ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter

MODULE 1 – THE EU CHARTER OF FUNDAMENTAL RIGHTS: SCOPE OF APPLICATION, RELATIONSHIP WITH THE ECHR AND NATIONAL STANDARDS, EFFECTS

IN THE FRAMEWORK OF THE PROJECT "*ACTIVE CHARTER TRAINING THROUGH INTERACTION OF NATIONAL EXPERIENCES*" (ACTIONES)

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Coordination of the ACTIONES Project:
Prof. Fabrizio Cafaggi (Scientific Coordinator)
Dr. Federica Casarosa (Project Manager)
Dr. Madalina Moraru
Dr. Nicole Lazzerini – Module Coordinator

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1. The Charter of Fundamental Rights of the European Union as a legally binding source of EU law

Since 1st December 2009, the European Union has its own written, legally binding Bill of Rights, the Charter of Fundamental Rights of the European Union (hereafter: the "Charter"). The Charter encompasses a broad range of civil, political, social and economic rights, together with rights peculiar to EU citizens, such as free movement within the EU or the right to vote at elections of the European Parliament.

Based on Article 6(1) TEU, the Charter has "the same status of the Treaties"; thus, the Charter is not only a legally binding source of EU law: it ranks at the top of EU law sources. Accordingly, all sub-primary provisions of EU law must be interpreted in conformity with the Charter. When conforming interpretation is not available, secondary law in conflict with the Charter should be set aside; the Court of Justice is the only jurisdiction with competence to hold EU law provisions invalid, in the context of a reference for preliminary ruling (Article 267 TFEU) or a direct action for annulment (Article 263 TFEU).[1]

Moreover, national provisions that fall within the scope of the Charter[2] must be compatible with the fundamental rights it contains. National authorities shall ensure that those national provisions are interpreted and applied in conformity if the Charter.[3] Judges play a particularly important role in this respect. When compatibility cannot be achieved through interpretation, they can (better, are under a duty to) solve the conflict by disapplying the conflicting national provision; however, disapplication requires that the relevant EU law provision[4] satisfies the requirements for direct effect.[5] If this is the case, disapplication can be performed by any national court, without having to request or await the prior setting aside of the conflicting national provision by legislative or constitutional means.[6] Direct effect is a peculiar feature of (some) EU law provisions and confers on the Charter an added value compared to the ECHR, whose provisions lack such an effect, at least for those national legal orders that do not acknowledge similar effects to the Convention (Italy, for instance).

Although the ACTIONES project is mainly concerned with the use of the Charter, the latter is not the only source of the fundamental rights protected under Union law. According to Article 6(3) TEU, the Union respects the fundamental rights granted by the ECHR and those stemming from the

[1] As regards the first option, see the judgments (all delivered by the Court sitting in Grand Chamber) of 9 November 2010, joined cases C-92/09 and 93/09, *Volker und Markus Schecke* (here); of 1st March 2011, Case C-236/09, *Test-Achats ASBL* (here); of 8 April 2014, Case C-293/12, *Digital Rights Ireland* (here). The Court of Justice has also competence to check the compatibility with the Charter of draft international agreement negotiated by the EU; a negative opinion of the Court impedes the conclusion of the agreement in its current version: see the Court's Opinion no. 1/15 of 26 July 2017 on the draft PNR agreement between the EU and Canada (here).

[2] See section 2 below.

[3] The judge may be presented with two different scenarios: a national provision may not be compatible with the Charter *tout court* or with the interpretation in light of the Charter of a EU secondary law provision.

[4] See the previous footnote.

[5] See section 4.2 below.

[6] See ECJ (Fifth Chamber), judgment of 11 September 2014, Case C-112/13, *A. v. B. and others* (here), in particular para. 36, reiterating ECJ (Grand Chamber), judgment of 22 June 2010, Joined cases C-188/10 and 189/10, *Melki* (here).

constitutional traditions common to the Member States as general principles of EU law. As is well known, the general principles are the sources through which, when a written catalogue such as the Charter was lacking, the ECJ secured the protection of fundamental rights in the Union legal order. The Lisbon Treaty has confirmed the relevance of the general principles, as a source concurring to the protection together with the Charter. Since the drafters of the Charter took into account the pre-Lisbon case law of the ECJ on the general principles, there is a significant overlap between the latter and the former. Yet, there are no written rules on their relationship (either in the Charter or in the Treaties); in addition, the ECJ has not engaged with this issue, though it referred to that case law in order to clarify doubts concerning the application of the Charter, for instance its scope at the national level. Based on the current case law, it seems safe to argue that the Charter represents the main reference point for the ECJ, which at the same time relies on its pre-Lisbon case law on the general principles to interpret the Charter. There are judgments where general principles appear to be the main source, but this mainly happens when the facts of the case took place entirely before the entry into force of the Lisbon Treaty.[7]

The general principles referred to in Article 6(3) TEU may play an autonomous role as regards the protection of fundamental rights not granted by the Charter. Think of a fundamental right that could emerge from the constitutional traditions common to the Member States.[8] Furthermore, there are also general principles that do not concern the protection of fundamental rights, which can nonetheless interact with the latter (and the Charter). The main example is represented by the general principle of effectiveness, which has a significant impact on the Member States' systems of remedies, and procedural rules more broadly, in the fields covered by Union law. According to this well-established general principle, the Member States must ensure that such rules do not make impossible or excessively difficult to obtain redress in case rights granted by Union law (any rights, not only the fundamental ones) are violated. This general principle is sometimes used by the Court in tandem with the fundamental right to effective judicial protection, granted by Article 47 of the Charter.

As a final note, it is worth recalling that, based on Article 6(2) TEU, the EU is under an obligation to accede the ECHR. After accession, the ECHR will be fully integrated into EU law, as a further brunch of the post-Lisbon EU system of fundamental rights' protection. Since the ECJ rejected the Draft Accession Agreement of the EU to the ECHR finalised in 2013, the EU is not yet bound by the ECHR.[9] Nonetheless, the latter has a twofold relevance under EU law: firstly, as a source of inspiration of the general principles of EU law, as explained above; secondly, as a parameter for the interpretation of the Charter, which shall not offer lesser protection than the ECHR, insofar as corresponding rights are concerned (see section 4.2 below).

[7] See, for instance, judgment (Grand chamber) of 19 April 2016, Case C-441/14, *Dansk Indus*tri (*DI*) (here).

[8] It is less likely that the general principles will supplement the Charter as regards the protection offered by the ECHR: all fundamental rights granted by the text of the ECHR are granted also by the Charter, in fact, this contains provisions corresponding also to those of some ECHR's protocols. However, not all fundamental rights granted in ECHR's protocols have an equivalent in the Charter; moreover, there is the possibility that protocols securing additional fundamental rights will be added to the ECHR.

[9] Opinion (Full Court) no. 2/13 of 18 December 2014 on the Draft Agreement on the Accession of the EU to the ECHR (here).

2. The logical path a national judge should follow to understand whether and how the Charter is applicable to the pending case

The Charter does not only provide a written catalogue of fundamental rights. It also contains a set of rules (known as "general provisions" or "horizontal clauses") concerning: the scope of application of the Charter (Article 51); the interpretation of the Charter's fundamental rights that "correspond" to rights granted by the European Convention on Human Rights ("ECHR") or "result from the constitutional traditions common to the Member States" (respectively, Article 52, para. 3, and Article 52, para. 4); the different effects of the Charter's provisions that contain "rights" or "principles" (Article 52, para. 5); the relationship with sources external to the EU legal order, notably domestic constitutions (Article 53).

This Module provides an overview of the most relevant – and complex – general provisions, taking into account the case law of the Court of Justice providing their interpretation. Indeed, familiarity with the horizontal clauses is an essential pre-requisite for the correct application of the Charter. Accordingly, the overview unfolds according to the logical path of reasoning of a national judge facing a case to which the Charter may be relevant. Therefore, Article 51 of the Charter, titled "Field of application", is the first general provision with which a national judge shall engage: is the Charter applicable to the pending case?. If the answer is in the affirmative, the national judge may have to consider other general provisions concerning the interpretation, the effects and the level of protection of the fundamental rights granted by the Charter.

In particular, a national court shall address the following questions:

1) Is there any scope for the protection afforded by domestic standard of fundamental rights protection? (**section 4.1**);

2) how does the ECHR and the case law of the European Court of Human Right (hereafter: ECtHR or Strasbourg Court) affect the interpretation of the Charter? (**section 4.2**);

3) which are the effects of the relevant provision(s) of the Charter? The provisions of the Charter entail different effects depending on whether they enunciate a (subjective) "right" or as a (legal) "principle" (**section 5.1**); moreover,

Moreover, when the Charter is applicable, national courts can rely on specific techniques of judicial interaction[10] in order to address conflicts with national law (such as direct effect: see **section 5.2**), to solve interpretative problems, or to achieve a coherent interpretation with national and international sources of fundamental rights' protection (notably, but not exclusively, domestic Constitutions and the ECHR).

By contrast, if the Charter is not applicable in the pending case, the national judge is not under any legal obligation flowing from EU law to address the case within the framework provided by the Charter. However, s/he may decide to take account of the Charter, and of the relevant case law of the ECJ, in the process of interpreting national fundamental rights. In particular, the protection afforded to a fundamental right based on the domestic sources may be extended through the use of the Charter. The use of the Charter by the ECtHR provides an interesting illustration of the added value of the Charter outside its scope of application. Clearly, the Strasbourg Court is never under a legal obligation to apply the Charter. Nonetheless, the latter has a more modern and, at times, more far-reaching formulation than the Convention. In line with its case law whereby the Convention is "a living

[10] On these techniques, see Module II in this Handbook.

instrument that must be interpreted according to present-day conditions", the ECtHR has drawn from the Charter arguments supporting a judicial *revirement*, in the sense of embracing a wider protection. For instance, in *Scoppola v. Italy (II)*,[11] the ECtHR overruled the interpretation according to which Article 7(1) ECHR does not guarantee the right to a more lenient criminal sanction introduced by law after the offence was committed. The Strasbourg Court acknowledged that important developments had occurred in the international scene, including the proclamation of the Charter, whose Article 49 explicitly recognizes the principle of retrospectiveness of the *lex poenalis mitior*.[12] Therefore, it concluded that "Article 7(1) [ECHR] guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law".[13]

Schalk and Kopf v. Austria,[14] where the ECtHR embraced a new interpretation of the personal scope of the right to marry, provides another example. According to the literal formulation of Article 12 ECHR,that right is only granted to heterosexual couples. By contrast, Article 9 of the Charter does not mention the beneficiaries of the right, thus encompassing both homosexual and heterosexual couples. In *Schalk and Kopf*, the ECtHR affirmed that, "[r]egard being had [inter alia] to Article 9 [CFREU], (…)[this Court] would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex".[15]

3. The scope of application of the Charter at the national level

Understanding the scope of application of the Charter is essential to establish whether the latter (and EU law more broadly) provides the framework to solve the case at issue. In the contrary case, the Charter may be relied on to support a certain interpretation of the applicable national or international sources of fundamental rights' protection, but there would be no legal duty to use it under EU law.

Article 51 of the Charter ("Field of application") states:

> "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".

Four main inferences can be drawn from this provision:

i. the Charter applies to two different sets of acts: EU acts and national acts. However, whilst all EU acts fall within the remit of the Charter, this is applicable only to national acts "implementing EU law";
ii. the Charter cannot be relied on to extend the material competences that the Member States decided to confer on the Union through the Treaties.

[11] *Scoppola v. Italy (II)*, no. 10249, ECHR 2009.
[12] *Ibid*., § 105.
[13] *Ibid*., § 109.
[14] Judgment of 24 June 2010, application no. 30141/04, *Reports of Judgments and Decisions* 2010.
[15] *Ibid*., § 61.

iii. the Charter encompasses both "rights" and "principles", whit different effects;

iv. individuals are not mentioned amongst the passive addressees of the Charter;

As a first issue, attention must be paid to the notion of "national act implementing EU law", which is referred to in Article 51(1) of the Charter. The principle of the neutrality of the Charter as regards the division of competences between the Union and the Member States (ii) sets a limit primarily to the EU legislator; however, it has a specific implication also on the scope of the Charter at the national level, as we shall see in a while. The inferences under *ii* and *iii* will be dealt with in sections 4.1 and 4.2.

The ECJ, sitting in Grand Chamber, clarified when a national act "implements EU law" for the purpose of Article 51(1) in its *Åkeberg Fransson* judgment of 26 February 2013.[16] It regarded Article 51(1) of the Charter as a codification of its *pre*-Lisbon case law on the general principles of EU law concerning fundamental rights, whereby the latter apply to national acts that fall within the scope of EU law. The most relevant passages of the judgment are reproduced here:

> "18 That article of the Charter thus confirms the Court's case law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.
>
> 19 The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect, the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union 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

[16] ECJ (Grand Chamber), judgment of 26 February 2013, case C-617/10, *Åkeberg Fransson* (here). In the pre-*Åkeberg Fransson* phase, the meaning of "implementing EU law" in Article 51(1) of the Charter was the subject of significant debate amongst academics. The formula most commonly used by the ECJ in its pre-legally binding Charter case law, was "within the scope of Union law". Therefore, Article 51(1) raised the question of whether the formulation of this provision corresponded to the precise choice of the drafters to endow the Charter with a different scope of application than that granted – before Lisbon – to the general principles of EU law on fundamental rights by the ECJ. Three main interpretations emerged. According to a narrow reading, the Charter was binding on the Member States only in situations of technical implementation of EU law, i.e. when the case involved national measures adopted in order to give effect to an EU law obligation. The broad interpretation regarded the expressions "implementation of EU law" and "scope of Union law" as synonyms, and therefore argued in favour of the continuity with the pre-Lisbon case law of the ECJ on the general principles. Although the ECJ has not provided any clear definition of "scope of Union law" in that case law, this unequivocally also covers cases beyond the strict technical notion of implementation. Finally, there was also an intermediate reading, which pointed at the existence of an EU law obligation as the criterion to determine whether a case falls within the scope of the Charter. These reading encompassed some cases beyond the category of technical implementation, without, however, endorsing in full the pre-Lisbon case law of the ECJ. For an overview and bibliographic references, see: General Direction of Research and Documentation of the CJEU, *Réflets n.1/2013 Édition spéciale Charte des droits fondamentaux de l'Union européenne*, available here (in French). An English translation is provided by the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union (see here).

> to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.
>
> (…)
>
> 21 Since the fundamental rights guaranteed by the Charter must therefore 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.
>
> 22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction.
>
> 23 These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties".

At first sight, this judgment does not add much in terms of clarity: "scope of Union law" is also judicial formula, which, as such, cannot provide real assistance when determining whether the Charter is applicable to the case at hand. Yet, although the pre-Lisbon case law does not offer a veritable definition of "scope of Union law, one can infer the essential meaning of it. **In a nutshell: in order to trigger the application of EU fundamental rights, it is not sufficient to claim that the national measure involved infringes one or more of them. There must be a rule of EU primary or secondary law, other than the fundamental right allegedly violated, that is applicable to the main dispute.** If such a different rule exists, the case falls within the scope of EU fundamental rights and the national measure in question can be checked against them.

Writing in an academic capacity, ECJ's Judge Allan Rosas explained the meaning of Article 51(1) of the Charter, in light of *Åkeberg Fransson*, as follows:

> "The Charter is only applicable if the case concerns not only a Charter provision but also another norm of Union law. There must be a provision or a principle of Union primary or secondary law that is directly relevant to the case. This, in fact, is the first conclusion to draw: the problem does not primarily concern the applicability of the Charter in its own right but rather the relevance of other Union law norms".[17]

The need for a different EU rule applicable to the case ("trigger rule") is a corollary of the principle of conferral. By their very nature, fundamental rights are cross-sectorial: issues concerning their protection can arise in any substantive area of law; thus, if the Charter's application could be triggered by simply claiming that a national act impinges on it, the principal of conferral would be put at risk. In the ECJ's own words, "[where] a legal situation does not fall within the scope of Union law, the

[17] See A. Rosas, *When is the EU Charter of Fundamental Rights applicable at the national level?*, 2012, available here.

Court has no jurisdiction to rule on it and any Charter provisions relied upon cannot, of themselves, form the basis for such jurisdiction".[18]

In *Siragusa*, a judgment delivered one year after *Åkeberg Fransson*, the ECJ made a precision to the interpretation provided in the latter judgment, pointing out that :

> "24. (…) the concept of 'implementing Union law', as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.
>
> 25. In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it".

The reference to "a certain degree of connection" between the situation in the main proceedings and EU law deserves some attention. The national court doubted the compatibility of an order requiring Mr Siragusa to dismantle work carried out in breach of a domestic law protecting the cultural heritage and the landscape with Article 17 of the Charter, on the right to property. As triggers for the application of the Charter, the referring judge mentioned various provisions of the Treaties and EU acts on environmental matters. However, none of them specifically regulated the subject matter of the case and the Court answered that the case did not fall within the scope of Union law and hence the Charter was inapplicable. Two main inferences can be drawn from this conclusion.

Firstly, a provision that confers on the Union the power to adopt legislation on a subject matter does not trigger, as such, the application of the Charter to a case concerning that same subject matter. **The application of the Charter requires that a(n other) rule of EU law is applicable to the situation at issue.**

Secondly, an EU act can trigger the protection of the Charter only if it lays down rules governing the *specific* situation at issue in the main proceedings. In *Siragusa* the Court made this point clear by quoting its *pre*-Lisbon judgment *Maurin*.[19] Mr Maurin was charged with selling food products after the expiry of their used-by date. The national court doubted the compatibility of the domestic procedure for establishing whether a falsification or fraud relating to products had been committed with the general principles of Union law concerning fair trial rights. The Court observed that, at the time of the facts, Community law prohibited trade in food products which did not comply with the labeling requirements laid down by the EC legislator.[20] Nevertheless, the case concerned a different situation, notably the selling of foods that complied with labeling requirements, but were sold after their used-by date.[21] The Court therefore regarded the case as falling outside the scope of Union law.

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[18] See, *inter alia*, order of 12 July 2012, Case C-466/11 *Currà and Others*, here, § 26.

[19] Judgment of 13 June 1996, case C-144/95, *Maurin*, here.

[20] Notably, by Council Directive 79/112/EEC, on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, O.J. 1979 *L* 33, 1.

[21] *Ibid.*, § 11.

To sum up, the question that a national judge shall address in order to understand whether s/he is under a legal obligation to solve the case within the framework of the Charter is: "**is there an EU law provision, other than a Charter's provision, that lays down a rule which is applicable to the situation in the main proceedings?**". Accordingly, the following section provides an overview of the situations where, according to the current state of evolution of the ECJ's case law, such a qualified connection between EU law and the case before the national court exists.

3.1 A taxonomy - based on the ECJ's case law - of national cases to which the Charter applies

The following scenarios exemplify cases that satisfy the conditions for the application of the Charter: a national provision appears to impinge upon a fundamental right granted by the Charter *and* a EU law provision other than the Charter is applicable. **This taxonomy is not exhaustive:** it is based on the current state of evolution of the case law of the ECJ, which is in a state of progressive development. Put before new scenarios, the Court of Justice may identify new connections that can validly trigger the application of the Charter. In a case involving a different connection, a national judge doubting on its validity as a trigger may consider sending a reference for preliminary ruling (on the interpretation of Article 51, para. 1 of the Charter) to the ECJ.[22] It is important to remember that provisions that (only) confer competences on the Union cannot trigger the application of the Charter.

The case falls within the scope of application the Charter when it concerns:

A) national measures that give effect to an obligation contained in a EU law provision addressed primarily to the domestic legislature;

B) national procedural provisions that allow for the legal protection, before domestic courts, of the rights conferred on individuals by Union law

C) the application of EU law rules, or of the national provisions giving them effect, by a national court or a national administrative authority;

D) national measures derogating from Union law rules, based on the grounds for derogation explicitly provided by EU primary or secondary law, or based on the ECJ's case law on mandatory requirements;

E) national provisions that clarify notions contained in EU law measures

After examining these categories and the relevant ECJ's case law, an additional scenario will be illustrated, the "*Kücükdeveci* scenario": so far, the ECJ has upheld in a limited number of cases but its potential is significant. Finally, the situation where national law contains a reference to Union law will be considered.

A) ***National measures that give effect to obligations contained in EU law provisions primarily addressed to the domestic legislature***

Both EU primary and secondary law provisions can entail obligations addressed to the Member States' legislators. Conceptually, the obligation laid by Article 19(1), second sentence, TEU, fits

[22] However, a national court of last instance would be under a *duty* to refer an interpretative question under Article 267 TFEU.

within this category: the Member States are requested to "provide remedies sufficient to ensure the effective legal protection in the fields covered by Union law". In light of its practical importance and cross-sectoral nature, this obligation is dealt with in a specific heading under point B below). As regards secondary law, any EU legally binding act (regulations, directives, decisions and even pre-Lisbon framework decisions) can be the source of the said obligations.
Importantly, it is not relevant whether the domestic legislator adopted the measures in order to give effect to a EU law obligation, or, rather, it acted on a purely domestic initiative (though the measures, in substance, give effect to the EU law obligation). This implies that even national measures adopted prior to the EU law obligation that they implement fall within the scope of the Charter. Otherwise, different national choices as regards the implementation of EU law obligations (adoption of an *ad hoc* implementing legislation vs. conformity with EU law ensured by pre-existing, purely domestic legislation) may create disparities as regards the application of the Charter to its beneficiaries. What matters is whether the EU law rule that eventually triggers the application of the Charter is applicable to the situation in the main proceedings (*ratione materiae*, *personae* and *temporis*).
Similarly, the degree of discretion left to Member States as regards the modalities of implementation of EU law obligations is not relevant. If the EU law provision at issue does not provide for any discretion, there may be a problem of compatibility of the EU law rule itself with the Charter.[23] By contrast, when some discretion exists, Member States are under a duty to give effect to the relevant EU law obligation in a way that both achieves the latter's purpose and is coherent with EU fundamental rights. Some EU law rules lay down very specific obligations, which leave only a limited degree of discretion to the Member States; other obligations, by contrast, have a more open formulation and leave a broad discretion to the Member States. An important sub-set of this category is constituted by national measures that give effect to the obligation to provide for effective, proportionate and dissuasive sanctions or penalties for the infringement of the national rules implementing a Directive.

Obligation stemming from a EU primary law provision

Casesheet 1.1 Case C-650/13 *Delvigne*

National measures concerned: Articles 28 and 34 of the French Criminal Code of 1810 (repealed in 1992), according to which a sentence for a serious criminal offence entailed the loss of civic rights, amongst which, notably, the right to vote at elections.
EU law trigger rule(s): the obligation of the Member States to ensure that the election of the European Parliament is by direct universal suffrage and free and secret, as laid down by Article 14(3) 4 TEU and Articles 1(3) and 8 of the Act of 1976 concerning the election of the members to the European Parliament (which has primary law *status*).
The case. Mr Delvigne, a French citizen, after being convicted of a serious crime, was given a custodial sentence of 12 years by a final judgment delivered on March 1988. At the time of the facts, the French Criminal Code provided for the loss of civic rights by operation of law. In 1992, a new law repealed the Code, with effect from 1 March 1994. Under the new disenfranchisement

[23] In case of EU secondary law provisions, when there is no space for conforming interpretation with the Charter, a national court should raise a preliminary question to the ECJ, asking to check the validity of the said provision. By contrast, when the EU law rule is of primary status, there is no such possibility and interpretation in conformity of the Charter is the only option available.

regime, the total or partial deprivation of civic rights must be the subject of a Court ruling and may not exceed 10 years in case of the conviction for a serious offence. However, the law repealing the old Code included a provision that confirmed the loss of civic rights resulting, by operation of law, from a criminal conviction by a final judgment delivered before the entry into force of the same law. As a consequence, the more favourable regime introduced by the new Code could not apply retroactively to Mr Delvigne.

In 2012, the man challenged before a national court (the *Tribunal d'instance* of Bordeaux) the decision of the competent administrative commission that had ordered his removal from the electoral roll of the municipality where he resided. The national court doubted the compatibility with the Charter of the national provisions at issue (i.e., those of the old Code that provided for the automatic loss of civic rights for an indefinite duration, and the provision of the law repealing it that saved these provisions' effects as regarded judgments that had become final). In particular, the national court referred to Article 39(1) of the Charter on the right of EU citizens to vote at elections of the European Parliament, and Article 49 of the Charter, insofar as this affirms the principle of retroactivity of the *lex poenalis mitior*.

At the outset, the Court of Justice recalled that, according to Article 8 of the Act of 1976, "subject to the provisions of the same Act, the electoral procedure for the European Parliament is to be governed in each Member State by its national provisions" (§ 29). It then went on by stating that "the Member States are bound, when exercising that competence, by the obligation set out in Articles 1(3) and 8 of the Act of 1976, read in conjunction with Article 14(3) TEU, to ensure that the election of Member of the European Parliament is by direct universal suffrage and free and secret. Consequently, a Member State which, in implementing [this obligation], makes provision in its national legislation for those entitled to vote in elections to the European Parliament to exclude Union citizens who (…) were convicted of a criminal offence and whose conviction became final before 1 March 1994, must be considered to be implementing EU law within the meaning of Article 51(1) of the Charter" (§§ 32 and 33). The Court therefore checked the contested national provisions against Articles 39(1) and 49 of the Charter, and ultimately upheld their compatibility with these latter.

Obligation to give effect to a Directive

Casesheet 1.2 - Case C-528/13 *Léger*

EU law trigger rule: Commission Directive 2004/33/EC, implementing Directive 2002/98/EC as regards certain technical requirements for blood and blood components

National measures concerned: French legislation enacted in order to give effect to Directive 2004/33/EC (Decree of 18 January 2009 laying down the selection criteria for blood donors).

The case. Mr Léger was not allowed to give blood because he had had sexual relations with another man. This denial was based on Decree of 18 January 2009 laying down the selection criteria for blood donors, which provides for a permanent ban on blood donation for men who have had sexual relations with other men. Mr Léger brought proceedings before the *Tribunal administratif* of Strasbourg, which, doubting the compatibility of the said provision with Directive 2004/33/EC, decided to refer a preliminary question to the Court of Justice.

The ECJ took the move from point 2.1 of Annex III of the Directive, in order to establish whether it prevents Member States from providing for a permanent ban on blood donation for men who

have had sexual relations with other men. This provision lays down permanent deferral criteria concerning: persons who are carriers of certain diseases, including 'HIV 1/2', or who have certain malignant diseases; intravenous or intramuscular drug users; xenotransplant recipients; and "persons whose sexual behaviour puts them at high risk of acquiring severe infectious diseases that can be transmitted by blood".

The Court recalled that, when they implement EU rules, the Member States must make sure that they do not rely on an interpretation of secondary legislation which would be in conflict with the requirements flowing from the protection of EU fundamental rights (§41). It then stated that the national court was under a duty to consider whether the French legislature "could reasonably consider that, in the case of a man who has had sexual relations with another man, there is in France a high risk of acquiring severe infectious diseases that can be transmitted by blood" (§ 45). If this was the case, the national court should establish the compatibility of the national provision with the Charter, notably its Article 21(1), which refers to sexual orientation amongst the grounds on which discrimination is prohibited. The Court recalled that, according to Article 51(1) of the Charter, the latter applies to the Member States only "when they are implementing Union law" (§ 46). It then observed that "[in] the present case, the Decree of 12 January 2009, which expressly refers to Directive 2004/33 in its preamble, implements EU law" (§ 47). Thus, the Court provided the national courts with the necessary guidance for assessing, in case, the compatibility of the contested national provision with Article 51(1) of the Charter.

The French legislation concerned may discriminate against homosexuals on grounds of sexual orientation, insofar as "[it] determines the deferral from blood donation of male donors who, on account of the fact that they have had homosexual sexual relations, are treated less favourably than male heterosexuals persons" (§§ 49 and 50). The Court recalled Article 52(1) of the Charter – laying down the conditions for limitations to the fundamental rights granted by the Charter – and provided indications to the national court regarding the assessment of the proportionality of the limitation to the principle of non-discrimination introduced by the legislation. The Court concluded that the national court could hold the legislation compatible with the Directive, interpreted in light of the Charter, if "on the basis of current medical, scientific and epidemiological knowledge and data, it was established that [the sexual behaviour concerned put] those persons at a high risk of acquiring severe infectious diseases and that, with due regard to proportionality, there [were] no effective techniques for detecting those infectious diseases or, in the absence of such techniques, any less onerous methods than such a counter indication for ensuring a high level of health protection of the recipients" (§ 69).

Casesheet 1.3 - Case C-617/10 *Åkeberg Fransson*

EU law trigger rule: Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("VAT Directive"), and Article 325 TFEU.

National measures concerned: Swedish legislation adopted before the accession of Sweden to the Union, which gave effect - in substance, though not formally - to an obligation subsequently introduced by the VAT Directive.

The case. A self-employed fisherman (Mr Åkerberg Fransson) provided false information in his tax returns; as a consequence, he had paid a lower rate of VAT than was due. Under the Swedish

legal order, such a misconduct may give rise to a criminal prosecution *and* administrative proceedings, so that the wrongdoer may be subject to both a criminal penalty and a tax surcharge. Since the decision to impose tax surcharges on Mr Fransson had become definitive, the referring judge (a Swedish criminal court, the *Haparanda tingsrätt*), doubted whether the principle of *ne bis in idem*, as granted by Article 50 CFR, required it to dismiss the criminal charge, by setting aside the relevant national provision.

The Swedish legislation in question was not specifically meant to give effect to Union law; in fact, it had been adopted before the date Sweden became a Member of the EU. The ECJ nevertheless considered that this legislation fell within the scope of the EU Charter because "the tax penalties and criminal proceedings to which Mr Fransson [had been or was] subject [were] connected in part to breaches of his obligations to declare VAT" (§ 24). The Court referred to Articles 2, 250(1) and 273 of Directive 2006/112/EC and on Article 4(3) TEU, from which it inferred that "every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion" (§ 25).[24]

In the Court's view, the fact that the system of the Union's own resources *inter alia* includes revenue from the application of a uniform rate to the harmonised VAT assessment bases implies that there exists "a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget" (§ 26). The Court explained that, "[g]iven that the European Union's own resources include (...) revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to European Union rules, *there is thus a direct link* between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, *since any lacuna in the collection of the first potentially causes a reduction in the second*" (*ibid.*). In order to stress the connection between the contested legislation and Union law, the Court referred also to Article 325 TFEU, which requires the Union and its Member States to counter fraud and any other illegal activities affecting the financial interests of the Union through effective deterrent measures. The Court pointed to the fact that, under this provision, the Member States are obliged "to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests" (*ibid.*). This precision is functional to demonstrate the existence of an *actual connection* between the EU legal order and the specific provision concerned, as the Swedish rule at stake referred to all taxes, and not specifically to VAT.

Obligation to give effect to the obligation to provide for effective sanctions, laid down by a Directive

[24] Article 4(3) TEU imposes on the Member States a general duty of sincere cooperation with the Union, as regards the fulfilment of the obligations arising from the acts of the institutions. Article 2 of the VAT Directive lists the transactions subject to VAT, whereas Article 250(1) stipulates that "[e]very taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable". Article 273 stipulates that Member States "may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion".

EU law trigger rule: Council Directive 89/666/EEC concerning the disclosure of accounting data by branches of companies established in another Member State (the 'Eleventh Directive')
National measures concerned: The provisions of the Austrian Commercial Code on the obligation to submit annual accounts for branches of foreign companies and the correlative penalties for failure to fulfil the obligation, implementing, in essence, the Eleventh Directive
The case. Texdata, a limited German company, pursued its activity in Austria through a branch registered with the Austrian commercial register since 2008. In 2011, the Austrian authorities issued two orders sanctioning Texdata for failure to timely submit the annual account data for two financial years, in line with the provisions of the Austrian Commercial Code.
The sanctioning system established under paragraph 283 of the Austrian Commercial Code, provided for one special and one ordinary sanctioning procedure. Should a company fail to comply with the nine-months time limit for submitting the accounting data, pursuant to the special procedure, a penalty order was issued, with no prior notification, no obligation to state reasons and no opportunity for the company to state views. If the sanctioned company submitted a reasoned objection to the penalty order, within a 14-days period, the latter were immediately rendered inoperable and the ordinary procedure was launched allowing both parties concerned to make their views known.
As the national judge doubted the compatibility of the Austrian sanctioning system with the right to effective judicial protection and the right of defence as guaranteed by Article 47 of the Charter, it referred a question for a preliminary ruling to the ECJ.
In analysing the question, the ECJ first established that Article 283 of the Austrian Commercial Code fell within the scope of EU law for the purpose of Article 51(1) of the Charter, as the first put in place a sanctioning system to guarantee the respect of an EU law obligation enshrined under the provisions of the Eleventh Directive (§ 75).
Regarding the substance of the Charter's rights concerned, the ECJ appreciated that the sanctioning system was compatible with the right to effective judicial protection and the right of defence as neither the 14-day time-limit for objections nor the prohibition to state views in the special procedure went beyond a necessary and proportionate limitation of the right (§§81, 85-88).

B) ***National procedural provisions that allow for the legal protection, before domestic courts, of the rights conferred on individuals by Union law***

According to an established case law of the ECJ, "in the absence of [EU law] rules governing the matter, it is for the domestic legal system of each member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU law], provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)".[25]
The Lisbon Treaty codified this case law: Article 19(1), second sentence, TEU, states that the "Member States shall provide remedies sufficient to ensure the effective legal protection in the fields covered by Union law". **Accordingly, national procedural provisions that give effect to the EU**

[25] *Steffensen*, § 60.

primary law obligation laid down by Article 19(1), second sentence, TEU, fall within the scope of Union law (hence, of the Charter), regardless of whether those provisions were adopted with the specific purpose to comply with that EU law obligation.

Casesheet 1.5 - Case C-279/09 *DEB*

EU law trigger: the principle of the responsibility of the Member States for breaches of EU law, whereby an individual has, on certain conditions, the right to obtain compensation of the damages caused by such a breach.[26]

National measures concerned: provisions of the German Code of civil provisions which, according to the interpretation provided by the *Bundesverfassungsgericht* (German Constitutional Court), do not allow access to legal aid for legal persons.

The case. The applicant, a company operating in the natural gas market, claimed to have suffered damages because of the delay in the transposition of two directives on the supply of natural gas into the German legal order. It therefore sought to sue Germany in accordance with the *Francovich*-jurisprudence.[27] As it lacked any income or assets, DEB could not afford the payment of litigation costs in advance as required by the relevant domestic legislation; for the same reason, it could not pay a lawyer, whose presence is compulsory under German law for the kind of action in question. In light of the interpretation of the relevant domestic provisions flowing from the case law of the *Bundesverfassungsgericht*, DEB requests for legal aid was refused. The company appealed the decision and, while the court of first instance rejected the claim, the *Oberlandesgericht* (Higher Regional Court) decided to submit a preliminary question concerning, substantially, the compatibility of the relevant domestic rules of civil procedure with the EU principle of effectiveness. In its order for reference, the national judge made no reference to the Charter.[28]

After noting that the case concerned "the principle of effective judicial protection[, which] is a general principle of EU law", the ECJ immediately pointed out that, "[a]s regards fundamental rights, it is important, since the entry into force of the Lisbon Treaty, to take account of the Charter, which has "the same legal value as the Treaties" (§ 30).[29] It then recalled that "Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States when

[26] Since its judgment in joined Cases C-6/90 and C-9/90, *Francovich*, the Court has held that the Member States are obliged to make good damages caused to individuals by breaches of (then) Community law for which they can be held responsible, provided that certain conditions are satisfied. The action for damages shall be brought before the competent national judges of the Member State that failed to transpose or did not properly transpose the directive. As regards the procedural rules regulating the action, the Court affirmed that "in the absence of Community [now, Union] legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community [now, Union] law (...) [, which nevertheless] must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation", *ibid*., §§ 42 and 43.

[27] See the previous footnote.

[28] The national provisions in question were, notably, Paragraph 12(1) of the *Gerichtskostengesetz* (Law on Court Costs), and Paragraphs 78(1), 114, 116, 122(1) and 123 of the *Zivilprozessordnung* (Code of Civil Procedure).

[29] ECJ, *DEB*, cit., para. 30.

they are implementing EU law" (*ibid*.). Accordingly, the Court decided "to recast the question referred so that it relates to the interpretation of the principle of effective judicial protection as enshrined in Article 47 [CFR]".[30] By doing so, the ECJ implicitly affirmed that national provisions that are *functional* to the exercise of actions aimed at ensuring the effective enjoyment of (self-standing) rights granted by Union law - such as, for instance, the right to have Member States make good the damages ensuing from breaches of Union law – shall comply with EU fundamental rights.

C) ***Application of EU law rules, or of the national provisions giving them effect, by a national court or a national administrative authority***

The duty of the Member States to give effect to Union law in compliance with EU fundamental rights is not limited to the domestic legislature. It targets also the national authorities entrusted with the application of the law within the Member States. Therefore, when they apply (or interpret) EU law rules, or the national provisions giving them effect, national courts and administrative authorities shall apply (or interpret) those provisions, so far as possible, in compliance with EU fundamental rights.

For instance, in *Stefan*,[31] a Member State had not transposed in its legislation Article 4(2), point c) of the Directive 2003/4/EC, on access to environmental information, which authorises to provide for an exception to the obligation to disclose environmental information in order to respect the right to a fair trial. The ECJ nonetheless argued that "Member States are, in any event, required to use the margin of appreciation conferred on them by point c) of Article 4(2) in a manner which is consistent with the requirements flowing from Article [47] of the Charter" (§ 34). It then added that, "since all authorities of the Member States, including the administrative and judicial bodies, must ensure the observance of the rules of EU law within their respective spheres of competence, they are, in a case such as that here at issue in the main proceedings, required, if the conditions are fulfilled for application of the second paragraph of Article 47 of the Charter, to ensure compliance with the fundamental right guaranteed by that article" (§ 35). Accordingly, the Court went on, "an interpretation to the effect that Directive 2003/4 authorises Member States to adopt measures that are incompatible with the second paragraph of Article 47 of the Charter or with Article 6 TEU cannot be accepted" (§ 36).

D) ***National measures derogating from Union law rules, based on the grounds for derogation explicitly provided by EU primary or secondary law, or based on the ECJ's case law on mandatory requirements***

Casesheet 1.6 - Case C-208/09 *Sayn-Wittgenstein*

EU law trigger rule: Article 21(1) TFEU on the free movement of EU citizens within the Union
National measure concerned: an Austrian law, with constitutional status, precluding the use of titles of nobility by Austrian citizens.
The case. In 2003, the *Verfassungsgerichtshof* (the Constitutional Court of Austria) interpreted the Austrian Law on the abolition of nobility titles (endowed with constitutional status) as precluding the use of these titles – including those of foreign origin – by Austrian citizens.[32] Mrs Ilonka Fürstin von Sayn-Wittgenstein, an Austrian national who lived in Germany, was informed that her surname

[30] *Ibid.*, para. 33.
[31] Court of Justice, judgment of 8 May 2014, case C-329/13, *Stefan*.
[32] Verfassungsgerichtshof, Geschäftszahl B557/03, Sammlungsnummer 17060.

was going to be changed to 'Sayn-Wittgenstein'. 'Fürstin [Princess] von Sayn-Wittgenstein' was the surname with which she had been registered in the Austrian register of civil status after her adoption by a German national. The woman brought an appeal before the *Verwalunggsgerichtshof* (Administrative Court), which referred a preliminary question to the ECJ, essentially asking whether the prohibition against holding titles of nobility, including those of foreign origin, could be qualified as a derogation from Article 21(1) TFEU, justified by reasons of public policy.

The Court observed that the applicant could validly rely on Article 21 TFEU, being "a national of a Member State [who], in her capacity as citizen of the Union, has made use of the freedom to move to and reside in another Member State" (§ 39). The Court pointed out 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] and in Article 8 of the [ECHR]".[33] It then admitted that the discrepancy in surnames could hinder the exercise of the right to free movement, by obliging the woman continuously to dispel doubts surrounding her identity.[34] However, the Court considered that the objective pursued by the contested national law – *i.e.*, implementing the principle of equal treatment as enshrined in the Austrian Constitution – was compatible with Union law, stressing that that principle is enshrined also in Article 20 CFR (§ 89). Confirming its case law,[35] the Court stated that "the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State" (§ 91).[36] After noting that, "in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic", the Court concluded that the prohibition did not appear disproportionate with respect to its stated objective (§§ 92 and 93).

Casesheet 1.7- Case C-411/10 *NS*

EU law trigger rule: Article 3(2) of Regulation (EC) n. 343/2003 (the Dublin II Regulation), as interpreted by the Court of Justice.

National measure concerned: application of the Dublin Regulation by the competent domestic authority (notably, a decision on whether to transfer the asylum seeker to the Member State competent to examine its request according to the ordinary criteria provided by the Regulation, or to assume the responsibility to examine the application).

The case. Mr N.S., an Afghan national, arrived in the UK after travelling through Greece, and applied for asylum. In accordance with Article 17 of Regulation (EC) n. 343/2003 – which lays down 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 (so-called 'Dublin II' Regulation) –,[37] the Secretary of State for the Home Department requested Greece – the Member State of first illegal entry – to take charge of Mr N.S. in order to examine his asylum

[33] *Ibid*., para. 50.

[34] *Ibid.*, paragraphs 66 and 70.

[35] Case C-36/02, *Omega*, §§ 37 and 38.

[36] *Ibid*., para. 91, referring to.

[37] O.J. 2003 *L* 50, 1.

request.[38] Mr N.S. opposed his transfer to Greece by alleging that, owing to the dramatic condition of the Greek asylum system, there was a serious risk that his fundamental rights, as granted by, *inter alia*, Articles 1, 4, 18, 19(2) and 47 CFR, would have been violated. He therefore argued that the UK should have examined his application by relying on Article 3(2) of the Dublin II Regulation, which allows the Member State where the application is lodged to assume the responsibility of examining it, even though another Member State would be competent. According to Article 3(1) of this Regulation, a request for asylum submitted within the territory of the Union must be examined by a single Member State, which the Member State where the request was lodged must identify in accordance with the criteria set out by the Regulation. Article 3(2) then adds that, "[b]y way of derogation (...), each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in th[e] Regulation". Whilst the judge of first instance dismissed Mr N.S.' request, stating that the Dublin II mechanism is based on the presumption that all Member States are safe countries from the point of view of fundamental rights' compliance,[39] the appeal court decided to issue a reference for preliminary ruling.[40] One of the questions raised was whether the Member States are bound to respect EU fundamental rights when they decide to assume the responsibility of an asylum request under Article 3(2) of the Regulation.

The ECJ dismissed the argument advanced by the British Government, according to which Article 3(2) of the Regulation should be regarded as a genuine 'sovereignty clause', aimed at safeguarding a prerogative that originally belonged to the Member States. Had the Court accepted this argument, it should have dismissed its fundamental rights jurisdiction, in favour of the (exclusive) applicability of *national* and *international* human rights standards. By contrast, the ECJ affirmed its jurisdiction on the decision adopted by Member States under Article 3(2) of the Regulation: it regarded that provision as "grant[ing] Member States a discretionary power which forms an integral part of the Common European Asylum System", being one of "the mechanisms for determining the Member State responsible for an asylum application" (§§ 65 and 68). In the Court's view, this is confirmed by the fact that the consequences of these decisions are governed by the Regulation itself (§ 67). On these premises, the Court concluded that "a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter" (§ 68).

E) ***National provisions that clarify notions contained in EU law measures***

Union acts sometimes provide the definition of specific notions and terms used therein. This means that the notion or term has an autonomous and uniform meaning under Union law; thus, the ECJ is

[38] Cf. Article 10 of the Regulation, cit. According to its Article 17(1), "[w]here a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within three months of the date on which the application was lodged within the meaning of Article 4(2), call upon the other Member State to take charge of the applicant".

[39] *R. (on the application of S) v. Secretary of State for the Home Department*, [2010] EWHC 705 (Admin).

[40] *R. (on the application of NS) v. Secretary of State for the Home Department* (Reference to ECJ) [2010] EWCA Civ 990.

competent to clarify any doubts in this respect, providing an interpretation in compliance with the Charter). In other instances, by contrast, the EU legislature makes an express reference to national law (i.e. the relevant law of each Member State), as regards the definition of the notion or term concerned. As the ECJ explained, "such a reference means that the European Union legislature wished to respect the differences between the Member States concerning the meaning and exact scope of the concepts in question".[41] However, the lack of an autonomous definition under Union law does not mean that the Member States may undermine the effective achievement of the objectives of the Union act concerned, nor their duty to give effect to this act in compliance with EU fundamental rights. Therefore, the national measures that specify the abovementioned notions fall within the scope of the Charter: their interpretation must therefore comply with it.

Casesheet 1.8 - Case C-571/10 *Kamberaj*

EU law provision: Article 11(1)(d), of Directive 2003/109/EC on the status of third-country nationals who are long-term residents, according to which "Long-term residents shall enjoy equal treatment as regards (…) social security, social assistance and social protection as defined by national law".

National measure concerned: an Italian legislation (more precisely, a Provincial law, adopted, notably, by the autonomous Province of Bolzano) which provides, with regard to the grant of a house benefit, different treatment for long-term third-country nationals compared to that accorded to citizens of the Union (whether Italian or otherwise) residing in the territory of the Autonomous Province of Bolzano.

The case: The Provincial law in question allocated the funds for housing benefit based on a weighted average determined with reference to the numerical size and needs of each category. However, whereas for Italian citizens and citizens of the Union the two factors taken into account when determining the weighted average are subject to the same multiplier, that is 1, for third-country nationals the element relating to their numerical size was subject to a multiplier of 5, whereas their needs were subject to a multiplier of 1. The Tribunal of Bolzano doubted the compatibility of the Provincial law with the principle of non-discrimination between third-country nationals who are long-term residents and Union citizens as established by Directive 2003/109/EC. After finding that the abovementioned mechanism for the allocation of funds created a difference in treatment between the two categories of treatment, the Court considered whether it fell within the scope of Article 11(1)(d), which concerns discrimination with respect to "social security, social assistance and social protection as defined by national law". The Court acknowledged that "[s]uch a reference [to national law] means that the European Union legislature wished to respect the differences between the Member States concerning the meaning and exact scope of the concepts in question". However, it also observed that it "do[es] not mean that the Member States may undermine the effectiveness of Directive 2003/109 when applying the principle of equal treatment provided for in that provision".[42] After recalling that, according to Article 51(1) of the Charter, the Member States must respect the fundamental rights granted by the Charter "when they are implementing Union law", the Court relied on Article 34(3) of the Charter. According to this provision, "the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack

[41] *Kamberaj*, § 77.

[42] *Kamberaj*, §§ 77-78.

sufficient resources". The Court then affirmed that national measures of social security and assistance that fulfil the purpose referred to by Article 34(3) CFR must be regarded as falling within the scope of the obligation to equal treatment laid down by the Directive.[43] Thus, it was for the national court to determine whether the Provincial law met that condition. In case it did, the Tribunal of Bolzano should hold that the Provincial law was incompatible to the principle of non-discrimination as implemented by the Directive.

F) ***Two more situations worth noting …***

F.1 The "*Kücükdeveci* scenario"

In a case decided shortly after the entry into force of the Lisbon Treaty, *Kücükdeveci*,[44] the ECJ applied the Charter in a case demonstrating a different type of connection between the Charter and EU law than those examined under points A) to E) above.

The Court relied on the Charter (notably, its Article 21(1) on non-discrimination) in a case concerning a national measure, adopted independently from Union law, that governed the same subject matter subsequently covered by a EU Directive, laying down a rule not compatible with this latter. The Court observed that the allegedly discriminatory conduct had occurred after the expiry of the period prescribed for the transposition of the Directive by the Member States. It then affirmed that, "[o]n that date, that directive had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal".[45] One may therefore infer that, after the expiry of its transposition period, the provisions of a Directive act as trigger for the application of the Charter in any case that falls within the scope *ratione temporis* of the Directive and that involves a national measure (or provisions) dealing precisely with the same subject governed by the Directive.

One can easily see how far-reaching this form of connection is. However, the fact that there is not yet an established case law of the Court requires some caution[46]. .

F.2 ***Reference to EU law made by a national provision that lacks any other connection with EU law***

The national legislature sometimes decides to include a reference to certain EU (primary or secondary) law provision in a purely domestic measure. According to the ECJ, this Court "has

[43] *Ibid.*, § 92.

[44] Case C-555/07 of 19 January 2010.

[45] *Kücükdeveci*, § 25.

[46] See, however, judgment of 26 September 2013, case C-476/11, *HK Danmark v. Experian*. As regards discrimination cases, a specific limit can also be inferred from the subsequent *Kaltoft* judgment. The anti-discrimination Directives adopted by the EU legislator cover a limited set of grounds of non-discrimination. In one of its preliminary questions, the national court asked whether Union law must be interpreted as laying down a general principle of non-discrimination on grounds of obesity as regards employment and non-discrimination. After stating that neither the Treaties nor EU secondary law would support a positive answer, the Court recalled its case law whereby "the scope of [anti-discrimination Directives] should not be extended by analogy beyond the discrimination based on the grounds listed [therein]".[46] This suggests that, in a case concerning a national measure that governs the same subject matter covered by an anti-discrimination Directive, and that falls within the latter's temporal scope of application, one cannot rely on Article 21 of the Charter to challenge those measures on grounds of non-discrimination not explicitly contained in the Directive. To put it differently, these grounds are an integral part of the material scope of the Directive

jurisdiction to give preliminary rulings on questions concerning provisions of EU law in situations in which the facts of the case in the main proceedings fell beyond the field of application of EU law but in which those provisions of EU law had been rendered applicable by domestic law due to a *renvoi* made by that law to the content of those provisions".[47] However, the *renvoi* must be fashioned in way such as to make the EU law provision concerned applicable "directly and unconditionally"[48].
When these conditions are satisfied, a national court may ask the ECJ to interpret the EU law provisions referred in light of the Charter. In this scenario, the Charter can have an impact on national legislation that, as such, does not fall within the scope of Union law.

3.2 The scope of application of the Charter as a matter of law *and facts*

The previous taxonomy shows that some national provisions have a structural link with EU law, because the national legislator adopted them in order to give effect to specific EU law obligations. These provisions fall within the scope of Union law (hence, of the Charter) *de plano*. By contrast, when a national provision does not have such a structural link with EU law, the facts of the case play a decisive role as regards the issue of the Charter's application.

Consider the following two situations, **A** and **B**, which are inspired to two real cases decided by the Court of Justice, respectively Case C-279/09 *DEB* and Case C-258/13 *Sociedade Agrícola*.
Situation A: a German company, working in the natural gas sector, seeks to bring an action to establish Germany's liability under EU law. Indeed, following Germany's failure to transpose two EU Directives concerning the marketing of natural gas within the fixed deadline, the company suffered major economic losses. Owing to the lack of any income or assets, the company cannot pay a lawyer and therefore seeks legal aid. Nevertheless, according to the German rules, only natural persons can be granted legal aid. The company challenges these rules before the domestic court.

Situation B: a Portuguese commercial company ,working in the trading of agricultural products, wants to bring a legal claim against another commercial company established in Portugal, in order to recover a credit for a service provided in Portugal. Nevertheless, the first company lacks any income and assets and cannot pay a lawyer. It makes an application for legal aid but the request is rejected because according to the Portuguese rules only natural persons can be granted legal aid. The company challenges these rules before the domestic court.

Both the German and the Portuguese courts before which the two companies brought proceedings have doubts regarding the compatibility of the relevant national rules with Article 47(3) of the Charter on the right to legal aid. There is no EU legislation concerning access to legal aid before the Member States' courts. Thus, there is also no structural link between the national provisions concerned and EU law. Both courts decide to refer a preliminary question to the ECJ, which holds the Charter applicable in case A, whereas it declares its manifest lack of jurisdiction in case B. Why?

[47] ECJ, judgment of 21 December 2011, Case C-282/10, *Cicala*, § 17.
[48] *Ibid.*, § 19. The ECJ referred to previous cases along the same lines, which is useful when considering whether the *renvoi* made by the national law satisfies the *test* established by the Court.

The legal action that the German company wants to bring against Germany aims at enforcing a right granted by EU law: the right to have Member States compensate for damages caused by violations of their EU law obligations (such as the obligation to transpose an EU Directive within the fixed deadline). Thus, there is something more than the "mere" claim that a provision of the Charter is violated.

By contrast, there is no EU law rule other than the provision of the Charter that is allegedly violated that applies in case B. The facts of the case all took place within the territory of a single Member State; thus, the Treaty provisions on the free movement of services do not apply. Moreover, the legal action that the Portuguese company wanted to bring does not concern a situation governed by EU law. However, if the facts of the case were different (for instance, the provisions on the freedom to provide services were applicable), the Charter could apply.

The main conclusion that can be inferred from this example is that, unless the national provision has a structural link with EU law (ie, it was adopted by the national legislature in order to give effect to EU law), the question of whether that provision falls within this scope of the Charter cannot be answered once and for all. Rather, it is strictly dependent on the facts of the case; accordingly, it may vary from case to case.

4. The relevance of the ECHR and of the national standards of protection within the scope of the Charter

The applicability of the Charter does not necessarily exclude the application of other sources of fundamental rights protection, which are binding on the Member State concern. Below, attention is paid, respectively, to the relationship between the Charter and the Member States' constitutions (**section 4.1**), and those between the Charter and the ECHR (**section 4.2**).

4.1 The relationship between the Charter and the Member States' constitutions

Article 53 of the Charter, titled "Level of protection", states: "[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, (…) by the Member States' constitutions". Apparently, this provision places a limit on the absolute character of the primacy of EU law over national law, by allowing the Member States, in situations falling within the scope of the Charter, to rely on to the domestic standard of fundamental rights protection, if that standard provides for more extensive protection than the Charter. The Court of Justice, sitting as the Grand Chamber, firmly rejected this interpretation in *Melloni*.[49]

The case arose from a preliminary reference question issued by the Spanish Constitutional Court. This asked, in essence, whether it could rely on Article 53 of the Charter in order to apply Article 24(2) of the Spanish Constitution to the addressees of a European Arrest Warrant (EAW) relating to judgments delivered *in absentia*. Indeed, the domestic standard could provide for a broader protection of fair-trial rights than that granted by the Framework Decision instituting the EAW mechanism. The Court of Justice affirmed that such a use of Article 53 of the Charter "would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules

[49] Judgment of 26 February 2013, case C-399/11, *Melloni*.

which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution".[50] Thus, it confirmed its well-established case law whereby, "by virtue of the principle of primacy of EU law, (…) 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".[51]
However, the ECJ also added that "Article 53 of the Charter 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 Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised". The Court found that the provision of the Framework Decision that concerns the execution of an EAW relating to a judgment delivered *in absentia* does not grant any freedom of manoeuvre to the Member States. As a rule, Member States can refuse the execution of such an EAW; by way of exception, refusal is not allowed when certain circumstances, which are specified by the provision itself, occur. In other words, through the provision at issue, the EU legislator tried to achieve a fair balance between the protection of the rights of the defence of the addressees of an EAW, on the one side, and the safeguard of the efficiency of the EAW system, on the other. The Court therefore concluded that there was no space for the application of Article 24(2) of the Spanish Constitution.

Based on the Court's approach in *Melloni*, in order to understand if there is space for the application of the domestic standard of fundamental rights protection, one must verify whether the EU law rule that triggers the application of the Charter in the specific case[52] leaves some margin of discretion to the Member States as regards its implementation. If yes, then the national court will apply the domestic standard of protection, provided that the level of protection granted by the Charter as well as the "primacy, unity and effectiveness" of Union law, are not compromised (*scenario 1*).
By contrast, there is no space for the application of domestic standards in situations where the EU law rule that triggers the application of the Charter to a specific case sets a precise level of protection for the fundamental right(s) involved (*scenario 2*).

Note that, under the first scenario, the ECJ referred to the level of protection granted by the Charter, "as interpreted by the Court" itself. Moreover, the second limit relies on broad concepts, whose application to a specific case may sometimes not be obvious. In case of doubts, national courts may consider issuing a preliminary reference question to the ECJ. Similarly, a national court should send a reference for preliminary ruling to the ECJ, when there are doubts as regards the compatibility of the EU law trigger provision with the Charter.

4.2 The ECHR as a minimum standard of protection with respect to the Charter

Article 52(3) CFR lays down a specific rule concerning the relevance of the ECHR within the Charter's scope. It states, notably, that, "[i]n so far as th[e] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the (...) Convention". The same provision then adds that Union law is not prevented from providing more extensive protection.

[50] *Melloni*, cit., § 59.
[51] Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, § 3, and *Melloni*, cit., § 59.
[52] See section 2 above, notably 2.2.

In other words, the ECHR represents a minimum *standard* of protection insofar as "corresponding rights" are concerned.
The official explanation of Article 52(3) CFR contains two lists of "corresponding rights", enumerating respectively, the Articles of the Charter where "both the meaning and the scope are the same as the corresponding Articles of the ECHR", and where the Articles "meaning is the same as the corresponding Articles of the ECHR, but (...) the scope is wider." The two lists are not exhaustive: they reflect the current state of evolution of the law and remain open to "developments in the law, legislation and the Treaties." Indeed, some additional correspondences already emerged in the ECJ's case law. For instance, according to its official explanation, Article 49(1) corresponds to Article 7(1) ECHR, with the exception of the principle of retroactivity of the subsequent law providing for a lighter criminal penalty. This principle can be found in the last part of the Charter's provision. However, in a judgment of 2009, *Scoppola v. Italy (No 2)*,[53] the Strasbourg Court interpreted Article 7(1) ECHR, as encompassing also the principle of the retroactivity of the lighter criminal sanction, by making a reference to Article 49(1) CFR.
When a national measure that falls within the scope of the Charter[54] seems to be in conflict with a fundamental right of the Charter, the national court shall establish whether a "corresponding right" is at issue. If yes, in order to establish whether there is a violation, account shall be taken of the meaning and the scope of the relevant fundamental right as it results from the ECHR, taking account not only of the text of the Convention but also of the interpretation provided by the Strasbourg Court.[55] According to the official explanation to Article 52(3) CFR, the parallelism also extends to the issue of authorised limitations, which must be the same as those laid down by the ECHR. Accordingly, the same grounds for limitations provided under the ECHR apply to the Charter's corresponding rights. Moreover, rights that are absolute under the Convention are equally absolute under the Charter.
Since all the Member States are High Contracting Parties to the ECHR, it is important to ensure the substantive coherence of the protection afforded to corresponding rights under the Convention and under the Charter. The national court shall ensure that the level of fundamental rights protection granted by the national measures that fall within the scope of the Charter is consistent with Article 52(3) of the Charter. At the same time, they should contribute to ensure that EU legislation is in line with this provision, issuing a preliminary question to the ECJ, if needed.

5. The effects of the Charter

The Charter acts as a parameter for the interpretation of the primary and secondary rules of Union law and of the national measures that fall within its scope. Its provisions also provide grounds for the review of EU secondary law rules: in case of a(n apparent) conflict, a national court may (or should, depending on the circumstances) send a reference for preliminary ruling to the ECJ, asking it to interpret the provision, or to assess its validity, in light of the Charter.
What if the national measure cannot be interpreted in conformity with the Charter? If the relevant provision of the Charter meets the conditions for direct effect, which the ECJ identified, the national court will be able to enforce it in the case at issue, without having to wait for the intervention of the domestic legislature. However, before examining these conditions (section 4.2), it is worth paying

[53] ECtHR, judgment of 17 September 2009, app. no. 10249, *Scoppola v. Italy* (No. 2), §§ 105 and 109.
[54] See section 2.2. above.
[55] This reference to the case law of the ECtHR can be found in the explanation of Article 52(3) of the Charter.

some attention to Article 52(5) CFR, which foresees a specific, and more limited, regime for the provisions of the Charter containing "principles" (section 5.1).

5.1 The justiciability of Charter "principles"

Article 52(5) states:

> "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".

In other words, this provision singles out a category of Charter's provisions – those containing "principles" –, which can only act as parameters of interpretation and grounds of validity/compatibility of Union legislation and national measures implementing Union law. In other words, "principles" cannot be relied on directly to disapply conflicting national provisions.

Article 52(5) of the Charter is unclear as regards the scope of application of "principles". The expression "such acts" in the second sentence of Article 52(5) of the Charter may suggest that "principles" can be relied on to test the compatibility with the Charter only of Union and national measures adopted *with a view* to give effect to the "principle" allegedly violated. The broader reading, whereby any national measure falling within the scope of the Charter can be tested against a "principle" is preferable. Otherwise, the protection of "principles" would be lacking with respect to the acts that are more likely to interfere with them, i.e. those acts that are not adopted with the purpose to implement "principles". According to this broader reading, the distinctive feature of "principles", in justiciability terms, is that they cannot be relied on to disapply conflicting domestic provision.

Problematically enough, there is not a definition of "principle" in the Charter, nor does the explanation of Article 52(5) provide a list of Charter "principles". However, the explanation contains some guidance: for illustrative purposes, it mentions as examples of "principles" Articles 25 (Rights of the elderly), 26 (Integration of people with disabilities), and 37 (protection of the environment). One must infer that the formulation of an entitlement as a "right" or as a "principle" is not a decisive element. The explanation also adds that, "[in] some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34". It is unclear whether this indication refers to the Articles of the Charter that encompass more than one entitlement, or it rather allows for the identification of "elements of a right and of a principle" within the same entitlement.

The case law of the Court of Justice does not provide much guidance as regards the identification of "principles" and their justiciability. So far, the Court has referred to Article 52(5) CFR only in the *Glatzel* judgment.[56]

Since the case concerned a Directive implementing *stricto sensu* a "principle", the judgment does not bring much clarity to the issue of the scope of application of "principles". In addition, the ECJ seemingly limited the role of "principles" as grounds of validity of Union law (and of compatibility of national law) only to Charter's provisions that confer on individuals directly enforceable *rights*. Yet, the text of Article 52(5) of the Charter suggests that also "principles" can perform this function, at least with respect to EU and national acts adopted in order to implement them.

[56] ECJ (Fifth section), judgment of 22 May 2014, case C-356/12, *Glatzel*.

More clarity on these issues is needed: national courts can contribute by referring preliminary questions to the Court, in the context of cases involving Charter's provisions that may qualify as "principles".

Casesheet 1.9 - case C-356/12, *Glatzel*

Facts: Mr Glatzel was refused a driving licence for heavy goods vehicles, on the ground that he suffered from a substantial functional loss of vision in one eye, called unilateral amblyopia,. The man brought an action before the *Verwaltungsgericht Regensburg* (Administrative Court). Since this court dismissed the action, he brought an appeal before the *Bayerisher Verwaltungsgerichtshof*, which decided to stay the proceedings and ask a preliminary reference to the ECJ. In particular, the referring court questioned the validity of point 6.4 of Annex III to Directive 2006/126 (on driving licences), which concerns the minimum standards for the drivers of heavy vehicles, in the light of Articles 20, 21(1) and 26 of the Charter, on (respectively), equality, non-discrimination, and the integration of people with disabilities. The *Bayerisher Verwaltungsgerichtshof* considered that the requirement, laid down by point 6.4 of Annex III to the Directive, whereby the drivers of heavy good vehicles must have a minimum visual acuity of 0,1 for the worse eye constituted discrimination on grounds of disability in respect of person who do not have such visual acuity, since they have binocular vision and a field o vision sufficient for both eyes.

The ECJ started by analysing the compatibility of point 6.4 of Annex III in light of Article 21(1) of the Charter, which prohibits discrimination based, *inter alia*, on disability. The Court found that it did not have sufficient information to determine whether the impairment suffered by Mr Glazel could be considered "disability" for the purposes of Article 21(1) of the Charter. However, the ECJ argued that, if the state of the man constituted discrimination, it could nonetheless be justified "in so far as such requirement actually fulfils an objective of public interest, is necessary and is not a disproportionate burden" (§ 51). The Court found that these requirements were justified; therefore, it upheld the compatibility of point 6.4 of Annex III in light of Article 21(1) of the Charter.

The Court then focused on the validity of the provision in light of Article 26 of the Charter, whereby "[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".

The Court started by recalling that, "as is clear from Article 52(5) and (7) of the Charter and the Explanations relating to the Charter of Fundamental Rights concerning Articles 26 and 52(5) of the Charter, that reliance on Article 26 thereof before the court is allowed for the interpretation and review of the legality of legislative acts of the European Union which implement the principle laid down in that article, namely the integration of persons with disabilities" (§ 74). The Court then quoted recital 14 and Articles 5(2) of Directive 2006/126, which concern specific conditions for the issue of driving licences to drivers with disabilities, and affirmed that, "in so far as Directive 2006/126 is a legislative act of the European Union implementing the principle contained in Article 26 of the Charter, the latter provision is intended to be applied to the case in the main proceedings" (§§ 75-76). Nevertheless, after quoting the text of Article 26 of the Charter, the Court considered that "the principle enshrined by that article does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on

individuals a subjective right which they may invoke as such". Accordingly, the Court upheld the validity of point 6.4 of Annex III to the Directive also in light of Article 26 of the Charter.

5.2 Reliance on the Charter to disapply conflicting national provisions (direct effect)

According to a settled case law of the Court of Justice, the provisions of EU law that are clear, precise and not subject to conditions can be relied on by legal and natural persons before domestic courts, in order to obtain the disapplication of conflicting national provisions. We speak of, respectively, vertical and horizontal direct effect depending on whether the direct effect of a EU law provision is relied upon in the context of proceedings opposing a natural or legal person to a Member State (*rectius*, one of its entities), or in disputes between private parties.[57]

In *Association de médiation sociale* (*AMS*)[58], the ECJ confirmed that at least some provisions of the Charter can be relied on to disapply a conflicting national measure (that implements Union law within the meaning of Article 51(1) of the Charter), including in a dispute between private parties. The provisions of the Charter amenable to such effect are those which are "sufficient in itself to confer on individuals an individual right which they may invoke as such".

It follows from *AMS* that the prohibition of age-discrimination in Article 21(1) of the Charter satisfies the test laid down by the Court, whereas Article 27 on the right of workers to information and consultation within the undertaking does not. Plausibly, Article 21 of the Charter satisfies the test also in relation to other of the grounds of non-discrimination mentioned. However, other Articles of the Charter may also satisfy the test. If the pending case involves a different provision of the Charter, it might be useful to ask the CJEU to clarify whether it satisfies the *AMS* test.

Casesheet 1.10 – Case C-176/12, Association de médiation sociale

Facts: Association de médiation sociale (hereafter: AMS) is a French non-profit association, governed by private law. At the time of the facts, the working staff of AMS included eight employees with contracts of indefinite duration, and more than a hundred employees hired on the basis of "accompanied-employment contracts" (the *contrat d'accompagnement dans l'emploi*). According to Article L. 1111-3 of the French Labour Code, employees holding the latter type of contract shall not be considered when calculating staff numbers in the undertaking. Thus, AMS did not reach the minimum threshold of 50 employees that, under the Labour Code,[59] makes the creation of a work council and the appointment of a union representative compulsory.

A trade union nonetheless created a section within the AMS, appointing as representative one of the undertaking's permanent employees. AMS sought the annulment of the appointment before French courts. The case arrived before the last instance court, notably the *Cour de Cassation (Chambre sociale)*, which decided to refer two preliminary questions to the Court of Justice. Firstly, it asked whether Article 27 of the Charter, on the right of workers to information and consultation

[57] It is worth recalling that the Court of Justice has endorsed a broad notion of "State" for the purpose of vertical direct effect, which includes also "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". See case C-282/10 *Dominguez*, § 39).

[58] Judgment of 15 January 2014, case C-176/12, *Association de médiation sociale* (*AMS*).

[59] Cf., notably, Articles L. 2142-1-1, L. 2143-3, and L. 2322-1.

within the undertaking, as specified by Directive 2002/14/EC[60], can be invoked in a dispute between private individuals in order to assess the compatibility of Article L. 1111-3 of the French Labour Code. In case of an affirmative answer, the *Cour de Cassation* also asked whether those provisions (i.e. Article 27 of the Charter as specified by the Directive), should be interpreted as precluding a national legislative provision such as that in question.

Firstly, the Court of Justice reformulated the two preliminary questions raised by the *Cour de Cassation* to ask "whether Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the Labour Code, is incompatible with European Union law, that article of the Charter can be invoked in a dispute between individuals in order to disapply that national provision."

Secondly, interpreting Article 3(1) of Directive 2002/14, the Court affirmed that Member States can determine different modalities of calculation of employees depending on their working contract, but cannot exclude *tout court* a category of employees from that calculation. Thus, a national provision such as that of the French Labour Code is inconsistent with the Directive.

As a third step, the Court found that Article 3(1) enshrines an obligation to take into account all employees, which "fulfils all of the conditions necessary for it to have direct effect".[61] However, according to an established case law of the Court, a directive cannot "of itself" apply in proceedings exclusively between private parties.[62]

At this point, the Court considered that it should ascertain "whether (…) Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, can be invoked in a dispute between individuals, in order to preclude, as the case may be, the application of the national provision which is not in conformity with that directive".[63] Since the national provision in question was adopted to implement Directive 2002/14, the applicability of the Charter was not disputed.[64]

The Court distinguished *Association de médiation sociale* from *Kücükdeveci*. The fundamental right at stake in the latter case, "the principle of non-discrimination on grounds of age (…), laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such".[65] By contrast, Article 27 of the Charter "to be fully effective (…) must be given more specific expression in European Union or national law"; hence, it cannot be invoked in the context of a horizontal dispute in order not to apply national provisions conflicting with Union law.[66]

The only remedy available to the defendants remained a liability action against France for not having ensured that national law conforms with the Directive, "in order to obtain, if appropriate, compensation for the loss sustained."[67]

[60] Directive 2002/14/EC, establishing a general framework for informing and consulting employees in the European Community.

[61] *AMS*, cit., § 35.

[62] Ibid., § 36.

[63] Ibid., § 41.

[64] Ibid., § 43.

[65] Ibid., § 47.

[66] Ibid., §§ 45 and 48.

[67] Ibid., § 50.