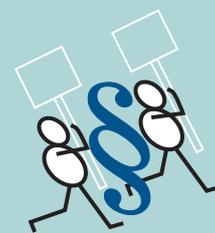


The Charter of Fundamental Rights as a Living Instrument



Manual



The European Charter of Fundamental Rights as a Living Instrument

Manual

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List of Abbreviations

AP	Additional Protocol
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDDH	Steering Committee for Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Covenant on the Elimination of Racial Discrimination
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice (with the entry into force of the Treaty of Lisbon the ECJ was renamed Court of Justice of the European Union (CJEU))
ECtHR	European Court of Human Rights
EP	European Parliament
ESC	European Social Charter
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MIPAA	Madrid International Plan of Action on Ageing
OHCHR	Office of the High Commissioner
SOLVIT	Internal Market Problem Solving Network
TEC	Treaty on the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
VIPPA	Vienna International Plan of Action on Ageing

Foreword

Professor Marek Safjan, Judge and President of Chamber, Court of Justice of the European Union, Luxemburg

For the Court of Justice of the European Union (CJEU), fundamental rights are an extremely important part of the *acquis communautaire* and also an essential component of the European identity. Human rights have been introduced into the sphere of European law as a substantial element of general principles of law almost 50 years ago.¹ However, from today's perspective, there is no doubt that the entry into force of the Charter of Fundamental Rights as binding law on 1 December 2009² had a specific symbolic significance for the European Union, being a clear confirmation of the trends consequently developed by the jurisprudence. What is more, it helped to stimulate the further development of the legal order and the process of integration as a whole. It has been the starting point for a new stage of human rights jurisprudence of the CJEU. Today, almost five years later, we may say that the quality, scope and frequency of the application of fundamental rights essentially changed the face of the Court's jurisprudence. The CJEU has become the Court of Human Rights for the European Union. How significant an impact the apparently formal act of including the Charter into the legal order of the EU would have on the whole EU legal system, was difficult to foresee.

The interpretation and application of the European legal provisions taking into account fundamental rights is a crucial factor for the legal order because it opens new ways of legal reasoning and methodology. It also allows to better recognize the purposes of legal mechanisms and their interdependency. For these reasons no supreme jurisdiction, neither at the national nor at the supranational level, may execute their functions without referring to the fundamental rights and to the general principles of law.

My personal experiences perfectly confirm this assumption. As a former constitutional judge, I can firmly say that the openness towards fundamental rights protection and to the general principles of law were – at the first stage after the collapse of the communist system in my country (Poland) – the very vehicle of transformation of the legal system. At the time they created substantive “added values” to the concept of the rule of law.

As a European judge, I should clearly assert that references to the fundamental rights guaranteed by the Charter not only have become current practice of the jurisprudence but also that they are a necessary element of the interpretation and the application of European provisions. Judgments such as, in recent years, *N.S.*³, *DEB*⁴, *Åkerberg Fransson*⁵, *Melloni*⁶, *Jeremy F.*⁷, *Trade Agency*⁸ and many others, very well illustrate present trends in the jurisprudence. References made in the jurisprudence to the guarantees of the fundamental rights are not a simple ornament. They influence essentially the process of interpretation, of determination of the very content of particular norms, their extent and the legal consequences, and thus they allow to enlarge the field of application of the European rules in the national legal orders.

The first criterion and point of reference to search for the correct and adequate standard of fundamental rights is always the preservation of the essence of fundamental rights. One cannot preclude *a priori* that the national constitutional standard provides better guarantees for the preservation of the substance of a particular fundamental right than the Charter standard.

However, so that the dialogue between the European and national courts is efficient, at least two conditions are to be met. Firstly, according to para. 29 of the *Åkerberg Fransson* judgment⁹, the exchange bet-

ween the CJEU and national judges has to be initiated – this initiative belongs to the national courts. Secondly, openness and sensitivity to the arguments provided by the other party of the dialogue is needed, the exchange between the European and national jurisdictions is not to be transformed into a “one-way message” – this requirement should be addressed first of all to the European courts.

But a prerequisite of the exchange and dialogue in between European and national courts regarding fundamental rights is knowledge of the Charter of Fundamental Rights of the EU and ways of its implementation. It is why initiatives like the project “Charter of Fundamental Rights as a Living Instru-

ment” and its focus on training of national judges and lawyers are important and deserve support. The Manual prepared within the project will surely help in this endeavour.

Professor M. Safjan agreed to use above views as a foreword for the Manual. They constitute a fragment of the recent publication:

M. Safjan, *Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union*, Distinguished Lecture, Centre for Judicial Cooperation, European University, Florence 2014.

Notes:

- 1 Cf. C-1/58, *Friedrich Stork et Cie v. High Authority*, Judgment of 4 February 1959 and C-29/69, *Stauder v. City of Ulm*, Judgment of 12 November 1969.
- 2 [2012] OJ C362/02.
- 3 Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. v. Refugee Applications Commissioner*, Judgment of 21 December 2011.
- 4 C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, Judgment of 22 December 2010.
- 5 C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, Judgment of 26 February 2013.
- 6 C-399/11, *Stefano Melloni v. Ministero Fiscal*, Judgment of 26 February 2013.
- 7 C-168/13, *Jeremy F.*, Judgment of 30 May 2013.
- 8 C-619/10, *Trade Agency*, Judgment of 6 September 2012.
- 9 Cf. C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, Judgment of 26 February 2013, para. 29.

Introduction by Authors

This *Manual* was prepared within the project “Making the Charter of Fundamental Rights of the European Union a Living Instrument”, implemented by partner institutions and organizations from several member states.

The Charter of Fundamental Rights of the European Union (CFR) guarantees the protection and promotion of more basic human rights than any other Charter or Convention has done before. Still, its concrete implications and relevance for national legislation, jurisdiction and legal practice is not completely clear. Knowledge about its scope and effects is not anchored in legal professions, nor do NGOs, trade unions or other stakeholders of relevance in this regard know how CFR rights can be fully protected. This is especially valid for the social rights vested in the CFR.

Based on this acknowledgement, the project “Making the Charter of Fundamental Rights of the European Union a Living Instrument” rolls out a wide range of activities that, on the one hand, aim at clarifying the CFR’s relevance at the national level as well as for EU legislation and, on the other hand, aim at developing methodologies how to transfer the content of the Charter as such and knowledge about its concrete implications to those who should apply its provisions in practice – making it a “living instrument”.

The main elements of the project included:

- A research study on the legal impact of the CFR, summed up in the book *Making the EU Charter of Fundamental Rights a Living Instrument* (Brill 2014) and during the international conference on the application of the CFR (Rome, October 2014)
- Round tables and seminars for NGOs, trade unions and other civil society actors

- The publication of NGO guidelines – *The European Charter of Fundamental Rights as a Living Instrument – Guidelines for Civil Society*, and finally
- Trainings and materials developed for judges and legal professionals.

Judges, attorneys and other legal professionals are those, who should use the provisions of the CFR in practice. Many of them, however, still lack knowledge about the scope and the concrete implications of CFR rights for their daily work. Taking into account what is already taught in law schools and judicial academies, the project tried to develop a standardized training curriculum for making legal professionals competent for applying CFR rights in their professional practice. Pilot trainings in Austria, Croatia, Italy and Poland have helped to draft this Manual for legal professionals’ education on CFR rights to be used EU wide.

The main objective of this *Manual* is to assist in the practical training for judges and lawyers on the content of the Charter, its legal meaning and implementation. It might be used by the trainers, educators and lawyers participating in the training. But it may be also treated by individual lawyers as an introduction to the Charter and its implementation regardless of the training.

The *Manual* is not, and does not have ambitions to be, academic work or commentary to the Charter – publications of both kinds exist on the European level and in particular national jurisdictions (many of them are mentioned or quoted in the Manual). It is a tool to assist in individual study or group training. It includes materials and instructions designed to help educators provide training on the CFR but its usage is not designed to be limited to the training.

In **part one** of the *Manual* we introduce the Charter, its history, scope, content and the implementation strategy as well as compare it with other systems of fundamental rights protection. **Part two** starts with a fundamental rights check-list – instructions how to decide whether the CFR is relevant in a concrete case. We analyse particular fundamental rights stemming from all chapters of the Charter in a more detailed and practical way – using examples, case law, underlying CFR add-ons. We also formulate questions for discussion (or individual analyses) that may help to facilitate the learning process. **Part three** is devoted to judicial methods of implementation of the Charter – applicability of the Charter at the EU and member states’ level. In **part four** we discuss non-judicial methods of implementation, like petitions to the European Ombudsman and letters to the Parliament, as well as discuss the ECJ law be-

fore the Lisbon Treaty (before the Charter became binding law). **Part five** has a more methodological character, consisting of instructions, advice and materials that might be used by trainers teaching legal professionals. It includes several worksheets with (hypothetic) cases that can be used during the training.

In the online version of the Manual, there are also some additional materials included that readers might find useful. Please consult the web addresses of the project partners to gain access to the online version.

Finally, we hope that you will find the Manual useful and interesting, whether as a reader or a trainer. Let’s make the Charter of Fundamental Rights a living instrument together.

*Eukasz Bojarski,
Dieter Schindlauer and
Katrin Wladasch*

Introduction to the Charter of Fundamental Rights

As the Treaty of Lisbon entered into force on 1 December 2009, the Charter of Fundamental Rights of the European Union (CFR) became legally binding, same as the treaties,¹⁰ both for European institutions and for member states enforcing Union law. The Charter, marking a new milestone on the path to European integration, summarizes the shared values of EU member states and for the first time gathers civil, political, economic and social rights into a single text.

The Charter comprises all the rights provided by the European Convention on Human Rights¹¹, adopted by the Council of Europe in 1950, rights stipulated by the European Social Charter¹², adopted by the Council of Europe in 1961, revised in 1996, as well as the rights and principles drawing from the shared constitutional traditions of all member states, from the practice of the European Court of Justice and from other international conventions regarding human rights.

Table 1:
Charter of Fundamental Rights of the European Union – Factsheet¹³

When was the Charter proclaimed?

The Charter was proclaimed on **7 December 2000** at the Nice European Council, by the European Parliament, the European Commission and by the EU member states, comprising the European Council.

Since when is the Charter legally binding?

The Charter is legally binding since **1 December 2009**.

What is the Charter's prime objective?

The Charter's prime objective is to **make rights more visible**.

What is the structure and content of the Charter?

The Charter comprises seven chapters and **54 Articles**. Particular rights can be found in six substantive chapters of the Charter – **dignity, freedoms, equality, solidarity, citizens' rights and justice**. The last chapter deals with the interpretation and application of the Charter.

What are the sources of inspiration for the rights enshrined in the Charter?

The Charter reflects rights guaranteed in the **European Convention on Human Rights**, the **European Social Charter**, the case-law of the European Court of Justice, pre-existing provisions of European Union law and the shared constitutional traditions of all member states.

Who is bound by the Charter's provisions?

The Charter applies to the **EU institutions** (European Commission, European Parliament, European Council, the Council, the Court of Justice of the European Union, European Court of Auditors and European Central Bank) and bodies. The Charter also applies to all **28 EU member states**, but only when they are acting within the scope of EU law (for example implementing EU law).

How many people are covered by the Charter?

As the Charter is legally binding in all EU member states, every individual in the EU is protected by its provisions. This means that the Charter is a guarantee of respect of fundamental rights of about **505 mln people**.

In what way can one use the Charter?

The Charter can be used as a ground of **review of EU measures**, or as a ground to challenge the legality of **national measures** implementing EU legislation.

1 Historical Overview

The prevailing drive within the Union towards the economic integration of member states has somewhat sidelined the subject of human rights protection, at least initially.

The idea of creating a list of rights, on which the EU would be based, for the very first time was mentioned in the European Commission Report on the European Union No. 5.75 of June 1975.¹⁴ The European Court of Justice¹⁵ in its landmark judgment *Stauder v. City of Ulm*¹⁶ confirmed that fundamental rights belong to the general principles of Community Law and that the Court is obliged and entitled to protect them. Later, the Court emphasized that the EU is obliged, when exercising its powers, to observe and protect human rights as general principles of European law.¹⁷ Further, the Court established that also member states acting within the scope of EU law must take human rights into account.¹⁸

A first normative acknowledgment of human rights was contained in the **Single European Act** (1986), its Preamble stating that one of the main goals of the European Community is:

“to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice”.

The jurisprudential practice of the European Court of Justice has subsequently led to the inclusion of fundamental rights among the general principles of Community law, with reference to the Charter and to the constitutional traditions of member states. This has resulted in a further normative acknowledgment, first with the Treaty of Maastricht in 1992, and later with the Treaty of Amsterdam in 1997.

As to the elaboration of an actual Union Charter of Human Rights, the first initiative dates back to November 1977, when a resolution adopted by the European Parliament invited the Commission to submit proposals in this sense based upon the European Convention on Human Rights and upon the UN International Covenant on Civil and Political Rights of 1966. This resolution followed shortly after the Joint Declaration on Fundamental Rights had been adopted by the Commission, the Council and the Parliament itself.

Other milestones have been the proclamation by the European Parliament of the **Declaration on Fundamental Rights and Freedoms** on 12 April 1989, a catalogue of rights that Community institutions would be bound to abide by; and the adoption of the **Community Charter of the Fundamental Social Rights of Workers** by eleven member states (except the United Kingdom) during the Council of Strasbourg in December 1989.

However, it was only in the late 1990s, when the Treaty of Amsterdam had come into force, that conditions became more favorable for “a specific charter of fundamental rights of the Union to be drawn up”¹⁹ at the European Parliament.

During the Cologne European Council (June 1999), Heads of State and Government ruled that:

“the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident”.

An *ad hoc* organ, the **Convention**, comprised of representatives of member states and European institutions, was therefore appointed to this end. The draft Charter was approved with a recommendation of the European Parliament in November 2000 and subsequently adopted during the Nice Summit of 7-9 December 2000. The character of the Charter, however, simply represented a political pledge by the member states and held no legally binding effects.

2 CFR as a Legally Binding Document

A first step towards making the Charter legally binding was the Treaty of Nice, signed on 26 February 2001, which – upon initiating the required institutional reforms towards the new European Union enlargement – provided in Declaration 23 (annexed) to review “the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice”. In the Laeken Declaration on the Future of the European Union, adopted at the end of the European Council of 15 December 2001, in addition to a reference to the Convention, it is stated that “thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights”. The final draft of the European Constitution Project elaborated by the Convention foresaw the inclusion of the Charter in Part II of the Treaty establishing a Constitution for Europe. The process of ratification of the Constitutional Treaty was however stopped in 2005 as some member states had failed to ratify it.

After a period of reflection the Charter was amended and then proclaimed anew in Strasbourg on 12 December 2007 by the Presidents of the Parliament, the Council and the Commission during the plenary session of the European Parliament.

This then became the version referenced by Article 6 of the Treaty on European Union (Treaty of Lisbon – TEU, 2007). **Signed on 13 December 2007, the Lisbon Treaty entered into force on 1 December 2009.**

To conclude, there are three sources of legal obligations for the EU and its member states (when acting in the scope of EU law) to protect fundamental rights:

- the general principles of European law,
- the fundamental rights enshrined in the Charter,
- the human rights protected by the European Convention on Human Rights.²⁰

The Charter has become a legal tool of great importance in the jurisprudence of the Court of Justice of the European Union, being increasingly referred to in its decisions. The number of decisions quoting the Charter in their reasoning has increased from 43 in 2011 to 87 in 2012. In 2013, the number of decisions quoting the Charter amounted to 114, which is almost triple the number of cases of 2011. Regarding applications for preliminary rulings submitted by national judges to the CJEU in 2013, 41 of the requests contained a reference to the Charter (same as in 2012). This is a rise by 65% as compared to 2011, when only 27 requests submitted contained a reference to the Charter.²¹ Even prior to the Charter obtaining legal force, the Court – as well as many of its Advocates General – had made reference to its provisions on a number of occasions and that number has risen significantly since the Charter became legally binding.²²

Notes:

- 10** Consolidated Versions of the Treaty on the Functioning of the European Union and the Treaty on European Union, amended by the Treaty of Lisbon, Official Journal C 326, 26 October 2012.
- 11** Convention for the Protection of Human Rights and Fundamental Freedoms, 11 April 1950, 213 UNTS 221.
- 12** European Social Charter (Revised), 2 May 1996, ETS 163.
- 13** Prepared on the basis of <http://www.eucharter.org> and <http://ec.europa.eu/justice/fundamental-rights/charter/> (last visited 7 January 2014).
- 14** Bulletin of the European Communities, Supplement No. 5/75.
- 15** With the entry into force of the Treaty of Lisbon the European Court of Justice (ECJ) was renamed Court of Justice of the European Union (CJEU).
- 16** C-29/69, *Stauder v. City of Ulm*, Judgment of 12 November 1969.
- 17** C-29/69, *Stauder v. City of Ulm*, Judgment of 12 November 1969, para. 7; C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment of 17 December 1970, para. 4.
- 18** Both in case of implementing EU law and derogation from it, see: C-5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, Judgment of 13 July 1989, and C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Judgment of 18 June 1991.
- 19** Point 12 of the Resolution on the Amsterdam Treaty, (CONF 4007/97 - C4-0538/97) A4-0347/97.
- 20** FRA Annual Report, Fundamental Rights: Challenges and Achievements in 2011, available at http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf (last visited 5 August 2014).
- 21** Data from European Commission, Report on the Application of the EU Charter of Fundamental Rights, 2013, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1399031014350&uri=CELEX:52014DC0224>.
- 22** G. de Burca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", 20(2) *Maastricht Journal of European and Comparative Law* 168 (2013), p. 169.

The Rights Guaranteed by the Charter of Fundamental Rights

The Charter of Fundamental Rights, as outlined in its Preamble, aims to “strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments”.

The rights provided there are subdivided into six chapters: **Dignity** (Articles 1-5), **Freedom**s (Articles 6-19), **Equality** (Articles 20-26), **Solidarity** (Articles 27-38), **Citizens’ Rights** (Articles 39-46) and **Justice** (Articles 47-50).

The Charter comprises rights derived from the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) or recognized as general principles of the EU by the Court of Justice of the European Union, in addition to so-called second generation fundamental rights, *i.e.* economic, social and cultural rights, and also third generation rights that are not thoroughly secured by other relevant international treaties. Among the most innovative are the **rights to protection of personal data** (Article 8), **the rights of the child** (Article 24), **the rights of the elderly to lead a life of dignity and independence** (Article 25), the full integration of **persons with disabilities** (Article 26), **environmental protection** (Article 37) and **consumer protection** (Article 38).

A further element of novelty is the introduction of several principles of bioethics: the **right to the integrity of the person**, the **prohibition of eugenic practices**, and the **prohibition of the reproductive cloning of human beings** (Article 3).

The Charter condemns the **death penalty** (Article 2), forbids **torture and inhuman or degrading treatment or punishment** (Article 4) and prohibits **slavery and forced labour** (Article 5). **Equa-**

lity between men and women must be ensured in all areas, including **employment, work and pay**, also allowing for practices of positive discrimination (Article 23). The **freedom to conduct a business** is guaranteed (Article 16) and the **right to property** is secured (Article 17). Moreover, the chapter on solidarity contains several articles concerning **collective rights** (particularly workers’ rights) and **social security**, including the right to strike among the rights of collective bargaining and action (Article 28).

The Charter also features the **right to good administration** (Article 41) and the **right of access to documents** (Article 42).

It also guarantees that everyone has the right to an **effective remedy** before a tribunal and to a **fair and public hearing within a reasonable time** (Article 47), as well as the **right to presumption of innocence and right of defence** (Article 48). The **principles of legality and proportionality of criminal offences and penalties** (Article 49) and the **principle of *ne bis in idem*** (Article 50) are likewise affirmed.

The initial proposal to include a reference to the religious heritage of Europe as part of the Preamble was soon discarded owing to opposition from several member states on grounds of secularism and separation between church and state. In the final version of the Charter, a reference to religious concerns is however present in Article 10, which stipulates that *everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.*

Table 2: The Rights guaranteed by the Charter of Fundamental Rights

Dignity	Freedoms	Equality
<p>➔ Right to:</p> <ul style="list-style-type: none"> • Life • Protection of dignity • Respect for one’s physical and mental integrity • Free and informed consent 	<p>⤴ Freedom of:</p> <ul style="list-style-type: none"> • Expression, information • Thought, conscience, religion • Art and science • Association • Assembly • To conduct a business 	<p>⌚ Rules of:</p> <ul style="list-style-type: none"> • Equality of all before the law • Equality of women and men • Cultural, religious and language diversity
<p>⊗ Prohibition of:</p> <ul style="list-style-type: none"> • Killings/death penalty • Torture • Degrading and inhumane treatment • Organ trafficking • Cloning • Eugenic practices • Slavery, forced labor • Human trafficking 	<p>➔ Right to:</p> <ul style="list-style-type: none"> • Liberty and protection from arbitrary detention • Marry • Found a family • Respect for private and family life • Education • Protection of personal data • Choose an occupation and engage in work • Property and bequeath • Protection of intellectual property • Asylum for refugees • Protection against collective expulsion • Protection against extradition to a state that violates fundamental human rights 	<p>⊗ Prohibition of discrimination (right to equal treatment) based on:</p> <ul style="list-style-type: none"> • Sex • Race and colour • Ethnic or social origin • Genetic features • Language • Religion or belief • Political or any other opinion • Membership of a national minority • Property • Birth • Disability • Age • Sexual orientation <p>⌚ Rules of respect of the rights of:</p> <ul style="list-style-type: none"> • Children • Elderly • Persons with disabilities

Solidarity

➔ **Right of the workers to:**

- Information, consultation
- Collective bargaining and action
- Access to placement services
- Fair and just working conditions
- Protection in the event of unjustified dismissal
- Protection of young people at work

⊗ **Prohibition of child labor**

⌚ **Rules of:**

- Reconciliation of family and professional life
- Protection of family – legal, economic and social

➔ **Right to:**

- Protection during maternity
- Maternal and paternal leave
- Social security benefits
- Social and housing assistance
- Access to services of general economic interest

⌚ **Rules of protection of:**

- Health
- Consumers
- Environment

Citizens' Rights

➔ **Right to:**

- Vote and to stand as a candidate at elections to the European Parliament
- Vote and to stand as a candidate at municipal elections
- Consular protection
- Petition
- Refer to the European Ombudsman
- Access to documents
- Good administration, which:
 - is impartial
 - is fair
 - hears the applicant
 - gives reasons to its decisions
- Have the Union make good any damage caused by its institutions

⤴ **Freedom of:**

- Movement
- Residence

Justice

➔ **Right to:**

- Effective remedy before the court
- Independent and impartial tribunal previously established by law
- Have one's case fairly and publically heard, within a reasonable time
- Be advised and have legal aid
- Defence
- Presumption of innocence

⊗ **Prohibition of:**

- Being held guilty of any criminal offence not prescribed by law at the time when it was committed
- Disproportionate penalties
- Being tried or punished twice for the same criminal offence

The Charter introduced different kinds of provisions: rights, freedoms and principles. All of them are equally recognized in the Preamble²³, yet Article 51(1) provides that while “rights” should be respected, “principles” should be observed and the application of both should be promoted (freedoms are not mentioned in the article, but it is understood that freedoms are part of the broader category of rights²⁴). To determine which normative form a particular provision has, it is necessary to refer not only to the wording, but also to the Explanations relating to the Charter of Fundamental Rights.²⁵ These were prepared by the Presidium of the Convention which drafted the Charter of Fundamental Rights of the European Union.

There are two types of rights and freedoms. The first group of rights and freedoms can be directly invoked in front of the institutions bound by the Charter. The normative content of the second group, however, depends upon legislation at the national or community level. The catalogue of rights directly applicable is coherent with rights included in the European Convention of Human Rights (with some extensions such as bioethical rights). The second group of rights contains:

- a. rights which refer exclusively to national law (the right to marry and the right to found a family; the right to conscientious objection; access to preventive health care and the right to benefit from medical treatment; freedom to found educational establishments and the right of parents to ensure the education and teaching of their children in conformity with their convictions);
- b. rights which refer to both the law of the EU and national laws and practice (the workers’ rights to information and consultation within the undertaking; the right to negotiate and conclude collective agreements and right to take collective actions, including strike actions; protection in the event of unjustified dismissal and the right to social benefit and social privileges).²⁶

During the drafting process it was decided that social rights should be normatively conceptualized as “principles” – hence, while the values expressed by

such a principle were common for the whole Community, the implementation was left to particular member states (or the EU where its competences were concerned). Therefore, to allege the violation of a “principle” in front of any court it is necessary to invoke certain legislation implementing the principle (principles are not directly enforceable). The European Union recognizes and respects the following principles: the right of elderly people to lead a life of dignity and independence, and to participate in social and cultural life; the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community; the right to social security benefits and social services providing protection in the following cases: maternity, illness, industrial accident, dependency and old age, and in the case of loss of employment; the right to social and housing assistance; the right to access to services of general economic interest in order to promote the social and territorial cohesion of the Union.

Notes:

23 The final preambular paragraph reads: “The Union therefore recognises the rights, freedoms and principles set out hereafter.”

24 C. Mik, “The Charter of Fundamental Rights: Determinants of Protective Standards”, in J. Barcz ed., *Fundamental Rights Protection in the European Union*, Warsaw 2009, pp. 61-79.

25 Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF> (last visited 5 August 2014).

26 Read more on this issue in A. Bodnar, “The Charter of Fundamental Rights: Differentiated Legal Character of Charter’s Provisions, Their Consequences for Individuals, Courts and Legislator”, in J. Barcz ed., *Fundamental Rights Protection in the European Union*, Warsaw 2009, pp. 145-167.

The Scope of the Charter of Fundamental Rights

Article 6 of the TEU, in addition to giving the Charter equal legal value as the Treaties, refers to the European Convention on Human Rights, which the Union is expected to adopt (Article 6.2), as well as other fundamental rights not outlined in the Convention but recognized as general principles of EU law.

§ Article 6 TEU

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.
-

Prior to the enforcement of the Treaty of Lisbon, the Charter of Nice was simply among the several sources that the European Court of Justice could draw upon when establishing fundamental human rights, along with other relevant international provisions. As a result, the Court retained a degree of discretionality in the assessment of fundamental rights and

their interpretation in order to ensure their compatibility with other basic principles and with the very goals of the Union.

Human rights protection, extended and enhanced by the Charter, is now founded upon an internal primary source of EU tenets, although, as pointed out above, Article 6 also mentions other sources on fundamental rights protection. In doctrine, some authors have criticized the complexity of Article 6 of the TEU. In particular, they have questioned the necessity of drawing upon an array of sources on human rights protection, as a potential cause of doubt and uncertainty. Other authors, however, view this as an opportunity to address any lacunae in the Charter and to avoid setting the fundamental rights into a single normative text, which, however complete, may at some point fail to address the protection requirements of an evolving society; in this way, the Court of Justice would retain leeway for a broader interpretation of the rights secured in the Charter.

It must also be underlined that Article 6 of the TEU affirms that “the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties”; similarly, Article 51 of the Charter states that “this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”. Therefore the power of EU institutions to promote and protect fundamental rights is limited to the scope of power of these institutions established by the Treaties.

Usually “the individual” is the one entitled by the provisions of the Charter (“every one”, “no one”). Some fundamental rights can only be applied to a specific category of entitled subjects, such as employees or EU citizens. All rights and freedoms undoubtedly refer to the protection of natural persons, but there are rights that can be invoked also by a legal

person (such as for instance respect to private life, home and communication; freedom to conduct a business; right to property).

that it does not contain any derogation from the Charter for those two countries, but merely has a clarifying function, serving as a guide to interpretation.²⁷

... Poland and the United Kingdom

Protocol No. 30, annexed to the Treaties on the Union, introduces a few specific dispositions for the United Kingdom and Poland pertaining to the Charter of Fundamental Rights. The Protocol provides that whenever a disposition of the Charter refers to national laws and practices, it shall apply to the United Kingdom and Poland only insofar as the laws and practices of these two countries recognize the Charter's principles and rights.

It is sometimes argued that the Protocol limits the jurisdiction of the Court of Justice of the EU and national tribunals regarding compatibility of the two member states' national regulations with the rights, freedoms and principles secured by the Charter.

However, in its Judgment of 21 December 2011 (*N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, Joined Cases C-411/10 and C-493/10*) the Court of Justice of the EU stated that:

"(...) Protocol No. 30 does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol No. 30, Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article.

In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognized in the Union and makes those rights more visible, but does not create new rights or principles. In those circumstances, Article 1(1) of Protocol No. 30 explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions".

Thus, even if Article 1(1) of Protocol No. 30 states that the Charter does not extend the ability of the Court of Justice, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms, this Protocol **does not signify an opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland**. On the contrary, the preamble to the Protocol emphasizes

The Polish Declaration No. 61, which was annexed to the Treaty of Lisbon, affirms that:

"the Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity".

In Poland it was perceived by its authors as a declaration securing that some legal provisions, i.a. indirectly concerning the legal recognition of same-sex couples, will not affect the Polish legal system.

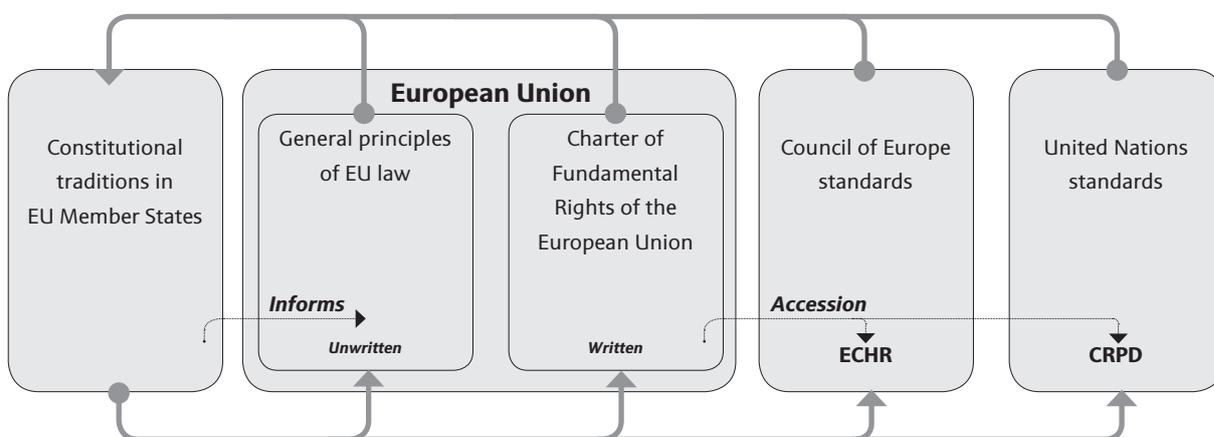
The Correlation of the Charter With Existing Systems of Fundamental Rights Protection

1

As already mentioned above, the European Union human rights protection system (with the Charter of Fundamental Rights of the European Union as its principal document) is not the only one establishing standards that EU member states have to comply with. The protection of fundamental rights in all member states is ensured by a four-layered system due to their membership in various international organizations:

- United Nations standards – member states are legally bound by all treaties they are party to;
- The Council of Europe – all EU member states are party to the European Convention on Human Rights (ECHR) and are under the jurisdiction of the Strasbourg court (ECtHR);
- The European Union – the EU system based on the Charter comes into operation only when member states are implementing EU law. Neither the Charter nor the Treaty create any new competences for the EU in the field of fundamental rights;

Table 3: Overview of Interactions of Fundamental Rights in EU law²⁸



Source: FRA, 2011

- National systems – member states have quite a different approach, history and tradition of human rights protection with constitutional traditions common to the EU member states.

Hence, the Charter, as a relatively new document, complements existing systems for the protection of fundamental rights, it does not replace them. Therefore, it is crucial for effective usage of the Charter to gain understanding on the correlation of the Charter with existing systems of fundamental rights protection.

and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – both from 1966 – alongside with various treaties covering different fundamental rights. States have to become party to the certain treaty to be bound by it, the sole membership in the United Nations is not sufficient to create certain obligations related to fundamental rights. Standards of fundamental rights protection established in the UN became the inspiration and starting point for development of various regional systems, also the EU system for the protection of fundamental rights.

All 28 member states of the European Union ratified six core UN treaties covering the areas of:

2 United Nations Standards and the Charter of Fundamental Rights

The United Nations is the organization connecting the greatest number of countries – 193 – including all EU member states. Human rights have been in the scope of interest of the UN from the very beginning of its existence, starting with the (non-binding) Universal Declaration of Human Rights. Nowadays the most important instruments of human rights protection are the International Covenant on Civil

- protection against racial discrimination (International Covenant on the Elimination of Racial Discrimination, CERD, 1965);
- economic, social and cultural rights (International Covenant on Economic Social and Cultural Rights, ICESCR, 1966);
- civil and political rights (International Covenant on Civil and Political Rights, ICCPR, 1966);
- elimination of discrimination against women (Convention on the Elimination of All Forms of Discrimination against Women, CEDAW, 1979);

- protection against torture (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT, 1984);
- protection of children's rights (Convention on the Rights of the Child, CRC, 1989).²⁹

On 5 January 2011, the European Union itself ratified the UN Convention on the Rights of Persons with Disabilities (CRPD). The European Union was the first international organization to become a formal party to this UN Convention. The decision was based on the recognition that the EU's powers can affect the rights of persons with disabilities in many situations. Therefore, this Convention specifically has a provision allowing for the EU to become party to it. As a consequence to its membership, the EU is obliged to ensure that all legislation, policies and programs at EU level comply with the Convention's provisions on the rights of persons with disabilities. The Court of Justice of the European Union has so far not had the opportunity to take a stand on the correlation of the Charter and UN instruments of human rights protection. Theoretically, and in most cases also in practice, obligations under UN treaties and the Charter are coherent. Nevertheless, in case of a clash, rules governing a multi-level legal system should be consulted.

The Lisbon Treaty, which is the base of the constitutional order in the EU, does not directly address the issue of the multi-level legal system; therefore, it is in the competence of the Court to deal with the problem. The Court usually refers to the general principles of international law in three situations:³⁰ to apply it as a tool delimiting scope of responsibilities between the EU and states,³¹ as interpretive rules³² or as provisions applied in the situation of lack of European legislation.³³

The landmark case on the multi-level legal system is *Kadi*.³⁴ The applicants challenged Council Regulation 81/2002 which made it possible to freeze bank accounts of individuals listed in Annex 1 prepared by a "Sanctions Committee".³⁵ The Regulation was annulled by the judgment. The Court restated the pri-

macy of member states' obligations under the UN Charter (Article 103) and decided that the review of lawfulness is possible only in cases of EU acts, not regarding documents of other international organizations – the hierarchy of laws was seemingly unchanged. But, on the other hand, it also proclaimed: *"emphasizing the rule of law the Court stated that the judicial review also covers all Community acts, even if they are designed merely to give effect to resolutions adopted by the UN Security Council"*³⁶ – in the case of a clash between fundamental rights and obligations under the UN Charter the first should prevail. Such approach enables a *"challenge to the primacy of that resolution in international law"*.³⁷ Some authors even emphasize that in this case *"the ECJ adopted a strongly pluralist approach which emphasized the internal and external autonomy and separateness of the EC's legal order from the international domain"*.³⁸

The UN Office of the High Commissioner for Human Rights (OHCHR) has drawn attention to the fact that the EU is obliged to protect human rights in a manner coherent with international standards:

*"Universality is itself a principle that the EU promotes. Therefore, it seems all the more important that the EU ensures that its own internal human rights regime conforms to UN standards, to which all its Member States have committed themselves, and which it promotes abroad. Any disparity between internal and external approaches to human rights would only serve to undermine the role of the EU in the eyes of its international partners and other third States."*³⁹

The OHCHR report also highlighted the undesirability of the EU and the CJEU pursuing an approach to human rights protection which is detached from the wider body of international human rights law.⁴⁰ Some defaults on part of the EU were also mentioned, such as the CJEU's dismissive treatment of the jurisprudence of the UN Human Rights Committee in *Grant*⁴¹ or the CJEU's failure to look to the guidance of the Committee on the Convention on the Rights of the Child on issues of child custody and other children's rights.⁴²

Table 4: Comparison of the European Union and Council of Europe

	European Union	Council of Europe
Characteristics, differences		
Member States	28	47
Establishment	1992 (Treaty of Maastricht)	1949 (Treaty of London)
Population	505,7 mln ⁴³	800 mln
Institutions		
Legislative	Council of Europe, European Parliament	Parliamentary Assembly
Executive	European Commission	Committee of Ministers
Judicative	Court of Justice of the EU (CJEU)	European Court of Human Rights (ECtHR)
Basic Human Rights Act	Charter of Fundamental Rights of the EU	European Convention on Human Rights and Fundamental Freedoms
Composition of the Court	28 judges (1/member state)	47 judges (1/member state)
Amount of cases in 2012/ judgments delivered in 2012	632/527 ⁴⁴	65,150/1,678 ⁴⁵
Court's budget	EUR 354,88 Mill for 2013 ⁴⁶	EUR 66,815,100/2013 ⁴⁷
The seat of the Court	Luxembourg	Strasbourg
Official languages of the Court	24 official languages of the Union	2 (English and French)
Europe day	May 9th	May 5th
Similarities		
Flag	The European flag (in CoE since 1995, in EU since 1985) ⁴⁸	
Anthem	The Ninth Symphony composed in 1823 by Ludwig van Beethoven, when he set music to the "Ode to Joy", Friedrich von Schiller's lyrical verse from 1785 ⁴⁹	
Approach to Human Rights protection	Forthcoming EU accession to the ECHR ⁵⁰	

3 Council of Europe and the Charter

The Council of Europe, with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Court of Human Rights (ECtHR), is perceived by many as the most effective system of human rights protection, having well established and recognized standards. The EU is not a party to the Convention (yet), but all its member states are and membership to the Council of Europe is a precondition of EU membership.

Article 52(3) CFR

Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.



Almost half of the rights guaranteed by the Charter have their equivalents in the ECHR. In case such rights are concerned, according to Article 52(3) of the Charter, the rights in the Charter should be given the same meaning and content as they have in the Convention. The Convention is treated as a minimal standard of protection – the EU can offer more in the area of fundamental rights protection, but never less.

The CJEU held in *J. McB. v. L.E.*⁵¹ that the meaning of rights should be established not only on the basis of provisions of the Convention, but also on clear and consistent jurisprudence of the ECtHR.⁵² In some cases the Luxembourg court widened the scope of the protection in comparison to the Strasbourg one. For instance, in the *DEB* case⁵³ – after having engaged in a thorough analysis of the ECtHR’s case law – the CJEU mainly relied on Article 47 of the Charter to expand the right to legal aid also to legal persons and not only to natural persons, thus reaching an outcome that was wider than the ECtHR’s jurisprudence. In *Volker*⁵⁴ – which involved an expansion of human rights in the area of data protection – the CJEU quoted several ECtHR cases to support a broad interpretation of Articles 7 and 8 CFR, and to determine the scope of the proportionality test as a way to restrict the right.

Some claim that Article 52(3) “materially incorporates the core norms of the Convention” into EU law.⁵⁵ The reason behind the widened scope of human rights protection granted to the CJEU by Article 52(3) can be found in the **different rationales** behind the two European courts. The CJEU can be seen as “an integrative agent”, striving for further EU harmonization, whereas the ECtHR’s mandate is that of providing a minimum human rights standards protection, beyond which wider scope is left for pluralism and national sovereignty within the EU.⁵⁶

Moreover, Article 53 of the Charter stipulates that no provision may be interpreted as restricting fundamental rights protected by other mechanisms which the EU or its member states are party to, including the ECHR (a non-regressive clause).

Leaving aside the theoretical debate, Article 6(2) of the Treaty on European Union put an obligation on the EU to accede to the Convention. Hence, in the future the EU will be party to the ECHR. The discussion on this issue has taken place since the late 1970s. The legal basis for the accession of the EU is provided for by Article 59, para. 2 of the ECHR (“the European Union may accede to this Convention”), as amended by Protocol No. 14 to the ECHR which entered into force on 1 June 2010.

The decision on the EU’s accession to the Convention was made mostly on the basis of two considerations: first, the need to establish external accountability of the EU in human rights cases, and second, to make the jurisprudence of the ECtHR and the CJEU as coherent as possible. However, the accession of the EU to the ECHR raises various challenges, such as:

- who should be held responsible in front of the Strasbourg Court in the context of human rights violations in the EU (member states or the EU and when);
- what should be the scope of the accession taking into account additional protocols (not all of them are ratified by all EU member states).

The idea of the EU’s accession to the ECHR should not be associated with the Treaty of Lisbon. The accession process began with the Council of the European Union referring the question of accession to the Convention to the European Court of Justice. The Court firstly decided in Opinion No. 2/94 of 28 March 1996 that the EU was “not equipped for accession”. The reason was that none of the EU treaties provided a legal basis for a possible accession. It is only Article 6(2) of the TEU as amended by the Lisbon Treaty that creates the legal basis for the accession.⁵⁷

The negotiations between the EU and the Council of Europe began in June 2010 when an informal working group, the Steering Committee for Human Rights (CDDH) together with the European Commission, was given the mandate to present the necessary legal instruments required for an achievable accession. In June 2011, a draft accession agreement

together with its explanatory report was finalised. In April 2013, negotiators of the 47 Council of Europe member states and the European Union finalised the draft accession agreement of the European Union to the European Convention on Human Rights. The procedure for now is that the CJEU must first be asked to give its opinion in accordance with Article 218(11) TFEU⁵⁸, since the accession is an international agreement between the Union and an international organisation (as of July 2014, the question was still pending). Furthermore, the Council of the EU must unanimously agree on the accession, and obtain an approval of all member states as well “in accordance with their respective constitutional requirements” (Article 218(8) TFEU).⁵⁹ Lastly, all the member states must approve the decision (Article 218(8) TFEU).⁶⁰ Thereafter, the EU’s accession to the ECHR would finally be completed.

In the draft accession agreement, a co-respondent mechanism is introduced. This concept will be included in Article 36 of the ECHR as para. 4 and the Accession Agreement will regulate the details of the procedure (Article 3 of the Draft Agreement⁶¹). Thus, according to the provisions of the Draft Agreement, three possible situations of co-respondent mechanism could exist:

1. A claim may be addressed against one or more EU member states and not against the EU – in such a case the EU could intervene as a co-respondent.
2. A claim may be lodged against the EU – in such a case the member states may intervene as co-respondents.
3. A claim is brought against both the EU and one or more member states in a case “*in which the Union or those Member States are not the ones who have actually engaged in the act or omission in dispute but they are the ones who have established the legal basis for said act or omission*”.⁶²

Due to the EU’s accession to the Convention several changes will take place, for instance the protection of human rights will be strengthened by creating a legal system of independent external control of EU laws and action. Moreover, the protection of funda-

mental rights in the EU and the CoE will be more coherent.⁶³

Before the accession, according to the CJEU, the Charter complements existing systems for the protection of fundamental rights without replacing them. Such situation results in cross-references between the two courts, which have been increasing over time – in 2010-11 in 57 CJEU judgments the ECtHR’s jurisprudence was mentioned.⁶⁴ As can be noted in some of its decisions, in this line of reasoning the Luxembourg Court has referred both to the Charter and the ECHR as sources of inspiration for the rights guaranteed by the EU legal order.

As an example, the decision of the CJEU in the case of *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* of 22 December 2010⁶⁵ concerned the reference for a preliminary ruling on the proceedings between Ms Sayn-Wittgenstein, an Austrian national resident in Germany, and the Head of Government of the Province of Vienna regarding the latter’s decision to correct the entry in the register of civil status of the family name “Fürstin von Sayn-Wittgenstein” acquired in Germany following an adoption by a German national, and to replace it with the name “Sayn-Wittgenstein”. In particular, the reference for a preliminary ruling concerned the interpretation of Article 21 TFEU concerning the European citizenship and the freedom to move and reside in the member states.

The Court stated that “*a person’s name is a constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the Charter of Fundamental Rights of the European Union and in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Even though Article 8 of that convention does not refer to it explicitly, a person’s name, as a means of personal identification and a link to a family, none the less concerns his or her private and family life.*”

However, the CJEU ruled that Article 21 TFEU must be interpreted as not precluding the authorities of a member state from refusing to recognise all the elements of the surname of a national of that state, as determined in another member state, provided that

the measures adopted by those authorities in that context are justified on public policy grounds.

Notwithstanding the fact that the Council of Europe human rights protection system has a longer history than the one secured by the European Union, there are also some cases where the Strasbourg Court referred to the Luxembourg Court, *e.g.*, in *Schalk and Kopf v. Austria*⁶⁶, in *Tomasović v. Croatia*⁶⁷, and in *Bayatyan v. Armenia*.⁶⁸

- when a member state authority exercises a discretion that is the outcome of EU law⁷⁰
- when national actions dealing with the disbursement of EU funds may constitute implementation of EU law.⁷¹

A much debated judgment in 2013 on the applicability of the Charter was *Åkerberg Fransson*.⁷² The Court was asked to clarify whether cases of national law which met objectives laid down in EU law also amounted to situations where EU law is being “implemented” within the meaning of Article 51 of the Charter. The Court held that, “[s]ince 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”. According to the Court, the national law in this context was “designed to penalise an infringement of [the] directive and [was] therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for a conduct prejudicial to the financial interests of the European Union.”

The explanations regarding Article 51 provided by the Presidium of the Convention, which drafted the Charter of Fundamental Rights of the European Union, affirm that the expression “member state” contained therein must be interpreted in such a way as to include not only central authorities, but regional and local ones as well, when implementing Union law. Therefore, it is possible to suggest that the sentence “only when they are implementing Union law” includes all instances in which member states fulfill the obligations laid down by EU law.

The CJEU shared its opinion on the limits of the scope of application of the Charter in the case of *Anton Vinkov v. Nachalnik Administrativno-nakazatelna deynost*.⁷³ There, it declared a preliminary reference from a Bulgarian Administrative Court concerning the right to a judicial remedy in respect of decisions imposing criminal sanctions for certain breaches

4 Human Rights Protection at the National Level and the Charter

It is well established that the states have the primary responsibility for protection and fulfilment of fundamental rights. However, as the Charter builds on the constitutional traditions common to the EU member states there is usually a great deal of common ground between constitutional provisions securing fundamental rights and the Charter.

Invoking a Charter provision in the case of national legislation is possible only when two conditions are met simultaneously. Firstly, according to Article 51(1) of the Charter, the document is addressed to the member states only when states are “implementing Union law”. “Implementation” should be understood as both the situation when the state acts in the scope of EU law and when the country implements or applies EU legal norms directly. Secondly, the Charter can be invoked only in such situations which concern not only the Charter provision but also a norm applicable *in concreto* (a provision or a principle of primary or secondary law) directly relevant to the case.

There are currently three situations (well established by the CJEU’s jurisprudence) when the CFR is applied:

- when a member state’s legislative activity and judicial and administrative practices fulfill obligations under EU law (“implementing EU law”)⁶⁹

of road traffic regulations inadmissible, referring to settled case law, which foresees that the requirements flowing from the protection of fundamental rights are binding on member states whenever they implement EU law.

The Charter is enforceable in the proceedings brought before it for the judicial review of the coherence of national legislation with EU law, enabling individuals to thereby rely on the rights and principles recognised in the Charter when challenging the lawfulness of domestic legislation. The Austrian Constitutional Court compared the role played by the Charter in the EU legal system and that played by the ECHR under the Austrian Constitution. According to Austrian Law, the ECHR has the status of constitutional law; a parallel conclusion was reached with regard to the Charter.⁷⁴ The Court acknowledged the very special character of the Charter within the EU legal system, and its different nature

compared to the body of rights and principles which the CJEU has been developing throughout the years. The Austrian case is an example of incorporation of the Charter in the national systems of fundamental rights.

The Association of Councils of States and of Supreme Administrative Jurisdictions (ACA) gathered data showing that the Charter has by now been referred to in numerous judgments by administrative courts in EU member states.⁷⁵ The provisions of the Charter most frequently mentioned in the reports are respect for private and family life (Article 7), freedom of expression and information (Article 11), right to property (Article 17), right to asylum (Article 18), prohibition of collective expulsion and non-refoulement (Article 19), rights of the child (Article 24), right to good administration (Article 41) and right to an effective remedy and to a fair trial (Article 47).

Notes:

- 27** See also opinion of Advocate General Juliane Kokkot, delivered on 15 December 2011, in C-489/10, *Bonda* (Judgment of 5 June 2012).
- 28** FRA Annual Report, Fundamental rights: Challenges and Achievements in 2011, available at http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf (last visited 5 August 2014).
- 30** OHCHR Report, “The European Union and International Human Rights Law” (2011), prepared by I. de Jesus Butler, p. 7. R. Holdgaard, “Principles of Reception of International Law in Community Law”, 25(1) Yearbook of European Law 263 (2006).
- 31** Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85, *A. Ahlström Osakeyhtiö and others v. Commission of the European Communities*, Judgment of 20 January 1994, para. 18.
- 32** C-149/96, *Portugal v. Council*, Judgment of 23 November 1999, paras. 34–35.
- 33** C-37/00, *Weber v. Universal Ogden Services Ltd*, Judgment of 27 February 2002, para. 31.
- 34** Joined Cases C-402/05 and C-415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of 3 September 2008.
- 35** A body established by the UN Security Council to counter fight terrorism.
- 36** A. Posch, “The Kadi Case: Rethinking the Relationship Between EU Law and International Law?”, 15 *Columbian Journal of European Law* 1 (2009).
- 37** Joined Cases C-402/05 and C-415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of 3 September 2008, para. 288.
- 38** G. de Burca, “The EU, the European Court of Justice and the International Legal Order after Kadi”, 51(1) *Harvard International Law Journal* 1 (2010), p. 4.
- 39** OHCHR Report, “The European Union and International Human Rights Law” (2011), prepared by I. de Jesus Butler, p. 8.
- 40** OHCHR Report, “The European Union and International Human Rights Law” (2011), prepared by I. de Jesus Butler, p. 8.
- 41** C-249/96, *Grant v. South West Trains*, Judgment of 17 February 1998, para. 46.
- 42** OHCHR Report, “The European Union and International Human Rights Law” (2011), prepared by I. de Jesus Butler, p. 11.
- 43** Eurostat, available at <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tgs00027&plugin=1> (last visited 4 August 2014).
- 44** Court of Justice of the European Union, Annual Report 2012, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf (last visited 4 August 2014).
- 45** European Court of Human Rights, Analysis of Statistics 2012, available at http://www.echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf (last visited 4 August 2014).
- 46** http://curia.europa.eu/jcms/jcms/P_80908/ (last visited 4 August 2014).
- 47** The Court in Figures, available at http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_1346157778000_pointer (last visited 4 August 2014).
- 48** Council of Europe, available at <http://www.coe.int/about-Coe/index.asp?page=syboles&l=en> (last visited 4 August 2014).
- 49** European Union, available at http://europa.eu/about-eu/basic-information/symbols/anthem/index_en.htm (last visited 4 August 2014).
- 50** Council of Europe, available at http://hub.coe.int/en/web/coe-portal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1394983&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&pager.offset=10 (last visited 4 August 2014).
- 51** C-400/10 PPU, *J. McB. v. L.E.*, Judgment of 5 October 2010.
- 52** *Ibid.*, para. 53: “Article 7 of the Charter must [...] be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights.”
- 53** C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, Judgment of 22 December 2010.
- 54** Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, Judgment of 9 November 2010.
- 55** W. Weiß, “Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon”, 7(1) *European Constitutional Law Review* 64 (2011).
- 56** Read more in T. Pavone, “The Past and Future Relationship of the European Court of Justice and the European Court of Human Rights: A Functional Analysis” (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042867 (last visited 4 August 2014).

- 57** Art. 6(2) TEU: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.”
- 58** Art. 218(11) TFEU: “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”
- 59** Art. 218(8) TFEU: “The Council shall act by a qualified majority throughout the procedure. However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [...]”.
- 60** Art. 218(8) TFEU: “[...]; the decision concluding this agreement [Agreement on Accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms] shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.”
- 61** Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 10 June 2010, 47+1(2013)008rev2.
- 62** Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 10 June 2010, 47+1(2013)008rev2, no 43.
- 63** Read more on the results of the accession in “Accession by the European Union to the European Convention on Human Rights. Answers to frequently asked questions”. available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Accession_documents/EU_accession-QA_updated_2013_E.pdf (last visited 4 August 2014).
- 64** Data from a study by the European Parliament, “Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights”, available at <http://www.statewatch.org/news/2012/may/ep-study-ecj-echr.pdf> (last visited 4 August 2014), p. 13.
- 65** C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Judgment of 22 December 2010.
- 66** *Schalk and Kopf v. Austria*, Application No. 30141/04, Judgment of 22 November 2011 – the ECtHR referred to Article 9 of the Charter.
- 67** *Tomasović v. Croatia*, Application No. 53785/09, Judgment of 18 January 2012 – the Charter was one of the international instruments cited by the Court while interpreting the ne bis in idem principle.
- 68** *Bayatyan v. Armenia*, Application No. 23459/03, Judgment of 7 July 2012 – the Court was concerned with the right to conscientious objection, referring to the Charter.
- 69** C-300/11, *ZZ v. Secretary of State for the Home Department*, Judgment of 4 June 2013.
- 70** C-4/11, *Bundesrepublik Deutschland v. Kaveh Puid*, Judgment of 14 November 2013.
- 71** C-401/11, *Blanka Soukupová v. Ministerstvo zemedelstvi*, Judgment of 11 April 2013.
- 72** C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, Judgment of 26 February 2013.
- 73** C-27/11, *Anton Vinkov v. Nachalnik Administrativno-nakazatelna deynost*, Judgment of 7 June 2012.
- 74** Austrian Constitutional Court, Cases U466/11 and U1836/11, 14 March 2012.
- 75** ACA Report, “Application of the Charter of Fundamental Rights of the European Union by National Courts: the Experience of Administrative Courts”, June 2012, available at http://aca-europe.eu/colloquia/2012/General_report.pdf (last visited 5 August 2014).
- 77** European Commission, Report on the Application of the EU Charter of Fundamental Rights, 2013, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1399031014350&uri=CELEX:52014DC0224> (last visited 5 August 2014).

The Charter Implementation Strategy

With a view to ensure full implementation of the Charter, in October 2010 the European Commission adopted a specific Strategy (COM(2010)573)⁷⁶ in order to ensure the compatibility with the Charter of all EU acts throughout the legislative process, from preliminary work to adoption and implementation by the member states. All legislative proposals at the European level have to be in conformity with the Charter. For this reason, each proposal for a new legislative act is scrutinized by the Commission against a checklist for possible violations of fundamental rights.

The aim of this strategy is to ensure that the fundamental rights laid down in the Charter are fully applied in actual practice. In this regard, the Union must allow its citizens to enjoy the rights secured by the Charter, promote an atmosphere of mutual trust between EU member states, earn the citizens' trust in the Union's policy and strengthen the credibility of the Union's external human rights action.

The Commission has also pledged to publish a yearly report on the application of the Charter in order to keep a track record of the progress achieved.



Please check the website of the European Commission's Directorate-General "Justice": http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm. This is a good source of information about the implementation of the Charter in all EU member states. As one example, the website hosts the annual reports on the implementation of the Charter in national languages.⁷⁷

As for the member states, each of them has its own internal apparatus for the protection of fundamental rights; the Charter is not meant to supersede them, but it orders that the rights it secures be respected when Union laws are enforced at the national level. It is also provided that the Commission may resort to infringement procedures in order to ensure full actualization of the Charter.

The Strategy provides in fact that:

“when a Member State does not respect fundamental rights when implementing Union law, the Commission, as guardian of the Treaties, has powers of its own to try to put an end to the infringement and may, if necessary, take the matter to the Court of Justice (action for failure to fulfil an obligation). The Commission may only intervene if the situation in question relates to Union law. The factor connecting it with Union law will depend on the actual situation in question”.

The Strategy further states that “the Commission is determined to use all means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law”, and for this reason, “[w]hen necessary it will start infringement procedures against Member States for non-compliance with the Charter in implementing Union law”.

Notes:

76 Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, 19 October 2010, COM (2010)573, http://ec.europa.eu/justice/news/intro/doc/com_2010_573_en.pdf (last visited 5 August 2014).

77 European Commission, Report on the Application of the EU Charter of Fundamental Rights, 2013, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1399031014350&uri=CELEX:52014DC0224> (last visited 5 August 2014).

Table 5:
Selected CFR rights and their field of protection (including primary and secondary legislation)
compared with provisions of the European Convention on Human Rights⁷⁸

Fundamental Right	The Charter	Documents of the Council of Europe	EU legislation (other)
Dignity	Article 1	Preamble to the Protocol 13 to the ECHR Preamble to the Additional Protocol to the Convention for the Protection of Human Rights and Dignity Article 26 ESC	Article 2 TEU Article 21 TEU
Right to life	Article 2	Article 2 of ECHR	
Death penalty prohibition	Article 2.2	Article 1 of the Protocol No. 6 to the ECHR Article 1 of the Protocol No. 13 to the ECHR	Council Directive 2004/83/EC
Right to respect for his or her physical and mental integrity	Article 3.1	Article 1 of the Additional Protocol to the Convention on Human Rights and Biomedicine	Directive 2012/29/EU
Right to the free and informed consent to medical practices	Article 3.2	Article 5 of the Convention for the Protection of Human Rights and Dignity	
Prohibition of eugenic practices, in particular those aiming at the selection of persons	Article 3.2		
Prohibition on making the human body and its parts as such a source of financial gain,	Article 3.2	Article 21 of the Convention for the Protection of Human Rights and Dignity	
Prohibition of the reproductive cloning of human beings	Article 3.2	Article 1.1 of the Additional Protocol to the Convention for the Protection of Human Rights and Dignity	
Prohibition of torture and inhuman or degrading treatment or punishment	Article 4	Article 3 ECHR	
Prohibition of slavery	Article 5.1	Article 4.1 ECHR	
Prohibition of forced or compulsory labour	Article 5.2	Article 4.2 ECHR	
Prohibition of trafficking in human beings	Article 5.3	Article 18 of the Council of Europe Convention on Action against Trafficking in Human Beings	Articles 79.1, 79.2.d TFEU
Right to liberty and security	Article 6	Article 5 ECHR	
Right to respect for private and family life	Article 7	Article 8 ECHR	
Right to protection of personal data	Article 8.1	Article 1 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data	Article 16 TFEU Directive 95/46/EC

Fundamental Right	The Charter	Documents of the Council of Europe	EU legislation (other)
Right of access to one's personal data and the right to have it rectified	Article 8.2		Directive 95/46/EC
Right to marry and right to found a family	Article 9	Article 12 ECHR	
Freedom of thought, conscience and religion	Article 10.1	Article 9 ECHR	
Right to conscientious objection	Article 10.2		
Freedom of expression and information	Article 11.1	Article 10.1 ECHR	
Right to freedom of peaceful assembly	Article 12.1	Article 11.1 ECHR	
Right to freedom of association	Article 12.1	Article 11.1 ECHR	
Right of everyone to form and to join trade unions	Article 12.1	Article 11.1. ECHR Article 5 ESC	
Freedom of the arts and sciences	Article 13		
Right to education and to have access to vocational and continuing training	Article 14.1	Article 2 of the Protocol 1 to the ECHR Article 10 ESC	
Right to found educational establishments	Article 14.3		
Right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions	Article 14.3		
Freedom to choose an occupation and right to engage in work	Article 15.1	Article 1 ESC	
Freedom to seek employment, to work, to exercise the right of establishment and to provide services	Article 15.2	Article 18 ESC	Articles 45.1, 49, 56 TFEU
Freedom to conduct a business	Article 16		Article 49 TFEU
Right to property and to bequeath	Article 17.1	Article 1 of the Protocol 1 to the ECHR	
Right to protection of intellectual property	Article 17.2		
Right to asylum for refugees	Article 18		
Right not to be collectively expelled	Article 19.1	Articles 3.1 and 4 of the Protocol 4 to the ECHR Article 1 of the Protocol 7 to the ECHR	

Fundamental Right	The Charter	Documents of the Council of Europe	EU legislation (other)
Right not to be removed, expelled or extradited to a State where there is a serious risk of death penalty, torture or other inhuman or degrading treatment or punishment	Article 19.2		
Right to be equal before the law	Article 20		
Prohibition of discrimination	Article 21	Article 14 ECHR	Council Directive 2000/43/EC Council Directive 2000/78/EC
Right to respect cultural, religious and linguistic diversity	Article 22		
Right of women and men to be equal in all areas	Article 23	Article 5 of the Protocol 7 to the ECHR Article 20 ESC	Article 8 TFEU Council Directive 2004/113/EC
Right of the child to protection and care	Article 24.1	Article 17 ESC	Article 3.3 TFEU
Right of the child to express their views freely	Article 24.1		
Right of the child to maintain on a regular basis a personal relationship and direct contact with both his or her parents	Article 24.3		
Rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life	Article 25	Article 23 ESC	
Right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community	Article 26	Article 15 ESC	
Workers' right to information and consultation within the undertaking	Article 27	Article 21 ESC	Council Directive 2001/23/EC businesses Directive 2002/14/EC

Notes

78 This table, or parts of it, may be used in order to learn about particular CFR provisions by comparing them to the provisions of the ECHR. In the national context one may also consider adding one more column to include national legislation on the protection of particular rights – constitutional and other provisions.

Full names of directives and other documents mentioned in the table above:

Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, ETS No. 186, 24 January 2002.

Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, ETS No. 168, 12 January 1998.

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work.

Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals.

Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

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.

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

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.

Protocol No. 13 to the ECHR concerning the abolition of the death penalty in all circumstances.

Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty.

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.

Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

CFR Rights' Guarantees – Rights and Their Effects in Practice

Bringing Principle Into Practice

The Charter of Fundamental Rights of the European Union (CFR) has become the most recent and most visible sign of the European Union's efforts to protect and promote basic human rights. It constitutes a comprehensive approach to civil, political, social, economic and cultural rights, and addresses both EU institutions and bodies as well as the member states of the EU when they are implementing EU legislation. EU institutions and member states are obliged to protect fundamental rights in the scope of creation, implementation, interpretation, application and control of application of EU law.⁷⁹ This wide scope of application however gives rise to certain difficulties relating to the effective enforcement of its provisions. Legal professionals and other stakeholders are still learning to assess the role of the Charter of Fundamental Rights and how to best guarantee its full effect.

Introduced by a fundamental rights "Check-List" for practitioners, the Chapter deals with the content of the most important social rights contained in the Charter. Relevant case-law is discussed here, and the rights set out in the Charter are contrasted with those set out in other international and European human rights instruments, to assess their additional value.

This shall enable trainers to effectively introduce the Charter, its relevance and methods of application to the concerned target groups.

Fundamental Rights "Check-List"⁸⁰

1. *What fundamental rights are/could be 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 on fundamental rights of the various policy options under consideration? 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 a 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?*
7. *Could there be any obligation for the state not only to respect, but also to protect and/or fulfil?*

1 Introduction

The following sub-sections provide an overview of the six substantial Chapters of the CFR: dignity, freedoms, equality, solidarity, citizens' rights and justice. From each Chapter, selected rights of particular importance are introduced in more detail. A focus is laid on social rights as the CFR constitutes a particularly progressive and evolved instrument in this regard.

Alongside an introduction to the contents of the right, especially its relationship to other international and regional instruments (with a special focus on the ECHR and the European Social Charter) is highlighted. This culminates in sub-sections titled "CFR Add-Ons", offering a summary of the most important complementary aspects of the CFR versus already existing instruments.

In addition, the sub-sections provide trainers with exemplary questions to use for analyses or discussion with training participants. This shall help draw the connection to the respective national legislative backgrounds, but also to point out the key points of the particular right, and thereby serve as an exercise for repetition. Essential cases are highlighted throughout the text, and an overview of relevant case-law enables a quick and easily accessible research aid.

Finally, each sub-section gives an overview of the corresponding legal texts to highlight the relationship the CFR has with other international and regional instruments. Thereby, a comparative and reflective approach is offered.

Selected Rights and Their Field of Protection

2

The following section presents the rights selected according to the criteria defined above. It aims at providing an overview on

- *the content of the specific right*
- *other legal sources of relevance for the specific right*
- *the state of art regarding its interpretation*

This includes referrals to the **Explanations relating to the Charter of Fundamental Rights**⁸¹ as well as interpretations by academia and by case law.

Notes:

79 F. Jasiński, "Charter of Fundamental rights: Structure, Scope of Regulation and Present Practical Meaning", in J. Barcz ed., *Fundamental Rights Protection in the European Union*, Warsaw 2009, pp. 39-57.

80 Developed based on the Fundamental Rights Check-List contained in the European Commission, Commission Staff Working Document on the Application of the EU Charter of Fundamental Rights 2011, available at http://ec.europa.eu/justice/fundamental-rights/files/swd2012-84-fundamentalrights_en.pdf (last visited 5 August 2014), p. 7.

81 Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF> (last visited 5 August 2014). Containing the following disclaimer: These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter. Where the text of this Manual refers to "the explanations", this document is referred to.

Article

3 Right to the Integrity of the Person



Article 3 – Right to the Integrity of the Person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
 - (a) the free and informed consent of the person concerned, according to the procedures laid down by law,
 - (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons,
 - (c) the prohibition on making the human body and its parts as such a source of financial gain,
 - (d) the prohibition of the reproductive cloning of human beings.

The Charter recognises the importance of the personal identity and uniqueness of every individual⁸² by extending the principle of human dignity to the right of the personal integrity of a person. Article 3 para. 2 also acknowledges the (future) relevance of bioethical questions for questions of personal integrity by formulating specific (non-exhaustive) bio-medical rights and principles. It is important to note that Article 3 has no explicit basis in the ECHR nor in previously existing Union legislation, though some of its aspects have been recognized to be covered by Article 8 ECHR. It is subject to the general rule on limitation of rights (*Schrankenklausele*) of Article 52 para. 1. Insofar as Article 3 refers to principles rather than rights, they need to be concretised by legislative action.⁸³ The explanations limit their references to sources of the Council of Europe Convention on Human Rights and Biomedicine (Oviedo Convention).⁸⁴ The list of prohibitions contained under para. 2 reflect the content of the Convention and its Additional Protocol on Cloning.⁸⁵ In practice, the questions of the limitation of (human) cloning and (prenatal) eugenic practices are the most controversial ones. An application of these principles requests *inter alia*

a determination examination of the date when the protection of human integrity starts – with birth or already before, for existing individuals or for future generations. Rights to be balanced when implementing the principle of personal integrity, and especially its para. 2, therefore are the rights of the individual in need for the best possible medical solution, hence the requirements of scientific research, and the rights of those unborn and the risks for their lives by genetic manipulation.

CFR Add-Ons

Article 3, and specifically its para. 2, introduces rights and prohibitions that have no explicit basis in the existing EU *acquis* or in the ECHR. Given the high grade of complexity of the rights to personal integrity and its relation to biomedical practices, their concrete applicability is difficult to judge. Nonetheless, Article 3, simply by acknowledging the importance of bioethical questions for fundamental rights of the individual as well as for mankind as such, must be considered as an important signpost for the future development of fundamental rights and the harmonisation of bioethical standards in Europe.

Case Law

The CJEU had to decide upon an application by the Netherlands, supported by Italy and Norway, for an annulment of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions in 2001. The Directive had been intended to harmonize the laws of member states regarding the patentability of biotechnological inventions, including plant varieties and human genes. The Dutch application (*inter alia*) was based on the argument that the EU Directive would undermine the “inalienable nature of living human matter that is a component of the fundamental right to human dignity and integrity.”

The application was rejected by the CJEU ruling that while it must ensure respect for fundamental rights in the application of EU law, it considered “that the Directive affords sufficient protec-

tion since it did not allow the human body, at the various stages of its formation and development to be a patentable invention.” However, in its judgment the Court also recognised the principle of free and informed consent, in particular in respect of the removal and transplantation of organs and tissue, as an element of the right to human integrity.⁸⁶

Questions for discussion:

- *Discuss the formulation and interpretation of human dignity/human integrity and its correlation to Article 3 in your national constitutions.*
- *Is the right to personal integrity as formulated in Article 3 of any relevance in your national context?*
- *How are questions of eugenic practices/reproductive cloning/the principle of informed consent/financial gain from (parts of the) human body regulated in the legislation of your country?*
- *What about the relevance of Article 3 para. 2 for fertilisation measures (including hired uteruses)?*
- *Which issues could be of further relevance?*
- *The list of prohibitions in para. 2 is not exhaustive. Discuss which further issues could/should be addressed in order to protect personal integrity.*

Notes:

82 R. Bifulco, “Commentary on the Charter of Fundamental Rights of the European Union: Dignity – Article 3: Right to the Integrity of the Person”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 19.

83 M. Borowsky, “Artikel 3”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 1.

84 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine), ETS No. 164, 4 April 1997.

Legal Documents: Council of Europe Convention on Human Rights and Biomedicine



Article 1 – Purpose and object

Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.

Article 5 Consent – General rule

An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

Article 13 – Interventions on the human genome

An intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants.

Article 14 – Non-selection of sex

The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided.

Article 21 – Prohibition of financial gain

The human body and its parts shall not, as such, give rise to financial gain.

Additional Protocol to the Convention on the Prohibition of Cloning of Human Beings⁸⁷

Article 1 – Any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited.

85 Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, ETS No. 168, 12 January 1998.

86 C-377/98, *Kingdom of the Netherlands v. Parliament and Council*, Judgment of 9 October 2001.

87 Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, ETS No. 168, 12 January 1998.

Freedoms

Article 15 Freedom to Choose an Occupation and Right to Engage in Work



Article 15 – Freedom to Choose an Occupation and Right to Engage in Work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

The three paragraphs of Article 15 differ in terms of the holders of the rights enshrined. Article 15 para. 1 CFR sets out that everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. Thus, this right is characterized by a **universal and programmatic nature**.

Article 15 para. 1 CFR

Article 15 para. 1 can be traced back to different sources of European Law, such as to Article 156 of the TFEU,⁸⁸ Article 1 para. 2 of the ESC and Point 4⁸⁹ of the Community Charter of the Fundamental Social Rights of Workers. All of these provisions have in common that they stress the significance of **work as an objective with a particularly high priority in the social policy of the EU**. However, among the mentioned norms, Article 15 CFR has the broadest personal scope of application, inasmuch as everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. In addition, Article 15 para. 1 reflects the case law of the CJEU, as can be exemplified on the basis of three judgments: In the *Nold* case, the CJEU highlighted that the right to fre-

ely practice a trade or profession is a fundamental right that is guaranteed by the common constitutional traditions of the EU member states.⁹⁰ In *Hauer*, the Court found that the freedom to pursue a trade or occupation can be limited by EU Law, as long as such limitations correspond to objectives of general interest pursued by the Union.⁹¹ Finally, in *Keller*, the CJEU confirmed that the freedom to pursue one's trade or profession is protected within the EU legal order and is subject to limitations justified by the objectives of general interest pursued by the EU.⁹²

Contrary to Article 1 ESC (right to work), Article 15 para. 1 CFR does not contain a “right to work” but only a “right to engage in work”, *i.e.* the right to have the *opportunity* to work. It has been held that “the right to work” was not included in the CFR because of possible repercussions on the balance of powers and competences between the EU and its member states.⁹³ The “right to engage in work” focuses on employability, reflecting a declared goal of the EU. Consequently, this right is not seen as an entitlement to obtain work with the support of the state but is rather conceived as the promotion of increasing labour market participation, the development of a skilled workforce and the improvement of education and training systems.⁹⁴ In a nutshell, employability is not based on individual rights but on economic policies that are aimed at ensuring that those who seek an employment or those who seek to keep an employment have equal starting opportunities.

In addition, Article 15 para. 1 CFR guarantees the freedom to choose or accept, *i.e.* the right of everyone to decide and choose one's occupation. The underlying reasoning of this provision is that everybody shall find his or her fulfilment as a social person by freely choosing or accepting an occupation. In this regard “occupation” is to be understood as to including both “traditional” and “new” professions, as well as covering employment in general.

Article 15 para. 2 CFR

Article 15 para. 2 CFR's personal scope of application are EU citizens. This provision is based on the freedoms in the field of work that are granted to EU citizens within the framework of the TFEU. It lays down that **every citizen of the Union** has the freedom

- to seek employment,
- to work,
- to exercise the right of establishment, and
- to provide services in any member state.

These are the freedoms upon which the European Communities were founded and that have been extensively dealt with by the CJEU. The principle of equal treatment links the four enumerated freedoms together. According to this principle, not only direct but also indirect forms of discrimination are prohibited. Therefore, a law of an EU member state which gives preferences regarding access to work to its own residents would be considered as discriminatory. Yet, the CJEU has argued on several occasions that certain discriminatory acts, especially when it comes to indirect discrimination, might be justified in particular cases.⁹⁵

Both the **freedom to seek employment** and the **freedom to work** are based on an employment relationship, namely a relationship in which a person renders economically quantifiable services in exchange for a certain economic remuneration. In contrast with the just mentioned two freedoms, **freedom to establishment** requires **independence** of the economic activity. Central elements to an independent economic performance are factors such as entrepreneurial risk. Freedom of establishment entails the obligation of non-discriminatory treatment so that the right holders can avail themselves of their right to initiate, pursue and manage independent professional or entrepreneurial activities within the limits foreseen by the respective EU member state for its own citizens. **Freedom to provide services** consists of the right to render cross-border services without any need of residing in the member state where the service is provided. Crucial for the

assessment of whether a specific activity qualifies as a “service” is the corresponding economic remuneration. The freedom to provide services obliges the EU member states to a non-discriminatory treatment of EU citizens and their own nationals so that EU citizens can exercise this right without bearing a greater burden than the nationals of the country where the service is rendered.

Article 15 para. 3 CFR

Article 15 para. 3 CFR entails a specific prohibition of discrimination providing that *nationals of third countries who are authorised*⁹⁶ to work in the territories of the Member States, are entitled to equivalent working conditions as EU citizens.⁹⁷ The personal scope of the application of Article 15 para. 3 covers third-country nationals, *i.e.* non-EU citizens, who are authorised to work in the territory of the member states of the EU. When it comes to the substantive scope of application of said paragraph, the wording refers to “working conditions”. This term is to be interpreted restrictively. Hence, it does not refer to employment conditions in general, but more narrowly to working conditions of non-EU citizens.⁹⁸ In academic literature there is widespread agreement that the notion of working conditions does not entail equal payment.⁹⁹ In addition, not all provisions of labour law and social security law are covered. On no account does Article 15 para. 3 CFR comprise equal access to the labour market of an EU member state. As such, it does not provide for equal treatment between EU citizens and third country nationals in terms of free movement of labour.¹⁰⁰

CFR Add-Ons

Whereas the TFEU refers only to Union workers and the ESC is applicable only to workers in the State Parties of the Council of Europe that have ratified the ESC, the personal scope of application of Article 15 CFR is broader, inasmuch as **every citizen of the Union and nationals of third countries who are authorized to work** has the right to engage in work and to pursue a freely chosen or accepted occupation.

Questions for discussion

- *Who are the rights holders entitled by the three paragraphs of Article 15 CFR?*
- *Can you identify the differences between the CFR, the TFEU and the ESC when it comes to the personal scope of application?*
- *Discuss the distinction between the right to engage in work, as laid down by Article 15 para. 1 CFR, and the right to work, as provided by the ICESCR and the ESC.*
- *What are, according to the case law of the CJEU, the limitations of Article 15 CFR? Which criteria need to be fulfilled for such limitations to be justified?*
- *Which core principle is the linkage between the freedoms referred to in Article 15 para. 2 CFR?*
- *Article 15 para. 3 CFR provides for a specific prohibition of discrimination for third country nationals. What does it consist of? Comment on the interpretation of the notion “working conditions”.*
- *Discuss the social dimension of Article 15 CFR.*
- *Discuss the (potential) relevance of Article 15 CFR for your national legal order.*



Legal Document: European Social Charter

Article 1

With a view to ensuring the effective exercise of the right to work, the Parties undertake:

1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
3. to establish or maintain free employment services for all workers;
4. to provide or promote appropriate vocational guidance, training and rehabilitation.



Legal document: International Covenant on Economic, Social and Cultural Rights

Article 6 para. 1

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Case Law

- C-4/73**, *Nold*, Judgment of 14 May 1974.
C-44/79, *Hauer*, Judgment of 13 December 1979.
C-234/85, *Keller*, Judgment of 8 October 1986.
C-544/10, *Deutsches Weintor eG v. Land Rheinland-Pfalz*, Judgment of 6 September 2012.
C-1/11, *Interseroh Scrap and Metals Trading GmbH*, Judgment of 29 March 2012.
Joined Cases **C-159/10** and **C-160/10**, *Gerhard Fuchs and Peter Köhler v. Land Hessen*, Judgment of 21 July 2011.
C-434/09, *Shirley McCarthy*, Judgment of 5 May 2011.
C-356/09, *Pensionsversicherungsanstalt v. Christine Kleist*, Judgment of 18 November 2010.

Right to Property

Article
17

Article 17 – Right to Property

1. **Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.**
2. **Intellectual property shall be protected.**

When it comes to Article 17 it is useful to deal with its two paragraphs separately. Whereas para. 1 refers to typical aspects of the right to property reflecting the different constitutional traditions of the member states, para. 2 introduces more innovative elements by protecting intellectual property.

Article 17 para. 1 CFR

The **first paragraph** of Article 17 to some extent echoes Article 1 of the First Additional Protocol to the ECHR and also reflects CJEU jurisprudence.¹⁰¹ As regards the right holders of Article 17 para. 1 CFR, this provision is addressed to both natural and legal persons.¹⁰²

Pursuant to Article 17(1) **first sentence** CFR “*everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions*”. Thus, this right is formulated as a **freedom from interference**¹⁰³ with the aim of guaranteeing the exercise of the rights connected to property.¹⁰⁴ The notion of “possessions” within the meaning of said provision is to be interpreted autonomously.¹⁰⁵ As EU law does not deal with property ownership, the EU member states and the EU acting as legislators will consequently need to fill this right with substance.¹⁰⁶ The scope of protection of Article 17 para. 1 first sentence is – in accordance with international law – to be understood in a broad sense. Property rights which are not protected by the EU member states at the domestic level (*e.g.*, so-called “acquired rights”/ “*droits acquis*” / “*wohlerworbene Rechte*”) can find protection on the Union level by subsuming them under Article 17.

A loss of property in order to be proportionate must be in the **public interest**, carried out in **accordance with law** and made subject to **fair compensation**. All of these three conditions need to be fulfilled cumulatively.¹⁰⁷ It has been underlined that the notion of “public interest” as referred to in *leg.cit.* is different from the concept of “general interest” as mentioned in Article 17 para. 1 third sentence CFR. While “public interest” could be understood more restrictively relating to activities of a juridical public entity, the term “general interest” is broader, referring to a range of values, for example in the economic-entrepreneurial field.¹⁰⁸ Some authors¹⁰⁹ have stressed that it would be desirable to interpret the term “public interest” within the meaning of Article 17 para. 1 second sentence CFR in the broadest sense of “general interest”, protecting thereby a set of values that found ample guarantees by the last-mentioned concept.

In contrast to Article 1 1st AP to the ECHR which only refers to “general principles of international law”, a loss of property rights pursuant to the CFR needs to be made subject to “*fair compensation being paid in good time*”. Thus, for the first time, there is an explicit formal mentioning of the requirement of fair compensation within a reasonable period of time. The specific determination of such a form of

compensation is innovative for many EU member states as well.¹¹⁰ A requirement of fair compensation is also not explicitly contained in the ECHR, even though the ECtHR applies similar standards in its jurisprudence.¹¹¹ In the context of Article 17 para. 1 CFR, it has been argued that “fair compensation” can be understood as ensuring a fair reconciliation between the interest of the community and the interests of the parties concerned. In addition, the need for interpreting this clause in a balanced way, as well as inspired by the interests of the EU and the principles of solidarity and substantial equality, has been argued for.¹¹²

The **third sentence** of Article 17 para. 1 CFR acknowledges the competence of the legislator to regulate the use of property.¹¹³ Such use may be regulated by law insofar as this is necessary in the general interest. In this respect, this provision structurally builds on the jurisprudence of the ECtHR¹¹⁴ related to Article 1 1st AP to the ECHR which has also been taken over by the CJEU.¹¹⁵ Furthermore, according to the CJEU’s jurisprudence, states have a wide margin of discretion when determining the objectives of general interest and the measures related to the achievement of a certain objective.¹¹⁶ The Court also regularly assesses the proportionality of the measures, thus ensuring that the measures taken are not disproportionate with respect to the goal pursued and do not interfere with the substance of the rights.¹¹⁷ The concept of “general interest” as interpreted by the ECtHR and the CJEU covers two dimensions: on the one hand, it refers to entrepreneurial activities in the broadest sense, on the other hand, it is linked to the public role of property and to socio-economic rights (*e.g.*, the protection of the environment, housing policies and consumer protection). The right to property as laid down in Article 17 para. 1 is recognized and guaranteed as a subjective right with the aim to protect the interests of the property owner with the limitations imposed by general interest. Hence, pursuant to the social dimension of this right and in the light of balancing contrasting values in the Charter, limitations of this right must be restrictive, proportionate to and justified by the objectives of general interest without interfering with the substance of the right.¹¹⁸

Article 17 para. 2 CFR

Paragraph 2 of Article 17 CFR refers to the protection of intellectual property. Such explicit protection is new to most European constitutions, to the Community Treaties and even to the ECHR. Thus, the explicit inclusion of intellectual property in Article 17 CFR constitutes a substantial innovation and mirrors the great economic significance of intellectual property in the European Union.¹¹⁹ Indeed, it has been held that this aspect of property protection, which builds on case law of the CJEU¹²⁰ and various legal acts of secondary law, deserves explicit consideration in the Charter. Yet, Article 17 para. 2 CFR does not deviate from the ECHR in this regard,¹²¹ as there is widespread agreement¹²² that the protection of intellectual property is implicitly covered by Article 1 1st AP to the ECHR.¹²³

Within primary law, only Article 36 TFEU includes the protection of “industrial and commercial property”, such as author’s rights, patents and trademarks, referring to one of the justifications for a restriction of the freedom of movement of goods.¹²⁴ Thanks to Article 17 para. 2 CFR, the protection of intellectual property has risen to “a constitutional value”. It has, therefore, become a benchmark for the CJEU both from an individualistic and socio-economic perspective. Furthermore, also the legislators of the member states are called upon to implement this principle, which is expected to lead to a harmonization of national legislations in this regard.¹²⁵

As far as the scope of the protection of Article 17 para. 2 CFR is concerned, the rights of the inventor are protected, such as the invention of an object (*e.g.*, industrial invention, model etc.) or the copyright on works of artistic value. Intellectual property protects two values: Firstly, the individual personal right of the author, aspiring to protect the personality of the author and his or her moral interests. In this regard certain rights and freedoms, such as the freedom of arts and science, need to be taken into account.¹²⁶ Secondly, intellectual property entails a right of a patrimonial nature related to the enterprise and to the economic exploitation of the work. This patrimonial nature needs to be balanced with other

values of the CFR or EU law, such as human dignity, the protection of health or the right to information. It is worth highlighting that Article 17 para. 2 CFR *does not* protect the right of an individual to intellectual property by including patrimonial and moral rights. This provision rather sets out the protection of intellectual property *per se*. Thus, the aim of Article 17 para. 2 CFR is not only to protect the patrimonial sphere, but in particular to promote general and social benefit, especially in the field of industrial and technological inventions.¹²⁷

CFR Add-Ons

The requirement of “*fair compensation being paid in good time*” (Article 17 para. 1 second sentence CFR) eliminates a shortcoming of the ECHR. In particular, while the Convention itself remains silent on the issue of compensation, the heavily criticized case law of the ECtHR foresees an entitlement for compensation in cases of expropriation of *foreign* citizens based on the general principles of international law. However, for cases of property loss by “*nationals of a Member State to the Convention*”, it derives such an entitlement for compensation from the principle of proportionality.¹²⁸ Thus, the CFR managed to overcome an existing deficit by introducing a specific criterion for compensation as a requirement for a legitimate loss of property. The necessity of providing for compensation “paid in good time” refers to the so-called “*Hull formula*”, according to which compensation must be “prompt, adequate and effective”. It is to be hoped that due to the clear standards included in the CFR, the CJEU will be able to develop a more precise and refined jurisprudence in relation to the right to property.¹²⁹

Neither the ECHR nor the EU treaties provide for the **explicit protection of intellectual property**. Article 17 para. 2 CFR, albeit building on previous secondary legislation and case law of the CJEU, constitutes a **novelty** in this regard. Thus, the protection of intellectual property can be said to have been lifted to the **constitutional realm**, highlighting thereby also its economic significance.

Questions for discussion:

- Elaborate on the personal and substantive scope of application of Article 17 para. 1 CFR. Can you imagine situations, in which Article 17 CFR goes beyond the property rights protected at the national level of the EU member states?
- Can you name the three requirements for a legitimate deprivation of property?
- What does the clause “fair compensation being paid in good time” refer to and why is it important?
- What is the novelty of Article 17 para. 2 CFR? Is there a conflict with the ECHR? Does the Constitution of your country protect intellectual property at the constitutional level?

Legal Document: 1st Additional Protocol to the ECHR – Protection of Property

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Legal Document: Declaration of Fundamental Rights and Freedoms of the European Parliament¹³⁰

Article 9

The right of ownership shall be guaranteed. No one shall be deprived of their possessions except where deemed necessary in the public interest and in the cases and subject to the conditions provided for by law and subject to fair compensation.

Case Law

C-501/11 P, *Schindler*, Judgment of 18 July 2013.

C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, Judgment of 22 January 2013.

C-12/11, *McDonagh v. Ryanair*, Judgment of 31 January 2013.

C-416/10, *Križan*, Judgment of 15 January 2013.

C-70/10, *Scarlet*, Judgment of 24 November 2011.

C-44/79, *Hauer*, 13 December 1979.

C-4/73, *Nold*, Judgment of 14 May 1974.

Anheuser-Busch Inc. v. Portugal, Application No. 73049/01, Judgment of 11 January 2007.

Akkus v. Turkey, Application No. 19263/92, Judgment of 9 July 1997.

Sporrong and Löhnroth v. Sweden, Application Nos. 7151/75 and 7152/75, Judgment of 23 September 1982.

Notes:

87 Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, ETS No. 168, 12 January 1998.

88 Article 156 TFEU reads as follows: “With a view to achieving the objectives of Article 151 and without prejudice to the other provisions of the Treaties, the Commission shall encourage co-operation between the Member States and facilitate the coordination of their action in all social policy fields under this Chapter, particularly in matters relating to:

- employment,
- labour law and working conditions,
- basic and advanced vocational training,
- social security,
- prevention of occupational accidents and diseases,
- occupational hygiene,
- the right of association and collective bargaining between employers and workers. (...)“

89 Point 4 of the Community Charter of the Fundamental Social Right of Workers reads as follows: “Every individual shall be free to choose and engage in an occupation according to the regulations governing each occupation.”

90 C-4/73, *Nold*, Judgment of 14 May 1974.

91 C-44/79, *Hauer*, Judgment of 13 December 1979.

92 C-234/85, *Keller*, Judgment of 8 October 1986.

93 See G. Arrigo, *La nuova Carta europea dei diritti fondamentali*, *Lavoro Informazione* 13 (2000).

94 See Council Decision 2010/707/EU of 21 October 2010 on Guidelines for the Employment Policies of the Member States, OJ L 308, 24 November 2010, available at http://europa.eu/legislation_summaries/employment_and_social_policy/community_employment_policies/em0040_en.htm (last visited 4 August 2014).

95 See, for example, C-204/90, *Bachmann*, Judgment of 28 January 1992; C-279/93, *Schumacker*, Judgment of 14 February 1995; C-415/95, *Bosman*, Judgment of 15 December 1995.

96 Compare the wording of Article 153(1)(g) TFEU that refers to “third country nationals legally residing in Union territory”.

97 See also the wording of Article 19 para. 4 ESC that provides for the right of migrant workers and their families to protection and assistance. Therein, it secures “for such workers lawfully within their territories treatment not less favorable than that of their own nationals” in specifically determined fields.

98 N. Bernsdorff, “Artikel 15: Berufsfreiheit und Recht zu arbeiten”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 21.

99 See in this regard Article 153 para. 5 AEUV; see also J. Blanke, “Die Gewährleistungen der Berufsfreiheit und des Rechts zu

arbeiten sowie der unternehmerischen Freiheit in der Grundrechte-Charta der Europäischen Union“, in P.J. Tettinger/K. Stern eds., *Die Europäische Grundrechte-Charta im wertenden Verfassungsvergleich* (2005), Article 15, para. 58; H.D. Jarass, *Die EU-Grundrechte – Ein Studien- und Handbuch* (2005), Article 15, para. 27.

100 N. Bernsdorff, “Artikel 15: Berufsfreiheit und Recht zu arbeiten”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 21.

101 See, for example, the Judgments of the ECJ, C-4/73, *Nold*, Judgment of 14 May 1974, and C-44/79, *Hauer*, Judgment of 13 December 1979.

102 A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 106.

103 N. Bernsdorff, “Artikel 17: Eigentumsrecht”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 18.

104 N. Bernsdorff, “Artikel 17: Eigentumsrecht”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, paras. 14 and 18.

105 N. Bernsdorff, “Artikel 17: Eigentumsrecht”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 15.

106 N. Bernsdorff, “Artikel 17: Eigentumsrecht”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 15.

107 N. Bernsdorff, “Artikel 17: Eigentumsrecht”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 20.

108 A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 110.

109 See, for example, A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 110.

110 A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 112.

111 For example, in *Akkus v. Turkey*, the ECtHR has found that a deferral of the compensation may render a compensation “inadequate” and “upset the balance between the protection of the right to property and the requirements of the general interest”. See on this Judgment of the ECtHR, *Akkus v. Turkey*, Application No. 19263/92, Judgment of 9 July 1997, para. 31 and A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 111.

- 112** A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 112 et seq.
- 113** N. Bernsdorff, “Artikel 17: Eigentumsrecht”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 14.
- 114** See, for example, the Judgment of the ECtHR in *Sporrong and Lönnroth v. Sweden*, Application Nos. 7151/75 and 7152/75, Judgment of 23 September 1982.
- 115** N. Bernsdorff, “Artikel 17: Eigentumsrecht”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 14.
- 116** A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 107.
- 117** See in detail L. Daniele, “La tutela del diritto di proprietà e del diritto al libero esercizio delle attività economiche nell’ordinamento comunitario e nel sistema della Convenzione europea dei diritti dell’uomo”, in *Il Diritto dell’Unione europea* (1998), p. 67; A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 107 et seq.
- 118** A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 109.
- 119** *Ibid.*, 113.
- 120** C-10/89, *CNL-SUCAL v. HAG*, Judgment of 17 October 1990, and C-200/96, *Metronome*, Judgment of 18 April 1998.
- 121** N. Bernsdorff, “Artikel 17: Eigentumsrecht”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 15; C. Grabenwarter, *Die Charta der Grundrechte für die Europäische Union*, DVBl. 2001, p. 5.
- 122** See, for example, W. Peukert, “Der Schutz des Eigentums nach Art. 1 des Ersten Zusatzprotokolls zur Europäischen Menschenrechtskonvention”, *EuGRZ* 1981, p. 103; E. Riedel, “Entschädigung für Eigentumsentzug nach Artikel 1 des Ersten Zusatzprotokolls zur Europäischen Menschenrechtskonvention: Zur Herausbildung eines gemeineuropäischen Standards”, *EuGRZ* 1988, p. 334;
- 123** W. Peukert, “Der Schutz des Eigentums nach Art. 1 des Ersten Zusatzprotokolls zur Europäischen Menschenrechtskonvention”, *EuGRZ* 1981, p. 103. For the protection of patents in the jurisprudence of the ECtHR see *British American Tobacco Company Ltd. v. Netherlands*, Application No. 19589/92, Judgment of 20 November 1995; *Anheuser-Busch Inc. v. Portugal*, Application No. 73049/01, Judgment of 11 January 2007; *Balan v. Moldavia*, Application No. 19247/03, Judgment of 29 January 2008.
- 124** In addition, intellectual property is indirectly included in the scope of application of Articles 101 and 102 TFEU that relate to free competition and the prohibition of an abuse of a dominant position. A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 113.
- 125** A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 114.
- 126** *Ibid.*, p. 115.
- 127** A. Lucarelli, “Article 17: Right to Property”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 114 et seq.
- 128** N. Bernsdorff, “Artikel 17: Eigentumsrecht”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 20.
- 129** N. Bernsdorff, “Artikel 17: Eigentumsrecht”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, paras. 15 and 23.
- 130** Declaration of Fundamental Rights and Freedoms of the European Parliament, 12 April 1989, C 120/54, available at http://www.europarl.europa.eu/charter/docs/pdf/a2_0003_89_en_en.pdf (last visited 4 August 2014).

Article
21 Non-Discrimination



Article 21 – Non-Discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.¹³¹

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.¹³²

In the explanations it is made clear that the extensive list of grounds contained in paragraph 1 is not considered as incompatible with Article 19 of the Treaty on the Functioning of the European Union (TFEU), which refers to gender, ethnic affiliation, religion or belief, sexual orientation, age and disability as grounds to be protected against discrimination. In contrast to the Charter, Article 19 TFEU confers power on the Union to adopt legislative acts, including harmonisation of the member states' laws and regulations, to combat discrimination on these grounds.

In contrast, the provision in Article 21(1) CFR does not create any power to enact anti-discrimination laws in these areas by member states or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by member states only when they are implementing Union law (see *supra*, Part III). Paragraph 1 therefore does not alter the extent of powers granted under Article 19 TFEU nor the interpretation given to that Article.

CFR Add-ons

Article 21 CFR extends the field of protection against discrimination to a wide range of “new” grounds such as genetic features, social origin, political opinion or property status. Moreover, the whole chapter on equality adopts new concepts that go beyond non-discrimination as for example the acknowledgement of diversity and integration of persons with disabilities.

Case Law

In a decision of its Grand Chamber, the CJEU examined the relevance of the non-discrimination principle for the EU institutions recruitment policies.¹³³ Several open competitions for the posts of civil servants with EU institutions had been published in three official languages (EN, DE, FR) only. The Court found that a candidate whose mother tongue was none of the three languages of full publication of the competition, was put at a disadvantage compared to a candidate, whose mother tongue was one of the three. Moreover, it considered the disadvantage a consequence of a disproportionate difference in treatment on the grounds of language, prohibited by Article 21 of the CFR.

Questions for discussion:

- *Does this decision affect national practice?*
- *What about a job advert for a public administrative at member state level, which is published in the main national language as well as in English, but not in any of the languages of autochthon minorities?*
- *What about relevant ECHR rights and rights enshrined in the national constitution?*
- *Discuss also any potential future effects for or comparable situations at the level of member state administration.*

Legal Document: Convention for the Protection of Human Rights and Fundamental Freedoms

Article 14

Prohibition of discrimination The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.





Legal Document: Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (General Prohibition on Discrimination)

Article 1

General prohibition of discrimination – 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

right to an independent and autonomous existence and, thirdly, the right to participate in social and cultural life.

The decision to include Article 25 in Chapter III of the Charter, “Equality”, rather than in Chapter IV, “Solidarity”, symbolizes the EU’s willingness to develop the rights of older people through the fight against discrimination on the grounds of age. However, Article 25 can only be understood in relation to the fundamental social rights enshrined in the Solidarity Chapter of the Charter. In this line, Article 25 requires measures to guarantee elderly persons to lead their lives independently, in a self-determined and autonomous manner. This encompasses, *inter alia*, the access to employment, training, services, medical treatment and health care, and finances. This also means to receive appropriate support in taking decisions and to exercise their legal capacity to fully participate in social, cultural as well as in public life. In this regard, it has to be stressed that Article 25 does not create directly enforceable individual rights. In conformity with Article 52 of the Charter, Article 25 constitutes a provision which establishes a principle and which requires the adoption of legislative or executive acts for its implementation.

A reference to non-discrimination on the grounds of age is also contained in Articles 10 and 19 of the TFEU which concerns both young and elderly people. In particular, Article 10 TFEU establishes that the aim to combat discrimination based, *inter alia*, on age is an EU general objective which the Union must pursue in the course of defining and implementing its policies and activities. Article 19 TFEU allows to take appropriate action to combat discrimination based also on the age.

Taking into account that the ECHR does not contain provisions on elderly rights, at European level, the protection of elderly people has been realized through the relevant case law of the ECtHR and, in particular, through the European Committee of Social Rights’ interpretation of Article 23 of the ESC. The rights of elderly people were recalled for the first time in the European framework by the Revised European Social Charter (ESC). Article 23 ESC

Article

25 The Rights of Elderly



Article 25 – The Rights of Elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 25 CFR recognizes in a more complete way the relationship between the non-discrimination principle covered by Article 21 CFR and older persons. There is a growing interest in the rights of elderly people to fully enjoy basic human rights. Elderly people are not often perceived as people able to manage their own lives or to participate meaningfully in the life of their communities, especially after they have reached an advanced age. This entails that many older people are often exposed to the risk of discriminatory treatment which also increases the risk of abuse and similar forms of mistreatment, but also the risk of poverty and social isolation. Undoubtedly, older people in general often have particular medical or social care needs which, if not met, can seriously endanger their right to a dignified existence.

The rights set out in Article 25 are grounded on three main concerns which are inter-linked. Firstly, the right to respect their inherent dignity. Secondly, the

establishes the obligation for state parties to adopt appropriate measures aimed at guaranteeing the effective exercise of the rights of elderly people to social protection. Article 25 CFR assumes Article 23 of the Revised European Social Charter as a juridical model of reference. This point is moreover underlined by the explanations relating to the Charter originally elaborated under the authority of the Presidium of the Convention.

The importance of these provisions is accentuated by the circumstance that at universal level to date no treaty is specifically dedicated to the rights of older persons. This has meant a “normative gap” in the protection of elderly people. However, older people’s rights overlap with several provisions of existing international human rights law. In particular the Universal Declaration of Human Rights can be mentioned, which is applicable to people of all ages. In the same vein, Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR) concerning the prohibition of “cruel, inhuman or degrading treatment” also is essential. Furthermore, Articles 7 (right to work), 9 (right to social security), and 15 (right to take part in cultural life) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) are applied to every person regardless of their age.

Accordingly, in the lack of specific international treaties on the rights of elderly, soft law encodes norms in various declarations, recommendations, guidelines and statements of principles adopted by states which agree to act in accordance with them. Among these, we can recall, *inter alia*, the 1982 Vienna International Plan of Action on Ageing (VIPPA), the 1991 UN Principles for Older Persons, the 1995 General Comment No. 6 on the economic, social and cultural rights of older persons, and the Madrid International Plan of Action on Ageing (MIPAA) adopted by the UN General Assembly on 2002. Finally, in Resolution 65/182 (December 2010), the UN General Assembly established an open-ended Working Group on Ageing with the purpose to explore existing gaps at the international level in the protection of the human rights of older persons and whether a treaty on their rights is required.

Case Law

An interesting reference to Article 25 CFR was made in the ECJ’s Judgment Mangold of 22 November 2005¹³⁴ where the Court stated that “the principle of non-discrimination on grounds of age must [thus] be regarded as a general principle of Community law.” On these grounds, the ECJ ruled that German law, which authorises without restrictions the conclusion of fixed-term contracts of employment once the worker has reached the age of 52, is inconsistent with the principle of non-discrimination in respect of age.

Furthermore, on 13 September 2011 the Court addressed that the Directive 2000/78/EC must be interpreted as precluding a clause in a collective agreement that fixes at 60 the age limit from which pilots are considered as no longer possessing the physical capabilities to carry out their professional activity while national and international legislation fix that age at 65.¹³⁵

In addition, with regard to the principle of non-discrimination on grounds of age the Court in its Judgment of 6 November 2012 stated that the Hungarian law requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued by EU non-discrimination law. Therefore, it is inconsistent with Articles 2 and 6 of the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.¹³⁶

Questions for discussion:

- *Does this decision affect national practice?*
- *Can you identify the differences between the CFR, the TFEU and the ESC with regard to the rights of elderly people?*
- *What are, according to the ECJ’s case law, the limitations of Article 25 CFR? In the light of Article 52 CFR discuss the distinction between principles and rights.*
- *Discuss the (potential) relevance of Article 25 CFR for your national legal order.*



Legal Documents: European Convention on Human Rights

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
(The ECHR does not contain specific provisions on elderly rights).

Recommendation 1796 (2007) of the Parliamentary Assembly on “The situation of elderly persons in Europe” of 24 May 2007.

Recommendation 1749 (2006) of the Parliamentary Assembly on “Demographic challenges for social cohesion” of 29 May 2006;
Recommendation 1591 (2003) of the Parliamentary Assembly on “Challenges of social policy in Europe’s ageing societies” of 29 January 2003.

Recommendation 1619 (2003) of the Parliamentary Assembly on “The rights of elderly migrants” of 8 September 2003.

Resolution 1793 (2011) of the Parliamentary Assembly on “Promoting active ageing – capitalising on older people’s working potential” of on 28 January 2011.

UN General Assembly, Resolution A/RES/37/51, Vienna International Plan of Action on Ageing (VIPPA).

UN General Assembly, Resolution A/RES/46/91, UN Principles for Older Persons.

General Comment No. 6 on the economic, social and cultural rights of older persons, E/1996/22.

UN General Assembly, Resolution A/RES/54/262, Madrid International Plan of Action on Ageing (MIPAA).



Legal Document: European Social Charter

Article 23 – The right of elderly persons to social protection

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

to enable elderly persons to remain full members of society for as long as possible, by means of:

- a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;
- b. provision of information about services and facilities available for elderly persons and their opportunities to make use of them;

to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:

- c. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;
 - d. the health care and the services necessitated by their state;
- to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

Integration of Persons with Disabilities

Article
26

Article 26 – Integration of Persons with Disabilities



The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

Article 26 CFR concerning the rights of persons with disabilities was not included in the first draft text drawn up by the Convention for the elaboration of the Charter, but it was added at a later time. This specific recognition given to the rights of persons with disabilities in Article 26 flows from the importance of non-discrimination and equal treatment in general. It is particularly important in this context



Other Sources

Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the Promotion of Human Rights of Older Persons of 19 February 2014.

Recommendation CM/Rec(2011)5 of the Committee of Ministers on reducing the risk of vulnerability of elderly migrants and improving their welfare of 25 May 2011.

Recommendation CM/Rec(2009)6 of the Committee of Ministers on ageing and disability in the 21st century: sustainable frameworks to enable greater quality of life in an inclusive society of 8 July 2009.

Recommendation R(94)9 of the Committee of Ministers concerning elderly people of 10 October 1994.

as persons with disabilities are often considered to be one of the most disadvantaged groups in society and continue to face considerable barriers in accessing all aspects of social life and economic goods. These barriers include lack of access to public buildings and workplaces, lack of accessible transportation, limited education and training opportunities, and lack of support, and so on. In this line, Article 26 complements Article 21 of the Charter, which prohibits discrimination based on any ground, including disability.

CFR Add-ons

The final version of the Charter of Fundamental Rights did not include Article 26 in the social rights grouped together under Chapter IV of the EU Charter of Fundamental Rights concerning the “solidarity rights”, but instead included it in the Chapter III of the Charter entitled “equality” (equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly, integration of persons with disabilities). This reflects a shift in the EU’s approach to questions concerning disability. Article 26 represents a significant cultural progress of EU law to consider this matter as belonging to the protection of human dignity and the rights of freedom and autonomy of people with disabilities. In addition, at the European level, Article 26 has contributed to modifying the conception of disability from a “medical approach” which conceived disability as a disease that requires medical interventions to a “social model” related to the protection of human rights in which disability is the result of the interaction between the individual and the social environment in which he or she lives. In this framework, the Charter’s provision has resulted in a change of perspective which over time had also emerged at the international level with, in particular, the 1993 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which provided an international framework for disability policy. In addition, part of Article 26’s potential has been said to be related to the EU’s membership to the UN Convention on the Rights of People with Disabilities and the possibility to use the Charter as a interpretative tool thereof.

Case Law

An interesting reference to Article 26 of the Charter is made in the Judgment of the CJEU (Second Chamber), Joined Cases C-335/11 and C-337/11, *Ring and Skouboe Werge*, Judgment of 13 April 2013. The “HK Danmark”, a Danish trade union, brought two actions for compensation. The applicants were dismissed with a shortened notice period. HK Danmark claimed that their employers were required to offer them a reduction in working hours because of their disability. The trade union also argued that the national legislation on the shortened notice period could not apply to those two employees since their absence because of illness was caused by their disability. The Court stated that a reduction in working hours may constitute a reasonable accommodation as defined in the Employment Directive and in the UN Convention on the Rights of Persons with Disabilities (CRPD). The employer is required to take appropriate measures to enable a person with a disability to have access to, participate in, or advance in employment. These measures can entail organisational measures, such as reduction of working hours. Finally, the judgment is also very important because it does not allow an employer to dismiss an employee who was unable to work for a long period of time due to his or her disability without looking into the possibility of providing reasonable accommodation for that employee and re-integrating the person in the workplace.

Further case law

C-303/06, *S. Coleman v. Attridge Law and Steve Law*, Judgment of 17 July 2008

C-13/05, *Chacón Navas v. Eurest Colectividades SA*, Judgment of 11 July 2006.

C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, Judgment of 22 May 2014.

Questions for discussion:

- *Does this decision affect national practice?*
- *If the adoption of reasonable accommodation involves a disproportionate obligation for the employer, is he/she still obliged to adopt it?*
- *Discuss also any potential future effects for comparable situations at the level of the domestic legal order.*
- *Debate the (potential) relevance of the concept of rights of persons with disabilities enshrined in Article 26 for your national legal and political context.*



Legal Document: European Convention on Human Rights

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialized placement and support services;

3. to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.



Legal Document: European Social Charter

Article 15 – The right of persons with disabilities to independence, social integration and participation in the life of the community

With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

1. to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialized bodies, public or private;
2. to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the

Other Sources



Recommendation Rec(86)18 of the Committee of Ministers to Member States on the European Charter on Sport for All: Disabled Persons of 4 December 1986.

Recommendation Rec(2006)5 of the Committee of Ministers to Member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015 of 5 April 2006.

Directive 2000/78 on the establishment of a General Framework for Equal Treatment in Employment and Occupation.

UN Convention on the Rights of People with Disabilities of 2006 (CRPD). The Convention introduces new topics such as the identification of the persons with disabilities, reasonable accommodations and international cooperation. In particular, reasonable accommodation is a CRPD cornerstone.

Notes:

131 The explanations state: Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the TFEU, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it.

132 The explanations state: Paragraph 2 corresponds to the first paragraph of Article 18 of the TFEU and must be applied in compliance with that Article.

133 C-566/10, *Republic of Italy v. European Commission*, Judgment of 27 November 2012.

134 C-144/04, *Werner Mangold v. Rüdiger Helm*, Judgment of the of 22 November 2005, paras. 75-78.

135 C-447/09, *Reinhard Prigge and Others v. Deutsche Lufthansa AG*, Judgment of 13 September 2011, para. 83.

136 C-286/12, *European Commission v. Hungary*, Judgment of 6 November 2012, para. 82.

Solidarity

Article 28 Right of Collective Bargaining and Action



Article 28 – Right of Collective Bargaining and Action

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 28 CFR sets out the right to collective bargaining and collective measures, including strike. As regards the right holders of this article (“workers and employers, or their respective organisations”), this provision does not only refer to individuals but also to the respective organisations of the bargaining partners. It is worth highlighting that the disjunction “or” in the wording of the article does not imply alternative subjects but has to be interpreted extensively as covering “workers and employers, as well as through their respective organizations”. Thus, the rights are granted to both workers and their representatives, whereby these two possibilities are not mutually exclusive. Indeed, an individual protection restricted to workers would make little sense, as the collective dimension is typical for both the respective organizations of workers and employers as well as for the actions of the interested parties which aim at protecting the respective interests of these two groups. Furthermore, the collective dimension that is intrinsic to the rights of collective bargaining and action does not exclude an individual dimension. Thus, Article 28 has both an individual and a collective dimension.

The right of collective bargaining and action as laid down in Article 28 of the Charter is based on the

more extensive provision of Article 6 of the European Social Charter (ESC). Article 6 ESC is perhaps the most famous provision of the ESC not only because it foresees the right to strike in a legally binding way in the field of international law for the very first time, but also because of its normative content that goes far beyond the protection of collective action at the national levels of the member states. While Article 6 ESC is fairly detailed, the wording of Article 28 CFR is brief and concise. It provides for three distinct rights: the right to collective bargaining, the right to conclude collective agreements, and the right to collective action, including strike action, to defend the interests of both workers and management. Strikingly, Article 28 does not make reference to the workers’ right to a fair remuneration, as this is laid down in Article 4 of the European Social Charter. The three rights enshrined in Article 28 are thematically linked to each other.

A common feature is that due to their collective nature, these rights have been historically linked to freedom of association of both workers and employers. This right is laid down in a number of treaties, such as Article 5 ESC and Article 11 para. 1 ECHR, which stress the workers’ right to freedom of association in labour unions as an instrument for the assertion of their rights.

As far as the right to take collective action is concerned, both workers and employers enjoy this right for the protection of their respective interests. While explicit reference is made to the right of workers to avail themselves of strike action, a lock out by employers, albeit not explicitly mentioned, is equally protected by Article 28 of the Charter. This becomes evident from the non-exhaustive enumeration (“in cases of conflicts of interest, to take collective action to defend *their* interests, *including* strike action”). Article 28 CFR does not indicate possible limits on collective action undertaken for the pursuit of the interests of the parties concerned.

By virtue of the clause “in accordance with Union law and national laws and practices”, the article does not affect in any way the delimitation of legislative competence and recognizes the principle of subsidiarity. In addition, said article does not affect the different levels of relationship, whether national or decentralized, among the parties. In this regard, the wording “at appropriate levels” concedes management and labour full contractual autonomy at all levels, including at the level of single undertakings. In view of this contractual autonomy conferred to management and labour, collective agreements have been considered as containing rules on working conditions agreed to by the parties involved. Yet, Article 28 remains silent on the legal effects of such agreements. In addition, the Charter – as opposed to Article 6 ESC – does not make reference to the possibility of involving public authorities in the bargaining process between management and labour. As a matter of fact, in modern social relations public authorities are commonly considered to have a stimulating impact in the consultation process between management and labour. Furthermore, Article 28 does not determine any particular methods of bargaining to be used.

In academic literature it has been criticized that Article 28 merely reproduces social rights that have been in existence before. No adequate account has been taken of the latest developments that have taken place in the field of social policies and led to amendments of the EU Treaties. As such, it has been deemed that Article 28 is rather a restatement of important steps that have been achieved in social relations but does not constitute a sufficient base for a developed *acquis communautaire* in this regard. Thus, further efforts will be needed in order to strive for a more balanced and comprehensive vision of social relations in a pluralistic and inclusive society, both from an economic and a social perspective.

CFR Add-Ons

It is worth highlighting that, unlike in German labour law, a right to take collective measures including the right to strike as foreseen in the Charter is not limited to cases of dispute with regard to collective agreements, but refers to cases of conflicts of interests, in general. Furthermore, even though Article

28 to a great extent only sums up existing rights, it has been emphasized that the general wording of this article allows for further developments of Union law and a dynamic interpretation without touching upon the Charter provision itself.

Questions for discussion:

- *Who are the subjects entitled to enjoy the rights set out in Article 28 CFR?*
- *Can you name the three rights laid down in Article 28 CFR?*
- *Discuss the individual and collective dimension of Article 28 CFR.*
- *Debate about the potential relevance of Article 28 CFR for your national context.*
- *What do critics refer to when they argue that further endeavours will be necessary in order to achieve a more balanced and all-embracing vision of social relations in Europe?*

Legal Document: European Social Charter

Article 6 – The right to bargain collectively

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

1. to promote joint consultation between workers and employers;
2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:
4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

Legal Document: European Convention on Human Rights

Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right

to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

● Case Law

C-341/05, *Laval*, Judgment of 18 December 2007.

C-438/05, *Viking*, Judgment of 11 December 2007.

Article

34 Social Security and Social Assistance

● Article 34 – Social Security and Social Assistance

1. **The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.**
 2. **Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.**
 3. **In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.**
-

Explanations

The principle set out in Article 34(1) CFR is based on Articles 153 and 156 of the Treaty on the Functioning of the European Union, Article 12 of the European Social Charter and point 10 of the Community

Charter on the Rights of Workers. The Union must respect it when exercising the powers conferred on it by Articles 153 and 156 TFEU. The reference to social services relates to cases in which such services have been introduced to provide certain advantages, but does not imply that such services must be created where they do not exist.

Paragraph 2 is based on Articles 12(4) and 13(4) of the European Social Charter and point 2 of the Community Charter of the Fundamental Social Rights of Workers and reflects the rules arising from Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 1612/68.

Paragraph 3 draws on Article 13 of the European Social Charter and Articles 30 and 31 of the revised Social Charter and point 10 of the Community Charter. The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union.

The right to social security and social care is listed in Title IV of the European Charter on Fundamental Rights, covering solidarity rights. Article 34 CFR, based on Articles 153 and 156 TFEU and Articles 12, 13 and 30 of the European Social Charter, follows immediately after the dispositions on workers' rights, building on them to outline an economic security plan for all those who are exposed to social risk. However, the right guaranteed here is not merely occupational, as the article aims to tackle poverty and social exclusion at large (para. 3).

In general, the right to social security and care can be considered a classic social right, guaranteed by the main international regulations on human rights. More specifically, within the EU this right has taken on a greater significance with regard to the free circulation of people.

Social aid and housing aid are social rights of a purely programmatic nature whose implementation lies solely with member states since the Union has no jurisdiction in this regard. Article 153 TFEU simply states that tackling social exclusion is one area where the Union supports and complements the action of member states, but without adopting any harmonization rules.

CFR Add-Ons

The right to security and social assistance has seen important developments within the EU, especially with regard to the circulation of people. The Treaty on the European Community (TEC) afforded Community institutions the power to take steps in the field of social security in order to ensure the freedom of movement for workers; this included the implementation of a system that would grant migrant workers (and those so entitled) the aggregation of all periods of time taken into account under the various national laws, both towards acquiring and retaining the right to social benefit, and towards calculating the amount thereof; and the payment of benefits to persons resident in the territories of member states (Article 137).

This provision has led the European institutions to adopt a series of acts of secondary legislation aimed at establishing a coordination mechanism and criteria for the full implementation of national systems and legislations on social security (Regulation (EEC) No. 1408/71 of the Council (14 July 1971) on *The Application of Social Security Schemes to Employed Persons and their Families Moving Within the Community*; Regulation No. 883/2004 (29 April 2004) on *The Coordination of Social Security Systems*, which was implemented following the adoption of Regulation No. 987/2009 (16 September 2009); Regulation No. 1231/2010 (24 November 2010) *extending Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality*; Regulation No. 465/2012 (22 May 2012) and Regulation No. 1224/2012 (18 December 2012), all of which modified the 2004 Regulation).

In this rather complex and many-tiered context, the contribution of the Charter of Fundamental Rights has allowed to alter the prevailing view within the Union, which earlier had deemed the issues of social security as essentially tied to the labour market.

This new communitary approach is apparent in Article 34 of the Charter. The first paragraph states that “the Union recognises and respects the entitlement to social security benefits and social services

providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices”. This is a primarily programmatic statement that does not prescribe any minimum standard of protection, but leaves member states with the onus to determine the conditions of entitlement and access to social services.

Further, it is said that “everyone residing and moving legally within the European Union is entitled to social security”. The universal reach of this paragraph unarguably defines the end point of social rights protection within the Union, the point where distinctions between workers and citizens are superseded. Access to social rights is therefore guaranteed to all legally residing individuals, regardless of their nationality.

Finally, the third paragraph of Article 34 can be regarded as a goal of the Union, to the effect that “in order to combat social exclusion and poverty, [the Union] recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices”. This is the first time that the right to social and housing assistance is recognised as a fundamental right at the Community level.

Case Law

The judgment in *Kamberaj* (C-571/10, *Servet Kamberaj v. Social Housing Institute of the Autonomous Province of Bolzano*, Judgment of 24 April 2012) is particularly relevant. The case involved an Albanian citizen long-time resident in Italy who had been denied access to housing support benefits (“*sussidio casa*”). Bolzano provincial law drew a distinction between national and community citizens and third-country citizens with regard to benefits entitlement.

The Luxembourg judges ruled that, in the present case, the so-called “*sussidio casa*”, as meeting the objectives set out in Article 34 CFR (namely to ensure a decent existence for all those who lack sufficient resources) can be included, in the context of EU law, among the essential services under Article 11, para. 4 of Directive 2003/109, with respect to which member states are not allowed to set limits to the equal treatment of long-term

resident workers of non-EU citizenship and EU citizens. Upon these grounds, the Court decreed the illegality of the national legislation.

According to the Court of Justice, the concept of social security and assistance as defined by Article 11.1 of Directive No. 109/2003, while being primarily a concept of law (para. 77), must be interpreted in the light of the third recital of the Directive, *i.e.* in compliance with the rights established in the Charter of Nice (para. 79). The Court mentions that “according to Article 34 of the Charter, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. It follows that, in so far as the benefit in question in the main proceedings fulfils the purpose set out in that article of the Charter, it cannot be considered, under European Union law, as not being part of core benefits within the meaning of Article 11(4) of Directive 2003/109. It is for the referring court to reach the necessary findings, taking into consideration the objective of that benefit, its amount, the conditions subject to which it is awarded and the place of that benefit in the Italian system of social assistance.” (para. 92). This decision underscores a key provision of the system of social rights protection enshrined in the Charter, and hints at a turning point in the implementation of the right to social security in European Union law.

Questions for discussion:

- *How does the CFR safeguard the social security and social assistance rights?*
- *Who are the subjects entitled to enjoy the rights set out in Article 34 CFR?*
- *Debate about the potential relevance of Article 34 CFR for your national context?*
- *Discuss how the right to social security and social assistance enshrined in Article 34 could affect national and European practice.*

At the international level, the main instruments for the protection of human rights establish the right to social security and social assistance.

Legal Document: Treaty on the Functioning of the European Union 

Article 21 – 1.

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Article 48

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

- (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
- (b) payment of benefits to persons resident in the territories of Member States.

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

- (a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or
- (b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.

Article 153 – 1.

With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (...)

- (c) social security and social protection of workers;

4. The provisions adopted pursuant to this Article:
- shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,
 - shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

Article 156

With a view to achieving the objectives of Article 151 and without prejudice to the other provisions of the Treaties, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Chapter, particularly in matters relating to: (...)

– social security.



Legal Document: European Social Charter (revised)

Article 12 – The right to social security

With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1. to establish or maintain a system of social security;
2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
3. to endeavour to raise progressively the system of social security to a higher level;
4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
 - a) equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
 - b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

Article 13 – The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake: to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts

or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want; to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

Article 30 – The right to protection against poverty and social exclusion

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake: a. to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance; b. to review these measures with a view to their adaptation if necessary.

Article 31 – The right to housing

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: to promote access to housing of an adequate standard; to prevent and reduce homelessness with a view to its gradual elimination; to make the price of housing accessible to those without adequate resources.

Other Sources



Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance.

Council Regulation (EC) No. 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.



Article 35 – Health Care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

The principles set out in this Article are based on Article 152 of the EC Treaty, now replaced by Articles 168 of the Treaty on Functioning of the European Union, and on Articles 11 and 13 of the European Social Charter.

The right to health care is one of the core social and economic rights and it is a basic pre-requisite for the enjoyment of many fundamental rights.

According to Article 11 of the European Social Charter 1961, the right to health care includes the state obligation to take preventive measures and to provide accessibility of social and medical assistance.

The first sentence of Article 35 CFR (“the right of access to preventive health care and the right to benefit from medical treatment”) is broader than the competence of the Union in relation to health care in Article 168 (Public health). It refers to Union action, such as “improving public health”, “promoting research”, “health information and education”, “monitoring”, and “early warning and combating serious cross-border threats to health.”

Member states have to protect the health of their citizens, to take legislative action to ensure equal access to health services, to provide health care to the impoverished and to protect people from health infringements by third parties. They are also required to create the conditions in which all people within the state have access to health services, and to the necessary preconditions for good health, such as clean water and adequate sanitation.

Article 35 of the Charter can be categorised as a principle instead of a clear individual right. In practice this means that it obliges member states to guarantee equal treatment for all health services provided by the state and the EU institutions to promote a high level of health protection. It, however, cannot be used as a legal basis for a claim of EU citizens against the EU institutions.

CFR Add-Ons

In doctrine, some authors said that Article 35 can be seen as a “touchstone against which Community [Union] ... action can be tested”.¹³⁷

Case Law

Article 35 of the Charter was referenced in the opinion of the Advocate General in *Aikaterini Stamatelaki v. NPDD Organismos Asfaliseos Eleftheron Epangelmaton* (2007).

The Advocate General stated that: “[a]lthough the case law takes as the main point of reference the fundamental freedoms established in the Treaty, there is another aspect which is becoming more and more important in the Community sphere, namely the right of citizens to health care, proclaimed in Article 35 of the Charter of Fundamental Rights of the European Union since ‘being a fundamental asset, health cannot be considered solely in terms of social expenditure and latent economic difficulties.’ This right is perceived as a personal entitlement unconnected to a person’s relationship with social security and the Court of Justice cannot overlook that aspect.”¹³⁸

Questions for discussion:

- *How does the CFR safeguard healthcare rights?*
- *Debate the (potential) relevance of Article 35 for your national (legal) context*
- *Could Article 35 stimulate a shift towards a human rights based approach in relation to health and health care – and what would that mean?*
- *Could Article 35 lead to an EU standard in regard to health and health care?*

Several international human rights documents refer to rights applicable in the context of health law and health policy. A right to health was first explicitly stated in the Preamble of the World Health Organization Constitution (1946), “The enjoyment of the ...

highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”.

Some United Nations human rights documents directly address health, such as the right to a standard of living adequate for health and well-being, or the need for recognition of the highest attainable standard of physical and mental health.



Legal Document: International Covenant on Economic, Social and Cultural Rights

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.



Legal Document: European Social Charter

Article 11 – The right to protection of health

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia*: to remove as far as possible the causes of ill-health; to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

Article 13 – The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public

or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;

4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

Legal Document: Consolidated Version of the Treaty on European Union



Article 168(7)

Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4 (a) shall not affect national provisions on the donation or medical use of organs and blood.

Consumer Protection

Article
38

Article 38 – Consumer Protection



Union policies shall ensure a high level of consumer protection.

Article 38 lays down the promotion of a high level of consumer protection as a task of the European Union. Article 38, however, is also a model case for a CFR principle rather than a right and hence has to be considered as an indirect right, which does not recognize or guarantee specific rights to the individual consumer.

This article is based on Article 169 TFEU laying down that with a view to promote the interests of consumers and ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interest of consumers, as well as to promoting their right to information, education and to organise themselves for the safegu-

ard of their interests. While Article 38 provides only for the guarantee of a particular goal (“a high level of consumer protection”), Article 169 TFEU is more concrete insofar as it determines also the means of how to achieve the stated aim. In addition, Article 38 of the Charter recalls Article 12 TFEU, according to which consumer protection requirements are to be taken into consideration when defining and implementing **all** Union policies and activities.

Consumer protection is a field in which the Union shares competence with the member states, as provided by the Treaties (Article 4(2)(f) TFEU). Based on Article 169(1) and (2) TFEU, the Union has adopted a series of regulations in order to protect the health and safety of consumers, such as with regard to reducing dangers related to the use of children’s toys or concerning labelling requirements for pharmaceutical, medical and other products. Furthermore, in order to protect the economic interests of consumers, the Union has become active when it comes to curtailing misleading publicity and regulating sales by distances (*e.g.*, “door to door” sales or telephone sales). Regulations cover a great variety of different aspects of consumer protection starting from the right to information and the protection of economic interests of the consumers (*e.g.*, prohibition of abusive agreement clauses in consumer contracts) ranging to general requirements of product safety and reparation for damages in the frame of product liability. It is worth noting, however, that member states are not prevented from introducing higher standards of consumer protection (Article 169(4) TFEU) as long as they are compatible with EU law.

In view of the broad scope of consumer protection, it is not surprising that the Union law has not developed a uniform definition of the term “consumer”. The point of departure of the European Court of Justice is to examine the specific protection purpose of each provision in question. In addition, case law of the CJEU suggests a narrow interpretation of the term “consumer” referring to persons that become active on the market for merely private purposes.¹³⁹ It is also unclear which kind of consumer concept Article 38 is based on: a “mature” consumer, who is well-informed and as such, less in need for protection, or rather on a “hasty” consumer, who deserves

a lot of protection. Some authors¹⁴⁰ have emphasized that in reality the situations may be manifold and, therefore, reject a uniform consumer concept underlying Article 38.

It has been argued that a socio-economic perspective of protection based on the principle of solidarity is slowly emerging from the Union framework as a whole.¹⁴¹ As a consequence thereof, the consumer is not only protected as an individual with personal and economic interests, but also as a member of a society that is underpinned by certain values (*e.g.*, collective need for safety, protection of health and of the environment etc.). Thus, when it comes to so-called indirect rights a “filtering” action by public authorities is needed in order to integrate the rights of individuals into a broader social dimension. In this regard, it is worth emphasizing that the rights to information and to education have become essential requirements for the protection of health and safety. The same is true for the right of consumers to organize themselves in order to safeguard their interests through association and representation. Such actions may contribute to aims that are in the interest of the general public. For example, it has been illustrated that consumer activities can raise the quality of entrepreneurial activities and increase their efficiency by inducing companies to produce high-quality products in order to avoid damages imposed on the basis of faulty products or by forcing inefficient companies to abandon the market. Consumer actions may, however, be at odds with conflicting values, such as freedom of enterprise. Whenever this is the case, it is important to strike a fair balance between social demands, on the one hand, and other rights anchored in the private realm, on the other.

A distinctive feature of Article 38 is that more clearly than any other provision of Title IV (“Solidarity”) it is formulated in a way that clearly suggests only a principle that the Union must ensure in its policies. This provision has the character of an objective norm to which the Union with support of the member states must abide by in its policies. Therefore, Article 38 does not confer subjective directly enforceable, rights to individuals. It is to be added, however, that Article 38 could be interpreted in the future as comprising also subjective legal positions, in par-



ticular when read in connection with other subjective rights, for example in the context of questions related to equal access to consumer information (Articles 20 and 21 CFR), or other relevant provisions of primary and secondary law, including charter provisions. For the time being, Article 38 is, however, only a principle of objective law that does not confer subjective rights to individuals. Eventually, Article 38 could gain further significance in the future whenever the CJEU will take this provision into account when interpreting Union Law.

CFR Add-Ons

Article 38 is less concrete than the underlying Treaty Articles. So the Add-On of it being included in the Charter lies mostly in the fact that consumer protection features as a fundamental rights principle in the CFR, which might contribute to shifting the perspective towards a more rights' based and individual approach.

Questions for discussion:

- Discuss the definition of “consumer” in relation to Article 38. Refer to the relevant concepts in your national legal order.
- If the principle laid down in Article 38 is considered to constitute an indirect right only, what does this mean in a concrete case? Reflect on the differences between principles and rights provided by the CFR.
- Which rights/principles enshrined in the CFR could constitute a barrier to guaranteeing consumer rights? Discuss the impact of contradicting rights in this field.
- Discuss the concept of the socio-economic perspective of consumer protection. Are there any concrete examples for this approach to be identified in your country? Would such an approach lead to necessary amendments in legislation at the national level?

Legal Document: Treaty on the Functioning of the European Union

Article 12

Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.

Article 169

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.
2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:
 - (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;
 - (b) measures which support, supplement and monitor the policy pursued by the Member States.
3. The European Parliament and the Council, acting in accordance with the ordinary legislative
4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

Notes:

137 K. Lenaerts/P. Foubert, “Social Rights in the Case-Law of the European Court of Justice: The Impact of the Charter of Fundamental Rights of the EU on Standing Case-Law”, 28 *Legal Issues of European Integration* 267 (2001), p. 271.

138 AG Opinion (11 January 2007), C-444/05, *Stamatelaki*, Judgment of 19 April 2007, para. 40 [footnotes omitted].

139 See, for example, C-464/01, *Gruber*, Judgment of 20 January 2005.

140 See H.-W. Rengeling/P. Szczekalla, *Grundrechte in der Europäischen Union* (2005), para. 1066; C Pielow, “Artikel 38: Verbraucherschutz”, in P.J. Tettinger/K. Stern eds., *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta* (2006), para. 13; B. Rudolf, “Artikel 38: Verbraucherschutz”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 3.

141 A. Lucareli, “Article 38: Consumer Protection”, in W. Mock ed., *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, 2010, p. 240.

Citizens' Rights

Article 41 Right To Good Administration

Article 41 – Right To Good Administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
 - a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
 - b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
 - c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

The right to good administration is based on the existence of the Union as a subject to the rule of law, the characteristics of which were developed by case law, which enshrined *i.a.* good administration as a general principle of law.¹⁴² The wording of paragraph 2's first two subparagraphs stems from case law¹⁴³ and the wording regarding the obligation to give reasons originates from Article 296 of the TFEU. Paragraph 3 reproduces the right now guaranteed by Article 340 of the TFEU and paragraph 4 reproduces the right now guaranteed by Article 20(2)(d).

The obligation of good administration is not new to the EU legal system and its jurisprudence. Already in its early case law the Court of Justice examined the administrative process to identify failure to achieve

good administration through an appraisal of the nature, object and proper operation of the duty performed¹⁴⁴. A duty is to be executed in a diligent manner. From the very beginning – in 1961, in the *Meroni* case, we may find the elements of the definition of the diligent execution, and these are:

- acting within a reasonable time,
- permitting access to information,
- obtaining necessary evidence,
- enabling a party to be heard.¹⁴⁵

Right to good administration means that every person has, *inter alia*, the right to have his or her affairs handled **impartially** by the institutions, bodies and other agencies of the European Union (CJEU – C-439/11 P, Opinion of AG Kokott – *Ziegler SA v. European Commission*). There are two aspects to that requirement of impartiality: *subjective impartiality*, meaning that no official of the agency concerned must show bias or personal prejudice in any way whatsoever, and *objective impartiality*, meaning that there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the agency or institution concerned. The Court of Justice often underlines that the European Commission is bound by that duty by virtue of the right to good administration enshrined in Article 41 of the Charter (C-439/11 P).

The Court has affirmed the importance of the **right to be heard** and its very broad scope in the EU legal order, considering that that right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person (see, *inter alia*, C-17/74, *Transocean Marine Paint Association v. Commission*, para. 15; C-7/98, *Dieter Krombach v. André Bamberski*, para. 42; and C-349/07, *Sopropé*, para. 36). The right to be heard guarantees every person the opportunity to make known his/her views effectively during an administrative procedure and before the adoption of any decision liable to affect his/her interests adversely (see, *inter alia*,

C-287/02, *Spain v. Commission*, para. 37 and case-law cited; C-349/07, *Sopropé*, para. 37; C-141/08 P, *Foshan Shunde Yongjian Housewares & Hardware v. Council*, para. 83; also C-27/09 P, *France v. People's Mojahedin Organization of Iran*, paras. 64 and 65).

The right to be heard must be applicable in any procedure which may culminate in a decision of an administrative or judicial nature adversely affecting a person's interests. That right ensures that every person is entitled to make representations, in writing or orally, on the matters on which the authorities intend to base a decision able to affect him/her adversely. The right to be heard has a number of objectives. Firstly, it is useful in establishing the facts and thus in the examination of the case. The representations made by the person concerned and the production of all elements liable to have a bearing on the authorities' decision must enable the authorities to examine, with full knowledge of all the implications and exhaustively, all the elements of fact, circumstance and law on which the procedure rests. Secondly, the right to be heard must ensure that the person concerned is in fact protected. That person is entitled to take part in a procedure which concerns him/her and, in that setting, he/she must be certain that he/she will be able to express his/her view, in advance, on all the important points on which the authorities intend to base their decision. The right to be heard must give him/her an opportunity to correct an error or submit such information relating to his/her personal circumstances as will tell in favour of the decision's being adopted or not or of its having this content or that (Opinion of AG Bot in C-277/11, *M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*).

That serves as a basis for the trust which the citizen must be able to have in the authorities. The Court has clearly recognised the existence of the right to be heard in administrative procedures commenced by an interested party seeking to benefit from an entitlement such as a customs exemption (C-269/90, *Technische Universität München*) or Community financial assistance. The Court has also made clear the scope of that right in the context of quasi-criminal proceedings in which the authorities proceed

against the person concerned on account of conduct deemed objectionable and impose economic and financial penalties on that person.¹⁴⁶ Thus, when the Commission censures a cartel or an abuse of a dominant position, the Court has accepted that the right to be heard involves, at the end of the investigation and prior to adoption of a decision, disclosure to the party concerned of the objections relied on against it. That statement of objections is a preparatory document which does not prejudice the Commission's final decision. However, it sets out the Commission's preliminary conclusions regarding the existence of an infringement of the competition rules, explaining the assessments of fact and law it has undertaken in the course of investigating the case, and opens the adversarial stage of the proceedings (Joined Cases C-142/84 and C-156/84, *British American Tobacco and Reynolds v. Commission*, para. 70).

The right of access to the file means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation that might be relevant for its defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information (T-304/95, *Limburgse Vinyl Maatschappij and Others v. Commission*, para. 315, and C-204/00, *Aalborg Portland and Others v. Commission*, para. 68). Infringement of the right of access to the Commission's file during the procedure prior to adoption of a decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed (T-304/95, para. 317). In such a case, the infringement is not remedied by the mere fact that access was made possible during the judicial proceedings (T-304/95, para. 318). As the examination undertaken by the General Court is limited to review of the pleas in law put forward, it has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure. Moreover, belated disclosure of documents in the file does not return the undertaking which has brought the action against the Commission decision to the situation in which it would have been if it had been able

to rely on those documents in presenting its written and oral observations to the Commission (C-204/00, para. 103).

Where access to the file, and particularly to exculpatory documents, is granted at the stage of the judicial proceedings, the undertaking concerned has to show, not that if it had had access to the non-disclosed documents, the Commission decision would have been different in content, but only that those documents could have been useful for its defence (C-199/99 P, *Corus UK v. Commission*, para. 128; T-304/95, para. 318; C-204/00, para. 131; see also C-109/10 P, *Solvay SA v. Commission*).

The right to good administration includes the **obligation of the administration to give reasons for its decisions**. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure satisfies the requirements of Article 296 TFEU and Article 41 CFR must be assessed with regard to not only its wording but also to its context and to all the legal rules governing the matter in question. Thus, the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him. Moreover, the degree of precision of the statement of the reasons for a measure must be weighed against practical realities and the time and technical facilities available for taking the measure (see T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, para. 141).¹⁴⁷

According to the jurisprudence by the Court of Justice, the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof.

That right also requires the authorities to pay due attention to the observations thus submitted by the

person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision (see C-269/90, *Technische Universität München*, para. 14; see also C-349/07, *Sopropé – Organizações de Calçado Lda v. Fazenda Pública*, para. 50). The obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person to understand why his/her application is being rejected is thus a corollary of the principle of respect for the rights of the defence (C-277/11, *M. M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*).

CFR Add-Ons

The right to good administration in Article 41 of the Charter is a unique regulation, both with regard to the EU legal system and the national legal orders. The citizen's right to good administration as enshrined in the Charter is even called revolutionary.¹⁴⁸ According to some opinions, the Charter's right to good administration is the foundation of Union constitutional law regulating European administration.¹⁴⁹ Also the Court of Justice described the right to be heard as having a constitutional status.¹⁵⁰ Article 41 of the Charter forms a basis, for the first time in EU history, to codify European administrative procedure, being a legal foundation for a more specific regulation.¹⁵¹

Questions for discussion:

- Discuss how the right to good administration enshrined in Article 41 could affect national and European practice.
- Debate the (potential) relevance of Article 41 for your national legal system.
- In which way(s) could the right to good administration improve the protection of an individual?
- Discuss also any potential future effects for comparable situations, as mentioned in CJEU case law, at the level of the member state administration.



Legal Document: Treaty on European Union

Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent. (...)



Legal Document: Treaty on the Functioning of the European Union

Article 15

1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible. (...)

Article 24

Every citizen of the Union may write to any of the institutions, bodies, offices or agencies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.

Notes:

142 C-255/90 P, *Burban v. European Parliament*, Judgment of 31 March 1992; T-167/94, *Nölle v. Council of the European Union and Commission of the European Communities*, Judgment of 18 September 1995; T-231/97, *New Europe Consulting and others*, Judgment of 9 July 1999.

143 C-222/86, *Heylens*, Judgment of 15 October 1987, para. 15 of the grounds; C-374/87, *Orkem*, Judgment of 18 October 1989; C-269/90, *TU Munchen*, Judgment of 21 November 1991; T-450/93, *Lisrestal*, Judgment of 6 December 1994; T-167/94, *Nölle v. Council of the European Union and Commission of the European Communities*, Judgment of 18 September 1995.

144 J. Wakefield, *The Right to Good Administration*, 2009, p. 34.

145 J. Wakefield, *The Right to Good Administration*, 2009, p. 145.

146 For an application of that right in relation to the competition rules, see Joined Cases C 322/07 P, C 327/07 P and C

Article 340

The contractual liability of the Union shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

Other Sources



European Code of Good Administrative Behaviour

National constitutions – relevant provisions relating to right to good administration:

Article 36 of Charter of Fundamental Rights and Freedoms of the Czech Republic, Article 44 of the Constitution of Estonia, Article 113 Constitution of Italy, Articles 3 and 29 Constitution of Cyprus, Article 57 Constitution of Hungary, Articles 18 and 23 Constitution of Austria; Articles 61, 63 and 77 Constitution of Poland; Articles 22, 266, 268 and 271 Constitution of Portugal; Articles 26, 39 and 40 Constitution of Slovenia; Articles 26 and 46 Constitution of Slovakia.

338/07 P, *Papierfabrik August Koehler and Others v. Commission*, Judgment of 3 September 2009, and, in the sphere of counter-terrorism, C-27/09, *France v. People's Mojahedin Organization of Iran*, Judgment of 21 December 2011, paras. 61-66 and the case-law cited.

147 CJEU, T-200/11, *Al Matri*, Judgment of 28 May 2013.

148 P. Craig, "The Constitutionalisation of Community Administration", 28 *European Law Review* 840 (2003).

149 K. Kowalik-Bańczyk, "Article 41", in A. Wróbel ed., *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, Warsaw 2013, p. 1120.

150 Joined Cases C 584/10 P, C 593/10 P and C 595/10 P, *Commission and Others v. Kadi*, Judgment of 18 July 2013.

151 K.D. Classen, *Gute Verwaltung im Recht der Europäischen Union*, 2009, p. 448.

Article
47 **Right to an Effective Remedy and to a Fair Trial**



Article 47 – Right to an Effective Remedy and to a Fair Trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The **explanations** of the Convention shortly note that in accordance with the case law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR Judgment of 9 October 1979, *Airey*, Application No. 6289/73, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the CJEU.

One should add that the right to legal aid may be treated as an ancillary right of access to legal advice and provides for the availability of legal aid as a prerequisite to effective access to justice. The right of access to legal aid is implicit in the doctrine of direct effect that inevitably involves the exercise of the right of access to justice. In the light of the Court's commitment to practical and effective rights legal representation, including assistance of a competent lawyer (ECHR Judgment of 13 May 1980, *Artico v. Italy*, Application No. 6694/74), aid may sometimes be mandatory.¹⁵² Legal aid must be obligatory for those who cannot afford it by themselves.

Interpreting the Charter in accordance with the European Convention of Human Rights makes the ECtHR's judgments with regard to the right to legal aid especially relevant (Article 52.3 of the Charter). The question of whether the interests of justice require the granting of legal aid is to be determined in the light of the case as a whole, both for first instance proceedings and in relation to appellate or cassation court proceedings. Free legal assistance must not be worthless in effect. Ruling on legal aid in the form of assistance by a lawyer, the European Court of Human Rights has held that the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *i.a.*, on the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him-/herself effectively (ECtHR Judgments in *Airey v. Ireland*, para. 26; *McVicar v. the United Kingdom*, paras. 48-49; *P., C. and S. v. the United Kingdom* of 16 July 2002, ECtHR 2002-VI, para. 91, and *Steel and Morris v. the United Kingdom*, para. 61). Account may be taken, however, of the financial situation of the litigant or his prospects of success in the proceedings (ECtHR Judgment in *Steel and Morris v. the United Kingdom*, para. 62).

The Court of Justice has ruled (C-63/01 *Evans v. The Secretary of State for the Environment, Transport and the Region*, para. 77) that according to the principles of equivalence and effectiveness it is incumbent on member states and their institutions to assess whether legal assistance is to be granted in connection with a proceedings required by a directive.

The Court of Justice pointed to **Council Directive 2002/8/EC** of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid

for such disputes. In recital 5 of the directive one may read as follows, “this Directive seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The generally recognised right to access to justice is also reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union”. Recitals 8ff read: “The main purpose of this Directive is to guarantee an adequate level of legal aid in cross-border disputes by laying down certain minimum common standards relating to legal aid in such disputes. [...] This Directive applies in cross-border disputes, to civil and commercial matters. All persons involved in a civil or commercial dispute within the scope of this Directive must be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings. Legal aid is regarded as appropriate when it allows the recipient effective access to justice under the conditions laid down in this Directive. Legal aid should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the costs of proceedings.”

The Court of Justice, invoking the ECtHR’s jurisprudence, affirmed that the right to **legal aid may cover both assistance by a lawyer and dispensation from payment of the costs of proceedings** (C-279/09, *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, para. 48). The Court of Justice accepted the ECtHR’s judgments stating that the right to legal aid is not applicable in all situations and that there must be clear criteria of granting it. As regards subjects of the right to legal aid, the Court assessed that no indication (in the Explanations) is given as to whether such aid must be granted to a legal person or in relation to the nature of the costs covered by that aid. The Court stressed that the right to an effective remedy before a court, enshrined in Article 47 of the

Charter, is to be found under Title VI of that Charter, relating to justice, in which other procedural principles are established which apply to both natural and legal persons. According to the Court, the inclusion of the provision relating to the granting of legal aid in the article of the Charter relating to the right to an effective remedy indicates that the assessment of the need to grant that aid must be made on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been violated, rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid.

The most important criteria were considered by the Court in C-279/09. The Court stressed that it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it seeks to achieve. In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant’s capacity to represent him-/herself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to gain access to the courts. With more specific regard to legal persons, the national court may take account of their situation. The court may therefore take into consideration, *i.a.*, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

Questions for discussion:

- *What are the criteria for granting legal aid to a natural person?*
- *What are the criteria for granting legal aid to a legal person?*
- *Discuss the relevance of the provision of legal aid for effective access to justice – and the (potential) role of Article 47 CFR for your national legal context in this regard.*
- *Discuss also any potential future effects for comparable situations, as mentioned in CJEU's case law, at the level of the member state administration.*



Legal Document: Treaty on the Functioning of the European Union

Article 67

(...) 4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Article 82

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:
 - (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
 - (b) prevent and settle conflicts of jurisdiction between Member States;
 - (c) support the training of the judiciary and judicial staff;
 - (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.
2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

- (a) mutual admissibility of evidence between Member States;

- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

Other Sources: Secondary legislation



Council Regulation 743/2002/EC establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters, OJ L 115, 1 May 2002.

Council Regulation 4/2009/EC on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10 January 2009.

Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31 January 2003.

Legal Document: European Convention on Human Rights



Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Notes:

152 L. Cariolou/A. Demetriades, “Right to an Effective Remedy and to a Fair Trial”, in EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, 2006, Article 47, p. 370.

Judicial Methods of Implementation of the Charter as a Living Instrument

Introduction

The Charter as a Living Instrument

This part is dedicated to the practical and procedural application of the Charter. It shows that – although not widely familiar yet even to the specialists in legislative and judicial circles – the CFR is already an important legal tool. The following chapters explore where and how the rights enshrined in the Charter can be relied on in disputes before national courts; where its principles can even be used to set aside contradicting national legislation and whether it can be used to determine the lawful behavior of two private actors.

To begin, it is important to highlight the debate with the question of the applicability and the nature of the Charter:

Article 6 TEU gives the Charter the same legal value as the Treaties and at the same time restricts its application by insisting that the provisions of the Charter “shall not extend in any way the competences of

the Union as defined in the Treaties”. In light of the very early statement of the Luxembourg Court in *van Gend & Loos*¹⁵³ introducing the principle of direct effect of Union law, which “not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage”, there are still important questions to be asked about the legal nature and effect of the Charter.

Even if the wording regarding the Charter insinuates that it does not change the legal situation but merely makes the existing situation more easily accessible, one can see from the case law of both the CJEU and national courts that the existence and binding force of the Charter in fact has influenced decisions and in some situations it might have even changed them in substance as well. So, it does make sense to draw some attention to the questions regarding the scope of applicability and application of the CFR as it will – with increasing speed – be used frequently.

Notes:

153 C-26-62, *van Gend & Loos*, Judgment of 5 February 1963.

Applicability of the CFR

First of all, if we want to use the Charter, we need to know where and when it applies at all. In principle, the applicability formula seems straightforward: The Charters' protection of fundamental rights comprises the EU. This means that it applies to the actions by EU institutions and at the national level whenever member states implement or apply EU law.

This will be explored in more detail in this Chapter, especially underscoring the fact that what seems clear and easy, is not always so.

1 Applicability at the EU Institutional Level

With regard to the EU institutional level this is a very clear regulation: The Charter applies to all EU institutions (European Commission, European Parliament, European Council, the Council, the Court of Justice of the European Union, European Court of Auditors and European Central Bank) and bodies, offices and agencies. Their actions are clearly covered by the protection of the Charter.

In principle, an **individual has the possibility to directly lodge a complaint with the CJEU** if the EU fails to comply with the EU Charter of Fundamental Rights (Article 263 TFEU). In practice there are quite some important hurdles to do so: An individual can only start proceedings against an individual EU act which is of **direct and individual** concern to him or her, and against an EU regulatory act, if this act does not entail implementing measures and is of direct concern to the individual. These limitations make it very difficult for an individual to complain

about a piece of legislation because, usually, legislation applies to everyone or to large groups of people. Thus, an individual is unlikely to satisfy these rules unless they are specifically named by a piece of legislation.

Therefore, it is **more common** for an individual to reach the CJEU **indirectly**. This may happen when an individual brings a complaint to the national courts and questions arise in the case as regards the interpretation of the relevant EU legislation and its compatibility with the Charter. This situation will be analyzed in the next chapter.

Apart from deciding on claims brought by individuals, the CJEU also has the competence to decide on infringement procedures directly. These are not brought to court by individuals, but by the Commission. As the "Guardian of the Treaties", the European Commission is entrusted to oversee the application of EU law. The infringement procedure – Articles 258-260 TFEU – is one of the enforcement mechanisms that can be applied by the Commission against a member state whenever the Commission is of the opinion that the member state is in breach of its obligations under Union law. This option represents a significant mechanism to protect fundamental rights in the EU and can be used when:

- a member state fails to implement a piece of EU human rights-related legislation;
- a member state implements EU legislation in a way that conflicts with fundamental rights.

The Commission might well act upon the information received from individuals, but it does so in its own name and therefore cannot directly remedy an individual case.

2 Applicability at the Member State Level

For the activities on member state level, the respective formula is: The CFR applies at the national level whenever member states implement or apply EU law. In this regard, Article 51(1) CFR states that “the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”.

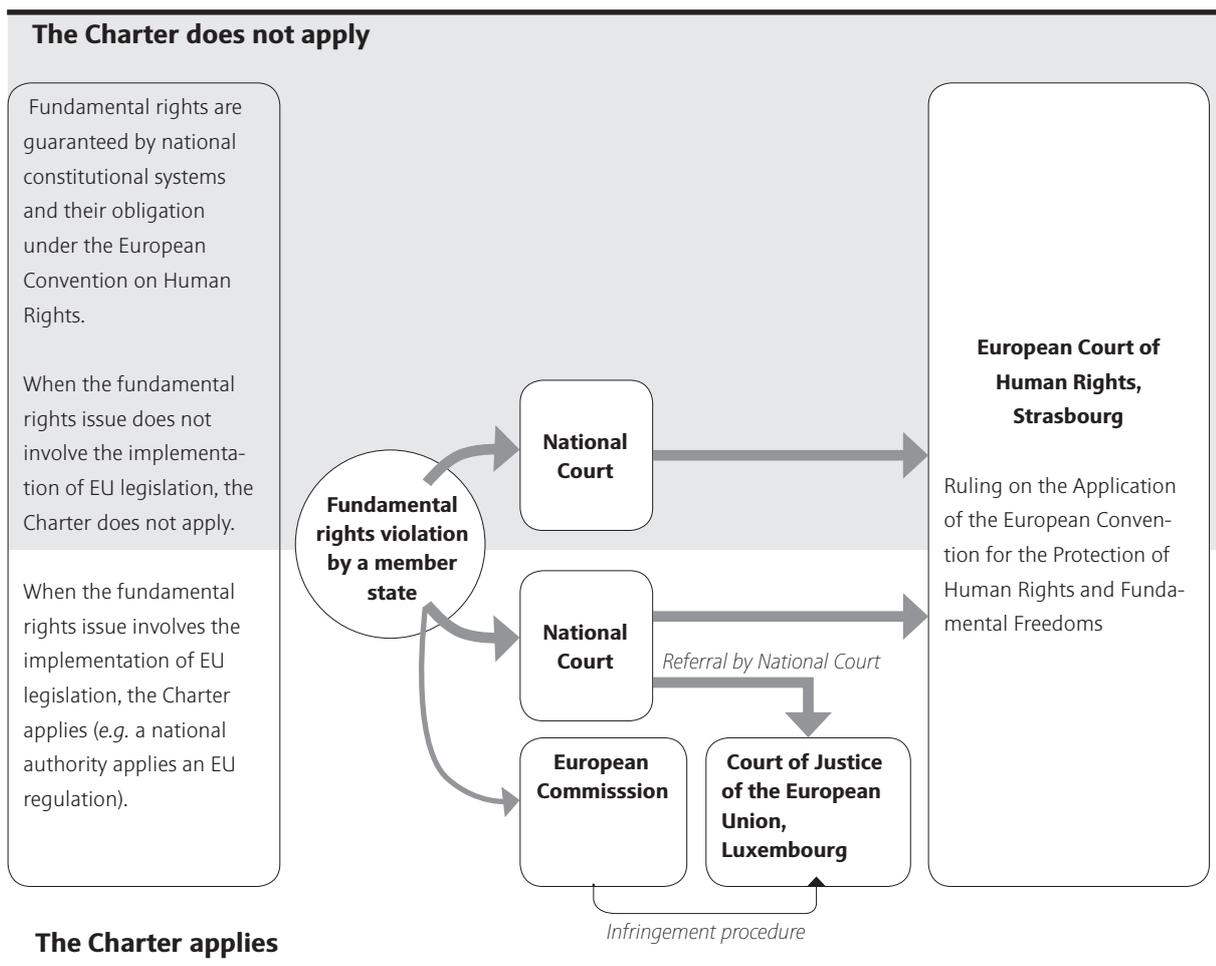
In case a national authority violates a fundamental right, the national judicial system remains the primary forum for access to justice. This is where

the judicial decision – including the application of the Charter – has to be taken. Only when the national courts have doubts about the interpretation of a Charter right or its applicability, a referral has to be submitted to the CJEU. The ruling of the CJEU will have to be incorporated in the decision of the national court.

These rules only seem simple and straightforward at a first glance. In practice, the CFR’s field of applicability at the national level remains to pose some of the most crucial questions regarding the CFR: In which circumstances are member states “implementing Union Law”? What does that actually mean?

EU Charter of Fundamental Rights

When does it apply and where to go in case of violation?



Source: European Commission, Commission Staff Working Document on the Application of the Charter of Fundamental Rights 2011, p. 3.

In principle, there seem to be three main options:

- When a legislative competence is available, the EU can harmonize fundamental rights protection in a specific field. Usually it does so by issuing a directive (e.g., Data Protection Directive 95/46/EC).
- When EU member states act in the scope of EU law, the CJEU can impose limits by referring to fundamental rights.
- When a situation falls outside an EU law context, the violation cannot be addressed by means of EU law even if it is a gross and outrageous one (like for example the systematic mistreatment of soldiers of an EU member state).

The regulations covering this aspect contain quite tricky and complicated phrasings and cross-references:

According to Article 6 of the TFEU, *“the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”*.

As for determining the scope of the phrase “implementing Union Law”, it is thus necessary to refer to the Explanations relating to the Charter of Fundamental Rights of the European Union¹⁵⁴ specifically to the section addressing Article 51. The document provides that *“As regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the scope of Union law”*.

§ Article 51 – Field of Application

1. 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. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

The Explanations also underline that the Court of Justice has confirmed this jurisprudential practice: “[...] it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules...”

In practice this means that Charter rights have to be taken into account, when

- Transposing EU directives into national legislation,
- Applying EU law (by a public authority),
- Applying and/or interpreting EU law in a judgment of a national court.

National legislation drafted in order to implement EU directives has to be examined in the light of CFR guarantees not only when fulfilling mandatory requirements but also when having made use of a wider margin for regulation.¹⁵⁵ Even if certain aspects of EU law are not yet fully transposed into national law, national practice in this regard has to be judged in the light of CFR provisions.

Obligations under the Charter also bind member state authorities when applying EU law, *i.e.* when they are acting as an “extended arm” of the EU – in legislation as well as in administration. The latter includes also contracts, the funding of projects, promotional measures and subsidies.

However, the case law of the CJEU does not entirely clarify the concrete field of application of the CFR at the level of national jurisdiction. It remains to be identified, how intense the “connecting points” between national law and EU law¹⁵⁶ need to be in order to “activate” CFR guarantees in a concrete case.

There are more formalistic approaches and more flexible ones to be monitored in academic circles as well as in the CJEU’s judgments. Therefore, the final

decision where the boundaries of “implementation of EU legislation” lie still has to, but also can be, undertaken by national judges. At the moment, the range of interpretation extends from strictly referring to national legislation enacted in order to transpose EU legislation to national law within a somewhat more diffuse “field of operation” of EU law. More recent case law of the CJEU evidences a trend of a rather broad understanding of EU law impact.

they are implementing Union law. Under Article 51(2), the Charter does not extend the field of application of Union law beyond the powers of the Union, or establish any new power or task for the Union or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it”.

The European Court has referred to this threshold in further rulings:

- C-400/10, *J. McB. v. L. E.*, Judgment of 5 October 2010
- C-256/11, *Dereci and Others*, Judgment of 15 November 2011

● **Court of Justice of European Union, C-370/12**
Thomas Pringle v. Government of Ireland, Ireland and The Attorney General, Judgment of 27 November 2012

This decision concerned a preliminary ruling on the validity of the European Council Decision amending Article 136 of the TFEU with regard to the stability mechanism for member states which have the Euro as a currency (the so-called ESM Treaty). Furthermore, it deals with the interpretation of the general principles of effective judicial protection and legal certainty.

Court of Justice of European Union, C-617/10 ●
Åklagaren v. Hans Åkerberg Fransson, Judgment of 26 February 2013

The *Åkerberg Fransson* case concerned a Swedish fisherman. The Swedish tax authorities accused him of incorrectly reporting his income, reducing also the amount of Value Added Tax (VAT) due. He was given a fine for tax offences, part of which was a VAT offence. Later, the Public Prosecutor also started criminal proceedings against Mr Åkerberg for tax evasion relating to the same conduct. The Swedish court referred to the CJEU to find out whether the duplication in administrative and criminal proceedings was precluded by Article 50 CFR (*ne bis in idem* principle).

In proceedings brought before the High Court of Ireland by a Mr Pringle, member of the Irish Parliament, the plaintiff claimed that Ireland, by ratifying the ESM Treaty, would create obligations which would be in contradiction with provisions of the EU Treaties concerning economic and monetary policy and he furthermore claimed that the ESM Treaty was incompatible with the general principle of effective judicial protection and with the principle of legal certainty.

In its ruling, the CJEU first had to decide whether this was a case where the CFR was applicable. It, therefore, used the Explanations relating to the Charter of Fundamental Rights of the European Union¹⁵⁷ to interpret Article 51 of the Charter itself, which limits the scope for member states “implementing Union law” to “...Member States when they act in the scope of Union law”.

Regarding the first point, the Court ruled that the general principle of effective judicial protection did not preclude the conclusion of an agreement such as the ESM Treaty, since no provision of the EU and FEU Treaties confers a specific power on the Union to establish a permanent stability mechanism such as the ESM.

By this interpretation, the Court was able to rule that in this case it was enough that the penalties imposed upon the fisherman were connected “in part” to VAT (para) in order to trigger the applicability of the Charter. According to the Court, the fact that

Regarding the **right to effective judicial protection** under the CFR the CJEU observed that:

“under Article 51(1) of the Charter, its provisions are addressed to the Member States only when

the national measures on the basis of which the tax penalties were imposed did not actually refer to the relevant Directive did not matter, since the overarching goal of these national measures corresponded to the goal of the directive. Hence, the Court stressed the fact that member states are under an obligation to arrange for effective measures to collect VAT on the basis of Council Directive 2006/112/EC on the common system of VAT and that this relates to the financial interests of the European Union itself as the Union's own resources are partly based on revenue from VAT.

Critical assessment

This judgment has been interpreted by many scholars as showing an “expansionist streak” in the approach of the CJEU (of which member states often suspect the Court). It still remains to be seen – by further evolving case law – whether this is the case or whether the Court just found the area of VAT so vital for and evidently related to the EU that it wanted to safeguard its jurisdiction over anything related to it.

● **Court of Justice of European Union, C-418/11T**
Texdata Judgment of 26 September 2013

Texdata is a company, established in Germany, which designs and markets software. It pursues its activities in Austria through a branch which has been registered in the Austrian commercial register as a branch of a company established in another member state.

The case concerns a requirement in Austrian company law which applies – based on Article 12 of Eleventh Council Directive 89/666/EEC – automatic periodic penalty payments for the failure to disclose certain fiscal documents within a defined period of time. This applies to capital companies established in another member state with a branch in Austria. The Court had to examine the compatibility of this system with the Directive, with the freedom of establishment and with the principle of effective judicial protection and the rights of defence as enshrined in Articles 47 CFR.

As far as the **applicability of the CFR** is concerned, the Court relied fully on its judgment *Åkerberg Fransson* and came to the same conclusion:

*“72. In that regard, the Court’s settled case-law states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations. It is consonant with those limits that the Court has already stated that it has no jurisdiction to appraise, in the light of the Charter, national legislation which falls outside the framework of EU law. On the other hand, if national legislation falls within the scope of EU law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see, inter alia, C-617/10 *Åkerberg Fransson* [2013] ECR I-0000, paragraph 19 and the case-law cited).*

*73. The Court has also had occasion to explain that, construed in the light of that case-law and of the explanations relating to Article 51 of the Charter, the fundamental rights guaranteed by the Charter must be respected where national legislation falls within the scope of EU law. In other words, the applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter (see, to that effect, *Åkerberg Fransson*, paragraphs 20 and 21).”*

Critical assessment¹⁵⁸

*In this judgment the Court clearly tried to establish the criteria developed in *Åkerberg Fransson* as the new benchmark for the determination of the applicability of the CFR.*

3 Competence for the Application of the CFR at the National Level Through National Courts

In principle, the competent national courts are in charge of applying the fundamental rights guaranteed in the Charter in cases, in which a sufficient relationship with Union law is established. This includes the competence and obligation to examine whether CFR rights are violated by a concrete action of public administration, and also the basis for screening national legislation relevant for a specific case in the light of its compatibility with EU law, including Charter rights.

Case law from Austria

● ***Austrian Constitutional Court, U466/11ua of 14 March 2012***

One of the most important decisions in Austria with regard to the CFR was the Constitutional Court's decision through which the Charter attained constitutional status (U466/11ua of 14 March 2012). The occasion was a complaint with regard to the violation of the right to an effective remedy and fair trial pursuant to Article 47 of the CFR in an asylum case of two Chinese citizens. As the complainants, under the general claim of having been violated in their constitutionally guaranteed rights, were exclusively invoking rights based on Article 47 of the CFR, the Court had to verify whether the alleged violation of the Charter actually gave rise to the competence of the Constitutional Court and whether the CFR was a standard for the review of proceedings according to Article 144a of the Federal Constitutional Act.

In its decision, the Court referred to the equality or equivalence doctrine¹⁵⁹ and inferred from the Judgment *Pasquini* (C-34/02, 19 June 2003) "that under Union law, rights which are guaranteed by directly applicable Union law must be enforceable in proceedings that exist for comparable rights deriving from the legal order of the Member States".¹⁶⁰ The Court referred to the ECHR which has constitutional status in Austria and its largely overlapping areas of protection with the younger CFR.

The Court thus concluded that "based on the domestic legal situation, it follows from the equivalence principle that the rights guaranteed by **the CFR may also be invoked as a source of constitutionally guaranteed rights** pursuant to Articles 144 and 144a respectively, Federal Constitutional Act (B-VG)".¹⁶¹

The Constitutional Court also ruled that in questions regarding the CFR, the Constitutional Court is the court with the obligation to refer the matter to the CJEU within the meaning of Article 267(3) of the TFEU, not the Asylum Court, which was merely entitled to do so. If the Constitutional Court has doubts about the interpretation of a provision under Union law – including the CFR – the Constitutional Court is to submit the question to the CJEU for a preliminary ruling. If there are no doubts about the background to the ECHR and case law issued on this subject by the ECtHR and other high courts, the Constitutional Court should decide without obtaining a preliminary ruling. It found no obligation to refer the matter to the CJEU where no point of law was relevant to the decision. This is the case in the field of the CFR when a right granted under constitutional law, in particular a right of the ECHR, has the same area of application as a right of the CFR. In such a case, the decision should be made by the Constitutional Court owing to the Austrian constitutional position, without having to obtain a preliminary ruling.¹⁶²

Critical assessment

The decision received great attention and was controversially debated in the literature. Major criticism came from the Supreme Court, which understood the decision as a postulation of a fundamental rights review monopoly by the Constitutional Court. In a statement, the Supreme Court particularly criticised the reasoning of the decision, which is grounded in the equivalence doctrine, according to which national procedures which concern the application of community law must not be less favourable than those governing domestic law or similar domestic claims. If the Constitutional Court takes this argument further and equates other Union law rights with constitutionally guaranteed rights, it would have a deep significance for its relation to the Higher Administrative

Court: The Constitutional Court would to a large extent be responsible for the national interpretation of Union law as the last instance. With the newly introduced right for individual appeal (Gesetzesbeschwerde) a violation of a provision applied by a court could also be claimed.

According to the Supreme Court, a generalisation of the postulate that every judicial review would fall under the responsibility of the Constitutional Court would be even more fatal. An argument against such a wide interpretation of the equivalence doctrine is that the legal protection against national law that is in violation of Union law is guaranteed through civil, criminal and administrative procedural law remedies. These remedies lead to a disapplication of provisions in violation of Union law so that a suspension is not required. Though member states are obliged to remove incompatible provisions, it is primarily the legislator who bears this duty, so that an additional competence of the Constitutional Court is not necessary, the Supreme Court argued.¹⁶³

● **Higher Administrative Court, Decision 2010/15/0196**
of 23 January 2013

The complainant who applied for an oral hearing before the Independent Finance Tribunal (Unabhängiger Finanzsenat – UFS) – concerning the pre-tax deduction (VAT) for his car – was not correctly in-

vited and therefore claimed that his right to an oral hearing had been violated. The Higher Administrative Court argued that VAT procedures fell within the scope of Union law and therefore in the scope of the CFR pursuant to its Article 51 para. 1. Therefore, Article 47 para. 2 of the CFR was applicable to such procedures. The Court held that the complaint was justified as the authority did not make it possible for the complainant to attend the trial. Through Union law, every national court, thus also the Higher Administrative Court, is obliged to ensure the protection of the rights stipulated in the CFR.

Critical assessment

*This decision is of importance as the Higher Administrative Court made it clear that **not only the Constitutional Court** but also the Higher Administrative Court itself is competent to protect the fundamental rights in court proceedings. By applying the CFR the Higher Administrative Court allowed a complaint to be successful that would not have stood any chance before in the light of national case law. The real consequences of this decision for Austria cannot be overrated. It marks the point from which on anybody who sees his or her rights enshrined in the CFR violated can address and remedy this before the Administrative Courts and ultimately in front of the Higher Administrative Court and before in ordinary courts and ultimately the Supreme Court (in civil and criminal proceedings) respectively. In addition, the path to the Constitutional Court remains open.¹⁶⁴*

Notes:

154 Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=J:C:2007:303:0017:0035:en:PDF> (last visited 5 August 2014).

155 M. Borowsky, “Vor Titel VII”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 24.

156 M. Safjan, *Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?*, EUI Working Papers LAW 2012/22, p. 2.

157 Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF> (last visited 5 August 2014).

158 See more at European Law Blog, “C-418/11 Texdata: All Quiet on the Åkerberg Fransson Front”, 1 October 2013, available at <http://europeanlawblog.eu/?p=1969> (last visited 17 July 2014).

159 See for that doctrine the judgments C-33/76, *Rewe*, Judgment of 16 December 1976, C-45/76, *Comet* Judgment of 16 December 1976, and C-326/96, *Levez*, Judgment of 1 December 1998.

160 Translation by the author.

161 Translation by the author.

162 See for an English and German summary of the case the European Database of Asylum Law, available at <http://www.asylumlawdatabase.eu/en/case-law/austria-constitutional-court-14-march-2012-u46611-ua> (last visited 17 July 2014).

163 See Supreme Court of Austria, *Zum Grundrechtecharta-Erkenntnis des Verfassungsgerichtshofs*, available at www.ogh.gv.at (last visited 2 May 2013).

164 Die Presse, “VwGH erweitert den Grundrechtsschutz”, available at <http://diepresse.com/home/recht/rechtallgemein/1345774/VwGH-erweitert-den-Grundrechtsschutz> (last visited 22 August 2013).

Possible Direct Horizontal Effects of CFR Rights

While it is quite clear that member states are always bound by the Charter when implementing or applying EU law, it still remains unclear and highly disputed to what extent the Charter is binding on third parties, *i.e.* how far the so-called horizontal outreach of the Charter goes. In principle, private parties are not directly bound by the Charter obligations.

When it comes to the issue of the state obligation to protect human rights claims, it seems to be a common interpretation that such is to be included for those rights that are originating in the ECHR.¹⁶⁵

This is also supported by Article 51 para. 1 2nd sentence, which states that the member states should promote the application of rights and principles, and which – according to Borowsky¹⁶⁶ – could be interpreted as an obligation to realise fundamental rights.

Some of the specific guarantees of rights in the CFR also include obligations and prohibitions which in practice indirectly effect third parties (*mittelbare Drittwirkung*), for example the prohibition of reproductive cloning of human beings and making the human body and its parts as such a source of financial gain (Article 3, para. 2), the prohibition of slavery and forced labour (Article 5) or of child labour (Article 32). It is also in the field of child rights where private parties are even direct addressees of obligations as Article 24 in its para. 2 obliges public authorities as well as private institutions to primarily consider the child's best interests and in its para. 3 foresees for every child the right to maintain on a regular basis a personal relationship and direct contact with its parents.

Some further Charter provisions are very likely to find application in horizontal disputes. These include¹⁶⁷: Article 8 (protection of personal data), Article 11 (freedom of expression and information), Article 12 (freedom of assembly and of association, which includes the right to form and join trade unions),

Article 16 (freedom to conduct a business), Article 17 (right to property and protection of intellectual property), Article 21 (non-discrimination), Article 22 (equality between women and men), Article 27 (workers. Right to information and consultation within the undertaking), Article 28 (right to collective bargaining and action), Article 30 (protection in the event of unjust dismissal), Article 31 (right to fair and just working conditions), Article 32 (prohibition of child labour and protection of young people at work), Article 33(2) (protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child).

It has to be kept in mind, however, that guarantees in the Charter are limited by the subsidiarity principle of Article 51. As far as it concerns EU institutions and bodies, this would not mean a limitation of their obligation to respect Charter rights but of their entitlement to act as a lawmaker within the field of fundamental rights as laid down in the Charter.¹⁶⁸

The CJEU has a vital role in further developing the idea of horizontal effect and it does so with some ambiguity. From the case *Dominguez*¹⁶⁹ (on the right to paid annual leave) we can learn a lot about the different steps of examination the Court uses when assessing a case where the potential horizontal effect (of a directive) is at stake:

The Court clearly put a lot of pressure on the national court to stretch its power of interpretation as widely as possible by stating: “*it should be noted that the principle that national law must be interpreted in conformity with European Union law also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.*”

The Court also held that if the objective of the directive could not be achieved through interpretation, the national court should assess whether the claimant could rely on direct effect of its relevant part, meaning to explore whether the defendant could be treated as an emanation of the state: “*direct effect may be relied upon include a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.*”

At the same time, the Court upheld its doctrine of non-direct-horizontal-effect by stating: “It is true that the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual.”

If this option was also not possible, the Court indicated that the injured party should rely on *Francovich* “*in order to obtain, if appropriate, compensation for the loss sustained*”.

In essence, in this judgment, the CJEU did not use the Charter or give the right to paid annual leave the status of a “general principle of law”. If we have a look at the following case law we can try to imagine whether this would have made a difference.

75. The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law (...) and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle.

76. Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned.

77. In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.

Critical assessment

Making equal treatment a general principle of EU law, Mangold v. Helm makes a claim for equal treatment available for private actors on a horizontal direct effect basis. This means that member state and even EU legislation can be challenged on the ground that they fail to comply with the general principle of equal treatment.

Court of Justice of European Union (Grand Chamber), C-555/07

Seda Küçükdeveci v. Swedex GmbH&CoKG, Judgment of 19 December 2010

The case concerned a dispute between Ms Küçükdeveci and her former employer Swedex – two private parties. The issue at stake was the application of

● **European Court of Justice, C-144/04**

Mangold v. Helm, Judgment of 22 November 2005

The case concerned a labor dispute between Mr Mangold and his employer Mr Helm – two private parties. The issue at stake was the application of a German legal norm by the employer, which was allowing a specific form of age discrimination. The case happened before the period for implementation of Directive 2000/78/EC had expired for Germany.

This case led to what was later called the “Mangold doctrine” as it ruled:

a German legal norm by the employer which allowed for a specific form of age discrimination.

The most interesting question was whether and how European Union law could be applied in a case like this between two private parties. In principle, Council directives do not have “direct horizontal effect” – which means that individuals cannot rely on them when dealing with other individuals.

At the outset of the *Kücükdeveci* case, the Court reaffirmed that the principle of non-discrimination on grounds of age is a general principle of EU law. More precisely, it explicitly acknowledged that the principle of non-discrimination on grounds of age is given “specific expression” by Council Directive 2000/78/EC.

Furthermore, the Court recalled that national legislation, which falls within the field of application of EU law, has to be examined and interpreted in the light of this principle.

Most importantly, the Court clearly ruled, that national courts must disapply national legislation contrary to this principle and that this duty also applies to proceedings between individuals and irrespective of whether the national court decides to make a reference for a preliminary ruling to the Court or not.

Critical assessment

Basically, the judgment gives practical direct effect to provisions of directives, which express general principles of EU law, even in horizontal situations. This is especially important in connection with fundamental rights, as they have been established as constituting a part of these general principles.

Notes:

165 See M. Borowsky, “Artikel 51”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 31, referring to Article 51, para. 3, 1st sentence: Insofar as this Charter contains rights, which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

166 M. Borowsky, “Artikel 51”, in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, para. 31.

167 See D. Leczykiewicz, “Horizontal Application of the Charter of Fundamental Rights”, 38 *European Law Review* 479 (2013).

168 For a differentiation between the obligation to respect and the entitlement to draft legislation in the field of fundamental rights see already ECJ Opinion No. 2/94 of 28 March 1996, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994CV0002:EN:PDF> (last visited 5 August 2014), which however came to the conclusion that the EU had no competence to accede to the ECHR.

169 C-282/10, *Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, Judgment of 24 January 2012.

EU General Principles and CFR Rights

Legal scholars distinguish various types of general principles of EU law. The first category entails principles stemming from the rule of law. The principle of equality and the principle of legal certainty belong, amongst others, to this category. The principles of this type have been derived by the Court from the basic thought that the EU legal order is grounded on the rule of law. For that reason they are, in essence, principles of public law.

The Treaties did not provide expressly for these kinds of principles. It can therefore be stated that these principles “pre-exist written law”, are extrapolated by the Court from the laws of the member states and are used by the Court to complement and refine the provisions in the Treaties. The second category of general principles of EU law covers those principles which underlie the EU’s constitutional structure and, thereby, define the EU’s “legal edifice”. The principle of supremacy and the principle of direct effect are examples to this category as they constitute “the essential characteristics of the [EU’s] legal order.”¹⁷⁰ The principles of this category are not derived by the Court from the law of the member states, but are “discovered by the Court by an inductive process” in regard to the development of the *ius commune europaeum*.

The CFR makes a distinction between general principles and rights. Article 51 in the second sentence of its para. 1 obliges EU institutions, bodies, offices and agencies to

- respect the rights,
- observe the principles, and
- promote the application of both – rights and principles.

The reasons for the distinction originate in the discussions held during the Fundamental Rights Convention when elaborating on the Charter’s text. And there it was specifically the introduction of social rights which had motivated Convention members to in-

sist on a differentiation between rights that would have a clearly binding and directly enforceable character and principles which could be interpreted as guidelines rather than enforceable entitlements.¹⁷¹ It needs to be stressed, however, that the distinction between rights and principles should not be drawn according to their litigability but rather according to their “status of enforceability”. In order for principles to be applicable and subsequently enforceable they need (legislative) implementation measures. According to the explanations provided by the Convention, they do not as such give rise to direct claims for positive action by the Union’s institutions or member states’ authorities.

In case of norms that are in violation of CFR principles, however, (national) courts can annul such norms referring to the principles, and as such apply them directly. Some of the principles, therefore, have a kind of defensive character and primarily aim at protecting national norms (specifically social standards) from a leveling by the side of the European Union and its competitive norms.

The Explanations provided by the Praesidium of the Convention, which drafted the Charter of Fundamental Rights of the European Union, mention Articles 25 (*the rights of the elderly*), 26 (*integration of persons with disabilities*) and 37 (*environmental protection*) as examples of principles recognised by the Charter.

In practice, the lines between rights and principles are floating. Some Articles contain both elements of a right and a principle, e.g., Articles 23 (*Equality between men and women*), 33 (*Family and Professional Life*) and 34 (*Social Security and Social Assistance*).¹⁷² According to *De Schutter*¹⁷³, the principles are designed in a way to develop into subjective rights.

§ Article 52 – Scope and interpretation of rights and principles

The provisions of this 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 respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

The case law is rather ambiguous about the application of principles and the CJEU has developed a very casuistic set of rules on it. The cases quoted further down look at the application of human rights guarantees from two different angles. In the first judgment (Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. v. Refugee Applications Commissioner*), the Court does not opt for a duty to a full assessment of the risks of inhuman or degrading treatment (according to Article 4 CFR) in another member state when applying the transfer rules, but at least introduces a certain (rather mysteriously phrased) threshold stating that at a point where the member state in question was unable “to be unaware” of systematic problems in regard to the protection of asylum seekers, the underlying presumption of the Dublin II regulation that all member states are observing the fundamental rights becomes rebuttable.

In the second case (C-399/11, *Melloni*), the CJEU introduces a new view on the application of the rights and principles enshrined in the CFR. In essence, the Court stipulated that member states may not offer a greater degree of protection (regarding procedural rights) than under the European Arrest Warrant. So, in a way, the Court establishes that the protection of human rights is limited by European law and must not be broadened by national constitutional laws. In cases like this, the guarantees in the Charter are maximum and not minimum ones.

Court of Justice of European Union (Grand Chamber), Joined Cases C-411/10 and C-493/10 N.S. v. Secretary of State for the Home Department and M.E. v. Refugee Applications Commissioner, Judgment of 21 December 2011

N.S., an Afghan national, had come to the UK after having travelled through other countries and applied for asylum. He had been arrested in Greece. The Greek authorities had given him an order to leave Greece; he was arrested and expelled to Turkey, where he was detained in appalling conditions for two months. The appellant escaped from his place of detention in Turkey and travelled to the United Kingdom, where he lodged an asylum application.

The Secretary of State for the Home Department requested the Hellenic Republic, in line with Article 17 of Regulation No. 343/2003 (Dublin II), to examine the asylum application of the appellant, who was informed that he would be transferred to Greece. N.S. claimed that there was a risk that his fundamental rights would be breached if he were returned to Greece.

In particular, the first reference for preliminary rulings concerned the interpretation of the Dublin II regulation establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national. Secondly, it concerned the fundamental rights of the EU, including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the CFR and the Protocol No. 30 on the application of the Charter to Poland and to the United Kingdom.

In its judgment, the Court noted, first, that the Common European Asylum System was conceived in a context making it possible to assume that all the participating states observe fundamental rights and that the member states can have confidence in each other in that regard. However, the Court stated that

“European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No. 343/2003 indicates as responsible observes the fundamental rights of the European Union.

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No. 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision."

● **Court of Justice of the European Union, C-399/11**

Stefano Melloni v. Ministerio Fiscal, Judgment of 26 February 2013

Mr Melloni was facing trial for bankruptcy fraud before an Italian court while he was living in Spain. A Spanish court authorised his extradition to Italy and released him on bail. Mr Melloni fled and therefore could not be surrendered to the Italian authorities. The trial took place in his absence, but in the presence of lawyers that Mr Melloni had appointed himself. Mr Melloni was convicted. The decision was upheld by all levels of Italian judiciary. Later Mr Melloni was arrested by the Spanish police. In 2008, a European Arrest Warrant was issued by the Italian court requesting Spanish authorities to surrender Mr Melloni. The Spanish court authorised the surrender, after which Mr Melloni lodged a petition for constitutional protection before the Spanish Constitutional Court. He claimed that if he was surrendered to Italy, the right to a fair trial as guaranteed by the Spanish Constitution would be violated. This guarantee stated that he should not be surrendered without Spain imposing on Italy a condition that he would be able to challenge the result of his Italian trial. This possibility did not exist under Italian law. The Court very clearly stated:

*56. The interpretation envisaged by the national court at the outset is that Article 53 CFR gives general authorisation to a MS to apply the standard of protection of fundamental rights guaranteed by its constitution when that **standard is higher** than*

that deriving from the CFR and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would, in particular, allow a MS to make the execution of a EAW issued for the purposes of executing a sentence rendered in absentia subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of [the EAW FD].

*57. Such an interpretation of Article 53 of the CFR **cannot be accepted.***

*58. That interpretation of Article 53 of the CFR would undermine the **principle of the primacy of EU law** inasmuch as it would allow a MS to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.*

*59. It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order [...], rules of national law, **even of a constitutional order**, cannot be allowed to undermine the effectiveness of EU law on the territory of that State [...]*

*60. It is true that Article 53 CFR confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, **provided that** the level of protection provided for by the CFR, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.*

*61. However ... Article 4a(1) of [the EAW] FD does **not allow** MS to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.*

*64. ... the answer to the third question is that Article 53 CFR must be interpreted as **not allowing** a MS to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing MS, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.*

Notes:

170 M. Zuleeg, "A Community of Law: Legal Cohesion in the European Union", 20 *Fordham International Law Journal* 623 (1997).

171 See M. Borowsky, "Artikel 51", in J. Meyer ed., *Charta der Grundrechte der Europäischen Union*, 4th ed., 2014, paras. 10ff.

172 Selection of examples by the Explanations of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union.

173 O. De Schutter, "Article 52", in *EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union*, 2006, p. 408.

Non-Judicial Methods of Implementation of the Charter of Fundamental Rights

Introduction

This part is devoted to non-judicial methods of implementation of the Charter. Without doubt, national and EU litigation are important ways of securing fundamental freedoms, but not in every situation these methods are the most effective and proper. Non-judicial methods provided in the Charter are letters to the Parliament and petitions to the European Ombudsman.

Moreover, the issue of CJEU case law before the Lisbon Treaty is addressed in this section. The evaluation of these cases is necessary to understand the scope of the Charter and particular rights, but at the time of the judgments the Charter was not legally binding and therefore could not be classified as a judicial method. The manual therefore provides information on milestone cases of the Luxembourg Court before 2009.

As to the development of other non-judicial methods of implementation of the Charter (not addressed in this section), there are various other possibilities to be considered. It is worth emphasizing that the Commission has already provided that all legislation be screened or audited for compliance with Charter rights. Additionally, so-called “mainstreaming” is already accepted as a central strategy for enhancing equality between men and women at EU level. There is an ongoing debate whether similar obligations should be placed on all EU institutions, not just legislative.

Another question is whether bodies – other than existing EU institutions – should be given the task of monitoring the implementation of the Charter and if yes, how they should warn about potential breaches.¹⁷⁴

At the EU level, there are also some specialized institutions that deal with fundamental rights (not covered by the manual) such as: European Data Protection Supervisor, European Initiative for Democracy and Human Rights, the Group of Independent Experts of the European Commission on the European Union and the Agency for Fundamental Rights.

In national contexts, we can notice the increasing use of human rights commissions with their own powers of investigation. Such an approach is a more proactive and positive role than courts traditionally play in the enforcement of human rights. The United Nations High Commissioner for Human Rights promotes the Paris Principles¹⁷⁵, a set of guidelines establishing the best practice in the composition and powers of such bodies. The question is if there is need and legal possibility to implement the Paris Principles at the EU level.

Notes:

174 C. McCrudden, “The Future of the EU Charter of Fundamental Rights” (2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=299639 (last visited 5 August 2014).

175 Annexed to General Assembly Resolution 48/134.

Mechanisms Ensured in the Charter:

Letters to the Parliament and Petitions to the European Ombudsman

According to Article 20 of the TFEU, all EU citizens have the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. Similarly, the Charter ensures in Article 41.4 that every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language. Such standard is an element of a right to good administration.

1 Complaint to the European Ombudsman¹⁷⁶

All EU citizens and residents (but also an enterprise or association in a member state)¹⁷⁷ may address complaints to the European Ombudsman, who investigates maladministration in institutions, agencies, offices and other bodies of the European Union, with the exception of the Court of Justice of the European Union acting in its judicial role. In 2012, the European Ombudsman registered 2,442 complaints, 30% of which fell within his mandate, and opened 465 inquiries.

Before the Ombudsman can open an inquiry, a complaint must meet further criteria of admissibility. These criteria, set out in the relevant articles of the Statute of the Ombudsman¹⁷⁸, specify that:

1. The author and the object of the complaint must be identified (Article 2(3)).
2. The Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling (Article 1(3)).
3. The complaint must be made within two years of the date on which the facts on which it is based came to the attention of the complainant (Article 2(4)).
4. The complaint must have been preceded by appropriate administrative approaches to the institution or body concerned (Article 2(4)).

5. In the case of complaints concerning work relationships between the institutions and bodies, on the one hand, and their officials and servants, on the other, the possibilities for submission of internal administrative requests and complaints must have been exhausted before lodging a complaint with the Ombudsman (Article 2(8)).

The Ombudsman also has the power to open inquiries on his/her own initiative. Using the own-initiative power, the Ombudsman may investigate a possible case of maladministration that a person who is not entitled to make a complaint brings to his attention. The number of own-initiative inquiries opened in 2012 was 15.

The Ombudsman shall find maladministration when an institution fails to respect the principles of good administration or fundamental rights, including those enshrined in the Charter, except where the alleged facts are, or have been, the subject of legal proceedings. Maladministration is a broader concept than illegality. The fact that an action was taken without breaching the law does not necessarily mean that it is compatible with the right to good administration enshrined in Article 41 of the Charter.

The European Ombudsman's inquiries mainly concern the issues of public access to EU documents, discrimination, the award of tenders and grants, the execution of contracts, competitions and selection procedures (including the activities of the European Personnel Selection Office's activities), as well as actions of the European Commission. The main types of alleged maladministration which the Ombudsman investigated in 2012 concerned lawfulness (27.7% of inquiries), as well as requests for information (12.5%), fairness (10.3%), and reasonable time-limit for taking decisions (8%).

The Ombudsman is fully independent and impartial in performing his/her duties and uses written and oral inquiry procedures. If there is an infringement

which is not resolved by the institution, the Ombudsman tries to find a friendly settlement or issues recommendations. If the institution does not follow the recommendations, the Ombudsman may notify the European Parliament. Although the European Ombudsman's recommendations are not legally binding, the rate of compliance is consistently high.¹⁷⁹

2 Petition to the European Parliament

§ Article 44 – Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

According to Article 44 of the Charter, all EU citizens and residents¹⁸⁰ have the right to petition the European Parliament. The right to petition is an essential democratic tool as it provides a reality check for members of the European Parliament on the issues that concern citizens. It also demonstrates that the European Parliament is devoted to promotion and protection the rights of citizens. Article 227 of the TFEU requires that such petition should concern a matter which falls within the Union's field of activity and which affects the petitioner directly.

The petition may be lodged individually or jointly with others. It may take the form of a complaint, request or opinion and may relate to issues of public or private interest. The petition may present an individual request, a complaint or observation concerning the application of EU law, both on the level of the EU and of a member state. It may also take a form of an appeal to the European Parliament to adopt a position on a specific matter. Such petitions give the European Parliament the opportunity to call attention to any infringement of a European citizen's rights by an EU institution or a member state authority. The petition may be written in one of the official languages of the European Union and every person must

receive an answer in the same language. The petition should contain the name, surname, nationality, permanent address of the petitioner and merits of the petition. Requirements on how to address the petition are specified in Rule 215 of the Rules of procedures of the European Parliament. Petitions, once registered, shall as a general rule become public documents, and the name of the petitioner and the contents of the petition may be published by Parliament for reasons of transparency, but there is also possibility to hold the petition confidential.

Rule 216 of the Rules of procedures of the European Parliament deals with the examination of the petition. Depending on the merits of the case, the Committee on Petitions may take several actions. First, it can ask the European Commission to conduct a preliminary investigation and provide information regarding compliance with relevant Community legislation or contact SOLVIT (for further explanations see below). Second, it can refer the petition to the other European Parliament committees for information or further action (a committee might, for example, take account of a petition in its legislative activities). In some exceptional cases, the Committee on Petitions may prepare and submit a full report to Parliament to be voted upon in plenary or conduct a fact-finding visit to the country or region concerned. In such a case the Committee issues a report containing its observations and recommendations. The Committee may also take any other action considered appropriate to try to resolve an issue or deliver a suitable response to the petitioner. The petitioner shall be informed of the decision taken by the Committee and given the reasons justifying the decision. The Committee is obliged to inform Parliament every six months of the outcome of its deliberations.

The European Parliament received **2,885 petitions in 2013**¹⁸¹ (compared to 2,322 in 2012). In 2013, the Committee managed to process approximately 989 petitions out of which 654 petitions were admissible (only 199 out of them were managed to be closed in 2013) and 335 inadmissible. A huge backlog of petitions leads to the conclusion that the whole petitions treatment process needs to be revised.¹⁸²

Protecting EU citizens' fundamental rights continues to be a key concern of the Parliament. The rights of children and persons with disabilities, freedom of expression and privacy, the right to property, and access to justice and free movement (*i.e.* fair access to the labour market and social security schemes in other EU countries) accounted for a large share of the Committee's work. The 2013 report also draws attention to the fact that the implementation of the Charter of Fundamental Rights has proved to be unclear and, to some extent, disappointing for many citizens. So far the European Commission has applied a strict interpretation of Article 51 and this fact needs to be addressed.

3 Complaint to SOLVIT

Following Recommendation 2001/893/EC of 7 December 2001 on principles for using SOLVIT – the Internal Market Problem Solving Network, SOLVIT was created as a network of centers set up by

member states within their own national administrations. It aims at fast and informal ways of resolving problems which individuals and businesses encounter when exercising their rights in the internal market.

Any EU citizen (and business) may lodge a complaint to SOLVIT, which is an online problem solving network (http://ec.europa.eu/solvit/index_en.htm). The system is based on the EU member states' joint work. The goal is to solve problems caused by the misapplication of EU law concerning internal market by public authorities, without legal proceedings. SOLVIT centers are committed to provide solutions to problems usually within a maximum of ten weeks. Using SOLVIT is free of charge.

SOLVIT system is advantageous in most of the cross-border legal problems in the EU, resulting from free flow of goods, services, employees and capital. Although its proposals are not binding, it is relatively effective in helping citizens to solve their legal problems.¹⁸³

Notes:

176 All statistical data in this part are from European Ombudsman Annual Report 2012, Luxembourg, Publications Office of the European Union – this is the most updated report issued by the European Ombudsman available at the time of writing.

177 According to Article 228 of the TFEU and Article 43 of the Charter, a European Ombudsman shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a member state.

178 Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, adopted by Parliament on 9 March 1994 (OJ L 113, 4 May 1994, p. 15) and amended by its decisions of 14 March 2002 (OJ L 92, 9 April 2002, p. 13) and 18 June 2008 (OJ L 189, 17 July 2008, p. 25).

179 P. Nikiforos Diamandouros, the European Ombudsman, reported that in 2011 the overall rate of compliance by the EU institutions with his suggestions was 82%, "Report on responses to proposals for friendly solutions and draft recommendations – How the EU institutions complied with the Ombudsman's sugges-

tions in 2011", available at <http://www.ombudsman.europa.eu/en/cases/followup.faces/en/12376/html.bookmark> (last visited 5 August 2014).

180 According to the Charter, any citizen of the Union or any natural or legal person residing or having its registered office in a member state has the right to petition to the EP.

181 Report of the Committee on Petitions (A7-0299/2013) available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0299+0+DOC+XML+V0//EN> (last visited 5 August 2014).

182 Report of the Committee on Petitions 2013 (2014/2008(INI)) available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0131+0+DOC+XML+V0//EN> (last visited 5 August 2014).

183 Commission Recommendation of 17 September 2013 C(2013) 5869 final on the principles governing SOLVIT.

The CFR and Luxembourg's Case Law Before the Lisbon Treaty

After the Lisbon Treaty came into force, the CJEU started applying the Charter in a direct way. However, the Court of Justice¹⁸⁴ referred to the Charter in its judgments even before the entry into force of the Lisbon Treaty, as a tool of interpretation of European Union law in the field of human rights. In this regard, the role taken over by the Advocates General of the Court was significant, as they were the first to quote the CFR. Therefore, the decisions of the Luxembourg Court are discussed in the section devoted to non-judicial methods of the implementation of the Charter.

Before 2009, the characterization of the Charter as an instrument for consolidating existing human rights has found an immediate acknowledgment in the opinions of the Advocate General of the ECJ, which have represented a sort of forerunner for subsequent jurisprudence. In this framework, we can recall, *inter alia*, the Opinions of Advocate General Lager of 10 July 2001 (C-353/99, para. 80) and of the Advocate General Tizzano of 8 February 2001 (C-173/99, para. 27). Both pointed out that the Charter represented a “privileged instrument for identifying fundamental rights” which were recognized as general principles of law even if the Charter was not in itself binding.

It took longer time for the ECJ to recognize that the Charter actually reaffirmed rights already enshrined as general principles of law – the Advocates General were more progressive in this matter. As can be noted in the following judgments, in this line of reasoning the Court initially referred to the Charter as a mere tool for the identification and interpretation of EU fundamental rights.

cation of minor children of third country nationals), the Court rejected a claim by the Parliament that Directive 2003/86/EC breached the fundamental right of respect of family life. According to the Parliament, some provisions of the Directive concerning the right to family life and the right to non-discrimination did not respect some fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the constitutional traditions common to the EU member states. On these grounds, the Parliament also invoked some provisions of the CFR, observing their relevance for the interpretation of the ECHR in so far as the Charter drew up a list of existing fundamental rights even though it did not have binding legal effect.

In its findings, the Court stated that fundamental rights formed an integral part of the general principles of Community law. The Court pointed out that *while the Charter is not a legally binding instrument [...], however, the Community acknowledged its importance in the second recital in the preamble to the Directive which recognised the principles not only by Article 8 of the ECHR but also by the Charter. «Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights’» (paragraph 38).*¹⁸⁵ In line with this decision, on 13 March 2007 the ECJ adopted a new judgment concerning the principle of effective judicial protection – C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*. By this decision, the Court reaffirmed that the CFR was not a legally binding instrument, but emphasized that it nevertheless was a tool for identification and interpretation of EU fundamental rights.

● **European Court of Justice, C-540/03**
Parliament v. Council, Judgment of 27 June 2006

In the Judgment *Parliament v. Council of 27 June 2006* (the case concerned the right to family reunifi-

● **European Court of Justice, C-244/06**

Dynamic Medien Vertriebs GmbH v. Avides Media AG., Judgment of 14 February 2008

This decision concerned a preliminary ruling on the interpretation of Articles 28 and 30 of EC Treaty concerning the free movement of goods. In addition, the preliminary ruling concerned the interpretation of Directive 2000/31/EC on certain legal aspects of information society services as electronic commerce in internal market.

The dispute in the main proceedings arose between two German competing companies, the “Dynamic Medien” and the “Avides Media” with respect to mail order via the internet sales by “Avides Media” in Germany of image storage media from the United Kingdom which had not been examined and classified by a higher regional authority or a national voluntary self-regulation body for the purpose of protecting young people. In particular, “Dynamic Medien” submitted that the German Law on the protection of young people prohibited the sale by mail order of image storage media, which had not been examined by the German competent authority.

The *Landgericht Koblenz* decided to refer the question to the ECJ for a preliminary ruling on the compatibility of the German Law with the EU provisions on the free movement of goods. The ECJ ruled that Article 28 EC Treaty did not preclude national rules such as those of the German Law on the protection of young people. In its judgment, the ECJ stated that the protection of the child is a legitimate interest that justified, in principle, a restriction of a fundamental freedom guaranteed by the EC Treaty, such as the free movement of goods. In this respect, the Court recalled that the protection of the rights of the child is affirmed by various international legal instruments and it is also *enshrined in instruments drawn up within the framework of the European Union, such as the Article 24 of CFR which provided that children have the right to such protection and care as is necessary for their well-being. Furthermore, a number of EU instruments, such as Directive 2000/31, recognised the rights of young people and the Member States’ right to take the measures necessary for guaranteeing their protection.*

This decision clarified that the fundamental rights such as identified and interpreted by the Court, also by way of reference to the CFR, must be balanced with other fundamental rules and principles of the EU legal order.

European Court of Justice, C-402/05 ●

Kadi e Al Barakaat v. Council, Judgment of 3 September 2008

In this case, the ECJ had to decide on the appeals concerning an action for annulment by Mr Kadi, a Saudi citizen, and Al Barakaat International Foundation against the judgments of the Court of First Instance of the European Communities of 21 September 2005. By those judgments, the Court of First Instance had rejected the actions brought by Mr Kadi and Al Barakaat against Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing specific restrictive measures on certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban. The Court of First Instance examined whether the Security Council had respected *ius cogens*, in particular certain fundamental rights, but did not find an infringement of this standard.

The Council Regulation had implemented the provisions of Common Position 2002/402/CFSP adopted on the grounds of UN Security Council Resolution 1390 of 2002 ordering member states to freeze without delay funds and other financial assets or economic resources of persons “who commit or attempt to commit, terrorist acts or participate in or facilitated the commission of terrorist acts”. The responsibility to carry out the so-called “listing” was imposed on member states.¹⁸⁶

The claims of the appellants were based on three grounds of annulment alleging the infringement of some fundamental rights. The first one concerned the alleged breach of the right to be heard; the second concerned an alleged breach of the right to respect for property and of the principle of proportionality; and the third one concerned the alleged breach of the right to effective judicial review. Furthermore, Al Barakaat claimed that the Council was incompetent to adopt the contested regulation.

In its final finding, the ECJ annulled Council Regulation (EC) No. 881/2002 in so far as it concerned Mr Kadi and the Al Barakaat International Foundation. In particular, with regard to the breach of the right of defence, the right to be heard, and the right to effective judicial review, the Court ruled that these were patently not respected.

In this regard, the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures in question was contrary to the principle of effective judicial protection which is a general principle of Community law, as interpreted in light of Articles 6 and 13 of the ECHR and reaffirmed by Article 47 of the CFR (para. 335).

Along the same lines, we can also recall other judicial decisions. Some of them recognized important social rights such as the right to strike and collective action:

C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union, v. Viking Line ABP*, Judgment of 11 December 2007

C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others*, Judgment of 18 December 2007

C-47/07, *Masdar (UK) v. Commission*, Judgment of 16 December 2008

C-388/07, *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, Judgment of 5 March 2009

C-12/08, *Mono Car Styling SA v. Dervis Odemis and Others*, Judgment of 16 July 2009

Notes:

184 The Court of Justice was renamed the Court of Justice of European Union after the Treaty of Lisbon went into force, therefore there is discrepancy in titles used to refer to Luxembourg court.

185 Confirming the role of the Charter, the Court finally held that international instruments referred to did not create an individual right for the members of a family to be allowed to enter the territory of a state and could not be interpreted as denying member states a certain margin of appreciation when examining applications for family reunification.

186 This obligation arises from Article 103 UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

Part Five

Materials and Curricula

This part of the manual aims to provide additional training material that can be used during seminars and trainings on the Charter of Fundamental Rights of the European Union (especially methodological advice) but also in the individual study of the CFR (worksheets can be used individually as well as in group work). As already mentioned in the foreword to this manual, these training materials are designed to assist both: individual legal professionals that need an introduction to the Charter and its implementation as well as trainers and educators providing more formal training on the Charter.

In the first section, methodological advice gained during pilot trainings for legal professionals and judges that were organized within the project in four EU member states (Austria, Croatia, Italy, Poland) is shared. We propose also a selection of materials that can be used.

The second section consists of five worksheets for the use during trainings (or alternatively, individual study). By analysing and discussing the facts of the case with the help of the provided questions, participants shall learn to assess the relevance of the CFR.

Methodological Advice and Sample Training Agendas

From our experience, we know that the level of knowledge of the Charter is rather limited (in comparison to the knowledge of fundamental rights derived from national constitutions and the European Convention on Human Rights). Therefore, we advise including a session on basic information related to the Charter (including an overview of its history, content, scope, and binding power). For this, several prepared tables could be used as educational material (see list of materials below).

A very important part of the training is the analysis of Article 51 CFR and the relevant jurisprudence of the CJEU (applicability of the Charter). One has to remember that this jurisprudence is still – and quite rapidly – evolving. Hence, it is advisable to follow its evolution. This session should consist of a preliminary introduction in the form of a presentation, followed by practical group work on given case studies (the first worksheet can also be used).

Finally, as the training should be focused on the practical skills of the participants, we suggest splitting participants into small groups and conducting session(s) where they work on case studies:

1. First, cases and instructions are given to the group (one can decide to discuss and agree on facts of the case first in the plenary discussion).
2. The groups are instructed to work on given cases according to the given questions.
3. Following this, groups are expected to present their findings,.
4. This is followed and accompanied by a plenary discussion.
5. Finally, the trainers give their feedback and provide the participants with additional explanations.

Several worksheets are included in this manual which can be used for this case study exercise during the seminar (see below). These provide exemplary exercises to be distributed to the participants.

The worksheets are also equipped with basic further information for the trainers (brief outcome of the case, summary of most relevant findings, prominent case law referred to). In the training setting, this information is not to be distributed to the participants too early. It is designed to provide basic background information to the trainers and may be shared with participants after their work is completed and discussed. We also provide the name and reference to the actual case by the CJEU.

At the end of the training, an open floor discussion on the practical possibilities of the usage of the Charter in daily legal practice can be organized – both to additionally link the training to real life situations and force participants to apply the information received during the training to their daily perspective.

In addition, feedback should be collected from the participants regarding the training and they should be asked to fill out evaluation forms (we do not provide evaluation forms as usually trainers have their own forms and they have to adhere to the structure of the particular training).

It is also our experience that when organizing a training for judges one may consider separating criminal and civil judges and preparing special materials for those groups as their experience and needs differ in the countries with strict judicial specialisation.

In terms of the **materials prepared for the participants**, it depends on the scope of the training, its length, addressees etc. But we advise providing participants with at least the text of the Charter as well as the materials prepared in this manual, printed as one sheet working material (they may be distributed at the beginning or during the session at the relevant point of discussion):

- **Table 1:** Charter of Fundamental Rights of the European Union – Factsheet. It may be used in the short session of basic questions and answers,

when the trainer instead of giving a presentation asks several questions and bases his/her explanations on the already existing knowledge of participants.

- **Table 2:** The Rights guaranteed by the Charter of Fundamental Rights. This is the whole Charter on one page, written in a slightly less legal language than the original text in order to make it more readable and shorter. It shows very quickly the scope of the Charter as well as the division of rights into different categories.
- **Table 3:** Overview of Interactions of Fundamental Rights in EU law. The diagram (cited by us after FRA) helps to understand the position of EU fundamental rights standards *vis-à-vis* other systems of protecting human rights.
- **Table 4:** Comparison of the European Union and Council of Europe. It shows basic facts regarding both institutions focusing on the rights and role of courts.
- **Table 5:** Selected CFR rights and their field of protection (including primary and secondary legislation) compared with provisions of the European Convention on Human Rights. This table, or parts of it, as already noted, may be used in order to learn about particular CFR provisions by comparing them to the provisions of the ECHR. In the

national context one may also consider adding one more column to include national legislation on the protection of particular rights – constitutional and other provisions. We may use this table or part of it by deleting the content of chosen column (with EU, ECHR or national standards) and asking participants to fill it in. This way they have to go through the chosen document and learn it.

- **Fundamental Rights “Check-List”** (from part 2 of the manual). This adapted list helps to deal with case scenarios and structures the legal analysis of the given case.
- **Case studies** – worksheets with questions. We propose five different worksheets. Worksheet 1 deals with basic concepts and principles, in particular the question when “applicability” of the CFR is given. Worksheets 2-5 address selected rights and questions of interpretation. This includes, *inter alia*, Articles 11 (freedom of expression/information), 15 (freedom to choose an occupation and right to engage in work), 17 (right to property), 28 (right to collective bargaining and action), and 38 (consumer protection).
- List of **additional resources** (see below several propositions), including relevant Internet sites, most important readings (bibliography in local language) and list of relevant court cases (both national and European).

1 Worksheet 1 – Basic Concepts and Principles

The right to child custody – which role for the EU?

Facts of the Case

Mr McB., an Irish national, and Ms E., a British national, lived together as an unmarried couple for more than 10 years in England, Australia, Northern Ireland and, from November 2008, Ireland. They had three children together, namely J., born in England on 21 December 2000, E., born in Northern Ireland on 20 November 2002, and J.C., born in Northern Ireland on 22 July 2007.

After the couple's relationship deteriorated in late 2008 and early 2009, the mother, alleging aggressive behaviour on the part of the father, fled on several occasions with her children to a women's refuge. In April 2009, the couple reconciled and they decided to marry on 10 October 2009. However, on 11 July 2009, the father discovered, on returning from a work-related journey to Northern Ireland, that the mother had left the family home with her children again and was living at the women's refuge.

On 15 July 2009, the father's lawyers prepared, on his instructions, an application to initiate proceedings before the Irish court with jurisdiction, namely the District Court, in order to obtain rights of custody in respect of his three children. However, on 25 July 2009, the mother took a flight to England, taking with her the abovementioned three children as well as her older child from a previous relationship. At that date, the abovementioned application had not been served on the mother, with the result that, in accordance with Irish procedural law, the action had not been validly brought and the Irish court had therefore not been seized.

On 2 November 2009, Mr McB. brought an action before the High Court of Justice of England and Wales (Family Division) (United Kingdom) seeking the return of the children to Ireland, in accordance with the provisions of the 1980 Hague Convention and Regulation No. 2201/2003. By order of 20 November 2009, that court requested that the father, pursuant to Article 15 of that convention, obtain a decision or a determination from the Irish authorities declaring that the removal of the children was wrongful within the meaning of Article 3 of that convention. The Irish High Court dismissed Mr. McB's action seeking for a decision or determination declaring the removal of his three children as unlawful and claiming his rights of custody. In the appeal against the decision, the Supreme Court noted that the provisions of Regulation No. 2201/2003 do not mean that the natural father of a

child must necessarily be recognised as having rights of custody in respect of that child, for the purposes of determining whether or not the removal of the child is wrongful, in the absence of a court judgment awarding such rights to him.

- *Do the facts of this case constitute a field of applicability for CFR rights?*
- *Which CFR rights would be of relevance in this case?*
- *How do you think the CJEU would decide in case of a request of a preliminary ruling?*
- *How would you decide in absence of any interpretative guidance provided by the CJEU?*

Information for the trainers

(not to be distributed to participants)

Case: C-400/10 PPU, J. McB. v. L. E., Judgment of 5 October 2010.

CFR rights and other provisions of relevance

Article 7 – Respect for private and family life

Article 24 – The rights of the child

Article 51 – Scope Court findings

Court findings

First, according to Article 51(1) of the Charter, the Charter's provisions are addressed to the member states only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not "establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties". Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it.

Even if the CJEU acknowledged the relevance of Articles 7 and 24 in this case, it came to the conclusion that the decision how parental custody can be obtained is to be decided on the level of the member state and ruled:

"Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, must be interpreted as not precluding a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction awarding such rights to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that regulation."

Important issues addressed (paras. 39ff)

Since "rights of custody" is defined by Regulation No. 2201/2003, it is an autonomous concept which is independent of the law of member states. It follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the member states for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question (C-66/08 *Kozłowski* [2008] ECR I-6041, paragraph 42 and case-law cited). Accordingly, for the purposes of applying Regulation No. 2201/2003, rights of custody include, in any event, the right of the person with such rights to determine the child's place of residence.

An entirely separate matter is the identity of the person who has rights of custody. In that regard, it is apparent from Article 2(11)(a) of that regulation that whether or not a child's removal is wrongful depends on the existence of "rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the member state where the child was habitually resident immediately before the removal or retention".

It follows that Regulation No. 2201/2003 does not determine which person must have such rights of custody as may render a child's removal wrongful within the meaning of Article 2(11), but refers to the law of the member state where the child was habitually resident immediately before its removal or retention the question of who has such rights of custody. Accordingly, it is the law of that member state which determines the conditions under which the natural father acquires rights of custody in respect of his child, within the meaning of Article 2(9) of that regulation, and which may provide that his acquisition of such rights is dependent on his obtaining a judgment from the national court with jurisdiction awarding such rights to him.

In the light of the foregoing, Regulation No 2201/2003 must be interpreted as meaning that whether a child's removal is wrongful for the purposes of applying that regulation is entirely dependent on the existence of rights of custody, conferred by the relevant national law, in breach of which that removal has taken place.

However, the referring court asks whether the Charter, and in particular Article 7 thereof, affects this interpretation of Regulation No. 2201/2003.

It must [...] be borne in mind that Article 7 of the Charter [...] must be read in a way which respects the obligation to take into consideration the child's best interests, recognised in Article 24(2) of that Charter, and taking into account the fundamental right of a child to maintain on a regular basis personal relationships and direct contact with both of his or her parents, stated in Article 24(3) (see, to that effect, Case C 540/03 *Parliament v. Council* [2006] ECR I 5769, paragraph 58). Moreover, it is apparent from recital 33 in the preamble to Regulation No 2201/2003 that that regulation recognises the fundamental rights and observes the principles of the Charter, while, in particular, seeking to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter. Accordingly, the provisions of that regulation cannot be interpreted in such a way that they disregard that fundamental right of the child, the respect for which undeniably merges into the best interests of the child (see, to that effect, Case C 403/09 PPU *Detiček* [2009] ECR I 0000, paragraphs 53 to 55).

It is necessary to take into account, in this regard, the great variety of extra-marital relationships and consequent parent-child relationships, a variety referred to by the referring court in its order for reference, which is reflected in the variation among Member States of the extent of parental responsibilities and their attribution. Accordingly, Article 24 of the Charter must be interpreted as not precluding a situation where, for the purposes of applying Regulation No 2201/2003, rights of custody are granted, as a general rule, exclusively to the mother and a natural

father possesses rights of custody only as the result of a court judgment. Such a requirement enables the national court with jurisdiction to take a decision on custody of the child, and on rights of access to that child, while taking into account all the relevant facts, such as those mentioned by the referring court, and in particular the circumstances surrounding the birth of the child, the nature of the parents' relationship, the relationship of the child with each parent, and the capacity of each parent to take the responsibility of caring for the child. The taking into account of those facts is apt to protect the child's best interests, in accordance with Article 24(2) of the Charter.

It follows from the foregoing that Articles 7 and 24 of the Charter do not preclude the interpretation of the regulation set out in paragraph 44 of this judgment.

In those circumstances, the answer to the question referred is that Regulation No 2201/2003 must be interpreted as not precluding a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction awarding such rights to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that regulation.

2 Worksheet 2 – Selected Rights and Their Interpretation

“Concerted trade union action in Latvia and Sweden”

Facts of the Case

The company L is incorporated under Latvian law with a registered office in Riga. The company posted workers from Latvia for works on a construction site in Sweden operated by a subsidiary called “Baltic”. Baltic is a company incorporated under Swedish law whose entire share capital was held by L. The work carried out by Baltic included the renovation and extension of school premises in Vaxholm, Sweden.

Around 65 per cent of the Latvian workers working in Sweden were members of the building workers’ trade union in Latvia. L had signed collective agreements with the Latvian building sector’s trade union, but it was not bound by any collective agreement with the local Swedish trade union. Thus, L and Baltic, on the one hand, and the Swedish building and public works trade union, on the other hand, began negotiations with a view to determining the rates of pay for the Latvian workers on the construction site in Sweden. Being a party to the collective agreement for the building sector required the company to accept a number of pecuniary obligations to be paid to the Swedish trade union and an insurance company that provided insurance contracts for workers. However, the negotiations failed. L refused to sign the collective agreement arguing that it was impossible to know in advance what conditions could be imposed on the company with regard to wages.

Hence, the Swedish trade union commenced collective action in the form of a blockade of all L’s sites in Sweden, thus preventing the delivery of goods onto the site, placing pickets and prohibiting the Latvian workers and vehicles from entering the building site. Such collective action was lawful under Swedish law. In the following, further trade unions, such as the Swedish electricians’ trade union, joined in with sympathy actions boycotting all of L’s sites in Sweden. None of the members of those trade unions were employed by L. As a result, L was no longer able to carry out its activities in Sweden. After work had stopped for a certain period, Baltic was declared bankrupt. Thus, L commenced proceedings before a Swedish court against the trade unions involved. The Swedish court approached the ECJ with a request for a preliminary ruling by inquiring, in essence, whether EU law precludes trade unions from taking collective action in the circumstances described above.

Which articles of the Charter could be affected? On which provisions of the Charter could the following actors rely:

- *the Latvian company L*
 - *the Latvian workers and*
 - *the Swedish trade union ?*
-
- *Debate the applicability of the CFR in this case.*
 - *What was the purpose of posting Latvian workers to Sweden? What was the aim of the trade negotiations between L and the Swedish trade union? After these negotiations had failed, why did other trade unions commence sympathy actions?*
 - *Discuss the implications of the concerted trade union actions on Baltic and L. Has one of the four fundamental freedoms of the EU been affected?*
 - *Are there any restrictions to the articles at stake?*
 - *Discuss the balancing between human rights and fundamental freedoms in the light of the specific circumstances of the case. What is the role of the principles of proportionality and non-discrimination in this regard?*

Information for the trainers

(not to be distributed to participants)

Case: C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others, 18 December 2007.

CFR rights and other provisions of relevance

Article 15 – Freedom to choose an occupation and right to engage in work

Article 16 - Freedom to conduct a business

Article 28 – Right to collective bargaining and action

Article 56 TFEU (former Article 49 EC)

Article 57 TFEU (former Article 50 EC)

Directive 96/71 of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

Court findings

The ECJ held that “Articles 49 EC and Article 3 of Directive 96/71 are to be interpreted as precluding a trade union in a member state, in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade of sites such as that at issue, to force a provider of services established in another member state to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.”

Important issues addressed

Although the right to take collective action must (...) be recognised as a fundamental right which forms an integral part of the general principles of Community law, the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national practices. [para. 91]

[...] [T]he protection of fundamental rights is a legitimate interest, which, in principle, justifies a restriction of the obligations imposed by Community law even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods or freedom to provide services. [para. 93, references omitted] As the Court held, in *Schmidberger* and *Omega*, the exercise of the fundamental rights that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such

exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality. [para. 94, references omitted] It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member States which posts workers in the framework of the transnational provision of services [95]. It must therefore be examined whether the fact that a Member State's trade union may take collective action in the circumstances described above constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified. [para. 96]

Other relevant information

[I]t must be pointed out that the right to take collective action for the protection of the workers of the host state against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty. [para. 103, references omitted]

It should be added that [...] the activities of the Community are to include not only an "internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital", but also "a policy of social sphere". Article 2 EC states that the Community is to have as its task, *inter alia*, the promotion of "a harmonious, balanced and sustainable development of economic activities" and "a high level of employment and of social protection". [para. 104]

Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, *inter alia*, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour. [para. 105]

[I]t must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers. [para. 107]

Referral to prior case law

C-112/00, *Schmidberger*, Judgment of 12 June 2003, para. 77.

C-36/02, *Omega*, Judgment of 14 October 2004, para. 36.

Joined Cases **C-369/96** and **C-367/96**, *Arblade and Others*, Judgment of 23 November 1999, para. 36.

C-165/98, *Mazzoleni and ISA*, Judgment of 15 March 2001, para. 27.

Joined Cases **C-49/98**, **C-50/98**, **C-52/98** to **C-54/98** and **C-68/98** to **C-71/98**, *Finalarte and Others*, Judgment of 25 October 2001, para. 33.

C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union*, Judgment of 11 December 2007, para. 77.

3 Worksheet 3 – Selected Rights and Their Interpretation

Volcanic ash as “super extraordinary circumstances”?

Facts of the Case

In April 2010, the eruptions of the Icelandic Volcano Eyjafjallajökull were followed by the closure of parts of the European airspace. Due to a cloud of volcanic ash and the great risks involved, the competent air traffic authorities closed the airspace over a number of member states on 15 April 2010. As a result, Ms Miller’s scheduled flight from Faro (Portugal) to Dublin (Ireland) provided by Ryan Air was cancelled two days later. Ms Miller thus found herself stranded in Faro for a week being able to return to Dublin only on 24 April 2010. During this time, the flight company did not provide any care or assistance to her.

Subsequently, Ms Miller claimed for expenses of €1129, representing her expenditure in procuring accommodation and subsistence based on Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.¹⁸⁷ Pursuant to Article 9 of this regulation, passengers have to be provided, free of charge, with meals, refreshments, hotel accommodation, local transport and basic communication services for the duration of the delay. This provision does not provide for any exceptions to the obligation of airlines to provide such care, not even in the case of “extraordinary circumstances”.

Ryanair refused to reimburse these costs arguing that given the magnitude and duration of the airspace closure due to the volcanic ashes this could not be classified as an “extraordinary circumstance”, which would exempt the airline from parts of the obligations set out in Regulation 261/2004/EC, but not from the right to provide care to passengers (Article 9 of the Regulation). Instead the airline outlined that such conditions constitute an additional category of “super-extraordinary circumstances” releasing the air carriers from all obligations under the mentioned Regulation, including those arising from Article 9.

- *What is the purpose of Regulation (EC) No. 261/2004? Can you identify a relation to any CFR right or principle?*
- *Which articles of the CFR are relevant in this case? Would they qualify as rights or principles – and what would a differentiation in this regard mean for their relevance in the concrete case?*
- *How can different rights/ principles be balanced in this case?*
- *Discuss the principles of proportionality and non-discrimination in light of the specific circumstances of the case.*

Notes:

187 Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

Information for the trainers

(not to be distributed to participants)

Case: C-12/11, McDonagh v. Ryanair Ltd., Judgment of 31 January 2013.

CFR rights of relevance and other provisions concerned

Article 16 – Freedom to conduct a business

Article 17 – Right to property

Article 38 – Consumer protection

Article 52 para. 1 – Scope of guaranteed rights

Regulation (EC) No. 261/2004 of the European Parliament and the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

In the context of a judicial proceeding between Ms Miller and Ryanair regarding the airline company's refusal to provide care, the Dublin Metropolitan District Court (Ireland) requested the ECJ pursuant to Article 267 TFEU to provide clarification on the interpretation and validity of Articles 5(1)(b) and 9 of the mentioned Regulation. In essence, the Irish court enquired whether events similar to the airspace closure in April 2010 could be understood as going beyond the existing concept of extraordinary circumstances, and, if so, whether that meant that liability for breach of the airline's duty to provide care under Articles 5 and 9 was excluded. In addition, the district court wanted to clarify whether in the case of particularly disruptive events such as volcanic eruptions, temporal and/or monetary caps could be read into the care obligations, in particular in the light of general principles of EU law (*e.g.*, principle of proportionality and non-discrimination) and specific articles of the CFR.

Court findings

The Court noted that the meaning of extraordinary circumstances is not defined in the Regulation, even though Recitals 14 and 15 of its preamble provide several examples, including notably air traffic management decisions and meteorological conditions incompatible with the operation of the flight. On previous occasions, notably in *Wallentin-Hermann*, the term had been defined narrowly as events “not inherent in the normal exercise of the activity of the carrier concerned and [...] beyond the actual control of that carrier on account of its nature or origin”. The Court refused to recognise a separate category of “particularly extraordinary” events against both the ordinary meaning of the notion and the underlying consumer-protective objectives of the Regulation. Furthermore, the Court relied on previous case law to show that the overall regime laid down in Regulation 261/2004 was proportionate, even in the face of substantive negative consequences for airlines. In addition, the Court highlighted that distinctions between different means of transport (such as air, rail and road) were warranted and thus not discriminatory.

The Court came to the conclusion that circumstances such as the closure of part of European airspace as a result of the eruption of a volcano constituted “extraordinary circumstances” within the meaning of that regulation. Thus, the air carriers are not released from their obligation to provide care, as laid down in Articles 5(1) (b) and 9 of the regulation. Ryanair was therefore obliged to compensate Ms Miller for breaching her right to care. However, the Court highlighted that an air passenger may only obtain reimbursement of the amounts which were “necessary, appropriate and reasonable to make up for the shortcomings of the air carrier”. The exact amount is a matter for the referring court to assess.

Important issues addressed

As regards Articles 16 and 17 of the CFR, Ryanair claimed that an unlimited duty of care would deprive airlines of “part of the fruits of their [...] labour and [...] investment” and, would therefore constitute a violation of the Charter. The Court’s response noted that neither the freedom to conduct a business (Article 16) nor the right to property (Article 17 CFR) were absolute rights. They must be considered in relation to their social function (cf. *Deutsches Weintor*, para. 54) and their scope is to be determined in accordance with Article 52(1) CFR.

When several rights protected by the EU legal order clash, there is a need to reconcile the requirements of the protection of those various rights and to strike a fair balance between them (cf. *Deutsches Weintor*, para. 47). In this case, the referring court mentions Article 16 and 17 FRC. However, it is also necessary to take account of Article 38 CFR, which, like Article 169 TFEU, seeks to ensure a high level of protection for consumers, including air passengers, in EU policies. As has been noted in Article 31 of the judgment, the protection of those passengers is among the principal aims of regulation (EC) 261/2004. Given the importance of consumer protection, the resulting fair balancing of rights leads to results in favour of the consumer.

Other relevant information

Concerning the principle of proportionality, the Court argues that a fair balance is to be struck between financial consequences for airlines, on the one hand, and the aim of ensuring a high level of passenger protection, on the other hand. This is distinct from the operator’s argument that with a ticket price of €98, expenses in excess of €1100 should be seen as disproportionate. Indeed, the Court by referring to the argument of the Advocate General held that air carriers should, as experienced operators, foresee costs linked to the fulfilment of their obligations and, in addition, may pass on the costs incurred by raising ticket prices.

Referral to prior case law

C-149/10, *Chatzi*, Judgment of 16 September 2010, para. 43: A European Union measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole.

C-544/10, *Deutsches Weintor*, Judgment of 6 September 2012, para. 54: Freedom to conduct a business (Article 16 CFR) and right to property (Article 17 CFR) are not absolute rights but must be considered in relation to their social function. When several rights protected by the EU legal order clash, there is a need to reconcile the requirements of the protection of those various rights and to strike a fair balance between them (para. 47).

C-294/10, *Eglitis and Ratnieks*, Judgment of 12 May 2011, paras. 23-24.

C-344/04, *IATA and ELFAA*, Judgment of 10 January 2006, paras. 78 and 92 et seq.: Article 5 to 7 of Regulation No. 261/2004 are not invalid by reason of infringement of the principle of proportionality. They do not infringe the principle of equal treatment. The situation of undertakings operating in the different transport sectors is not comparable since the different modes of transport, having regard to the manner in which they operate, the conditions governing their accessibility and the distribution of their networks, are not interchangeable as regards the conditions of their use.

Joined Cases **C-581/10** and **C-629/10**, *Nelson and Others*, Judgment of 23 October 2012, paras. 39, 72, 81: The importance of the objective of consumer protection may justify even substantial negative economic consequences for certain economic operators.

C-275/06, *Promusicae*, Judgment of 29 January 2008, paras. 65-66: When several rights protected by the EU legal order clash, there is a need to reconcile the requirements of the protection of those various rights and to strike a fair balance between them.

C-83/10, *Sousa Rodríguez and Others*, Judgment of 13 October 2011, para. 44: When an air carrier fails to fulfil its obligations under Article 9 (“right to care”) of Regulation No. 261/2004, an air passenger is justified in claiming a right to compensation on the basis of the factors set out in those provisions.

C-549/07, *Wallentin-Hermann*, Judgment of 22 December 2008, paras. 18, 32.

4 Worksheet 4 – Selected Rights and Their Interpretation

“Easy digestible” wine?

Facts of the Case

German Wine Ltd. is a cooperative of wine-growers. The labels on its bottles bear the inscription “mild edition, easily digestible” referring thereby to reduced acidity levels.

The authority responsible for supervising the marketing of alcoholic beverages objected to the use of the description “easily digestible” (“*bekömmlich*”). Indeed, the authority argued that this constitutes a “health claim” within the meaning of Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods hence *any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health*. Pursuant to Article 4(3)(a) of the mentioned regulation, *beverages containing more than 1,2% by volume of alcohol (e.g., wine) shall not bear health claims*. Article 4(3) *leg.cit.* does not provide for any exceptions to this prohibition.

The authority therefore ordered the cooperative to remove the adjective “*bekömmlich*” when advertising the wine.

- *What is the purpose of Regulation (EC) No. 1924/2006? Can you identify a relation to any CFR right(s) or principle(s)?*
- *Can CFR principles be applied when implementing Regulation (EC) No. 1924/2006?*
- *Discuss potential conflicts between different rights/principles and how they could be solved.*

Information for the trainers

(not to be distributed to participants)

Case: C-544/10, Deutsches Weintor eGv. Land Rheinland-Pfalz, Judgment of 6 September 2012.

CFR rights of relevance and other provisions of relevance

Article 15 – Freedom to choose an occupation and right to engage in work

Article 16 - Freedom to conduct a business

Article 35 – Health care

Article 38 – Consumer protection

Article 51 para. 1 – Field of application

Article 52 para. 1 – Scope and interpretation of rights and principles

Article 6 (1) TEU

Regulation (EC) No. 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, as last amended by Commission Regulation (EU) No. 116/2010 of 9 February 2010.

German Wine Ltd brought an action before the relevant national court. Doubts arose as to whether the prohibition of health claims for certain alcoholic beverages without any exception is compatible with EU law, in particular with the fundamental rights of the freedom to choose an occupation (Article 15 CFR) and the freedom to conduct a business (Article 16 CFR). Indeed, producers or distributors of wine were prohibited by the German competent authority from labelling their products as “easily digestible”, despite the fact that this claim was truthful in view of the low acidity levels of this type of wine.

Court findings

Firstly, in the request for a preliminary ruling, the Court dealt with the question whether the labelling of wine such as the one at issue as “easily digestible” constituted a “health claim” within the meaning of Regulation (EC) No. 1924/2006. According to the court, such a “health claim” refers to a relationship that must exist between a food or one of its constituents and health. This relationship must be understood broadly [para. 34]. In addition, it is necessary to take into account both temporary, as well as cumulative effects of the repeated and long-term consumption of a certain food on the physical condition [para. 38]. In the present case, “easily digestible” implies that the digestive system will remain relatively healthy and intact even after repeated consumption over an extended period of time, given that the wine is characterised by reduced acidity [para. 39]. In that, the claim in question might suggest a sustained beneficial physiological effect that other types of wine do not dispose of [para. 40]. Hence, the first subparagraph of Article 4(3) of the mentioned regulation must be interpreted as meaning that “health claim” cover a description such as “easily digestible” that is accompanied by a reference to the reduced content of substances often perceived by consumers as being harmful [para. 41].

Secondly, the question of whether the prohibition from using health claims for certain alcoholic beverages without exception is compatible with EU law and, in particular, with Article 6 (1) TEU, was addressed by the Court. In Article 6 para. 1 TEU, the EU recognised the rights, freedoms and principles set out in the Charter to have the same legal value as the Treaties [para. 43]. Account is to be taken of Article 15 para. 1 CFR and Article 16 CFR, but “it is important also to take into account the second sentences of Article 35 of the Charter, which requires a high level of human health protection to be ensured in the definition and implementation of all the European Union’s policies and activities. As is apparent from recitals 1 and 18 in the preamble to Regulation No. 1924/2006, health protection is among the principal aims of that regulation” [paras. 44-45].

As a result, the court found that the fact that a producer or distributor of wine is prohibited under this regulation, without exception, from using a claim of the kind at issue in the main proceedings, even if that claim is inherently correct, is compatible with the first subparagraph of Article 6(1) TEU.

Important issues addressed

When several rights protected by the EU legal order clash, there is a need to reconcile the requirements of the protection of those various rights and to strike a fair balance between them [para. 47]. As regards the protection of health, the Court stressed that alcoholic beverages in view of the risks of addiction and abuse as well as in view of its complex harmful effects, represent a special category of foods that is subject to particularly strict regulation. Thus, measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflect public health concerns. The protection of public health constitutes an objective of general interest justifying, where appropriate a restriction of a fundamental freedom [para. 49].

In addition, the Court stressed that neither the freedom to conduct a business (Article 16) nor the right to property (Article 17 CFR) are absolute rights. They must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those freedoms, provided that those restrictions in fact correspond to objectives of general interest pursued by the EU and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which impairs the very substance of those rights [para. 54]. As the legislation at issue only controls but does not prohibit the production and marketing of alcoholic beverages, it does not in any way affect the actual substance of freedom to choose an occupation or of the freedom to conduct a business [para. 58].

Referral to prior case law

C-210/03, *Swedish Match*, Judgment of 14 December 2004, para. 72: Freedom to pursue a trade or profession, like the right to property, is not an absolute right but must be considered in relation to its social function.

C-22/94, *Irish Farmers Association and Others*, Judgment of 15 April 1997, para. 27; **C-64/00**, *Booker Aquaculture and Hydro Seafood*, Judgment of 10 July 2003, para. 68: Restrictions may be imposed on the exercise of the freedom to pursue a trade or profession, provided that those restrictions in fact correspond to objectives of general interest pursued by the EU and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.

5 Worksheet 5 – Selected Rights and Their Interpretation

“Free-of-charge access to exclusive television content?”

Facts of the Case

The Austrian *Bundeskommunikationssenat* (Federal Communication Senate) requested the ECJ to examine the validity of Article 15 para. 6 of the Audiovisual Media Services Directive¹⁸⁸ in the light of EU law. The question arose in a proceeding between *Sky Österreich GmbH* (“Sky”) and the *Austrian public broadcaster* (“ORF”) concerning the financial conditions, under which ORF is entitled to gain access to the satellite signal of *Sky* to make short news reports in cases where the latter had acquired exclusive broadcasting rights. *Sky* had acquired exclusive rights to broadcast Europa League matches in the Austrian territory by means of a contract dating from 21 August 2009. The company had spent several million Euro each year on the licence and production costs in this regard.

In particular, it was asked whether Article 15 para. 6 of the Audiovisual Media Services Directive amounts to an infringement of the fundamental rights of the holder of exclusive broadcasting rights. Indeed, the holder of those rights is required to authorise any other broadcaster to make short news reports, without being able to seek compensation *exceeding the additional costs directly incurred in providing access*.

Article 15 Audiovisual Media Services Directive reads as follows:



- (1) Member States shall ensure that for the purpose of short news reports, any broadcaster established in the Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.
 - (3) Member States shall ensure that such access is guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal with, unless impossible for reasons of practicality, at least the identification of their source.
 - (4) As an alternative to paragraph 3, Member States may establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means.
 - (5) Short extracts shall be used solely for general news programmes and may be used in on-demand audiovisual media services only if the same programme is offered on a deferred basis by the same media service provider.
 - (6) Without prejudice to paragraphs 1 to 5, Member States shall ensure, in accordance with their legal systems and practices, that the modalities and conditions regarding the provision of such short extracts are defined, in particular, with respect to any compensation arrangements, the maximum length of short extracts and time limits regarding their transmission. Where compensation is provided for, it shall not exceed the additional costs directly incurred in providing access.
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Recital 48 of the preamble to the Audiovisual Media Services Directive reads as follows:

Audiovisual Media Services Television broadcasting rights for events of high interest to the public may be acquired by broadcasters on an exclusive basis. However, it is essential to promote pluralism through the diversity of news production and programming across the Union and to respect the principles recognised by Article 11¹⁸⁹ of the Charter of Fundamental Rights of the European Union.

Recital 55 of the preamble to the Audiovisual Media Services Directive reads as follows:

In order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the Union are fully and properly protected, those exercising exclusive television broadcasting rights to an event of high interest to the public should grant other broadcasters the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms taking due account of exclusive rights. Such terms should be communicated in a timely manner before the event of high interest to the public takes place to give others sufficient time to exercise such a right. A broadcaster should be able to exercise this right through an intermediary acting specifically on its behalf on a case-by-case basis. Such short extracts may be used for EU-wide broadcasts by any channel including dedicated sports channels and should not exceed 90 seconds. [...]

- *In light of the preamble, what are the aims of the Audiovisual Media Services Directive? Can you identify a relation to any CFR rights or principles?*
- *How can different rights/principles be balanced in this case? Under which conditions may limitations of certain rights be possible?*
- *Does the CFR preclude the EU legislator from limiting the compensation that holders of exclusive rights may seek from other channels for short news reports to the additional costs directly incurred?*

Notes:

188 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

189 Article 11 CFR enshrines the freedom of expression and information.

Information for the trainers

(not to be distributed to participants)

Case: C-283/11, Sky Österreich GmbH v. Österreichischer Rundfunk, Judgment of 22 January 2013.

By its question, the *Bundeskommunikationssenat* requests the Court, in essence, to examine the validity of Article 15 para. 6 of the Audiovisual Media Services Directive in the light of Articles 16 and 17(1) CFR. In particular, it asks whether Article 15(6) amounts to an infringement of the fundamental rights of the holder of exclusive broadcasting rights, since Sky is required to authorise any other broadcaster established in the EU to make short news reports, without being able to seek compensation exceeding the additional costs incurred (in the present case no additional costs arose).

CFR rights of relevance and other provisions concerned

Article 16 – Freedom to conduct a business

Article 11 – Freedom of expression and information

Article 17 – Right to property

Article 52 para. 1 second sentence: principle of proportionality

Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (*Audiovisual Media Services Directive*).

Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

Court findings

The Audiovisual Media Services Directive authorises any broadcaster established in the EU to produce short news reports on events of high interest to the public, where those events are subject to exclusive broadcasting rights.¹⁹⁰ Short extracts may be chosen freely from the signal of the holder of the exclusive broadcasting rights,¹⁹¹ which may request compensation corresponding only to the additional costs directly incurred in providing access.¹⁹²

In the circumstances of the case, the European Union legislature was lawfully entitled to impose the limitations on the freedom to conduct a business contained in Article 15 para. 6 of Directive 2010/13, in relation to holders of exclusive broadcasting rights and to consider that the disadvantages resulting from the provision are not disproportionate in the light of the aims which it pursues and are such as to ensure a fair balance between the various rights and fundamental freedoms at issue in the case [para. 67].

The CFR does not preclude the limitation of costs for broadcasting short news events of high interest to the public (*e.g.*, football matches) from being limited to the additional costs directly incurred. Thus, the validity of Article 15(6) of the Audiovisual Media Services Directive is not affected.

Important issues addressed

In those circumstances, the question arises as to whether Article 17(1) CFR extends to audiovisual broadcasting rights acquired contractually. Article 17 CFR does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activities, but also to rights with an asset value, such as the exclusive broadcasting rights at issue [paras. 34-35].

An economic operator, such as Sky, which, after the entry into force of Directive 2007/65, has acquired exclusive broadcasting rights by means of a contract, cannot rely on an acquired legal position, protected by Article 17(1)¹⁹³ of the Charter [paras. 39-40].

The protection afforded by Article 16¹⁹⁴ CFR covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition. The freedom of contract includes, in particular, the freedom to choose with whom to do business and the freedom to determine the price of a service. The consequence of Article 15 of Directive 2010/13, [...] is that the holder of exclusive broadcasting rights cannot decide freely with which broadcasters to enter into an agreement [...] and on the price to be charged [...]. In those circumstances, Article 15(6) amounts to interference with the freedom to conduct a business [paras. 41-44].

However, in accordance with the Court's case law, Article 16 CFR is not absolute, but must be viewed in relation to its social function¹⁹⁵ and may be subject to a broad range of interventions which may limit the exercise of economic activity in the public interest [paras. 45-46].

In accordance with Article 52(1) CFR, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest. The Court held that Article 15(6) Audiovisual Media Services Directive does not affect the core content of the freedom to conduct a business [paras. 48-49].

In light, first, of the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter and, second, of the protection of the freedom to conduct a business as guaranteed by Article 16 CFR, the European Union legislature was entitled to adopt rules such as those laid down in the Audiovisual Media Services Directive, which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom.

Other relevant information

In so far as concerns the proportionality of the interference, the Court recalls that this principle requires that measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. (Case C 343/09 *Afton Chemical* [2010] ECR I 7027, paragraph 45, and Joined Cases C 581/10 and C 629/10 *Nelson and Others* [2012] ECR, paragraph 71 and the case-law cited)

In that regard, the Court notes, first of all, that the marketing on an exclusive basis of events of high interest to the public is increasing and liable to restrict considerably the access of the general public to information relating to those events. Thus, Article 15 Audiovisual Media Services Directive seeks, as is apparent from recitals 48 and 55 in the preamble thereto, to safeguard the fundamental freedom to receive information, guaranteed under Article 11(1) CFR and to promote pluralism of the media protected under Article 11(2) CFR [para. 51].

The safeguarding of the freedoms protected under Article 11 CFR undoubtedly constitutes a legitimate aim in the general interest, the importance of which in a democratic and pluralistic society must be stressed [para. 52]. Article 15(6) of Directive 2010/13 is appropriate for the purpose of ensuring that objective, as it puts any broadcaster in a position to be able to make short news reports and thus to inform the general public of events of high interest. As concerns the necessity of such legislation, the Court notes that a less restrictive measure could have consisted in providing compensation in excess of the costs directly incurred to the exclusive rights holder. [...] However, it is apparent that less restrictive legislation would not achieve the objective pursued as effectively, as it could have the effect of deterring or even preventing certain broadcasters from requesting access and, consequently, such a regulation would have considerably restricted the access of the general public to information [paras. 53-55]

As regards the possible disproportionate nature of Article 15(6) Audiovisual Media Services Directive, it should be noted that the EU legislature was required to strike a balance between the freedom to conduct a business, on the one hand, and the fundamental freedom of citizens of the EU to receive information and the freedom and pluralism of the media, on the other. The assessment of the possible disproportionateness must be carried out with a view to reconciling those different rights and freedoms and to striking a fair balance between them (see, to that effect, Case C 275/06 *Promusicae* [2008] ECR I 271, paragraphs 65 and 66, and *Deutsches Weintor*, paragraph 47) By establishing requirements for the use of the extracts [*e.g.*, short news reports may be produced only for general news programmes; member states are required to define the conditions regarding the provision of extracts by taking due account of the exclusive broadcasting rights, the maximum length of the extracts may not exceed 90 seconds etc.], the EU legislature has ensured that the extent of the interference with the freedom to conduct a business (Article 16 CFR) are confined within precise limits. [paras. 58-61].

Referral to prior case law

Joined Cases **C-184/02** and **C-223/02**, *Spain and Finland v. Parliament and Council*, Judgment of 9 September 2004, paras. 51-52, and **C-544/10**, *Deutsches Weintor*, Judgment of 6 September 2012, para. 54: Freedom to conduct a business is not absolute, but must be viewed in relation to its social function.

C-343/09, *Afton Chemical*, Judgment of 8 July 2010, para. 45, and Joined Cases C-581/10 and C-629/10, *Nelson and Others*, Judgment of 23 October 2012, para. 71: The principle of proportionality requires that measures adopted do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

C-275/06, *Promusicae*, Judgment of 29 January 2008, paras. 65-66, and **C-544/10**, *Deutsches Weintor*, Judgment of 6 September 2012, para. 47: The assessment of the possible disproportionate nature of a provision must be carried out with a view to reconciling the requirements of the protection of different rights and freedoms and to strike a fair balance between them.

Notes:

190 Article 15 (1) Audiovisual Media Services Directive.

191 Article 15 (3) Audiovisual Media Services Directive.

192 Article 15 (6) Audiovisual Media Services Directive.

193 Article 17 CFR regulates the right to property.

194 Article 16 CFR lays down the freedom to conduct a business.

195 See, to that effect, Joined Cases C-184/02 and C-223/02, *Spain and Finland v. Parliament and Council*, Judgment of 9 September 2004, paras. 51-52, and C-544/10, *Deutsches Weintor*, Judgment of 6 September 2012, para. 54 and the case law cited.

Additional Information and Training Materials

A must see list of Internet sites on the Charter of Fundamental Rights

European Union Agency for Fundamental Rights – <http://fra.europa.eu/en> – access to reports and analysis done by the Agency, concerning the level of protection of fundamental rights in all EU member states.

Charterpedia – <http://fra.europa.eu/en/charterpedia> – database on the Charter provisions and relevant case-law. Judgments of the Court of Justice of the EU and national courts are assigned to a particular Charter’s provision.

Court of Justice of the EU – <http://curia.europa.eu> – website of the main EU court. Judgments with references to the Charter may be easily found, simply select the Charter as a reference text in the search engine.

European Commission – http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm – website of the European Commission’s Directorate-General “Justice”. Source of information about the implementation of the Charter in all EU member states (you can find annual reports on the implementation here: http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm).

Europe of Human Rights – <http://www.europa-praw.org/c/ue/cj-eu-anti-discrimination> – website of Helsinki Foundation for Human Rights’ (Poland) programme. Started in 2014. Will provide information about CJEU judgments referring to the Charter (in English).

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C-12/08, *Mono Car Styling SA v. Dervis Odemis and Others*, Judgment of 16 July 2009.

C-12/11, *McDonagh v. Ryanair*, Judgment of 31 January 2013.

C-144/04, *Mangold v. Helm*, Judgment of 22 November 2005.

C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Judgment of 22 December 2010.

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C-356/09, *Pensionsversicherungsanstalt v. Christine Kleist*, Judgment of 18 November 2010.

C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, Judgment of 22 May 2014.

C-370/12, *Thomas Pringle v. Government of Ireland, Ireland and The Attorney General*, Judgment of 27 November 2012.

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C-388/07, *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, Judgment of 5 March 2009.

C-399/11, *Stefano Melloni v. Ministerio Fiscal*, Judgment of 26 February 2013.

C-4/11, *Bundesrepublik Deutschland v. Kaveh Puid*, Judgment of 14 November 2013.

C-400/10 PPU, *J. McB. v. L.E.*, Judgment of 5 October 2010.

C-401/11, *Blanka Soukupová v. Ministerstvo zemědělství*, Judgment of 11 April 2013.

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The Charter of Fundamental Rights as a Living Instrument
Manual



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