
Fundamental Rights in the European Union

The role of the Charter
after the Lisbon Treaty



IN-DEPTH ANALYSIS

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This publication aims to provide a general overview of the impact of fundamental rights in the EU legal order, in particular since the entry into force of the Lisbon Treaty and the Charter of Fundamental Rights gaining legal force. It examines the development of the case law of the European Court of Justice on fundamental rights and the impact of the Charter on EU policies and objectives. It describes EU institutions' initiatives to evaluate the impact of new legislation, and its implementation by the Member States, on fundamental rights.

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EXECUTIVE SUMMARY

The European Union, like its Member States, must comply with the principle of the rule of law and respect fundamental rights when fulfilling its tasks foreseen by the Treaties. These legal obligations were framed progressively by the case law of the Court of Justice of the EU (ECJ). The Court filled gaps in the original Treaties, thus ensuring simultaneously the autonomy and consistency of the EU legal order and its relationship with national constitutional orders.

Since the entry into force of the Lisbon Treaty, these principles are also clearly laid down by the Treaties and by the Charter of Fundamental Rights (with the same legal value). The Charter draws on the European Convention on Human Rights (ECHR), the European Social Charter and other human rights conventions, the constitutional traditions common to the EU Member States, and the Court's case law. Even if some of its provisions refine, or even develop, existing human-rights instruments, the Charter does not extend EU competence. However, as part of the body of EU constitutional rules and principles, the Charter is binding upon the EU institutions when adopting new measures as well as on the Member States when implementing them.

The Charter is the point of reference not only for the Court of Justice but also for the EU legislature, notably when EU legislation gives 'specific expression to fundamental rights', as is the case for EU policies dealing with anti-discrimination, asylum, data protection transparency, good administration, and procedural rights in civil and criminal proceedings. Moreover, fundamental rights can also be at stake in EU legislation covering all other domains of Union competence such as transport, competition, customs and border control. As these policies can also have an impact on citizens' and individuals' rights, such as human dignity, privacy, the right to be heard, and freedom of movement, EU law should duly take such situations into account.

According to Article 52 of the Charter, any limitation of fundamental rights must be provided for by law, respect the essence of those rights and freedoms and respect the principle of proportionality, failing which EU legislation is to be considered void.

Since the Charter is an instrument of primary EU law, three Court of Justice cases which interpret it are particularly worth noting: in 2010 the Court annulled an EU measure in the field of agricultural policy because of data protection concerns (Joined Cases C-92/09 and C-93/09 *Schecke*); in 2011 it partially annulled an EU measure dealing with insurance services, because of discrimination between women and men (Case C-236/09 *Test-Achats*); in 2014 the Court annulled the Data Retention Directive (Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*) because of violation of the principle of proportionality when limiting fundamental rights to privacy and data protection (Articles 7 and 8 of the Charter). Furthermore, national legislation implementing EU law should be set aside if it does not meet the standards established in EU law (as with the C-396/11 *Radu* and C-399/11 *Melloni* cases) and in particular, those set out in the EU Charter (or higher standards set at national level).

These principles, as well as the principle of mutual trust among Member States were set out in the ECJ opinion on EU accession to the ECHR (see its para. 166). This has raised even higher the standards to be reached when adopting EU legislation with an impact on fundamental rights. The consequences of legislation infringing fundamental rights standards, have led the EU institutions to develop a consistent strategy to take into account the fundamental rights dimension when drafting, amending or assessing the impact of future legislation.

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1. Introduction

The protection of fundamental rights was not explicitly included in the founding Treaties of the European Communities, which contained only a small number of articles that could have had a direct bearing on the protection of the rights of individuals.

For example, in the EEC Treaty, the rules on the general prohibition on discrimination on grounds of nationality (Article 7), on the freedom of movement for workers (Article 48), on the freedom to provide services (Article 52), on improved working conditions and an improved standard of living for workers (Article 117), on equal pay for men and women (Article 119), and on the protection of persons and protection of rights (Article 220), may be considered to have had a such bearing.

An explicit reference to fundamental rights at Treaty level appeared only over 30 years later, with the entry into force of the Maastricht Treaty (1993). Indeed, according to Article F of the Treaty on European Union, the EU was obliged to:

respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States as general principles of Community law.

Since the entry into force of the Amsterdam Treaty (1999), and notably of the Lisbon Treaty (2009), protecting fundamental rights is a founding element of the European Union and an essential component of the development of the supranational European Area of Freedom, Security and Justice.

Under the Lisbon Treaty, the EU Charter of Fundamental Rights, originally solemnly proclaimed in Nice in 2000, has the same legal value as the Treaties. Even if it does not extend the competences of the Union, it gives them a new 'soul' by focusing on the rights of the individual with regard to all EU policies. The Charter draws on the European Convention on Human Rights (ECHR), the European Social Charter and other human-rights conventions, as well as the constitutional traditions common to the EU Member States, as stated in case law of the European Court of Justice. However, it also updates them by recognising new kinds of rights protecting individuals from new forms of abuses by public or private entities (such as the right to the protection of personal data and to good administration). The Charter is binding upon the EU institutions when enacting new measures, as well as for the Member States whenever they act within the scope of EU law.¹

The Charter is the reference not only for the Court of Justice but also for EU law-making institutions, in particular the Commission, when launching new proposals which give 'specific expression to fundamental rights'.² This is the case with EU policies dealing with anti-discrimination, asylum, data protection, transparency, good administration, and procedural rights in civil and criminal proceedings. Nevertheless, fundamental rights (and the Charter) come into play in EU legislation in any other domain of EU competence, such as transport, competition, customs and border control. As these policies can also have an impact on the rights of citizens and other individuals, such as

¹ See judgment in Case C-617/10 *Åkerberg Fransson*.

² Case 555/47 *Kücükdeveci* [2010] ECR I-365, para 21. See Elise Muir, 'The Fundamental rights implications of EU legislation: some constitutional challenges', *Common Market Law Review* 51: 219-246, 2014, pp. 223-226.

human dignity, privacy, the right to be heard and freedom of movement, EU and Member-State law should take the Charter into account when regulating these spheres.

An essential aspect of the EU's fundamental rights policy will be the Union's accession to the European Convention on Human Rights, which became obligatory under the Lisbon Treaty (Article 6(2) TEU).³ This would complement the system of protection of fundamental rights by conferring competence on the European Court of Human Rights to review EU measures while taking account of the Union's specific legal order.

2. EU Fundamental rights prior to the Lisbon Treaty

2.1. Common ground with national constitutions

The European Court of Justice (ECJ)⁴ was in the forefront of European Community fundamental rights protection. In the 1969 *Stauder*⁵ case it already referred to fundamental rights as being part of the general principles of Community law and underlined that they are protected by the Court. The ECJ's willingness to protect fundamental rights appeared in the broader context of, on the one hand, the doctrine of supremacy of Community law as proclaimed in *Van Gend en Loos*⁶ and *Costa v Enel*,⁷ being part of a broader phenomenon of 'juridification' in European integration,⁸ and on the other hand, the reluctance of national constitutional courts, especially in Germany, to recognise this supremacy without sufficient guarantees for fundamental rights at Community level.

Indeed, the ECJ's main interlocutor on the question of fundamental rights was the German Federal Constitutional Court (*Bundesverfassungsgericht*, 'BVerfG') which, in its *Solange I* decision of 1974,⁹ expressed the view that Community law did not, at that time, ensure a standard of fundamental rights corresponding to that of German Basic Law.¹⁰ Only some years later, and after several ECJ judgments strengthening its 'general principles' case law, did the BVerfG in the *Solange II* judgment,¹¹ finally concede that the protection of fundamental rights ensured by the ECJ could be presumed to be equivalent to the protection granted by the German Constitutional Court. However, the BVerfG indicated that this presumption could not be considered absolute, upholding similar reservations with regard to the constitutionality of the Maastricht Treaty¹² and

³ In the light of [Opinion 2/13](#) of the CJEU, by which the Court ruled the draft accession agreement was not compatible with the EU Treaties, EU accession to the ECHR has been delayed.

⁴ For ease of understanding the abbreviation ECJ is used throughout this publication, although since the entry into force of the Lisbon Treaty, the abbreviation CJEU has come into use.

⁵ Case 29/69 *Stauder* [1969] ECR 419.

⁶ Case 26/62.

⁷ Case 6/64.

⁸ See Francesca Ferraro, *Lo spazio giuridico europeo tra sovranità e diritti fondamentali. Democrazia, valori e rule of law nell'Unione al tempo della crisi*, Editoriale Scientifica, 2014, p. 20.

⁹ Judgment of 29 May 1974, Case 2 BvL 52/71.

¹⁰ See the BVerfG judgments of 29 May 1974, *Solange I* (2 BvL 52/71) and of 22 October 1986, *Solange II* (2 BvR 197/83) as well as the *Frontini* and *Fragd* judgments of the Italian *Corte Costituzionale* and the declaration of the Spanish *Tribunal Constitucional* of 13 December 2004.

¹¹ Judgment of 22 October 1986 (Case 2 BvR 197/83). See also the decision of the Italian *Corte costituzionale* in the *Frontini* case (1973) and the declaration of the Spanish *Tribunal Constitucional* of 13 December 2004.

¹² *Maastricht-Urteil* of 12 October 1993, Case 2 BvR 2134, 2159/92.

the Lisbon Treaty,¹³ despite the fact that both instruments make explicit the pivotal role of fundamental rights in European construction.

During the 1970s, the ECJ developed its fundamental rights case law. In the 1970 case of *Internationale Handelsgesellschaft*¹⁴ it proclaimed that such rights, as general principles of Community law, are 'inspired by the constitutional traditions common to the Member States', simultaneously underlining that their protection 'must be ensured within the framework of the structure and objectives of the Community.' In 1974 in *Nold*,¹⁵ the Court added that, apart from national constitutional traditions, Community fundamental rights can be based on international agreements to which the Member States are contracting parties, explicitly pointing to the ECHR the following year (*Rutili* case).¹⁶

For over 40 years, the ECJ and the national constitutional courts co-existed in a creative ambiguity; each one considering itself to be the final judge.¹⁷ In the ECJ's view, EU law (including all acts of secondary law) enjoys unconditional supremacy over national law (including constitutions), whilst national constitutional courts view the national constitution to be the supreme law of the Member State. In particular, they have underlined the need to uphold the protection of fundamental rights, as granted at national level, which should not be lowered, as well as preserving national constitutional identity. The latter aspect was recognised after the Lisbon Treaty in the EU Treaties (Article 4 TEU and Article 67 TFEU) and by Article 53 of the EU Charter, which 'codifies the idea of the floor of protection, according to which EU law sets a minimum which Member States are free to exceed,¹⁸ as far as the domain at stake has not been harmonised at EU level' (see *Radu* and '*Melloni*' jurisprudence).

2.2. Fundamental rights as general principles of EU law

Long before the entry into force of the Lisbon Treaty and the EU Charter of Fundamental Rights became binding, the ECJ recognised a number of fundamental rights in the guise of general principles of EU law. Examples include the right to **protection of human dignity and personal integrity**,¹⁹ the right to **freedom of**

¹³ *Lissabon-Urteil* of 30 June 2009, Joined Cases BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09. For a comment in English, see e.g. Christian Tomuschat, [The Ruling of the German Constitutional Court on the Treaty of Lisbon](#), *German Law Journal* 10.8 (2009), pp. 1259ff. Similar reservations were raised by the constitutional courts of Poland, the Czech Republic, Spain and France. In particular, the Czech Constitutional Court questioned the Court of Justice's views on the supremacy of EU law in its *Landtová* judgment of 14.2.2012.

¹⁴ Case 11/70 [1970] ECR 1125, para. 4.

¹⁵ Case 4/73 [1974] ECR 491, para. 13.

¹⁶ Case 36/75 [1975] ECR 1219.

¹⁷ See Gunnar Beck, 'The Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor', *European Law Review* 30 (2005) 42ff.

¹⁸ Federico Fabbrini, *Fundamental Rights in Europe. Challenges and Transformations in Comparative Perspective*, Oxford University Press, Oxford, 2014, p. 39.

¹⁹ Recognised in Case C-377/98 *Netherlands v Parliament and Council*, a decision concerning the patentability of the human genome. The ECJ ruled, *inter alia*, that: '... is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed', and that '... all processes the use of which offend against human dignity are also excluded from patentability so that the EU Directive and that (...) human dignity is thus safeguarded' because '...human living matter could not be reduced to a means to an end.'

expression,²⁰ **equality** before the law,²¹ principles of **contradictory administrative proceedings** and the principle of '**good administration**'.²²

Despite these developments, by recognising fundamental rights on a case-by-case basis, the ECJ has been unable to develop a comprehensive system of fundamental rights protection covering all areas of Community and, thereafter, EU action. Furthermore, due to the lack of reference to specific fundamental rights in EU legislation, EU citizens could not know with certainty whether their rights had been violated.

2.3. Promoting fundamental rights as a political objective

Over the years, the fundamental rights dimension of Community law was not an endeavour exclusive to the ECJ. On the contrary, this new political dimension of Community law was at the core of solemn Declarations by the EU institutions starting with the **Declaration on European Identity** (Copenhagen European Summit, 14-15 December 1973),²³ in which the principles of democracy, the rule of law, social justice and respect for human rights were considered a cornerstone of European international identity. The European Parliament, even before direct elections, subscribed in 1977 to a **Joint Declaration on Fundamental Rights**, together with the Council and the Commission, which stressed 'the prime importance they attach to the protection of fundamental rights', as derived from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.²⁴

²⁰ Recognised in Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda*, which was concerned with the balance between the freedom of expression and the freedom to provide services. The ECJ ruled that: 'A cultural policy with the aim of safeguarding the freedom of expression of the various (in particular, social, cultural, religious and philosophical) components of a Member State may constitute an overriding requirement relating to the general interest which justifies a restriction on freedom to provide services'.

²¹ Recognised in Cases: C-83/83 *Racke*, C-15/95 *EARL* and C-292/97 *Karlsson*. In *Karlsson* the ECJ stated that the prohibition of discrimination in agricultural policy '...is merely a specific expression of the general principle of equal treatment, which requires that comparable situations not be treated differently and different situations not be treated alike unless such treatment is objectively justified...'. The Court added that '...when a Member State imposes restrictions on the exercise of fundamental rights it must observe the principle of proportionality. In accordance with that principle, the restriction must not constitute, having regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights (...)'

²² Recognised in Cases: C-222/86 *Heylens*, C-374/87 *Orkem*, C-255/90 *P Burban* and T-167/94 *Nölle*. In *Nölle* the ECJ ruled that: 'Where the Community institutions have a wide power of appraisal, respect for the rights guaranteed by the Community legal order in administrative proceedings is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, and the right of the person concerned to make his views known and to have an adequately reasoned decision.'

²³ See Declaration on European Identity (Copenhagen 1973) on: <http://www.cvce.eu/>.

²⁴ OJ C 103, 27.04.1977, p. 1. See also Draft Joint Declaration by the European Parliament, the Council and the Commission concerning respect for human rights, PE 47.729, December 1976. Another important EP resolution on the draft joint declaration was adopted on 10 February 1977, based on report A0-0557/76 drawn up by Léon Jozeau-Marigné, on behalf of the Legal Affairs Committee (OJ C 57, 7.3.1977, p. 54).

However, the Parliament's main contribution at the time was the adoption, in 1984, of a draft European Union Treaty,²⁵ which stated that:

The Union shall protect the dignity of the individual and grant every person coming within its jurisdiction the fundamental rights and freedoms derived in particular from the common principles of the Constitutions of the Member States and from the European Convention for the Protection of Human Rights and Fundamental freedoms.

Five years later, in 1989, the EP adopted a Resolution on Fundamental Rights (Rapporteur: Karel De Gucht)²⁶ followed by a **Declaration of fundamental rights and freedoms**,²⁷ which was the first catalogue of fundamental rights (some of them, such as environment and consumer protection, were not covered by several national constitutions), and which was unsuccessfully submitted to the Intergovernmental Conference which negotiated the Maastricht Treaty.

Whilst the competences of the European Community were relatively limited until the 1980s, when the main focus was on the establishment of an internal market and of the four freedoms connected to its realisation (freedom of movement of persons, capital, goods and services), they have increased dramatically since the ratification of the Maastricht Treaty. This expanded scope of EU activity justified the appropriate broadening of ECJ competence with regard to fundamental rights also.

Notably, since the entry into force of the Maastricht Treaty, EU activity has expanded to areas such as immigration and asylum, security and data protection, thereby increasing greatly the possibility of infringement of individuals' fundamental rights by EU measures.

In this context the Commission then proposed the Community accede to the European Convention of Human Rights (ECHR). However, following a request for an opinion submitted by the UK, Denmark and Sweden, the Court of Justice declared on 28 March 1996 that:

*No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.*²⁸

Although the Court confirmed that 'Respect for human rights is ... a condition of the lawfulness of Community acts,' it considered that:

Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.

The implicit reference by the ECJ to a Treaty amendment to reach the same objective was taken into account by the EP in its resolution of 19 November 1997 on the Amsterdam Treaty, when the Parliament called for '**a specific charter of fundamental**

²⁵ Preliminary Draft Treaty establishing the European Union, Article 4, paragraph 1 (doc. A1-1200/83/A).

²⁶ Report on the Declaration of fundamental rights and freedoms (doc. A2-0003/89) of 20 March 1989, general rapporteur Karel De Gucht.

²⁷ EP resolution of 12 April 1989 on the Declaration of Fundamental rights and Freedoms, OJ C 120, 16.5.1989, p. 51, on the basis of the report of the Committee on Institutional Affairs (doc. A2-0003/89 cit.).

²⁸ [Opinion No 2/94.](#)

rights of the Union to be drawn up'.²⁹ However, the Member States did not take this recommendation into account in the Amsterdam Treaty.

2.4. The Amsterdam Treaty and 'promotion' of fundamental rights by the EU legislature

The turning point for the promotion (not just protection) of fundamental rights by the European legislature was the Amsterdam Treaty, and its new objective to 'maintain and develop' the European Union as an **Area of Freedom, Security and Justice**. This objective was complemented by an appropriate legal basis in the form of several Treaty articles dealing with: anti-discrimination policies (Article 13 TEC);³⁰ access to documents (Article 255 TEC);³¹ data protection (Article 286 TEC);³² as well as policies linked with: freedom of movement (integration of the Schengen intergovernmental cooperation into the EU); asylum and migration; judicial cooperation in civil and criminal matters and in police cooperation. These legal bases made it possible to adopt the first generation of EU rules giving specific expression to fundamental rights.

However, the objective to establish a European Charter of Fundamental Rights, notably in the context of new EU competences linked with the objective of the European Area of Freedom, Security and Justice, was not abandoned. It was thanks to the German Presidency of the Council that the project resurfaced some weeks before the entry into force of the Amsterdam Treaty. At the 1999 Cologne Summit, the European Council adopted conclusions³³ providing that 'the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident'. Specifically, the European Council underlined that:

this Charter should contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the [ECHR] and derived from the constitutional traditions common to the Member States, as general principles of Community law. The Charter should also include the fundamental rights that pertain only to the Union's citizens. In drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union.

²⁹ See Méndez de Vigo and Tsatsos report (doc. A4-0347/97) of 19 November 1997 and OJ C 371, 8.12.1997, p. 99.

³⁰ See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19/07/2000) and the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 02/12/2000).

³¹ See Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 31/05/2001)

³² See Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8 12/01/2001) which mirrors at EU institution level the rules on data protection applicable at Member States level (implementing Directive 95/46 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23/11/1995).

³³ [Conclusions of the Presidency](#), European Council meeting in Cologne, 3-4 June 1999.

After a year of intense negotiations within a Convention³⁴ chaired by Roman Herzog, former President of the Federal Republic of Germany and of the German Constitutional Court, the **Charter of Fundamental Rights of the European Union** was adopted and proclaimed on 7 December 2000 in Nice by the European Parliament, the Commission and the Council of the European Union.³⁵ However, at the time, the Charter was not legally binding for the Member States or EU citizens, but had the nature of an **inter-institutional agreement**, covering the activities of the EU institutions.³⁶

The prospect of the future transformation of the Charter into a binding act was referred to in Declaration 23 annexed to the Treaty of Nice (concluded at the same time), where the need for a constitutional reform, whereby the Charter would be transformed into a binding text, was underlined.

This possibility was taken up in the Laeken Declaration of 15 December 2001,³⁷ by which the European Council decided to convene a Convention which would consider, among other things, **whether the Charter should be included in the basic treaty and whether the European Community should accede to the ECHR**. During the negotiations, owing to the fact that the scope of a binding EU Charter would be wider than that of the ECHR, and would also cover economic and social rights (Title IV), an additional paragraph 5 was added to Article 52 of the Charter. It stipulated that certain provisions of the Charter were only programmatic 'principles' and not judicially enforceable rights. However, neither the Charter nor the 'Explanations'³⁸ relating to it explain which provisions should be considered as such 'principles'.

During the negotiation of the Treaty establishing a Constitution for Europe, the Charter of Fundamental Rights was included as the second part of the draft European Constitution. However, due to the results of the 2005 referendums in France and the Netherlands, the process of ratification of the new Treaty was abandoned. After a period of reflection, in June 2007, the European Council decided to convene another Intergovernmental Conference to prepare a '**Reform Treaty**', which would provide for significant institutional and procedural reforms relating to the EU. One such reform was to make the Charter legally binding, on an equal footing with the Treaties, as well as to plan for EU accession to the ECHR.

³⁴ The Convention was composed of 15 representatives of the Heads of State or Government, 30 representatives of the national parliaments, 16 representatives of the European Parliament and one representative of the Commission.

³⁵ [Conclusions](#) of the Presidency, Nice European Council, 7-10 December 2000.

³⁶ On the legal status of the Charter before the Lisbon Treaty see e.g. Bruno de Witte, 'The Legal Status of the Charter: Vital Question or Non-Issue', *Maastricht Journal of European and Comparative Law* 8 (2001), pp. 81ff.

³⁷ Text of the Laeken Declaration, available from <http://www.cvce.eu/>.

³⁸ On the role of the 'Explanations' in the interpretation of the Charter, see e.g. Jean-Paul Jacqu e, 'The Explanations Relating to the Charter of Fundamental Rights of the European Union', in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights*, Hart Publishing, 2014, p. 1715ff.

3. EU fundamental rights after the Lisbon Treaty

3.1. The outlook for the Charter of Fundamental Rights

With the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights became a legally binding catalogue of fundamental rights within the EU legal order. It has been increasingly referred to by the Court of Justice, and – as Judge Marek Safjan underlines – these references are not 'simply ornamental' but, on the contrary:

*They influence the process of interpretation, of determination of the very content of particular norms, their extent and legal consequences, and thus they provide for the enlargement of the field of application of the European rules in the national legal orders.*³⁹

Even if the Charter is worded taking into account all previous ECJ case law, **it enjoys a higher degree of legitimacy, thanks to its ratification by all the Member States on behalf of their citizens.** As Judge Koen Lenaerts observed, the EU Charter can be described as the outcome of a pan-European political consensus which should frame both the activity of the EU legislature and EU judges.⁴⁰ An important aspect of the EU Charter, indicated explicitly in its preamble, is that it places the individual at the heart of EU activities.

The Charter is divided into six titles organised to reflect the importance of EU principles:

- Dignity (Articles 1-5)
- Freedoms (Articles 6-19)
- Equality (Articles 20-26)
- Solidarity (Articles 27-38)
- Citizens' Rights (Articles 39-46)
- Justice (Articles 47-50).

3.2. Scope of the EU Charter *ratione materiae*: a new 'soul' to EU policies?

3.2.1. Introduction

Even if fundamental rights are *per se* universal and indivisible, the ECJ has, since the Community's beginnings, claimed that its jurisdiction is limited only to domains which fall within the scope of its competence and to Member States' activities whenever they act within the scope of Union law.⁴¹ As far as the Charter is concerned, the same principle is enshrined in Article 6(1) TEU according to which the EU Charter's provisions 'shall not extend in any way the competences of the Union as defined in the Treaties'.

After the Lisbon Treaty, this so-called 'principle of conferral' has been further codified by the TEU, notably in Article 5, according to which:

³⁹ Marek Safjan, 'Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union', *EUI LAW; Centre for Judicial Cooperation DL*, 2014/02, p. 2.

⁴⁰ Koen Lenaerts and José Antonio Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice', in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights*, Hart Publishing, 2014, p. 1560.

⁴¹ See Cases: 5/88 *Wachauf* and C-260/89 *ERT*.

*The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality Under the principle of conferral, **the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.** Competences not conferred upon the Union in the Treaties remain with the Member States. [emphasis added]*

It is, then, the scope of EU law which determines EU jurisdiction on fundamental rights and not the reverse. The same applies to the **content** of EU fundamental rights. In fact, according to Article 52(2) of the Charter:

Rights recognised by [the] Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

In the light of this specification, in several areas where the same subject matter is regulated both by an Article of the Treaty and by an Article of the Charter (see the case of **data protection** covered by Articles 16 TFEU and 8 of the Charter, or the case of **access to documents** covered by Article 15 TFEU and Article 42 of the Charter), the legislature has to take *both* as a reference; indeed very often they complement each other. The same applies to all rights derived from the notion of **EU citizenship**, laid down in Article 20 TFEU, which are also reproduced under Title V of the Charter.

3.2.2. The ambiguity of some EU legal bases and the need for a 'connecting factor' between Member States' legislation and EU competences

The theory of **implied powers**,⁴² the principle of **effectiveness** and of **equivalence**,⁴³ as well as the **teleological**⁴⁴ interpretation of the Court, have been powerful incentives, also since the Lisbon Treaty, to expand the scope of EU law (as well as of the Charter). The criteria to be followed when choosing a legal basis remain of fundamental importance,⁴⁵ as is an explicit link between the EU legislative text and the Charter. Recently, whilst deciding a case concerning the implementation of Directive 2004/38 on the freedom of movement,⁴⁶ which does not harmonise the national rules of

⁴² See Article 352 TFEU, which grants powers of action when no other basis is available to attain objectives of the Treaties, but which may only be invoked within the framework of the policies defined in the Treaties.

⁴³ In many EU areas, in the absence of relevant European Union rules, the protection of the rights which individuals acquire under European Union law are considered a matter for the domestic legal order of each Member State, which shall adopt detailed procedural rules, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice, or excessively difficult, the exercise of rights conferred by the European Union legal order (principle of effectiveness).

⁴⁴ See the *CILFIT* (C-283/81) case where the ECJ affirmed that 'every provision of Community law must be placed in its context and interpreted in the light of the provisions of EC law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied'. See also Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', *European Journal of Legal Studies* 1.2 (2007), p. 5.

⁴⁵ As stated in Case C-338/01 (paras 54-58) 'The choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure.'

⁴⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77,

procedure in case of refusal, the ECJ considered that national remedies must afford effective judicial protection as set out in Article 47 of the Charter and the basis for a refusal must be disclosed to the person concerned.⁴⁷

However, the most famous ECJ judgment dealing with the scope of application of EU law is *Åkerberg Fransson*,⁴⁸ where the Court, referring to its established case law on the scope of fundamental rights in the EU and to the explanations relating to Article 51 of the Charter of Fundamental Rights, considered that the fundamental rights guaranteed by that Charter must be complied with where national legislation falls within the scope of European Union law.

On the same day the Court stated in *Melloni*⁴⁹ that **only in a situation where an action of a Member State is not entirely determined by European Union law**, do national courts and authorities remain free to apply national standards of protection of fundamental rights. However, even in these cases, the level of protection provided by the Charter of Fundamental Rights, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law must not thereby be compromised.

Indeed, in the *Åkerberg Fransson* case, the Court interpreted the *ne bis in idem* principle laid down in Article 50 of the Charter of Fundamental Rights. The Court observed that the principle of preventing a person from being punished twice for the same offence does not preclude a Member State from imposing, for the same acts, a combination of tax penalties and criminal penalties, as long as the tax penalty is not criminal in nature. It then defined the three criteria to be followed by the national judge to assess if a sanction is criminal in nature, for example, the legal classification of the offence under national law, the very nature of the offence, and the nature and degree of severity of the penalty that the person concerned is liable to incur.⁵⁰ According to the Court:

since the fundamental rights guaranteed by the Charter must ... be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

As stated by Judge Koen Lenaerts, *Åkerberg Fransson* is a seminal judgment which clarifies the scope of application of the Charter and further develops the *Wachauf* case law. It is grounded on the **principles of effectiveness** and **loyal cooperation** between the EU and its Member States.⁵¹ At the same time, it preserves the application of national standards in protection of fundamental rights, notably in a situation where Member State action is not entirely determined by EU law. In these cases, where EU legislation is absent, it should be taken in account that, according to Article 53 of the Charter:

⁴⁷ Case C-300/11 ZZ v UK Home Secretary.

⁴⁸ Case C-617/10.

⁴⁹ Case C-399/11.

⁵⁰ These criteria mirror the so-called 'Engel' Criteria defined by the European Court of Human Rights (ECtHR), confirming the convergence of the case law of the two European Courts. See ECtHR judgment of 8 June 1976, Application No 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

⁵¹ Lenaerts, op.cit.

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

According to the Court of Justice, Article 53 of the Charter confirms that, where a European Union legal act calls for national implementing measures, national authorities and courts may apply national standards of fundamental-rights protection, provided that the **level of protection** granted by the Charter of Fundamental Rights and the primacy, unity and effectiveness of European Union law are not thereby compromised.⁵²

This was the case in *Melloni*, where a preliminary ruling by the Spanish Constitutional Court was based on a situation where two different regimes of judgment *in absentia* competed at national and European level.

The ECJ's answer was in favour of the application of the principle of EU law, as described by the Framework Decision on the European Arrest Warrant, because:

allowing a Member State to avail itself of Article 53 of the Charter of Fundamental Rights to make the surrender of a person conditional on a requirement not provided for in the EU framework decision on the European Arrest warrant would, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that decision, undermine the principles of mutual trust and recognition which that decision purports to uphold and would therefore compromise its efficacy.

4. EU fundamental rights and international instruments

4.1. The relationship between EU Fundamental rights and the ECHR

By referring to fundamental rights in its case law, the ECJ established a bridge between the then newly founded Community legal order, on the one hand, the already existing national constitutional systems, and international treaties ratified by its Member States, especially the ECHR, on the other hand. However, although the interaction of the various levels of fundamental rights in Europe has admittedly led to the overall strengthening of their level of protection, it has not resulted in the emergence of a uniform concept of such rights, in particular as regards their content and scope.⁵³ Owing to the fact that the legal standards of fundamental rights enshrined in European Court of Human Rights (ECtHR) case law are also applicable to EU Member States, the ECJ very soon recognised the 'special significance' of the ECtHR and established a close dialogue with the Strasbourg court.⁵⁴ On its side, in its 1999 *Matthews* ruling,⁵⁵ the ECtHR recognised Gibraltar citizens' right to participate in elections to the European Parliament as an essential element of participation in the European Community's

⁵² See 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' (2012) 49 *Common Market Law Review* 49.2 (2012): 489–519.

⁵³ See Fabbrini, *Fundamental Rights in Europe...*, pp. 13-14.

⁵⁴ On the dialogue between the ECJ and ECtHR in general see e.g. Marta Cartabia, 'Europe and Rights: Taking Dialogue Seriously', *European Constitutional Law Review* 5.1 (2009), pp. 5-31.

⁵⁵ Application No 24833/94.

democratic life (thereby requiring an amendment to the UK European Elections Act which did not recognise such a right). In its subsequent case law, the ECtHR defined the relationship between the ECHR, on the one hand, and the EU legal order, on the other, by establishing a presumption that the protection of fundamental rights afforded by the Community legal system was deemed to be equivalent to the protection granted under the Human Rights Convention.

Cross-fertilisation between ECJ and ECtHR case law gained new dynamism following the adoption of the EU Charter, as most of the rights recognised by that instrument correspond to rights also guaranteed by the ECHR.⁵⁶ Not surprisingly, Article 52(3) of the Charter states that, without prejudice to a more extensive protection, the meaning and scope of those rights shall be the same as those laid down by the ECHR. In addition, the official 'Explanations' to the Charter provide a list of the articles having the same meaning as the corresponding articles of the ECHR, but where the scope is wider.⁵⁷

With such a wide, overlapping legal space, the dialogue between the two courts provides a means of avoiding divergence between the EU *acquis* in the area of fundamental rights and ECtHR case law, thereby strengthening the 'principle of homogeneity'. However, concern has been raised with regard to the ECJ's insufficient openness towards ECtHR case law, and the Luxembourg court has even been criticised for developing its own fundamental rights standards, paying less and less attention to the ECHR.⁵⁸ Indeed, with regard to EU legal acts, Member States could find themselves in a difficult situation in case of discrepancy between ECJ and ECtHR case law, which can only be systematically prevented by EU accession to the ECHR.⁵⁹

⁵⁶ The correspondences are as follows: Article 2 corresponds to Article 2 of the ECHR, — Article 4 to Article 3 ECHR, — Article 5(1) and (2) to Article 4 ECHR, — Article 6 to Article 5 ECHR, — Article 7 to Article 8 ECHR, — Article 10(1) to Article 9 ECHR, — Article 11 corresponds to Article 10 ECHR without prejudice to any restrictions which Union law may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) ECHR, — Article 17 corresponds to Article 1 of the Protocol to the ECHR, — Article 19(1) corresponds to Article 4 of Protocol No 4, — Article 19(2) corresponds to Article 3 ECHR as interpreted by the ECtHR, — Article 48 corresponds to Article 6(2) and(3) ECHR, — and Article 49(1) (with the exception of the last sentence) and (2) correspond to Article 7 ECHR.

⁵⁷ Those rights are the following: Article 9 covers the same field as Article 12 ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation, — Article 12(1) corresponds to Article 11 ECHR, but its scope is extended to EU level, — Article 14(1) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training, — Article 14(3) corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents, — Article 47(2) and (3) corresponds to Article 6(1) ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation, — Article 50 corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to EU level between the Courts of the Member States, — And finally, citizens of the EU may not be considered as aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 ECHR as regards the rights of aliens therefore do not apply to them in this context.

⁵⁸ See Gráinne de Búrca, 'After the EU Charter of fundamental rights: the Court of Justice as a human rights adjudicator?', *Maastricht Journal of European and Comparative Law*, Vol. 20, 2013.

⁵⁹ Francesca Ferraro, *Lo spazio giuridico europeo...*, p. 224.

Finally, the Charter also incorporates rights that are not found in the ECHR⁶⁰ and which, as interpreted by the ECJ, can in turn contribute to ECtHR case-law development. The latter already increasingly takes the EU Charter into account when interpreting the ECHR.

Thus, the Charter encourages constructive dialogue between the ECJ and ECtHR, which is particularly important for policies linked to development of the European Area of Freedom, Security and Justice. This cooperation arose from the ECJ judgment in *NS* and the ECtHR ruling in *MSS v Belgium and Greece*.⁶¹ These demonstrate that both of the European courts consider that the principle of mutual recognition of measures adopted by EU Member States is refutable when there is a systemic violation of fundamental rights by the requesting state and that the strict application of the Dublin Regulation in cases where Member States were aware of a risk of ill-treatment was incompatible with the human rights obligations of those states. This should not be taken as a basis for calling the level of protection afforded to fundamental rights in another Member State into question, unless the facts of a case indicate systemic failures in the protection of fundamental rights.

4.2. EU fundamental rights and the United Nations Charter

Fundamental rights have also been a crucial element of relations between the EU and the United Nations. Even if the EU, or its Member States, recognise UN texts such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and several other UN conventions, some tension has arisen in recent years, when the EU has implemented measures taken by the UN Security Council (UNSC) on the basis of Chapter VII of the UN Charter.

This was notably the case with the UN Security Council (UNSC) system for freezing the funds of persons or entities allegedly associated with terrorist organisations. In particular, a Saudi national, Yassin Abdullah Kadi, challenged the lawfulness of his inclusion on 'Terrorist list', and the reproduction of the same list in an EU measure intended to implement the UNSC decision in all EU Member States, before the ECJ. Initially, in 2005, the Court of First Instance (now the General Court) held that UN Security Council measures enjoy, in principle, immunity from EU jurisdiction. However, when hearing the case on appeal in 2008, the ECJ found that the courts of the European Union must ensure, in principle, full judicial review of the lawfulness of all EU legal acts, including those which implement UN Security Council resolutions, especially if the right to fair trial had not been granted to the individual affected. The ECJ justified its stance by underlining that the EU is based on the rule of law, and therefore all EU acts must conform with 'the basic constitutional charter, the EC Treaty'. The Court added that:

the obligations imposed by an international agreement [i.e. in this case the UN Charter] cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights.

It is worth recalling that the same argument was used, in even stronger terms, after the entry into force of the Lisbon Treaty and the ensuing full legal force of the EU Charter,

⁶⁰ This is notably the case of economic and social rights under Title IV of the Charter, such as the right of collective bargaining and action, including the right to strike. But is also the case of the right to good administration (Art 41 of the Charter) which is complemented by a specific legal basis in the TFEU (Article 298).

⁶¹ Case 30696/09.

when in 2013 the Council considered that improvements in UNSC practices (introducing the presence of an Ombudsman) could be considered as complying with the principle of fair trial. Even in this case, in *Kadi*⁶² the ECJ considered that the UNSC system did not afford the same level of protection as set out in EU law, and in particular by the Charter, especially as far as the right to be heard, the right to have access to one's file (Article 41(2) of the EU Charter), and the right to a fair trial (Article 47 of the EU Charter) were concerned.

5. Duty of Member States to respect EU fundamental rights

5.1. Scope of the duty

Despite the existence of a common constitutional culture of fundamental rights across the EU, there are still noteworthy differences in the protection of specific fundamental rights in various Member States.⁶³ The relationship between national fundamental rights' instruments and the EU Charter is thus all the more relevant. According to Article 51(1) of the Charter:

'the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only **when they are implementing Union law.**' [emphasis added]

This concept is not new, as it was previously formulated in ECJ case law (*Wachauf*,⁶⁴ *ERT*⁶⁵ and *Annibaldi*⁶⁶). It is worth recalling that in the *NS*⁶⁷ case the Court made it clear that the notion of 'implementing EU law' also covers those cases where the Member States enjoy discretionary powers as to the method of implementation, and not only those where they have no choice as how to implement the EU rule.

Some problems of interpretation could, however, arise from the ambiguity of the 'Explanations' dealing with this Article,⁶⁸ which state that:

*As regards the Member States, it follows unambiguously from the case law of the [ECJ] that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act **in the scope of [EU] law.*** [emphasis added]

This expression is wider than the reference to 'implementing EU law' which, in any case, requires the existence of an EU legislative measure to be implemented. However, it would be difficult to accept that, as a general rule, the Charter could be directly applicable to the Member States in all the domains covered by the Treaties as an

⁶² Joined Cases C-402/05 P and C-415/05 P.

⁶³ Fabbrini, *Fundamental Rights in Europe...*, p. 256.

⁶⁴ Case 5/88.

⁶⁵ Case C-260/89.

⁶⁶ Case C-309/96.

⁶⁷ It is worth noting that the CJEU in the *NS* ruling of 2011 considered that human beings should also be protected against potential breaches (not simply actual breaches), and this duty has a clear preventive function in relation to torture, degrading and humiliating treatment.

⁶⁸ According to Article 6(1) of the TEU and to Article 52(7) of the Charter itself, the text of the explanations provides guidance to the Courts of the Union and of the Member States.

alternative to the national constitutional standards, in the absence of specific EU legislation.

The ECJ's position is that:

*fundamental rights guaranteed by the Charter must ... be complied with where national legislation falls **within the scope of European Union law** [therefore] situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.⁶⁹ [emphasis added]*

According to this statement, the ECJ assimilates the meaning of 'implementing EU law' with 'the scope of EU law', which is obviously wider than the previous expression. As Judge Safjan indicated, in *Åkerberg Fransson*, the ECJ adhered to the so-called 'functional approach' to the scope of application of the Charter by national courts, whereby the duty to apply the Charter:

concerns not only the specific provisions adopted specifically for implementation purposes but also other national provisions, which are necessary to ensure an effective application of the European provisions. ... [It] requires the indication of a concrete, precisely identified rule of EU law applicable within the scope of national law, so that the Charter could be applied.⁷⁰

Finally, as has been recently pointed out by Federico Fabbrini, Member States' duty to conform with EU fundamental rights can either appear in the guise of a 'floor', whereby national law may not fall below the level of protection provided for by EU law, or in the form of a 'ceiling', whereby the European level of protection constitutes the maximum that Member States may not exceed.⁷¹

5.2. Interpretation of EU measures and national implementing measures

Member States, when implementing EU measures or acting within the scope of EU law (see above), must, as far as possible, apply EU rules in accordance with the requirements for the protection of fundamental rights as foreseen by the Community legal order. This results from established ECJ case law, especially *Wachauf*, *Promusicae*⁷² and more recently, *Telekabel*.⁷³ In the latter case, the Court indicated that when transposing directives into their respective domestic legal orders, the EU Member States are under a duty to:

take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order.

Furthermore, the duty to respect EU fundamental rights also extends to the interpretation of national implementing measures. When interpreting these, national courts and other authorities must:

⁶⁹ *Åkerberg*, cit., para. 21.

⁷⁰ Safjan, 'Fields of application...', pp. 4-5.

⁷¹ Fabbrini, *Fundamental Rights in Europe...*, *passim*, and in particular pp. 39-41. According to Fabbrini, an example of the 'floor' is Case C-617/10 *Fransson*, whereas an example of the 'ceiling' is Case C-399/11 *Melloni*.

⁷² Case C-275/06.

⁷³ Case C-314/12.

*make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.*⁷⁴

In other words, Member States should act as an instrument of the decentralised administration of the Union whenever they apply or implement a regulation, transpose a directive, execute a decision of the Union or a judgment of the Court.⁷⁵

5.3. Fundamental rights and derogation clauses in EU legislation

As defined by EU law (and ECJ case law), fundamental rights should also be respected when Member States are entitled to derogate from EU law. This can happen, for instance, on the basis of such justifications as the protection of public order, public security or public health.⁷⁶ In its rulings on *Schmidberger*⁷⁷ and *Omega*,⁷⁸ the ECJ accepted that EU economic freedoms could be superseded when, respectively, the principle of human dignity and freedom of expression are at stake at national level.⁷⁹ The Court thus paved the way to a **multilevel protection of fundamental rights** and to the observance of the principle of subsidiarity in this sensitive domain.

The Court's reasoning rests on the assumption that **even when derogating from EU law, Member States are actually applying it nonetheless**. This is because derogations from EU law are, as such, also grounded in EU law, and therefore the use made of such derogations must comply with the conditions set by EU law, such as protecting legitimate interests, lack of discrimination, proportionality and compliance with fundamental rights. As Judge Koen Lenaerts declared:

*Where a national measure implementing EU law falls within that margin of discretion, a constitutional court may examine whether such a measure complies with fundamental rights as protected under its national constitution. Conversely, where a national measure falls outside such margin, compliance with fundamental rights must be examined by reference to the level of protection guaranteed by the Charter.*⁸⁰

5.4. Fundamental rights and areas not regulated by EU law

EU standards in fundamental rights may also be at stake whenever a particular aspect, falling within the area of EU competence, is nonetheless explicitly left unregulated under EU law. This silence at EU level is often justified by the fact that the EU legislature intended to respect the specificity of national legal orders (notably when dealing with sensitive issues such as administrative or criminal sanctions). Thus, for instance, in the absence of EU measures harmonising national rules of procedure, it is for the Member States to ensure the full effect of the EU measures in conformity with

⁷⁴ See also Case C-101/01 *Lindqvist*, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others*, paragraph 28.

⁷⁵ See George Arestis 'Fundamental rights in the EU: three years after Lisbon, the Luxembourg perspective'.

⁷⁶ The Treaty provisions provide for the possibility of derogation based on reasons of public policy, public security and public health (i.e. Articles 36, 45(3), 52 and 65(1)(b) TFEU).

⁷⁷ Case C-112/00.

⁷⁸ Case C-36/02.

⁷⁹ However, in *Omega* the ECJ indicated that the EU legal order is different from the national constitutional orders and it has to shape its own concept of fundamental rights.

⁸⁰ Lenaerts, op.cit.

the EU Treaties. This stems from Article 19(1) TEU, which requires that the Member States 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. In accordance with the principle of effectiveness, national remedies must afford effective judicial protection to EU rights. This requirement has been explicitly formulated in Article 47 of the EU Charter.

The same logic applies to national sanctions (criminal or administrative) which protect the enforcement of EU law, even if such sanctions were originally adopted without taking into account the effectiveness of EU law. When interpreting national criminal rules which sanction conduct violating EU law (e.g. breach of VAT regulations), Member States must take EU fundamental rights into consideration, as well as other general principles of EU law.⁸¹

5.5. EU fundamental rights outside the scope of EU obligations

A different situation arises if a Member State acts within the scope of EU competence, but no obligation arises under EU law. According to ECJ case law (*Annibaldi*⁸² and *Dereci*⁸³ rulings), national courts and authorities can take their national constitutional standards as legal references. However, as a recent study reveals, it can happen that the Charter is invoked by national courts in situations outside the scope of EU law.⁸⁴

6. EU Institutions' duty to respect EU fundamental rights

6.1. Recent case law

According to Article 52 of the Charter, any limitation to fundamental rights must be provided for by law, respect the essence of those rights and freedoms, and respect the principle of proportionality, failing which EU legislation is also to be held void. The ECJ has fleshed out these principles in three recent judgments, rendered since the entry into force of the Lisbon Treaty.

6.1.1. *Schecke* (2010)

In this case,⁸⁵ the ECJ annulled certain EU rules providing for the annual *ex-post* publication of the names of beneficiaries of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), and of the amounts received by each beneficiary under each of those Funds. Whilst recognising that, in a democratic society, tax-payers have the right to be kept informed of the use made of public funds, the Court considered nonetheless that it was necessary to strike a proper balance between the right to transparency, on the one hand, and the right to protection of personal data of natural persons, on the other. However, due to the absence in EU law of criteria minimising interference with personal data (such as the definition of the periods during which those persons received such aid, the frequency of such aid or the nature and amount thereof), the Court considered that the Council and the Commission exceeded the limits of proportionality. In fact, derogations from

⁸¹ See Case C-617/10 *Åkerberg Fransson*.

⁸² C-309/96.

⁸³ Case C-256/11 *Dereci* [2011] ECR I-11315.

⁸⁴ European Union Agency for Fundamental Rights, *Fundamental rights: challenges and achievements in 2013 – Annual report 2013*, June 2014, p. 25.

⁸⁵ Joined Cases C-92/09 and C-93/09.

the rights which natural persons enjoy under Articles 7 and 8 of the Charter must apply only where strictly necessary.

6.1.2. *Test-Achats (2011)*

In the second of the cases under consideration, *Test-Achats*,⁸⁶ the ECJ partially annulled an EU measure dealing with insurance services on account of discrimination between women and men, in violation of Articles 21 and 23 of the Charter. These provisions stipulate that any discrimination based on gender is prohibited and that equality between men and women must be ensured in all areas. The issue was that Directive 2004/113 in principle promoted equal treatment, but at the same time, recognised an unlimited transitional period for the Member States in its Article 5(2). Accordingly, the Court considered there was a risk that EU law may permit a derogation from the equal treatment of men and women to persist indefinitely. Such a provision, enabling the Member States to maintain, without temporal limitation, an exemption from the rule of unisex premiums and benefits, was considered contrary to the achievement of the objective of equal treatment between men and women, and incompatible with Articles 21 and 23 of the Charter.

6.1.3. *Digital Rights Ireland (2014)*

In a third recent case, *Digital Rights Ireland*,⁸⁷ the ECJ annulled the Data Retention Directive on account of a violation of the principle of proportionality when limiting fundamental rights to privacy and data protection (Articles 7 and 8 of the Charter).

The main objective of the Data Retention Directive was to harmonise Member States' provisions concerning the retention of certain data, generated or processed by providers of publicly available electronic communications services or of public communications networks. Its aim was to ensure that data were available where required for the prevention, investigation, detection and prosecution of serious crime, such as, in particular, organised crime and terrorism. Thus, the Directive provided that the above-mentioned providers must retain traffic and location data, as well as related data necessary to identify the subscriber or user. In contrast, it did not permit retention of the content of the communication or of information consulted.

However, the Court took the view that, by requiring the retention of this data, and by allowing the competent national authorities to access the data, the Directive was interfering in a particularly serious manner with the fundamental rights to respect for private life and protection of personal data. Furthermore, the fact that data were retained and subsequently used without informing the subscriber or registered user, is likely to generate a feeling in the persons concerned that their private lives are the subject of constant surveillance.

Therefore, the Court was of the opinion that, by adopting the Data Retention Directive, the EU legislature exceeded the limits imposed by compliance with the principle of proportionality. In that context, the Court observed that, in view of the important role of protection of personal data in the light of the fundamental right to respect for private life, and the extent and seriousness of the interference with that right caused by the Directive, the discretion afforded the EU legislature is reduced, with the result that that discretion should be reviewed strictly.

⁸⁶ Case C-236/09.

⁸⁷ Joined Cases C-293/12 and C-594/12.

Although the retention of data required by the Directive may be considered appropriate to attain the objective it pursues, the wide-ranging and particularly serious interference of the Directive with the fundamental rights at issue was not sufficiently circumscribed to ensure that that interference was limited to strict necessity.

The judgment is particularly noteworthy as it defines the principles that the legislature should have followed.

First, the Court considered the Directive excessive in covering, in a generalised manner, all individuals, all means of electronic communication and all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting serious crime.

Second, the Court considered the Directive failed to lay down any objective criterion to ensure the competent national authorities could access data and limit their use to prevention or detection of serious crimes, or prosecutions of these. On the contrary, the Directive simply referred, in a general manner, to 'serious crime' as defined by each Member State in its national law. In addition, the Directive did not lay down any substantive and procedural conditions under which the competent national authorities may access and subsequently use the data. In particular, access to the data was not made dependent on prior review by a court or by an independent administrative body.

Third, concerning the data retention period, the Directive imposed a period of at least six months, without making any distinction between the categories of data on the basis of the persons concerned, or the possible usefulness of the data in relation to the objective pursued, without stating the objective criteria on the basis of which the period of retention must be determined in order to ensure that it is limited to what is strictly necessary.

6.2. Evaluating the impact of fundamental rights on EU legislation

6.2.1. The Charter in new EU legislation and compliance of the acquis

The *Digital Rights Ireland* ruling mentioned above marks a new trend for the Court of Justice, not only in so far as data protection is concerned (as was confirmed a month later with the *Google Spain* case⁸⁸), but also of the new obligations incumbent upon the EU legislature (whatever the content of the legislative proposal), in cases of possible impact on fundamental rights. According to the Council Legal Service, the *Digital Rights Ireland* ruling:

*...confirms that the Court of Justice will not satisfy itself with anything less than a strict assessment of the proportionality and necessity of measures that constitute serious restrictions to fundamental rights, however legitimate the objectives pursued by the EU legislature.*⁸⁹

To conform with the requirements formulated in recent ECJ case law, the EU legislature ought to improve the quality of legislative preparatory work, the *ex ante* scrutiny of future legislation and *ex post* impact assessment of measures already adopted, by taking as a compass the need to comply, both with the Charter, and with the principle of subsidiarity.

⁸⁸ Judgment in Case C-131/12. See information note by the Council Legal Service on that judgment (doc. 10187/14).

⁸⁹ Implementation of the Charter of Fundamental Rights of the EU – Presidency discussion paper (9 July 2014), available online unofficially at [Statawatch](#).

This message has been taken particularly seriously by the European Parliament and the Commission since the entry into force of the Lisbon Treaty. In 2010 the Commission adopted a 'Strategy for the effective implementation of the Charter'.⁹⁰ It aims to promote a 'fundamental rights culture' at all stages of the legislative procedure, from the initial drafting of a proposal within the Commission to impact assessment, and right up to checks on the legality of the final text. Compared to the previous practice of 'self-certification', by which the legislature simply stated that the legislative text 'complies' with the Charter (as was e.g. the case of the European Arrest Warrant Framework Decision), new EU texts make a clear reference to the specific fundamental rights at stake, especially where often a balance must be struck between different rights. Since 2010, Commission staff have to take into account the following 'check list' which mirrors Article 52(2) of the Charter:

1. What fundamental rights are affected?
2. Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)?
3. What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)?
4. Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)?
5. Would any limitation of fundamental rights be formulated in a clear and predictable manner?
6. Would any limitation of fundamental rights:
 - be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)?
 - be proportionate to the desired aim?
 - preserve the essence of the fundamental rights concerned?

The Commission's Strategy provides, *inter alia*, for the impact assessment of all new legislative proposals from the point of view of observance of the Charter. More detailed guidelines are contained in the Commission's Operational Guidance on that topic.⁹¹ Such an evaluation is needed notably when a planned EU measure limits a fundamental right. In such cases a detailed examination of the necessity for, and proportionality of, these limitations is required in accordance with Article 52 of the Charter.

A similar approach has also been launched by the Council (see the Council Conclusions of 25 February 2011 which set out the main elements of its role in ensuring effective implementation of the Charter⁹²). As requested in point 15 of these conclusions, the 'Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies' were highlighted by the Council in its

⁹⁰ COM(2010)573 final.

⁹¹ SEC(2011)567 final.

⁹² Council [conclusions](#) on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, 5-6 June 2014.

conclusions of 23 May 2011 on the Council's actions and initiatives for the implementation of the Charter.⁹³

7. Prospects: the Charter and greater political legitimacy

Protecting and promoting fundamental rights is not simply a legal exercise, but is the core of all EU policies, as reiterated by the President of the Commission, Jean-Claude Juncker. In the *Political Guidelines* for his Commission, Juncker emphasised that:

*Our European Union ... is also a Union of shared values, which are spelled out in the Treaties and in the Charter of Fundamental Rights. Citizens expect their governments to provide justice, protection and fairness, with full respect for fundamental rights and the rule of law. This also requires joint European action, based on our shared values. **I intend to make use of the prerogatives of the Commission to uphold, within our field of competence, our shared values and fundamental rights***

Moreover, during his hearing before the EP, the Commission's First Vice-President, Frans Timmermans, in charge of Better Regulation, inter-Institutional relations, the rule of law and Charter of Fundamental Rights, underlined that the rule of law and promotion of fundamental rights would be at the core of his mandate. Specifically, he declared that:

*The Commission, as guardian of the Treaty, including the Charter of Fundamental Rights, has a particular responsibility to ensure their full respect. I would see it as my responsibility ... to give priority to this essential Commission competence. **I will not hesitate to use all instruments at the Commission's disposal to ensure the application of the rule of law and respect for fundamental rights***

Furthermore, Timmermans made the following commitments regarding the protection and promotion of fundamental rights:

- swift **accession to the ECHR** as soon as the ECJ issues its (positive) opinion;⁹⁴
- close cooperation with national, European and international **fundamental rights organisations**;
- organisation of an **annual colloquium** on the state of play of fundamental rights in Europe (with the participation of all relevant institutions, including the EP).

It is worth noting that the European Parliament has organised annual debates on fundamental rights since the creation of its Civil Liberties Committee in 1992.⁹⁵ However, recently the Council, in its conclusions⁹⁶ on the Commission's 2013 report on the application of the Charter, noted that it is the duty of all Union institutions to

⁹³ See point 9 of the Council conclusions on the Council's actions and initiatives for the implementation of the Charter of Fundamental Rights of the European Union (doc. 10139/1/11 REV 1).

⁹⁴ Timmermans [reiterated the Commission's commitment](#) to accession in a debate in the EP in February 2015, but acknowledged that addressing the challenges raised by the Court's opinion would not all be easy. A 'reflection period', giving time to consult with stakeholders, is required to establish the best way forward.

⁹⁵ Some years later these debates were discontinued due to inadequate participation by the other institutions.

⁹⁶ [Council conclusions](#) on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, 5- 6 June 2014.

scrutinise their actions with regard to the provisions of the Charter. Furthermore, the Council indicated it would welcome renewed determination from the Union institutions to ensure consistent application of the Charter in legislative activity.⁹⁷

It seems therefore that, under the Juncker Commission, fundamental rights will continue to play a critical role in all EU policies. The coming years are likely to mark a new era of fundamental rights, regardless when or if the EU eventually accedes accession to the ECHR. Greater emphasis on fundamental rights, which are increasingly taken into account both in the EU legislative process and in the case law of the European courts, contributes to the consolidation of a set of distinctly European values, thereby reinforcing the sense of identity and community uniting the peoples of Europe, which in turn strengthens the Union's political legitimacy.⁹⁸ By structuring the legal and political discourse around the culture of rights, the EU institutions not only boost their credibility, simultaneously placing themselves closer to citizens, but also contribute to the creation of a European public sphere.

8. The ECJ opinion on EU accession to the ECHR

EU accession to the ECHR⁹⁹ is provided for by Article 6(2) TEU and by Protocol No 8 to the Treaties. Relations between the EU and ECHR were set out in a draft accession agreement, negotiated over three years up to April 2013. However, after this was submitted for opinion to the Court of Justice, the Court ruled that it was incompatible with the EU Treaties.¹⁰⁰ In the light of the Court's opinion, the EU institutions and the states party to the draft agreement are still considering how and if it may be adapted to address the Court's concerns. In the meantime, a new Protocol (No 14) to the ECHR had been ratified to pave the way to EU accession to the Convention of Human Rights (previously accession was only open to states).

The draft agreement provided a strict framework for dialogue between the two courts, with both referring to the same common legal heritage. If this dialogue were to take place in a spirit of mutual cooperation, accession to the ECHR could provide, as noted by ECJ Judge Koen Lenaerts (writing before the Court's opinion was adopted), 'the perfect avenue for both Courts to develop a common constitutional space for the protection of fundamental rights, whilst preserving the special characteristics of each legal system'.¹⁰¹

⁹⁷ In its conclusions, the Council welcomed further debate on the application of the Charter and reiterated its commitment to continue holding an annual inter-institutional exchange of views on the application of the Charter, based on the annual report on the application of the Charter submitted by the Commission. This would also take account of the resolutions adopted by the European Parliament and the annual report presented by the EU Agency for Fundamental Rights (point 23). Moreover, it noted with interest the idea of an annual assessment by the Council on the basis of the Commission's annual report on the application of the Charter of Union action regarding the provisions of the Charter. It could also point out areas for future action, and noted that this could gradually lead to a Union internal strategy on fundamental rights, possibly through an action plan on a mid-term basis, regarding the respect and promotion of the Charter (point 24).

⁹⁸ See E. Muir, 'The Court of Justice in the Novel System for the Protection of Fundamental Rights in the EU', *Maastricht Faculty of Law Working Paper*, 2012-5, p. 19. See also Francesca Ferraro, *Lo spazio giuridico europeo...*, p. 225.

⁹⁹ On EU accession to the ECHR see F. Fabbrini, J. Larik, 'The Accession of the EU to the ECHR and its Effects: *Nada v Switzerland*, the Clash of Legal Orders and the Constitutionalization of the ECtHR', (forthcoming) in *Oxford Yearbook of European Law* (2015); available at [SSRN](#).

¹⁰⁰ [Opinion 2/13](#) of 18 December 2014.

¹⁰¹ Lenaerts, *op.cit.*

On 18 December 2014, the ECJ, sitting as the full Court, further to a request from the Commission on the basis of Article 218(11) TFEU, delivered Opinion 2/13 on the non-compatibility of the envisaged agreement with the Treaties (see box above). The main point raised by the Court was to underline that the EU is not a state, but a 'new legal order', with its own constitutional framework and founding principles: a sophisticated institutional structure and a full set of legal rules to ensure its operation and the subjects of which comprise not only its states but also their nationals (paras 157 and 158). The draft accession agreement could therefore threaten the specific characteristics of the EU as well as of the primacy of EU law (on this point, the ECJ quoted the *Melloni* judgment – C-399/11), and the direct effect of provisions applicable to EU nationals and to the Member States themselves (as well as the principle of the autonomy of the EU legal system, laid down in Article 344 TFEU).

Moreover according to the ECJ, the draft agreement does not adequately recognise that the set of common values on which the EU is founded (Article 2 TEU) implies and justifies the existence of mutual trust among the Member States (a presumption which can be refutable only in case of systemic violations). According to the Court, in so far as the ECtHR requires a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust among those Member States, this is liable to upset the balance of the European Union and undermine the autonomy of EU law.

In its Opinion, the Court stated that it is in continuity with its previous jurisprudence according to which: 'the interpretation of fundamental rights should be ensured within the framework of the structure and objectives of the EU' and it is binding not only for the institutions, bodies, offices and agencies of the EU but also for Member States when they are implementing EU law (see the *Åkerberg Fransson* case, C-617/10).

Overall, as highlighted earlier in this analysis, the ECJ confirmed that respect for fundamental rights is a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not valid in the EU.¹⁰² On Article 53 of the ECHR, which confers on the Contracting Parties the power to lay down higher standards of protection than those guaranteed by the ECHR, the ECJ considers that this should not threaten the level of protection provided for by the EU Charter and the primacy, unity and effectiveness of EU law.

The ECJ's Opinion is currently being studied by the Commission, which should reopen negotiations on the basis of the principles outlined by the Court. Furthermore on this delicate issue there is a debate in progress in the Council and in the European Parliament (AFCO, LIBE and JURI Committees). On the academic side, it has also triggered many reactions, some very critical but others at least partially supportive:¹⁰³ with an intensive and complex debate shaping up.

¹⁰² See judgments in *ERT*, C-260/89, *Kremzow*, C-299/95, *Schmidberger*, C-112/00, and *Kadi and Al Barakat International*.

¹⁰³ For a general overview on this debate, see in particular: verfassungsblog.de and [Jean Paul Jacqué](#) (former Secretary of the Convention which negotiated the EU Charter).

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The European Union, like its Member States, has to comply with the principle of the rule of law and respect for fundamental rights when fulfilling the tasks set out in the Treaties. These legal obligations have been framed progressively by the case law of the European Court of Justice. The Court filled the gaps in the original Treaties, thus simultaneously ensuring the autonomy and consistency of the EU legal order and its relation with national constitutional orders.

Since the entry into force of the Lisbon Treaty, these principles have also been expressly laid down in the Treaties and in the Charter of Fundamental Rights. Being part of the body of EU constitutional rules and principles, the Charter is binding upon the EU institutions when adopting new measures, as well as for Member States during implementation.

The Charter is the point of reference, not only for the Court of Justice, but also for the EU legislature, especially when EU legislation gives specific expression to fundamental rights. Moreover, fundamental rights are also of relevance for EU legislation covering all the other areas of Union competence.

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