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The application of the rights and principles of the  
Charter of Fundamental Rights

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European University Institute

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## **Abstract**

The Charter of Fundamental Rights codifies and reaffirms the rights and principles recognised in European Union law. These rights and principles result from the constitutional traditions common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the case law of the Court of Justice of the European Union and that of the European Court of Human Rights. The Charter was meant to strengthen the protection of fundamental rights and principles by making them more visible. This study explores the restrictions on the applicability of the rights and principles enshrined in the Charter. Given that the most problematic questions are those regarding the application of the Charter's rights and principles by the Member States, it focuses on these questions and points out, when necessary, some other problems such as the distinction between rights and principles and their application in horizontal relations. The study also analyses the different modes and constraints of application of the Charter and interpretation of it by Member State courts. Finally, it examines whether the Charter, despite its limited scope of application, can provide national courts with new competences to apply the fundamental rights.

## **Keywords**

Charter of Fundamental Rights, judicial interactions, rights and principles, scope of application of the Charter, notion of implementation of EU law, competences of national courts, national constitutional standards, relations between EU and national law





This study explores the limitations of the application of the rights and principles enshrined in the Charter of Fundamental Rights of the EU (hereafter CFR or Charter). It is impossible to discuss here all the issues related to the application of the Charter. Given that, viewed from the perspective of judicial interactions, the most problematic questions are those regarding the application of the Charter by the Member States, the study will focus on these questions and will point out, when necessary, some other problems such as the distinction between rights and principles and their application in horizontal relations. Application of the Charter by courts of the Member States requires interpretation of the field of application of the Charter to the Member States (Article 51(1) CFR). This is a necessary first step but, of course, not the last one. Therefore, this study tries to define the scope of the obligation on the Member States to respect and apply the Charter but also to analyse the consequences of this obligation for national courts. Hence, it presents, first, the problems in the binding force of the Charter for the Member States (points II-IV) and next, the problems of its application by national courts in relation to their constitutional powers (point V). Finally, it suggests that the question of the scope of application of the Charter (regulated by Article 51(1)) should be distinguished from the question of its actual application in place of national constitutional rights and freedoms (point VI). It argues that the latter question should be answered on the basis of Article 53 CFR and its interpretation by the Court of Justice of the European Union (CJEU). Article 51(1) CFR allows a broad scope of applicability of the Charter which should not depend on the special needs of EU law to apply the Charter. Such needs may be, however, used as criteria justifying intervention by the Charter in lieu of national fundamental rights. In other cases, the Charter may operate in parallel with national fundamental rights – it may be put on standby and only step in when a national law does not guarantee an adequate level of protection or when the implementation of EU law is put in jeopardy.

## **I. Preliminary remarks\***

The Charter is about people and their rights. As is stated in its preamble, the EU places the individual at the heart of its activities and contributes to the preservation and development of common values. By strengthening the protection of fundamental rights, the Charter serves these aims. Therefore, the ultimate objective of the Charter is to put people and their rights at the centre of the integration process.<sup>1</sup> This aim should determine the rules of interpretation and application of the Charter in EU law and that of the Member States. However, while the Charter was adopted to strengthen the protection of fundamental rights of individuals in the EU, it just codifies and reaffirms the rights and principles already recognised in European Union law and makes them more visible. Moreover, the Charter does not change any EU power or extend the scope of application of European law (Article 6(1) TEU, Article 51(2) CFR).<sup>2</sup> As to the Member States, the Charter might have been seen as a superfluous legal act. All Member States have already been bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and have had their well-established fundamental rights from which the EU fundamental rights have been derived. No need to remind that rule of law and respect for human rights are the founding values of the EU common to the Member States (Article 2 TEU). Sharing these

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\* All the views and opinions of the author are strictly personal.

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<sup>1</sup> This correlates with the policies of the EU as expressed by the European Parliament: “It is only by placing the well-being of the people and the respect of their rights at the centre of the EU’s policies and decisions, that we will manage to counteract Euroscepticism”. Explanatory statement to the Report on the situation of fundamental rights in the European Union in 2017 of 13.12.2018 (2018/2103(INI)).

<sup>2</sup> For more, see, e.g., Koen Lenaerts, ‘Respect for fundamental rights as a constitutional principle of EU’ *Columbia Journal of European Law* 1(2000); Piet Eeckhout, ‘The EU Charter of Fundamental Rights and the federal question’ 39 *CMLRev* (2002), 945–994.

values is a condition of the EU membership and the Member States may be sanctioned for not keeping this commitment (Article 7 TEU). Thus, the legal and practical constraints on the Charter might have provoked questions as to its practical effectiveness. Nevertheless, more than 10 years after its entry into force as a binding legal act the Charter has proved to be a milestone in the development of the legal systems of the EU and its Member States. It has become an important part of EU and national jurisprudence – not only does the CJEU invoke its provisions and use them as a legal basis for its decisions but the same is true of national courts. This process has not been easy and hassle-free from the point of view of the constitutional identity of the Member States. It has not been possible to avoid interactions between the national constitutional orders and the Charter. These interactions may be positive in the sense of the cross-fertilisation or cross influence, resulting in establishing the common standard of protection of the fundamental rights. However, these interactions may sometimes lead to competition between the national constitutional law and the Charter.

As part of EU law with the same legal value as the Treaties, the Charter acquires the same quality, meaning that the fundamental rights enshrined in it can have direct effect and primacy over national law. In consequence, national courts not only examine the compliance of national law with EU law but also its compliance with the fundamental rights recognised in the EU system. Applying the Charter, the national judge not only adjudicates a concrete case but also faces the problems of the complicated relations between the Charter and constitutional fundamental rights; the problem of the competences of the ordinary judge versus the competences of the constitutional judge; and the issue of the division of competences between constitutional courts and the CJEU in the field of fundamental rights. These are all valid and complex problems underlining the challenging aspect of the Charter for national legal systems and national judges. However, they should not overshadow the importance and usefulness of the Charter in helping national courts to protect European and national constitutional values. The Charter, which was initially seen as a legal instrument serving the EU and making the EU fundamental rights more visible, now more than ever can protect and support the constitutional values of the Member States.

## II. Rights and principles in the Charter

It will be useful to first explain the character of the provisions in the Charter and particularly the distinction between rights and principles. As will be clarified later, this distinction is not relevant to the problem of the applicability of the Charter to the Member States as defined in Article 51(1) CFR but it introduces the main modality for judicial authorities to apply the provisions of the Charter and must always be taken into account when analysing the problem of application of the Charter.

The terminology used in the Charter to describe its content is not quite coherent. First, the preamble states that the European Union recognises the rights, freedoms and principles set out in the Charter. Then Article 51(1) provides that the EU and the Member States should respect the rights and observe the principles. Finally, Article 52(5) provides for the distinction between the rights and principles of the Charter. This distinction is introduced to find a compromise as to the justiciability of economic and social rights and is well known in national constitutional systems (yet under different names and not always as exactly the same legal concept – e.g. subjective rights, programmatic norms, constitutional principles).<sup>3</sup> The principles referred to in Article 52(5) CFR should not be confused with general principles of EU law. This last concept is developed in the case law of the CJEU and is not limited to fundamental rights (or principles) and does not impose any constraints as to the justiciability of these general principles. Therefore, the terminology used in the case law of the CJEU, particularly from the time before the entry into force of the Charter should not be relevant to interpretation of Article 52(5)

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<sup>3</sup> See, e.g., Steven Peers, Sacha Prechal ‘Article 52 – scope and Interpretation of Rights and Principles’ in Steven Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds) *The EU Charter of Fundamental Rights. A commentary*, (Hart Publishing 2014), p 1505.

CFR. Also in the present work, the terminology used in its further parts does not refer to the distinction made in Article 52(5) CFR.

From the point of view of entities applying the Charter, whether they are EU or national institutions and courts, the distinction between rights and principles directly provided in Article 52(5) will influence the way the Charter is applied. As they are part of the primary law of the EU, both rights and principles in the Charter have the qualities of direct effect and primacy over national law. However, their functioning in national and EU law is different. As is provided for in Article 52(5) CFR, the provisions of the Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union and by acts of Member States when they are implementing Union law in the exercise of their powers. They are only judicially cognisable in the interpretation of such acts and in the ruling on their legality. The effects of the principles are therefore limited in comparison to the rights. The rights contained in the Charter may be fully judicially operational – they can be invoked and enforced before courts and be a direct legal basis for judicial decisions, while the principles should be implemented by legislative or executive acts and their judicial operability is limited to the interpretation and legality of such acts. Therefore, the principles may not be a direct and autonomous basis for judicial decisions but need to be implemented by further acts and are used for the purpose of deciding on the interpretation or validity of these acts.

It is not always easy to classify a given provision in the Charter as a right or a principle. Of course, the title of a given provision in the Charter is not decisive in this respect. Moreover, the same provision may contain both rights and principles.<sup>4</sup> There are still not many directions in the case law of the CJEU about the distinction between rights and principles. The CJEU has already confirmed that Article 21 CFR prohibiting discrimination on the basis of the grounds established therein, Article 47 CFR establishing the right to effective judicial protection and Article 31(2) granting the right to paid annual leave are sufficient in themselves and do not need to be made more specific by provisions in EU or national law to confer on individuals these rights.<sup>5</sup> Therefore, we may state that these provisions contain rights and not principles in the meaning of article 52(5) CFR.

The application of both rights and principles of the Charter often requires courts to balance the interests which they represent and to find the right equilibrium between them using the proportionality rule and taking into account indications that may be derived from legal acts of the EU where such balancing might have already been done. The CJEU has confirmed that such balancing of rights has no effect on the possibility of relying on the rights in question before a court.<sup>6</sup>

### **III. Question of interpretation of Article 51(1) of the Charter**

Before the Charter entered into force, the fundamental rights were already recognised in the Treaties and the case law of the CJEU. There was no doubt that they apply to the EC (and later EU). As to their application towards the Member States, there have been two basic groups of case-law of the CJEU on application of the fundamental rights – the *Wachauf* line and the *ERT* line. The first group – with the name taken from the judgment in the *Wachauf* case of 1989<sup>7</sup> – comprises situations where Member States “act as agents” of the EU, i.e. when they implement EU law even using their discretionary power.

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<sup>4</sup> As the explanations of the Charter say, examples of principles include Articles 25 (rights of the elderly), 26 (rights of persons with disabilities) and 37 (environmental protection) and provisions which contain both elements of a right and of a principle, e.g. Articles 23 (equality between women and men), 33 (right to family and professional life) and 34 (social security and social assistance).

<sup>5</sup> Cases C-414/16 *Vera Egenberger* ECLI:EU:C:2018:257, par 78; C-243/19, *A v Veselības ministrija*, ECLI:EU:C:2020:872, par 36, C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer* ECLI:EU:C:2018:871, par 87.

<sup>6</sup> C-414/16 *Vera Egenberger* ECLI:EU:C:2018:257, par 80.

<sup>7</sup> Cases 5/88 *Wachauf* ECLI:EU:C:1989:321; C-2/92 *Bostock* ECLI:EU:C:1994:116.

In these situations Member States act as the executive power of the EU.<sup>8</sup> The second group is the line originating from the *ERT* judgment of 1991, in which CJEU held that Member States must observe fundamental rights also when they act within the exceptions from market freedoms authorised by the EU (situations of derogation).<sup>9</sup>

Some approaches distinguished one more group, encompassing situations other than implementation or derogation, yet falling within the scope of EU law. These are situations where there exists some other link to EU law which is different from direct implementation or derogations.<sup>10</sup> In other words, these are situations which – for some other reason – as it was put in *Seda Küçükdeveci* judgment “fall within the scope of European Union law”.<sup>11</sup> In this case such link was the directive regulating the situation in question, which had not been implemented by the Member State despite the expiry of the time limit for its implementation and which could not have been applied directly in the horizontal situations.<sup>12</sup>

However, the question of the Member States being bound to observe EU fundamental rights was addressed relatively rarely in the CJEU jurisprudence prior to the Treaty of Lisbon. The situation changed with the Treaty of Lisbon granting the Charter the status equal to the Treaties (Article 6(1) TEU). Article 51(1) CFR stating that the provisions of the Charter are addressed to the Member States “only when they are implementing Union law” stirred controversies and disputes from the very beginning.<sup>13</sup> Various suggestions as to the interpretation of Article 51(1) CFR attempting to dispel the doubts have been formulated in opinions of Advocates General as well as in the doctrine.<sup>14</sup> One of the first was that of Advocate General E. Sharpston in her opinion in *Zambrano* case. She held that the fundamental rights of the EU should always find application wherever the EU has a competence regardless of whether it has been exercised, because granting a competence by the Member States to the EU entails transferring the responsibility for the protection of fundamental rights.<sup>15</sup>

Advocate General Cruz Villalon presented a different suggestion in his opinion in the *Åkerberg Fransson* case. In his view, it should fall for the CJEU to decide whether there exists a specific interest of the EU in taking over protection of fundamental rights, i.e. whether the link between the case and EU

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<sup>8</sup> See Joseph H.H Weiler, Nicolas J.S. Lockhart ‘Taking rights seriously’ seriously: The European Court and its fundamental rights jurisprudence – part I’ 32 CMLRev (1995) 51–94.

<sup>9</sup> Cases C-260/89 *ERT* ECLI:EU:C:1991:254; C-368/95 *Familiapress* ECLI:EU:C:1997:325.

<sup>10</sup> See opinion of Advocate General E. Sharpston of 22 May 2008 in case C-427/06 *Birgit Bartsch*, par 69. See also Xavier Groussot, Laurent Pech, Gunnar T. Petursson, ‘The Scope of Application of EU Fundamental Rights on Member States’ Action: In Search of Certainty in EU Adjudication’ *Eric Stein Working Paper* 1 (2011).

<sup>11</sup> Case C-555/07 *Seda Küçükdeveci* ECLI:EU:C:2010:21, par 23.

<sup>12</sup> *Ibidem*, par 25.

<sup>13</sup> The matters were made even worse by the inconsistency of terms used in different language versions, e.g. English: *implementing*, French: *mettent en œuvre*, German: *Durchführung*, Spanish: *apliquen* which could be translated as enforcement, enactment, application or implementation of EU law. Additionally, these terms could be understood differently in the given legal systems.

<sup>14</sup> See e.g. Allard Knook, ‘The Court, The Charter, And The Vertical Division Of Powers In The European Union’ 42 CMLRev (2005), 367-398; Koen Lenaerts ‘The Court of Justice of the European Union and the Protection of Fundamental Rights’ *Polish Yearbook of International Law* 31 (2011), p 79-106; Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ *European Constitutional Law Review*, 3 (2012) p 375-403; Marek Safjan ‘Areas of Application of the Charter of Fundamental Rights of the European Union: Fields Of Conflict?’ *EUI Working Papers LAW* 22 (2012); Alan Rosas, ‘When is the EU Charter of Fundamental Rights applicable at national level?’ *Jurisprudence* 19(4) (2012) p 1269–1288; Bas van Bockel, Peter Wattel, ‘New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson’ *European Law Review* 6 (2013) p 866; Koen Lenaerts, ‘Trybunał Sprawiedliwości Unii Europejskiej a ochrona praw podstawowych’ *Europejski Przegląd Sądowy* 1(2013) p 4: See also Nina Pótorak ‘Zakres związania państw członkowskich Kartą Praw Podstawowych UE’ *Europejski Przegląd Sądowy* 9(2014) p. 17-28, where several theses developed in this article have been formulated.

<sup>15</sup> Opinion of Advocate General Sharpston in case C-34/09 *Gerardo Ruiz Zambrano* ECLI:EU:C:2010:560, par 163. It states also that the AG did not believe her proposal is very likely to be adopted at the present stage of EU law development without the intervention of the EU legislator, par 171-177.

law is sufficiently strong and not merely marginal.<sup>16</sup> He suggested introducing an additional criterion that “the presence of EU law in a given situation” should be “sufficiently strong”. Only then will the EU acquire a specific interest in the assumption of responsibility for guaranteeing fundamental rights by the Member States.

Another contribution was the suggestion so-called *reverse Solange*, formulated in 2012.<sup>17</sup> The authors suggested that the application of the Charter should go beyond the scope of EU law when a Member State systematically and seriously infringes the essence of fundamental rights. The competence of the EU to intervene under the Charter would stem from the essence of the EU citizenship, since the citizens are entitled to have their fundamental rights protected in every aspect. The suggestion was dubbed *reverse Solange*, which could be understood to mean that as long as the Member States observe the essence of fundamental rights, they remain free to apply their own fundamental rights. If, however, they seriously infringe these rights, Charter comes into play, even in situations falling outside the scope of Union law.

None of the suggestions presented above was approved in the case-law of the CJEU. For two of them the reason might have been that they advocated for extending the scope of application of fundamental rights beyond EU law, thus for the federalization effect of the Charter which was one of the obstacles to giving the Charter a binding force.<sup>18</sup> Such interpretation would be also disputable in the light of the current guarantees provided for in the Treaties and the Charter itself, whose aim was to counteract the expansion of EU competences (Article 6(1) point 2 TEU; Article 51(2) CFR).

The Court formulated the first systemic interpretation of Article 51(1) CFR in its judgment of 2013 in the *Åkerberg Fransson* case.<sup>19</sup> The question asked by a Swedish court in this case was about the interpretation of the *ne bis in idem* principle regarding the admissibility of imposing both a criminal and administrative penalty for the infringement of tax provisions. The main problem occurring in this case was about the possibility of applying the Charter to the actions of the Member States which were not aimed directly at fulfilling obligations imposed by the EU. In its judgement, the CJEU holds that Article 51(1) CFR means that the Member States are bound by the Charter when they act within the scope of EU law application, so when national provisions fall within the scope of EU law. The CJEU adds that there cannot exist situations which are covered by EU law without the Charter being applicable.<sup>20</sup>

This judgment has been widely commented on in legal works<sup>21</sup> and national case law.<sup>22</sup> It explains the interpretation of Article 51(1) CFR but it does not give a ready-to-use pattern suitable for every case. After the *Åkerberg Fransson* judgment it is clear that “the Charter does not grant ‘free-standing’ fundamental rights – that is, rights that have no point of attachment to what lies within the competence

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<sup>16</sup> Opinion of Advocate General Cruz Villalon in case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2012:340, par 27.

<sup>17</sup> Armin von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, Maja Smrkolj ‘Reverse Solange: Protecting the essence of fundamental rights against EU Member States’ 49 CMLRev (2012), 489-520.

<sup>18</sup> The federalizing effect would be that the CFR could be applied regardless of whether the matter falls within the competence of the EU, and therefore also outside the scope of EU law. See more Koen Lenaerts, *supra* note 2, p. 23-24; Piet Eeckhout, *supra* note 2; Groussot, Pech, Petursson, *supra* note 10, p 16.

<sup>19</sup> Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105.

<sup>20</sup> Case C-617/10 *Åkerberg Fransson*, par 21.

<sup>21</sup> See, e.g. Daniel Sarmiento, ‘Who’s afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe’ 50 CMLRev (2013), 1267–1304; Michael Dougan ‘Judicial review of Member State action under the general principles and the Charter: Defining the ‘scope of Union law’ 52 CMLRev (2015), 1201–1245.

<sup>22</sup> In its judgment of 24 April 2013 the German Bundesverfassungsgericht held that the *Åkerberg Fransson* judgment must be interpreted as referring to the specific case of VAT regulations, since if it were to have a larger scope it would have to be regarded as issued *ultra vires* and thus infringing the constitutional identity of the Member States, Decision of 24 April 2013, 1 BvR 1215/07. <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-031en.html>. This decision was also invoked by the UK Supreme Court, [2014] UKSC 3 of 22 January 2014.

of the Union.”<sup>23</sup> What comes from *Åkerberg Fransson* and has been confirmed by further case law is that citizenship of the EU may not be regarded in itself as justifying application of the Charter towards individuals. In other words, there must be some EU provision concretising the rights stemming from citizenship for a case to be considered to fall within the scope of the Charter.<sup>24</sup> Neither is EU citizenship in itself a link sufficient to justify application of the Charter and nor does the Charter extend the rights granted to EU citizens. The question remains, however, of what this point of attachment (link) enabling a national court to conclude that a given case falls within the scope of application of the Charter could be.

#### **IV. The field of application of the Charter to the Member States (an attempt at systematisation)**

On the basis of the case law of the CJEU it is possible to list a few groups of situations which fall under the terms of implementation of EU law as provided for in Article 51(1) CFR.<sup>25</sup>

##### ***1. Direct implementation of EU law***

First is the situation when Member States directly implement EU law, which may be called acting ‘as agents’ or as the executive power of the EU.<sup>26</sup> It is reflected in the first criterion usually checked by the CJEU when deciding on the applicability of the Charter, which is whether the national legislation in question aims to implement provisions of EU law.<sup>27</sup> This happens in cases such as those governed by directly effective EU legislation (most of all by the Treaties or regulations<sup>28</sup>) or governed by national provisions directly implementing EU law (mainly directives).<sup>29</sup> In most of these cases, the principles of primacy and direct effect of EU law come into play, which might be a simple indication for the national court that the Charter is also applicable.

The question of the applicability of the Charter does not depend on whether a Member State uses its discretionary power when implementing EU law (however, this criterion may be of importance when the CFR overlaps with a constitutional standard what will be analysed further on). Such a conclusion may already be drawn from the *ERT* case and has been confirmed in later case law.<sup>30</sup>

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<sup>23</sup> As Advocate General Sharpston has put it in her opinion in case C-456/12 *O. v Minister voor Immigratie* ECLI:EU:C:2013:837, par 60.

<sup>24</sup> Contrary to what was proposed in *revers Solange*, Von Bogdandy and others *supra* note 17.

<sup>25</sup> There might be many possible systematisations, e.g. Advocate General Bobek lists three groups: direct application, indirect application and derogations, opinion in C-298/16 *Ispas*, ECLI:EU:C:2017:650, par 32. See also e.g. N. Lazzarini, *ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter, Module 1 – The EU Charter of Fundamental Rights: Scope of Application, Relationship with The ECHR and National Standards, Effects*, <https://cjc.eui.eu/wp-content/uploads/2019/03/D1.1.a-Module-1.pdf>

<sup>26</sup> Cases 5/88 *Wachauf* ECLI:EU:C:1989:321; C-2/92 *Bostock* ECLI:EU:C:1994:116. For more, see Weiler, Lockhart *supra* note 8.

<sup>27</sup> E.g. case C-265/13 *Emiliano Torralbo Marcos* ECLI:EU:C:2014:18, par 30.

<sup>28</sup> E.g. case C-559/14 *Meroni* ECLI:EU:C:2016:349, par 44.

<sup>29</sup> E.g. case C-528/13 *Geoffrey Léger* ECLI:EU:C:2015:288, pars 46-47 and C-418/11 *Texdata Software GmbH* ECLI:EU:C:2013:588.

<sup>30</sup> Cases C-260/89 *ERT* ECLI:EU:C:1991:254; C-411/10 and C-493/10 *N.S.* ECLI:EU:C:2011:865, par 68; C-276/12 *Jiří Sabou* ECLI:EU:C:2013:678 par 25-26; C-329/13 *Ferdinand Stefan* ECLI:EU:C:2014:815, par 34; C-258/14 *Eugenia Florescu and others* ECLI:EU:C:2017:448, par 48. See also the opinion of Advocate General Mengozzi in C-638/16 *PPU X and X v État belge* ECLI:EU:C:2017:93, par 81-83.

## **2. Indirect implementation of EU law**

A second group covers situations when the case is governed by national provisions which are not aimed at the implementation of EU law but which affect EU law (we may call this situation an indirect implementation of EU law).<sup>31</sup> That was the situation in the *Åkerberg Fransson* case where EU law provided only general and not specified obligations of the Member States and the national provisions on the sanctions were not directed at implementation of EU law but they were used also in cases concerning EU tax rules. That was also the case in *Berlioz* judgment where a national provision regulating sanctions for refusing information and not aimed to transpose a directive was treated as implementation of EU law since the application of that national provision was “intended to ensure that of the directive.”<sup>32</sup> In the *Delvigne* case, the CJEU decided that the Member State must be considered to have been implementing EU law when adopting general provisions on the right to vote if it influenced the right to vote in elections to the European Parliament.<sup>33</sup> In these cases the general obligations of the Member States stemming from EU law could be affected by the application of the national provisions in question.

However, the mere fact that a national measure comes within an area of the competences of the EU is not enough to bring the case within the scope of EU law.<sup>34</sup> EU competence should be executed, so there should be EU rules (not necessarily a legislative act, but a rule coming from EU legal acts or from the case law of the CJEU) which imply an obligation on the Member State and within which the national measure falls. Moreover, indirect interference between national and EU law is not always sufficient as the concept of implementation of EU law requires “a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.”<sup>35</sup> This degree of connection should be determined on a case by case basis using the criteria formulated by the CJEU such as: whether the given national legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and whether there are specific rules in EU law on the matter or capable of affecting it.<sup>36</sup> It seems, therefore, that if the national law is not intended to implement EU law and it serves objectives other than that of EU law, in order to qualify that national law as being in the scope of the Charter there must be a particular EU rule imposing an obligation on the Member State and in consequence concerning or affecting the issue regulated by the national law (such as the VAT directive and Article 325 TFEU in the *Åkerberg Fransson* case).

This indirect implementation group also comprises procedural measures adopted by the Member States within their procedural autonomy but which may affect the effective enforcement of EU law. In the *DEB* case, Article 47 CFR was applied to verify national provisions concerning legal aid in compensation claims, although EU law does not regulate the question of legal aid in such claims.<sup>37</sup> Similarly, in the *Stojanow* case the CJEU held that the question of jurisdiction of courts which adjudicate on agricultural subsidy issues falls under the Charter.<sup>38</sup>

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<sup>31</sup> Case C-40/11 *Y. Iida* ECLI:EU:C:2012:691, par 79. See also C-206/13 *Cruciano Siragusa* ECLI:EU:C:2014:126, par 25.

<sup>32</sup> Case C-682/15 *Berlioz Investment Fund* ECLI:EU:C:2017:373, par 40.

<sup>33</sup> Case C-650/13 *Delvigne* EU:C:2015:648, par 24-34. According to EU law, the electoral procedure is to be governed in each Member State by its national provisions. However, when exercising that competence, the Member States are bound by EU law in order to ensure that the members of the European Parliament are elected by direct universal suffrage in a free and secret ballot.

<sup>34</sup> E.g. case C-198/13 *Víctor Manuel Julian Hernández* ECLI:EU:C:2014:2055, par 36.

<sup>35</sup> Case C-206/13 *Cruciano Siragusa*, par 24.

<sup>36</sup> *Ibidem*, par 25.

<sup>37</sup> Case C-279/09 *DEB* ECLI:EU:C:2010:811; See also C-199/11 *Otis* ECLI:EU:C:2012:684, par 45.

<sup>38</sup> Case C-93/12 *Velko Stojanov* ECLI:EU:C:2013:432.

The indirect implementation of EU law category also includes cases where EU legislation exists but cannot be directly applicable at the national level because of the constraints of the doctrine of the direct effect of EU law especially in relation to the directives. That can be illustrated by the judgments concerning the applicability of the EU fundamental rights as recognised before the Charter - *Mangold*<sup>39</sup> and *Seda Küçükdeveci*<sup>40</sup> cases in which, although the EU directive couldn't have been directly effective due to the nature of the litigation (between private parties and in *Mangold* case - due to non-expiration of the period for transposing the directive), the CJEU examined whether the national provisions – falling within the scope of provisions of the directive – were compliant with fundamental rights. Similarly, in *Navarro* case, the CJEU held that the provisions of the directive on a guarantee fund were not directly effective because the case concerned the time before the expiry of deadline for implementation of the directive, but once the directive entered into force, national provisions on guarantee funds fell within the scope of EU law and therefore had to be compliant with fundamental rights.<sup>41</sup> It can be inferred from the case law of the CJEU that fundamental rights (at least non-discrimination) can be relied on in cases in which a directive itself might not be applied. It is because the sheer existence of a directive regulating the same matters as the relevant national legislation is a link with EU law, which triggers the application of the fundamental rights.<sup>42</sup> However, the subsequent case law explains that what should be actually taken into account in such situations is the existence of national provisions regulating the same issues as the directive and which might undermine the effectiveness of the directive after the transposition deadline.<sup>43</sup>

That leads us to the problem of the applicability of the Charter in horizontal situations. The CJEU has stated that the Charter may be applicable in relations between private parties.<sup>44</sup> This does not mean, however, that the Charter may be always invoked in a horizontal relation in order to disapply a national provision. Here, the CJEU has indicated that it depends on the character of the provision of the Charter. If the provision in the Charter is sufficient in itself to confer on individuals a right which they may rely on as such, it may be invoked in horizontal relations in order to disapply national provisions.<sup>45</sup> If the Charter provision does not suffice to confer on individuals a right and it needs more specific expression in EU directive, it cannot be invoked in a dispute between individuals in order to disapply the national provision. These statements are probably based on the premise that in the case of the Charter provisions which need to be implemented with a directive, it is in fact the directive which would be applied in horizontal relations, and this is not permitted by EU law. In the case of a Charter provision being a directly applicable general principle of EU law (e.g. the non-discrimination principle), it is this provision that is applied in a horizontal relation, so there is no back door for the horizontal effect of directives.

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<sup>39</sup> Case C-144/04 *Werner Mangold* ECLI:EU:C:2005:709, par 78.

<sup>40</sup> Case C-555/07 *Seda Küçükdeveci*.

<sup>41</sup> Case C-246/06 *Josefa Velasco Navarro* ECLI:EU:C:2008:19, par 32.

<sup>42</sup> Case C-555/07 *Seda Küçükdeveci*, case C-144/04 *Werner Mangold* ECLI:EU:C:2005:709, par 78, case C-246/06 *Josefa Velasco Navarro* ECLI:EU:C:2008:19, par 32.

<sup>43</sup> Case C-427/06 *Birgit Bartsch* ECLI:EU:C:2008:517, par 24. See also case C-147/08 *Jürgen Römer* ECLI:EU:C:2011:286, par 61-64. See the opinion of Advocate General E. Sharpston of 22 May 2008 in case C-427/06 *Birgit Bartsch*, par 69. See Groussot, Pech, Petursson, *supra* note 10.

<sup>44</sup> Case C-414/16 *Vera Egenberger* ECLI:EU:C:2018:257, par 82. On the horizontal effect of the Charter, see, e.g., Marek Safjan 'The Horizontal Effect of Fundamental Rights in Private Law-On Actors, Vectors, and Factors of Influence' in Kai Purnhagen, Peter Rott (eds) *Varieties of European Economic Law and Regulation. Studies in European Economic Law and Regulation*, vol 3. Springer; Eleni Frantziou 'Mangold Recast? The CJEU's Flirtation with Drittwirkung in Egenberger' *European Law Blog*, 24 April 2018; Eleni Frantziou 'Joined cases C-569/16 and C-570/16 Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable' *European Law Blog*, 19 November 2018, [www.europeanlawblog.eu](http://www.europeanlawblog.eu); Aurelia Colombi Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights, CJEU 17 April 2018, Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V* and CJEU 11 September 2018, Case C-68/17, *IR v JQ*' *European Constitutional Law Review*, 15: 294–305, 2019.

<sup>45</sup> Cases C-414/16 *Vera Egenberger*, par 76-78 and C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2, par 47.



As to the problem of the relation between Article 51(1) CFR and the horizontal direct effect of the Charter, it should be stated that the provision in question does not address the question of whether individuals might be directly bound by the Charter and it cannot be interpreted as systematically precluding such a possibility. If the Charter provision is sufficient in itself to confer rights on individuals, meaning that it is both mandatory and unconditional in nature, it may be relied on in disputes between individuals in a field covered by EU law and therefore falling within the scope of the Charter.<sup>46</sup> This means that Article 51(1) CFR does not govern the question of the application of the Charter in disputes between individuals and that this question should instead be answered on the basis of the established case law of the CJEU on the horizontal effect of primary EU law.<sup>47</sup> Thus, the Charter's provisions may be horizontally applicable in the fields covered by EU law and therefore falling within the scope of the Charter, which is a criterion different from implementation of EU law used in Article 51(1) CFR.

From this reasoning, it also results that the distinction between rights and principles introduced in Article 52(5) of the Charter, which may be of relevance to the question of the horizontal application of the Charter, should not be relevant for the analysis of the scope of application of the Charter as defined in Article 51(1). Not only is the question of the horizontal application of the Charter distinct from the question of its scope of application towards Member States but also the character of the Charter's provisions (i.e. being a right or principle) should not be a factor taken into account when analysing the problem of the applicability of the Charter to the Member States. However, even when the case before a national judge falls under the implementation of EU law and therefore Charter is applicable, Article 52(5) CFR may still limit the actual application of the Charter's principle. This shows the complexity of the process of application of the Charter by a national judge, as well as how many different but overlapping questions it provokes.

The next subcategory in this indirect implementation of EU law group concerns national measures which limit the freedoms of the internal market (situations of derogation).<sup>48</sup> In its judgment in the *Pfleger* case, the CJEU answered the question of whether the Charter should apply when a Member State introduces regulations providing criminal penalties for organising games of chance without a licence.<sup>49</sup> It applied the *ERT* line of case law and concluded that where a Member State relies on public interest requirements in order to justify national restrictions on the freedoms of the internal market it must be subject to examination in the light of the rights guaranteed by the Charter. In consequence, "(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 must, therefore, be regarded (...) as 'implementing Union law' within the meaning of Article 51(1) of the Charter."<sup>50</sup> It should be added, that in situations of derogation, the question is often whether a given national law falls within the category of rules limiting the freedoms of the internal market.<sup>51</sup> Thus, the question of the applicability of the Charter in situations of derogation has been answered by the CJEU on the basis of the *ERT* case law but the underlying analysis concerned the scope of EU law itself (i.e. whether the EU law covers the national derogating regulations).

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<sup>46</sup> Such arguments have been used by the CJEU in order to declare the right to paid annual leave as expressed in Article 31(2) CFR to be horizontally effective, case C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer* ECLI:EU:C:2018:871, par 87, 79-92.

<sup>47</sup> See *ibidem*, par 88.

<sup>48</sup> Cases C-260/89 *ERT* ECLI:EU:C:1991:254; C-368/95 *Familiapress* ECLI:EU:C:1997:325.

<sup>49</sup> Case C-390/12 *Robert Pfleger* ECLI:EU:C:2014:281. See also cases C-201/15 *AGET Iraklis* EU:C:2016:972, pars 63 -64; C-235/17 *European Commission v Hungary* EU:C:2019:432, pars 64-65; C-78/18 *European Commission v Hungary* ECLI:EU:C:2020:476 pars 101-104.

<sup>50</sup> C-390/12 *Robert Pfleger* ECLI:EU:C:2014:281, par 36.

<sup>51</sup> See, e.g., case C-483/12 *Pelckmans Turnhout NV* ECLI:EU:C:2014:304, par 25; case C-122/15 *C* ECLI:EU:C:2016:391, par 29 and the opinion of Avocate General Kokkot ECLI:EU:C:2016:65, par 66-67; case C-235/17 *European Commission v Hungary* ECLI:EU:C:2019:432, par 65.

Concluding this part of the analysis, it might be said that any obligation to enforce EU law by a Member State could be a link enabling applicability of the Charter. This comprises situations where national legislation affects enforcement of an obligation coming from EU law (it either serves or jeopardises the enforcement of EU law), even if it is not aimed at its implementation. This may include: national procedural provisions established within the procedural autonomy of Member States but falling under the requirement of the effectiveness of EU law; national law falling within the scope of EU provisions lacking direct effect but enforcement of which might be put into question by this national law; and national provisions limiting the basic freedoms of the internal market. It follows then that the Charter may cover not only situations where a Member State acts under the principles of primacy and direct effect but also under the principle of effectiveness of EU law.<sup>52</sup>

### **3. The given case falls under EU law**

For the Charter to be applicable it is not enough for a national provision to fall within the scope of EU law but this provision must also be applicable in the given case before the national judge.<sup>53</sup> This approach was confirmed by the judgment in the *Iida* case, which although it concerned national provisions directly implementing EU regulations it was treated as not falling under the Charter because the facts of this particular case remained outside the scope of EU law.<sup>54</sup> In the *Mohamed Daouidi* case CJEU stated that since the question of the application of EU law in this case had to be established by the referring court following a previous judgment of the CJEU, at that stage in the proceedings it was not determined that the situation of the applicant in the national proceedings came within the scope of EU law.<sup>55</sup> The CJEU did not find the Charter applicable in a case concerning court fees when, contrary to the *DEB* case mentioned above, the litigation before the national court did not concern a matter regulated by EU law.<sup>56</sup> Also when a case before a national court concerned the execution of a judgment ordering compensation by the State for the excessive length of legal proceedings referring to a bankruptcy, the CJEU decided that there was nothing indicating that the dispute before the national court related to the interpretation or application of a rule of EU law other than the Charter itself.<sup>57</sup> The Charter will not be applicable even if the domestic provisions applied by the national court form part of a regulation transposing an EU directive but these provisions do not implement a specific obligation with regard to the situation at issue in the proceeding before the national court.<sup>58</sup>

The above does not mean that the Charter does not apply in the cases of an “abstract review” of national provisions which implement the EU law if this abstract verification is necessary for the national court in order to issue a decision in a given case.<sup>59</sup>

### **4. The scope of EU law**

As has already been pointed out with respect to situations of derogation, interpretation of the concept of implementation of EU law may also be problematic because of difficulties in defining the scope of EU law as such. This can be illustrated by different views of the scope of regulation of the EU Visa Code

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<sup>52</sup> See van Bockel, Wattel, *supra* note 14, p 878.

<sup>53</sup> E.g. cases C-258/13 *Sociedade Agrícola e Imobiliária da Quinta de S. Paio Lda* ECLI:EU:C:2013:810, par 23; C-56/13 *Érsekcsanádi Mezőgazdasági* ECLI:EU:C:2014:352, par 54-57.

<sup>54</sup> Case C-40/11 *Y. Iida*, par 80.

<sup>55</sup> Case C-395/15 *Mohamed Daouidi* ECLI:EU:C:2016:917, par 60-68.

<sup>56</sup> Case C-265/13 *Emiliano Torralbo Marcos* ECLI:EU:C:2014:187.

<sup>57</sup> Case C-177/17 and C-178/17 *Demarchi Gino Sas* ECLI:EU:C:2017:656, par 28.

<sup>58</sup> Case C-32/20 *TJ* ECLI:EU:C:2020:441, par 27

<sup>59</sup> See also opinion of Advocate General Bobek in cases C-83/19, C-127/19 and C-195/19 *Asociația ‘Forumul Judecătorilor din România’* ECLI:EU:C:2020:746, pars 200-202.

presented by the Advocate General and the CJEU acting in the Grand Chamber. According to the Advocate General, when applying the Visa Code a Member State acts within the scope of EU law, but for the CJEU the national authorities were wrong to qualify the factual situation as being within the scope of the Visa Code and to decide on the request for a visa. In consequence, such a situation is outside of the scope of EU law and so it is not subject to the Charter.<sup>60</sup>

This was also the problem in many cases decided after *Åkerberg Fransson*. The CJEU has rejected application of the Charter in cases remaining clearly outside the scope of EU law, such as concerning immunity from a suit enjoyed by Germany in Italian courts in cases concerning compensation for its actions during WWII<sup>61</sup> and the pensions of former functionaries of Polish *ancien régime* security services.<sup>62</sup> However, there have also been less obvious cases, such as *Banco Português de Negócios*, in which the CJEU decided that national measures on salary reductions in a nationalised bank introduced in order to fulfil the obligations under the Stability and Growth Pact did not fall under EU law,<sup>63</sup> and in the *Montull* case, in which the CJEU held that since no provision of EU law precluded discrimination between adoptive and biological fathers as to the parental leave, the case remained outside the scope of EU law.<sup>64</sup> In the *Dano* case, the CJEU analysed first whether the Member State acted in compliance with an EU directive by excluding entitlement to certain social benefits and then declared that the Member States had competence to determine the conditions for granting these benefits. Therefore, when exercising this competence, they were not implementing EU law.<sup>65</sup> Similarly in *DK* case, the CJEU stated that the situation to which the question of the national court referred was not covered by a directive, therefore the Charter could not be applied in this situation.<sup>66</sup>

A new chapter in the problem of defining the scope of EU law concerns the question of whether and to what extent the independence and organisation of a national judiciary is subject to EU law. This new chapter was opened by the judgment of the CJEU in the *Associação Sindical dos Juizes Portugueses* case concerning the interpretation of Article 19(1) TEU in the context of the principle of judicial independence. The basic question coming out from the preliminary reference by the Portuguese Supremo Tribunal Administrativo was whether EU law (Article 19 TEU and Article 47 CFR) might apply to the principle of judicial independence of a national court, the Tribunal de Contas.<sup>67</sup> Answering that question, first, the CJEU indicated that Article 19(1) TEU related to “the fields covered by Union law,” irrespective of whether the Member State was implementing EU law within the meaning of Article 51(1) CFR. Second, the CJEU stated that to the extent that the Tribunal de Contas might have ruled on questions concerning the application or interpretation of EU law, the Member State had to ensure that that court met the requirements necessary for effective judicial protection in accordance with Article 19(1) TEU. In this respect, it was essential to guarantee independence of the national court as required in Article 47 CFR. Finally, the CJEU did not base its decision on the Charter but on interpretation of Article 19 TEU. Therefore, it treated Article 19 TEU as justification for the application of the Charter to establish the standard of judicial protection as required by this provision, but not as an argument that when Article 19 TEU can be applicable to national law, it constitutes the implementation of EU law in the meaning of Article 51(1) CFR

Deciding a case concerning an infringement procedure against Poland due to violations of the principle of judicial independence regarding the judges of the Supreme Court, the CJEU confirmed the

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<sup>60</sup> Case C-638/16 PPU *X and X v État belge* ECLI:EU:C:2017:173.

<sup>61</sup> Case C-466/11 *Gennaro Currà*. ECLI:EU:C:2012:465.

<sup>62</sup> Case C-28/14 *Ryszard Pańczyk* ECLI:EU:C:2014:2003.

<sup>63</sup> Case C-128/12 *BPN - Banco Português de Negócios SA* ECLI:EU:C:2013:149.

<sup>64</sup> Case C-5/12 *Marc Betriu Montull* ECLI:EU:C:2013:571, pars 67, 73.

<sup>65</sup> Case C-333/13 *Dano* ECLI:EU:C:2014:2358, pars 88-92.

<sup>66</sup> Case C-653/19 PPU *DK* ECLI:EU:C:2019:1024, pars 40-42.

<sup>67</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, pars 29 -30, 40-41.

reasoning applied in the *Associação Sindical dos Juízes Portugueses* case and explained that this judgment was based on Article 19(1) TEU because the national court in question could rule on questions concerning the application or interpretation of EU law.<sup>68</sup> This logic was also applied to several preliminary references addressed by Polish courts to the CJEU concerning reform of the national judiciary. The courts asked whether Article 19(1) TEU in connection with Article 47 CFR allowed changes to the retirement age of the judges of the Supreme Court and to the nomination process of the judges, together with new rules on disciplinary proceedings. The underlying argument in these references was that the courts of the Member State deciding cases with elements of EU law are European courts bound by Article 19(1) TEU.<sup>69</sup> Deciding on a few of these referrals, the CJEU did not rely on the Charter but confirmed once more that Article 19(1) TEU applied if the national court could rule on questions concerning the application or interpretation of EU law and therefore falling within the fields covered by EU law. Hence, application of Article 19(1) TEU requires verification of whether Member States provide remedies that are sufficient to ensure effective legal protection within the meaning of Article 47 CFR.<sup>70</sup>

Some conclusions may be drawn from this CJEU case law. First, national court cases concerning EU law fall under the implementation of EU law in the meaning of Article 51(1) CFR and consequently Article 47 CFR regulates the standard of these court proceedings (e.g. in the *DEB*, *Stojanov* and *AK* cases<sup>71</sup>). In such cases, analysis of national remedies on the basis of Article 47 CFR makes an analysis of Article 19(1) TEU redundant because it can only reinforce the conclusion already set out on the basis of the Charter.<sup>72</sup> Second, when national court cases do not concern EU law, a possible but unlikely impact of these cases on the effectiveness of EU law is not sufficient to fulfil the conditions of Article 51(1) CFR (as, e.g., in the *Demarchi Gino* case<sup>73</sup>). Nevertheless, Article 47 CFR may still be applicable in those cases which do not qualify as implementation of EU law but which fall within fields covered by EU law within the meaning of Article 19(1) TEU. Then, this provision is applied as a rule being a part of Article 19 TEU and serving its interpretation, as it defines the standard of effective legal protection which has to be ensured by the Member States in the fields covered by EU law.<sup>74</sup>

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<sup>68</sup> See Case C-619/18 *European Commission v Poland* ECLI:EU:C:2019:531, par 50 - 54.

<sup>69</sup> As stated by Advocate General Bobek, any transversal structural changes to the national judiciary will by definition be applicable to any and all functions exercised by national judges, case C-556/17 *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* ECLI:EU:C:2019:339, par 54.

<sup>70</sup> Cases C-585/18, C-624/18 and C-625/18 *AK and others* ECLI:EU:C:2019:982, par 82-86; C-558/18 and C-563/18, *Miasto Lowicz and Prokurator Generalny*, EU:C:2020:234, par 34.

<sup>71</sup> Cases C-279/09 *DEB* ECLI:EU:C:2010:811; C-93/12 *Velko Stoyanov* ECLI:EU:C:2013:432; C-585/18, C-624/18 and C-625/18 *AK and others* par 78-81.

<sup>72</sup> Case C-585/18, C-624/18 and C-625/18 *AK and others* par 168-169. The same logic seems to be behind the reasoning of the CJEU in cases C-354/20PPU and C-412/20PPU L and P, ECLI:EU:C:2020:1033, where it analysed only Article 47 CFR even if the national court referred also to Article 19 TUE; as the cases concerned European Arrest Warrant, it was oblivious that Article 47 was applicable.

<sup>73</sup> Case C-177/17 and C-178/17 *Demarchi Gino Sas* ECLI:EU:C:2017:656. See also case C-256/19 *S.A.D. Maler und Anstreicher OG* ECLI:EU:C:2020:523, par 33-34.

<sup>74</sup> Case C-585/18, C-624/18 and C-625/18 *AK and others* par 168. See also opinion of Advocate General Hogan in case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2020:1055, par 42-47.

## **V. Application of the Charter and application of the constitutional standards of the Member States**

### ***1. Competences of national judges deriving from the Charter***

Defining the scope of application of the Charter is the first problem, and of course it is followed by others such as: how the Charter interacts with constitutional basic rights and the constitutional identity of the Member States; whether the Charter precludes application of the national standard of fundamental rights protection; which standard prevails in the case of conflict and who decides this; and finally whether the Charter is useful or needed by the courts of the Member States if they already have their established fundamental constitutional rights.

By making the fundamental rights recognised by the EU more visible and more convenient to use in practice, the Charter encouraged national judges to rely on EU fundamental rights. It can be stated with some simplification that just as the *van Gend en Loos* judgement gave national courts the power to review the compliance of national legislation with EU law, the Charter gave them the power to review the compliance of national legislation with fundamental rights. Of course, it was not the Charter itself but rather the doctrine of direct effect and primacy of EU law. The Charter, as part of EU law with the same legal value as the Treaties, acquires the same quality, meaning that the provisions in the Charter can have direct effect and supremacy over national law. In consequence, national courts examine the compliance of national law with the fundamental rights recognised in the EU system.

This competence was confirmed in the *Åkerberg Fransson* judgment, in which the CJEU precluded application of national procedural rules on reviewing the compliance of domestic law with fundamental rights. It held that Swedish law could not make application of the Charter conditional on whether incompatibility with fundamental rights was manifest, “since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice of the European Union, whether that provision is compatible with the Charter.”<sup>75</sup> That was also directly confirmed in the *A v B* judgment concerning the Austrian legal system, in which the CJEU stated that the ordinary courts might not be under a duty to apply to the constitutional court for statutes to be annulled with *erga omnes* effect if that obligation prevented the courts from exercising their right to make a reference to the CJEU. It was, however, allowed if the court remained free to refer questions for preliminary rulings and to fulfil its obligations arising from the principles of primacy and direct effect of EU law.<sup>76</sup> This means that applying the Charter is the autonomous competence and duty of national courts, which are supported in this task by the CJEU through the preliminary rulings procedure.

This leads to the question of division of competence. As long as the EU had no single legal act regulating fundamental rights, national constitutional or supreme courts remained the courts of last instance in matters of fundamental rights (of course without prejudice to the role of the ECtHR<sup>77</sup>). Once such an act came into force, the problems with delimiting the jurisdictions of constitutional courts and the CJEU reappeared.<sup>78</sup> National courts examine the compliance of domestic law with the fundamental rights recognised in the EU system, even if under national law they do not have the competence to

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<sup>75</sup> Case C-617/10 *Åkerberg Fransson*, par 48.

<sup>76</sup> Case C-112/13 *A v B* ECLI:EU:C:2014:2195.

<sup>77</sup> Judicial dialogue between national courts and the ECtHR is significantly enhanced by Protocol 16 to the Convention, which gives the highest courts and tribunals of the Member States of the Convention the possibility to ask the ECtHR for advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention, which entered into force on 1 August 2018. The ECtHR has already delivered its first opinions.

<sup>78</sup> As reflected, e.g., in verdicts of constitutional courts using the concept of *ultra vires* jurisdiction of the CJEU in the scope of the fundamental rights – e.g. the decisions of *Bundesverfassungsgericht* of 6 July 2010, 2 BvR 2661/06, *Honeywell*; of 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16; the judgment of the Czech Constitutional Court of 15 February 2012 (TZ 8/12), *Slovak pensions*.

review the compliance of national provisions with constitutional rights (which is often reserved to the constitutional or highest courts). Nevertheless, EU law gives national courts the competence, right and obligation to apply the Charter autonomously and independently of national procedures. It may be said that application of the Charter bestows on national courts the role of constitutional courts – not only examining the compliance of national law with EU law, but also its compliance with the fundamental rights recognised in the EU system. In some cases, reference to the Charter and the preliminary ruling procedure may also be seen as allowing the established national interpretation of the fundamental rights to be changed when it is considered by the domestic courts to be unjustified, outdated or not complying fully with international standards.<sup>79</sup>

## 2. Diverging EU and national standards of protection of fundamental rights

The most problematic situation arises when the Charter is applicable and the standard of protection of fundamental rights it provides is different to that provided for in national law. If this standard is higher than that offered by national law, there is no doubt that it prevails. If the standard is seen by a national court as lower than that offered by the national law, on the basis of Article 53 CFR, Member States can apply the national standard. As we already know from the case law, there might, however, be situations where application of national standards leads to infringement of EU law. Would it then be allowed?

In the *Åkerberg Fransson* judgment, the CJEU finding the Charter applicable, held at the same time that national courts were free to apply constitutional standards in a situation where action by the Member State was not entirely determined by EU law as long as the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law were not thereby compromised.<sup>80</sup> Moreover, the CJEU authorised the national court to assess the compliance of the regulations in question with the constitutional standards.<sup>81</sup> In the *Melloni* judgment, the CJEU interpreting Article 53 CFR held that “where an EU legal act calls for national implementing measures” national courts remained free to apply national standards of protection of fundamental rights, provided that the level of protection guaranteed by the Charter as interpreted by the CJEU and the primacy, unity and effectiveness of EU law were not thereby compromised.<sup>82</sup> Finally, it held that a national constitutional order could not be allowed to undermine the effectiveness of EU law and to disapply EU harmonised legal rules which were in compliance with the Charter.

The CJEU in both the *Åkerberg Fransson* and *Melloni* judgments used the same formula but for different reasons. In *Åkerberg Fransson* it was used to justify the application of the national standard (possibly higher than the EU); in *Melloni* it was used to exclude such application as interfering with the primacy of EU law. This distinction is justified in view of the differences between these two cases: the first one concerned the indirect implementation of EU law which did not provide a common standard of protection of the fundamental right in question (*ne bis in idem* in the case of tax infractions<sup>83</sup>); the second one concerned direct implementation of EU law which concretised and defined the level of protection

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<sup>79</sup> It seems that the Charter was viewed as such by the Social Court of Barcelona in case C-395/15 *Daouidi*, where the court underlined that it is clear from the case law of the supreme court of Spain that dismissal on grounds of illness or of temporary disability resulting from an accident at work is not considered to be discriminatory, with the result that that dismissal cannot be considered ‘void,’ but asked the CJEU whether such a dismissal is contrary to Articles 21(1), 30, 31, 34(1) and 35 of the Charter, par 32-33.

<sup>80</sup> Case C-617/10 *Åkerberg Fransson*, par 29.

<sup>81</sup> *Ibidem*, par 36.

<sup>82</sup> Case C-399/11 *Stefano Melloni*, 26 February 2013 ECLI:EU:C:2013:107, par 60, 58. See also Nik de Boer, ‘Case C-399/11, Stefano Melloni v Ministerio Fiscal, Judgment of the Court (Grand Chamber) of 26 February 2013’ 50 CMLRev (2013) 1083–1103; Marek Safjan, Dominik Düsterhaus, Antione Guérin, ‘La Charte des droits fondamentaux de l’Union européenne et les ordres juridiques nationaux, de la mise en œuvre à la mise en balance’ RTD Eur. (2016) p 219.

<sup>83</sup> Case C-617/10 *Åkerberg Fransson*, par 36.

of the fundamental right (right to defence as one of the conditions of execution of a European arrest warrant, defined in Framework Decision 2002/584<sup>84</sup>).

The foregoing considerations lead to the conclusion that two situations should be distinguished: where action by the Member State is entirely determined by EU law; and where national action is not fully regulated by EU law. Actions by Member States, which are straightforward implementations of obligations under EU law (they are entirely determined by EU law) are primarily subject to evaluation in the light of the Charter and Member States may not invoke their national standards of protection of fundamental rights to avoid fulfilment of obligations arising from EU law. In cases where action by the Member State is not entirely determined by EU law, national courts may in principle apply their national standard of protection of fundamental rights. The Charter is to intervene in situations where the primacy, unity or effectiveness of EU law may be jeopardised.<sup>85</sup> In other words, courts may primarily apply the constitutional standard and national procedures for its protection but if it compromises the principles of primacy or effectiveness of EU law, they should turn to the EU standards and the protection it offers.<sup>86</sup>

Advocate General Bobek explained this problem with reference to the distinction between situations where national rules fall under EU harmonised rules and where national rules do not interact directly with such harmonised EU rules but still fall within the scope of EU law. In the first situation, it may be assumed that the EU legislature has already struck a balance between, on the one hand, the protection of fundamental rights and, on the other hand, the overall efficacy of the measure at issue with regard to its objectives, so in such a case only the EU standard of protection of fundamental rights should apply. In the second situation, Member States exercising their discretion can apply their own concept of fundamental rights as long as they do not provide less protection than that guaranteed in the Charter.<sup>87</sup> It may be added that in the first situation (a national rule coming directly within the scope of harmonised or unified EU rules) it should be assumed that the EU legislator not only struck a balance between the fundamental rights and the effectiveness principle but also defined the standard of protection of fundamental rights by striking a proper balance between overlapping or conflicting EU fundamental rights.<sup>88</sup> Therefore, it can be assumed that EU legislation is compliant with the Charter and Member States cannot invoke their fundamental rights in order to justify noncompliance with this legislation. Otherwise, they put into question the primacy, unity and effectiveness of EU law. However, in the case of doubt they can challenge such EU legislation by contesting the relevant EU act before the CJEU as infringing the Charter.<sup>89</sup> This possibility, although limited, is also granted to individuals who may contest an EU legal act before a national court, which may in consequence refer the case to the CJEU. Conversely, if the level of protection of a given right or freedom in the Charter is not defined by EU legislation, Member States may use their constitutional standards of protection but they have to keep the minimal standard as provided by the Charter. Referring to the concepts used by K. Lenaerts, it may be said that in the first situation (existing harmonised or unified EU rules) there exists an EU legislative consensus which must be in compliance with the EU constitutional consensus; in the second case (no

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<sup>84</sup> Case C-399/11 *Stefano Melloni*, par 63.

<sup>85</sup> See Sarmiento, *supra* note 21, p 1290.

<sup>86</sup> Case C-168/13 PPU *Jeremy F* ECLI:EU:C:2013:358 par 53.

<sup>87</sup> Opinion of Advocate General Bobek in case C-310/16 *Petar Dzivev* ECLI:EU:C:2018:623, par 84-88. Similarly, Advocate General Bot in the *Melloni* case distinguished between situations where the level of protection of fundamental rights is defined by the EU and cases where it is not. In the first case, the EU definition “reflects a balance between the need to ensure the effectiveness of European Union action and the need to provide adequate protection for fundamental rights” par 124-125.

<sup>88</sup> As explained in relation to the specific circumstances in case C-399/11 *Melloni*, par 62.

<sup>89</sup> It seems that this was the aim of the preliminary reference of the Irish court in case C-363/12 *Z. v A Government department* ECLI:EU:C:2014:159, where the court asked if the Directive 2006/54 is compatible with the Charter if it is interpreted as allowing to refuse a maternity leave to a mother whose genetic child has been born through a surrogacy arrangement.

EU legislation or rules), there is no legislative consensus but the constitutional consensus might still apply.<sup>90</sup>

Coming back to the relation between fundamental rights protection and the effectiveness principle, it should be added that tensions between these two rules may occur not only when national and EU standards of protection of fundamental rights are different but it may also occur within the EU system itself – when the EU effectiveness principle interferes with the fundamental rights recognised by the EU. In the *M.A.S. (Taricco II)* judgment, the CJEU was confronted with a question from the Italian Corte Costituzionale on whether it was possible to disapply national rules on the prescription periods for tax frauds preventing the imposition of effective and dissuasive penalties affecting the financial interests of the EU and required by the CJEU’s *Taricco I* judgment.<sup>91</sup> The problem was that this disapplication might constitute a breach of a national principle that the applicable law on criminal sanctions had to be precise. Before giving the answer, the CJEU referred to and explained the same principle concerning criminal sanctions enshrined in Article 49 CFR, which must have been observed by the Member States when they implemented the EU law. It seems, therefore, that the CJEU treated the national principle invoked by the Italian court as an EU law principle enshrined in the Charter which must also be respected by the national court when the effectiveness of EU law is at stake. Finally, the CJEU stated that the national court should have complied with the rule that offences and penalties must be defined by law, even if it would not guarantee the whole effectiveness of the implementation of the EU law.<sup>92</sup> What could be derived from these statements is confirmation that the effectiveness of EU law is not an absolute principle and may not require Member States to omit or diminish the level of protection of fundamental rights as provided for in both the Charter and national constitutional law.<sup>93</sup>

A preliminary conclusion may be that in cases of direct implementation of EU law by Member States, the Charter should be the main fundamental rights act applied by national courts. In cases of indirect implementation of EU law, the Charter is applicable but not necessarily applied – if the national standard of protection of fundamental rights is sufficient, it is enough to rely on this standard and the Charter applies only if it provides a higher level of protection or if the unity, primacy or effectiveness of EU law may be compromised. This approach seems compatible with the principle of subsidiarity of protection adopted in the ECHR system. The European Court of Human Rights recognises both national constitutional courts and the CJEU as guarantors of human rights observance in national and the EU systems. It also establishes a rebuttable presumption that the EU legal system offers an equivalent level of protection of human rights. In cases where Member States act in compliance with their obligations stemming from EU law, it can be presumed that they also act in compliance with fundamental rights and the responsibility for human rights observance rests on the CJEU and EU law. In cases where Member States exercise their discretionary power, the responsibility for fundamental rights observance rests primarily on national courts<sup>94</sup>. However, as has been clarified by the CJEU, even in such cases Member States cannot ignore the Charter if it can pose a threat to EU law or principles of primacy, unity and effectiveness.

### 3. Consistent EU and national standards

The next question is whether the Charter is applicable in cases where the EU and national standards of protection of fundamental rights are consistent. This question, even if not in an obvious way, is relevant

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<sup>90</sup> Koen Lenaerts, ‘EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection’ *Polish Yearbook of international law*, vol. 34 (2014), p 135.

<sup>91</sup> Case C-105/14 *Taricco and others* ECLI:EU:C:2015:555.

<sup>92</sup> Case C-42/17 *M.A.S.* ECLI:EU:C:2017:936, par 51- 61.

<sup>93</sup> See more Nina Póltorak *European Union Rights in National Courts* (Wolters Kluwer 2015), p 339.

<sup>94</sup> Judgment of the ECtHR of 30 June 2005, no. 45036/98 *Bosphorus Hava Yolları*; judgment of 6 December 2012, no. 12323/11, *Michaud v France*.



to the problem of protection of the constitutional identity of the Member States. When discussing challenges that the Charter brought to national legal orders, it might be wrongly assumed that constitutional identity is a concept that serves to emphasise the differences in understanding or application of common values and fundamental rights in the Member States. Indeed, this concept is usually used to justify possible derogations or exceptions from EU common rules, as it is obvious that there is no need to rely on or invoke national identity just to justify compliance with common rules. However, we should not forget that the constitutional identity of a given Member State does not consist only of deviating rules but also comprises rules which are common to all Member States and are codified in the Charter. In the majority of cases, constitutional identity is equal to or corresponds directly to European values. These cases are just not as noticeable as deviating standards cases are. Consequently, the EU and national standards of fundamental rights protection are very often the same. Nevertheless, even in the case of such convergence, the principles of direct effect and primacy allow national courts to rely on the Charter in order to examine whether the standard of fundamental rights protection has been guaranteed without a need to refer any questions on this matter to the supreme or constitutional court. Therefore, even in such cases, the national judge acquires the competences of the constitutional judge verifying whether national law complies with EU fundamental rights.

## **VI. Applicability and application of the Charter**

### ***1. Arguments against a functional interpretation of Article 51(1)***

The above analysis shows the tensions between the need to apply the Charter as a legal instrument serving effective implementation of EU law by the Member States and the problems it may create for the fragile equilibrium of EU law and national constitutional fundamental rights. For effective implementation of EU law, the intervention of the Charter should be possible in all situations that fall – even indirectly – within the scope of EU law. However, every decision on the applicability of the Charter to the Member States provokes complex problems related to the constitutional laws of Member States and the division of competences between the CJEU and national constitutional courts. Should this affect the interpretation of Article 51(1) CFR? Should we advocate for a functional interpretation of Article 51(1) CFR<sup>95</sup> which could lead to limitation of the applicability of the Charter to cases where the intervention of the Charter is needed to eliminate the risk to the unity, primacy and effectiveness of EU law, so in practice to the effective enforcement of EU law by the Member States?<sup>96</sup> In the opinion of the author of this study, it is doubtful. There are a few reasons for this. First, there is the formal argument grounded in the wording of Article 51(1). It does not provide that the Charter bind Member States only if it is required for effective implementation of EU law, and neither does it make any other referral to the function of the Charter. It defines the scope of applicability of the Charter as being based just on the notion of implementing EU law. Second, a functional interpretation of Article 51(1) might influence interpretation of another concept – the scope of EU law. In other words, the scope of EU law should not be interpreted in the context of a need to apply the Charter in a given case. Defining the scope of EU law affects not only the applicability of the Charter but also the applicability of EU primary and

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<sup>95</sup> The concept of functional interpretation of art 51(1) is not the same as the functional approach proposed by Marek Safjan. The functional approach – in the concept of judge Safjan, located halfway between the restrictive and abstract approaches – allows applicability of the Charter in cases of national law implementing EU law only indirectly, but at the same time requires that there must be a specific rule of EU law applicable to this national law, see ‘Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union’ in Fabrizio Cafaggi, Stephanie Law (eds) *Judicial Cooperation in European Private Law* (Edward Elgar 2017), p 51.

<sup>96</sup> The absence of risk to the unity, primacy and effectiveness of EU law was treated in C-206/13 *Cruciano Siragusa*, par 32 and C-198/13 *Victor Manuel Julian Hernández*, par 47 as an additional justification for declaring the Charter not applicable in these cases. See also opinion of Advocate General Saugmandsgaard Øe in case C-235/17 *European Commission v Hungary* ECLI:EU:C:2018:971, par 95-112.

secondary law, of the preliminary ruling procedure and the infringement procedure instituted by the European Commission. Therefore, linking the interpretation of the scope of EU law with the need to apply the Charter might lead to a restrictive interpretation of the range of EU law itself. This would be particularly alarming in cases concerning rights resulting from citizenship of the EU. As we know, the Charter does not grant any further rights not comprised already in the concept of EU citizenship, but the scope of rights originating from this citizenship should not depend on the necessity to apply the Charter in a given case.<sup>97</sup> The next, third reason is based on the consequence of a functional interpretation of Article 51(1) CFR. Linking the decision on the scope of application of the Charter with the need of effectiveness of the EU law may result in restrictive interpretation of the former in the cases where there is no risk for the latter. This risk may however appear in other cases, but it would be difficult to take it into account if it was already decided that similar situations did not constitute implementation of EU law. And, finally, the fourth reason is the function of the Charter, which is, as its preamble states, “to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible.” The main aim of the Charter is not to guarantee effective enforcement of EU law by the Member States. The Charter is there to reaffirm and protect the rights of individuals. Of course, this is possible only within the limits established in Article 51(1) CFR, thus within the boundaries of EU law, but it does not mean that these limits may be further restricted by a functional interpretation of Article 51(1). Such interpretation would not only be against the aims and objectives of the Charter but also contrary to the expectations of the addressees of the fundamental rights and principles – the people of Europe. The fact that the Charter only applies to Member States when they implement EU law is already perceived as insufficient and unsatisfactory for many citizens and this situation can create more alienation from the Union – as has been stated by the European Parliament.<sup>98</sup> This can only be worsened by a restrictive interpretation of Article 51(1) CFR.

## **2. A functional interpretation of Article 53 of the Charter or what triggers the application of the Charter**

Rejection of a functional interpretation of Article 51(1) CFR does not mean that the need to apply the Charter cannot be taken into account when the CJEU or a national court decides on the actual application of the Charter in a given case. For this aim, it is important to differentiate between the scope of application of the Charter to the Member States and putting it into operation, i.e. to separate the question of applicability of the Charter from its actual application in a given case in lieu of a national standard. Finding that a given case before a national court falls within the scope of application of the Charter opens the possibility of its application, but it does not create an obligation to replace national constitutional fundamental rights with those in the Charter. While applicability of the Charter is regulated by Article 51(1) CFR, its actual application may be limited by Article 53 CFR. Unlike Article 51, Article 53 may be subject to a functional interpretation which takes into account the need to apply the Charter. The objective interpretation of the applicability of the Charter as regulated in Article 51(1) allows keeping under potential scrutiny all national actions which are covered by EU law (in the words of the CJEU: “situations cannot exist which are covered [...] by European Union law without [...] fundamental rights being applicable”<sup>99</sup>). A different question is however deciding whether intervention of the Charter is needed and to what extent it should be applied in the place of a national standard of

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<sup>97</sup> For example, the CJEU has established that EU law also embraces situations which are outside the scope of application of secondary EU law but which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by EU citizenship, case C-165/14, *Rendón Marín* ECLI:EU:C:2016:675, pars 74 and the case law quoted therein.

<sup>98</sup> The European Parliament called on the EU institutions to consider an enhancement of the scope of application of the Charter, Explanatory statement to the Report on the situation of fundamental rights in the European Union in 2017 of 13.12.2018 (2018/2103(INI)).

<sup>99</sup> Case C-617/10 *Åkerberg Fransson*, par 21.

protection of fundamental rights.<sup>100</sup> This question should be answered on the basis of Article 53 CFR and the meaning given it by the CJEU in the *Melloni* and *Åkerberg Fransson* cases.

What can be derived from *Melloni* and *Åkerberg Fransson* is that when a Member State directly implements EU law which harmonises the standard of legal protection of fundamental rights, it has to apply the Charter instead of national standards. However, when a Member State only indirectly applies EU law and does not establish the common standard of protection of fundamental rights, applicability of the Charter would not necessarily lead to its actual application in place of the national standards. In such a case and under the condition that the national standards are adequate (they do not pose a threat to the standards of the Charter or obligations of the Member States), the role of the Charter may be secondary – it supports national standards and may be applied together with or as a subsidiary to national fundamental rights but does not have to be the legal basis of national court decisions. This may, however, change over time, and in the same kind of cases a Member State may not be able to provide the adequate level of protection of fundamental rights. If this happens, application of the Charter should be activated. The factor triggering its application in the cases of indirect implementation of the EU law should be the existence of a threat to the Union standard of fundamental rights protection or to the principles of primacy, unity and effectiveness of EU law.

Such a threat may arise not only in situations where the EU and national standards are at variance but also where they are generally convergent but there are deficiencies in the national legal and institutional system guaranteeing this convergent standard. Then, not only is the national law at risk but so is the EU level of fundamental rights protection. If the national law or institutions are not effective in guaranteeing the domestic basic rights, protection of the EU fundamental rights is also put in jeopardy what justifies intervention of the Charter and the EU fundamental rights enforcement mechanisms. As a result, when individuals and national courts are able to invoke and apply the Charter to reinforce their constitutional values, the Charter helps to protect and support the national constitutional identity.<sup>101</sup>

A reference could be made at this point to the central thesis formulated by the Bundesverfassungsgericht in its so-called *Solange* rulings, in which the German constitutional court held that as long as European law observes the fundamental rights guaranteed in the national system there is no need for the national standard or the constitutional court to intervene.<sup>102</sup> We could formulate a mirror image of the *Solange* ruling – let us call it *Union Solange* – which says that as long as the national law of a given Member State observes the EU standard of fundamental rights and does not pose a risk of compromising the primacy, unity or effectiveness of EU law, the Charter is applicable but it does not have to be put into operation (there is such a possibility but there is no need to turn to the Charter). The above paraphrase is different from the *reverse Solange* proposal because, in the latter the need for an intervention by the Charter was to define its scope of application to Member States even outside EU law.<sup>103</sup> In *Union Solange* as proposed above, the scope of application of the Charter is an objective and not functional notion while the need for Charter's intervention justifies its actual operation in lieu of national standards.

### ***3. Applicability and application of the Charter – consequences for judicial interactions***

The above approach has certain procedural consequences. First, it gives the courts of the Member States the possibility to treat the Charter as applicable in all cases which directly or indirectly fall within the

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<sup>100</sup> A different approach seems to be taken by Mark Dawson, who argues for a sliding scale rather than a binary approach to the operation of Article 51 CFR, *The Governance of EU Fundamental Rights* (CUP 2017), p 77.

<sup>101</sup> Which is confirmed by the considerable increase in the number of references to the Charter in referrals for preliminary rulings in general and particularly to Article 47 in cases concerning the rule of law.

<sup>102</sup> E.g. in judgment of 22 October 1986, FCT, 2 BvR 97/83; of 7 June 2000, 2 BvL 1/97210; of 9 January 2002, 1 BvR 1036/99211.

<sup>103</sup> Von Bogdandy and others, *supra* note 17.

scope of EU law. Second, in a situation of indirect implementation, it gives them the possibility to actually apply the Charter in lieu of national standards if they conclude that the national law fails to guarantee the adequate protection of fundamental rights or that the unity, primacy or effectiveness of EU law is at risk. In such cases, national courts must also have the possibility (and obligation, in the case of courts of last instance) to use the procedure of dialogue with the CJEU in which the CJEU exercises its competences and obligations to ensure that the law is observed in the interpretation and application of the Treaties. This approach also allows national courts and the CJEU to treat the changing situation of implementation of EU law in a Member State as a relevant factor since it keeps open the actual application of the Charter by not locking it in the stage of applicability of the Charter based on a restrictive interpretation of Article 51 CFR. In grey area cases of indirect implementation of the Charter, the national judge may decide that the Charter is applicable and, taking into account the circumstances indicated by the CJEU based on the Article 53 CFR, that it should or should not be applied instead of the national law.

It is finally interesting to analyse the milestone decisions of the Bundesverfassungsgericht, which seem to implement the rules coming from the case law of the CJEU as interpreted in this article from the perspective of national law.<sup>104</sup> The Bundesverfassungsgericht has stated that the Charter might be a standard for the constitutional review of national law or practice falling within the scope of EU law. First, it relied on the distinction between legislation fully and not fully harmonised under EU law. In the first case, EU fundamental rights should be applied instead of the national standard. In the second case, the national fundamental rights should be applied. This follows from the finding that where EU law does not fully harmonise the given question it seeks to accommodate the diversity of fundamental rights regimes; and it rests on the rebuttable presumption that the application of national fundamental rights ensures the level of protection required by the EU fundamental rights. Second, the constitutional court may and should review compliance with the Charter of the application of EU law by the national authorities because the Charter takes precedence over German fundamental rights in cases of fully harmonised legislation. The Bundesverfassungsgericht added that an additional review on the basis of EU fundamental rights is only necessary if there are specific and sufficient indications showing that the constitution does not afford adequate fundamental rights protection.<sup>105</sup>

From the point of view of the subject matter of this study it should be first underlined that in the cases described above, the Charter was applicable and that the decisions of Bundesverfassungsgericht did not concern the applicability of the Charter in the meaning of Article 51 CFR. Second, the Bundesverfassungsgericht made the distinction between cases of fully harmonised legislation – where the Charter must be applied for the constitutional review exercised by the constitutional court – and legislation not fully harmonised – where the national standard of fundamental rights protection should be the basis for such a review. This distinction and its consequences for the national system were based on Article 53 CFR as interpreted by the CJEU in the *Melloni* judgment. It most probably means that the Bundesverfassungsgericht agreed with the CJEU that in cases of fully harmonised EU law, the Member States are obliged to apply the Charter and might not rely on their own standards of fundamental rights protection. Then, like all other national courts, the constitutional court should ensure the protection of the EU fundamental rights and it should do so by incorporating these fundamental rights into its standard of constitutional review. By doing so, it ensures effective legal protection giving the individuals additional constitutional guarantees of their EU fundamental rights. In this review, the Bundesverfassungsgericht is expected to seek close cooperation with the CJEU and refer questions for preliminary ruling where they have not already been clarified by the CJEU case law. In the situation of not fully harmonised cases, even though the Charter is applicable in the meaning of Article 51(1) CFR, the national constitutional law and not the Charter should be the benchmark for the constitutional review. This is because in such cases it is the national law that guarantees the effective fundamental rights

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<sup>104</sup> Orders of 6 November 2019, 1 BvR 16/13 and 1 BvR 276/17.

<sup>105</sup> As stated in Bundesverfassungsgericht Press release no 83/2019 of 27 November 2019.

protection required by the Charter. Nevertheless, this guarantee might not be sufficient and then the constitutional court might be obliged to verify compliance of the national law with the Charter.

## **VII. Conclusions**

With the Charter as a legal act with a constitutional character, the judicial and legal interactions in the EU's multi-layered legal and judicial system were taken to another level, which is both challenging and full of opportunities. National courts can indirectly derive from the Charter certain extended or even new competences of constitutional review, which can be enforced without the intervention of constitutional or higher courts and which may lead to substantial changes in the interpretation and application of national standards of fundamental rights protection. The dialogue between national courts, including constitutional courts, and the CJEU shows that the main problems and questions of division of competences originating from this new deal have been solved. Now, when interpreting and applying the solutions developed through judicial interactions both EU and national judges should remember the promise of the Charter, which is to place the individual at the heart of the activities of the EU and in consequence to guarantee the effective fundamental rights protection of individuals at both EU and national levels. One of the main prerequisites of this promise is to assure applicability of the Charter in all cases covered by EU law and to reassure national judges in their interpretation of the scope and modes of application of the Charter that, while respecting the restrictions of the scope of the Charter, guarantee the genuine protection of fundamental rights. This study has therefore postulated that the question of applicability of the Charter should be separated from the question of its application in specific cases in lieu of national standards. The former should be decided on the basis of Article 51(1) CFR and the latter on the basis of Article 53 CFR and the functional interpretation of it given by the CJEU. Where the Member States directly implement EU law, the Charter should be the primary fundamental rights protection act for national courts. In the case of indirect implementation of EU law, the Charter should step in where a given fundamental right may be at risk of being insufficiently protected or where effective implementation of European Union law is under threat. The option to apply the Charter should be available in the largest possible range of situations – as large as the scope of EU law – yet a need for its application may occur when national standards and measures for fundamental rights protection are insufficient or inadequate for the implementation of EU law.

The Charter's entry into force was an occurrence of both legal and symbolic significance. It emphasises the fact that the European Union is an organisation uniting European countries through a set of shared values and it constitutes another declaration by the Member States that they are committed to observing these values, which are and must remain the foundation of integration. It also gives individuals and national courts a powerful tool to protect the fundamental values common to the Member States and the EU. The Charter offers national courts supranational fundamental rights guarantees, which are crucial in the case of serious deficiencies of domestic legal systems. If fundamental rights in the Member States are compromised, the Charter and the CJEU can provide a guarantee of protection which might be more effective than domestic measures or an intervention by the ECHR. Finally, it is extremely important in cases where national fundamental rights protection proves to be dysfunctional. This means that in certain situations the EU becomes an organisation protecting human rights and the CJEU a court of fundamental rights. It also means that in such situations national judges may rely on the Charter to protect the constitutional values of a Member State which might be jeopardised. Such situations are still exceptional even if they tend to happen more often. The Charter does not replace national constitutional standards of fundamental rights protection and does not take over the responsibility for fundamental rights protection in national systems. This responsibility still rests primarily with national courts, yet the rights and principles of the Charter can help them discharge this duty.

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