.
[299] MURPHY D.T. (1994): p. 71.
[300] ESTELLA A. (2002): p. 165; DELMAS-MARTY M. (2013): p. 329; MIETTINEN S. (2015): p. 440.
[301] *See* e.g. Cases C-15/83 *Denkavit*; C-181/84 *Man Sugar*; C-302/86 *Danish Bottles*; C-240/83 *Bruleurs*; C-426/93 *Germany* v *Council*; C-84/94 *UK v Council*.

Member States, can be read as an expression of proportionality.[302] Broadly understood, subsidiarity and proportionality thus become intertwined in the assessment of whether and how the Union should use its attributed powers.[303] The CJEU makes a distinction between subsidiarity and proportionality in abstract, but in practice tends to appreciate the two as one.[304] In the words of the Court, 'a measure will be proportionate only if it is consistent with the principle of subsidiarity.'[305] Ultimately the objective of the subsidiarity principle is to examine 'whether a European law *disproportionately restricts national autonomy*'.[306] From this point of view, subsidiarity may be seen as form of constitutional or federal proportionality.[307] Consequently, it becomes an instrument for balancing not only the use of shared competences but also constitutional pluralism.[308]

In order for the CJEU to evaluate the compliance of a Union action with the principle of subsidiarity, the effectiveness of the supranational measure in question needs to be examined.[309] Article 5(3) TEU lays down two cumulative *efficiency criteria* for this purpose. Firstly, the Union should act in cases of *national insufficiency*, expressed through the formulation 'only if and in as far as the objectives of the proposed action cannot be sufficiently achieved by the Member States'. Secondly, the Union action should represent a *comparative advantage*, in the sense that the objective 'can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.' On the one hand, these two criteria combined suggest that even though a national measure is insufficient, the Union cannot act unless it can efficiently attain the objectives in question.[310] On the other hand, they imply that the Union may act when the effectiveness of Union law is at stake.[311]

As a compliment to the efficiency criteria, a more teleological, functional or consequentialist approach to subsidiarity can be observed as part of its judicial review. This *dynamic criterion* reverts the subsidiarity logic by departing from the objectives of the Union, rather than the question of whether the EU or the Member States sufficiently and

[302] SCHÜTZE R. (2012): p. 184; GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 236-237, 249; MIETTINEN S. (2015): p. 441.
[303] DAVIES G.T. (2006): p. 71; SCHÜTZE R. (2009a): p. 263; SCHÜTZE R. (2012): p. 184; GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 236-237.
[304] Case C-491/01 *Imperial Tobacco*, paras. 122-141, 180-184. *See* SCHLÜTTER B. (2010): p. 25; GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 245; MIETTINEN S. (2015): p. 440-441.
[305] Case C-84/94 *UK v Council*, para. 54. *See also* ESTELLA A. (2002): p. 145.
[306] SCHÜTZE R. (2009a): p. 264; SCHÜTZE R. (2009b): p. 533.
[307] SCHÜTZE R. (2009a): p. 262-263; SCHÜTZE R. (2009b): p. 532-533; SCHÜTZE R. (2012): p. 184; GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 249; MIETTINEN S. (2015): p. 441.
[308] BENGOETXEA J. (2014): p. 150, 165; GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 234.
[309] SCHLÜTTER B. (2010): p. 23.
[310] ESTELLA A. (2002): p. 93-98; SCHÜTZE R. (2012): p. 178. *See also* Commission Communication to the Council and the European Parliament on the Principle of Subsidiarity, SEC(92) 1990 final, 27.10.1992, where a similar terminology is employed.
[311] BIONDI A. (2012): p. 216. Notwithstanding the efficiency requirements for Union actions, the burden of proof in cases of subsidiarity review before the Court has been placed on the applicant, in other words the Member State pleading for infringement of the subsidiarity principle. *See* e.g. Cases C-280/93 *Germany v Council*, para. 95; C-310/04 *Spain v Council*, para. 127; C-176/09 *Luxembourg v EP & Council*, paras. 80-83. Also, *see* GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 248.

more effectively can take action.[312] In accordance with the principle of conferral in Article 5(2) TEU, the Union 'shall act only […] to attain the objectives set out' in the Treaties. This linkage of EU competences to integration objectives offers flexibility to the subsidiarity principle and enables its teleological interpretation.[313] From a dynamic point of view, a *cross-border element* or a potential *damage to common interests* may trigger the recourse to subsidiary EU intervention.[314] It has been stated that EU action is justified in situations where a transnational aspect cannot be satisfactorily regulated by the Member States, or if the non-intervention of the Union would lead to distortion of competition, trade or otherwise damage the common interests of the Member States.[315] As pointed out by AG Maduro in *Vodafone*, the CJEU needs to strike a balance between the interests of the Member States and the Union when considering the compliance of EU law with the substantive aspects of the subsidiarity principle.[316] Yet, the Court tends to accord a wide margin of discretion to EU actions in its judicial subsidiarity review.[317]

Although the criteria for judicial review of subsidiarity have developed over time, the CJEU has remained cautious in their application.[318] This hesitancy concerns procedural as well as material subsidiarity, partly due to the fact that these two dimensions of subsidiarity are heavily intertwined in the case law of the Court.[319] Similarly, concerning the negative and positive dimensions of subsidiarity, it is possible to observe that the focus on efficiency and results in the criteria may work as a limit as well as a justification for Union intervention.[320] As a consequence, the subsidiarity principle has not been able to clarify the limits and exercise of Union competences, as initially envisaged.[321] Subsidiarity's limited justiciability and lack of direct effect[322] in turn raises the question of to what extent the Court itself is bound by the principle when interpreting Union law.

Subsidiarity is a 'rule of reason', a 'state of mind' within the EU.[323] As a constitutional

[312] ESTELLA A. (2002): p. 165.
[313] RAITIO J. (2013): p. 242.
[314] ESTELLA A. (2002): p. 131-133; DAVIES G.T. (2006): p. 72.
[315] *See* Article 5 of the Protocol No. 30 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of Amsterdam. Interestingly, these guidelines are not included in Protocol No. 2 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of Lisbon.
[316] Opinion of AG POIARES MADURO in Case C-58/08 *Vodafone*, paras. 33-37.
[317] GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 250-251.
[318] BIONDI A. (2012): p. 217-218.
[319] ESTELLA A. (2002): p. 105, 174-175.
[320] ESTELLA A. (2002): p. 113, 168-169.
[321] DAVIES T. (2006): p. 68-69; ROSAS A. – ARMATI L. (2012): p. 29.
[322] Case T-5/93 *Tremblay*, para. 61. *See also* the Presidency Conclusions of the Edinburgh European Council of 11-12 December 1992, Annex 1 to Part A, p. 17; WIKLUND O. (1997): p. 356-357; ESTELLA A. (2002): p. 142; RAITIO J. (2013): p. 249.
[323] Commission Report to the European Council on the Adaption of Community Legislation to the Subsidiarity Principle, COM(93) 545, p. 1-2.

principle, it must not be reduced to a principle of merely procedural nature.[324] As a result of its material dimension, the subsidiarity will influence the interpretation and balancing of different interests within the Union legal order.[325] In the same way as the principle of proportionality is constantly present in adjudication, the principle of subsidiarity could be regarded as a 'legal norm permeating all aspects of Union life'.[326] Based on the Preamble of the TEU, subsidiarity expresses a general concept of EU law according to which 'decisions are taken as closely as possible to the citizens'. Furthermore, in support of its broad interpretation, Article 5(1) TEU specifically sets out that '[t]he use of Union competences is governed by the principles of subsidiarity and proportionality'.[327] It follows that subsidiarity should not be understood only as a procedural rule in its narrow sense, but also as a material principle in the wide sense, aimed at balancing the primacy, unity and effectiveness of EU law with Member State interests.[328]

Admittedly, the subsidiarity principle is mainly aimed at the political institutions of the Union. Nevertheless, it does not exclude the CJEU from its field of application.[329] In fact, the subsidiarity principle in Article 5(3) TEU is addressed to all the EU institutions. As an institution under Article 13(1) TEU, the Court is hence obliged to observe the principle of subsidiarity in its decision-making.[330] Indeed, in its narrow sense subsidiarity considerations by the Court can be attributed to its control of legislative acts *ex post*, as set out in Article 5(3) TEU and Article 8 of the Protocol on subsidiarity. However, there is no reason why subsidiarity could not be understood more broadly in relation to the Court.[331] Bearing in mind that the CJEU tends to make a wide interpretation of general principles, Article 5(2) TEU does not point to any particular kind of EU 'action', thus favouring a wide interpretation of material subsidiarity.[332]

Although the interpretative impact of subsidiarity on the CJEU have been moderate, a few cases can still be identified as representative of how the Court uses subsidiarity as a supporting argument for limiting or justifying its own powers of judicial review.[333] In fact, it has been argued that a restriction of the Court's jurisdiction in favour of a wider margin

[324] SCHÜTZE R. (2009a): p. 261.
[325] SCHLÜTTER B. (2010): p. 3, 60
[326] EDWARD D. (2012): p. 101-102.
[327] JIRÁSEK J. (2008): p. 2-3; EDWARD D. (2012): p. 101-102.
[328] *See* SCHILLING T. (1994): p. 255.
[329] MURPHY D.T. (1994): p. 94-95.
[330] MURPHY D.T. (1994): p. 72; ESTELLA A. (2002): p. 101-202.
[331] BERMAN G.A. (1994): p. 366-367; MURPHY D.T. (1994): p. 94-95; DE BÚRCA G. (1998): p. 226-229; JIRÁSEK J. (2008): p. 4-6; EDWARD D. (2012): p. 101-102.
[332] JIRÁSEK J. (2008): p. 5-6. It has even been suggested that, in cases of doubt, the Court should interpret the law in favour of the lowest sufficient level of implementation where the objectives can be efficiently achieve. *See* BERMAN G.A. (1994): p. 366-367; EDWARD D. (2012): p. 101-102.
[333] BIONDI A. (2012): p. 216-217; HORSLEY T. (2012): p. 272-273; MIETTINEN S. (2015): p. 454.

of discretion for Member States could be observed at the time when subsidiarity was enshrined as a general principle in the Treaties.[334] In any case, the Court has explicitly restricted its jurisdiction on grounds of subsidiarity in cases such as *Chrome* and *Salvador Dali*, where the national level was found more appropriate for managing certain issues without taking actions through EU secondary legislation.[335]

Conversely, the Court has also used subsidiarity to justify its jurisdiction. In *Bosman*, it balanced subsidiarity against other principles and held that the principle of subsidiarity cannot limit the intervention by the Union, if this would lead 'to a situation […] which […] restricts the exercise of rights conferred on individuals by the Treaty.'[336] In *Firefighters' Equipment* the Court based its reasoning on the market distortion criterion, finding that 'the national provisions in question differ significantly from one Member State to another [and] may constitute […] a barrier to trade'.[337] Similarly, the Court made use of the efficiency criteria to justify EU intervention in *Commission v Council III*, by concluding that although criminal law does not 'fall within the Community's competence […], the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective'.[338]

While the CJEU has no obligation to state whether subsidiarity has been observed in its legal reasoning or not, it is evident that the Court has an important influence on how material subsidiarity is understood in EU law.[339] If subsidiarity is seen as a concept permeating the Union legal order, then the natural consequence should be that also EU fundamental rights are 'subject to subsidiarity scrutiny.'[340] This assumption is particularly pertinent in a time when the principle of subsidiarity has been introduced as a principle governing the interpretation of the Charter.

3.2 The Intersection of Subsidiarity and Fundamental Rights in EU Law

3.2.1 The Subsidiary Nature of EU Fundamental Rights Law

Subsidiarity and fundamental rights are inherently related to one another by their respective function as limiting and justifying intervention from public authorities at

[334] REICH N. (1994): p. 477. *See* Cases C-2/91 *Meng*; C-267/91 & 268/91 *Keck*; C-317/91 *Audi*.
[335] Cases C-114/01 *Chrome*, paras. 50-52, 56-57; C-518/08 *Salvador Dali*, para. 32.
[336] Case C-415/93 *Bosman*, para. 81. *See also* RAITIO J. (2003): p. 99.
[337] C-103/01 *Firefighters' Equipment*, paras. 46-47.
[338] C-440/05 *Commission v Council III*, para. 66. *See also* Case C-176/03 *Commission v Council II*, paras. 47-48.
[339] JIRÁSEK J. (2008): p. 6-7; SCHÜTZE R. (2012): p. 181. *See* e.g. Cases C-46/93 & 48/93 *Brasserie du Pêcheur*, where the CJEU formulated its own criteria for state liability, without providing any justification for the need for intervention at EU level.
[340] MURPHY D.T. (1994): p. 93.

different levels in society. United by common values, their aim is to find the most appropriate level of intervention – be it local or supranational – in order to promote ideals of individual freedom and human dignity. Given these functional similarities, subsidiarity can be regarded as a *structural principle* of international human rights law.[341] Arguably, the application of fundamental human rights in a European context entails considerations relating to both procedural and material subsidiarity.[342]

The subsidiary nature of international human rights standards can be illustrated by the system of external judicial review under the ECHR, to which all EU Member States have submitted themselves.[343] From the perspective of procedural subsidiarity, the exhaustion of domestic remedies as an admissibility requirement under Article 35(1) ECHR, reflects the subsidiarity nature of European human rights protection in relation to national fundamental rights protection.[344] As an expression of material subsidiarity, Article 53 ECHR lays down a minimum standard of protection, which the contracting parties may go beyond in their national legislation. The ECHR becomes applicable only if it provides a higher level of protection than the national legislation in question.[345] Similarly, the ECtHR accords States discretion when balancing conflicting interests. This margin of appreciation doctrine in favour of domestic deference can also be regarded as a form of material subsidiarity.[346]

In accordance with the principle of subsidiarity, States remain the paramount guarantors of supranational human rights standards within their respective jurisdictions. This follows from the fact that international human rights, due to their abstract nature, to a large extent are dependent on implementation and enforcement at national level.[347] As a consequence, the subsidiarity presumption holds that local implementation is the most appropriate level of protection for safeguarding rights of the individual.[348] Given this discretion, national authorities are left to define the concrete content of individual rights. The supranational bodies should only intervene in as far as domestic authorities cannot satisfactorily achieve

[341] CAROZZA P.G. (2003): p. 40, 66; CARTER W.M. (2008): p. 319.
[342] SCHLÜTTER B. (2010): p. 55.
[343] Opinion from the Commission for Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly on the Charter, CHARTE 4465/00, CONTRIB 319, 14.9.2000. *See also* Report from the Parliamentary Assembly of the Council of Europe on the Charter of Fundamental Rights of the European Union, Doc. 8819, 27.9.2000; Council of Europe Interlaken Declaration following the High Level Conference on the Future of the European Court of Human Rights, 19.2.2010.
[344] ECtHR Cases 21893/93 *Akdivar & Others v Turkey*, paras. 65-66; 13378/05 *Burden v the United Kingdom*, para. 42. *See also* CJEU Opinion 2/13, paras. 19, 90, 236. Also, *see* D'ASCOLIO S. – SCHERR K.M. (2007): p. 15; CARTER W.M. (2008): p. 327; JIRÁSEK J. (2008): p. 8-9; BESSON S. (2014): p. 191.
[345] BESSELINK L.F.M. (1998): p. 657, 676-677; BESSON S. (2014): p. 192-193.
[346] CAROZZA P.G. (2003): p. 40, 62; CARTER W.M. (2008): p. 325; FOLLESDAL A. (2011): p. 28; DE VRIES S.A. (2013b): p. 77.
[347] S'DA Rose M. (1999): p. 55; CAROZZA P.G. (2003): p. 62.
[348] CARTER W.M. (2008): p. 319; JIRÁSEK J. (2008): p. 8-10.

the envisaged standard of human rights protection.[349]

Within the EU, fundamental rights related Treaty provisions may express a similar vision of subsidiarity. Article 157 TFEU states that '[e]ach Member State shall ensure […] the principle of equal pay for male and female workers', with the support of the Union.[350] In relation to this, *Grant* can be mentioned as a case exemplifying the subsidiarity concerns of the CJEU. In its ruling the Court did not assimilate discrimination on grounds of sexual orientation to sex discrimination, but held that 'it is for the legislature alone' to decide whether a principle of non-discrimination on grounds of sexual orientation should be introduced into the Union legal order.[351]

By reconciling supranational standards with national levels of protection, the principle of subsidiarity promotes a unified minimum protection while still encouraging a plurality of standards.[352] As a result, individual human rights are ensured through a system of complementary protection mechanisms where no level of governance has absolute jurisdiction.[353] In other words, by encouraging cooperation and mutual respect between different-level guarantors of human rights, subsidiarity contributes to the balance of unity and diversity in the field of international human rights law.[354]

Like the principle of subsidiarity, fundamental rights regulate the *use of powers*, in contrast to their attribution. Rather than conferring positive competences, human rights constitute 'negative competences' with the aim of restricting public powers.[355] By indicating the possibilities and limits of intervention into individual rights and freedoms, human rights have a prescriptive nature, in the light of which other norms are assessed.[356] However, these rights not only restrict the use of powers, but also legitimate their exercise, in a way similar to the principle of subsidiarity. This is especially true for the distribution of powers within the EU, where subsidiarity, proportionality and the respect for fundamental rights condition the legitimacy of the EU legal system. That is to say, all legal acts of the Union have to comply with fundamental rights as general principles of law.[357] Fundamental rights protection may not have been the constitutive objective of the Union,

[349] CAROZZA P.G. (2003): p. 57-58; CARTER W.M. (2008): p. 326-327.
[350] MURPHY D.T. (1994): p. 91-92.
[351] Case C-249/96 *Grant*, para. 36. *See* HERDEGEN M. (2008): p. 353. It may be added that sexual orientation was introduced as a prohibited ground of discrimination with the Treaty of Amsterdam. Currently, references to this form of non-discrimination can be found in Articles 10 and 19(1) TFEU as well as in Article 21(1) CFR.
[352] CAROZZA P.G. (2003): p. 40; CARTER W.M. (2008): p. 330.
[353] ENGEL C. (2001): p. 166.
[354] CAROZZA P.G. (2004): p. 58, 78.
[355] TUORI K. (2000): p. 247; PERNICE I. (2008): p. 244; SCHLÜTTER B. (2010): p. 59; CHRONOWSKI N. (2014): p. 14.
[356] DUBOUT E. (2014): p. 198.
[357] Case C-4/73 *Nold*, para. 13.

but still contributes to its legitimacy.[358]

Under the present Lisbon Treaty, Article 2 TEU identifies respect for human rights as one of the founding values of the EU. Nevertheless, fundamental rights promotion is not listed in Article 3 TEU among the objectives of the Union. Ambiguously, it may thus seem that the Union does not have the means to guarantee its values.[359] Namely, there is a crucial difference between EU values and objectives, in the sense that the objectives alone provide a legal basis to act. As a fact, the Union has not been attributed any general competence in the field of fundamental rights protection.[360] Correspondingly, the CJEU has made a distinction between the obligation of the Union to respect fundamental rights, on the one hand, and the lack of explicit power to legislate in the field of fundamental rights protection, on the other.[361] Furthermore, the mere obligation to respect fundamental rights must not extend the powers of the Union in any way, as explicitly stated by Articles 6(1) and 6(2) TEU and implied by Articles 4(1) and 5(2) TEU.[362]

Fundamental rights do not represent a distinct policy area with explicit EU competences. Still, the transversal nature of fundamental rights makes them inherently intertwined with all areas of EU law. Their omnipresence contributes to blurring the limits of conferred competences. In fact, the distinction between EU values and objectives is overlapping, as Article 3(1) TEU states that one of the objectives of the Union is to promote its values.[363] This imbrication of values and objectives suggests that the Union might have implicit competences in the area of fundamental rights. For instance – in accordance with the Treaty of Lisbon, but despite the lack of general fundamental rights competence – the Charter has been made legally binding and the EU shall now accede to the ECHR.[364] Similarly, the concept of fundamental rights as general principles of EU law was initially introduced by the CJEU without any legal support in the founding Treaties.[365]

Despite the lack of any explicit general competence in the area of fundamental rights, the EU nevertheless possesses legislative powers in specific policy areas closely linked to fundamental rights protection. The Union may thus directly or indirectly be able to set

[358] BENGOETXEA J. (2001): p. 60-63; CHALMERS D. (2010): p. 149.
[359] DUBOUT E. (2014): p. 193.
[360] DE BÚRCA G. (2001): p. 134; LEINO-SANDBERG P. (2005): p. 45; ROSSI L.S. (2012): p. 91; AUGENSTEIN D. (2013): p. 1919; DUBOUT E. (2014): p. 196-197; WALKILA S. (2015): p. 147.
[361] CJEU Opinion 2/94.
[362] PERNICE I. (2008): p. 242-243; CHRONOWSKI N. (2014): p. 14.
[363] ROSSI L.S. (2012): p. 91-93.
[364] DUBOUT E. (2014): p. 197.
[365] JIRÁSEK J. (2008): p. 7.

fundamental rights standards.[366] Firstly, the Treaties explicitly empower the Union to enact legislation in connection to some fundamental rights, such as Article 19 TFEU regarding the fight against discrimination. Secondly, in policy areas such as freedom, security and justice, the implementing secondary legislation may inevitably touch upon fundamental rights issues. Thirdly, any issue falling within the scope of Union law may trigger fundamental rights considerations before the CJEU, as EU institutions as well as Member States must comply with fundamental rights as general principles of EU law.[367]

Given the cross-cutting nature of fundamental rights in EU law and the non-exhaustive list of conferred competences in Articles 3 to 6 TFEU, it can be maintained that the powers in the area of fundamental rights are *shared* between the Union and its Member States.[368] If this assumption is accepted, it naturally follows that the principle of subsidiarity applies to Union actions within the field of fundamental rights. On the one hand, this implies that legislative acts connected to fundamental rights issues are subjected to procedural subsidiarity review under Article 5(3) TEU.[369] On the other hand, the imprecise competences of the Union in the field of fundamental rights make their connection to the principle of subsidiarity less obvious.[370] From the perspective of material subsidiarity, the Member States will enjoy a margin of discretion when implementing Union law, as long as the EU fundamental rights standards are not compromised.[371] The Union can thus be considered to primarily have discretion and not an obligation to act.[372]

In accordance with negative subsidiarity, competences of the Union in the field of fundamental rights are subsidiary to the protection accorded by the Member States through their national legal systems.[373] The Lisbon Treaty expresses a *prima facie* assumption of the Member States as the primary defenders of fundamental rights.[374] Nonetheless, the Union will intervene if the fundamental rights issue in question falls within the scope of EU law and cannot satisfactorily be resolved by the Member States. In the *Frontex* case the CJEU held that 'the fundamental rights […] may be interfered with to such an extent that

[366] ROSAS A. – ARMATI L. (2012): p. 162; DUBOUT E. (2014): p. 197; MUIR E. (2014): p. 220-221.
[367] MUIR E. (2014): p. 223-228.
[368] BESSELINK L.F.M. (1998): p. 677; JIRÁSEK J. (2008): p. 2-3; MUIR E. (2014): p. 239.
[369] MUIR E. (2014): p. 239.
[370] CAROZZA P.G. (2003): p. 54.
[371] JIRÁSEK J. (2008): p. 11, referring to Cases C-274/99 P *Connolly*, paras. 41, 49; C-465/00, 138/01 & 139/01 *Rundfunk*, para. 83; C-540/03 *Parliament v Council*, paras. 54–66; C-145/04 *Spain v UK*, para. 94; C-402/05 P & 415/05 P *Kadi*, para. 360. *See also* KÜHN Z. (2010): p. 152, 160-161, refererring to the *Wachauf* and the *ERT* lines of case law. *See also* THYM D. (2013): p. 401-402.
[372] CRAIG P. (2012c): p. 467; MIETTINEN S. (2015): p. 228. Nevertheless, *see* e.g. Case C-68/95 *Port*, paras. 38-40, where the CJEU held that although the EU institutions have a broad discretion when assessing whether transnational measures are necessary, they are still 'required to act in particular when the transition to the common organisation of the market infringes certain traders' fundamental rights protected by Community law, such as the right to property and the right to pursue a professional or trade activity.'
[373] MURPHY D.T. (1994): p. 90; BESSELINK L.F.M. (1998): p. 677.
[374] FOLLESDAL A. (2011): p. 18-20.

the involvement of the European Union legislature is required.'[375] The fact that EU intervention is sometimes necessary illustrates how the fundamental rights policy of the Union may take expressions in the form of positive subsidiarity.[376] In such situations, the complementarity of the subsidiarity principle and fundamental rights becomes evident as the primacy of Union law is legitimated by its respect for fundamental rights. The principle of subsidiarity alone is not a sufficient guarantee that the attributed EU competences will not be abused.[377]

EU fundamental rights can be understood as a 'second-order quality' that conditions the legitimacy of the Union legal order.[378] The CJEU observes that actions under EU law are compliant with these fundamental rights.[379] Yet, the Luxembourg Court is not a human rights court with a general jurisdiction similar to the one in Strasbourg. The interpretation of fundamental rights before the CJEU is restricted to the field of Union law. The Court does not offer any specific remedies in cases of violations of fundamental rights, but fundamental rights claims can be raised under the standard judicial procedures before the Court.[380] Ultimately, the enforcement of EU fundamental rights is also dependent on a decentralised system where national courts are expected to review the compliance of national laws with EU law.[381]

In spite of the subsidiary nature of fundamental rights within the Union legal order, the Court's approach to fundamental rights has also been criticised as being opportunistic, taking the expression of judicial activism. While the initial purpose of EU fundamental rights was the respect for the Member State autonomy, it has conversely been claimed that the Court uses fundamental rights as a means of enhancing European integration and expanding its jurisdiction.[382] For instance, the commendable approach that the Court has taken towards the legal protection of vulnerable groups such as women, children, immigrants, homosexuals and transgender persons has been criticised as suffocating judicial and constitutional pluralism within the Union.[383] Meanwhile, it must not be forgotten that diversity exists not only on a national, but also on an individual level. The protection of fundamental rights also entails the majority's respect for the minority.

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[375] Case C-355/10 *Frontex*, para. 77.
[376] ALSTON P. – WEILER J.H.H. (1999): p. 27.
[377] TRIDIMAS T. (2010): p. 100-101; FOLLESDAL A. (2011): p. 20.
[378] CHALMERS D. (2010): p. 149.
[379] Cases C-305/05 *Ordre des barreaux*, paras. 27-37; C-578/08 *Chakroun*
[380] TRIDIMAS T. (2006): p. 613; ROSAS A. – ARMATI L. (2012): p. 166.
[381] CARTER W.M. (2008): p. 319-320; KÜHN Z. (2010): p. 158-159. *See* Case C-106/77 *Simmenthal*, para. 16.
[382] WEILER J.H.H. (1991): p. 583; COPPEL J. – O'NEIL A. (1992): p. 691-692; CUNHA RODRIGUES J. N. (2010): p. 91; TRIDIMAS T. (2010): p. 102; ANAGNOSTARAS G. (2014): p. 122.
[383] CARTABIA M. (2012): p. 272-275, referring to Cases C-117/01 *K.B.*; C-423/04 *Richards*; C-147/08 *Römer*.

The criticism of EU fundamental rights bears similarities with the disapproval of subsidiarity, seen by some as a principle promoting integrationist rather than consensus solutions.[384] In other words, subsidiarity would be inappropriate to govern the fundamental rights protection within the Union legal order, despite its presumption of decision-making close to the citizens.[385] Be that as it may, it must not be forgotten that the CJEU also protects interests of the individual. Likewise, it has been argued that fundamental rights, in the same way as the principle of subsidiarity, have made the CJEU act more cautiously.[386] At a time when the Charter explicitly introduces subsidiarity as a principle of fundamental rights, subsidiarity could be used as an instrument for regulating the exercise of powers within the field of fundamental rights.[387]

3.2.2 The Compliance of the Charter with the Principle of Subsidiarity

Given the similarities between the principle of subsidiarity and EU fundamental rights, it may seem surprising that these two concepts have not intersected before the enactment of the Charter.[388] Nevertheless, a parallel development towards subsidiarity and the Charter can still be observed throughout the history of European integration. Interestingly, the vision of governance through subsidiarity and the idea of a catalogue of fundamental rights were both brought forth for the first time in 1975 in the Report on European Union. In fact, both suggestions were presented as ways of regulating and delimiting competences.[389] Similarly, the Parliament Draft Treaty on European Union in 1984 suggested the inclusion of both subsidiarity and substantive fundamental rights at Treaty level.[390] The Leaken Declaration on the Future of the European Union in 2001 also stressed the importance of the subsidiarity principle and the Charter in the constitutionalisation of the Union.[391]

The principle of subsidiarity was first mentioned during the drafting procedure of the Charter in June 2000.[392] This incorporation of subsidiarity into the Charter represents a compromise of both political and legal nature, as a result of the Member States' unease regarding the consequences of adopting a fundamental rights document. Indeed, the negotiation process was characterised by a fear that the Charter might provoke an

[384] ESTELLA A. (2002): p. 75.
[385] MUIR E. (2014): p. 222.
[386] ENGEL C. (2001): p. 156.
[387] MUIR E. (2014): p. 239.
[388] CAROZZA P.G. (2003): p. 54.
[389] *Report on European Union*. COM(75) 400 final, p. 10, 16, 26.
[390] Articles 4(3) and 12(2) of the EP Draft Treaty establishing the European Union, 14.2.1984.
[391] Presidency Conclusions of the Leaken European Council, 14-15 December 2001, p. 19-23.
[392] Draft Charter, CHARTE 4373/00 CONVENT 40, 23.6.2000, p. 1-5. *See* Article 46(1), in principle corresponding to the present Article 51(1) CFR.

uncontrollable extension of the Union's powers of the Union to the detriment of Member State autonomy. As a result, the general provisions, presently found in Articles 51 to 54, were introduced to set out the conditions for and the limits to the application of the Charter.[393] In spite of the efforts to render the Charter subsidiary to other sources of EU law, its relation to the principle of subsidiarity was never clarified in official documents.[394]

Today, the legally binding Charter explicitly consolidates subsidiarity as a principle of fundamental rights under EU law.[395] Article 51(1) states that the Charter is 'addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.' With reference to the subsidiarity principle, its Preamble reaffirms the intention to balance European unity with a plurality of nations. While emphasising 'universal, indivisible' and 'common values', the Charter still recognises the diversity of the 'peoples of Europe', respects the 'authorities at national, regional and local levels' and 'places the individual at the heart of its activities.' The Charter's invocation of the principle of subsidiarity thus both reinforces and complements this reconciliation of harmonized values with national identities.[396]

The Charter carries many characteristics that bear witness of its subsidiarity. First of all, Article 52(6) sets out that '[f]ull account shall be taken of national laws and practices'. Correspondingly, several provisions contain explicit references the legislation of the Member States.[397] According to the Explanations, these limitations of the material scope underline the Charter's respect for subsidiarity.[398] The same holds true for Article 52(2) regarding rights for which provision is made in the Treaties. Secondly, the distinction between rights and principles under Articles 51(1) and 52(5) can be understood as an expression of subsidiarity. In order to be fully effective, the principles need to be implemented by the Union or the Member States in accordance with their respective powers.[399] Thirdly, elements of subsidiarity can be identified in Article 53 and its reservation that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting' fundamental rights as guaranteed elsewhere in Union or international law or by

[393] DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 372; CAROZZA P.G. (2004): p. 41; KNOOK A. (2005): p. 367; GROUSSOT X. (2006): p. 107; CRAIG P. (2010): p. 214; KAILA H. (2012): p. 293-294, 301; LENAERTS K. (2012): p. 376; MIETTINEN S. (2015): p. 223; WALKILA S. (2015): p. 132.
[394] CAROZZA P.G. (2004): p. 57. *Cf.* Commission Communication on the Charter COM(2000) 559 final, p. 5, 9.
[395] FOLLESDAL A. (2011): p. 20.
[396] CAROZZA P.G. (2003): p. 53-54; PERNICE I. – KANITZ R. (2004): p. 7.
[397] Articles 16, 28, 30, 27, 34, 35 and 36 CFR.
[398] Explanations to Article 52(6) CFR. *See also* PERNICE I. – KANITZ R. (2004): p. 8-9; LEBECK C. (2013): p. 63; CHRONOWSKI N. (2014): p. 14; WARD A. (2014): p. 1415-1416.
[399] WARD A. (2014): p. 1416.

the Member States.[400] Similarly, Article 52(4) bears traces of subsidiarity as its rejects autonomous interpretations by stating that '[i]n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.'[401]

As yet another expression of its subsidiarity, the Charter does not autonomously determine its own field of application.[402] It neither alters the distribution of competences between the EU and its Member States, nor extends the jurisdiction of the CJEU.[403] Rather, its scope can be defined as relative, because it is tied to the general scope of EU law.[404] Paradoxically, the application of the Charter is restricted to the Union legal order, despite the universal nature of fundamental rights.[405] As a consequence, the Charter is rather complementary than parallel in relation to national fundamental rights protection, because of their separate fields of application. In line with the subsidiarity principle, Member States retain their general competence as primary guardians of fundamental rights.[406]

This limited applicability of the Charter is reinforced by the word 'only' in Article 51(1).[407] In accordance with the principle of conferral, the responsibility of the EU for guaranteeing fundamental rights can be understood as a transfer of power from the Member States.[408] It follows, that Charter's scope is limited to the areas of competence conferred on the Union.[409] In other words, the Charter is a mere fundamental rights reflection of the existing Union legal order.[410] In relation to this, it should to be kept in mind that the primary aim of drafting a Charter was to render fundamental rights within the EU more visible.[411]

Reaffirming the Charter's restrictive scope, Articles 51(1), 51(2) and 52(2) reiterate the principles of conferral and subsidiarity. The Charter neither extends the scope of EU law, nor modifies the powers or tasks conferred on the Union in the Treaties. With the Lisbon Treaty its subsidiary and non-universal nature was further emphasised by Article 6(1) TEU

[400] MUIR E. (2014): p. 243-245.
[401] CAROZZA P.G. (2003): p. 54-55; AUGENSTEIN D. (2013): p. 1933-1934.
[402] SAFJAN M. (2012): p. 2.
[403] CHRONOWSKI N. (2014): p. 13; WALKILA S. (2015): p. 157.
[404] CAROZZA P.G. (2003): p. 54; KAILA H. (2012): p. 300.
[405] WEILER J.H.H. (1999): p. 104; PARMAR S. (2001): p. 354; CAROZZA P.G. (2003): p. 71; DUTHEIL DE LA ROSCHÈRE J. (2009): p. 124.
[406] PERNICE I. – KANITZ R. (2004): p. 14; LINDFELT M. (2007): p. 130; ROSAS A. – KAILA H. (2011): p. 15.
[407] KAILA H. (2012): p. 297; FOLLESDAL A. (2011): p. 20; WARD A. (2014): p. 1424; WALKILA S. (2015): p. 160.
[408] Opinion of AG CRUZ VILLÓN in Case C-617/10 *Åkerberg Fransson*, para. 37.
[409] SAFJAN M. (2012): p. 4; WALKILA S. (2015): p. 157.
[410] FONTANELLI F. (2014): p. 200.
[411] CAROZZA P.G. (2004): p. 40.

and Declaration No. 1 relating to its application.[412] Clearly, the Charter was not intended to provide a legal basis for the EU to legislate, but in reverse it strengthens the fundamental rights implications of the existing legal bases in the Treaties.[413] Instead of conferring competences on the Union, the Charter sets limits to how the EU and the Member States may use their attributed powers.[414] This difference between the Treaties and the Charter is well illustrated by Articles 19 TFEU and 21 CFR. These provisions are substantially similar but functionally distinct. Article 19 TFEU constitutes a specific legislative basis for EU acts in the fight against discrimination, whereas the prohibition of discrimination under Article 21 CFR conditions all areas of EU law, without thereby defining the reach of the Union's jurisdiction in anti-discrimination cases.[415]

Although the Charter does not provide a legal basis for the EU to legislate, this does not exclude its potential as an influence on policy-making.[416] Fundamental rights implementation is facilitated by the EU's obligation to ensure that all its actions comply with the Charter.[417] Accordingly, the respect for fundamental rights can also be used by the EU as a justification for enacting legislation in a given area of competence.[418] As pointed out by Article 51(1), the Union and its Member States 'shall promote the application' of the rights guaranteed under the Charter in accordance with their respective powers.

Interestingly, it was pointed out during the drafting process that some rights contained in the Charter 'require action by the European Union for them to be implemented, and the legislator has broad discretionary powers as regards such action.'[419] However, the current Explanations to the Charter merely states that '[p]rinciples may be implemented through legislative or executive acts […] adopted by the Union in accordance with its powers'.[420] Still, the Charter could also be interpreted as containing provisions of positive fundamental

[412] Declaration No. 1 concerning the Charter of Fundamental Rights of the European Union, annexed to the Treaty of Lisbon. *See* VON DANWITZ T. (2001): p. 303; CAROZZA P.G. (2004): p. 36; PERNICE I. (2008): p. 242-244; DUTHEIL DE LA ROSCHÈRE J. (2009): p. 122; ANDERSON D. – MURPHY C.C. (2011): p. 9; ANDERSON D. – MURPHY C.C. (2012): p. 165; AUGENSTEIN D. (2013): p. 1919; FONTANELLI F. (2013): p. 322-323; AZOULAI L. (2014): p. 11; WARD A. (2014): p. 1413.
[413] GROUSSOT X. (et.al.) (2013): p. 100; CHRONOWSKI N. (2014): p. 14.
[414] PERNICE I. – KANITZ R. (2004): p. 8, 17.
[415] CRAIG P. (2012c): p. 227; ROSAS A. – ARMATI L. (2012): p. 176.
[416] DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 364; WILLIAMS A. (2007): p. 90; DUTHEIL DE LA ROSCHÈRE J. (2009): p. 124; CHALMERS D. (2010): p. 150; FOLLESDAL A. (2011): p. 20; ANDERSON D. – MURPHY C.C. (2012): p. 156, 174; ROSAS A. – ARMATI L. (2012): p. 211-212; FONTANELLI F. (2013): p. 317; DUBOUT E. (2014): p. 198; MUIR E. (2014): p. 221-222.
[417] ARMSTRONG K. (et.al.) (2008): p. 424; FOLLESDAL A. (2011): p. 20; ANDERSON D. – MURPHY C.C. (2012): p. 174; KAILA H. (2012): p. 298; MICKLITZ H.-W. (2012): p. 377; FONTANELLI F. (2013): p. 317.
[418] CAROZZA P.G. (2004): p. 47-48; DE SCHUTTER O. (2004): p. 25; WARD A. (2004): p. 127. *See* e.g. Commission Proposal for a European Parlimament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257, p. 150-160, section 2.4, where it is stated that 'While it is true that the right of movement and residence of family members of Union citizens is not explicitly referred to by the Treaty, the right does flow from the right to preserve family unity, which is intrinsically connected to the right to the protection of family life, a fundamental right forming part of the common constitutional traditions of the Member States, which are protected by Community law and incorporated in the Charter'.
[419] Draft Charter, CHARTE 4111/00, 20.1.2000, para. 20. *See* DE WITTE B. (2001): p. 86; HELANDER P. (2001): p. 109-116; OJANEN T. (2003): p. 678; LINDFELT M. (2007): p. 134.
[420] Explanations to Article 52(5) CFR.

rights obligations for the Union, at least within its existing fields of competence. In fact the ECtHR, as a source of analogous comparison, has held that prohibitions may require States to take positive actions in order to fulfil their negative obligations under the ECHR.[421]

Regardless of the effects that subsidiarity may have on limiting the Charter's scope of application, it is clear that its incorporation into the Charter implies that there is more to subsidiarity in EU law than its formal definition in Article 5(3) TEU.[422] Charter subsidiarity should not be reduced to the abstention of the Union with respect to fundamental rights issues outside its jurisdiction.[423] Given the Charter's lack of legal basis for the EU to legislate, it must be concluded that the subsidiarity envisaged under the Charter is not only the procedural one set out in the TEU.[424] Subsidiarity in the context of the Charter appears to rather be of a material and judicial nature. In the same way as the Charter can be regarded to have interpretative effects on the entire legal order of the Union, the principle of subsidiarity conditions the application of the Charter. In other words, material subsidiarity has an impact on the Charter in the form of an interpretative principle.[425] As a compliment to its narrow legislative definition in Article 5(3), subsidiarity can also be understood more broadly as a principle of legal interpretation promoting the values and objectives of the Union under Articles 2 and 3 TEU.[426]

As explained, the notion of subsidiarity consolidated in the Charter represents a different understanding of the principle compared to the one applicable to legislative procedures.[427] Nevertheless, there are no clear answers to how this material subsidiarity should be applied when the CJEU interprets and applies the Charter 'with due regard to the principle of subsidiarity'.[428] Hence, it may be asked to what extent the earlier examined subsidiarity tests regarding national insufficiency, comparative advantages, cross-border elements or potential damages to common interests applies to the Charter in the Court's legal reasoning. Fundamental rights are to some extent functionally different from other EU policy areas. For instance, the prohibition of discrimination does not necessarily have a

[421] DE BÚRCA G. (2001): p. 134; CAROZZA P.G. (2004): p. 50; CRAIG P. (2010): p. 216. *See* e.g. ECtHR Cases 6289/73 *Airey v Ireland*; 6833/74 *Markcx v Belgium*; 7601/76 *Young, James & Webster v UK*; 8978/80 *X & Y v Netherlands*; 10126/82 *Plattform 'Arzte fur das Leben' v Austria*; 16798/90 *López Ostra v Spain*.
[422] BESSELINK L.F.M. (1998): p. 676; FOLLESDAL A. (2011): p. 31.
[423] *Cf.* LINDFELT M. (2007): p. 130.
[424] CAROZZA P.G. (2004): p. 57. Nevertheless, the Charter requires the EU to respect a certain level of fundamental rights protection when adopting secondary legislation. *See* DE SCHUTTER O. (2004): p. 25; LEBECK C. (2013): p. 443.
[425] JIRÁSEK J. (2008): p. 8; SCHLÜTTER B. (2010): p. 47; GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 244.
[426] EDWARD D. (2012): p. 96.
[427] MUIR E. (2014): p. 242.
[428] *Cf.* ENGEL C. (2001): p. 153, 169; CAROZZA P.G. (2003): p. 39, 57; TRIDIMAS T. (2006): p. 184; JIRÁSEK J. (2008): p. 7; MUIR E. (2014): p. 222, 240. ENGEL and CAROZZA are hopeful, whereas TRIDIMAS, JIRÁSEK and MUIR remain more sceptical about the actual effects that subsidiarity may have on the implementation of the Charter.

cross-border element that could support the need for Union intervention.[429] Therefore, it is conceivable that the subsidiarity approach to fundamental rights is more concerned with the moral, normative and democratic aspects of the principle.[430] In the field of fundamental rights, it is above all collisions between different values or objectives that trigger questions about the distribution of competences and the adequate level of intervention.[431]

The consolidation of subsidiarity in the Charter offers possibilities for fruitful symbiosis, but all the same leaves many questions unanswered. Obscurity persists as to the practical relevance of subsidiarity to fundamental rights under EU law, especially since the CJEU never explicitly considered the principle of subsidiarity in any fundamental rights case before it.[432] Hence, it remains to be examined what kind of implicit expressions subsidiarity takes in the Court's application of the Charter.

3.3 The Significance of Subsidiarity in Standard-setting under the Charter

3.3.1 Minimum Protection as an Expression of Negative Subsidiarity

In the spirit of subsidiarity, the objective of the Charter is not to harmonise the level of fundamental rights protection within the Member States of the EU.[433] The general provisions of the Charter limit its effects and merely lay down a *minimum standard* of protection within the Union. By setting its proper fundamental rights standard, the Union not only obligates the Member States to comply with fundamental rights, but also legitimises its own actions as an autonomous entity with fundamental values and constitutional limits.[434] According to the Parliament, 'the Charter constitutes a common basis of minimum rights, and the Member States cannot use the argument that the Charter would provide a lower level of protection of certain rights than the safeguards offered under their own constitutions as a pretext for watering down those safeguards'.[435]

Through the principle of subsidiarity and the minimum level of protection, the Charter seeks to balance a plurality of sources.[436] This balancing entails a search for a unified level of fundamental rights consistent with the EU legal order and its objectives, while at the

[429] MUIR E. (2014): p. 240-243.
[430] SCHLÜTTER B. (2010): p. 8.
[431] DAVIES G.T. (2006): p. 70-72; MUIR E. (2014): p. 241.
[432] CAROZZA P.G. (2003): p. 54, 79.
[433] TORREZ PEREZ A. (2013): p. 150; WALKILA S. (2015): p. 169. In many areas, the EU only has competence to lay down a minimum standard, for instance in the field of workers' rights. *See* DE SCHUTTER O. (2004): p. 25-26.
[434] WEILER J.H.H. (1999): p. 117; FOLLESDAL A. (2011): p. 22; CARTABIA M. (2012): p. 270.
[435] EP Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, para. 6.
[436] CAROZZA P.G. (2003): p. 67; LINDFELT M. (2007): p. 129.

same time respecting the diversity of the constitutional traditions of the Member States as far as possible.[437] The application of the Charter with respect to subsidiarity thus favours a 'practice of cross-judicial communication and comparison'.[438]

In the plurality of EU fundamental rights sources, the ECHR plays an important role. According to Article 6(3) TEU, the rights guaranteed under the Convention constitute general principles of EU law, whereas Article 6(2) TEU provides that the EU shall accede to the ECHR. In addition to this, the Convention has been a source of inspiration when drafting the Charter. Article 52(3) CFR contributes to setting the minimum level of protection, by stating that in so far as its provisions correspond to rights guaranteed by the ECHR, they shall have the same meaning and scope.[439] Nevertheless, Article 52(3) points out that the Charter may provide more extensive protection. Such additional protection may take the form of a broader personal scope, a more comprehensive content of the rights guaranteed or more limited possibilities of restriction. However, the Charter's general field of application remains narrower than that of the Convention.[440] In other words, the Charter takes the ECHR as a point of reference, but may still go beyond it.[441] This framing of fundamental rights replicates the subsidiary relation of the ECHR to the Member States.[442]

Similarly to the ECHR, the Charter may be understood as a living instrument regarding its exact content and scope. While the Charter aims to make EU fundamental rights more visible, it does not pretend to provide a static or exhaustive list of rights.[443] The references in Article 6 TEU to the ECHR, the constitutional traditions common to the Member States and the general principles, confirm that the CJEU retains its freedom to continue to develop fundamental rights as general principles of EU law.[444]

The relation expressed in Article 52(3) stresses the importance of consistency of the Charter with regard to the minimum standard guaranteed by the ECHR.[445] In fact, the

[437] WALKILA S. (2015): p. 170.
[438] CAROZZA P.G. (2003): p. 75.
[439] PERNICE I. – KANITZ R. (2004): p. 11-13; SCMAUCH M. (2012): p. 472, 476; LEBECK C. (2013): p. 450; WARD A. (2014): p. 1449. The Explanations to Article 52(3) CFR list Articles 2, 4, 5(1-2), 6, 7, 10(1), 11, 17, 19(1-2), 48 and 49(1) as having the same meaning and scope as their corresponding Articles under the ECHR.
[440] BESSELINK L.F.M. (2001): p. 72-73; LENAERTS K. – DE SMIJTER E. (2001): p. 97; LEBECK C. (2013): p. 74; WALKILA S. (2015): p. 133.
[441] WEILER J.H.H. (1999): p. 113; LENAERTS K. – DE SMIJTER E. (2001): p. 97; ANDERSON D. – MURPHY C.C. (2011): p. 7; LENAERTS K. (2012): p. 384; WALKILA S. (2015): p. 134. The Explanations to Article 52(3) CFR lists Articles 9, 12(1), 14(1), 14(3), 16, 47(2-3) and 50 as having the same meaning but a wider scope than their corresponding Articles under the ECHR.
[442] CHRONOWSKI N. (2014): p. 17-18, referring to J.-P. COSTA's lecture 'The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudential Dialogue between the European Court of Human Rights and the European CJEU' at King's College in London, 7.10.2008.
[443] GROUSSOT X. (2006): p. 106; DASHWOOD A. (et.al.) 2011: p. 362; WALKILA S. (2011): p. 816; LEBECK C. (2013): p. 457.
[444] ANDERSON D. – MURPHY C.C. (2012): p. 164; CRAIG P. (2012c): p. 231; ROSAS A. – ARMATI L. (2012): p. 56-57; AUGENSTEIN D. (2013): p. 1920.
[445] WARD A. (2004): p. 140; AUGENSTEIN D. (2013): p. 1928.

ECtHR presumes that the Charter offers a protection of fundamental rights in compliance with the ECHR.[446] As a sign of this homologous interpretation of the minimum protection, the CJEU primarily refers to the Charter as a source of fundamental rights, whilst interpreting the substantive minimum level in accordance with the corresponding provisions under the Convention.[447] However, this does not make the CJEU competent to rule on whether national rights comply with the ECHR.[448] For instance, in cases *Bonda* and *Åkerberg Fransson* the Court had to consider the effects of the *ne bis in idem* principle in Article 50 CFR in national proceedings relating to incorrect tax statements.[449] In both cases, the Court took note of the ECtHR case law on the *ne bis in idem* principle in Article 4 of Protocol No. 7 ECHR, but did not rule out a possible combination of administrative and criminal sanctions under the Charter.[450] This has led to criticism of the Court for possibly according a lower level of protection than the one afforded by the ECHR.[451]

Still, the interpretation of the rights guaranteed under the Charter is not autonomous, as a result of the principle of subsidiarity.[452] Not only is it tied to the ECHR standard, but in accordance with Articles 52(4), 52(6) and 53 CFR, its provisions shall also be interpreted with the Member State constitutions as a source of inspiration.[453] This requirement of harmonious interpretation can be seen as a form of subsidiarity, because it is aimed to mitigate possible tensions between the unifying effects of the primacy of Union law and the diversity of national constitutions.[454]

Nevertheless, the Charter's level of protection must not be understood as the 'lowest common denominator'. Instead, the Explanations affirm that the Charter shall be interpreted 'in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.'[455] Member States cannot automatically presume the common minimum standard to be respected in other

[446] ROSAS A. – ARMATI L. (2012): p. 170; SCMAUCH M. (2012): p. 469-470. WALKILA S. (2015): p. 118-119. *See* ECtHR Case 45036/98, *Bosphorus v Ireland*, para. 165. *See also* ECtHR Cases 19075/91 *Vermeulen v Belgium*. Also, *see* 39594/98 *Kress v France*, in relation to the CJEU Case C-17/98 *Emesa Sugar*.
[447] KAILA H. (2012): p. 312; RAITIO J. (2013): p. 351-352; Raitio 2014: p. 110. *See* e.g. Cases C-279/09 *DEB*, para. 32; C-386/10 P *Chalkor*, paras. 51-53; C-199/11 *Otis*, para. 47.
[448] VAN BOCKEL B. – WATTEL P. (2013): p. 870; FONTANELLI F. (2014): p. 227. *See* Cases C-571/10 *Kamberaj*, paras. 62-63; C-617/10 *Åkerberg Fransson*, para. 44; C-501/11 P *Schindler*, para. 32; C-295/12 P *Telefónica*, para. 41.
[449] Cases C-489/10 *Bonda*, paras. 36-45; C-617/10 *Åkerberg Fransson*, paras. 32-37.
[450] *See* e.g. ECtHR Cases 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 *Engel & Others v the Netherlands*, paras. 80-82; 14939/03 *Sergey Zolotukhin v Russia*, paras. 52-53.
[451] VAN BOCKEL B. – WATTEL P. (2013): p. 880-882; TORRES PÉREZ A. (2014): p. 313-314.
[452] AUGENSTEIN D. (2013): p. 1928-1929.
[453] KAILA H. (2012): p. 312; ROSAS A. – ARMATI L. (2012): p. 59; SCMAUCH M. (2012): p. 473; WALKILA S. (2015): p. 170. *See also* Case C-271/08 *Commission v Germany*, para. 38.
[454] BESSELINK L.F.M. (2001): p. 69; CAROZZA P.G. (2003): p. 54-55; JIRÁSEK J. (2008): p. 10.
[455] Explanations to Article 52(4) CFR.

Member States.[456] As a consequence, it has even been suggested that the Charter may contribute to a more autonomous understanding of fundamental rights within the EU, at the expense of the balance between commonalities and particularities of Member States.[457] For instance, in *Mangold* and *Kücükdeveci*, non-discrimination based on age was considered a general principle of EU law, despite the fact that only the constitutions of Finland and Portugal comprised a prohibition of discrimination on grounds of age at the time.[458]

As a minimum standard, the Charter does not prevent Member States from providing better protection to its citizens.[459] In line with the principle of subsidiarity, Article 53 acknowledges divergent levels of protection by specifying that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised' under EU law, international laws or Member State constitutions.[460] Like the concept of constitutional identity under Article 4(2) TEU, the EU grants Member States discretion to set their own level of protection in the field of domestic fundamental rights.[461] Given the Charter's close connection to the ECHR, this discretion may be compared to the margin of appreciation accorded by the ECtHR.[462] Accordingly, the CJEU gives Member States leeway when the protection is not harmonised at EU level. In principle, Member States may implement their own conception of fundamental rights on the condition that the national provisions do not hamper the primacy, unity and effectiveness of Union law or the minimum protection guaranteed under the Charter.[463]

3.3.2 Maximum Protection from the Perspective of Positive Subsidiarity

From a subsidiarity-oriented perspective, the rights and freedoms of individuals should be guaranteed at the closest but most appropriate level of governance. Subsidiarity reconciles a plurality of fundamental rights by giving priority to the standard that offers the best –

[456] LEBECK C. (2013): p. 459; MUIR E. (2014): p. 235-236. *See* Joined Cases C-411/10 & 493/10 *N.S*, paras. 105-106, where the CJEU held that 'European Union law precludes the application of a conclusive presumption that the Member State […] responsible observes the fundamental rights of the European Union. Article 4 of the Charter […] must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.' *See* Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.
[457] CAROZZA P.G. (2004): p. 51-54.
[458] HERDEGEN M. (2008): p. 345. *See* Case C-144/04 *Mangold*, para. 75; C-555/07 *Kücükdeveci*, paras. 21-22.
[459] BESSELINK L.F.M. (2001): p. 73; VON DANWITZ T. (2001): p. 301; AUGENSTEIN D. (2013): p. 1928-1929; THYM D. (2013): p. 402-404.
[460] HANCOX E. (2013): p. 1427.
[461] WALKILA S. (2012): p. 634; DUBOUT E. (2014): p. 210; WALKILA S. (2015): p. 175.
[462] JIRÁSEK J. (2008): p. 10-11; KUMM. M. (2010): p. 117.
[463] Cases C-617/10 *Åkerberg Fransson*, para. 29; C-399/11 *Melloni*, para. 60. *See* HANCOX E. (2013): p. 1428-1429; RAITIO J. (2013): p. 364; VAN BOCKEL B. – WATTEL P. (2013): p. 871, 879; WALKILA S. (2015): p. 171-174. *See also* Cases C-135/08 *Rottman*, paras. 6, 51-59; C-213/07 *Michaniki*, paras. 5, 44-49, where the CJEU allowed for constitutional reservations within the discretion of the Member States and in accordance with the principle of proportionality, as long as these reservations are not in conflict with the objectives of Union law.

presumably the highest – level of protection.[464] Like the concept of minimum harmonisation under EU law, the Charter thus sets out a level of protection, which Member States may go beyond. By providing a higher level of protection in accordance with Article 53, Member States can set their proper local *maximum standard*.[465]

As all EU Member States are contracting parties to the ECHR and the minimum protection under the Charter corresponds to the level afforded by the Convention, it is assumed that the choice of providing a higher level of protection lies within the discretion of each individual Member State.[466] Ideally, EU intervention would not even be necessary, since the Union is only capable of offering a similar or lower level of protection.[467] Against the background of negative subsidiarity, fundamental rights protection would thus be attributed to national authorities.[468]

According to this logic, the Union should act only if it is more apt to efficiently protect a given fundamental right. For instance, due to the transnational character of a particular right, Member States may not have all the means to guarantee its sufficient enforcement.[469] Nevertheless, this pluralistic approach to fundamental rights can also lead to tensions between different systems of protection. The Union legal order and national constitutions may balance individual rights and principles or individual rights and public interests differently.[470] This naturally raises the question of potential conflicts between the primacy of Union law and subsidiarity as a principle of fundamental rights: 'how much subsidiarity can [EU] law suffer in the sphere of the protection of fundamental rights'?[471]

In accordance with the principle of primacy, a provision of EU law must be given priority before any conflicting national provision. Member State authorities and courts are obliged to set aside domestic legislation deemed incompatible with the Union legal order.[472] Primacy of Union law applies to norms of primary as well as secondary law, and irrespective of the normative level of the conflicting national provision in question.[473] Traditionally, the principle of primacy has not been understood as leaving room for

[464] CAROZZA P.G. (2003): p. 69.
[465] BESSELINK L.F.M. (1998): p. 675-677.
[466] MURPHY D.T. (1994): p. 93.
[467] ESTELLA A. (2002): p. 81.
[468] CAROZZA P.G. (2003): p. 56.
[469] CAROZZA P.G. (2003): p. 79.
[470] LEBECK C. (2013): p. 450; DUBOUT E. (2014): p. 207.
[471] BESSELINK L.F.M. (1998): p. 678.
[472] Case C-106/77 *Simmenthal*, paras. 22-24; C-13/91 & 113/91 *Debus*, para. 32; C-119/05 *Lucchini*, para. 61; C-115/08 *ČEZ*, para. 138.
[473] BESSELINK L.F.M. (2001): p. 69; PRECHAL S. (2007): p. 38; BIONDI A. (2012): p. 223; ROSAS A. – ARMATI L. (2012): p. 58; WALKILA S. (2015): p. 173.

subsidiarity considerations in EU law.[474]

The primacy doctrine is not enshrined in the Treaties, but has been developed by the CJEU from the 1960's and case *Costa*, indicating that EU law, as 'an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions'.[475] Although it is true that the Court uses the common constitutional traditions of the Member States as a source of inspiration, only the CJEU alone is competent to review fundamental rights compliance under EU law.[476] As a result, even constitutional provisions of the Member States have been subject to the primacy of Union law.[477] In *Walloon*, the Court concluded that a Member State cannot 'plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under Community law'.[478]

Initially, the CJEU introduced fundamental rights as general principles of EU law in order to legitimate its primacy.[479] Based on this equation, the primacy doctrine harmoniously coexists with fundamental rights and the principle of subsidiarity. As long as a specific right cannot be better guaranteed at national level, the uniform protection at EU level prevails.[480] In this sense, the Charter can be seen as 'a counterpart to the unconditional acceptance of the primacy of European law over national law'.[481] However, by opening up for a higher level of protection, Article 53 CFR seems to render the primacy of Union law conditional upon the highest standard available. Such an exception could supposedly dilute the effects of the primacy doctrine.[482] The Charter enters into a paradoxical reasoning in which the primacy of its proper fundamental rights standard would work against the idea of a local maximum standard.[483] As a result, the idea of the common constitutional traditions of the Member States as the ultimate source of legitimacy

[474] WIKLUND O. (1997): p. 357.
[475] Case C-6/64 *Costa*, para. 3. *See also* Case C-14/68 *Walt*, paras. 5-6. Also, *see* ROSSI L.S. (2008): p. 65; CRAIG P. – DE BÚRCA G. (2011): p. 256; ROSAS A. – ARMATI L. (2012): p. 69; RAITIO J. (2013): p. 251-252; MUTANEN A. (2015): p. 80. Declaration No. 17 concerning Primacy, annexed to the Treaty of Lisbon, nevertheless reiterates the case law of the CJEU on the primacy of EU law.
[476] Cases C-11/70 *Handelsgesellschaft*, para. 4; C-44/79 *Hauer*, para. 14. *See* WEILER J.H.H. (1999): p. 114-116; TRIDIMAS T. (2010): p. 98.
[477] *See* e.g. Cases C-11/70 *Handelsgesellschaft*, para. 3; C-44/79 *Hauer*, para. 14; C-149/79 *Workers' Nationality*, paras. 16, 19; C-285/98 *Kreil*, para. 32; C-409/06 *Wetten*, paras. 60-61; C-213/07 *Michaniki*, paras. 21-24, 35; C-378/07 – 380/07 *Angelidaki*, para. 207; C-314/08 *Filipiak*, para. 85.
[478] Case C-212/06 *Walloon*, para. 58.
[479] DE WITTE B. (1999): p. 863; VON DANWITZ T. (2001): p. 292; DE BÚRCA G. (2012): p. 478.
[480] MUIR E. (2014): p. 234.
[481] PERNICE I. (2008): p. 239.
[482] BESSELINK L.F.M. (2001): p. 80; CAROZZA P.G. (2004): p. 45; DUTHEIL DE LA ROSCHÈRE J. (2009): p. 120-121; HANCOX E. (2013): p. 1427; TANASESCU E.S. (2013): p. 215.
[483] CHALMERS D. (2010): p. 142; CARTABIA M. (2012): p. 273; BENGOETXEA J. (2014): p. 166.

for primacy of Union law is put to test.[484]

The CJEU was faced with this dilemma in *Melloni*. In the case, the Spanish Constitution recognised a more extensive protection of the right to a fair trial than Articles 47 and 48(2) CFR. Still, the Court found that the Framework Decision 2002/584 on the European arrest warrant lawfully allowed for the extradition of Mr Melloni, despite the fact that he had been convicted in his absence by an Italian court.[485] According to the CJEU, Article 53 CFR 'must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.' In this sense the *Melloni* case appears to set a maximum level under the Charter.[486]

In *Melloni*, the Court emphasised that the 'framework decision effects a harmonisation of the conditions of execution of a European arrest warrant'.[487] This impact of harmonisation was further clarified in *Åkerberg Fransson*, where the Court explained that only 'in a situation where action of the Member States is not entirely determined by European Union law […], national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised'.[488] In other words, by virtue of primacy, a harmonized standard at EU level – albeit explicitly lower – precludes a higher national standard.[489] The degree of harmonisation of rights affects the margin of discretion for Member States to provide a higher level of protection.[490] In this sense, the *Melloni* judgement may be understood as an expression of the pre-emption doctrine, closely related to the principle of primacy. Member States may act in areas of shared competence to the extent that the EU has not used its power.[491] It has been suggested that this, in turn, might render the respect for the constitutional identity of the Member States

[484] SARMIENTO D. (2013): p. 1267-1268.
[485] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.
[486] C-399/11 *Melloni*, paras. 54, 64. *See* TORRES PÉREZ A. (2014): p. 316-317. In comparison, the *Åkerberg Fransson* judgment conversely confirmed the minimum standard of the Charter, because its interpretation of *ne bis in idem* offered a higher protection that the national legislation. Case C-617/10 *Åkerberg Fransson*. *See* HANCOX E. (2013): p. 1428.
[487] Case C-399/11 *Melloni*, para. 62.
[488] Case C-617/10 *Åkerberg Fransson*, para. 29.
[489] Case C-399/11 *Melloni*, para. 60; CJEU Opinion 2/13, para. 189. *See also* HANCOX E. (2013): p. 1428; SARMIENTO D. (2013): p. 1289-1294; BESSON S. (2014): p. 198; MIETTINEN S. (2015): p. 221, 229.
[490] VAN BOCKEL B. – WATTEL P. (2013): p. 879.
[491] SARMIENTO D. (2013): p. 1290-1291. Pre-emption can be observed e.g. in Cases C-31/78 *Bussone*, paras. 43-47; C-148/78 *Ratti*, paras. 26-27; C-222/82 *Apple*, para. 23; C-16/83 *Prantl*, para. 13; C-218/85 *CERAFEL*, para. 13; C-11/92 *Gallaher*, para. 20; C-52/92 *Commission v Portugal*, para. 19. *See* RAITIO J. (2003): p. 100; SCHÜTZE R. (2006): p. 1032-1048; RAITIO J. (2013): p. 245-246

conditional upon the primacy, unity and effectiveness of Union law.[492]

Hence, the highest protection available will not automatically become the frame of reference for fundamental rights within the EU.[493] Instead, to justify the primacy of the Charter as a maximum standard in *Melloni*, the Court emphasised 'the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted' for the purpose of the European arrest warrant.[494] In fact, the objective of harmonisation under the Framework Decision 'is to enhance the procedural rights of persons subject to criminal proceedings' by replacing the 'multilateral system of extradition between Member States with a system of surrender […] based on the principle of mutual recognition'.[495] The mutual trust and understanding of a given fundamental right empowers the EU to legislate in favour of a common lower standard.[496] This has been confirmed, not only in *Melloni*, but also in *Wereld*, where the Court held that the Framework Decision did not breach the principles of equality and legality of criminal offences, although it derogated from the requirement of double criminality with regard to the crimes listed in Article 2(2).[497] Hence, consensus among Member States regarding a certain level of fundamental rights protection creates a limit to the subsidiarity principle.[498]

At a first glance, the *Melloni* judgment appears to render the principle of subsidiarity non-existent in the field of EU fundamental rights. The judgement ensures neither the best nor the most immediate protection available. Rather, the case seems to confirm the fear of the Charter as a centralising force, extending its scope of application and imposing its harmonised standards of protection, without any regard to subsidiarity.[499] In its judgement, the Court even invoked primacy, despite the fact that the Framework Decision could not have direct effect.[500] This might nevertheless be a too hasty conclusion. What the *Melloni* judgement rather with certainty makes clear is that the subsidiarity of the Charter must be evaluated in the light of the primacy, unity and effectiveness of Union law.

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[492] CHRONOWSKI N. (2014): p. 17; MIETTINEN S. (2015): p. 468-469; WALKILA S. (2015): p. 173-175. However, respect for constitutional identity under 4(2) TEU was not pleaded before the CJEU in *Melloni*. *See* Opinion of AG BOT in Case C-399/11 *Melloni*, paras. 139-142. As suggested by SARMIENTO D. (2013): p. 1292-1293, 1298, Member States may nevertheless make *ex ante* constitutional objections in the legislative process or separately *ex post* bring a direct action under Article 263(2) TFEU before the CJEU, if they consider that EU secondary legislation infringes provisions of the Charter or their national constitutional identity guaranteed in Article 4(2) TEU. *See also* TORRES PÉREZ A. (2014): p. 318.
[493] WEILER J.H.H. (1999): p. 109.
[494] Case C-399/11 *Melloni*, para. 62. *See also* LEBECK C. (2013): p. 74.
[495] Case C-399/11 *Melloni*, paras. 36, 51. *See also* Recitals 5, 7 and Article 1(1-2) of Framework Decision 2002/584 as well as Cases C-396/11 *Radu*, paras. 33-34; C-168/13 PPU *Jeremy*, paras. 35-36.
[496] MIETTINEN S. (2015): p. 228-229.
[497] Case C-303/05 *Wereld*, para. 60. *See* TRIDIMAS T. (2010): p. 105.
[498] BESSON S. (2014): p. 191-192.
[499] FONTANELLI F. (2013): p. 332; HANCOX E. (2013): p. 1428.
[500] MIETTINEN S. (2015): p. 36. *See* Case C-399/11 *Melloni*, para. 60. *See also* Article 34(2)(b) TEU under the Amsterdam Treaty, which stated that framework decisions 'shall not entail direct effect'.

Firstly, it is important to note that *primacy of EU law* must not be understood as supremacy of Union law. Like subsidiarity, primacy does not represent a hierarchisation of the different systems of protection. Rather, the two principles favour a plurality of sources that need to be reconciled through a balance of interests and objectives.[501] Furthermore, both subsidiarity and primacy have a strong connection to the principle of sincere cooperation in Article 4(3) TEU.[502] The previous Amsterdam Protocol on subsidiarity emphasised that '[w]here the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required […] [to take] all appropriate measures to ensure the fulfilment of their obligations under the Treaty and [abstain] from any measure which would jeopardise the attainment of the objectives of the Treaty.'[503] Parallels can also be drawn between this principle of loyalty and the principle of mutual recognition. As indicated by the CJEU in *Pelz*, there is a requirement of 'mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter'.[504]

Although no longer in force, the Amsterdam Protocol on subsidiarity can be read as further clarifying the relation between primacy and subsidiarity.[505] As a fact, the Protocol stated that the principle of subsidiarity 'shall not affect the principles developed by the CJEU regarding the relation between national and Community law'. 'The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the CJEU.'[506] In practice, these provisions suggest that the principle of subsidiarity cannot be invoked to obstruct the objectives of the internal market and the primacy of Union law.[507] In this sense, the Charter reconciles primacy with fundamental rights. Although EU law takes primacy over national constitutions, the Union is still bound by the Charter. The primacy of the Charter is vital, because the lack of a common maximum level of protection could in some situations undermine the unity and effectiveness of the EU legal order, in the same way as the lack of a common minimum standard could risk the universality of fundamental rights.[508]

[501] BESSELINK L.F.M. (1998): p. 676.
[502] RAITIO J. (2003): p. 100; ROSAS A. – ARMATI L. (2012): p. 22; HUOMO-KETTUNEN M. (2013): p. 55.
[503] Article 8 of Protocol No. 30 on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty.
[504] Case C-491/10 PPU *Pelz*, para. 70.
[505] ESTELLA A. (2002): p. 102-103.
[506] Articles 2 and 3 of the Protocol No. 30 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of Amsterdam.
[507] RAITIO J. (2013): p. 246.
[508] BESSELINK L.F.M. (1998): p. 659-669; WEILER J.H.H. (1999): p. 112.

Secondly, regarding the *unity of EU law*, it must be kept in mind that the Lisbon Treaty does not take a state-centred negative approach to the principle of subsidiarity. In its positive form, subsidiarity may as well favour EU actions based on shared values and objectives.[509] Thus, there is no *prima facie* hierarchy between the different-level systems of protection.[510] In some situations the whole concept of a maximum standard become meaningless, as illustrated by *Grogan*, where three different rights had to be balanced against each other.[511] In other situations, negative subsidiarity might undermine the universality of rights.[512] Especially in the context of the common market, a uniform action coordinated at EU level is preferable and sometimes even unavoidable.[513] That is to say, when a clear comparative advantage exists, a particular situation should be regulated through harmonisation at Union level. As held by AG Cruz Villalón in *Åkerberg Fransson*, 'ultimately, on occasions which it is difficult to stipulate in advance, it is legitimate that the Union's interest in leaving its mark – its conception of the fundamental right – should take priority over that of each of the Member States'.[514]

Similarly to the European arrest warrant cases, the CJEU in *UK v Council* regarding the Working Time Directive 93/104 stated – in a tautological manner – that the intention to harmonise national legislation necessarily entailed Union action.[515] In line with the principle of subsidiarity, Member States have discretion only to the extent that the content of a given right has not been exhaustively determined at supranational level.[516] Within a system of constitutional character, such as the EU, it is sometimes necessary to strike a balance in favour of uniformity, at the expense of pluralism, in order to preserve the autonomy of the system.[517] As the Court held already in *Handelsgesellschaft*, the validity of Community 'measures can only be judged in the light of Community law […] [as] an independent source of law.' '[R]ecourse to […] national law in order to judge the validity of [such] measures […] would have an adverse effect on the uniformity and efficacy of Community law.' As a consequence, '[t]he protection of [fundamental] rights […] must be ensured within the framework of the structure and objectives of the Community.'[518]

[509] FOLLESDAL A. (2011): p. 22-23.
[510] SCHLÜTTER B. (2010): p. 31.
[511] Case C-159/90 *Grogan*, where the CJEU had to balance the right to life with the right to self-determination and freedom of expression. *See* WEILER J.H.H. (1999): p. 109-111.
[512] CARTER W.M. (2008): p. 330.
[513] MIETTINEN S. (2015): p. 455.
[514] Opinion of AG CRUZ VILLALÓN in Case C-617/10 *Åkerberg Fransson*, para. 41.
[515] Case C-84/94 *UK v Council*, paras. 57, 66, relating to Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, OJ L 307/18, 13.12.1993. *See* SCHÜTZE R. (2012): p. 182.
[516] SCHLÜTTER B. (2010): p. 4-5.
[517] CAROZZA P.G. (2003): p. 76.
[518] Case C-11/70 *Handelsgesellschaft*, paras. 3-4. *See* AUGENSTEIN D. (2013): p. 1925.

Thirdly, the *effectiveness of EU law* justifies a maximum approach to the Charter as compliant with the principle of subsidiarity. In accordance with the concept of positive subsidiarity, efficiency considerations may require that integration be regulated at EU level.[519] For instance, the effectiveness of the internal market and the financial interests of the EU can be seen as legitimising EU intervention in *Åkerberg Fransson*.[520] In practice, the efficiency considerations appear to weigh even heavier than arguments based on transnational implications in favour of Union action.[521] It is therefore argued that the CJEU tends to favour integrationist interpretations, stressing the *effet utile* of EU law when balancing different interests of individuals and the EU.[522]

The judgement in *Melloni* can be read as a confirmation from the CJEU that a satisfactory balance had been struck by the legislator when reconciling the efficiency of the European arrest warrant on the one hand, with the individual right to a fair trial on the other.[523] If Member States could interpret a harmonised right in a divergent manner, its impact would vary between Member States. This would be detrimental to the efficacy and full effect of the fundamental right in question.[524] As the Court concluded in *Hernandez*, 'the reason for pursuing the objective of protecting fundamental rights in EU law […] is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law'.[525]

Article 53 CFR can be interpreted as opening up for a constitutional dialogue between the EU and its Member States.[526] According to the Court in *Melloni*, the Article allows Member States to apply a higher level of protection as far as this standard does not compromise the protection offered by the Charter or the primacy, unity and effectiveness of Union law.[527] Although ambiguously formulated, the wording of the Article may still imply such a restrictive interpretation.[528] In fact, Article 53 declares that 'nothing in *this* [emphasis added] Charter shall be interpreted as restricting' domestic fundamental rights standards. This does not exclude the possibility that domestic standards may be restricted

[519] Commission Report to the European Council on the adaption of community legislation to the subsidiarity principle, COM(93) 545, p. 2. *See also* FOLLESDAL A. (2011): p. 29.
[520] Case C-617/10 *Åkerberg Fransson*, paras. 24-27. *See* RAITIO J. (2013): p. 364.
[521] ESTELLA A. (2002): p. 106-107.
[522] TRIDIMAS T. (2006): p. 139-141; LEBECK C. (2013): p. 39.
[523] ANAGNOSTARAS G. (2014): p. 122; MUIR E. (2014): p. 234.
[524] BESSELINK L.F.M. (1998): p. 668, 677-678; CAROZZA P.G. (2003): p. 73; WALKILA S. (2015): p. 249.
[525] Case C-198/13 *Hernández*, para. 47. *See also* Case C-206/13 *Siragusa*, paras. 31-32.
[526] THYM D. (2013): p. 419; WALKILA S. (2015): p. 175.
[527] Case C-399/11 *Melloni*, para. 60; CJEU Opinion 2/13, para. 189. *See also* HANCOX E. (2013): p. 1428; MIETTINEN S. (2015): p. 221, 229.
[528] LEBECK C. (2013): p. 74.

with reference to other sources of Union law.[529] Similarly, Article 53 limits the Charter's potential of restricting other fundamental rights standards to 'their respective fields of application'. This may be interpreted as referring only to rights falling outside the scope of Union law. Conversely, nothing prevents the Charter from restricting fundamental rights within its scope.[530] Such a reading of Article 53 tends to accentuate the *sui generis* nature of EU law and emphasise the Charter as an autonomous fundamental rights standard.[531]

Although the maximum approach to the Charter can be justified by positive subsidiarity, the notion of subsidiarity it represents may still be criticised. In the light of the *Melloni* judgment, the expansive approach to fundamental rights can no longer be justified by more extensive protection. It is even questionable whether the CJEU can be claimed to have a prudent approach to fundamental rights.[532] From the perspective of fundamental rights alone, the highest level of protection should prevail, but in reality the Court balances fundamental rights with many other objectives and values under the Treaties.[533]

While the effective protection of fundamental rights is the primary concern of subsidiarity in international human rights law, subsidiarity as a general principle of EU law is more concerned with the primacy, unity and effectiveness of *Union law in general*.[534] Traditionally, subsidiary human rights mechanisms have been preoccupied with the protection of the individual. The common denominator for subsidiarity and human rights concerns has been human dignity.[535] However, the principle of subsidiarity under Union law only partly shares these objectives and values. Fundamental rights are just one of many concerns of the EU, as demonstrated by the subsidiarity test. In determining the level of intervention, the Union looks for measures that can satisfactorily guarantee the common interests of the Member States. In defining these objectives, it assumes that its proper interests correspond to those of the Member States.[536] Member States appear to have no ultimate veto when the primacy, unity and effectiveness of Union law are at stake.

For these reasons, it can be concluded that the principle of subsidiarity – as defined by the EU and applied by the CJEU – is not value-neutral. Subsidiarity is not in itself a threat, neither to European integration nor to fundamental rights. However, it represents a

[529] LIISBERG J.B (2001): p. 1996; CAROZZA P.G. (2004): p. 46.
[530] BESSELINK L.F.M. (2001): p. 75.
[531] BESSELINK L.F.M. (1998): p. 667; LAVRANOS N. (2013): p. 133, 140; CHRONOWSKI N. (2014): p. 16.
[532] *Cf.* KUMM. M. (2010): p. 114; MIETTINEN S. (2015): p. 438.
[533] *Cf.* FOLLESDAL A. (2011): p. 29.
[534] BESSELINK L.F.M. (1998): p. 664.
[535] CAROZZA P.G. (2003): p. 58.
[536] DAVIES G.T. (2006): p. 72; FOLLESDAL A. (2011): p. 18; MUIR E. (2014): p. 239.

particular vision of integration, which in some situations can be considered to fail in striking a balance between unity and diversity.[537] The weakness of subsidiarity as a principle of fundamental rights under the Charter lies in the difficulties it experiences in addressing and balancing conflicts between different objectives and values in the EU fundamental rights context. Under the current subsidiarity parameters in EU law, the common objectives and values dictated by the Union are likely to prevail over colliding national fundamental rights standards and their respective values and objectives.[538] As exemplified by the *Melloni* judgement, positive subsidiary triggers the application of the Charter in situations where fundamental rights objectives and values at national level risk to jeopardise the primacy, unity and effectiveness of Union law.

3.4 The Subsidiary Scope of the Charter within the Field of EU Law

3.4.1 The Charter's Limited Scope of Addressees

For the purpose of examining the Charter's subjective scope *ratione personae*, its formal status must be taken as the point of departure.[539] As a preliminary observation, the Charter distinguishes between an active and a passive category of addressees. The active personal scope determines the holders of the rights and freedoms it guarantees, in other words the circle of persons protected under the Charter. The passive personal scope identifies the guarantors of rights and freedoms, broadly speaking the Union and its Member States, which are all under the obligation to respect the Charter.[540]

In accordance with its Preamble and the principle of subsidiarity, the Union has elaborated the Charter with 'the individual at the heart of its activities'.[541] By increasing the clarity, transparency and visibility of EU fundamental rights, the Charter raises awareness among the European citizens about their rights and freedoms.[542] Further to this, the legally binding status of the Charter raises important questions about its personal scope.[543] Who is entitled to invoke provisions under the Charter and against whom?

The *active personal scope* of the Charter primarily applies to natural persons domiciled or residing within the jurisdiction of an EU Member State.[544] However, each Charter

[537] ESTELLA A. (2002): p. 6-7, 80-81.
[538] MUIR E. (2014): p. 239-244.
[539] ANDERSON D. – MURPHY C.C. (2011): p. 8; TANASESCU E.S. (2013): p. 223.
[540] CURTIN D. – VAN OOIK R. (2001): p. 103.
[541] Preamble of the Charter of Fundamental Rights of the European Union.
[542] DE BÚRCA G. (2001): p. 130; Walkila S. (2011): p. 816; WALKILA S. (2015): p. 146.
[543] GROUSSOT X. (et.al.) (2013): p. 97.
[544] LEBECK C. (2013): p. 60.

provision more specifically outlines its beneficiaries.[545] Many Charter provisions do not make any apparent distinction between EU citizens and a third-country nationals.[546] Due to the universal and unconditional nature of human dignity, especially Title I of the Charter refers to 'everyone' as 'persons', without any distinction.[547] Other provisions are tied to the EU citizenship[548], whereas some are explicitly directed to third-country nationals.[549]

Some of the rights guaranteed may be applicable also to legal persons with registered office, administration or establishment within the EU.[550] However, the Charter cannot be invoked against the Union or its Member States by third countries or international organisations. Similarly, local and national authorities as well as Member States are excluded from the circle of right-holders.[551] Borderline cases may yet arise from situations involving legal entities of semi-private nature or with semi-public functions.[552] Nonetheless, in *Bank Mellat* and *Bank Saderat*, the General Court *a contrario* came to the conclusion that 'neither in the Charter […] nor in European Union primary law are there any provisions which state that legal persons who are emanations of States are not entitled to the protection of fundamental rights.'[553] The two rulings suggest that even legal persons from third countries may take advantage of fundamental rights guaranteed by the Charter.

While each provision defines its beneficiaries, the *passive personal scope* of the Charter is specifically addressed in one of the general provisions, namely Article 51(1).[554] The obligation to respect the rights and observe the principles therein is addressed to the EU and the Member States. This *vertical* dimension follows from the traditional function of fundamental rights, protecting the individual against the arbitrary use of public power.[555] When it comes to the validity, application and interpretation of measures falling within the scope of EU law, private parties thus have the possibility to invoke the Charter against Member States or the Union.[556]

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[545] CURTIN D. – VAN OOIK R. (2001): p. 103-104; DE BÚRCA G. (2001): p. 134. *See also* Draft Charter, CHARTE 4111/00, 20.1.2000, p. 3-4.
[546] *See* e.g. Articles 6-17, 19-35, 38 and 47-50.
[547] Articles 1-5 CFR.
[548] Title V (Articles 39-46) of the Charter.
[549] Articles 15(3), 18 and 45(2) CFR.
[550] CURTIN D. – VAN OOIK R. (2001): p. 103-104; LEBECK C. (2013): p. 60. *See* e.g. Articles 7, 8, 11, 15, 16, 17, 20, 21(2), 41, 42, 43, 44, 47, 48, 49, 50. *See also* e.g. Cases C-279/09 *DEB*, para. 59; C-92/09 & 93/09 *Schecke*, para. 59; Cases C-70/10 *Scarlet*, para. 46.
[551] Nevertheless, Article 36 CFR recognises the freedom of Member States to provide services of general economic interest. *See* LEBECK C. (2013): p. 60-61. According to MICKLITZ H.-W. (2012): p. 361, Member States could also be understood as right-holders in Cases C-112/00 *Schmidberger*; C-36/02 *Omega*.
[552] LEBECK C. (2013): p. 60-61, 285.
[553] Cases T-496/10 *Bank Mellat*, paras. 36-41; T-494/10 *Bank Saderat*, paras. 34-39. The two appeals are pending as Cases C-176/13 P *Bank Mellat*; C-200/13 P *Bank Saderat*. The Opinion of AG SHARPSTON in the Cases suggests the appeals should be dismissed.
[554] CURTIN D. – VAN OOIK R. (2001): p. 104.
[555] CRAIG P. (2012c): p. 196; LEBECK C. (2013): p. 43; CHRONOWSKI N. (2014): p. 14.
[556] CURTIN D. – VAN OOIK R. (2001): p. 111.

According to Article 51(1), the provisions of the Charter are primarily 'addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity'. Through the codification of the fundamental rights protected within the EU, the Union has strengthened its legitimacy as an autonomous legal order with primacy over national law.[557] In line with the subsidiarity principle, the Union establishes legal ties not only with its Member States, but also directly with EU citizens. Together with the Member States, the Union is explicitly responsible for guaranteeing the rights and freedoms of its citizens. In this respect, the EU legal order distinguishes itself from international public law and other international organisations.[558] Stressing its innovative character, the CJEU in *Van Gend* pronounced that 'the [Union] constitutes a new legal order of international law […] the subjects of which comprise not only Member States but also their nationals.'[559]

Although EU actions have to comply with fundamental rights as general principles resulting from the constitutional traditions common to the Member States and the ECHR, the Union was never formally bound by any fundamental rights document prior to the proclamation of the Charter.[560] Despite the fact that all EU Member States are contracting parties to the ECHR, it does not automatically follow that the instrument also binds the Union itself.[561] As confirmed by the ECtHR, the Strasbourg court does not have jurisdiction to examine claims raised directly against the EU.[562] The ECtHR can only exercise its jurisdiction indirectly, when Member States apply Union law within their respective domestic jurisdictions.[563] Under the current *Bosphorus* doctrine, the ECtHR presumes that the EU protection of fundamental rights is 'comparable' and thus also 'equivalent' to the ECHR.[564] Even though the Charter today is legally binding for the EU, the Union is nonetheless under no obligation to respect human rights in public international law. Hence, the obligation of the EU to accede to the ECHR under Article 6(2) TEU is an important complement to the Charter.[565]

The Union's fundamental rights obligations under the Charter are addressed to its

[557] DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 369; PERNICE I. (2008): p. 239-240; ANDERSON D. – MURPHY C.C. (2011): p. 1-2; ANDERSON D. – MURPHY C.C. (2012): p. 179; LEBECK C. (2013): p. 54; WALKILA S. (2015): p. 131, 270.
[558] PERNICE I. (2008): p. 253, 236-238; CHRONOWSKI N. (2014): p. 13-14.
[559] Case C-26/62 *Van Gend*, section B. *See* MICKLITZ H.-W. (2012): p. 352.
[560] KAILA H. (2012): p. 292.
[561] Article 49 TEU. *See* PERNICE I. – KANITZ R. (2004): p. 18; WARD A. (2004): p. 125; DOUGLAS-SCOTT S. (2013): p. 154; WALKILA S. (2015): p. 121.
[562] ECtHR Cases 8030/77 *CFDT v The European Communities alternatively their Member States*; 13258/87 *M. & Co. v Germany*; 51717/99 *Guerin Automobiles v The 15 EU Member States;* 73274/01 C*onnolly v the 15 EU Member States;* 6422/02 & 9916/02 *Gestoras & Others v The 15 EU Member States*.
[563] ECtHR Cases 17862/91 *Cantoni v France*; 24833/94 *Matthews v UK*; 62023/00 *Emesa Sugar v Netherlands*; 28336/02 *Grifthorst v France*. PERNICE I. – KANITZ R. (2004): p. 10; LEBECK C. (2013): p. 80.
[564] ECtHR Case 45036/98 *Bosphorus v Irland*, paras. 155, 165.
[565] PERNICE I. – KANITZ R. (2004): p. 13; PELLONPÄÄ M. (2007): p. 102-103; LEBECK C. (2013): p. 77-81; WALKILA S. (2015): p. 271.

institutions, bodies, offices and agencies. The list is consistent with the formulations in Articles 15 and 16 TFEU and must be considered thorough. The seven institutions of the Union are listed in Article 13 TEU, among others the Council, the Parliament, the Commission and the CJEU. No exhaustive list of EU bodies, offices and agencies exist, but the formulation must be considered to refer to all entities established by primary or secondary Union law. For instance, the Committee of Regions, the Economic and Social Committee, the European Central Bank, the European Investment Bank as well as decentralized agencies deserve to be mentioned.[566]

With due regard to subsidiarity, the Charter applies when the Union exercises its powers. Naturally, all actions of its institutions, bodies and agencies fall within the scope of EU law.[567] Therefore, all EU organs can be held liable for fundamental rights violations before the CJEU.[568] Proceedings are likely to concern either claims that the EU has failed to guarantee a sufficient level of protection or taken measures that are incompatible with the Charter.[569]

Whereas the Charter is generally applicable to the activities of the Union, it sets out a limited scope of application with regard to the Member States.[570] Article 51(1) CFR identifies the EU Member States as vertical addressees of its passive personal scope, but 'only when they are implementing Union law.' Against the background of subsidiarity, this dimension of the Charter reflects the multi-level collaborative execution of EU law in general, and of EU fundamental rights law in particular. To a large extent, the EU is dependent on its Member States for the implementation, application and enforcement of fundamental rights as guaranteed by the Charter.[571]

In accordance with Article 19 TEU, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' Although the Member States guarantee fundamental rights under their national constitutions, they are

[566] LINDFELT M. (2007): p. 235; ANDERSON D. – MURPHY C.C. (2011): p. 8. CURTIN D. – VAN OOIK R. (2001): p. 105-107. It can also be noted that some Articles of the Charter specifically points out only one or a few EU organs, such as Articles 39 (Parliament), 43 (European Ombudsman) and 44 (Parliament). *See* CURTIN D. – VAN OOIK R. (2001): p. 106.
[567] KAILA H. (2012): p. 303; LEBECK C. (2013): p. 59. Nevertheless, challenges to the applicability of the Charter could possibly arise with regard, for instance, to public-private partnerships established by the Union, such as the European Institute for Innovation and Technology. Similarly, the EU agencies established under the common foreign and security policy are excluded from the jurisdiction of the CJEU, in accordance with Article 275 TFEU. *See* WARD A. (2014): p. 1426.
[568] This can be done either through direct actions under Article 263 TFEU before the General Court or before the CJEU through a national request for a preliminary ruling under Article 267 TFEU. *See* MICKLITZ H.-W. (2012): p. 354-355; ROSAS A. – ARMATI L. (2012): p. 164; WARD A. (2014): p. 1425; WALKILA S. (2015): p. 222. *See* e.g. Cases C-185/95 P *Baustahlgewebe*; C-540/03 *Parliament v Council*; C-402/05 P & 415/05 P *Kadi*; C-341/06 P & 342/06 P *Chronopost*; C-385/07 P *Grüne Punkt*; C-465/07 *Elgafaji*.
[569] CRAIG P. (2012c): p. 219.
[570] DE BÚRCA G. (2001): p. 136.
[571] WEILER J.H.H. – FRIES S.C. (1999): p. 161; PERNICE I. (2008): p. 250-251; CHALMERS D. (2010): p. 141; WALKILA S. (2015): p. 256. *See also* CJEU Opinion 1/09, para. 66.

obliged to respect and uphold the rights and freedoms under the Charter when they implement Union law.[572] The Charter's reference to 'Member States' in Article 51(1) naturally covers both central and regional authorities as well as local bodies and public organisation.[573] Because the CJEU recognizes national courts as Member State authorities, these must equally be considered bound by the Charter.[574] What rather causes interpretational challenges is the concept of 'implementing Union law'.[575]

The different formulations of the Charter's applicability to Member State activity, such as 'only where the latter transpose or apply', 'exclusively within the framework of implementing' or 'exclusively within the scope of Union law', suggest that the drafters of the Charter envisaged a limited field of application at national level.[576] A literal interpretation of the current formulation points towards a limited Member State applicability alike.[577] Still, the Explanations to the Charter implies a wider field of application, covering both implementation of and derogation from EU law, when stating that 'it follows unambiguously from the case law of the CJEU 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'.[578] This ambiguity – together with the UK and Poland Protocol No. 30 – illustrates the political sensitivity that surrounds the applicability of the Charter and the extent to which it binds Member States, particularly in areas where national autonomy remains strong.[579]

In *Åkerberg Fransson*, the Court – with reference to the Explanations and the pre-Charter case law – eventually held that 'implementing Union law' refers to all situations 'where national legislation falls within the scope of European Union law'.[580] Similarly, in *N.S.*, the Court confirmed that Protocol No. 30 does not constitute a general opt-out from the Charter for Poland and the UK. Rather, the Protocol should be understood as clarifying

[572] CHRONOWSKI N. (2014): p. 13.
[573] Explanations to Article 51(1) CFR. *See* WARD A. (2014): p. 1413.
[574] *See* e.g. Cases C-43/75 *Defrenne I*, para. 37; C-224/01 *Köhler*, paras. 40-43, 48. *See also* WALKILA S. (2015): p. 222-223.
[575] ANDERSON D. – MURPHY C.C. (2011): p. 8; ROSAS A. – ARMATI L. (2012): p. 164 *See also* e.g. Opinion of AG BOT in Case C-108/10 *Scattolon*, paras. 116-120; Opinion of AG KOKOTT in Cases C-483/09 & 1/10 *Gueye*, para. 77.
[576] Draft Charter, CHARTE 4123/1/00, 5.2.2000; CHARTE 4235/00, 18.4.2000; CHARTE 4360/00, 14.6.2000. *See* DE BÚRCA G. (2001): p. 136-137; DE VRIES S.A. (2013b): p. 72.
[577] WARD A. (2014): p. 1425. However, when comparing the different language versions of the Charter, the literal wording of Article 51(1) appears ambiguous. The French version of the article uses the expression 'mettre en œuvre' and the German version the word 'Durchfürung', which both correspond to the English version with the word 'implement'. However, the verb 'apliquen' is used in the Spanish version, 'soveltavat' in Finnish and 'tillämpar' in Swedish, which all three refer to the application of Union law, rather than to its implementation. With regard to these differences in the literal wordings of Article 51(1), it is questionable whether the Charter's applicability in relation to the Member States should be limited only actions of national implementation. *See* ANDERSON D. – MURPHY C.C. (2011): p. 8
[578] Explanations to Article 51(1) CFR, referring to Cases C-5/88 *Wachauf*; C-260/89 *ERT*; C-309/96 *Annibaldi*. *See* BESSELINK L.F.M. (2001): p. 76; ANDERSON D. – MURPHY C.C. (2011): p. 8; SAFJAN M. (2012): p. 4.
[579] DE BÚRCA G. (2001): p. 138; ANDERSON D. – MURPHY C.C. (2011): p. 3-4, 10.
[580] Case C-617/10 *Åkerberg Fransson*, paras. 19-21. *See* VAN BOCKEL B. – WATTEL P. (2013): p. 868.

the limited applicability of the Charter to Member State actions.[581]

Based on the case law of the CJEU, the notion of national measures considered to *implement* EU law must be understood broadly.[582] As suggested by different AGs and later confirmed by the Court in *Åkerberg Fransson*, the formulation 'implementing Union law' does not exclusively refer to the direct and explicit transposition of EU norms into national law. In fact, the Charter applies to national measures serving a purpose of EU law, irrespective of whether they were intentionally designed to implement Union law or formerly adopted and therefore just happen to already fulfil such a purpose.[583] Similarly, in *DEB*, the Court held that despite the procedural autonomy of the Member States, their general procedural rules must comply with the Charter when giving effect to EU law.[584]

A part from the agency situation, where the Member States act on behalf of the Union, the Charter is also binding when the EU accords a *margin of discretion* to the Member States. While it is possible that the implementation of Union law leaves room for domestic considerations, this does not mean that Member States are allowed to disregard their fundamental rights obligations under the Charter.[585] As established by the Court in *N.S.*, Article 51(1) CFR covers situations where the Member States enjoys such discretion under EU law.[586] Correspondingly, in *Kamberaj*, the Court held that although the implemented Union law in question refers to definitions in national law, those definitions must still guarantee at least the same protection as the Charter.[587] Additionally, in *Alemo*, the Charter was used to review national implementation measures that went beyond the minimum level of harmonisation under EU law.[588]

In continuity with the pre-Lisbon ruling in *ERT* – the Court has confirmed that the Charter is binding on Member States also when they *derogate* from Union law.[589] According to the Court in *Tsakouridis*, 'reasons of public interest may be relied on to

[581] Cases C-411/10 & 493/10 *N.S.*, paras. 116-122. *See* also Opinion of AG KOKOTT in Case C-489/10 *Bonda*, paras. 21-23. Also, *see* ANDERSON D. – MURPHY C.C. (2011): p. 10-11; KOUTRAKOS P. (2014): p. 2; WARD A. (2014): p. 1420.
[582] FONTANELLI F. (2013): p. 319; CHRONOWSKI N. (2014): p. 15.
[583] Opinion of AG BOT in Case C-108/10 *Scattolon*, para. 119; Opinion of AG KOKOTT in Case C-489/10 *Bonda*, paras. 14-16, 20; Case C-617/10 *Åkerberg Fransson*, paras. 24-28. *See* SAFJAN M. (2012): p. 5, 14; FONTANELLI F. (2013): p. 315, 323; HANCOX E. (2013): p. 1418-1419; FONTANELLI F. (2014): p. 213-216; WARD A. (2014): p. 1451-1452. Admittedly, *Åkerberg Fransson* can be seen as a borderline case, given that the AG (Opinion of AG CRUZ VILLALÓN in Case C-617/10 *Åkerberg Fransson*, para. 64) as well as the Commission along with the Governments of the Czech Republic, Denmark, Ireland, the Netherlands and Sweden pleaded inadmissibility based on the lack of jurisdiction in the case. *See* RAITIO J. (2013): p. 363; VAN BOCKEL B. – WATTEL P. (2013): p. 869; WARD A. (2014): p. 1434.
[584] C-279/09 DEB, paras. 30-33. *See* WARD A. (2014): p. 1432-1433.
[585] EECKHOUT P. (2002): p. 977; FONTANELLI F. (2013): p. 317; HANCOX E. (2013): p. 1418-1419.
[586] Cases C-411/10 & 493/10 *N.S.*, paras. 64-69. *See* SAFJAN M. (2012): p. 7-8, 13; FONTANELLI F. (2014): p. 211; WARD A. (2014): p. 1432.
[587] Case C-571/10 *Kamberaj*, paras. 79-81, 92. *See* HANCOX E. (2013): p. 1420-1421.
[588] Case C-426/11 *Alemo*, paras. 23-25, 30-36. *See* BARTL M. – LEONE C. (2015): p. 146-149, 15.
[589] Case C-260/89 *ERT*, paras. 41-43. *See* LENAERTS K. (2011): p. 88; ROSAS A. – ARMATI L. (2012): p. 167; HANCOX E. (2013): p. 1419-1420; WARD A. (2014): p. 1428.

justify a national measure which is liable to obstruct the exercise of freedom of movement for person only if the measure in question takes account of [fundamental] rights'.[590] Similarly, in *Pfleger*, '[t]he use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty' was regarded as implementation for the purpose of Article 51(1) CFR.[591] In line with the principle of subsidiarity, the possibility of derogations in compliance with the Charter offers Member States leeway in the implementation of EU law.[592]

Although the Charter primarily aims to protect its beneficiaries against arbitrary exercise of public power in vertical relations, the holder of rights may as well wish to invoke Charter provisions in *horizontal* relations against another private party.[593] Admittedly, no clear-cut answer to the question of the Charter's horizontal impact is to be found in its provisions or the Explanations thereto.[594] At the outset, however, it is true that Article 51(1) does not mention individuals or private entities as addressees with obligations under the Charter. As argued by AG Trstenjak in *Dominguez*, a private party cannot fulfil the requirement in Article 52(1) CFR indicating that '[a]ny limitation on the exercise of rights and freedoms recognised by this Charter must be provided for by law'.[595]

Still, in *Kücükdeveci*, the CJEU incidentally referred to Article 21 CFR and held that it is for the national court hearing a dispute between private parties to disapply 'if need be any provision of national legislation contrary to' 'the principle of non-discrimination on grounds of age as given expression in Directive 2000/78'.[596] Arguably, Article 51(1) does not explicitly exclude private parties from the Charter's passive personal scope.[597] In fact, the CJEU recognised the horizontal effects of rights in private relations already prior to the existence of the Charter.[598] Hence, 'it would be paradoxical if the incorporation of the Charter into primary law actually changed that state of affairs for the worse', as argued by AG Villalón Cruz in *AMS*.[599] In effect, the Court has held that the Charter is 'applicable in all situations governed by European Union law'.[600] In addition to this, the Preamble of the

[590] Case C-145/09 *Tsakouridis*, para. 52.
[591] Case C-390/12 *Pfleger*, para. 36.
[592] CAROZZA P.G. (2003): p. 55-56.
[593] LEBECK C. (2013): p. 41; CHRONOWSKI N. (2014): p. 14.
[594] CRAIG P. (2012c): p. 206-207; WARD A. (2014): p. 1430.
[595] Opinion of AG TRSTENJAK in Case C-282/10 *Dominguez*, paras. 80-83. *See* LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1579.
[596] Case C-555/07 *Kücükdeveci*, paras. 22, 51, relating to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
[597] CURTIN D. – VAN OOIK R. (2001): p. 112; LAZZERINI N. (2014): p. 925; WALKILA S. (2015): p. 168.
[598] *See* e.g. Cases C-36/74 *Walrave*, para. 17; C-13/76 *Donà*, para. 17; C-415/93 *Bosman*, para. 82; C-51/96 & 191/97 *Deliège*, para. 47; C-281/98 *Angonese*, para. 31; C-309/99 *Wouters*, para. 120; C-438/05 *Viking*, para. 33.
[599] Opinion of AG VILLALÓN CRUZ in Case C-176/12 *AMS*, paras. 32-35.
[600] Case C-617/10 *Åkerberg Fransson*, para. 19. *See* LAZZERINI N. (2014): p. 929.

Charter states that the enjoyment of rights 'entails responsibilities and duties with regard to other persons, to the human community and to future generations.'

As a fact, several provisions of the Charter recognise rights that can be relied on in judicial proceedings between private parties.[601] Secondary legislation, case law as well as the Explanations recognise that rights, such as non-discrimination under Article 21, can be materially relevant in horizontal relations.[602] Furthermore – in comparison to Articles 14 ECHR and 1(2) of Protocol No. 12 – Article 21 CFR does not state that discrimination must be attributable to a public authority.[603] By analogy, the case law of the ECtHR also supports a horizontal application of the Charter.[604] However, the ECHR does not impose a requirement of direct horizontal effect. The impact of the ECHR on horizontal relations is rather indirect, as it is deemed sufficient that individuals are able to rely on the Member States' obligation to protect the individual rights guaranteed, also in the private sector.[605]

Although the rights and freedoms guaranteed in the Charter may have a certain impact on horizontal relations, such an effect is not unlimited. Given the secondary nature of the Charter, its provisions will become relevant rather *indirectly*, through their connection to other primary or secondary norms conferring rights and obligations on individuals and private entities.[606] As an example, Article 23 CFR, regarding equality between women and men, is to be observed in all areas of Union law, whereas its practical scope of application will be determined by other norms such as Article 157 TFEU – having both vertical and horizontal effect – regarding equal pay between female and male workers.[607] Therefore, it may be concluded that the Charter does not entail any universal or autonomous horizontal applicability. Any other interpretation would not only be likely to increase the number of judicial proceedings between private parties before the CJEU, but also boost constitutional litigation through the transfer of powers from the EU legislator to the CJEU in the area of fundamental rights protection.[608]

[601] E.g. Articles 7, 8, 21, 23 and 27-33 CFR. *See* CURTIN D. – VAN OOIK R. (2001): p. 112; ROSAS A. – ARMATI L. (2012): p. 180; GROUSSOT X. (et.al.) (2013): p. 112; LEBECK C. (2013): p. 454.
[602] Explanations to Article 21 CFR. *See* e.g. Cases C-144/04 *Mangold*; C-555/07 *Kücükdeveci*. *See also* LEBECK C. (2013): p. 321-322.
[603] SICILIANOS L.-A. (2006); p. 193.
[604] E.g. ECtHR Cases 6289/73 *Airey* v *Ireland*; 16798/90 *Lopez Ostra* v *Spain*; 48787/99 *Ilascu & Others* v *Moldavia & Russia*. *See* PELLONPÄÄ M. (2007): p. 23-25; HARTKAMP A. (2010): p. 535; LEBECK C. (2013): p. 298-299, 454; GROUSSOT X. (et.al.) (2013): p. 112.
[605] Opinion of AG TRSTENJAK in Case C-282/10 *Dominguez*, paras. 84-87. *See* LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1579.
[606] LEBECK C. (2013): p. 321-322, 454-455. *See also* e.g. Opinion of AG TRSTENJAK in Case C-282/10 *Dominguez*, para. 83.
[607] CRAIG P. (2012c): p. 206-207.
[608] WALKILA S. (2015): p. 178, 267-269.

3.4.2 The Relative Field of Application of the Charter

In spite of the universal nature of human rights, EU fundamental rights have a spatial scope of application that is different from that of rights guaranteed under domestic law and the ECHR. The EU Courts are not human rights courts with a general jurisdiction, such as the ECtHR. Rather than universally applicable, the *ratione materiae* of the Charter must be defined in relation to the scope of EU law itself.[609] Notwithstanding the function that the Convention fulfils as a source of inspiration for the Charter, their respective fields of application must not be assimilated.[610]

Article 51(1) CFR aims to determine and limit the situations in which the rights, freedoms and principles guaranteed can be invoked and enforced.[611] Consistent with the principle of subsidiarity, the Charter's field of application can be described as *relative*, since fundamental rights do not in themselves constitute a competence-conferring source of primary law. It follows, that for the Charter to be applicable, another norm of substantive EU law first needs to apply to the situation at hand.[612] To determine whether the circumstances of the case are 'governed by European Union law', an analysis of the subject matter first needs to be carried out.[613] A *sufficient connection to EU law* must be established before the Charter is considered applicable.[614]

Still, the required degree of connection between EU law and the subject matter raises problems of legal certainty regarding the applicability of the Charter.[615] A too abstract connection might extend the scope of the Charter to almost any domestic measure, whereas a too narrow reading of Article 51(1) could create a discontinuity between the scope of the Charter and the scope of fundamental rights as general principles of EU law.[616] For these reasons, it is argued that a Member State *obligation* – either positive or negative – deriving from EU law triggers the application of the Charter.[617] In *Siragusa*, the CJEU formulated this criterion as a question of whether 'the provisions of EU law in the subject area

[609] PERNICE I. – KANITZ R. (2004): p. 20; AZOULAI L. (2012): p. 208-209; MUIR E. (2012): p. 17; ROSAS A. – ARMATI L. (2012): p. 166; FONTANELLI F. (2013): p. 317; TANASESCU E.S. (2013): p. 223; WARD A. (2014): p. 1424. However, under Article 24(1) TEU, the jurisdiction of the CJEU is very limited with respect to the common foreign and security policy of the Union.
[610] However, it may be asked whether the EU's accession to the ECHR under Article 6(2) TEU could have the potential of extending the scope of the Charter. *See* SAFJAN M. (2012): p. 15.
[611] WARD A. (2014): p. 1413-1415.
[612] Opinion of AG SHARPSTON in Case C-427/06 *Bartsch*, para. 69. *See* KAILA H. (2012): p. 305-306; ROSAS A. (2012): p. 1280-1281; SAFJAN M. (2012): p. 13; SARMIENTO D. (2013): p. 1272; FONTANELLI F. (2014): p. 215; WARD A. (2014): p. 1446.
[613] WARD A. (2014): p. 1435, 1451-1452, referring to Case C-617/10 *Åkerberg Fransson*, para. 19.
[614] KAILA H. (2012): p. 303; WALKILA S. (2015): p. 154.
[615] WARD A. (2014): p. 1452.
[616] ANDERSON D. – MURPHY C.C. (2011): p. 8; ROSAS A. (2012): p. 1280-1281; FONTANELLI F. (2014): p. 215.
[617] HANCOX E. (2013): p. 1421; VAN BOCKEL B. – WATTEL P. (2013): p. 877-879; FONTANELLI F. (2014): p. 234; WARD A. (2014): p. 1451. It has also been suggested that the Union should have a 'specific interest' in the subject matter, in order for it to have jurisdiction, but the CJEU has not endorsed such an approach. *See* Opinion of AG CRUZ VILLALÓN in Case C-617/10 *Åkerberg Fransson*, para. 40. Also, *see* FONTANELLI F. (2013): p. 322; HANCOX E. (2013): p. 1415; FONTANELLI F. (2014): p. 215.

concerned […] impose any obligation on Member States with regard to the situation at issue in the main proceedings'.[618] In *Åkerberg Fransson*, the connection to EU law was deemed sufficient, despite the fact that the tax penalties and criminal proceedings for breaches to declare VAT were only 'connected in part' to the Member State's obligation under Union law to collect VAT.[619] Even the mere existence of a Directive was considered sufficient in cases *Mangold*, *Bartsch*, *Kücükdeveci* and *Römer*, once the time-limit for national transposition had elapsed.[620]

The Court's case law on the scope of the Charter can be understood from a functional perspective as well as from the point of effectiveness of Union law. When assessing the applicability of the Charter, the first question that needs to be answered is whether the national legislation in the dispute affects the *function* of Union law.[621] As illustrated by cases *McB* and *N.S.*, domestic rules may be complementary and thus functionally related to the EU legal order.[622] These functional criteria were specified in *Iida*, where the Court stated that 'it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law […] and also whether there are specific rules of European Union law on the matter or capable of affecting it'.[623] These criteria reflect the subsidiarity application of the Charter as set out in Article 51(1) CFR.

The functional relation between national measures, EU law and the Charter became even more apparent in *Åkerberg Fransson*. In this ruling, the national norms in question had not been adopted with the intention to implement Union law, but still gave effect to Member State obligations flowing from the EU.[624] Consequently, the objective function of the national norm was decisive, irrespective of what had been its original subjective intention.[625] The judgement must nevertheless be read in conjunction with the Court's ruling in *Siragusa*, which stressed that Article 51(1) CFR still 'requires a certain degree of

[618] Cases C-206/13 *Siragusa*, paras. 26-27; C-198/13 *Hernandez*, para. 35, both judgments referring to Case C-144/95 *Maurin*, paras. 11-12. *See* WALKILA S. (2015): p. 162.
[619] Case C-617/10 *Åkerberg Fransson*, paras. 24-25. *See* WARD A. (2014): p. 1432.
[620] Cases C-144/04 *Mangold*, para. 76; C-427/06 *Bartsch,* para. 17; C-555/07 *Kücükdeveci*, para. 25; C-147/08 *Römer*, para. 61. *See* GROUSSOT X. (et.al.) (2011b): p. 24-30; KAILA H. (2012): p. 311; PECH L. (2012): p. 1863-1865; ROSAS A. – ARMATI L. (2012): p. 166; DE VRIES S.A. (2013b): p. 73; FONTANELLI F. (2014): p. 211-212. However, in discrimination cases the prohibition must derive from an EU norm of substantive nature and not a competence conferring norm, such as Article 19 TFEU on non-discrimination. *See* SAFJAN M. (2012): p. 13.
[621] LEBECK C. (2013): p. 459.
[622] Cases C-400/10 PPU *McB*, para. 52; C-411/10 & 493/10 *N.S.*, para. 68. *See* SAFJAN M. (2012): p. 7-8, 11-12.
[623] Case C-40/11 *Iida*, para. 79, referring to Case C-309/96 *Annibaldi*, paras. 21-23. *See also* FONTANELLI F. (2013): p. 320; LEBECK C. (2013): p. 459.
[624] Case C-617/10 *Åkerberg Fransson*, paras. 24-27. *See also* Case C-650/13 *Delvigne*, paras. 33-39. Also, *see* FONTANELLI F. (2014): p. 219-220; MUIR E. (2014): p. 238.
[625] FONTANELLI F. (2013): p. 333.

connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'.[626] In other words, the appreciation of the sufficient connection to EU law is 'an assessment of degree, not one of existence.'[627] Domestic measures may be reviewed by the CJEU in the light of EU fundamental rights, whenever the measure in question can be objectively but concretely linked to the EU.[628]

Apart from the functional approach to Charter applicability, the CJEU also takes into consideration the *principle of effectiveness* when establishing jurisdiction in the area of fundamental rights. Article 19 TEU obligates the Member States to 'ensure effective legal protection in the fields covered by Union law' and the CJEU, in turn, strives to uphold a uniform application of Union law among the Member States.[629] Through references to the *effet utile* doctrine, the Court may thus establish a link between the Charter and domestic measures also in situations where national authorities do not formally execute obligations under EU law.[630] For instance, in *DEB*, the Court held that German procedural rules denying legal persons legal aid made compensation claims under EU law excessively difficult or even practically impossible, in a way which conflicted with the principle of effective judicial protection under Article 47 CFR.[631] Similarly, in *Åkerberg Fransson*, the relevant provisions of Swedish criminal law were not harmonised at EU level, but were still indirectly significant for the effective enforcement of tax operations under EU law. In order to not jeopardise the effectiveness of the Charter, the Court reiterated that 'any [national] legislative, administrative or judicial practice […] which might prevent European Union rules from having full force and effect' must be set aside.[632] The same line of reasoning was followed in *Melloni*, where the Court reiterated that national procedural rules must not compromise 'the primacy, unity and effectiveness of EU law'.[633]

What emerges from the examination of the Charter's field of application is an assumption about its coexistence with the general scope of EU law. In *Åkerberg Fransson*, the CJEU eventually confirmed the coinciding nature of the two and hence laid the basis for a doctrine of *equivalence*.[634] In essence, '[t]he applicability of European Union law

[626] Case C-206/13 *Siragusa*, paras. 24. *See also* Case C-198/13 *Hernandez*, para. 34.
[627] FONTANELLI F. (2014): p. 241-242.
[628] FONTANELLI F. (2013): p. 317.
[629] SARMIENTO D. (2013): p. 1281-1285; WALKILA S. (2015): p. 170.
[630] SAFJAN M. (2012): p. 12; FONTANELLI F. (2014): p. 205-207.
[631] Case C-279/09 *DEB*, para. 59. *See* SAFJAN M. (2012): p. 8-9; WARD A. (2014): p. 1445-1446. *See also* e.g. Cases C-372/09 & 373/09 *Peñarroja*, para. 63; C-300/11 *ZZ*, paras. 50-69.
[632] Case C-617/10 *Åkerberg Fransson*, para. 46. *See* SAFJAN M. (2012): p. 14; VAN BOCKEL B. – WATTEL P. (2013): p. 867, 877-878; FONTANELLI F. (2014): p. 216-217.
[633] Case C-399/11 *Melloni*, para. 60. *See* CHRONOWSKI N. (2014): p. 16.
[634] KAILA H. (2012): p. 305-306; ROSAS A. – ARMATI L. (2012): p. 164 HANCOX E. (2013): p. 1416, 1430; VAN BOCKEL B. – WATTEL P. (2013): p. 871, 877-878; FONTANELLI F. (2014): p. 215-216; WALKILA S. (2015): p. 148.

entails applicability of the fundamental rights guaranteed by the Charter.' In other words, 'the fundamental rights guaranteed by the Charter must […] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable.'[635] The *Texdata* judgement further clarified that 'if national legislation falls within the scope of EU law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights'.[636]

Based on the coinciding scopes of the Charter and general EU law, it may be concluded that Court has adopted an extensive understanding of Article 51(1) CFR.[637] This naturally follows from the principle of conferral and the fact that the Charter, in accordance with Article 51(2) CFR, does not extend the competences of the Union.[638] On the one hand, the invocation of fundamental rights under the Charter presupposes that the situation is governed by Union law.[639] On the other hand, fundamental rights condition the application of EU law.[640] Hence, the Union legal order does not allow for interpretations of EU norms in conflict with fundamental rights.[641]

Notwithstanding the clarifications made by the CJEU with regard to the Charter's scope of application, uncertainty pertains as to the general scope of EU law. In the end, it becomes obvious that the obscurity rather originates from the fluid nature of the Union legal order itself, and that the conditions for Charter applicability merely illustrates this problem.[642] The Charter's field of application develops in parallel with the competences of the Union.[643] Because the legal order of the Union is constantly evolving, no fixed rules exist to identify its boundaries in relation to the domestic legal orders. Ultimately, a line between the two can only be drawn by the CJEU on a case-by-case basis.[644] So far, however, the Court has not provided any comprehensible criteria to determine the outer

[635] Case C-617/10 *Åkerberg Fransson*, para. 21.
[636] Case C-418/11 *Texdata*, para. 72. *See* FONTANELLI F. (2014): p. 240. Cases such as *Bank Mellat* and *Bank Saderat* suggest that even legal entities in third countries may be affected by EU law and as a result become entitled to invoke the Charter. *See* Cases T-496/10 *Bank Mellat*, paras. 36-41; T-494/10 *Bank Saderat*, paras. 34-39. The two appeals are pending as Cases C-176/13 P *Bank Mellat*; C-200/13 P *Bank Saderat*. The Opinion of AG SHARPSTON in the Cases suggests the appeals should be dismissed. *See* WARD A. (2014): p. 1423.
[637] LENAERTS K. (2011): p. 89-90; KAILA H. (2012): p. 305-306; ROSAS A. – ARMATI L. (2012): p. 166; SCMAUCH M. (2012): p. 474; VON DANWITZ T. – PARASCHAS K. (2012): p. 1406-1407; WARD A. (2014): p. 1429.
[638] KAILA H. (2012): p. 302; LEBECK C. (2013): p. 450; WALKILA S. (2015): p. 234.
[639] WARD A. (2004): p. 124-125; MUIR E. (2014): p. 237.
[640] EECKHOUT P. (2002): p. 954; ROSAS A. – ARMATI L. (2012): p. 165; WALKILA S. (2015): p. 154.
[641] EECKHOUT P. (2002): p. 977; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2010): p. 1659; KAILA H. (2012): p. 307.
[642] WILHELMSSON T. (1997): p. 357; PERNICE I. – KANITZ R. (2004): p. 19; ROSAS A. (2012): p. 1270; RAITIO J. (2013): p. 362; FONTANELLI F. (2014): p. 196, 236.
[643] CAROZZA P.G. (2004): p. 47.
[644] GROUSSOT X. (2006): p. 282; LINDFELT M. (2007): p. 130; HANCOX E. (2013): p. 1415.

limits of Union law.[645]

In fact, the Court itself experiences difficulties in addressing the question of the scope of EU law. Articles 19 TEU and 267 TFEU merely mandate the Court to interpret the Union legal order. It delivers its interpretation in the abstract, because it neither applies national law nor Union law directly to the situation in the main proceedings.[646] This ambivalence is well illustrated by *Zakria*, where the national court, in essence, asked whether the Charter applies to the case. In its preliminary ruling, the Court first explained that it was 'not in a position to determine whether the situation of the claimant in the main proceedings is governed by European Union law within the meaning of Article 51(1) of the Charter', but only due to the lack of sufficient information regarding the main proceedings. Nevertheless, – and without giving any further guidance – the Court paradoxically concluded that '[i]t is for the referring court to ascertain, in the light of the facts in the main proceedings, whether the situation of the claimant in the main proceedings is governed by European Union law'.[647] Similarly, in *Dereci*, the Court gave an abstract answer to the question referred, but still concluded that it was for the national court to assess whether the concrete situation was covered by EU law in the first place.[648]

Despite – or possibly because of – the fluid nature of EU law itself, concerns have been expressed about the potential of the legally binding Charter as an instrument for the CJEU to extend its powers. As is well known, it was the Court that initially took the lead in introducing fundamental rights as general principles of EU law. The Court's initial requirements of Union measures respecting fundamental rights was gradually extended into areas where the EU had only limited influence, first through the obligation of Member States to respect fundamental rights when implementing, and later also when derogating from Union law.[649] It is true that the functional approach and effectiveness of EU law have contributed to an extensive application of the Charter in cases such as *Åkerberg Fransson*.[650] Still, cases like *Dereci* and *Zakria* appear to represent a more cautious approach to the applicability of the Charter.[651]

All in all, the questions about the Charter as a source of 'competence creep', federal

[645] DE BÚRCA G. (1998): p. 217; AUGENSTEIN D. (2013): p. 1919; FONTANELLI F. (2014): p. 227; MUIR E. (2014): p. 237.
[646] FONTANELLI F. (2014): p. 235-236, 245.
[647] Case C-23/12 *Zakria*, paras. 39-40.
[648] Case C-256/11 *Dereci*, para. 70. *See* FONTANELLI F. (2013): p. 317; FONTANELLI F. (2014): p. 232-237.
[649] VON DANWITZ T. (2001): p. 303; ROSAS A. – ARMATI L. (2012): p. 165-166; DUBOUT E. (2014): p. 195; MIETTINEN S. (2015): p. 225. For examples of pre-Lisbon judgments considered to extend the jurisdiction of the CJEU, *see* e.g. Cases C-273/97 *Sirdar*, para. 17; C-285/98 *Kreil*, para. 17; C-117/01 *K.B.*, paras. 30-34.
[650] DUBOUT E. (2014): p. 208; MUIR E. (2014): p. 233; WARD A. (2014): p. 1425; MIETTINEN S. (2015): p. 67. *See also* Opinion of AG CRUZ VILLALÓN in Case C-617/10 *Åkerberg Fransson*, para. 63.
[651] DE VRIES S.A. (2013b): p. 63.

integration or autonomous application of fundamental rights boil down to the applicability of other concepts of EU law, most prominently the economic freedoms of the Union and EU citizenship.[652] As AG Kokott noted in *Tas-Hagen*, these two concepts have 'a scope which is not restricted to specific matters.'[653] Together with discrimination cases such as *K.B.*, *Maruko*, *Mangold*, *Kücükdeveci* and *Römer* – which do not present any cross-border element – the economic freedoms and the citizenship of the Union have contributed to a significant decrease in utility of the doctrine of 'purely internal' situations falling outside the scope of EU law.[654] As demonstrated in cases such as *Pistre*, *Terhoeve*, *Guimont*, *Carpenter* and *Karner*, internal situations can be brought within the ambit of Union law because the national measures in question compromise the effective exercise of economic freedoms.[655] Likewise in *Avello*, *Zhu* and *Rottman*, national measures depriving EU citizens of the useful effect of their citizen rights have been held to fall within the jurisdiction of the Court. In *Zambrano*, the Court even extended its protection of the 'genuine enjoyment of the substance of the rights' attached to the EU citizenship to include a wholly domestic situation.[656] As the law of the Union stands today, the existence of a 'purely internal' situation can no longer be determined based on the lack of cross-border elements, but its meaning must be restricted to refer to areas of law where Member States retain their sovereign powers.[657]

Regardless of whether the Charter is considered to extend the scope of EU citizenship or *vice versa*, its conditions of applicability remain unclear, or at least difficult to anticipate.[658] This lack of legal certainty was addressed by AG Sharpston in her Opinion in *Zambrano*.[659] From the case law of the CJEU, it is clear that neither EU citizenship nor the Charter extend the jurisdiction of the Court beyond the conferred powers of the Union.[660] Consequently, the AG chose to approach Article 51(1) CFR from the perspective of existing competences, rather than from the subject matter analysis normally applied by the

[652] AZOULAI L. (2012): p. 209-211; DE VRIES S.A. (2013b): p. 62; AZOULAI L. (2014): p. 7-8; DUBOUT E. (2014): p. 196-197; MUIR E. (2014): p. 233.
[653] Opinion of AG KOKOTT in Case C-192/05 *Tas-Hagen*, para. 34.
[654] Cases C-117/01 *K.B.*, paras. 30-34; C-267/06 *Maruko*, paras. 58-60; C-144/04 *Mangold*, paras. 37-38; C-555/07 *Kücükdeveci*, paras. 23-27; C-147/08 *Römer*, paras. 34-36. *See* MUIR E. (2012): p. 17; ROSAS A. – ARMATI L. (2012): p. 165-166; DUBOUT E. (2014): p. 194-195, 206; MIETTINEN S. (2015): p. 220. For purely internal situations falling outside the scope of EU law, *see* e.g. Cases C-175/78 *Saunders*, para. 11; C-332/90 *Bundespost*, paras. 9-12; C-299/95 *Kremzow*, paras. 15-18; C-328/04 *Vajnai*, paras. 12-13.
[655] Cases C-321/94 – 324/94 *Pistre*, para. 44; C-18/95 *Terhoeve*, paras. 27-29; C-448/98 *Guimont*, paras. 19-22; C-60/00 *Carpenter*, para. 37-39; C-71/02 *Karner*, paras. 19-22. *See* CHALMERS D. (2010): p. 143; ANDERSON D. – MURPHY C.C. (2011): p. 8; ANDERSON D. – MURPHY C.C. (2012): p. 165; WHEATHERILL S. (2013): p. 29; FONTANELLI F. (2014): p. 237.
[656] Cases C-148/02 *Avello*, paras. 22-25; C-200/02 *Zhu*, paras. 25-26, 44-47; C-135/08 *Rottman*, para. 43-46, 59; C-34/09 *Zambrano*, paras. 41-45. *See* SAFJAN M. (2012): p. 3; HANCOX E. (2013): p. 1431; DUBOUT E. (2014): p. 201, 206; FONTANELLI F. (2014): p. 205-207.
[657] SHARPSTON E. (2012): p. 270.
[658] *Cf.* the positions of CUNHA RODRIGUES J. N. (2010): p. 97; VAN BOCKEL B. – WATTEL P. (2013): p. 875, 228-883.
[659] ANDERSON D. – MURPHY C.C. (2011): p. 16; SHARPSTON E. (2012): p. 270; SANKARI S. (2013): p. 241-244.
[660] Regarding citizenship, *see* e.g. Cases C-64/96 & 65/96 *Uecker*, para. 23; C-148/02 *Avello*, para. 26. Regarding the Charter, *see* e.g. Cases C-256/11 *Dereci*, para. 71; C-617/10 *Åkerberg Fransson*, para. 23.

CJEU.[661] The suggestion echoes the *civis europeus sum* reasoning presented by AG Jacobs in *Konstantinidis*, where he in vain argued that an EU citizen should be 'entitled to assume that, wherever he goes […] in the European Community, he will be treated in accordance with a common code of fundamental values'.[662]

While the Court did not endorse Sharpston's suggestion, her Opinion still remains both interesting and powerful, as she argued 'that, in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on *the existence and scope of a material EU competence.* To put the point another way: the rule would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised*.'[663]

Although it must be recognised that Sharpston's vision has the potential of reinforcing the federal structure of the EU, it might as well have an impact on the constitutionalisation of the Union legal order.[664] Her competence-based approach offers a concrete connection to EU law, while still respecting the principle of conferral. It would give impulses for Member States to adopt a minimum level of protection in accordance with the Charter, especially in areas of shared competence where the EU has not yet acted. A reading of Article 51(1) CFR in line with the material competences of the Union would also support the genuine enjoyment of EU citizenship rights.[665] Eventually, an extensive interpretation of Charter applicability could have the potential of further contributing to the primacy, unity and effectiveness of Union law.[666] Admittedly, this kind of interpretation would broaden the scope of application of the Charter. Nevertheless, the general scope of EU law would remain unaltered. As a consequence, the relative field of application of the Charter would endure in accordance with the principle of subsidiarity.[667]

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[661] WARD A. (2014): p. 1452.
[662] Opinion of AG JACOBS in Case C-168/91 *Konstantinidis*, para. 46, referred to in Opinion of AG POIARES MADURO in Case C-380/05 *Europa*, para. 16; Opinion of AG SHARPSTON in Case C-34/09 *Zambrano*, para. 83. *See also* ANDERSON D. – MURPHY C.C. (2011): p. 16; ROSAS A. – ARMATI L. (2012): p. 147; SAFJAN M. (2012): p. 2.
[663] Opinion of AG SHARPSTON in Case C-34/09 *Zambrano*, para. 163.
[664] *Cf.* SHARPSTON E. (2012): p. 270-271; LEBECK C. (2013): p. 58.
[665] Opinion of AG SHARPSTON in Case C-34/09 *Zambrano*, paras. 165-170. *See also* SHARPSTON E. (2012): p. 270-271.
[666] DUBOUT E. (2014): p. 202-203.
[667] ANDERSON D. – MURPHY C.C. (2012): p. 174; SAFJAN M. (2012): p. 4-5. SHARPSTON's suggestion for Charter applicability can be compared to the even bolder one presented by former European Commission for Justice Viviane REDING. In a speech in 2013, REDING stated that '[a] very ambitious Treaty amendment – which I would personally favour for the next round of Treaty change – would be abolishing Article 51 of our Charter of Fundamental Rights, so as to make all fundamental rights directly applicable in the Member States […] This would open up the possibility for the Commission to bring infringement actions for violations of fundamental rights by Member States even if they are not acting in the implementation of EU law. I admit that this would be a very big federalising step. It took the United States more than 100 years until the first ten amendments started to be applied to the states by the Supreme Court.' SPEECH/13/677, 4.9.2013. Also, *see* CHRONOWSKI N. (2014): p. 16.

4 Expressions of Subsidiarity in the Application of the Charter

4.1 Balancing Economic Freedoms and Fundamental Rights under the Charter

4.1.1 The Relation between Fundamental Rights and Economic Freedoms

Agreeably, the European integration process was originally built on a basis of economic cooperation.[668] As a consequence, it has been maintained, on the one hand, that EU fundamental rights protection is submitted to the forces of the market and thus constitutes a means of integration rather than an end in itself.[669] On the other hand, social considerations in the form of fundamental rights have formed an integral part of the internal market since the 1970's. The CJEU has actively been involved in the protection of fundamental rights long before the formal introduction of fundamental rights in the Maastricht Treaty or the definition of the EU as a 'social market economy' in the Lisbon Treaty.[670]

Arguably, fundamental concepts such as primacy of Union law, free movement and EU citizenship were essential to the penetration of fundamental rights into the Union legal order.[671] Conversely, the proper functioning of the economic freedoms is dependent on the effective guarantee of fundamental rights, such as the right to property, liberty and equal treatment.[672] Given this complementarity, economic freedoms and fundamental rights are inherently intertwined within the EU legal system.[673] As a fact, the CJEU itself has qualified the economic freedoms as fundamental rights.[674]

The intertwinement of economic freedoms and fundamental rights is emphasised not only by their mutual status as EU primary law, but also by the Charter. Its Preamble affirms that the EU preserves 'common values' and 'ensures the free movement of persons, services, goods and capital, and the freedom of establishment." The provisions of the Charter comprise civil rights crucial to the exercise of economic activity and free

[668] TUORI K. (2010): p. 15-17; AUGENSTEIN D. (2013): p. 1918.
[669] COPPEL J. – O'NEILL A. (1992): p. 691-692; LINDFELT M. (2007): p. 302; CARTABIA M. (2012): p. 264-265; SCHIEK D. (2012): p. 223; AUGENSTEIN D. (2013): p. 1917.
[670] ROSAS A. – ARMATI L. (2012): p. 212; BARNARD C. (2013): p. 46; DE VRIES S.A. (2013b): p. 59-60; WHEATHERILL S. (2013): p. 35-36. *See* Article F of the Maastricht Treaty and Article 3(3) TEU, as amended by the Treaty of Lisbon. For early notable judgments, *see* e.g. Case C-11/70 *Handelsgesellschaft*, para. 4; C-43/75 *Defrenne I*, para. 10.
[671] MURPHY D.T. (1994): p. 81; CUNHA RODRIGUES J. N. (2010): p. 96; ROSAS A. – ARMATI L. (2012): p. 205-206, 213; RAITIO J. (2013): p. 523.
[672] PERNICE I. – KANITZ R. (2004): p. 8; DE VRIES S.A. (2013b): p. 84; WALKILA S. (2015): p. 115.
[673] LINDFELT M. (2007): p. 305; TRSTENJAK V. (2013): p. 309-310.
[674] *See* e.g. Cases C-152/82 *Forcheri*, para. 11; C-222/86 *Heylens*, para. 14; C-49/89 *Corsica*, para. 8; C-55/94 *Gebhard*, para. 37; C-415/93 *Bosman*, para. 129. *See* LINDFELT M. (2007): p. 302; MICKLITZ H.-W. (2012): p. 361; LEBECK C. (2013): p. 261; WALKILA S. (2015): p. 114. Also, *see* Opinion of AG STIX-HACKL in Case C-36/02 *Omega*, para. 50. The economic freedoms of the EU (Articles 26 TFEU) comprises the free movement of goods (Articles 34-36 TFEU), persons (Articles 20(2), 21 and 45 TFEU), services (Articles 49 and 56 TFEU) and capital (Articles 63-65 TFEU).

movement in general, but also social and economic rights in particular. Moreover, the it contains Articles that coincides with the Treaty provisions on some of the economic freedoms. For instance, Article 15(2) ensures the right to engage in work in any Member State and Article 16 guarantees the freedom to conduct a business.

Article 45 CFR enhances the EU citizens' right to free movement, as enshrined in Articles 20(2) and 21 TFEU.[675] Because the right in question is quite abstractly formulated, it is nevertheless necessary to rely on the relevant Treaty provisions for its interpretation.[676] As pointed out by the Court in *Zeman*, Article 45 CFR must be interpreted in the light of Article 45 TFEU.[677] As an expression of subsidiarity, Article 52(2) CFR further specifies that rights with corresponding Treaty provisions 'shall be exercised under the conditions and within the limits defined by those Treaties.' Similarly, Article 53 provides that nothing in the Charter shall be interpreted as restricting or adversely affecting fundamental rights recognised elsewhere in EU law. In other words, the economic provisions of the Charter must not be understood as replacing the provisions on free movement enshrined in the Treaties, but rather as guaranteeing a minimum level of protection of the rights attached thereto.[678]

In contrast to fundamental rights under the Charter, the economic freedoms under the Treaties have an autonomous scope of application. However, this does not mean that a hierarchy would prevail between the two.[679] The subsidiary quality of Charter rights does not deprive them of their normative force. While economic freedoms may operate independently and provide a legislative basis for the Union, fundamental rights conditions the legality of all acts of EU law.[680] Given the 'broad convergence both in terms of structure and content' of economic freedoms and fundamental rights, 'it would be a mistake to seek to construct a generally conflictual or hierarchical relation between fundamental rights and fundamental freedoms', as argued by AG Trstenjak in *Commission v Germany*.[681] Bearing in mind the Union's constant reconciliation of a plurality of values,

[675] Explanations to Article 45 CFR. *See* MENÉNDEZ A.J. (2002): p. 477; ROSAS A. – KAILA H. (2011): p. 17; AUGENSTEIN D. (2013): p. 1937; DE VRIES S.A. (2013b): p. 84; LEBECK C. (2013): p. 259-261; WALKILA S. (2015): p. 167. However, the fact that the Charter does not explicitly codify all the economic freedoms, may also be understood as a wish to keep them separate from fundamental rights. *See* WALKILA S. (2015): p. 115.
[676] MENÉNDEZ A.J. (2002): p. 477; LEBECK C. (2013): p. 260-261.
[677] Case C-543/12 *Zeman*, para. 39. *See also* Cases; C-162/09 *Lassal*, para. 29; C-434/09 *McCarthy*, para. 27. Also, *see* Case C-367/12 *Seebacher*, paras. 20-22, regarding the relation between Article 16 CFR and Article 49 TFEU.
[678] BESSELINK L.F.M. (2001): p. 73; CRAIG P. (2012c): p. 226; WALKILA S. (2015): p. 141.
[679] PERNICE I. – KANITZ R. (2004): p. 9; TRIDIMAS T. (2006): p. 339; ROSAS A. – ARMATI L. (2012): p. 162; DE VRIES S.A. (2013b): p. 87-88; WALKILA S. (2015): p. 116. *Cf.* PARMAR S. (2001): p. 354; LINDFELT M. (2007): p. 295-298, 302; AUGENSTEIN D. (2013): p. 1937.
[680] LEBECK C. (2013): p. 44; WALKILA S. (2015): p. 118.
[681] Opinion of AG TRSTENJAK in Case C-271/08 *Commission v Germany*, paras. 183-199.

it is only natural that tensions arise between economic objectives and social policies.[682]

With respect to their mutual constitutional status within the Union legal order, collisions between fundamental rights and economic freedoms must ultimately be solved through their respective balancing by the CJEU.[683] This judicial levelling presupposes that both economic freedoms and fundamental rights are legitimate factors to consider when reconciling individual rights with public interests, on the one hand, and the divisions of competences between the Member States and the EU, on the other.[684]

Because the weighing of different interests is done with regard to the specific circumstances of each case, the outcome of individual judgments may vary. Whether the balance is struck in favour of economic or social interests in a particular case, therefore, does not allow for any far-reaching conclusions.[685] In order to understand the relation between economic freedoms and fundamental rights, instead, it is necessary to examine the general approach that the CJEU takes when engaging in their respective balancing. Essentially, the question lies in whether fundamental rights under the Charter operate on an equal basis with the economic freedoms, as one of many factors to consider within the EU legal system. When economic and social interests are balanced, do fundamental rights function merely as justifications to restrictions on free movement, or do economic freedoms as well have to justify restrictions on fundamental rights?[686]

4.1.2 Economic Freedoms, Fundamental Rights and Their Respective Restrictions in the Light of the Charter

'[S]ince 1 December 2009, when the Treaty of Lisbon entered into force, it has been necessary to take into account a number of provisions of primary social law which affect the framework of the fundamental [economic] freedoms', as pointed out by AG Villalón Cruz in *Palhota*.[687] Article 6 TEU together with the legally binding Charter emphasise the importance of interpreting economic freedoms with due regard to fundamental rights.[688] Consistently with the case law of the CJEU, fundamental rights condition the exercise of regulatory measures of the Union and its Member States when they act within the scope of

[682] PARMAR S. (2001): p. 354; MENÉNDEZ A.J. (2002): p. 477-478; LINDFELT M. (2007): p. 294; ROSAS A. – ARMATI L. (2012): p. 212-213; WHEATHERILL S. (2013): p. 29.
[683] TUORI K. (2010): p. 28-29; DE VRIES S.A. (2013b): p. 83; SARMIENTO D. (2013): p. 1297; WALKILA S. (2015): p. 250.
[684] WEILER J.H.H. (1999): p. 106-107, 120; DE VRIES S.A. (2013b): p. 94.
[685] ROSAS A. – ARMATI L. (2012): p. 212-213; DE VRIES S.A. (2013a): p. 191; RAITIO J. (2013): p. 530; WALKILA S. (2015): p. 20.
[686] WHEATHERILL S. (2004): p. 201; LINDFELT M. (2007): p. 302; TUORI K. (2010): p. 28-29; AUGENSTEIN D. (2013): p. 1935; DE VRIES S.A. (2013a): p. 188; DE VRIES S.A. (2013b): p. 88. *Cf.* the system of protection under the ECHR, which is said to operate based on the logic that economic interests must be justified as exceptions to human rights, rather than *vice versa*.
[687] Opinion of AG VILLALÓN CRUZ in Case C-515/08 *Palhota*, para. 51.
[688] DE VRIES S.A. (2013a): p. 188; WALKILA S. (2015): p. 117.

EU law.[689] When implementing Union law, Member States have to ensure that a fair balance is struck between the economic objectives involved and the different fundamental rights concerned.[690] Conversely, when restricting fundamental freedoms, the national derogating measures have to be appreciated in the light of EU fundamental rights.[691] As confirmed by the Court in the post-Lisbon case *Pfleger*, 'unjustified or disproportionate restrictions of the freedom to provide services under Article 56 TFEU is also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter.'[692]

However, fundamental rights are not absolute or fixed standards, but must be carefully balanced against other legitimate interests affecting the subject matter.[693] In accordance with Article 52(1) CFR, '[a]ny limitation […] must be provided for by law and respect the essence of [Charter] 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.' In other words, restrictions on fundamental rights are not considered violations, as long as they can be justified and respect the substantive core of the rights in question.[694] As a result, the mere applicability of a given fundamental right does not in itself dictate the outcome of an individual case.[695] For instance, in *Delvigne*, Articles 39(2) and 49(1) CFR did not preclude the deprivation of the right to vote from EU citizen convicted of serious crime.[696] Notwithstanding this derogation option, it must be noted that rights considered as non-derogable under the ECHR, are also absolute in accordance with Article 52(3) CFR. Similarly, derogations under the Charter cannot go further than derogations under the ECHR due to their mutual level of minimum protection.[697]

Referring to the Charter, the CJEU quashed the General Court's ruling in *Knauf*,

[689] WEILER J.H.H. (1999): p. 120; BESSELINK L.F.M. (2001): p. 78-79; WHEATHERILL S. (2004): p. 203-204; TRIDIMAS T. (2010): p. 103; SARMIENTO D. (2013): p. 1299. *See* e.g. Case C-617/10 *Åkerberg Fransson*, para. 19.
[690] FONTANELLI F. (2013): p. 317-318; ANAGNOSTARAS G. (2014): p. 122. *See* e.g. Cases C-5/88 *Wachauf*, paras. 17-22; C-274/99 P *Connolly*, paras. 40-41, 49; C-465/00, C-138/01 & 139/01 *Rundfunk*, para. 83; C-101/01 *Lindqvist*, para. 91.
[691] WHEATHERILL S. (2004): p. 203; GROUSSOT X. (et.al) (2013): p. 114-115; AUGENSTEIN D. (2013): p. 1934; WHEATHERILL S. (2013): p. 23. DUBOUT E. (2014): p. 208; *See* e.g. Case C-260/89 *ERT*, paras. 41-43
[692] Case C-390/12 *Pfleger*, para. 59. *See also* Cases C-391/09 *Wardyn*, paras. 89-91; C-98/14 *Berlington*, paras. 90-92.
[693] BESSELINK L.F.M. (1998): p. 639; ANDERSON D. – MURPHY C.C. (2011): p. 15; AZOULAI L. (2012): p. 214; DE VRIES S.A. (2013b): p. 75-76; TRSTENJAK V. (2013): p. 300; OJANEN T. (2014): p. 533. *See also* Opinion of AG POIARES MADURO in Case C-305/05 *Ordre des barreaux*, para. 49.
[694] BESSELINK L.F.M. (1998): p. 634; LENAERTS K. – DE SMIJTER E. (2001): p. 97; LINDFELT M. (2007): p. 297; KUMM. M. (2010): p. 115; SCHLÜTTER B. (2010): p. 4-5. *See* e.g. Cases C-4/73 *Nold*, para. 14; C-44/79 *Hauer*; C-5/88 *Wachauf*, para. 18; C-112/00 *Schmidberger*, para. 80; C-62/90 *Medicinal Products*, para. 23; C-404/92 P *X*, para. 18; C-145/04 *Spain v UK*, para. 94.
[695] RAITIO J. (2013): p. 523, 528; MIETTINEN S. (2015): p. 226. *See* e.g. Cases C-71/02 *Karner*, para. 50-53; C-470/03 *COS.MET*, paras. 72-73, regarding freedom of expression.
[696] Case C-650/13 *Delvigne*, paras. 46, 58; *See also* e.g. Cases C-291/12 *Schwartz*, paras. 35-39; C-237/15 PPU *Lanigan*, para. 55.
[697] BESSELINK L.F.M. (1998): p. 652; LEBECK C. (2013): p. 66-67; PEERS S. – PRECHAL S. (2014): p. 1469-1470; WARD A. (2014): p. 1418. Non-derogable rights are e.g. the prohibition of torture (Article 3 ECHR, Article 4 CFR) and the *ne bis in idem* principle (Article 4 of ECHR Protocol No. 7, Article 50 CFR).

because restrictions of Article 47 CFR had not been provided for by law.[698] Conversely, in *Melloni*, the Court held that the right to an effective judicial remedy under Article 47 CFR had lawfully been restricted.[699] Similarly, in *Sky*, it was stated that Article 16 CFR on 'the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.'[700] Contrariwise, in *Alemo*, Article 16 CFR did not entitle 'the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee's freedom to conduct a business'.[701]

In order to lawfully restrict a fundamental right, the measures must not only be objectively justified, but also proportionately balanced with regard to the general interests involved, the protection of fundamental rights of others and the particular circumstance of the case.[702] Hence, alongside the subsidiarity principle, the scope of fundamental rights protection under the Charter is governed by the principle of proportionality.[703] In the search for the optimal balance in *Commission v Germany*, AG Trstenjak emphasised that '[f]or the purposes of drawing an exact boundary between fundamental [economic] freedoms and fundamental rights, the principle of proportionality is of particular importance. In that context, for the purposes of evaluating proportionality, in particular, a three-stage scheme of analysis must be deployed where (1) the appropriateness, (2) the necessity and (3) the reasonableness of the measure in question must be reviewed.'[704]

For illustration, when assessing the proportionality of EU actions against Articles 7 and 8 CFR in *Digital Rights*, the Court emphasised that 'where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference'. Inherent to the subsidiarity principle, 'the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of

[698] Case C-407/08 P *Knauf*, paras. 91-92. ROSAS A. – KAILA H. (2011): p. 16-17; KAILA H. (2012): p. 312. *See also* Case T-187/11 *Trabelsi*, paras. 84-117.
[699] Case C-399/11 *Melloni*, para. 49. *See also* Case C-619/10 *Trade Agency*, paras. 52, 55. *See* TORRES PÉREZ A. (2014): p. 313.
[700] Case C-283/11 *Sky*, para. 46. *See also* Cases C-348/12 P *Naft*, para. 123; C-390/12 *Pfleger*, para. 58.
[701] Case C-426/11 *Alemo*, para. 36, referring by analogy to Case C-544/10 *Weintor*, paras. 54, 58. *See* BARTL M. – LEONE C. (2015): p. 146-149, 15.
[702] *See* e.g. Cases C-275/06 *Promusicae*, para. 68; C-468/10 & 469/10 *ASNEF*, paras. 40, 43.
[703] BESSELINK L.F.M. (1998): p. 639; SANKARI S. (2010): p. 212; BARNARD C. (2013): p. 47; LEBECK C. (2013): p. 36-37, 447; MIETTINEN S. (2015): p. 42-43; WALKILA S. (2015): p. 20.
[704] Opinion of AG TRSTENJAK in Case C-271/08 *Commission v Germany*, para. 189. *See also* GROUSSOT X. (2006): p. 146-152; BARNARD C. (2013): p. 48-49; LEBECK C. (2013): p. 37.

what is appropriate and necessary in order to achieve those objectives'.[705] While there is no exact formula for assessing proportionality, it is suggested that the Charter may contribute to increased transparency in the proportionality review of restrictive measures.[706]

Following the judgements in *Viking* and *Laval*, it has been argued that the CJEU treats fundamental rights as obstacles to free movement, rather than as objectives of the Union in themselves.[707] With reference to their intertwined character and respective status as primary law, it has therefore been suggested that the Court should engage in a true balancing-act by applying a double proportionality test.[708] Fundamental rights should not be understood as exceptions to the rules on free movement, but in the words of AG Trstenjak in *Commission v Germany*, 'a fair balance between both of those legal positions must be sought. In that regard, it must be presumed that the realisation of a fundamental [economic] freedom constitutes a legitimate objective which may limit a fundamental right. Conversely, however, the realisation of a fundamental right must be recognised also as a legitimate objective which may restrict a fundamental [economic] freedom.'[709]

Since the Charter became legally binding, increased tendencies towards such a line of reasoning can be identified in *Pfleger*, where the Court indicated that '[n]ational legislation that is restrictive from the point of view of Article 56 TFEU […] is also capable of limiting the freedom to choose an occupation, the freedom to conduct a business and the right to property enshrined in Articles 15 to 17 of the Charter.' In other words, 'Article 56 TFEU covers also possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary.'[710] However, already in *Karner* the Court reviewed the respect for fundamental rights, even though it had not found any restriction of the free movement in the case.[711]

Evidently, economic freedoms may be subject to limitations in the same way as fundamental rights.[712] However, whereas the CJEU in *ERT* confirmed that restrictions of the free movement have to comply with fundamental rights, in *Schmidberger* and *Omega* it

[705] Cases C-293/12 & 594/12 *Digital Rights*, paras. 46-47. *See also* Cases C-343/09 *Afton*, para. 45; C-92/09 & 93/09 *Schecke*, 74; C-581/10 & 629/10 *Nelson*, para. 71; C-249/11 *Byankov*, paras. 43-48; C-283/11 *Sky*, para. 50; C-101/12 *Schaible*, para. 29.
[706] BARNARD C. (2013): p. 57; DE VRIES S.A. (2013a): p. 191; MIETTINEN S. (2015): p. 479.
[707] C-438/05 *Viking*, paras. 46-49, 79; C-341/05 *Laval*, para. 105. *See* LINDFELT M. (2007): p. 302; TUORI K. (2010): p. 28-29; ROSAS A. – ARMATI L. (2012): p. 212; SCHIEK D. (2012): p. 237-238; AUGENSTEIN D. (2013): p. 1935; BARNARD C. (2013): p. 41-42; DE VRIES S.A. (2013b): p. 88, 93; WHEATHERILL S. (2013): p. 26-28.
[708] DE VRIES S.A. (2013a): p. 190-191; DE VRIES S.A. (2013b): p. 92-93; DUBOUT E. (2014): p. 203.
[709] Opinion of AG TRSTENJAK in Case C-271/08 *Commission v Germany*, para. 188. *See also* TRSTENJAK V. (2013): p. 311-314.
[710] Case C-390/12 *Pfleger*, paras. 57, 60. *See also* Cases C-233/12 *Gardella*, paras. 39-41; C-98/14 *Berlington*, paras. 90-91. Also, *see* PEERS S. – PRECHAL S. (2014): p. 1489-1490.
[711] Case C-71/02 *Karner*, paras. 43-44. *See* WHEATHERILL S. (2013): p. 24; DUBOUT E. (2014): p. 204.
[712] LINDFELT M. (2007): p. 297; CARTABIA M. (2012): p. 264-265; ROSAS A. – ARMATI L. (2012): p. 208; AZOULAI L. (2014): p. 8; WALKILA S. (2015): p. 115.

established that fundamental rights may also in themselves provoke derogations from the economic freedoms.[713] This line of cases can be traced back to the ruling on mandatory requirements in *Cassis de Dijon* and demonstrates the Courts evolving inclination to consider social interests in parallel with economic objectives.[714] Similarly, in *Familiapress*, the Court held that the '[m]aintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. Such diversity helps to safeguard freedom of expression'.[715]

As evidenced by *Sayn-Wittgenstein*, Article 51(1) CFR applies also in situations where Member States invoke fundamental rights as reasons for derogating from the economic freedoms.[716] With reference to Article 21 CFR, the CJEU held that 'it does not appear disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting […] titles of nobility […]. [R]efusing to recognise the noble elements of a name […] cannot be regarded as a measure unjustifiably undermining the freedom to move and reside enjoyed by citizens of the Union.'[717] Similarly, the best interest of the child in Article 24(1) CFR was used to justify the prohibition of selling image storage media lacking age-limit labelling in *Dynamic Medien*.[718] On the one side, positive evaluators of the Charter's impact on free movement claim that it is likely to facilitate the justification of national exemptions from economic freedoms.[719] Critics, on the other side, point out that the Charter merely operates as a justification to exceptions from the economic freedoms and not *vice versa*.[720]

In any case, the balancing of fundamental rights and economic freedoms well illustrates the constitutional nature of collisions that may arise between the two. After all, the Court's delicate reconciliation of fundamental rights with other general and individual interests touches upon the division of competences as well as sensitive economic, social and moral issues.[721] Rulings such as *Omega* and *Sayn-Wittgenstein* exceptionally allow national fundamental rights to prevail over economic EU objectives and may thus – in the spirit of constitutional pluralism – be said to accord Member States a certain margin of discretion

[713] Cases C-260/89 *ERT*, paras. 41-43; C-112/00 *Schmidberger*, para. 80; C-36/02 *Omega*, para. 41. *See* DE VRIES S.A. (2013b): p. 62, 70; GROUSSOT X. (et.al) (2013): p. 114-115; LEBECK C. (2013): p. 262; RAITIO J. (2013): p. 530; SARMIENTO D. (2013): p. 1297; TANASESCU E.S. (2013): p. 220.
[714] BESSELINK L.F.M. (2001): p. 76-77; MENÉNDEZ A.J. (2002): p. 477-478; DE VRIES S.A. (2013b): p. 75; RAITIO J. (2013): p. 527; WHEATHERILL S. (2013): p. 25; WALKILA S. (2015): p. 117. *See* Case C-120/78 *Cassis de Dijon*, para. 8. However, Article 36 TFEU does not list fundamental rights among the grounds for prohibitions and restrictions.
[715] Case C-368/95 *Familiapress*, para. 18. *See* WHEATHERILL S. (2013): p. 23.
[716] DE VRIES S.A. (2013b): p. 68; DUBOUT E. (2014): p. 208.
[717] Case C-208/09 *Sayn-Wittgenstein*, paras. 93-94. *Cf.* Case C-391/09 *Wardyn*, para. 88.
[718] Case C-244/06 *Dynamic Medien*, paras. 41, 49-52.
[719] LINDFELT M. (2007): p. 302-303; DE VRIES S.A. (2013a): p. 191-192; WHEATHERILL S. (2013): p. 30.
[720] TUORI K. (2010): p. 28-29; AUGENSTEIN D. (2013): p. 1935-1938.
[721] ANDERSON D. – MURPHY C.C. (2011): p. 19; FOLLESDAL A. (2011): p. 28; WHEATHERILL S. (2013): p. 22.

when it comes to their most fundamental values.[722] This observation is highlighted by the Court's reference in *Sayn-Wittgenstein* to national constitutional identity under Article 4(2) TEU.[723] Ultimately, the Union's respect for the Member State's constitutional identity may be understood as a form of judicial subsidiarity imposed on the CJEU.[724]

While the case law of the CJEU conveys tendencies speaking both for and against the subsidiarity of fundamental rights in relation to free movement, it appears safe to conclude that, at least, fundamental rights have not become primary to the economic freedoms. After all, the respect for fundamental rights represents only one of several objectives and values that need to be balanced. Whilst respecting the core of both economic freedoms and fundamental rights, the Court must strike a fair balance between the unity of the Union legal order and the diversity of the Member States' constitutional traditions.

4.2 The Application of the Charter in Conjunction with Other Norms of EU Law

4.2.1 The Question of the Charter's Direct Effect or Direct Applicability

As primary law, the Charter is to be observed by the Union and its Member States when acting within the scope of EU law. In other words, it does not need any further implementation to be binding.[725] This suggests that the Charter could be invoked even before domestic courts and thus – potentially – also have *direct effect*. Admittedly, the principle of direct effect is closely linked to the principle of primacy. Through these two constitutional principles, the Union legal order retains its force and autonomous nature.[726] However, it must be kept in mind that primacy of EU law is not synonymous with direct effect.[727] While the Charter has primacy over national law, this does not automatically mean that it would also have direct effect.

The concept of direct effect is not enshrined in the Treaties, but can be traced back to

[722] HERDEGEN M. (2008): p. 353; JIRÁSEK J. (2008): p. 10-11; BIONDI A. (2012): p. 223-224; AUGENSTEIN D. (2013): p. 1933; DE VRIES S.A. (2013a): p. 189-190; DE VRIES S.A. (2013b): p. 93.
[723] Case C-208/09 *Sayn-Wittgenstein*, para. 92. AZOULAI L. (2012): p. 216; SARMIENTO D. (2012a): p. 309. Since the entry into force of the Treaty of Lisbon, an increase can be observed in the number of cases where constitutional identity under Article 4(2) TEU has been invoked as a justification for restrictions of or on the basis of fundamental rights. *See* MIETTINEN S. (2015): p. 468-469, referring to e.g. Cases C-58/13 & 59/13 *Torresi*, paras. 54-59; C-202/11 *Las*, paras. 26-27; C-393/10 *O'Brien*, para. 49; C-391/09 *Wardyn*, paras. 87-88; C-51/08 *Commission v Luxembourg*, paras. 72, 124.
[724] KOMBOS C. (2006): p. 435; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2011): p. 193; BIONDI A. (2012): p. 223; ROSAS A. – ARMATI L. (2012): p. 71; DELMAS-MARTY M. (2013): p. 332; GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 244; WHEATHERILL S. (2013): p. 31; CHRONOWSKI N. (2014): p. 17; MUIR E. (2014): p. 243; MIETTINEN S. (2015): p. 438-448.
[725] RAITIO J. (2003): p. 110; PRECHAL S. (2007): p. 38; CRAIG P. – DE BÚRCA G. (2011): p. 258; ROSAS A. – ARMATI L. (2012): p. 76; LEBECK C. (2013): p. 41. In the early case law of the CJEU, the concepts of direct applicability and direct effect are used interchangeably. *See* e.g. Cases C-26/62 *Van Gend*, section B; C-41/74 *Van Duyn*, para. 12.
[726] ROSAS A. – ARMATI L. (2012): p. 76-79; LEBECK C. (2013): p. 40.
[727] DE WITTE B. (2010): p. 12.

Van Gend, where the CJEU emphasised that the Member States 'have acknowledged that Community law has an authority which can be invoked by their nationals before courts and tribunals.'[728] In its broad sense, direct effect refers to situations where an EU norm has an autonomous and immediate impact on the legal order of a Member State, such as providing a free-standing ground for judicial review. In accordance with this concept of *objective direct effect*,[729] any EU norm deemed to have direct effect can be immediately and independently relied on before national courts.[730]

Another question is, however, whether an EU norm may have *subjective direct effect*,[731] in other words whether it is capable of directly conferring substantive rights or obligations on private parties.[732] Individual rights may follow from a directly effective EU norm, but the former is not a condition of the latter.[733] Hence, in a narrower sense, the question of the Charter's direct effect refers to its potential to create free-standing rights and obligations that can be invoked before national courts by its active addressees.[734] 'Independently of the legislation of the Member States, Community law […] not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community', as explained by the Court in *Van Gend*.[735]

Independently of whether an EU norm intends to confer substantive rights on individuals or not, the case law of the CJEU establishes that it must be unconditional, sufficiently clear and precise, in order to be directly effective.[736] These requirements of clarity, precision and unconditionality serve to identify norms that can be directly relied on and immediately justiciable before national courts.[737] In essence, objective direct effect pertains to the direct invocability of an EU norm at national level. Its character is thus

[728] Case C-26/62 *Van Gend*, section B. *See* CRAIG P. – DE BÚRCA G. (2011): p. 181-182; MUTANEN A. (2015): p. 79.
[729] EDWARD D. (1998): p. 442; VAN GERVEN W. (2000): p. 506; CRAIG P. – DE BÚRCA G. (2011): p. 181-182.
[730] WINTER J.A. (1972): p. 425; RAITIO J. (2003): p. 108; PRECHAL S. (2005): p. 226-270; DOUGAN M. (2007): p. 933-935; PRECHAL S. (2007): p. 37; WALKILA S. (2015): p. 67.
[731] EDWARD D. (1998): p. 442; VAN GERVEN W. (2000): p. 506; CRAIG P. – DE BÚRCA G. (2011): p. 181-182.
[732] CRAIG P. – DE BÚRCA G. (2011): p. 180; ROSAS A. – ARMATI L. (2012): p. 76.
[733] The question of whether a norm of EU law has the capacity to vest individuals with substantive rights (subjective direct effect) has sometimes been equated with the question of whether the norm can be immediately and autonomously relied on before national courts (objective direct effect). *See* ROSAS A. – ARMATI L. (2012): p. 76-77; WALKILA S. (2015): p. 63-64, 89.
[734] DOUGAN M. (2007): p. 933-934.
[735] Case C-26/62 *Van Gend*, section B.
[736] E.g. Cases C-26/62 *Van Gend*, section B; C-13/68 *Salgoil*, p. 460; C-9/70 *Grad*, para. 9; C-2/74 *Reyners*, para. 10; C-41/74 *Van Duyn*, paras. 5-7, 12-15; C-6/90 & 9/90 *Francovich*, para. 11; C-156/91 *Hansa Fleisch*, paras. 12-21; C-62/00 *Marks & Spencer*, para. 25; C-397/01 – 403/01 *Pfeiffer*, para. 103; C-268/06 *Impact*, paras. 59-68. *See* DOUGAN M. (2007): p. 935; CRAIG P. – DE BÚRCA G. (2011): p. 180; WALKILA S. (2015): p. 84.
[737] DOUGAN M. (2007): p. 933-934, 942-943.

primarily procedural. Subjective direct effect, however, additionally requires that a norm is capable of conferring individual rights or obligations. Hence, it relates not only to the immediate justiciability of the norm at national level, but more importantly to its substance.[738] Due to the fact that fundamental right guarantees can be more vaguely formulated than other EU provisions, the conditions for direct effect must be appreciated with special attention to the facts of the case and other related norms of EU law.[739]

With regard to the specific circumstances of each case, the CJEU will examine the invoked EU right or obligation in order to determine whether its normative content is unconditional, sufficiently clear and precise for the purpose of direct effect.[740] In cases such as *Defrenne I*, *Viking Line*, *Laval*, *Mangold* and *Kücükdeveci* private parties have been entitled to rely directly on EU norms of a fundamental rights character before national courts.[741] In fact, the Court has accorded norms subjective direct effect irrespectively of their 'source, character, or rank in hierarchy'. Rather, the decisive quality has been their 'remedial force', capable of sufficiently ascertaining substantive rights or obligations that can be cognised by national courts.[742]

The direct invocability and immediate justiciability of EU fundamental rights at national level can further be categorised in terms of vertical or horizontal impact.[743] *Vertical direct effect* was established in *Van Gend*, where the CJEU held that a negative obligation of the Member State can be directly relied on by a private party before a national court.[744] In *Lutticke*, the Court later confirmed that also positive Member State obligations can be directly justiciable in national proceedings, thus creating rights for private parties.[745] Conversely, *horizontal direct effect* refers to situations where an EU norm may be directly relied on in national proceedings between private parties, as was the case in *Defrenne I*.[746] The horizontal effect of fundamental rights is not decisively consolidated in either primary or secondary EU law, but its evolution has been characterised by a continuous extension into relations between private parties.[747] The question nevertheless pertains as to whether and to what extent provisions of the Charter

[738] PRECHAL S. (2005): p. 105-106; PRECHAL S. (2007): p. 37; WALKILA S. (2015): p. 64-65.
[739] WALKILA S. (2015): p. 248.
[740] WALKILA S. (2015): p. 84, 244, 250.
[741] Cases C-43/75 *Defrenne I*, paras. 24, 39; C-341/05 *Laval*, paras. 97-100; C-438/05 *Viking Line*, para. 61; C-144/04 *Mangold*, para. 77; C-555/07 *Kücükdeveci*, para. 51.
[742] WALKILA S. (2015): p. 80-84, 235-236. *See also* DUTHEIL DE LA ROSCHÈRE J. (2009): p. 122.
[743] DE MOL (2011): p. 110-111; ROSAS A. – ARMATI L. (2012): p. 79-80, 179-180; LEBECK C. (2013): p. 41; MUTANEN A. (2015): p. 79; WALKILA S. (2015): p. 67.
[744] Case C-26/62 *Van Gend*, section B.
[745] Case C-57/65 *Lutticke*, p. 210-211.
[746] Case C-43/75 *Defrenne I*, paras. 24, 39. *See also* e.g. Cases C-281/98 *Angonese*, paras. 34-35; C-453/99 *Courage*, paras. 23-24 ; C-144/04 *Mangold*, para. 77; C-438/05 *Viking Line*, para. 61; C-555/07 *Kücükdeveci*, para. 51.
[747] WALKILA S. (2015): p. 4-5.

may have either vertical or horizontal direct effect.

Similarly to the appreciation of other EU fundamental rights norms, the direct effect of Charter provisions must be examined in the light of their specific content and context.[748] Accordingly, the provisions must be unconditional, sufficiently clear and precise in order to produce direct effect at national level.[749] Although the Court has never explicitly applied the doctrine on direct effect to provisions of the Charter, in *AMS* it still, in a comparable manner, held that '[i]t is […] clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law.'[750] In *Glatzel*, alike, the Court found that Article 26 'cannot by itself confer on individuals a subjective right which they may invoke as such'.[751]

In line with Article 52(5) CFR, the Court takes the position that fundamental principles need further implementation to be fully effective. As a consequence, Charter principles are judicially cognisable only through the interpretation of other EU norms. This need for a concretising legal basis must be understood independently from the requirement of a sufficient connection between the subject matter and EU law for the purpose of Article 51(1) CFR.[752] With reference to the Explanations and Protocol No. 30, the CJEU has confirmed that social rights, such as Articles 26 and 27 CFR, cannot in themselves be directly relied on at national level.[753] Due to their incomplete character, seemingly, principle-like fundamental rights were never intended to have direct effect.[754]

Given the reasons to why Charter principles would not be capable of producing direct effect at national level, it may seem appealing to presume that Charter rights would, *a contrario*, be directly effective. Indeed, it has been argued that at least some of the rights and freedoms of the Charter may have direct effect and thus be cognisable before national courts, even between private parties.[755] As a fact, the drafting Convention held that there are rights in the Charter 'which are clearly amenable to the law.'[756] Further to this, the

[748] WALKILA S. (2015): p. 236, 259.
[749] CURTIN D. – VAN OOIK R. (2001): p. 111-112; DE MOL M. (2012): p. 297.
[750] Case C-176/12 *AMS*, paras. 45-47. *See* LAZZERINI N. (2014): p. 925-928.
[751] Case C-356/12 *Glatzel*, para. 78.
[752] WARD A. (2014): p. 1417.
[753] Explanations to Article 52(5) CFR. Article 1(2) of Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, annexed to the Treaty of Lisbon. *See* e.g. Cases C-176/12 *AMS*, paras. 45-47; C-356/12 *Glatzel*, para. 78.
[754] OJANEN T. (2003): p. 675; DUTHEIL DE LA ROSCHÈRE J. (2009): p. 125-126; DE MOL M. (2012): p. 297; ROSAS A. – ARMATI L. (2012): p. 178; DE VRIES S.A. (2013b): p. 86-87; PEERS S. – PRECHAL S. (2014): p. 1511; WALKILA S. (2015): p. 243-245, 248. Nevertheless, drawing inspiration from Article 28 CFR, the CJEU granted direct horizontal effect to the right to collective action as a general principle of EU law in Case C-438/05 *Viking Line*, para. 61.
[755] CURTIN D. – VAN OOIK R. (2001): p. 111-112; PECH L. (2012): p. 1872-1873, 1879; ROSAS A. – ARMATI L. (2012): p. 178-179; GROUSSOT X. (et.al.) (2013): p. 106; LAZZERINI N. (2014): p. 921-932.
[756] Draft Charter, CHARTE 4111/00, 20.1.2000, para. 20.

CJEU in *AMS* stated that 'the facts of the case may be distinguished from those which gave rise to *Kücükdeveci* in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.'[757] In *AMS*, the Court thus seemed to imply that some rights of the Charter might – at least under specific circumstances – produce direct effects at national level.[758] What made *Kücükdeveci* different, in the words of AG Trstenjak in *Dominguez*, was the fact that '[t]he distinctive feature of prohibitions on discrimination is that their substantive core is essentially identical at both primary and secondary law levels.'[759]

In line with settled case law, however, the CJEU has retained its requirement of a concrete connection between the subject matter and an EU norm, other than the Charter.[760] Notwithstanding its status as primary law, the Charter appears to lack the capacity of direct effect.[761] With reference to Article 51(1), the Court has confirmed the secondary nature of the Charter, rather than affirmed that it would be capable of having direct effect at national level. In line with the subsidiarity principle of the Charter, it is therefore submitted that the direct invocability of fundamental rights is best ensured through national legislation. Alternatively, direct effect can be accorded to certain provisions of the Treaties and secondary legislation, if the Union is better placed to guarantee certain rights, such as rights stemming from the economic freedoms or EU citizenship.[762]

Intuitively, the possible existence of a fundamental rights rationale in terms of subsidiarity was also implicitly addressed by AG Sharpston in *Zambrano*, where she criticised EU fundamental rights protection as being 'partial and fragmented; that it is dependent on whether some relevant substantive provision has direct effect or whether the Council and the European Parliament have exercised legislative powers.'[763] If the Court, on the contrary, deviated from its subsidiarity logic for the Charter and instead established its direct effect, it would be liable to open up for an uncountable number of possibilities to invoke fundamental rights within the Union legal order. Rather than having direct effect, it has therefore been argued that the rights and freedoms under the Charter should primarily

[757] Case C-176/12 *AMS*, para. 47, referring to Case C-555/07 *Kücükdeveci*, paras. 22, 51.
[758] ANDERSON D. – MURPHY C.C. (2011): p. 15; WALKILA S. (2015): p. 79.
[759] Opinion of AG TRSTENJAK in Case C-282/10 *Dominguez*, para. 162. *See* DE MOL M. (2012): p. 289; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1579.
[760] C-198/13 *Hernandez*, paras. 34-35; C-92/14 *Tudoran*, paras. 44-48. *See* WALKILA S. (2015): p. 165, 178.
[761] DE MOL M. (2012): p. 296-297, referring to Case C-282/10 *Dominguez*.
[762] *See* e.g. Case C-413/99 *Baumbast*, paras. 82-84, where the CJEU established that Article 21 TFEU has direct effect, conferring a free-standing right of free movement on citizens of the Union who do not have any direct connection with the economic activities on the internal market. *See* DE MOL M. (2012): p. 302; LEBECK C. (2013): p. 260.
[763] Opinion of AG SHARPSTON in Case C-34/09 *Zambrano*, para. 170. *See* GROUSSOT X. (et.al) (2013): p. 104.

be guaranteed through the reliance on indirect effect.[764]

In the end, irrespectively of whether the Charter is deemed to have a direct or merely indirect impact, its capacity of *direct applicability* at national level must not be disregarded. Namely, domestic courts can apply EU primary law directly regardless of whether it was intended to confer rights on private parties or not.[765] As a fact, in *Melki*, the Court implied a possibility for a national tribunal to directly apply the Charter, on the condition that the situation at hand was brought into its scope by virtue of another norm of EU law.[766] The Court's judgement in *Martín,* delivered only few days after the Charter became legally binding, also seems to embrace the idea of the Charter as being directly applicable at national level. According to its ruling, Directive 85/577, interpreted in conjunction with Article 38 CFR, did not preclude a national court from declaring, of its own motion, a contract void 'on the ground that the consumer was not informed of his right of cancellation, even though the consumer at no stage pleaded that the contract was void before the competent national courts.'[767] Similarly, in *Safe Harbour*, 'Directive 95/46, read in the light of Articles 7, 8 and 47 of the Charter […] [did] not prevent a supervisory authority of a Member State […] from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country'.[768] Direct applicability of the Charter is also evidenced by its invalidation of EU secondary legislation in *Schecke*, *Test-Achats*, *Digital Rights* and *Safe Harbour* as well as by cases like in *Melloni*, where the Charter has been used to set aside national constitutional law.[769]

In conclusion, it may be added that the direct applicability of the Charter is complemented by the principle of primacy. The Charter may not have direct effect and is thus lacking capacity to provide a normative substitute if the national legal order fails to guarantee a given right or obligation. While the Charter does not have the capacity to fill normative gaps in the national legal order, the principle of primacy may still exclude national legislation, if deemed to be in conflict with EU law.[770] With reference to the

[764] RAITIO J. (2013): p. 361; WALKILA S. (2015): p. 268.
[765] BENGOETXEA J. (2008): p. 9-10.
[766] Cases C-188/10 & 189/10 *Melki*, para. 55. *See* MUIR E. (2012): p. 20; ROSAS A. – ARMATI L. (2012): p. 72; CHRONOWSKI N. (2014): p. 15.
[767] Case C-227/08 *Martín*, paras. 17, 36, regarding Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises. *See* LEBECK C. (2013): p. 287-288.
[768] Case C-362/14 *Safe Harbour*, para. 66. *See* European Parliament and Council Directive 95/46/EC 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.
[769] Cases C-92/09 & 93/09 *Schecke*, paras. 87-89; C-236/09 *Test-Achats*, para. 32; C-293/12 & 594/12 *Digital Rights*, para. 69; C-362/14 *Safe Harbour*, para. 105. *See also* C-399/11 *Melloni*, paras. 54, 64.
[770] MUIR E. (2012): p. 8; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1575-1576.

primacy of Union law, national provisions declared incompatible with the Charter can be set aside. In other words, the primacy of the Charter may contribute to the enforcement of EU fundamental rights at national level, even though its provisions are not considered to be unconditional, sufficiently clear and precise to produce direct effect.[771]

4.2.2 Indirect Effect and the Interpretative Value of the Charter

Although the Charter, due to its subsidiarity, does not have an autonomous scope of application or direct effect, it still conditions the interpretation and application of EU law through its *indirect effect*. In line with the principle of consistent interpretation or indirect effect, a norm that brings the subject matter within the scope of EU law must be interpreted as far as possible in harmony with its wording and objectives.[772] This obligation of harmonious interpretation entails the interpretation of EU law in the light of fundamental rights.[773] With regard to the Charter, the CJEU confirmed in *Åkerberg Fransson* that there can be no situations in EU law where fundamental rights do not apply.[774]

The incorporation of fundamental rights into EU law not only contributed to its legitimacy as formal rules on the normative surface, but also influenced the legal culture and the underlying fundaments of the EU legal system.[775] As an expression of common values, fundamental rights and principles offer guidance to the interpretation of EU law. In addition to enhanced constitutional guarantees of the Union, they increase legal certainty and contribute to the coherence and consistence of the Union legal order.[776] The stronger impact guiding principles such as fundamental rights have on the judiciary, the more rational and predictable the judicial decision-making will be.[777]

According to Article 51(1) CFR, the EU shall 'respect the rights, observe the principles and promote the application thereof' within the limits of its powers. Thereto, the principle of indirect effect presupposes that norms are interpreted with respect to their hierarchy.[778]

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[771] On the concepts of *substitutionary effect* of directly effective EU norms and *exclusionary effect* of the principle of primacy of EU law, *see* DOUGAN M. (2007): p. 934-938; CRAIG P. – DE BÚRCA G. (2011): p. 259-260.
[772] *See* e.g. Cases C-51/76 *Verbond*; para. 11; C-14/83 *Von Colson*, para. 26; C-106/89 *Marleasing*, paras. 8-9; C-165/91 *Van Munster*, para. 35; C-300/98 & 392/98 *Dior*, paras. 47-49; C-306/05 *SGAE*, para. 34; C-361/06 *Schwebda*, paras. 49-50; C-188/07 *Mesquer*, para. 84; C-402/07 & 432/07 *Sturgeon*, paras. 41, 47-48.
[773] *See* e.g. Cases C-101/01 *Lindqvist*, para. 87; C-305/05 *Ordre des barreaux*, paras. 28-29; C-578/08 *Chakroun*, par 44. *See also* PERNICE I. – KANITZ R. (2004): p. 5-8; ANDERSON D. – MURPHY C.C. (2011): p. 9; CRAIG P. – DE BÚRCA G. (2011): p. 109; ROSAS A. – ARMATI L. (2012): p. 72; FORNASIER M. (2015): p. 37; WALKILA S. (2015): p. 53, 118, 232, 272.
[774] Case C-617/10 *Åkerberg Fransson*, para. 21.
[775] TUORI K. (2000): p. 99, 249-250.
[776] TUORI K. (2000): p. 222; DE BÚRCA G. – ASCHENBRENNER J.B. (2003): p. 369; HARBO T.-I. (2010): p. 161; KÜHN Z. (2010): p. 153; WALKILA S. (2015): p. 43-46, 232.
[777] RAITIO J. (2003): p. 337-345, 368-382; WALKILA S. (2015): p. 43.
[778] *See* e.g C-314/89 *Rauh*, para. 17; Cases C-218/82 *Commission v Council I*, para. 15; C-101/01 *Lindqvist*, para. 84-87; T-309/03 *Grau*, para. 102-103; T-351/03 *Schneider*, para. 182; C-540/03 *Parliament v Council*, paras. 35-38, 105; T-16/04 *Arcelor*, paras. 181-183; C-402/05 P & 415/05 P *Kadi*, para. 225; C-465/07 *Elgafaji*, paras. 28, 28. *See also* PRECHAL S. (2005): p. 184; CRAIG P. (2012c): p. 207; WALKILA S. (2015): p. 68.

As suggested by AG Léger in *Hautala*, 'the Charter […] should provide guidance' and 'the authorities responsible for applying it are under a strict requirement to give it a wide interpretation'.[779] In other words, EU norms benefit from other – both higher and lower ranking – norms of EU law for their interpretation and concretisation.[780]

Ultimately, the CJEU is responsible for ensuring that primary and secondary law is interpreted in compliance with the Charter.[781] This interpretative obligation exists regardless of whether the norms in question have been implemented by Member States or the Union. For instance, in *Strack*, the Court overturned a ruling, because the General Court 'should have favoured an interpretation […] which ensured the consistency […] with the right to paid annual leave as a principle […] affirmed by Article 31(2) of the Charter.'[782] Nevertheless, in *McB*, the Court pointed out that the Charter 'should be taken into consideration solely for the purpose of interpreting [EU law] and there should be no assessment of national law as such.'[783]

Stemming from the principle of sincere cooperation under Article 4(3) TEU, the provisions of the Charter have indirect effect also in the Member States 'when they are implementing Union law' for the purpose of Article 51(1) CFR. In this sense, the obligation of consistent interpretation may also contribute to a smoother incorporation of EU law into the national legal orders.[784] Irrespective of whether Charter provisions are considered to have direct effect, their indirect effect prevails when Member States act within the scope of EU law.[785] As established by the CJEU in *Promusicae*, national measures under EU law must comply with fundamental rights.[786] This obligation concerns 'national law as a whole'.[787] For instance, in *Åkerberg Fransson*, the Court held that national measures must comply with the Charter even though the national legislation in question was not intended to implement Union law.[788]

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[779] Opinion of AG LÉGER in Case C-353/99 P *Hautala*, para. 86.
[780] WALKILA S. (2015): p. 272.
[781] CRAIG P. – DE BÚRCA G. (2011): p. 109; ROSAS A. – ARMATI L. (2012): p. 74, 164; WALKILA S. (2012): p. 619; WALKILA S. (2015): p. 118.
[782] Case C-579/12 *Strack*, paras. 40, 52.
[783] Case C-400/10 PPU *McB*, para. 52, regarding Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. *See* WARD A. (2014): p. 1432, 1442.
[784] ANDERSON D. – MURPHY C.C. (2011): p. 16.
[785] RAITIO J. (2003): p. 111; ROSAS A. – ARMATI L. (2012): p. 72.
[786] Case C-275/06 *Promusicae*, para. 68. Regarding the obligation to interpret Directives in the light of EU fundamental rights, *see also* e.g. Cases C-274/99 P *Connolly*, para. 37; C-465/00, 138/01 & 139/01 *Rundfunk*, para. 68; C-131/12 *Google Spain*, para. 37; C-212/13 *Ryneš*, para. 68.
[787] Cases C-106/77 *Simmenthal*, para. 16; C-453/99 *Courage*, para. 25; C-397/01 – 403/01 *Pfeiffer*, paras. 115-116. *See* PRECHAL S. (2007): p. 39-39; ROSAS A. – ARMATI L. (2012): p. 72-73; FORNASIER M. (2015): p. 35. However, the CJEU does not require national legislation to be interpreted *contra legem*. *See* e.g. Cases C-105/03 *Pupino*, para. 47; C-268/06 *Impact*, para. 100.
[788] Case C-617/10 *Åkerberg Fransson*, paras. 28, 46.

For purpose of harmonious interpretation, an EU measure 'must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter'.[789] In this regard, the interpretative impact of the Charter may take a variety of expressions. For instance, the Court has used the Charter to evidence general principles of EU law, such as equal treatment and non-discrimination in cases like *Kücükdeveci*, *Prigge*, *Chatzi* and *Soukupová*.[790] In *Pérez*, *Weintor* and *Susisalo*, the protection for human health under Article 168(1) TFEU was reinforced by Article 35 CFR.[791] Furthermore, the Court has interpreted Directives in the light of the Charter in cases such as *Danosa*, *Samba*, *ASNEF*, *Kott*, *XYZ* and *ABC*, in order to determine the content and scope of substantive rights.[792] With reference to the Charter in *PMOI*, the Court validated a Council Decision restricting the right to be heard.[793] Lastly, in *DEB*, national procedural rules were complemented by Article 47 CFR, making it possible also for legal persons to obtain legal aid in accordance with the principle of effective judicial protection.[794]

In addition to the indirect effect that the Charter has on EU primary and secondary law, it can also have a restricting or conditioning impact on national legislation 'implementing Union law'.[795] For instance, in *Berlington*, the Court emphasised that 'where a Member State relies on overriding requirements in the public interest […], such justification must also be interpreted in the light of […] the fundamental rights now guaranteed by the Charter'.[796] Similary, in *Kamberaj*, the CJEU found that 'when determining […] social protection measures defined by their national law' for the purpose of a Directive, 'Member States must comply with the rights and observe the principles provided for under the Charter'.[797] In accordance with the principle of subsidiary, the Court held that 'in so far as the benefit in question in the main proceedings fulfils the purpose set out in [Article 34(2)] of the Charter […] [i]t is for the referring court to reach the necessary findings, taking into consideration the objective of that benefit, its amount, the conditions subject to which it is

[789] Case C-579/12 *Strack*, para. 40. *See also* C-149/10 *Chatzi*, para. 43; C-12/11 *McDonagh*, para. 44. Also, *see* LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1576.
[790] Cases C-555/07 *Kücükdeveci*, para. 21; C-447/09 *Prigge*, para. 38; C-149/10 *Chatzi*, para. 63; C-401/11 *Soukupová*, para. 28.
[791] Cases C-570/07 & 571/07 *Pérez*, para. 65; C–544/10 *Weintor*, paras. 54, 58; C-84/11 *Susisalo*, para. 37.
[792] Cases C-232/09 *Danosa*, para. 71; C-69/10 *Samba*, paras. 48-50; C-468/10 & 469/10 *ASNEF*, paras. 40-45; C-364/11 *Kott*, para. 48; C-199/12 – 201/12 *XYZ*, para. 40; C-148/13 – 150/13 *ABC*, para. 46.
[793] Case C-27/09 P *PMOI*, para. 66, regarding the validity of Council Decision 2008/583/EC of 15 July 2008 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/868/EC.
[794] Case C-279/09 *DEB*, para. 59.
[795] MUIR E. (2012): p. 11-12; LENAERTS K. – GUTIÉRREZ-FONS J.A. (2014): p. 1575-176.
[796] Case C-98/14 *Berlington*, para. 74.
[797] Case C-571/10 *Kamberaj*, para. 80.

awarded and the place of that benefit in the Italian system of social assistance.' [798]

The indirect effect of the Charter is not only vertical, but may also be horizontal. The CJEU as well as national courts of the Member States are bound to interpret EU norms applicable between private parties in the light of fundamental rights.[799] Through judicial review, the public power may act as a mediator, letting the effects of fundamental rights radiate into relations between private parties, by means of interpretation.[800] The Charter has been used in this way by the CJEU to influence private relations in cases like *Scarlet*, *SABAM*, *McB*, *Alemo*, *Cimade* and *Sky*.[801]

In any case, the rulings of the Court must comply with the Charter. For this reason, it has been suggested that the distinction between direct and indirect effect of fundamental rights is rather procedural and not always pertinent in practice.[802] For instance, in *Alemo*, the CJEU interpreted Directive 2001/23 in the light of Article 16 CFR, and reached the conclusion that Member States cannot permit employers to apply the Directive in a way liable to seriously affect the employees' freedom to conduct a business.[803] The similarities in protection afforded – regardless of whether fundamental rights are given direct or indirect effect – may be explained by the confluence of fundamental rights sources in primary and secondary EU law.[804] As held by AG Poiares Maduro in *Viking*, '[w]ith regard to the demarcation of the respective spheres of rights, indirect horizontal effect may differ from direct horizontal effect in form; however, there is no difference in substance.'[805]

Ultimately, the indirect effect of the Charter contributes to 'the primacy, unity and effectiveness of EU law'.[806] In theory, the principle of indirect effect is more related to the primacy of EU law than to the concept of direct effect. As a fact, indirect effect presupposes primacy of Union law and will trigger its application to guarantee the uniform application of EU law, if conflicts of norms cannot be solved through harmonious interpretation.[807] Similarly, the Charter was drafted with the aim of ensuring a uniform

[798] Case C-571/10 *Kamberaj*, para. 92. *See* SCMAUCH M. (2012): p. 475.
[799] *See* e.g. Cases C-265/95 *Commission v France*, para. 32; C-112/00 *Schmidberger*, paras. 74-75; C-275/06 *Promusicae*, para. 68. Also, *see* LEBECK C. (2013): p. 454-455; COLOMBI CIACCHI A. (2014): p. 115-116; WARD A. (2014): p. 1431.
[800] GROUSSOT X. (et.al.) (2013): p. 116; WALKILA S. (2015): p. 67, 223.
[801] Cases C-70/10 *Scarlet*, paras. 43-50; C-360/10 *SABAM*, paras. 41-48; C-400/10 PPU *McB*, paras. 49-53; C–179/11 *Cimade*, para. 42; Case C-283/11 *Sky*, para. 42; C-426/11 *Alemo*, paras. 30-35.
[802] HARTKAMP A. (2010): p. 543-546; WALKILA S. (2015): p. 249-254.
[803] Case C-426/11 *Alemo*, paras. 30-35, 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, JO L 82/16, 22.3.2001.
[804] RAITIO J. (2003): p. 94; LEBECK C. (2013): p. 26, 449; WALKILA S. (2015): p. 84.
[805] Opinion of AG POIARES MADURO in Case C-438/05 *Viking*, para. 40.
[806] *See* Cases C-617/10 *Åkerberg Fransson*, para. 29; C-399/11 *Melloni*, para. 60; C-112/13 *A v B*, para. 44; C-198/13 *Hernandez*, para. 47; C-206/13 *Siragusa*, paras. 31-32. *See* ROSAS A. – ARMATI L. (2012): p. 73-74; WALKILA S. (2015): p. 249, 270.
[807] PRECHAL S. (2007): p. 39-40; ROSAS A. – ARMATI L. (2012): p. 67, 72.

interpretation of EU law, through the expression of common values and fundamental rights of the Union.[808] The unity of the law, in consequence, promotes the proper functioning of the internal market.[809] Hence, the requirement of conform interpretation, aiming as far as possible to give full effect to the Charter, also contributes to the effectiveness of EU law within the legal orders of the Member States.[810]

Notwithstanding this symbiosis between the primacy, unity and effectiveness of EU law and the principle of consistent interpretation, these requirements are not unconditional. In fact, the indirect effect of the Charter may render these requirements of the Union legal order conditional upon the principle of legal certainty and legitimate expectations of individuals. In *Belvedere*, concerning the reopening of a final judicial decision, the CJEU held that 'the obligation to ensure effective collection of European Union resources cannot run counter to compliance with the principle that judgment should be given within a reasonable time […] under the second paragraph of Article 47 of the Charter'.[811] Although the Court emphasised that the issue concerned an 'exceptional provision of national law', the respect for the fundamental rights of the individual had to be balanced against the primacy, unity and effectiveness of EU law.[812]

In the end, the indirect effect of the Charter appears to confirm its subsidiary nature. The Charter has become a significant determinant of fundamental rights within the EU, but it still operates mainly as a complementary source, in parallel with a range of other fundamental rights sources in primary and secondary law.[813] Its predominantly indirect effect can be understood as an expression of subsidiarity, since norm conflicts should primarily be solved at national level – albeit by references to the CJEU for preliminary rulings – through the method of harmonious interpretation.[814] In the same way as subsidiarity aims to reconcile different-level interpretations of fundamental rights, also the interpretative method of indirect effect can be said to promote a visions of constitutional pluralism, in which a multitude of fundamental rights sources coexist.[815]

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[808] Commission Communication on the strategy for the effective implementation of the Charter of Fundamental Rights of the European Union, COM(2010) 573 final, section 1.3.3. *See* PERNICE I. – KANITZ R. (2004): p. 6; WALKILA S. (2015): p. 164.
[809] PRECHAL S. (2007): p. 39-40.
[810] RAITIO J. (2003): p. 113; PRECHAL S. (2007): p. 38-39; BENGOETXEA J. (2008): p. 13.
[811] Case C-500/10 *Belvedere*, para. 23.
[812] Case C-500/10 *Belvedere*, para. 28. *See* DOUGAN M. (2007): p. 952; SCMAUCH M. (2012): p. 476-477; VAN BOCKEL B. – WATTEL P. (2013): p. 881. By analogy, *see* Cases C-108/01 *Asda*, paras. 85-96; C-234/04 *Kapfere*, paras. 19-24; C-392/04 & 422/04 *Arcor*, paras. 51-57; C-453/00 *Kühne*, paras. 23-28.
[813] DOUGAN M. (2007): p. 952.
[814] ROSAS A. – ARMATI L. (2012): p. 57; WALKILA S. (2015): p. 141-145.
[815] PRECHAL S. (2007): p. 39-40; DE WITTE B. (2012): p. 360; DE LA MARE T. – DONNELLY C. (2011): p. 376-378; ROTH W.-H. (2011): p. 82-88.
[815] CAROZZA P.G. (2003): p. 58; BESSON S. (2014): p. 173.

4.3 The Charter as a Basis for Judicial Review

4.3.1 Disapplication of National Norms in Conflict with the Charter

As demonstrated, collisions between national norms and the Charter should primarily be solved through consistent interpretation of domestic law in a way that complies with the Charter.[816] Only if the conflict cannot be harmoniously settled through this method of indirect effect, the national norm will have to be set aside with reference to the primacy of Union law. When the application of national legislation and EU law would lead to different outcomes in a given situation, EU norms are given priority.[817]

In *Costa*, the CJEU established that the Union legal order, as 'an independent source of law, could not, because of its special and original nature, be overridden by domestic provisions, however framed, without […] the legal basis of the Community itself being called into question.'[818] No exceptions are made for national norms with constitutional status, not even if they guarantee individual rights or other interests in conflict with EU law.[819] As held in *Simmenthal*, 'every national court must […] apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.'[820] In other words, primacy precludes national measures liable to jeopardise the protection of fundamental rights under EU law.[821]

Although closely related, the principles of direct effect and primacy of EU law must not be confounded. The primacy of the Charter is not dependent on whether its provisions can be considered to have direct effect or not. As previously discussed, the question of whether the Charter has direct effect refers to its potential of conferring substantive rights that may be directly enforced by private parties before national courts. The primacy of the Charter, in contrast, must be understood as referring to the exclusionary effects that it may have on national legislation that comes within the scope of EU law.[822]

In accordance with Article 52(5), also Charter principles are judicially cognisable 'in

[816] PRECHAL S. (2007): p. 38; KÜHN Z. (2010): p. 153; WALKILA S. (2015): p. 250.
[817] BESSELINK L.F.M. (1998): p. 643-644; ROSAS A. – ARMATI L. (2012): p. 67; LEBECK C. (2013): p. 39-40.
[818] Case C-6/68 *Costa*, para. 3.
[819] *See* e.g. Cases C-11/70 *Handelsgesellschaft*, para. 3; C-379/87 *Groener*, paras. 19-25; C-285/98 *Kreil*, paras. 30-32; C-213/07 *Michaniki*, para. 69; C-399/11 *Melloni*, para. 60.
[820] Case C-106/77 *Simmenthal*, para. 21.
[821] For pre-Lisbon judgments where EU fundamental rights have precluded national measures, *see* e.g. Cases C-60/00 *Carpenter*, paras. 45-46; C-442/00 *Caballero*, para. 44; C-109/01 *Akrich*, paras. 58-61; C-482/01 & 493/01 *Orphanopoulos*, paras. 110,116; C-81/05 *Alonso*, para. 41,47; C-127/08 *Metock*, paras. 79, 80.
[822] DOUGAN M. (2007): p. 932-935.

the interpretation of [Union and Member State] acts and in the ruling on their legality.'[823] As a consequence, Charter rights, freedoms and principles have the capacity of setting aside conflicting norms at national level, irrespective of whether they are deemed to be unconditional, sufficiently clear and precise.[824] For instance, in cases *ABC* concerning asylum on grounds of sexual orientation, even a principle as abstract as the respect for human dignity was used to set aside national measures in conflict with Directive 2004/83. Article 1 CFR precluded competent national authorities from accepting the submission of the applicant 'to "tests" with a view to establishing his homosexuality'.[825]

Compliance of domestic measures with the Charter may be reviewed by the CJEU to the extent that Member States are implementing or derogating from Union law for the purpose of Article 51(1) CFR.[826] Nevertheless, the norm establishing a sufficient connection to EU law is not necessarily the one to be reviewed under the Charter. For example, in *Åkerberg Fransson*, national laws implementing Article 235 TFEU and Directive 2006/112 brought the situation within the scope of EU law, but in the end the Court reviewed provisions of Swedish criminal law in the light of the Charter's provision on *ne bis in idem*.[827] Similarly, in *Melloni*, procedural guarantees under the Spanish Constitution were set aside, although the subject matter was brought within the scope of EU law by means of Framework Decision 2002/584.[828] This approach to compliance of national measures with fundamental rights considerably broadens to Court's jurisdiction, especially in situations where Member State derogations from EU law are reviewed under the Charter.[829] Conversely, it has been argued that the Charter in fact facilitates the appreciation of compatibility with national measures, by providing a concrete standard of review for EU fundamental rights.[830]

In line with the *Simmenthal* doctrine, any national court 'is under a duty to give full effect to such provisions, if necessary refusing of its own motion to apply any conflicting

[823] It has nevertheless been suggested that the distinction between rights and principles under Article 52(5) CFR might lead to paradoxical situations, where a mis-implementation of a principle can be set aside based on primacy of EU law, whereas the same principle could not be deemed to have direct effect to fill the normative gap in the national legislation in the event of complete non-implementation. *See* ANDERSON D. – MURPHY C.C. (2011): p. 6.
[824] DOUGAN M. (2007): p. 933; PRECHAL S. (2007): p. 44; CRAIG P. – DE BÚRCA G. (2011): p. 260.
[825] Cases C-148/13 – 150/13 *ABC*, paras. 46, 53, 65, 72, regarding Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
[826] PERNICE I. (2008): p. 246-247; DE VRIES S.A. (2013b): p. 61.
[827] Case C-617/10 *Åkerberg Fransson*, paras. 24-27, regarding Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. *See* FONTANELLI F. (2014): p. 243-244.
[828] *See* Case C-399/11 *Melloni*, paras. 30-34.
[829] VON DANWITZ T. (2001): p. 303; ROSAS A. – ARMATI L. (2012): p. 165-166; DUBOUT E. (2014): p. 195; MIETTINEN S. (2015): p. 225. For pre-Lisbon rulings considered to extend the jurisdiction of the CJEU, *see* e.g. Cases C-273/97 *Sirdar*, para. 17; C-285/98 *Kreil*, para. 17; C-117/01 *K.B.*, paras. 30-34.
[830] *Cf.* CHALMERS D. (2010): p. 142-143; WALKILA S. (2015): p. 254.

provision […] of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness' of the EU legal system.[831] In *Melloni*, the Spanish court was obliged to recognise the primacy of the Charter, at the expense of a higher national standard. The CJEU considered it sufficient that the harmonised standard of protection under the Framework Decision already in itself complied with the Charter.[832] Conversely, in *Åkerberg Fransson*, the Court held that the disapplication of national law cannot be made conditional upon whether or not the Swedish court first finds the national provision to be in clear breach with the Charter. Such a condition would withhold the full effect of the Charter.[833] By way of explanation, the clarity of neither the Charter provision in question, nor its infringement, may be used as requirements for the Charter to take primacy over conflicting national legislation.

What eventually triggers the exclusionary effect of the Charter at national level is the overarching objective of preserving the primacy, unity and effectiveness of Union law. As long as these three fundamental prerequisites of EU law are not compromised, Member States remain free to apply a domestic standard of protection in accordance with Articles 51(1) and 53 CFR.[834] To date, the CJEU has applied the Charter in a variety of cases in order to set aside national measures with reference to the proper functioning of the Union legal order and respect for fundamental rights. In *Chakroun* and *Kamberaj* the Charter precluded material provisions of national legislation, whereas domestic procedural rules and practices were struck down in *Morcillo* and *N.S.* respectively.[835] Equivalently, discriminatory clauses in domestic collective agreements were disapplied in *Prigge*, *Hennings* and *Alemo*, due to their incompliance with the Charter.[836]

Notwithstanding the formal competence of the CJEU to review national measures within the scope of EU law, it has been argued that this prerogative is not in consistency with the principle of subsidiarity.[837] It is true that the judicial review of national measures by the Court puts restrains on the autonomy of the Member States as well as their constitutional orders. This might in turn lead to problems of democracy deficit, the rule of

[831] Case C-617/10 *Åkerberg Fransson*, paras. 45-46, referring to Cases C-106/77 *Simmenthal*, paras. 21-24; C-314/08 *Filipiak*, para. 81; C-188/10 & 189/10 *Melki*, para. 43-44. *See* FONTANELLI F. (2013): p. 324-325.
[832] Case C-399/11 *Melloni*, paras. 60-64, also referred to in Case C-617/10 *Åkerberg Fransson*, para. 29. *See* TORRES PÉREZ A. (2014): p. 326; WARD A. (2014): p. 1418-1419.
[833] Case C-617/10 *Åkerberg Fransson*, paras. 44, 48-49. *See* HANCOX E. (2013): p. 1417, 1428; VAN BOCKEL B. – WATTEL P. (2013): p. 871.
[834] Cases C-399/11 *Melloni*, para. 60; C-112/13 *A v B*, para. 44; C-198/13 *Hernandez*, para. 47; C-206/13 *Siragusa*, paras. 31-32. *See also* CJEU Opinion 2/13, paras. 188-189. Also, *see* VAN BOCKEL B. – WATTEL P. (2013): p. 871.
[835] Cases C-578/08 *Chakroun*, paras. 44, 66; C-571/10 *Kamberaj*, para. 92-93; C-169/14 *Morcillo*, paras. 50-51; C-411/10 & 493/10 *N.S.*, paras. 98-108.
[836] Cases C-447/09 *Prigge* paras. 71-76; C-297/10 *Hennings*, para. 78; C-426/11 *Alemo*, paras. 30-37.
[837] MURPHY D.T. (1994): p. 96.

judges, confusion of powers and legal uncertainty.[838] Nonetheless, it must be emphasised that the preclusion of an inconsistent national measure under EU law merely imposes an obligation on the national court to disapply the norm in question. The conflicting norm must be set aside in the specific situation at hand, but for the rest it may remain in force within the national legal order.[839] The CJEU does not have the power to annul or invalidate national legislation. In the end, it is therefore for the national court to rule on the legal effects of incompliance, beyond disapplication in the case at hand.[840]

Allegedly, the CJEU applies a gradient scale of review, in compliance with the principle of subsidiarity under the Charter.[841] As a first step, the Court strives to solve collisions between EU norms or between Union law and national provisions through the use of consistent interpretation.[842] Alternatively, the CJEU may render the disapplication of national law conditional upon certain criteria to be verified by the national court with regard to the circumstances of the case. This kind of fundamental rights review accords a broader discretion for the national court to appreciate Member State implementation of or derogation from EU law in the light of the Charter.[843] Such conditional review can be exemplified by *HK*, where the Court held that 'the principle of non-discrimination on grounds of age, enshrined in Article 21 of the Charter […] must be interpreted as not precluding an occupational pension scheme under which […] pension contributions […] increase with age, provided that the difference in treatment on grounds of age […] is appropriate and necessary to achieve a legitimate aim, which it is for the national court to establish.'[844] The Court can also deliver a ready-made solution in favour of the national action at issue.[845] Only in cases where the a national measure demonstrates unconditional incompliance with the Charter, they will be immediately set aside by the CJEU with reference to the primacy of Union law.

Admittedly, the Member States' use of competence is to a large extent conditioned by the Charter.[846] Still, primacy of EU law must not be assimilated with supremacy.[847] In the

[838] SARMIENTO D. (2012b): p. 327-336.
[839] PERNICE I. – KANITZ R. (2004): p. 20; DOUGAN M. (2007): p. 938-940; ROSAS A. – ARMATI L. (2012): p. 68; BENGOETXEA J. (2014): p. 162-164. The CJEU can find national provisions to be inconsistent with EU law both in preliminary references under Article 267 TFEU and appeals or direct actions under Article 258 TFEU. *See* PERNICE I. (2008): p. 246; CHRONOWSKI N. (2014): p. 17.
[840] PRECHAL S. (2007): p. 53.
[841] CAROZZA P.G. (2003): p. 55-56.
[842] PRECHAL S. (2007): p. 38; KÜHN Z. (2010): p. 153; WALKILA S. (2015): p. 250.
[843] WIKLUND O. (1997): p. 358; PERNICE I. – KANITZ R. (2004): p. 20; JIRÁSEK J. (2008): p. 10; SARMIENTO D. (2012a): p. 298-302; SARMIENTO D. (2012b): p. 336-337.
[844] Case C-476/11 *HK*, para. 69. *See also* e.g. Case C-437/13 *Unitrading*, para. 30, where the CJEU held that 'Article 47 of the Charter must be interpreted as not precluding proof of origin of imported goods […], provided that the principles of effectiveness and equivalence are upheld. It is for the national court to ascertain whether that is so in the main proceedings.'
[845] TRIDIMAS T. (2010): p. 103. *See* e.g. Cases C-112/00 *Schmidberger*, para. 80; C-36/02 *Omega*, para. 41.
[846] AZOULAI L. (2012): p. 212-213.

words of AG Poiares Maduro in *Europa*, 'a distinction must be drawn between […] jurisdiction to review any national measure in the light of fundamental rights and […] jurisdiction to examine whether Member States provide the necessary level of protection […] to fulfil their other obligations as members of the Union. The first type of review […] is not within the Union's current competences. However, the second type of review flows logically from the nature of the process of European integration. […] Though the degree of protection of fundamental rights at national level does not have to be exactly the same as […] the European Union, there must be some measure of equivalence in order to ensure that the law of the Union can operate effectively within the national legal order.'[848] In other words, EU and Member State standards are not mutually exclusive, but complement each other through the medium of interpretative dialogue.[849] In line with the principle of subsidiarity, the CJEU accords the Member States discretion, as long as the protection under the Charter and the proper functioning of the Union legal order are guaranteed. '[T]he national courts and tribunals, in collaboration with the CJEU, fulfil a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed', as emphasised by the Court in *Inuit*.[850]

4.3.2 The Validity of EU Law in the Light of the Charter

In accordance with the principle of subsidiarity and the gradient scale of judicial review, the strictest form of central scrutiny is applied when the CJEU appreciates the validity of measures originating from the Union itself.[851] With respect to its jurisdiction under Article 263 TFEU, the Court has the power to review the legality of acts of EU institutions, bodies, offices and agencies. The Charter, as part of the EU constitutional framework, may thus be used by the Court to declare secondary legislation and individual decisions void, due to their incompliance with fundamental rights.[852]

The obligation of the Union to comply with fundamental rights as general principles of EU law was introduced by the CJEU through its rulings in *Stauder* and *Handelsgesellschaft*.[853] Later, in *Les Verts*, it declared that the Treaties, as the 'basic constitutional charter, […] established a complete system of legal remedies and procedures

[847] PERNICE I. (2002): p. 520; PRECHAL S. (2007): p. 38; ROSAS A. – ARMATI L. (2012): p. 53; BESSON S. (2014): p. 189.
[848] Opinion of AG POIARES MADURO in Case C-380/05 *Europa*, para. 20: ' *See* MICKLITZ H.-W. (2012): p. 396-397.
[849] BESSON S. (2014): p. 190-191.
[850] Case C-583/11 P *Inuit*, para. 99, referring to CJEU Opinion 1/09, para. 69.
[851] CAROZZA P.G. (2003): p. 55; JIRÁSEK J. (2008): p. 10; OJANEN T. (2014): p. 529.
[852] CURTIN D. – VAN OOIK R. (2001): p. 110; ESTELLA A. (2002): p. 137-138; FOLLESDAL A. (2011): p. 20; ROSAS A. – ARMATI L. (2012): p. 164; SAFJAN M. (2012): p. 2; WARD A. (2014): p. 1426.
[853] Cases C-29/69 *Stauder*, para. 7; C-11/70 *Handelsgesellschaft*, para. 3.

designed to permit the CJEU to review the legality of measures adopted' by the Union.[854] This development has led to criticism implying that the Court is substituting its position for that of the EU legislature. Nevertheless, this form of 'constitutional review' may also act as a counter-majoritarian power.[855]

Notwithstanding the discretion of national courts to review the compatibility of Member States' implementing measures with the Charter, this does not make them competent to scrutinise EU law. In the same way as the CJEU is not competent to invalidate national laws, Member State courts cannot appreciate the validity of EU measures. Accordingly, Member States cannot invoke the existence of national fundamental rights standard, or the lack of a Union standard, as reasons for having mis-implemented or wrongfully derogated from EU law. The EU Courts alone, as the supreme interpreters of Union law, have the power to invalidate acts of secondary law.[856] With regard to Article 51(1) CFR, their power of judicial review of EU acts exists regardless of whether the claim of invalidity arose from the Union's proper exercise of competence, or as a result of a national implementing measure.[857]

As was held by the Court in *Hauer*, '[t]he question of a possible infringement of fundamental rights by a measure of Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardising of the cohesion of the Community.'[858] As a result, Articles 52(6) and 53 CFR cannot be interpreted as granting Member States the competence to review the legality of EU acts. For instance, in *Melloni*, the validity of Framework Decision 2002/584 could not be appreciated under the Spanish Constitution, but only in the light of the Charter.[859]

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[854] Case C-294/83 *Les Verts*, paras. 23. *See also* Cases C-50/00 P *Pequeños Agricultores*, para. 40; C-131/03 P *Reynolds*, para. 80; C-59/11 *Kokopelli*, para. 34. Also, *see* RAITIO J. (2003): p. 98; MICKLITZ H.-W. (2012): p. 353-354.
[855] ESTELLA A. (2002): p. 137; CRAIG P. (2009): p. 94; SARMIENTO D. (2013): p. 1299. For other pre-Lisbon cases where the CJEU has reviewed the legality of EU measures in the light of fundamental rights, *see* e.g. Cases C-185/95 P *Baustahlgewebe*; T-228/02 *Modjahedines*; T-351/03 *Scheider*; C-540/03 *Parliament v Council*; C-229/05 *PKK*; C-402/05 P & 415/05 P *Kadi*; C-341/06 P & 342/06 P *Chronopost*; C-385/07 P *Grüne Punkt*. Also, *see* BRYDE B.-O. (2010): p. 126; ROSAS A. – ARMATI L. (2012): p. 164.
[856] *See* e.g. Cases C-314/85 *Foto-Frost*, paras. 15-20; C-143/88 & 92/89 *Zuckerfabrik*, para. 17; C-344/04 *IATA*, para. 27; C-119/05 *Lucchini*, para. 53; C-188/10 & 189/10 *Melki*, para. 54; C-199/11 *Otis*, para. 53; C-112/13 *A v B*, para. 41. *See* BESSELINK L.F.M. (1998): p. 643-644; BESSELINK L.F.M. (2001): p. 68; PERNICE I. – KANITZ R. (2004): p. 20; BESSELINK L.F.M. (2012): p. 173; ROSAS A. – ARMATI L. (2012): p. 71; WALKILA S. (2015): p. 169-170.
[857] Case C-400/10 *McB*, para. 52. *See also* Case C-583/11 P *Inuit*, paras. 92-96. Also, *see* MUIR E. (2012): p. 20; WARD A. (2014): p. 1442, 1451-1453.
[858] Case C-44/79 *Hauer*, para. 14, referring to Case C-11/70 *Handelsgesellschaft*, para. 3. *See* WEILER J.H.H. (1999): p. 109-111; PRECHAL S. (2007): p. 40, 52; AUGENSTEIN D. (2013): p. 1920-1921.
[859] Case C-399/11 *Melloni*, paras. 47-54. *See* THYM D. (2013): p. 401-402.

This centralisation of judicial review of EU actions has been criticised as an inter-judicial transfer of powers from the constitutional courts of the Member States towards the CJEU.[860] From the perspective of positive subsidiarity, however, it may conversely be argued that the Court itself is best placed to review the compliance of EU measures with EU fundamental rights, in order to guarantee the uniform interpretation of EU law within the Union. To a great extent, the fundamental rights standard of the Union also draws on common constitutional traditions, which indirectly gives the Member States influence over the judicial review of EU norms.[861]

As emphasised by the CJEU, respect for fundamental rights is 'a condition of the lawfulness of Community acts.'[862] The EU 'is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights'.[863] Consequently, the Charter limits rather than extends the competences of the Union.[864] In its capacity to provide a legal basis for invalidating measures of EU law, it functions as a competence-check and thus obligates the Union to take fundamental rights seriously.[865] Not only does the Charter legitimate the actions of the Union, but it also constitutes an internal source of reflexive self-restrain.[866] This can be seen in the increased mainstreaming of references to fundamental rights in the legislative practice of the EU, even in secondary legislation not explicitly addressing issues of a fundamental rights nature.[867]

Article 53 CFR provides that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised […] by Union law'. The CJEU may thus review the EU legislature's respect for fundamental rights with the Charter as a minimum standard of protection.[868] In *Parliament v Council*, the Court first used this scrutiny and referred to the Charter, before it was even legally binding.[869] Some four years later, shortly after the entry into force of the Lisbon Treaty, the legally binding Charter was applied in *Schecke*, where the Court for the first time invalidated parts of an EU legislative act on grounds of its lack of respect for fundamental

[860] TRIDIMAS T. (2010): p. 99.
[861] CAROZZA P.G. (2003): p. 54-55; AUGENSTEIN D. (2013): p. 1933-1934.
[862] CJEU Opinion 2/94, para. 34. *See* WILLIAMS A. (2007): p. 77.
[863] Case C-583/11 P *Inuit*, para. 91, referring to Case C-550/09 *E & F*, para. 44.
[864] HELANDER P. (2001): p. 109-111; FONTANELLI F. (2014): p. 200; MIETTINEN S. (2015): p. 67-68.
[865] SARMIENTO D. (2013): p. 1270; OJANEN T. (2014): p. 541; MIETTINEN S. (2015): p. 224; WALKILA S. (2015): p. 274.
[866] TUORI K. (2000): p. 247, 250; TUORI K. (2010): p. 10; ANDERSON D. – MURPHY C.C. (2011): p. 9.
[867] *See* e.g. references to EU secondary legislation in Cases C-465/07 *Elgafaji*, para. 6; C-92/09 & 93/09 *Schecke*, para. 4; C-61/11 PPU *Dridi*, paras. 3-4, 10. *See* MUIR E. (2012): p. 11-12. However, it cannot be concluded that a Directive complies with fundamental rights, merely based on references to fundamental rights in its Preamble. *See* Opinion of AG SHARPSTON in Cases C-92/09 & 93/09 *Schecke*, para. 113.
[868] LEBECK C. (2013): p. 75.
[869] Case C-540/03 *Parliament v Council*, paras. 30-32, 38, 58, 105.

rights.[870] In fact, the line of cases on data protection and privacy well illustrates the increased influence that the Charter has gained over time. Whilst the Court took a restrictive approach to data-processing in the *Passenger Name Records* case of 2006, Directive 2006/24 survived the action for annulment on grounds of legal basis brought by *Ireland & Slovak Republic* in 2009, only to later be declared void in 2014 in *Digital Rights* for reasons of incompliance with the Charter.[871]

Through judicial review of EU secondary law, the interpretative force and direct applicability of the Charter is brought into the spotlight.[872] This forceful application is illustrated most notably by *Digital Rights*, where the CJEU declared the entire Directive 2006/24 void.[873] Despite its legitimate objective, 'the EU legislature [had] exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter.'[874] With reference to the protection of personal data under Article 8 CFR, the Court equally invalidated Decision 2000/520 in *Safe Harbour*.[875] Similarly, the annulment of Articles of secondary law in *Schecke* and *Test-Achats* confirm the constant Charter scrutiny of EU competences. Indeed, fundamental rights may lawfully be restricted under Article 52(1) CFR, but restrictions need to be proportionate and justified as necessary and genuinely meeting objectives recognised by the EU.[876] As put by AG Kokott in *Test-Achats*, 'the discretion [of the Union] is not boundless. In particular, the exercise of that discretion cannot have the effect of frustrating the implementation of a fundamental principle of European Union law.'[877]

When appreciating the validity of EU measures under the Charter, the Court must first consider whether the interests involved are legitimate. If deemed to be objectively justified and necessary, the Court further evaluates the proportionality of restrictions, hence considering whether the EU legislature has adequately balanced general and individual interests.[878] In *Test-Achats*, the CJEU did not even consider the restrictions of the principle of non-discrimination justified, because 'a provision, which enables the Member States

[870] Cases C-92/09 & 93/09 *Schecke*, para. 89. *See* ROSAS A. – ARMATI L. (2012): p. 172; WALKILA S. (2015): p. 130, 142-143.
[871] Cases C-317/04 & 318/04 *Passenger Name Records*, paras. 54-61; C-301/06 *Ireland & Slovak Republic*, paras. 56-61, 67-70; C-293/12 & 594/12 *Digital Rights*, paras. 69-71. *See* MIETTINEN S. (2012): p. 19-20, 230-238.
[872] WALKILA S. (2015): p. 144.
[873] European Parliament and Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.
[874] Cases C-92/09 & 93/09 *Schecke*, para. 50; C-293/12 & 594/12 *Digital Rights*, para. 69.
[875] C-362/14 *Safe Harbour*, paras. 79-106, regarding Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council 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.
[876] Cases C-293/12 & 594/12 *Digital Rights*, para. 38
[877] Opinion of AG KOKOTT in Case C-236/09 *Test-Achats*, para. 48.
[878] MUIR E. (2012): p. 11-13; MIETTINEN S. (2015): p. 233-236.

[…] to maintain […] an exemption from the rule of unisex [insurance] premiums and benefits, works against the achievement of the objective of equal treatment between men and women' and was thus 'incompatible with Articles 21 and 23 of the Charter.'[879] Conversely, in *Schecke*, the objective was legitimate, but the restriction was annulled as disproportionate. It did 'not appear that the institutions [had] properly balanced, on the one hand, the objectives' of the Regulation 'against, on the other, the rights which natural persons are recognised as having under Articles 7 and 8 of the Charter.'[880] However, counterexamples exist, where the legislature was accorded a broad margin of appreciation. For instance, in *Melloni*, the Court considered the procedural right in question exhaustively regulated at EU level, without further examining the proportionality of the measure.[881]

In conclusion, the Charter has become a powerful tool for the judicial review of EU secondary law in the light of fundamental rights. As part of the Union's constitutional order, it embodies fundamental values of the Union expressed in Article 2 TEU. In consequence, it has even been suggested that the Charter could have the potential of assuming an even 'higher legal status and scope among the source of EU law.'[882] On the one side, this statement may be supported by *Kadi*, where the CJEU affirmed that the respect for human dignity preconditions the validity of the Treaties, which 'in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights'.[883] On

[879] Case C-236/09 *Test-Achats*, para. 32, regarding the validity of Article 5(2) of 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. *See also* Case C-221/09 *Tuna*, paras. 88, 113, where the CJEU in a similar manner annulled Regulation 530/2008 with reference to the prohibition of discrimination on grounds of nationality, not as enshrined in Article 21 CFR, however, but as a general principle of EU law. *See* Commission Regulation (EC) No 530/2008 of 12 June 2008 establishing emergency measures as regards purse seiners fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45 °W, and in the Mediterranean Sea.

[880] Cases C-92/09 & 93/09 *Schecke*, para. 86, regarding the validity of Articles 42(8b) and 44a of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy as amended by Council Regulation (EC) No 1437/2007 of 26 November 2007 and Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). *See also* Case C-355/10 *Frontex*, para. 77, where the CJEU, without any reference to the Charter, annulled a Council Decision, because the Decision through delegated powers interfered with fundamental rights to such an extent that the involvement of the European Union legislature was required. *See* Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. *Cf.* C-129/14 PPU *Spasic*, para. 74, where the CJEU held that Article 54 of the Convention Implementing the Schengen Agreement was compatible with Article 50 CFR. *See* Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

[881] Case C-399/11 *Melloni*, paras. 42-44. *See* MIETTINEN S. (2015): p. 240. *Cf.* Cases C-584/10 P, 593/10P & 595/10 P *Kadi II*, paras. 99-101, 119, 164, where the CJEU confirmed the annulation of Regulation 1190/2008 made by the General Court in T-85/09. *See* Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.

[882] WALKILA S. (2011): p. 818. *See also* WALKILA S. (2015): p. 156-157, 231, 274.

[883] Cases C-402/05 P & 415/05 P *Kadi*, para. 304, where the CJEU annulled Regulation 881/2002 on grounds of fundamental rights infringements. Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan.

the other side, however, the Court has no jurisdiction to review the validity of primary law.[884] Further to this, the ECtHR, in line with its *Bosphorus* doctrine, presumes that the EU protection of fundamental rights complies with the ECHR.[885]

Certainly, the Charter already contributes to the interpretation of primary law in the light of fundamental rights. However, to give priority to fundamental rights 'protection and to disapply for that purpose the relevant provisions' of the Treaties 'would necessitate recognising that there was also a hierarchy among primary rules and a kind of "supra-constitutional" value in the respect for fundamental rights', as stated by AG Mengozzi in *Gestoras*, at a time when the Charter was not yet legally binding.[886] Since then, the Charter has become mandatory, but this has still not resulted in the elevation of the Charter above the status of primary law. Indeed, it is questionable to what extent such an idolisation of the Charter would be compatible with the principle of subsidiarity that it presently embodies. Would a possible review of primary law with respect to the Charter ultimately contribute to the primacy, unity and effectiveness of Union law as a whole?

4.4 Non-application of the Charter

4.4.1 Reasoning Silence as an Expression of the Charter's Subsidiarity

The silence on fundamental rights that prevailed in the genesis of European integration, has turned into a cacophonic discourse on constitutional pluralism.[887] However, occasional silence still persists with respect to the Charter as a source in EU fundamental rights adjudication before the CJEU. It is, indeed, a conspiracy of silence, as the absence of reasoning may intentionally be used by the Court as a counterweight to judicial activism.[888] By selectively using silence as a means of reasoning its judgments, the Court may be sidestepping important constitutional questions concerning the Charter and its relation to other sources of EU law.[889] In fact, the rulings of the Court may conceal more

[884] Cases C-31/86 & 35/86 *LAISA*, para. 18. *See also* Article 344 TFEU containing an obligation for Member States to not submit disputes concerning the interpretation or application of the Treaties to any other court than the CJEU. Also, *see* LENAERTS K. – DE SMIJTER E. (2001): p. 93; ROSAS A. – ARMATI L. (2012): p. 53; GRAGL P. (2014): p. 1738. However, in Case C-432/04 *Cresson*, paras. 11-114, the CJEU reviewed the compatibility of Article 245(2) TFEU with fundamental rights, but the claim of incompatibility was dismissed. *See* LINDFELT M. (2007): p. 298-300.
[885] ECtHR Case 45036/98 *Bosphorus v Irland*, paras. 155, 165. Regarding the accession of the EU to the ECHR under Article 6(2) TEU, it has been argued that the autonomy of the Union legal order would be jeopardised if the ECtHR was accorded scrutiny to review, not only secondary legislation, but also EU primary law. Alternatively, Member States could possibly be held responsible for measures taken under primary law. *See* PERNICE I. – KANITZ R. (2004): p. 13; PELLONPÄÄ M. (2007): p. 102-103; GROUSSOT X. (et.al.) (2011a): LEBECK C. (2013): p. 77-81; GRAGL P. (2014): p. 1750-1751. *Cf.* CJEU Opinion 2/13, paras. 242-248.
[886] Opinion of AG MENGOZZI in Case C-354/04 P *Gestoras*, para. 177.
[887] WILLIAMS A. (2007): p. 71; TUORI K. (2010): p. 6.
[888] SANKARI S. (2010): p. 200; SARMIENTO D. (2012a): p. 285, 292-297; SANKARI S. (2013): p. 214, 218.
[889] PECH L. (2012): p. 1862-1863.

than they reveal, which in turn necessitates a look beyond their textual reasoning.[890]

Already in 2010, the CJEU established that 'it is important, since the entry into force of the Lisbon Treaty, to take account of the Charter, which has "the same legal value as the Treaties"'.[891] Yet today, the Court tends to only inconsistently make use of the Charter. The procedure for preliminary references gives the Court leeway to answer questions from the national courts in a selective and heterogeneous manner. This procedural flexibility opens up for judicial minimalism and the possibility of leaving sensitive issues aside, such as the application of the Charter.[892]

By means of *reasoning silence*, the Court may choose not to answer a question referred, or to answer it in a different way than it was posed.[893] However, it is difficult to draw any far-reaching conclusions from the Court's use of silence. Not all judicial vacuums are carefully reasoned. They might as well be the result of old habit, doctrinal confusion, missed opportunities or peculiar developments.[894] Therefore, the mere identification of relevantly speaking silences can already in itself be of importance for understanding the constitutional framework in which the Court operates.[895] With respect to the Charter, such intentional silences may, above all, be observed in cases, where the referring national court or the AG make a reference to the Charter, which the Court nevertheless chooses to ignore.

In *Römer*, AG Jääskinen made reference to Article 21(1) of the legally binding Charter and argued that 'in the same way as the Court decided with regard to discrimination on grounds of age' in *Mangold* and *Kücükdeveci*, 'the prohibition of discrimination on grounds of sexual orientation should be regarded as a general principle of Union law.'[896] Any other interpretation would lead to differences in normative status among the grounds of discrimination prohibited under the Charter.[897] Still, the Court remained silent as to the applicability of the Charter and non-discrimination as a general principle of EU law. Although sexual orientation was recognised as a prohibited ground of discrimination, the Court still relied merely on secondary legislation in its reasoning.[898] Conversely, in *Kücükdeveci*, the Court had referred to Article 21 CFR – albeit only in passing – even

[890] EECKHOUT P. (2011): p. 4; DELMAS-MARTY M. (2013): p. 330; MIETTINEN S. (2015): p. 229; WALKILA S. (2015): p. 26.
[891] Case C-279/09 *DEB*, para. 30.
[892] PECH L. (2012): p. 1843; SARMIENTO D. (2012a): p. 286, 292; LEBECK C. (2013): p. 29; SANKARI S. (2013): p. 219
[893] SARMIENTO D. (2012a): p. 292.
[894] PECH L. (2012): p. 1843; SANKARI S. (2013): p. 215.
[895] SANKARI S. (2013): p. 215.
[896] Opinion of AG JÄÄSKINEN in Case C-147/08 *Römer*, para. 131. *See* Cases C-144/04 *Mangold*, paras. 75-76; C-555/07 *Kücükdeveci*, paras. 21-22. *See also* Opinion of AG RUIZ-JARABO COLOMER in Case C-267/06 *Maruko*, para. 78. Also, *see* PECH L. (2012): p. 1859.
[897] PECH L. (2012): p. 1848.
[898] in Case C-147/08 *Römer*, para. 64. *See* SAIZ ARNAIZ A. – TORRES PÉREZ A. (2012): p. 10; PECH L. (2012): p. 1841-1849; HANCOX E. (2013): p. 1422-1423.1858.

before it was legally binding.[899] The silence in *Römer*, may thus be interpreted as a means of supposedly avoiding further elaboration on the relation between the Charter and principles of EU law in general, or the question of sexual orientation in particular.[900]

Similarly, in *Dominguez*, AG Trstenjak considered Article 31(2) CFR when elaborating on the question of whether paid leave may be enforced as a substantive right in a dispute between a worker and the employer.[901] Although the Court found that 'the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law', it still disregarded the Charter and exclusively relied on secondary legislation in its judgement.[902] Allegedly, the absence of the Charter might imply hesitancy as whether to categorise annual paid leave as either a fundamental right or a fundamental principle under of Article 52(5) CFR. The case also touches upon the Charter's possible capacity or incapacity of direct horizontal effect.[903] In any case, the silence in *Dominguez* cannot be deduced from the ambivalent status of social rights. As a matter of fact, the Charter has been absent in the Court's reasoning on first, second as well as third generation rights.[904] Since *Kücükdeveci*, there has even been rulings on age discrimination that completely lack references to Article 21(1) CFR.[905]

In contrast to *Römer* and *Dominguez*, the initiative for Charter application in *Zambrano* came from the referring court. In essence, the national court asked whether the expulsion of a family, consisting of third-country national parents and children with EU citizenship, was compliant with Articles 21, 24 and 34 CFR. Still, the CJEU answered the question solely based on Article 20 TFEU.[906] The Court's review of fundamental rights remained merely indirect, which, on the one hand, implies that fundamental rights are inherent to EU citizenship.[907] On the other hand, *Zambrano* and subsequent cases regarding third-country national family members and their derived rights, also suggest that the Court makes a distinction between its abstract jurisdiction and the Charter's concrete field of application.

[899] C-555/07 *Kücükdeveci*, para. 22. *See* PECH L. (2012): p. 1860; WALKILA S. (2015): p. 145. Also, *see* Cases C-297/10 & 298/10 *Hennigs*, paras. 47, 78, where the CJEU referred to Article 21 CFR when recognising discrimination on grounds of age.
[900] PECH L. (2012): p. 1841.
[901] Opinion of AG TRSTENJAK in Case C-282/10 *Dominguez*, paras. 70-88.
[902] Case C-282/10 *Dominguez*, paras. 16-21. *See* DE MOL M. (2012): p. 290-293; PECH L. (2012): p. 1843, 1857-1858; LAZZERINI N. (2014): p. 914; WALKILA S. (2015): p. 237.
[903] DE MOL M. (2012): p. 295-297; PECH L. (2012): p. 1856-1857, 1861-1862; HANCOX E. (2013): p. 1422-1423; LAZZERINI N. (2014): p. 930-932; MUIR E. (2014): p. 231-232; MIETTINEN S. (2015): p. 229.
[904] *See* e.g. Cases C-139/07 P *Glaswerke* (access to documents); C-28/08 P *Lager* (access to documents); C-104/09 *Alvarez* (sex discrimination); C-34/10 *Brüstle* (principles of bioethics); C-67/14 *Alimanovic* (nationality discrimination). Also, *see* SAIZ ARNAIZ A. – TORRES PÉREZ A. (2012): p. 10; WALKILA S. (2015): p. 145.
[905] *See* Cases C-229/08 *Wolf*; C-341/08 *Petersen*; C-45/09 *Rosenbladt*; C-250/09 & 268/09 *Georgiev*.
[906] Case C-34/09 *Zambrano*, paras. 35-45.
[907] ROSAS A. – ARMATI L. (2012): p. 165; SAIZ ARNAIZ A. – TORRES PÉREZ A. (2012): p. 10; RAITIO J. (2013): p. 523; DUBOUT E. (2014): p. 194-195, 202; WALKILA S. (2015): p. 145. *See* e.g. Cases C-413/99 *Baumbast*, paras. 68-75; C-60/00 *Carpenter*, paras. 37-40; C-109/01 *Akrich*, para. 58; C-430/10 *Gaydarov*, paras. 21, 24-42; C-434/10 *Aldazhov*, paras. 16, 41-49, where the CJEU did use the Charter as a source for the fundamental rights considered.

The Charter is applied only once it has been established that the circumstances of the third-country nationals in question fall within the scope of Union law, for the purpose of Article 51(1) CFR.[908]

The Court's reasoning silence on the Charter may be understood as an expression of subsidiarity. First of all, the subsidiary nature of the Charter becomes visible in the secondary significance that the CJEU accords to it as a source of fundamental rights.[909] The Charter does not only lack an autonomous field of application, but the Court also tends to give priority to Treaty provisions, fundamental rights as general principles and secondary legislation, favouring the provision that most concretely sets out the fundamental right in question.[910] Neither has the Charter come to replace the concept of fundamental rights as general principles of EU law.[911] Instead of assimilating its provisions with the general principles, *Kücükdeveci* and the subsequent case law appear to dissociate the two sources from each other.[912] For instance, in cases regarding the horizontal direct effect of fundamental rights, the Court has consistently referred to general principles rather than the Charter. Evidently, all its provisions do not express general principles of EU law.

Ultimately, the vacuum left by the CJEU when disregarding the Charter, not only demonstrates the sensitive nature of the issue, but also constitutes a form of judicial subsidiarity.[913] By not taking the interpretation of EU law further than what is necessary to solve the case at hand, the Court accords Member States a margin of discretion. The degree of judicial review applied by the CJEU will thus indicate to what extent and on what conditions it is willing to engage in a judicial dialogue with its national correspondents.[914] A complete silence would undermine the authority of the Court and the credibility of the Charter, but to a certain extent judicial minimalism functions as an argumentative model for peaceful reconciliation of institutional, normative and moral interests in constitutional conflicts. The judicial strategy of reasoning silence thus helps the CJEU to navigate

[908] *See* e.g. Cases C-434/09 *McCarthy*, paras. 57, 27; C-40/11 *Iida*, para. 79-81; C-356/11 *Dereci*, para. 66, 70-74; C-87/12 *Ymeraga*, paras. 21-22, 40-43, where the Charter was considered but not applied by the CJEU, because the situations of the third-country family members of the applicants were found to not be governed by EU law. Contrastingly, the CJEU applied the Charter with respect to the rights of third-country nationals in Cases C-69/10 *Samba*, paras. 34, 49; C-356/*11 O. & S.*, paras. 75-82, but not at all in Case C-61/11 PPU *Dridi*, paras. 31-43. *See* SANKARI S. (2013): p. 242-245; VAN BOCKEL B. – WATTEL P. (2013): p. 882-883; DUBOUT E. (2014): p. 206-207.
[909] CAROZZA P.G. (2003): p. 54.
[910] VON DANWITZ T. (2001): p. 294; PECH L. (2012): p. 1879; SARMIENTO D. (2012a): p. 297; SANKARI S. (2013): p. 214; MIETTINEN S. (2015): p. 220-221; WALKILA S. (2015): p. 145.
[911] MUIR E. (2012): p. 8; WALKILA S. (2015): p. 141. *See* Article 6(3) TEU and Article 52(2) CFR.
[912] MUIR E. (2012): p. 14; PECH L. (2012): p. 1860-1861; DE VRIES S.A. (2013b): p. 73.
[913] DE BÚRCA G. (1998): p. 225; KOMBOS C. (2006): p. 435; MUIR E. (2014): p. 243.
[914] SARMIENTO D. (2012a): p. 291, 310; SARMIENTO D. (2012c): p. 29.

through the European landscape of constitutional pluralism.[915]

4.4.2 The Isolated Charter as an Insufficient Connection to EU Law

With respect to subsidiarity, the Charter was never intended to apply outside the scope of EU law, when Member States act within their own jurisdictions.[916] In contrast to the general applicability of the ECHR, the Charter's field of application is rather relative. It does not apply autonomously to any given situation, but the subject matter needs to demonstrate a sufficient degree of connection to Union law.[917] The broad interpretation of the scope of EU law made by the CJEU in *Åkerberg Fransson*, however, sparked new life into the old debate of whether the Charter may in fact extend the powers of the EU.[918]

Similarly, the extensive content of the Charter might cast doubt as to whether it complies with the principle of subsidiarity.[919] The initial aim of the Charter was never to create any new rights or expand the EU competences. Still, it contains material provisions covering areas where the Union has none or only little competence, such as the right to life in Article 2.[920] In addition to this, the Charter contains innovative provisions traditionally not recognised as fundamental rights, such as the principles of bioethics set out in Article 3(2).[921] Drafted with future changes of society and the Union legal order in mind, at present the material scope of the Charter is admittedly broader than the scope of EU law itself.[922] Given that the impact of the Charter is limited to the areas governed by the Treaties, some of these provisions thus risk becoming empty statements, promising more than they can keep.[923] Nevertheless, these limits to do not prevent the Union from drawing inspiration from the entire content of the Charter for the purpose of the *ultima ratio* procedure under Article 7 TEU, which is not limited to the scope of EU law itself.[924]

Be that as it may, it remains a fact that that the Charter applies to all situations governed by Union law. Nonetheless, it is equally true that it cannot apply outside this scope.[925] In

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[915] SANKARI S. (2010): p. 200; SANKARI S. (2013): p. 214; SARMIENTO D. (2012a): p. 305, 309-312.
[916] Draft Charter, CHARTE 4111/00, 20.1.2000, p. 2; CHARTE 4123/1/00 REV, Convent 5, 15.2.2000, p. 9. The Drafts refer to Cases C-60/84 & 61/84 *Cinéthèque*, para. 26; C-260/89 *ERT*, para. 43; C-299/95 *Kremzow*, paras. 16-19.
[917] KAILA H. (2012): p. 303; WALKILA S. (2015): p. 154, 175-176.
[918] DUBOUT E. (2014): p. 208; FONTANELLI F. (2014): p. 243; MUIR E. (2014): p. 233; WARD A. (2014): p. 1425; MIETTINEN S. (2015): p. 67.
[919] VON DANWITZ T. (2001): p. 304.
[920] CURTIN D. – VAN OOIK R. (2001): p. 108; ROSAS A. – ARMATI L. (2012): p. 172-173; LEBECK C. (2013): p. 97-98, 443.
[921] Commission Communication on the Charter COM(2000) 559 final, p. 9. *See* BESSELINK L.F.M. (2001): p. 70-72; PARMAR S. (2001): p. 363; CAROZZA P.G. (2004): p. 43.
[922] LEANERTS K. – DE SMIJTER E. (2001): p. 273; KNOOK A. (2005): p. 371; KAILA H. (2012): p. 298;
[923] DE WITTE B. (2001): p. 88; OJANEN T. (2003): p. 677-678; PERNICE I. – KANITZ R. (2004): p. 18; WARD A. (2014): p. 1413-1414.
[924] DE WITTE B. – TOGGENBURG G.N. (2004): p. 81; PERNICE I. – KANITZ R. (2004): p. 18; FOLLESDAL A. (2011): p. 20-21; KAILA H. (2012): p. 314; ROSAS A. – ARMATI L. (2012): p. 168; TANASESCU E.S. (2013): p. 224.
[925] *See* e.g. Cases C-617/10 *Åkerberg Fransson*, para. 19; C-258/13 *Agricola*, para. 19; C-483/11 & 484/11 *Boncea*, para. 29.

purely internal situations, demonstrating an *insufficient connection to EU law*, the Court will thus declare itself incompetent to rule on questions relating to fundamental rights.[926] As a result, the Court's jurisdiction in relation to the Charter can be defined not only positively as conditions for applicability, but also negatively as boundaries for inapplicability.[927] However, the Court's judgments and orders on inadmissibility demonstrate a heterogeneous line of reasoning, which makes it challenging to identify the separating line between applicability and inapplicability of the Charter.[928]

From the subsidiary nature of the Charter, it follows that litigants cannot rely directly on its provisions as the only legal basis of a dispute.[929] In other words, the isolated Charter does not in itself form a basis for jurisdiction even in cases concerning the protection of a right that it guarantees.[930] Instead, the CJEU has explicitly stated that in order for the Charter to apply, the situation must be brought within the scope of Union law by an EU norm *other* than the Charter.[931] For illustration, the Court declined jurisdiction in *Chartry*, '[a]lthough the right to an effective legal remedy […] was reaffirmed by Article 47 of the Charter'. However, 'the order for reference [did] not contain any specific information enabling the subject-matter of the dispute in the main proceedings to be considered to be connected with EU law. The dispute […] [was] not connected in any way with any of the situations contemplated by the provisions of the EC Treaty on the free movement of persons, of services, or of capital.[932]

By way of explanation, a vague or abstract Treaty connection, such as the general respect for fundamental rights provided in Articles 2 and 6 TEU, is not a sufficient connection to EU law. Similarly, it is questionable whether a provision such as Article 18 or 21 TFEU could bring any infringement of fundamental rights within the scope of EU law. Not just any nationality discrimination or other violation suffered in connection to the exercise of freedom of movement automatically falls within the scope of the Union law,

[926] KAILA H. (2012): p. 314; DUBOUT E. (2014): p. 206; WALKILA S. (2015): p. 155. For pre-Lisbon judgments where the protection of fundamental rights fell outside the scope of EU law, *see* e.g. Cases C-299/95 *Kremzow*, paras. 15-16; C-306/96 *Annibaldi*, para. 13; C-186/01 *Dory*, paras. 34-41; C-328/04 *Vajnai* paras. 13-14; C-427/06 *Bartsch*, paras. 16-18, 25. For pre-Lisbon judgments where the protection of fundamental rights came within the scope of EU law, *see* e.g. Cases C-60/00 *Carpenter*, paras. 37-45; C-71/02 *Karner*, paras. 49; C-148/02 *Avello*, paras. 24-31; C-555/07 *Kücükdeveci*, paras. 23-25; C-147/08 *Römer*, paras. 60-61, 64. *See also* ROSAS A. – ARMATI L. (2012): p. 165; FONTANELLI F. (2013): p. 319; LEBECK C. (2013): p. 302; RAITIO J. (2013): p. 361; TANASESCU E.S. (2013): p. 221; DUBOUT E. (2014): p. 204; RAITIO J. (2013): p. 361.
[927] SARMIENTO D. (2013); p. 1286-1287; DUBOUT E. (2014): p. 204.
[928] ROSAS A. – ARMATI L. (2012): p. 165; HANCOX E. (2013): p. 1423.
[929] Cases C-617/10 *Åkerberg Fransson*, para. 22; C-466/11 *Currà*, para. 26.
[930] VAN BOCKEL B. – WATTEL P. (2013): p. 869-870; MIETTINEN S. (2015): p. 228; WALKILA S. (2015): p. 169. *See* e.g. Cases C-617/10 *Åkerberg Fransson*, para. 22; C-265/13 *Marcos*, para. 30; C-650/13 *Delvigne*, para. 27.
[931] E.g. Cases C-314/10 *Pagnoul*, paras. 23-24; C-27/11 *Vinkov*, paras. 57-60; C-418/11 *Texdata*, paras. 72-73; C-483/12 *Turnhout*, paras. 17-23; C-488/12 – 491/12 & 526/12 *Nagy*, paras. 17-18; C-614/12 & 10/13 *Dutka*, para. 15; C-14/13 *Cholakova*, para. 30; C-265/13 *Marcos*, paras. 29-33, 36, 43; C-332/13 *Weigl*, paras. 13-16; C-92/14 *Tudoran*, paras. 44-49. *See* SCMAUCH M. (2012): p. 473; FONTANELLI F. (2013): p. 320; HANCOX E. (2013): p. 1423; RAITIO J. (2013): p. 362; FONTANELLI F. (2014): p. 209.
[932] Case C-457/09 *Chartry*, para. 25.

without further demonstration of a substantive connection thereto.[933]

As a fact, the requirements flowing from the protection of fundamental rights under the Charter are binding on Member States only when they *implement* or *derogate* from Union law in the meaning of Article 51(1) CFR.[934] For instance, in *Asparuhov*, the CJEU concluded that 'the order for reference does not contain any specific information to show that the [national] decision […] would constitute a measure implementing European Union law'.[935] Equivalently, in *Gueye*, national actions against domestic violence, albeit closely connected, were not considered to be implementation of Framework Decision 2001/220 on the standing of victims in criminal proceedings.[936] Neither the coincidence that a national provision is worded in a way similar to the Charter, can be considered implementation.[937]

The conditions for applicability in Article 51(1) are inherently connected to Article 51(2) CFR, providing that the Charter does not extend the competences of the EU.[938] '[A]lthough respect for the fundamental rights […] is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community', as consistently held by the CJEU.[939] In the spirit of subsidiarity, this characteristic of fundamental rights has also been confirmed with respect to the Charter.[940]

In *McB*, the Charter could not be used to review the contested national provision in relation to the 'Brussels II' Regulation 2201/2003, because the Union lacked specific competences to regulate the attribution of custody rights.[941] In *Ymeraga*, the applicant could not invoke the Charter as a means of extending the personal scope of Directives 2004/38 and 2003/86 to include him as a beneficiary.[942] Similarly, in *Pringle*, the Charter was not applicable to the European Stability Mechanism, as a measure of enhanced

[933] ROSAS A. – ARMATI L. (2012): p. 167-168; HANCOX E. (2013): p. 1423-1425. *Cf.* Opinion of AG JACOBS in Case C-168/91 *Konstantinidis*, para. 46.
[934] SCMAUCH M. (2012): p. 473; FONTANELLI F. (2013): p. 320; HANCOX E. (2013): p. 1423; DUBOUT E. (2014): p. 208; FONTANELLI F. (2014): p. 240; WARD A. (2014): p. 1447; WALKILA S. (2015): p. 164.
[935] Case C-339/10 *Asparuhov*, paras. 13-14. *See also* Cases C-267/10 & 268/10 *Rossius*, paras. 19-20; C-434/11 *Corpul*, paras. 14-15; C-498/12 *Pedone*, paras. 12-15; C-499/12 *Gentile*, paras. 12-15; C-555/12 *Loreti*, paras. 15-18; C-73/13 *T*, paras. 11-14.
[936] Cases C-483/09 & 1/10 *Gueye*, para. 68-69.
[937] Case C-482/10 *Cicala*, paras. 21-30. *See* FONTANELLI F. (2014): p. 209; WALKILA S. (2015): p. 156.
[938] WARD A. (2014): p. 1446-1447.
[939] *See* e.g CJEU Opinion 2/94, paras. 34-35; Case C-249/96 *Grant*, para. 45. *See* KAILA H. (2012): p. 298; CHRONOWSKI N. (2014): p. 13; DUBOUT E. (2014): p. 196; WARD A. (2014): p. 1413-1414.
[940] *See* e.g. Cases C-20/10 *Vino I*, para. 52; C-161/11 *Vino II*, para. 24; C-256/11 *Dereci*, para. 71;
[941] Case C-400/10 PPU *McB*, paras. 51-52, regarding Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. *See* KAILA H. (2012): p. 312; SAFJAN M. (2012): p. 9-10; DUBOUT E. (2014): p. 208-209; WARD A. (2014): p. 1440-1443.
[942] C-87/12 *Ymeraga*, paras. 40-43, regarding Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification; European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. *See* VAN BOCKEL B. – WATTEL P. (2013): p. 876.

cooperation under Article 20(1) TEU, because the establishment of such a mechanism went beyond the competences of the EU itself. In the words of the Court, 'the Charter does not extend the field of application of Union law beyond the powers of the Union, or establish any new power or task for the Union or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it.'[943]

However, as stated by the Court in *Hernandez*, 'the mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law, and therefore cannot render the Charter applicable'.[944] Whilst the Court examined the case in *Ymeraga* as admissible under Article 20 TFEU, and held that the national legislation at issue 'indeed [was] intended to implement' EU law, it still found that the situation of the applicant was 'not governed by European Union law', for the purpose of Article 51(1) CFR, as established in *Åkerberg Fransson*.[945] Hence, the CJEU upholds a strict distinction between the abstract existence of jurisdiction, on the one hand, and the concrete application of relevant EU norms to the circumstances of the case, on the other. Out of these two conceptions, only the latter may trigger the applicability of the Charter.[946] The Charter's field of application does not coincide with the broader notion of EU competences, as boldly suggested by AG Sharpston in *Zambrano*, but only with the more moderate conception of situations falling within the scope of EU law.[947]

It is evident from the Court's ruling in *Siragusa* that the mere existence of an action within the scope of EU law does not in itself constitute a sufficient connection to the Charter. For the purpose of 'implementing Union law' under Article 51(1) CFR, it is not enough that the matters covered are 'closely related' or that one has an 'indirect impact' on the other. Aspects such as the 'nature' of the measure in question, whether it 'pursues objectives other than those covered by EU law', the fact that it is only 'indirectly affecting EU law' or not governed by any 'specific rules of EU law on the matter', might indicate that the issue lies outside the scope of the Charter.[948]

However, these criteria are not clear-cut and borderline cases may easily arise. Without

[943] C-370/12 *Pringle*, paras. 64, 167-168, 179-181. *See* LEBECK C. (2013): p. 59; WARD A. (2014): p. 1433, 1444; MIETTINEN S. (2015): p. 259-260.
[944] Case C-198/13 *Hernandez*, para. 36. *Cf.* Cases C-483/09 & 1/10 *Gueye*, paras. 55, 69-70; C-370/12 *Pringle*, paras. 104-105, 180-181.
[945] *Cf.* Cases C-87/12 *Ymeraga*, paras. 43, 45; C-617/10 *Åkerberg Fransson*, paras. 19-27. *See* SANKARI S. (2013): p. 244; SARMIENTO D. (2013): p. 1286-1287.
[946] FONTANELLI F. (2014): p. 238-240.
[947] *Cf.* Opinion of AG SHARPSTON in Case C-34/09 *Zambrano*, para. 163.
[948] Case C-206/13 *Siragusa*, paras. 24-26, referring to Cases C-309/96 *Annibaldi*, paras. 21-23; C-40/11 *Iida*, para. 79; C-87/12 *Ymeraga*, para. 41. *See* FONTANELLI F. (2013): p. 329-330; FONTANELLI F. (2014): p. 240-242; WARD A. (2014): p. 1447-1448.

giving any further guidelines in *Zakaria*, the Court laconically stated that 'the decision to refer does not provide sufficient information' in order to assess the treatment of border guards in relation to Regulation 562/2006.[949] It was 'for the referring court to ascertain, in the light of the facts in the main proceedings, whether the situation of the claimant in the main proceedings [was] governed by European Union law' and thus also by the Charter.[950] Conversely, in *Norte*, Portugal had reduced wages in the public sector as a result of its obligations under the EU Stability and Growth Pact. Nevertheless – and without any further explanation – the Court did not find that the measures constituted implementation of Union law under Article 51(1) CFR, but ruled that it had no jurisdiction.[951] Alternatively, had the Court accepted jurisdiction in the case, this would have rendered the Charter applicable to many other austerity measures in the Member States as well. This could, in turn, be contrary to the principle of subsidiarity under the Charter.[952]

To conclude, the limits to Charter applicability– although divergent and difficultly defined – fulfil an important function of contributing to the observance of the subsidiarity principle.[953] Because of the constant push and pull between unity and diversity inherent to European constitutional pluralism, as well as the intertwinement of EU law with the laws of the Member States, it is not always easy to draw a line between the two.[954] Furthermore, the CJEU cannot control which cases are brought before it in relation to the Charter.[955] Yet, it can choose to decline jurisdiction with reference to Article 51 CFR, to avoid extending its jurisdiction and distorting the vertical division of powers between the EU and its Member States.[956] In accordance with subsidiarity, fundamental rights are ensured by the Member States' constitutional systems in disputes outside the scope of EU law.[957] Inside its scope, the principle of subsidiarity will be respected by the CJEU when interpreting the Charter, as long as the national constitutional frameworks comply with its minimum level of protection and do not undermine the primacy, unity and effectiveness of the Union legal order.[958]

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[949] European Parliament and Council Regulation (EC) No 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).
[950] Case C-23/12 *Zakaria*, paras. 39-40. *Cf.* C-234/12 *Sky*, paras. 27-33; *See* HANCOX E. (2013): p. 1423-1424.
[951] Case C-128/12 *Norte*, paras. 10-13. *See also* Cases C-434/11 *Corpul*, paras. 13-16; C-264/12 *Seguros I*, paras. 18-22; C-665/13 *Seguros II*, paras. 12-16. Also, *see* SARMIENTO D. (2013): p. 1286-1287.
[952] VAN BOCKEL B. – WATTEL P. (2013): p. 878.
[953] MURPHY D.T. (1994): p. 97; KIIKERI M. (2001): p. 253; GROUSSOT X. – BOGOJEVIĆ S. (2014): p. 244.
[954] FONTANELLI F. (2014): p. 198.
[955] HANCOX E. (2013): p. 1425-1426; MIETTINEN S. (2015): p. 39-40.
[956] SARMIENTO D. (2012a): p. 292-293; GROUSSOT X. (et.al.) (2013): p. 101; WARD A. (2014): p. 1450.
[957] BESSELINK L.F.M. (2001): p. 68; PERNICE I. (2008): p. 241; BESSELINK L.F.M. (2012): p. 173; FONTANELLI F. (2014): p. 198; WALKILA S. (2015): p. 169. *See also* Opinion of AG KOKOTT in Cases C-483/09 & 1/10 *Gueye*, paras. 77-79.
[958] HANCOX E. (2013): p. 1427; TORRES PÉREZ A. (2014): p. 316.

CONCLUSION: Taking Fundamental Rights and Subsidiarity Seriously

Looking back at the parallel evolution of fundamental rights and subsidiarity in EU law, the Charter eventually became their common point of intersection. Both concepts endorse similar transversal affinities, conditioning the exercise of EU competences with the constant aim of determining the most appropriate level of intervention. In the same way as negative subsidiarity, fundamental rights may limit the Union's use of power. Conversely, fundamental rights may justify intervention at EU level, in the same way as positive subsidiarity. In this sense, both fundamental rights and subsidiarity contribute to the constitutionalisation of the Union legal order.

The Charter itself presents several traits of subsidiarity. From a structural point of view, the Charter is unable to provide an autonomous legal basis or extend the competences of the Union. This subsidiary approach is further evidenced by its many references to national legislation and other sources of EU law. Also, the distinction between substantive rights and programmatic principles has a similar impact on the Charter. As a result, its personal as well as its material scope is limited and dependent on the applicability of other EU norms. The Charter only applies once the subject matter falls within the scope of Union law, as demonstrated not only by the *Åkerberg Fransson* line of cases, but also by rulings where the CJEU has declined jurisdiction under the Charter.

From a material point of view, the Charter introduces subsidiarity as an interpretative principle of EU fundamental rights. Setting out a minimum level of protection, all norms of EU law must be interpreted in the light of the Charter. Notwithstanding this indirect effect, it still leaves room for the Union and its Member States to provide a higher level of protection. Similarly, the Court's reasoning silences on Charter applicability leave Member States a margin of discretion in accordance with the principle of subsidiarity. Furthermore, the minimum level under the Charter conditions the validity of EU secondary law, as evidenced by cases *Schecke*, *Test-achats*, *Digital Rights* and *Safe Harbour*. In the same way, national law in conflict with fundamental rights will be set aside for the benefit of the Charter's direct application. In fact, under certain circumstances, the Charter may even impose a maximum level of protection.

As demonstrated in *Melloni*, preservation of the *primacy, unity and effectiveness of*

Union law may trigger a maximum level of protection under the Charter. Although such EU level intervention can be justified in the light of positive subsidiarity, it all the same becomes evident that the EU legal system has adopted its proper understanding of subsidiarity, comprising more than one single priority.[959] Given its *sui generis* character, the Union legal order sets its own objectives.[960] In contrast to international human rights law, fundamental rights protection is only one of many objectives that EU subsidiarity has to balance when determining the appropriate level of intervention for the proper functioning of the internal market and the EU legal order. Hence, collisions might arise between these objectives and the fundamental values of the Union itself.[961] In the end, the primacy, unity and effectiveness of Union law can only exceptionally be set aside by reasons of legal certainty of the individual under the Charter, as evidenced in *Belvedere*.

Enhanced legal certainty in EU fundamental rights protection was one of the primary aims when drafting the Charter. On the one hand, its provisions render the existence and content of fundamental rights more visible to EU citizens and hence contribute to increased substantive legal certainty and acceptability. On the other hand, it may be argued that the principle of subsidiarity, in turn, contributes to formal legal certainty and predictability.[962] As an interpretative principle, subsidiarity offers a basis for systematisation of the increased number of EU fundamental rights sources in the post-Lisbon context. Ultimately, such enhanced formal and substantive legal certainty contributes to a more consistent application of EU fundamental rights law in the Member States.[963] In addition to this, the subsidiary nature of the Charter has the potential of mitigating the transfer of normative powers from the EU legislature to the judiciary in the field of fundamental rights.

All the same, it may be argued that subsidiarity undermines legal certainty, because it recognises a plurality of fundamental rights standards. However, in a system of multilevel governance, such as the EU, uniformity is not necessarily the ultimate goal.[964] Although fundamental rights have a universal core, their concrete implications are strongly dependent on national particularities.[965] In other words, fundamental rights function differently in this supranational setting than within a national State.[966] Whereas States are

[959] ESTELLA A. (2002): p. 6-7.
[960] RAITIO J. (2003): p. 93.
[961] MUIR E. (2014): p. 244.
[962] For a distinction between formal and substantive legal certainty, *see* AARNIO A. (1987): p. 3; RAITIO J. (2003): 341. *See also* TUORI K. (2000): p. 226, for a distinction between material principles, such as fundamental rights, and procedural principles, such as subsidiarity.
[963] *Cf.* FONTANELLI F. (2014): p. 220, 246-247; WARD A. (2014): p. 1453.
[964] CAROZZA P.G. (2003): p. 76-77.
[965] CARTABIA M. (2012): p. 274.
[966] ENGEL C. (2001): p. 158-159.

the primary guarantors of human rights under international law, the Union has its proper fundamental rights obligations under EU law.[967] Moreover, the claim that subsidiarity reduces the exercise of power to a vertical reasoning of either EU or Member State intervention may be addressed in a similar manner.[968] In line with constitutional pluralism, there is no hierarchy between the different sources of fundamental rights in Europe. Instead, loyalty and dialogue are vital for their harmonious coexistence.[969] Within the limits of its minimum and maximum level of protection, the Charter eventually unites a diversity of national fundamental rights standards through the principle of subsidiarity.

As a common standard of protection, the relevance of the Charter increases along with the competences of the Union.[970] Despite its contribution to enhanced attention to fundamental rights, it nevertheless leaves many questions unanswered. Could the Charter give rise to directly enforceable fundamental rights in horizontal relations, despite its subsidiary nature? Or does subsidiarity eventually risk neutering the effects of the Charter in favour of fundamental rights as general principles of EU law?[971] Would EU accession to the ECHR have an impact on the subsidiarity of the Charter? And is Charter subsidiarity of relevance in areas where the Union has exclusive competences? In the end, only the CJEU is likely to be able to provide further insight into these issues, through its continuous application of the Charter.

In its interpretation, the Court no longer focuses solely on *when* the Charter is applicable, but also on *how* it is to be reconciled with other standards.[972] For this purpose, the EU needs a proper fundamental rights methodology.[973] In response, it is therefore submitted that subsidiarity – as a means of striking a balance between national diversity and European unity – may constitute an interpretative tool for EU fundamental rights protection. Eventually, subsidiarity contributes to solving collisions between conflicting standards of protection.[974] Ultimately, the Charter invites the Union to take, not only fundamental rights, but also subsidiarity seriously.

[967] *Cf.* SCHLÜTTER B. (2010): p. 57-58.
[968] ESTELLA A. (2002): p. 177.
[969] SARMIENTO D. (2012): p. 344; SARMIENTO D. (2013): 1303; BENGOETXEA J. (2014): p. 150.
[970] ANDERSON D. – MURPHY C.C. (2011): p. 20; DUBOUT E. (2014a): p. 196, 211.
[971] *Cf.* WARD A. (2014): p. 1429.
[972] SARMIENTO D. (2013): p. 1302.
[973] PERNICE I. – KANITZ R. (2004): p. 8; DUBOUT E. (2014a): p. 196; MUIR E. (2014): p. 244.
[974] *Cf.* WIKLUND O. (1997): p. 357; MIETTINEN S. (2015): p. 30.