Value, effect, and potential of the EU Charter of Fundamental Rights in the Dutch legal order

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Value, effect, and potential of the EU Charter of Fundamental Rights in the Dutch legal order

Preliminary opinions of
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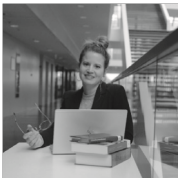

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Preface

Having been legally binding since coming into force on 1 December 2009, the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) [1] enshrines the fundamental rights of EU citizens and residents into primary EU law. Being part of primary EU law means that the Charter has the same value as the EU Treaties (Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)).
Being considerably younger than the European Convention on Human Rights (ECHR), the Charter's youthfulness is one of the reasons why not everyone is equally familiar with the Charter's substance and effect. The same happened with the ECHR in its early years. The Charter sets out rights and principles, some of which are also included in the ECHR, such as the right to life (Article 2 of the Charter), the right to respect for private and family life (Article 7 of the Charter) and freedom of expression and information (Article 11 of the Charter). Others are new, such as freedom of the arts and sciences (Article 13 of the Charter), rights for the elderly (Article 25 of the Charter), and rights for persons with disabilities (Article 26 of the Charter).

The Charter firstly governs the acts of all EU institutions (including the European Commission and the European Parliament), EU agencies (including the European Public Prosecutor's Office and the European Medicines Agency) and other European Union bodies. In addition, the Charter governs the acts of (the authorities in) Member States in implementing EU law (Article 51 of the Charter). The Charter can also be invoked directly between private parties in some cases (horizontal effect).

This year, the Charter has been binding for fifteen years. This anniversary alone is a good reason to reflect on the value, effect and potential of the Charter in the Dutch legal order. A second reason is the criticism that has been voiced here and there about how the Charter is applied and cited (or not cited when it should have been) in Dutch legal practice and scholarship.[2] As a topic, the Charter raises several questions. What is the state of knowledge of the Charter among Dutch lawyers? Is this knowledge

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[1] Charter of Fundamental Rights of the European Union, *Official Journal of the European Union (OJEU)* 2007, C 303/1.

[2] See, for example, J. Krommendijk, 'Tien jaar bindend EU-Grondrechtenhandvest in de Nederlandse rechtspraktijk: een inleidende schets van de status quo,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019; and specifically for criminal law J.W. Ouwerkerk & P.A.M. Verrest, 'De struisvogel voorbij. Pleidooi voor een actieve participatie inzake fundamentele rechten in de strafrechtspleging,' *Delikt en Delinkwent* 2021/47.

necessary and does it differ between the principal areas of Dutch law? What is the Charter's scope of effect? How does the Charter relate to the ECHR and national fundamental rights, and does the Charter add any value? Could the Charter replace the ECHR? Is the Charter used to its full potential, and if not, why not and is that a problem? Are the answers to these questions different for administrative law, criminal law, and private law, and if so, why is that? These questions will be addressed this year in the preliminary opinions to be submitted to the 2024 annual meeting of the Dutch Lawyers' Association (*Nederlandse Juristen-Vereniging*, or NJV) and discussed at the annual meeting itself on 7 June 2024.

Across all areas of Dutch law, EU law also applies, either directly through regulations or indirectly through directives. This means that the Charter plays a role within all those areas of law. It is, therefore, important for every Dutch lawyer to have knowledge of the Charter's scope and effect. The fact that the Charter is relevant to so many fields of law also means that it is impossible to provide a complete overall view of it within a short time span. The advisory committee has, therefore, chosen to seek preliminary opinions for the following primary areas of law: administrative law, criminal law, private law, and employment law.

Given that some Charter-related topics are of interest to lawyers across all of these areas of law, these preliminary opinions are preceded by a preliminary opinion by Janneke Gerards entitled 'The EU Charter of Fundamental Rights: a crash course.' In her preliminary opinion, Gerards discusses the structure and nature of the EU fundamental rights system and the general doctrine of Charter law. In doing so, she also looks at the development of fundamental rights and Charter law in the case law of the Court of Justice of the European Union (hereinafter: CJEU). Her preliminary opinion also addresses the relationship between the Charter, national constitutional rights, and the ECHR, before noting in conclusion that there is great promise of ever better and more sophisticated protection of fundamental rights at the EU level in the years to come.

Hanna Sevenster will subsequently discuss the Charter in relation to administrative law, asking whether the emperor might have new clothes. She notes that it has become impossible to imagine administrative law without the Charter. Since its entry into force in 2009, the Charter's impact is most palpable in the area of administrative law. After all, much of EU law is administrative law or has been converted into administrative law, and then not only agriculture and competition law, but also environmental law, energy law, and migration law. Sevenster goes into whether the Charter adds

value, ultimately concluding that it does, and that the emperor does indeed have new clothes.

Pieter Verrest's preliminary opinion is about the Charter and Dutch criminal law. In recent years, the role of the Charter in criminal law has become increasingly clear. The Charter is a powerful source of law and an important benchmark in Dutch criminal law, Verrest notes. This development came partly on the back of the meteoric development of criminal law regulations at EU level and the CJEU's role in issuing important criminal judgments based on the Charter. Verrest closes with a recommendation to the government to help raise awareness of the Charter, to the legislator to actively look at compatibility with EU law and CJEU case law, to criminal law practitioners to develop sufficient knowledge of EU law and the effect of the Charter, and to criminal law scholars to integrate EU criminal law into the description of Dutch law.

Kasper Jansen will delve into the Charter's impact in the domain of private law. He notes that the significance of the Charter in a property law context currently seems limited (other than for some specific areas of private law, such as employment law and intellectual property law). This is remarkable because EU law as such actually exerts a large and growing influence on Dutch private law. Jansen argues that the Charter can advance the development of the effect of fundamental rights in private law precisely because the Charter contains a number of more property law-oriented fundamental rights. Moreover, he notes, the CJEU has issued a series of rulings where they give direct horizontal effect to the Charter, as a result of which various Charter rights directly create rights and obligations for individuals. Inspired by the Charter and CJEU case law, Jansen advocates for an approach where fundamental rights, in terms of their essence, prevail over (other) private-law rights and interests as a general principle. The Charter can help take another step in integrating fundamental rights into the property law discourse and in further refining property law rules issued by the EU. Finally, the Charter and any case law based on it can contribute to further harmonisation of the general part of European private law, Jansen concludes.

The final preliminary opinion in this compilation comes from Femke Laagland. In her preliminary opinion entitled 'The Charter as a driver for employment law: fact or fiction?' she sets out to shed light on the normative force of the employment law-related Charter provisions at a European level and its effect on Dutch employment law. The impact that the Charter is having on employment law, especially in relation to other areas of private law, is relatively great. Laagland discusses Charter rights

that are specifically relevant to employment law, such as the right to collective bargaining and collective action and the right to paid annual leave. She also considers how the Charter relates to the European Social Charter and the ECHR. Furthermore, she goes into the distinction that Article 51 and Article 52 of the Charter make between provisions containing subjective rights that have the status of a right and provisions containing principles. This distinction is important for the effect of fundamental employment rights under the Charter, including their horizontal effect. She concludes that the Charter as an instrument for upward protection of Dutch employment law is a mixed success at best. While the right to paid annual leave under Article 31(2), for example, has had far-reaching impact on Dutch law, the same cannot be said of all employment law-related Charter provisions and certainly not of those provisions that 'only' provide a principle, such as the right to information and consultation.

The above is a brief outline of the preliminary opinions for the Dutch Lawyers' Association for 2024. We hope that this brief outline has aroused the reader's curiosity and inspired the reader to read the preliminary opinions in full. In addition, we hope that these preliminary opinions will trigger an engaging and ultimately fruitful discussion at the annual meeting of the Dutch Lawyers' Association on Friday, 7 June 2024. We are grateful to the authors of the preliminary opinions for their wonderful essays, which shed light on what the Charter means for Dutch law and illustrate that without knowledge of the effect of the Charter and its key provisions, Dutch lawyers, regardless of their area of law, will not be able to operate effectively in a multilayered legal order such as ours. We hope to see you at the annual meeting on 7 June 2024!

The Dutch Lawyers' Association's advisory committee:
Marry de Gaay Fortman
Maarten Kroeze
Jannemieke Ouwerkerk

The EU Charter of Fundamental Rights: a crash course

Janneke Gerards LLM

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1 Introduction

Ask any Dutch lawyer to give an example of provisions enshrining fundamental rights and they will likely come up with provisions from the European Convention on Human Rights (ECHR). That the right to a fair trial is contained in Article 6 of the ECHR, that privacy rights are enshrined in Article 8 of the ECHR, and that freedom of expression is contained in Article 10 of the ECHR are things that everyone in the legal profession in the Netherlands knows. Of course, lawyers are also aware that the ECHR is certainly not the only source of law codifying fundamental rights. The EU Charter of Fundamental Rights (Charter), in particular, has been increasingly gaining in popularity. In recent years, for example, the right to a fair trial and an effective remedy as set forth in Article 47 of the Charter has often been invoked in Dutch courts. Resourceful lawyers use other provisions as well, such as Article 24 on the rights of the child and Article 16 on freedom to conduct a business, which are fundamental rights that are not contained in the ECHR or where the ECHR has a narrower scope of application than the Charter, meaning that the Charter does add value in those cases.

The fact that this added value exists and that lawyers are aware of it does, however, not mean that the Charter is a given as a source of legal knowledge on fundamental rights, nor that it is easily applicable in practice.[1] The Charter has quite a few specific features that make it a different kind of fundamental rights document than the ECHR. For example, there are significant differences between the ECHR and the Charter when it comes to the material and personal scope of application and to the application of traditional fundamental rights doctrines such as those of positive obligations, fundamental social rights, and horizontal effect. These peculiarities largely explain the extent and manner in which the Charter permeates various areas of domestic substantive and procedural law. The various preliminary opinions in this compilation clearly show this.

[1] This is also reflected in the various contributions to J.H. Gerards, H.C.F.J.A. de Waele & K. Zwaan (ed.), *Vijf jaar bindend EU-Grondrechtenhandvest. Doorwerking, consequenties, perspectieven*, Deventer: Wolters Kluwer 2015; H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019. In fact, relative unfamiliarity with the Charter is also a broader European phenomenon; as recently as in 2020, the European Commission called for greater engagement by all relevant actors, including legislators, administrative bodies and policymakers, and committed to 'fostering the use of the Charter as a compass,' making 'the Charter a living instrument, protecting fundamental rights in Europe for the benefit of all' – see European Commission, Strategy for strengthening the Charter of Fundamental Rights in the EU, Brussels, 2 December 2020, COM(2020) 711 final.

To give the reader some background for better understanding of the further analysis in the other preliminary opinions for the 2024 annual meeting of the Dutch Lawyers' Association, this paper will offer a 'crash course' on the EU Fundamental Rights Charter. This paper is intended as an introduction for those who want to find out quickly where the Charter came from, how it has been shaped in European case law, how its main doctrines have been shaped, and how it relates to the ECHR.[2] To understand how the Charter has evolved in recent years, Section 2 will first explain the legal context in which the Court of Justice of the European Union (CJEU or Court) shapes its case law on the Charter.[3] A brief summary of the origins and development of fundamental rights in CJEU case law (Section 3) will subsequently provide a basis for understanding of current doctrines and applications. The core section of this paper, Section 4, will go into the central fundamental rights doctrines developed by the CJEU with respect to the Charter. Section 5 will highlight the interaction between the Charter, national constitutional rights, and the ECHR, including the principles of mutual trust and mutual recognition. Section 6 will close this summary.

[2] This part is based partly on J.H. Gerards, 'Chapter 5. The Fundamental Rights Jurisprudence of the ECJ,' in: S. Greer, J.H. Gerards & R. Slowe, *Human rights in the Council of Europe and the European Union: Achievements, Trends and Challenges*, Cambridge: Cambridge University Press 2018, p. 293-367.

[3] The Court of Justice of the European Union consists of the Court of Justice, the General Court and specialised courts (Article 19(1), TEU). To avoid confusion, this chapter uses the abbreviation 'CJEU' for the Court of Justice of the European Union as a whole; an exception is made only when the General Court (known as the Court of First Instance until the Lisbon Treaty) is specifically mentioned. For the period when the EU was not yet the EU, but the EC or EEC, the abbreviation ECJ is used for convenience.

2 Structure and nature of the EU fundamental rights system

2.1 Principles and concepts underlying the work of the CJEU

The main task of the CJEU, in line with the objectives of the European Union, is to safeguard 'the primacy, unity, and effectiveness of EU law'[1] and 'the implementation of the process of integration that is the *raison d'être* of the EU itself.'[2] Much of the jurisprudence of the CJEU is based on principles directly related to these objectives and Member States' duties in pursuing them.[3] Key principles are those of direct effect and primacy, unity in the interpretation of internal market and competition law, mutual respect and recognition, effectiveness and equivalence of procedural mechanisms and EU citizenship.[4] These key objectives and principles are reflected in the strategies followed by the CJEU and the legal policy choices it makes, including with regard to fundamental rights.[5] Commentators have noted that the CJEU's originally economic background is an important factor in its jurisprudence.[6] The EU's 'raison d'être' pushes the CJEU towards strong protection of quintessential EU values, such as economic integration, mutual recognition, and direct effect and primacy of EU law.[7] Other key principles that the CJEU has to respect are those of respect for national sovereignty, identity, and diversity.[8] Despite its important and extensive set of powers, the EU is a functional-type organisation, authorised to act only to achieve the objectives explicitly laid down in the Treaties. This stems in particular from the principles of attribution and limited transfer of power, according to which EU institutions may only exercise those powers that the

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1 CJEU 26 February 2013, case C-399/11, ECLI:EU:C:2013:107 (*Melloni*), para. 60.

2 Opinion 2/13 of 18 December 2014 on the accession of the EU to the ECHR, ECLI:EU:C:2014:2454, para. 172. See also, for example, G. De Búrca, 'Europe's Raison d'Être,' NYU Public Law and Legal Theory Research Paper No. 13-09, 2013, http://ssrn.com/abstract=2224310.

3 Cf. C. van de Heyning, *Fundamental Rights lost in complexity. The protection of fundamental rights against violations by the rulemaker in converging national and European legal systems* (thesis University of Antwerp), 2011, p. 84 et seq.

4 Idem; see also A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication*, Oxford: Oxford University Press 2009, p. 50 et seq.

5 For example, M. Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism,' *European Journal of Legal Studies* (1) 2007, p. 1-21, on p. 5.

6 See with further source citations J.H. Gerards, 'Non-Discrimination, the European Court of Justice and the European Court of Human Rights – who takes the lead?' in: Th. Giegerich (ed.), *The European Union as Protector and Promoter of Equality*, Springer Verlag 2020, p. 135-163.

7 However, see also Section 3.1, which shows that the CJEU has in recent years started to focus more on fundamental rights.

8 Cf. J. Snell, 'Fundamental Rights Review of National Measures: Nothing New under the Charter?' *European Public Law* (21) 2015, p. 285-308, on p. 300.

Treaties expressly confer on them.[9] This means, for example, that the CJEU may not give interpretations of fundamental rights that expand (explicitly or otherwise) the powers of the Union.[10] For example, unlike the ECtHR, the CJEU cannot easily impose positive obligations on EU institutions or Member States to legislate or implement policies to actively protect fundamental rights.[11]

The principles of attribution and limited transfer of power are closely linked to the principles of subsidiarity and proportionality. These principles imply that what can be regulated at the national should not be taken up at the EU level.[12] Compliance with these principles is strictly monitored by Member States, especially by some national constitutional courts.[13] EU institutions, including the CJEU, overstepping the limits of their powers or infringing on national (constitutional) law may trigger protests from Member States and, in extreme cases, even lead to European law and CJEU rulings being overruled or disregarded.[14] Similarly, the CJEU must consider the principle of respect for national constitutional identity, as stated in Article 4(2) of the TEU.[15] This principle requires the CJEU to respect central national

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[9] For example, S. Prechal, S. de Vries & H. van Eijken (2010), 'The Principle of Attributed Powers and the "Scope of EU Law",' in: L. Besselink et al. (ed.), *The Eclipse of the Legality Principle in the European Union*, Leiden: Kluwer Law International 2010, p. 213-247. This principle is emphasised even more strongly in the Treaty of Lisbon; see M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts,' *Common Market Law Review* (45) 2008, p. 617-665.

[10] A risk that is often highlighted in this context is that of 'competence creep' resulting from such interpretations. See, for example, S. Prechal, 'Competence Creep and General Principles of Law,' *Review of European Administrative Law* (3) 2010, p. 5-22.

[11] For more on this, see M.P. Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations*, Antwerp: Intersentia 2017.

[12] See Article 5(2) of the TEU and the Protocol on the application of the principles of subsidiarity and proportionality. What is also important to note is that this limitation also relates to legislation and policymaking in the area of fundamental rights; see, for example, S. Besson, 'The Human Rights Competences in the EU – The State of the Question after Lisbon,' in: G. Kofler et al. (ed.), *Human Rights and Taxation in Europe and the World*, IBFD: 2011, p. 37-63.

[13] See especially the *Lissabon* judgment of the German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvE 2/08, judgment of 30 June 2009, ECLI:DE:BVerfG:2009:es20090630.2bve000208, legal ground 231; see later also the ESM judgment by the same Court, 2 BvR 1390/12, judgment of 18 March 2014, ECLI:DE:BVerfG:2014:rs20140318.2bvr139012, legal grounds 160 et seq. See further, for example, P. Craig, 'The ECJ and ultra vires action: a conceptual analysis,' *Common Market Law Review* (48) 2011, p. 395-437, on p. 403.

[14] See, for example, R. Barents, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism,' *European Constitutional Law Review* (5) 2009, p. 421-446; A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication*, Oxford: Oxford University Press 2009; G. Beck (2011), 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor,' *European Law Journal* (17) 2011, p. 470-494. For a brief run-down of national supreme courts that have accepted some form of ultra vires review, see F. Zoll, K. Południak-Gierz & W. Bańczyk, 'Primacy of EU law and jurisprudence of Polish Constitutional Tribunal. Recent developments in the light of the Polish Constitutional Tribunal's case law,' Report requested by the JURI committee of the European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, PE 732.475, June 2022, https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL_STU(2022)732475_EN.pdf, p. 8. This piece also goes into the most recent and most controversial rulings in this context, i.e. those of the Polish Constitutional Court of 14 July 2021, P 17/20 (see p. 22) and 7 October 2021, K 3/21 (see p. 23-24).

[15] See further, for example, C. van de Heyning, *Fundamental Rights lost in complexity. The protection of fundamental rights against violations by the rulemaker in converging national and European legal systems* (thesis, University of Antwerp), 2011, p. 116-119; L.F.M. Besselink, 'National and constitutional identity

constitutional principles, including fundamental rights, in its jurisprudence. Like the principle of subsidiarity and the principle of conferral, the principle of respect for national constitutional identity has a bearing on the CJEU's scope of action in interpreting the EU Charter of Fundamental Rights.

2.2 Procedural context

The CJEU's approach to fundamental rights cases is determined not only by the key principles of the EU system, but also by procedural specifics.[16] Most fundamental rights cases are referred to the Court in the form of a reference for a preliminary ruling by one of the national courts.[17] This means that unlike the European Court of Human Rights (ECtHR), the CJEU does not hear cases that have already been fully litigated at the national level and concluded with a final judgment.[18] Instead, the CJEU is asked for its assessment and interpretation in an ongoing case, where national courts may still have important work to do to establish and qualify facts and assess the reasonableness of an interference in the exercise of a fundamental right.[19] As a result, the CJEU can leave to national courts some of the work that the ECtHR has to do itself. One consequence of this is that some doctrines in CJEU case law are somewhat abstract in nature and lack the clarification that, in ECtHR cases, often ensues from application to the facts. However, this downside is compensated to some extent by the fact that the CJEU does in many cases provide precise and often tailored interpretive principles on the facts of the case.[20]

References for a preliminary ruling can relate to a multitude of topics. Unlike cases heard by the ECtHR, preliminary references are certainly not limited to fundamental rights issues, but can concern a variety of EU law

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before and after Lisbon,' *Utrecht Law Review* (6) 2010, p. 36-49, on p. 42 et seq.; A. von Bogdandy & S. Schill, 'Overcoming absolute primacy: respect for national identity under the Lisbon Treaty,' *Common Market Law Review* (48) 2011, p. 1417-1454, on p. 1418-1419.

[16] Cf. P. Pescatore, 'Fundamental Rights and Freedoms in the System of the European Communities,' *American Journal of Comparative Law* (18) 1970, p. 343-351, on p. 347; B. de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights,' in: Ph. Alston et al. (ed.), *The EU and Human Rights*, Oxford: Oxford University Press 1999, p. 859-897; J.H. Gerards, 'Who decides on fundamental rights issues in Europe? – Toward a mechanism to coordinate the roles of the national courts, the ECJ and the ECtHR,' in: S. Weatherill & S. de Vries (ed.), *Five years legally binding EU Charter of Fundamental Rights – What is the state of play in the protection of fundamental Rights in the EU?* Oxford: Hart 2015, p. 47-74; M.P. Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations*, Antwerp: Intersentia 2017; J. Krommendijk & G.B.M. de Vries, 'De wisselwerking tussen het HvJ EU en het EHRM: een hernieuwde liefde?' *SEW* 2021, issue 12, p. 560-570.

[17] See Article 267 of the TFEU.

[18] M. Bobek, 'The Court of Justice, the national courts and the spirit of cooperation: between *Dichtung und Wahrheit*,' in: A. Lazowski & S. Blockmans (ed.), *Research Handbook on EU Institutional Law*, Cheltenham: Edward Elgar 2016, Section 2.1.

[19] Ibid., Section 2.2; see also M. Broberg & N. Fenger, *Preliminary references to the European Court of Justice*, third edition, Oxford: Oxford University Press 2021.

[20] For details of the consequences of this feature of the preliminary procedure, see Section 4.5.5 (on the review of justification at the CJEU) and Section 4.6 (on intensity of review) below.

topics, ranging from major questions about the validity of the European Stability Mechanism to technical issues about specific customs tariffs. Preliminary references on fundamental rights may concern the interpretation of the Charter and sometimes of specific provisions of primary EU law, such as provisions of the Treaty on the Functioning of the European Union (TFEU), but very often they also concern the interpretation of secondary EU law, such as the General Data Protection Regulation (GDPR) and the EU equality directives.[21] Usually, the referring court asks the CJEU to provide the necessary instruments and clarifications to properly apply the relevant provision in a specific case, or a national court may want to know whether a provision of EU law or an EU resolution is compatible with EU law, including EU fundamental rights.[22] The Court can then review EU law's compatibility with the EU Charter, and if it concludes that an incompatibility exists, it can invalidate the relevant EU law provision.[23]

While the Court may, strictly speaking, not rule on the validity of national law, the CJEU still regularly looks at whether a national legal provision (for example a provision implementing a directive) is compatible with EU law, also in view of its duty to protect the full and effective functioning of EU law. If national rules or practices are not in accordance with EU law, including EU fundamental rights, it is the duty of the national court to interpret or disapply national rules in the main proceedings in accordance with EU law.[24]

Fundamental rights issues may, furthermore, arise in connection with the infringement proceedings of Article 269 of the TFEU and the direct action proceedings of Article 263 of the TFEU. Infringement proceedings offer a way to hold a Member State responsible for failure to (fully) comply with fundamental rights provisions, such as those contained in the Charter or in equality directives.[25] A Member State may also be held accountable for an alleged breach of its EU obligations, such as those relating to the internal market, whereby the Member State cites the need to protect fundamental rights as justification for its lack of compliance.

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[21] See Article 267(preamble)(a) of the TFEU.

[22] See Article 267(preamble)(b) of the TFEU. This provision shows that while the CJEU may interpret provisions of primary EU law (including the Charter), it may not review their validity.

[23] For a far more detailed explanation, see M. Broberg & N. Fenger, *Preliminary references to the European Court of Justice*, third edition, Oxford: Oxford University Press 2021, Section 4.3 and Section 11.2.6.

[24] For more specifics with respect to the EU Charter of Fundamental Rights, see CJEU 26 February 2013, case C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*), paras. 44-48. This obligation ensues from the doctrines of direct effect and primacy of EU law; see further S. Haket, *The EU Law Duty of Consistent Interpretation in German, Irish and Dutch Courts*, Antwerp: Intersentia 2019, p. 11-13 and 22-29.

[25] For example, CJEU 6 November 2012, case C-286/12, ECLI:EU:C:2012:68 (*Commission/Hungary*), 7; CJEU 24 June 2019, case C-619/18, ECLI:EU:C:2019:531 (*Commission/Poland (lowering of the retirement age of Supreme Court judges)*).

A direct action, brought under Article 263 of the TFEU, requires the Court to focus its attention on the compatibility of concrete EU resolutions and (sometimes) legislation with fundamental rights. Examples of concrete EU resolutions include resolutions to issue fines or withdraw support. However, this provision offers only limited ways for individuals and legal entities to challenge fundamental rights violations before the Court. Particularly when it comes to the compatibility with the Charter of general resolutions, regulatory acts or legislation, the CJEU has adopted a restrictive interpretation of the possibilities for direct challenge.[26]

In both types of direct proceedings, the Court's task consists of assessing the validity of EU acts as well as interpreting the Charter and other relevant provisions of primary and secondary EU law.[27] In dealing with these direct appeals, the CJEU acts, as it were, as an administrative court, which must consider the fact that resolutions were adopted by equivalent 'state powers' with their own specific legitimacy.[28]

[26] For example, CJEU 14 January 2021, case C-129/20 P, ECLI:EU:C:2021:24, (*Sabo and Others*), para. 29; CJEU 25March 2021, case C-565/19, ECLI:EU:C:2021:252 (*Carvalho*), paras. 48-49 and 77. See further, for example, G. Winter, '*Plaumann* Withering: Standing before the EU General Court Underway from Distinctive to Substantial Concern,' *European Journal of Legal Studies* 2023, doi.org/10.2924/EJLS.2023.008.

[27] Cf. F. van den Berghe, 'The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?' *European Law Journal* (16) 2010, p. 112-157, on p. 115.

[28] Section 4.6 below on the intensity of review will go into the consequences of this.

3 The development of fundamental rights by the CJEU

3.1 Fundamental rights as general principles of EU law

Cooperation within the predecessors to the current European Union, such as the European Coal and Steel Community and the European Economic Community, was predominantly economic in nature. It is, therefore, understandable that it was initially considered hardly necessary to include provisions on fundamental rights. It was assumed that fundamental rights would almost never be affected by mere economic cooperation.[1] To the extent that the founding treaties contain provisions on fundamental rights, such as the right to equal pay for men and women, these served a clear economic purpose. However, it gradually became clear that the exercise of powers by EU institutions could indeed have an impact on fundamental rights.[2] For example, there has been litigation on the compatibility of sanctions or agricultural subsidies with the right to property, the right to a fair trial, and the right to equal treatment.[3]

In response to growing national concern over such infringements, the Court of Justice began to provide for the protection of fundamental rights in the 1970s.[4] In the *Stauder* case, the Court stated in a brief finding that 'the

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[1] See further P. Pescatore, 'Fundamental Rights and Freedoms in the System of the European Communities,' *American Journal of Comparative Law* (18) 1970, p. 343-351, on p. 344; U. Scheuner, 'Fundamental Rights in European Community Law and in National Constitutional Law,' *Common Market Law Review* (12) 1975, p. 171-191, on p. 171; M.A. Dauses, 'The Protection of Fundamental Rights in the Community Legal Order,' *European Law Review* (10) 1985, p. 398-419; A. von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union,' *Common Market Law Review* (37) 2000, p. 1307-1338, on p. 1308; C. van de Heyning, *Fundamental Rights lost in complexity. The protection of fundamental rights against violations by the rulemaker in converging national and European legal systems* (thesis, University of Antwerp), 2011, p. 32-33; G. De Búrca, 'The Evolution of EU Human Rights Law,' in: P. Craig & G. De Búrca (ed.), *The Evolution of EU Law*, third edition, Oxford, Oxford University Press 2021, p. 480-505, on p. 487. Initially, immediately after the European Treaties came into existence, there were still some negotiations on more extensive political cooperation, whereby the protection of fundamental rights was also considered; for details, see p. 484-486 of the aforementioned article by De Búrca.

[2] M.A. Dauses, 'The Protection of Fundamental Rights in the Community Legal Order,' *European Law Review* (10) 1985, p. 398-419, on p. 400. In fact, Germany had already warned of that previously during the negotiations on the EEC treaty; see G. De Búrca, 'The Evolution of EU Human Rights Law,' in: P. Craig & G. De Búrca (ed.), *The Evolution of EU Law*, third edition, Oxford, Oxford University Press 2021, p. 480505, on p. 487.

[3] P. Pescatore, 'Fundamental Rights and Freedoms in the System of the European Communities,' *American Journal of Comparative Law* (18) 1970, p. 343-351, on p. 345; U. Scheuner, 'Fundamental Rights in European Community Law and in National Constitutional Law,' *Common Market Law Review* (12) 1975, p. 171191, on p. 174.

[4] Cf. M.A. Dauses, 'The Protection of Fundamental Rights in the Community Legal Order,' *European Law Review* (10) 1985, p. 398-419, on p. 400 et seq.; J. Coppel & A. O'Neill, 'The European Court of Justice: Winning Minds, Not Hearts,' *Common Market Law Review* (29) 1992, p. 669-692, on p. 670-671; B. de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights,' in: Ph. Alston et al. (ed.), *The EU and Human Rights*, Oxford: Oxford University Press 1999, p. 859-897, on p. 866; C. van de Heyning, *Fundamental Rights lost in complexity. The protection of fundamental rights against violations by the rulemaker in converging national and European legal systems* (thesis, University of Antwerp), 2011, p. 36 et seq.; G.F. Mancini & D.K. Keeling, 'Democracy and the European Court of Justice,' *Modern Law Review*

provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the court,'[5] thus recognising that fundamental rights could form part of the Community legal order in the form of general principles of Community law.[6] In subsequent rulings, the ECJ gradually clarified how certain rights could be regarded as forming part of the general principles of the Community.[7] In the *Internationale Handelsgesellschaft*[8] and *Nold*[9] rulings, the Court explained that a right can only be considered a 'common' principle if there is sufficient consensus on its fundamental law character.[10] The ECJ relied on various sources to recognise such a consensus, such as the constitutions of the Member States and the human rights treaties they have ratified, in particular the ECHR.[11] Moreover, as the case law on fundamental rights as principles grew, the ECJ was able to refer to its own precedents where it had established that a particular right is part of the general principles of EU law.[12]

This approach to fundamental rights as general principles has served the CJEU well for many years and has enabled the Court to draw up its own unwritten catalogue of fundamental rights.[13] This approach initially gained even greater strength and legitimacy as it was codified in Article 6(2) of the Maastricht Treaty of 1992. However, it was to be expected that the Court

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(57) 1994, p. 176-190, on p. 187; G. De Búrca, 'The Evolution of EU Human Rights Law,' in: P. Craig & G. De Búrca (ed.), *The Evolution of EU Law*, third edition, Oxford, Oxford University Press 2021, p. 480-505, on p. 488. After initial hesitations, development went fairly smoothly; as early as in 1975, Scheuner spoke of the 'generally accepted idea' of the protection of fundamental rights in the law of the European Communities (U. Scheuner, 'Fundamental Rights in European Community Law and in National Constitutional Law,' *Common Market Law Review* (12) 1975, p. 171-191, on p. 171).

5 CJEC 12 November 1969, case C-29/69, ECLI:EU:C:1969:57 (*Stauder*), para. 7.

6 Cf. U. Scheuner, 'Fundamental Rights in European Community Law and in National Constitutional Law,' *Common Market Law Review* (12) 1975, p. 171-191, on p. 182.

7 See also M.A. Dauses, 'The Protection of Fundamental Rights in the Community Legal Order,' *European Law Review* (10) 1985, p. 398-419, on p. 401; J. Coppel & A. O'Neill, 'The European Court of Justice: Winning Minds, Not Hearts,' *Common Market Law Review* (29) 1992, p. 669-692, on p. 671; F.G. Jacobs, 'Human Rights in the European Union: the role of the Court of Justice,' *European Law Review* (26) 2001, p. 331-341, on p. 332-333.

8 CJEC 17 December 1970, case C-11/70, ECLI:EU:C:1970:114 (*Internationale Handelsgesellschaft*).

9 CJEC 11 January 1977, case C-4/73, ECLI:EU:C:1974:51 (*Nold KG/Commission*); see later also, for example, CJEC 13 December 1979, case C-44/79, ECLI:EU:C:1979:290 (*Hauer*), para. 15.

10 U. Scheuner, 'Fundamental Rights in European Community Law and in National Constitutional Law,' *Common Market Law Review* (12) 1975, p. 171-191, on p. 183; G. De Búrca, 'The Evolution of EU Human Rights Law,' in: P. Craig & G. De Búrca (ed.), *The Evolution of EU Law*, third edition, Oxford, Oxford University Press 2021, p. 480-505.

11 See, for example, CJEC 28 October 1975, case C-36/75, ECLI:EU:C:1975:137 (*Rutili*), para. 32; CJEC 13 December 1979, case C-44/79, ECLI:EU:C:1979:290 (*Hauer*), paras. 17, 20, 22. See further H.C.K. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System*, Antwerp: Intersentia 2011, p. 324 et seq. and see C. van de Heyning, *Fundamental Rights lost in complexity. The protection of fundamental rights against violations by the rulemaker in converging national and European legal systems* (thesis, University of Antwerp), 2011, p. 39 et seq.

12 For example, CJEU 11 July 1989, case C-265/87, ECLI:EU:C:1989:303 (*Schräder*), para. 15. See also H.C.K. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System*, Antwerp: Intersentia 2011, p. 330331.

13 See also G. De Búrca, 'The Evolution of EU Human Rights Law,' in: P. Craig & G. De Búrca (ed.), *The Evolution of EU Law*, third edition, Oxford, Oxford University Press 2021, p. 480-505, on p. 489.

would change its approach following the promulgation of the EU Charter of Fundamental Rights in Nice in 2000.[14] After all, the drafters of the Charter had made great effort to turn the Charter into a modern codification of fundamental rights.[15] It filled some of the gaps left by the ECHR by, for example, also including social and economic rights, and it added a number of rights and principles that are of particular importance to the EU.[16] The drafters thus made it clear that all these rights can be regarded as principles common to the constitutional traditions of the Member States. However, while the General Court started to refer to the Charter relatively often,[17] the CJEU continued to mainly use its tried-and-tested method of referring to unwritten principles and the ECHR.[18] This changed when the Charter became a binding fundamental rights document upon the signing of the Treaty of Lisbon, as discussed in more detail in Section 4.

3.2 The CJEU as a 'court of fundamental rights'?

As set out above, the CJEU has made considerable effort to develop a fundamental rights catalogue as part of the unwritten principles of EU law. Even so, its case law in the field of fundamental rights has often been characterised as being reactive.[19] This is due to the principles discussed in Section 2, and then in particular to the Court's strong desire to respect and promote the economic 'raison d'être' of European cooperation. Examples of the ECJ's initial reluctance are well known. One of them is the *Hoechst* judgment from 1989, where the Court ruled that searches of business premises did not constitute a breach of fundamental rights, because companies could not rely on the same protection that private individuals can derive from the right to respect for private life under Article 8 of the

[14] See further B. de Witte, 'The Legal Status of the Charter: Vital Question or Non-Issue?' *Maastricht Journal of European and Comparative Law* (8) 2001, p. 81-89, on p. 84.

[15] For example, G. de Búrca, 'The drafting of the European Union Charter of fundamental rights,' *European Law Review* (26) 2001, p. 126-138.

[16] See further, for example, M.H.S. Gijzen, 'The Charter: A Milestone for Social Protection in Europe?' *Maastricht Journal of European and Comparative Law* (8) 2001, p. 33-48; D. Guðmundsdóttir, 'A Renewed Emphasis on the Charter's Distinction between Rights and Principles: Is a Doctrine of Judicial Restraint More Appropriate?' *Common Market Law Review* (52) 2015, p. 685-720, on p. 687; J. Krommendijk, 'Principled silence or mere silence on principles?' *European Constitutional Law Review* (11) 2015, p. 321-356.

[17] For example, Court of First Instance of the EC 28 June 2002, case T-177/01, ECLI:EU:T:2002:112 (*Jégo-Quéré/Commission*), para. 42.

[18] For example, CJEC 6 March 2001, case C-274/99 P, ECLI:EU:C:2001:127 (*Connolly/Commission*), para. 39. Not until later, and especially in cases where the ECHR could not be relied upon or where the national court submitted preliminary references on the Charter, did the Court start to specifically refer to the Charter (besides other international treaties recognising the fundamental right in question); see, for example, CJEU 14 February 2008, case C-450/06, ECLI:EU:C:2008:91 (*Varec*), para. 48; CJEU 11 December 2007, case C-438/05, ECLI:EU:C:2007:772 (*International Transport Workers' Federation and Finnish Seamen's Union*), paras. 43-44; CJEU 14 February 2008, case C-244/06, ECLI:EU:C:2008:85 (*Dynamic Medien*), para. 39; CJEU 29 January 2008, case C-275/06, ECLI:EU:C:2008:54 (*Promusicae*), para. 61 et seq.

[19] See, with further source citations, S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.32-52.33.

ECHR.[20] It was not until 2002, when the ECtHR had long since reached a different conclusion, that the ECJ reversed its ruling.[21] The Court also made it clear in the 2000s that EU freedoms of movement, in principle, take precedence over fundamental social and economic rights, such as the right for employees to engage in collective action.[22] The CJEU showed itself to not be very dynamic either when it came to individuals' *jus standi* before the Court. The Court's approach to *jus standi* makes it very difficult for individuals to effectively lodge a complaint about European legislative acts.[23]

In the eyes of critics, these lines of case law show that the CJEU has not adopted a positive attitude towards fundamental rights.[24] However, this perception of the CJEU does not do justice to its contribution to the development of fundamental rights in the EU. In some areas, the CJEU has always pioneered and its case law is even more developed than that of the ECtHR.[25] An example is the area of non-discrimination and equality, where

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[20] CJEU 21 September 1989, joined cases C-46/87 and C-227/88, ECLI:EU:C:1989:337 (*Hoechst/Commission*), paras. 17-18. The Court chose a similar, restrictive approach in *Orkem* (CJEU 18 October 1989, case C-374/87, ECLI:EU:C:1989:387 (*Orkem/Commission*), paras. 19 and 29); see further F. van den Berghe, 'The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?' *European Law Journal* (16) 2010, p. 112-157, on p. 120; W. Weiß, 'The EU Human Rights Regime Post Lisbon: Turning the CJEU into a Human Rights Court?' in: S. Morano-Foadi & L. Vickers (ed.), *Fundamental Rights in the EU. A Matter for Two Courts*, Oxford: Hart 2015, p. 69-89, on p. 73.

[21] CJEU 22 October 2002, case C-94/00, ECLI:EU:C:2002:603 (*Roquette Frères*), para. 29 et seq.; as early as in 1992, the ECtHR had already ruled that a search of business premises could also be covered by Article 8 of the ECHR: ECtHR 16 December 1992, no. 13710/88, ECLI:CE:ECHR:1992:1216JUD001371088, paras. 30-31.

[22] CJEU 11 December 2007, case C-438/05, ECLI:EU:C:2007:772 (*International Transport Workers' Federation and Finnish Seamen's Union*), ECLI:EU:C:2007:772, paras. 85-90. In the same manner, the Court set rather steep criteria for justification of blockading as a specific form of collective action by trade unions in the *Laval* case; CJEU 18 December 2007, case C-341/05, ECLI:EU:C:2007:809 (*Laval un Parteri*), para. 110. See further, for example L. Azoulai, 'The Court of Justice and the Social Market Economy: the emergence of an ideal and the conditions for its realisation,' *Common Market Law Review* (45) 2008, p. 13351355; S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon,' *Human Rights Law Review* (11) 2011, p. 645-682, on p. 678; S. Weatherill, 'From Economic Rights to Fundamental Rights,' in: S.A. de Vries et al. (ed.), *The Protection of Fundamental Rights in the EU After Lisbon*, Oxford: Hart 2013, p. 11-36, on p. 26-28; S. Garben, 'The constitutional (im)balance between "the market" and "the social" in the European Union,' *European Constitutional Law Review* (13) 2017, p. 23-61, p. 33-34.

[23] This is shown by the classic *Plaumann* doctrine; see CJEC 15 July 1963, case 25/62, ECLI:EU:C:1963:17 (*Plaumann*). For a more recent application of this doctrine and the consequences thereof for individuals' *jus standi*, see, for example, CJEU 3 October 2013, case C-583/11 P, ECLI:EU:C:2013:625 (*Inuit Tapiriit Kanatami and Others/Parliament and Council*). For more about this, see also G. Winter, '*Plaumann* Withering: Standing before the EU General Court Underway from Distinctive to Substantial Concern,' *European Journal of Legal Studies* 2023, doi.org/10.2924/EJLS.2023.008.

[24] See, for example, J. Heliskoski, 'Fundamental Rights versus Economic Freedoms in the European Union: Which paradigm?' in: J. Klabbers & J. Petman (ed.), *Nordic Cosmopolitism: Essays in International Law for Martti Koskenniemi*, Leiden: Martinus Nijhoff/Brill 2003, p. 417-443; S. Weatherill, 'From Economic Rights to Fundamental Rights,' in: S.A. de Vries et al. (ed.), *The Protection of Fundamental Rights in the EU After Lisbon*, Oxford: Hart 2013, p. 11-36, on p. 26. For a summary, see also W. Weiß, 'The EU Human Rights Regime Post Lisbon: Turning the CJEU into a Human Rights Court?' in: S. Morano-Foadi & L. Vickers (ed.), *Fundamental Rights in the EU. A Matter for Two Courts*, Oxford: Hart 2015, p. 69-89, on p. 73. See also the preliminary opinions of Laagland and Jansen.

[25] W. Weiß, 'The EU Human Rights Regime Post Lisbon: Turning the CJEU into a Human Rights Court?' in: S. Morano-Foadi & L. Vickers (ed.), *Fundamental Rights in the EU. A Matter for Two Courts*, Oxford: Hart 2015, p. 69-89, on p. 74. See also S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon,' *Human Rights Law Review* (11) 2011, p. 645-682, on p. 675, albeit that she also notes that the CJEU's actual motive in the cases discussed below was not so much the desire to effectively protect fundamental rights

the CJEU has always played an important role.[26] Although the relevant treaty provisions clearly reflect economic motives, they have enabled the CJEU to develop a number of important concepts, such as that of substantive and indirect discrimination.[27] In a similar way, the CJEU has drawn on the notion of EU citizenship to link EU principles to the exercise of certain fundamental rights.[28] Particularly in the areas of freedom, security and justice and with respect to immigration and asylum law, the Court has also recognised important rights, such as the protection of family life, social rights, residence rights, and non-discrimination rights.[29] Its review criteria are, in some respects, clearer and more helpful than those of the ECtHR, and EU case law sometimes even offers a higher level of protection.[30] There is also clear progressiveness when it comes to the protection of personal data and topics such as internet freedom.[31] In recent years, the CJEU has succeeded in developing the right to personal data protection into a kind of 'super fundamental right' and requires that the fundamental rights of Articles 7 and 8 of the Charter be given priority over the economic interests of, for example, internet search engines.[32] It is also clear that the CJEU is

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but rather the desire to maintain and strengthen the autonomy of the EU legal order. More recently, too, doubts have been raised over whether the CJEU is indeed intrinsically motivated to protect fundamental rights; see, for example, S. Garben, 'The constitutional (im)balance between "the market" and "the social" in the European Union,' *European Constitutional Law Review* (13) 2017, p. 23-61.

[26] See further, with further source citations, J.H. Gerards, 'Non-Discrimination, the European Court of Justice and the European Court of Human Rights – who takes the lead?' in: Th. Giegerich (ed.), *The European Union as Protector and Promoter of Equality*, Springer Verlag 2020, p. 135-163. This does, in fact, show that the CJEU offers less far-reaching protection than the ECtHR in certain areas of equality law.

[27] For example, CJEC 15 June 1978, case C-149/77, ECLI:EU:C:1978:130 (*Defrenne/Sabena*); CJEC 13 May 1986, case C-170/84, ECLI:EU:C:1986:204 (*Bilka/Weber von Hartz*); CJEC 27 October 1993, case C-127/92, ECLI:EU:C:1993:859 (*Enderby*); CJEC 2 August 1993, case C-271/91, ECLI:EU:C:1993:335 (*Marshall*). Muir has branded this the 'transformative function' of EU equality law; see E. Muir, 'The Transformative Function of EU Equality Law,' *European Review of Private Law* (21) 2013, p. 1231-1254, on p. 1236 et seq.

[28] For example, CJEC 29 April 2004, case C-482/01, ECLI:EU:C:2004:262 (*Orfanopoulos*); see further, for example, S. Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights,' *Common Market Law Review* (49) 2012, p. 1565-161, on p. 1595; D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe,' *Common Market Law Review* (50) 2013, p. 1267-1304, on p. 1271; A. von Bogdandy et al., 'Reverse *Solange* – protecting the essence of fundamental rights against EU member states,' *Common Market Law Review* (49) 2012, p. 489-520, on p. 503.

[29] See, for example, CJEC 17 September 2002, case C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R*); CJEU 22 December 2010, case C-208/09, ECLI:EU:C:2010:806 (*Sayn-Wittgenstein*).

[30] For specific examples, see K. Zwaan & A. Terlouw, 'Het *Y. en Z.*-arrest: een nieuwe visie op vervolging op grond van godsdienst,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 83-100; K. Zwaan & A. Terlouw, 'Het *A.B.C.*-arrest: menselijke waardigheid en de geloofwaardigheid van seksuele gerichtheid,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 143-158.

[31] For more on this, see, for example, Chapter 4 (on freedom of expression and the right to information) and Chapter 7 (on personal data protection, by Van der Jagt), in: J.H. Gerards (ed.), *Fundamental Rights. The European and International Dimension*, Cambridge: Cambridge University Press 2023.

[32] S. de Heer & S. de Vries, 'Over *Google Spain* en *Schrems*, of: de grote vlucht van het recht op bescherming van persoonsgegevens in de EU,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 101-120, on p. 107 (referring to CLEU 24 September 2019, case C-136/17, ECLI:EU:C:2019:773 (*GC and Others/Google*), paras. 81, 87 and 119); B. van der Sloot, 'Wij zijn twee vriendjes, jij en ik: de innige tango van de twee Europese hoven op het gebied van privacy en gegevensbescherming,' *SEW* 2021, issue 12, p. 582-594, on p. 584.

committed to protecting the right of access to an independent court and other procedural rights.[33]

Still, it remains difficult to give an unambiguous answer to the question of whether the CJEU has actually become a 'fundamental rights court' following the emergence of the Charter. Compared to the ECtHR, the CJEU has a clearly broader mandate and – in addition to fundamental rights – rules on a multitude of matters.[34] However, the CJEU must always take into account the key principles discussed in Section 2.1, which dictate that, for example, the Court must always strive for unified and effective functioning of EU law and for respect for the autonomy of the EU legal order. Moreover, the tendency to be progressive, especially on 'typical' EU topics (which nowadays also include data protection), remains strong. Whether the CJEU considers fundamental rights equally important in other, more controversial areas, is still up for debate, as is also evident from the various preliminary opinions.[35] Sections 4 and 5 will show that this background and the Court's resulting, rather ambivalent attitude has significant impact on its interpretation of the EU Charter of Fundamental Rights.

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[33] By now, there is extensive case law available on this; for just a few examples from many, see CJEU 19 November 2018, case C-585/18 and joined cases C-624/18 and C-625/18, ECLI:EU:C:2019:982 (*A.K. (independence of the chamber of the Sąd Najwyższy)*); CJEU 24 June 2019, case C-619/18, ECLI:EU:C:2019:531 (*Commission/Poland (lowering the retirement age of judges)*); CJEU 15 July 2021, case C-791/19, ECLI:EU:C:2021:596 (*Commission/Poland (disciplinary courts)*); CJEU 6 October 2021, case C-487/19, ECLI:EU:C:2021:798 (*W.Ż.*); CJEU 26 April 2022, case C-401/19, ECLI:EU:C:2022:297 (*Poland/Parliament and Council*). For more about this case law, see, among others, J.J.J. Sillen, 'Rechterlijke onafhankelijkheid als Unierechtelijk beginsel. Bespiegelingen naar aanleiding van *Commissie/Polen*,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 313; M. Leloup, *The impact of the fundamental rights case law of the European Court of Human Rights and the European Court of Justice on the domestic separation of powers* (thesis, University of Antwerp), 2021; J.J.J. Sillen, 'Straatsburg, Luxemburg en twee perspectieven op rechterlijke onafhankelijkheid,' *SEW* 2021, issue 12, p. 628.

[34] Cf. J. Krommendijk & G.B.M. de Vries, 'De wisselwerking tussen het HvJ EU en het EHRM: een hernieuwde liefde?' *SEW* 2021, issue 12, p. 560-570, on p. 561; A. Rosas, 'The Court of Justice of the European Union: A Human Rights Institution?' *Journal of Human Rights Practice* 2022, p. 204-214, on p. 211.

[35] See further, for example, D. Leczykiewiecz, 'The Charter of Fundamental Rights and the EU's Shallow Constitutionalism,' in: N.W. Barber, M. Cahill & R. Ekins (ed.), *The Rise and Fall of the European Constitution*, Oxford: Hart Publishing 2019, p. 125-154. This is the case, for example, when it comes to the right to equal treatment. With respect to this right, the CJEU has long been at the forefront when it comes to conceptual development and judicial protection, but recently the ECtHR appears to offer more protection in certain areas; see J.H. Gerards, 'Non-Discrimination, the European Court of Justice and the European Court of Human Rights – who takes the lead?' in: Th. Giegerich (ed.), *The European Union as Protector and Promoter of Equality*, Springer Verlag 2020, p. 135-163; J.H. Gerards, 'Non-discrimination in the case-law of the European Court of Justice and the European Court of Human Rights,' in: C. O'Cinneide, J. Ringelheim & I. Solanke, *Research Handbook on European Anti-Discrimination Law* (Edward Elgar) (to be published in 2024).

4 General doctrine of Charter law in CJEU case law

4.1 Introduction

Since the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter has, under Article 6(2) of the TFEU, had the same value as the Treaties.[1] This fact has led to a large number of references for a preliminary ruling on the exact interpretation and meaning of the Charter. In turn, these references have given the CJEU many opportunities to develop standards and doctrines in the field of fundamental rights and to clarify the text of the Charter.[2] Building on concepts and principles that it developed as general principles in its previous case law on fundamental rights, the CJEU has now formulated a number of case law doctrines on various topics, such as the material and personal scope of application of the Charter, the criteria for justification of infringements of fundamental rights, horizontal effect, and the relationship between the Charter and national constitutional rights.[3]

The Charter itself provides the necessary tools for the development of these general doctrines. Title VII contains a number of generic provisions that are relevant to the interpretation and application of all fundamental rights set out in the first fifty provisions of the Charter. Given that these provisions cover the full breadth of the Charter, they are usually referred to as 'horizontal' provisions. Title VII contains, among other things, provisions on the material scope of application of the Charter (Article 51(1)), the possibilities for limiting the exercise of fundamental rights (Article 52(1)), the relationship between the Charter and other fundamental rights instruments, such as the ECHR and national constitutions (Article 52(3) and Article 53), and the legal nature of the fundamental social and economic rights included in the Charter (Article 52(5)). In these provisions, the drafters of the Charter set down clear choices as to how the Charter should be interpreted and applied. What is special here is that many of these choices are explained in the Explanations relating to the Charter, which, according

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[1] On the role of the binding Charter, see also K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights,' *European Constitutional Law Review* (6) 2012, p. 375-403, on p. 376-377; S. Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights,' *Common Market Law Review* (49) 2012, p. 1565-161.

[2] Opinions vary on the consequences of the Charter becoming binding; cf., for example, S. Weatherill, 'From Economic Rights to Fundamental Rights,' in: S.A. de Vries et al. (ed.), *The Protection of Fundamental Rights in the EU After Lisbon*, Oxford: Hart 2013, p. 11-36, on p. 30 and, in the same compilation, S.A. de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon – An Endeavour for More Harmony'.

[3] Cf. D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe,' *Common Market Law Review* (50) 2013, p. 1267-1304, p. 1270.

to Article 52(7), are of additional value in the interpretation and development of EU fundamental rights protection.

Given that the CJEU always refers to these horizontal provisions of Title VII in its Charter-related case law, these provisions and the explanation given in the Explanations play a vital role in the discussion of the general doctrines in this section. At the same time, it is significant to note that the CJEU had already developed strong fundamental rights case law before the Treaty of Lisbon came into force and the Charter became binding. A number of doctrines had, therefore, already been established in the case law on fundamental rights as general principles of EU law. Since the Court has built on this in its post-Lisbon case law, previously developed doctrines continue to be important today and are occasionally mixed with new doctrines.

This section aims to explain the most important general Charter doctrines as developed in the case law of the CJEU, against the backdrop of the context outlined above in Section 2 and Section 3. The following sections will go into the scope of application (Section 4.2), horizontal effect (Section 4.3), the difference between 'Charter rights' and 'Charter principles' (which includes many fundamental social and economic rights) (Section 4.4), justification of limitation of fundamental rights (Section 4.5), the intensity of review used (Section 4.6), and positive obligations (Section 4.7).

4.2 Scope of application

4.2.1 Acts and omissions of EU institutions

The wording of Article 51(1) of the Charter makes it clear that the Charter applies primarily to acts, measures, and resolutions of the institutions, bodies, offices and agencies of the EU.[4] The CJEU has confirmed that it cannot act contrary to the Charter due to the essential nature of the rights at stake; regulations, resolutions, and other acts that are incompatible with these rights cannot be permitted.[5] This even applies to acts by EU institutions that, strictly speaking, fall outside the EU framework, such as the adoption of a Memorandum of Understanding by the European Commission in connection with the treaty on the European Stability

[4] For a more detailed explanation of the interpretation of this provision, see A. Ward, 'Article 51. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1611-1673, Section 51.56-51-66.

[5] For example, CJEU 9 November 2010, case C-92/09, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*), para. 46; CJEU 24 October 2018, case C-234/17, ECLI:EU:C:2018:853 (*XC and Others*), para. 37. For a more fundamental, constitutional substantiation, see D. Leczykiewiecz, 'The Charter of Fundamental Rights and the EU's Shallow Constitutionalism,' in: N.W. Barber, M. Cahill & R. Ekins (ed.), *The Rise and Fall of the European Constitution*, Oxford: Hart Publishing 2019, p. 125-154 and see for historic backgrounds A. Ward, 'Article 51. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1611-1673, Section 51.42.

Mechanism (ESM).[6] Furthermore, the Court has ruled that the Charter imposes an obligation to interpret EU measures and resolutions in a manner that respects fundamental rights.[7]
Although this aspect of the Charter's scope of application appears to be clear, it sometimes raises questions. The *OZ* case, for example, concerned a complaint about sexual harassment by an employee of the European Investment Bank.[8] The complaint was investigated by an investigative committee, after which the President of the European Investment Bank decided not to pursue it further. According to the person concerned, her rights to good administration and a fair trial were thereby impaired. Although the CJEU did not explicitly address the interpretation of Article 51(1) of the Charter, it did deem the Charter applicable in this case, as can be deduced from its review.[9]

The review of EU legislation against the Charter may result in the CJEU invalidating an EU legislative act, such as a directive.[10] This may raise a question as to how invalidation of an EU legislative act affects national laws transposing the EU legislation concerned. In the *Tele2 Sverige* case, the CJEU answered this question by ruling that the relevant national law should not be applied as long as it does not remedy the deficiencies identified by the CJEU in relation to the original EU legislation.[11]

The limit on the applicability of the Charter to EU acts is laid down in Article 51(2) of the Charter, which states that the Charter does not extend the field of application of Union law beyond the powers of the Union. The Charter, therefore, does not grant the EU institutions new powers of their own to act to ensure the protection of fundamental rights. This limitation is closely linked to the fundamental principles underlying EU law, as set out in Section 2.

4.2.2 Acts and omissions of Member States

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6 CJEU 20 September 2016, joined cases C-8/15 P to C/10-15 P (*Ledra Advertising/Commission and ECB*), para. 67.

7 For example, CJEU 15 September 2011, case C-483/09, ECLI:EU:C:2011:583 (*Gueye*), para. 55; CJEU 13 May 2014, case C-131/12, ECLI:EU:C:2014:317 (*Google Spain and Google*).

8 CJEU 4 April 2019, case C-558/17 P, ECLI:EU:C:2019:289 (*OZ/EIB*).

9 In fact, the ruling shows that substantive Charter provisions, too, can in some cases impose further restrictions on application. For example, the CJEU deemed that the investigative committee and the president could not be regarded as a 'tribunal' as defined in Article 47 of the Charter, meaning that this provision did not apply (CJEU 4 April 2019, case C-558/17 P, ECLI:EU:C:2019:289 (*OZ/EIB*), para. 49). The complainant was, however, able to invoke the right to good administration under Article 41 of the Charter in this case (para. 59).

10 For example, CJEU 8 April 2014, case C-293/12, ECLI:EU:C:2014:238 (*Digital Rights Ireland*).

11 CJEU 21 December 2016, case C-203/15, ECLI:EU:C:2016:970 (*Tele2 Sverige*).

The Charter was drawn up primarily to ensure that fundamental rights be properly protected against the acts of the EU and its institutions.[12] When it comes to national acts, this protection is in itself sufficiently guaranteed by national fundamental rights instruments and international treaties, such as the ECHR. As the ECtHR found in the *Bosphorus* case, the EU Member States are fully responsible for their own acts under the ECHR, even if this is directly prompted by EU law.[13] As a result, it may seem less necessary for the Charter to also apply to the acts of the Member States.[14] Yet there are circumstances where it is logical for national acts and omissions to fall within the Charter's scope of application.[15] Two main situations can be distinguished here, which for convenience can be referred to as the 'agent situation' (a) and the 'infringement situation' (b). Both these situations will be discussed separately below. To close, a special situation will be discussed briefly, namely the situation where the wording of the Charter itself expressly limits the parties responsible for complying with a fundamental right to the EU institutions (c).

a. Implementing EU law – the 'agent situation'

Member States are only obliged to comply with the Charter 'when they are implementing Union law' (Article 51(1) of the Charter).[16] In what has meanwhile become a classic ruling, the CJEU's ruling in the *Åkerberg Fransson* case explains how this provision should be interpreted.[17] This ruling builds on a previous case, the *Wachauf* case from 1989, where the CJEU ruled that when a Member State transposes a directive into national law or implements the obligations under a regulation, it must do so in accordance with the fundamental rights as recognised by CJEU case law.[18]

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[12] Cf. A. Ward, 'Article 51. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1611-1673, Section 51.42.

[13] For the Bosphorus doctrine, see ECtHR (GK) 30 June 2006, no. 45036/98, ECLI:CE:ECHR:2006:0630JUD004503698 (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi/Ireland*); see further on this, for example, J.H. Gerards, 'Chapter 5. Relationship Between the Convention and the EU,' in: P. van Dijk et al. (ed.), *Theory and Practice of the European Convention on Human Rights*, fifth edition, Antwerp: Intersentia 2018, p. 331-350, on p. 339-343.

[14] See further A. Ward, 'Article 51. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1611-1673, Section 51.52, which points out that when the Charter was drafted there were some hesitations on making the Charter overly binding on the Member States.

[15] In fact, it has been argued that the scope of application should be extended even further; about this, see A. Jákab & L. Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights,' *Cambridge Yearbook of European Legal Studies* (24) 2022, p. 239-261.

[16] For example, T. von Danwitz & K. Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights,' *Fordham International Law Review* (35) 2012, p. 1396-1424, on p. 1405.

[17] CJEU 26 February 2013, case C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*). For more details about this, see also A. Ward, 'Article 51. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1611-1673, Section 51.73-51.83.

[18] CJEC 13 July 1989, case C-5/88, ECLI:EU:C:1989:321 (*Wachauf*), paras. 19 and 22; see also F.G. Jacobs, 'Human Rights in the European Union: the role of the Court of Justice,' *European Law Review* (26) 2001, p. 331-341, on p. 333.

In the *Åkerberg Fransson* ruling, the CJEU confirmed that the applicability of the Charter follows the applicability of EU law, because it would be undesirable for there to be situations governed by EU law where fundamental rights are not being protected.[19] On the other hand, if a limitation on a fundamental right does not fall within the scope of EU law, the Court has no jurisdiction to rule on it and the provisions of the Charter can, consequently, not be applied.[20]

This approach makes sense from the perspective of the principles discussed in Section 2: if Member States were to be able to unilaterally decide not to comply with fundamental EU principles, the effectiveness of EU law as a whole would be jeopardised.[21] Since the Charter is specifically intended to limit the acts and omissions of the EU institutions and bodies, it is obvious that implementing acts in the Member States will also be regulated in this way. Conversely, limiting the scope to acts that implement EU law is understandable from the principle of the limited transfer of powers to the EU and the notion of respect for national sovereignty.

The consequence of the approach in the *Åkerberg Fransson* ruling is that the Charter applies as soon as the Member States act as if they were themselves an institution or body of the EU or, in other words, if they act as 'agents' or extensions of the EU institutions.[22] In many cases, it is quite easy to determine whether or not they are, but it still took a lot of case law to specify when exactly a situation could be classed as an 'agent situation'. In the *Julián Hernández* ruling in particular, the Court formulated some further criteria to help determine whether a national act falls under EU law and, therefore, under the Charter.[23] According to the CJEU, the mere fact that the subject of national legislation is covered in a significant body of EU law is not sufficient to bring a case within the scope of the Charter:[24]

'In order to determine whether a national measure involves the implementation of EU law for the purposes of Article 51(1) of the Charter, it is necessary to determine, inter alia, whether that national legislation is intended to implement a provision of EU law; the nature of the

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[19] CJEU 26 February 2013, case C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*), para. 21. See also H. de Waele, 'Het toepassingsbereik van het Handvest: *Åkerberg Fransson* in Nederland,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 46-61, on p. 47 et seq.

[20] CJEU 26 February 2013, case C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*), para. 22.

[21] Idem, para. 19.

[22] The EU Fundamental Rights Agency (FRA) speaks of 'agents' or 'representatives' (FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*, Luxembourg: Publications Office of the European Union, 2020, p. 40).

[23] CJEU 10 July 2014, case C-198/13, ECLI:EU:C:2014:2055 (*Julián Hernández and Others*), para. 34; see previously CJEU 6 March 2014, case C-206/13, ECLI:EU:C:2014:126 (*Siragusa*). See also H. de Waele, 'Het toepassingsbereik van het Handvest: *Åkerberg Fransson* in Nederland,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 46-61, on p. 48; FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*, Luxembourg: Publications Office of the European Union, 2020, p. 40 et seq.

[24] CJEU 10 July 2014, case C-198/13, ECLI:EU:C:2014:2055 (*Julián Hernández and Others*), para. 37; see also CJEU 6 March 2014, case C-206/13, ECLI:EU:C:2014:126 (*Siragusa*), para. 24.

legislation at issue 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 rules which are capable of affecting it.'[25]

For an example of a practical application of these rather abstract criteria, see the *Miratvilles Ciurana* case.[26] The main proceedings in this case concerned the possibility of holding directors of public limited companies liable. In this case, a creditor had a claim based on an employment contract but at the same time wanted to hold the directors jointly and severally liable for the company's debts before the same court. The employment tribunal was not competent under national law to also rule on directors' liability and wondered whether this limitation was compatible with the Charter, in particular the right to an effective legal remedy (Article 47 Charter). With respect to this point, he referred to a number of directive provisions, but the Court found that none of these provisions related to the liability of directors and did not impose any special requirements with regard to the court's competence to rule on this matter. As a result, the directive could not be considered applicable to the litigious act at a national level, meaning that it could not be considered a form of implementing EU law either.[27] The Charter was, therefore, not applicable in this case and the CJEU could not answer the questions of interpretation posed in this regard.

The Court of Justice is usually quite quick to conclude that a certain situation is governed by EU law.[28] A national act or omission, even if not specifically intended to implement EU law, may still fall within the scope of the Charter if it pursues typical EU objectives or concerns fundamental rights issues that are such that the unity, primacy, or effectiveness of EU legislation may be at stake.[29] The fact that there is certain or even broad discretion at national level is not decisive for applicability of the Charter either.[30] It is primarily about EU law being applied or implemented.[31]

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[25] CJEU 6 March 2014, case C-206/13, ECLI:EU:C:2014:126 (*Siragusa*), para. 24.

[26] CJEU 14 December 2017, case C-243/16, ECLI:EU:C:2017:969 (*Miratvilles Ciurana*).

[27] See also, for example, CJEU 19 April 2018, case C-152/17, ECLI:EU:C:2018:264 (*Consorzio Italian Management*) paras. 34-35; CJEU 25 October 2018, case C-260/17, ECLI:EU:C:2018:864 (*Anodiki Services EPE*), paras. 35-39.

[28] For example, CJEU 22 May 2014, case C-56/13, ECLI:EU:C:2014:352 (*Érsekcsanádi Mezőgazdasági*), para. 54. See further FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*, Luxembourg: Publications Office of the European Union, 2020, p. 40 et seq.; A. Ward, 'Article 51. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1611-1673, Section 51.53 and Section 51.87.

[29] CJEU 6 March 2014, case C-206/13, ECLI:EU:C:2014:126 (*Siragusa*), paras. 25 and 31.

[30] CJEU 13 June 2017, case C-258/14, ECLI:EU:C:2017:448 (*Florescu and Others*), para. 48; CJEU 13 December 2017, case C-403/16, ECLI:EU:C:2017:960 (*El Hassani*), para. 36; CJEU 27 January 2022, case C-234/20, ECLI:EU:C:2022:56 (*Sātiņi-S SIA*), para. 57.

[31] For a run-down of situations where EU law applies, see FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*, Luxembourg: Publications Office of the European Union, 2020, p. 40-42 and, in particular, the 'checklist on the applicability of the Charter' in this guidance on p. 47 et seq.

Additionally, the Court turns out to be prepared to, by way of an exception, deal with certain preliminary references relating to the Charter, even if there is no clear link between the national matter and EU law. The Court does this, for example, if the provisions of EU law are not applicable in themselves but national law does refer to them and conforms to them.[32] However, the CJEU will only deal with such an issue if providing a preliminary interpretation is in the special interest of unity of interpretation of EU law.[33]

In a number of cases, the CJEU held – in addition to the *Julián Hernández* situation discussed above – that the situation was not one of implementing EU law.[34] This is obviously the case if the situation is purely internal or if the EU has no powers at all in a particular area.[35] Another example is a situation of minimum or partial harmonisation, where an EU regulation covers only a limited number of issues. If, in such a situation, a Member State chooses under its own national sovereign competence to opt to transpose a EU regulation into its national law with a more extensive level of protection of fundamental rights than the EU regulation strictly requires ('gold-plating'), the Member State itself will remain responsible for that more extensive, non-mandatory protection.[36] And neither will the Member State be held to render account for that under the Charter.[37] The same applies to other situations where national authorities either exercise powers not governed by EU law or have such a degree of discretion that the choices made must be considered entirely their own.[38] The determining factor here is, therefore, whether or not a specific exercise of powers is dictated or

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[32] CJEU 24 October 2019, joined cases C-469/18 and C-470/18, ECLI:EU:C:2019:895 (*IN and JM*), paras. 18-22; CJEU 11 June 2020, case C-634/18, ECLI:EU:C:2020:455 (*Prokuratura Rejonowa w Słupsku*), paras. 24-25.

[33] CJEU 24 October 2019, joined cases C-469/18 and C-470/18, ECLI:EU:C:2019:895 (*IN and JM*), para. 24; CJEU 11 June 2020, case C-634/18, ECLI:EU:C:2020:455 (*Prokuratura Rejonowa w Słupsku*), para. 29.

[34] For several specific examples, see also J. Krommendijk, 'Tien jaar bindend EU-Grondrechtenhandvest in de Nederlandse rechtspraktijk: een inleidende schets van de status quo,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 1-44, on p. 13.

[35] For more about these cases, see H. de Waele, 'Het toepassingsbereik van het Handvest: *Åkerberg Fransson* in Nederland,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 46-61, on p. 48-49. He also points to the interpretation of this provided in Dutch policy documents (p. 50).

[36] See, for example, CJEU 18 September 2019, case C-366/18, ECLI:EU:C:2019:757 (*Ortiz Mesonero*), paras. 45-51; CJEU 19 November 2019, joined cases C-609/17 and C-610/17 (*TSN*), para. 53; CJEU 28 November 2019, case C-653/19 PPU, ECLI:EU:C:2019:1024 (*Spetsializirana prokuratura*), paras. 28 and 41; CJEU 17 March 2021, case C-652/19, ECLI:EU:C:2021:208 (*Consulmarketing*), paras. 44-45. See also FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*, Luxembourg: Publications Office of the European Union, 2020, p. 51.

[37] Needless to say, this is different if the matter comes under the harmonised part; for more about this, see, for example, CJEU 13 February 2020, case C-688/18, ECLI:EU:C:2020:94 (*Spetsializirana prokuratura (trail in absentia/non-appearance of accused persons)*).

[38] For example, CJEU 8 May 2014, case C-483/12, ECLI:EU:C:2014:304 (*Pelckmans*), paras. 22-25; CJEU 5 February 2015, case C-117/14, ECLI:EU:C:2015:60 (*Nisttahuz Poclava*); CJEU 7 March 2017, case C-638/16 PPU, ECLI:EU:C:2017:173 (X and X).

governed by EU law.[39] The mere fact that a national issue is close to an issue regulated by EU law or that there is indirect influence of EU law on national law is not sufficient for the Charter to be applicable.[40]

In fact, the Charter not applying to national acts does not mean that there is no protection of fundamental rights whatsoever. As the CJEU itself noted, the ECHR – to which all EU Member States are parties – and national fundamental rights do still apply in that case.[41] As a result, the state can usually still be held accountable for fundamental rights violations before national courts or ultimately the ECtHR, though not on the basis of the Charter.

b. Infringement situation

In its case law on the application of fundamental rights as general principles, notably in the classic *ERT* case, the CJEU held that acts and omissions of Member States also fall within the scope of EU law when the Member States infringe upon the fundamental freedoms of the EU or when they discriminate directly or indirectly on the basis of nationality.[42] The CJEU made it clear in the *Pfleger* case that Article 51(1) of the Charter should be read as a continuation of this case law, although this is not explicitly stated in the wording of the provision.[43] The reasoning behind this is as follows:

> '… where a Member State relies on overriding requirements in the public interest in order to justify rules which are liable to obstruct the exercise of the freedom to provide services, such justification, provided for by EU law, must be interpreted in the light of the general principles of EU law, in particular the fundamental rights henceforth guaranteed by the Charter. Thus, the national rules in question can fall under the exceptions provided for only if they are compatible with the fundamental rights the observance of which is ensured

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[39] CJEU 22 May 2014, case C-56/13, ECLI:EU:C:2014:352 (*Érsekcsanádi Mezőgazdasági*), para. 54; CJEU 10 July 2014, case C-198/13, ECLI:EU:C:2014:2055 (*Julián Hernández and Others*), para. 39; CJEU 11 November 2014, case C-333/13, ECLI:EU:C:2014:2358 (*Dano*), paras. 89-91; CJEU 18 December 2014, case C-354/13, ECLI:EU:C:2014:2463 (*Kaltoft*), paras. 36-40; CJEU 8 December 2016, case C-532/15, ECLI:EU:C:2016:932 (*Eurosaneamientos and Others*), para. 54.

[40] CJEU 28 October 2021, case C-319/19, ECLI:EU:C:2021:883 (*Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo*), para. 44.

[41] For example, CJEU 15 November 2011, case C-256/11, ECLI:EU:C:2011:734 (*Dereci*), paras. 72-73; CJEU 30 May 2013, case C-168/13 PPU, ECLI:EU:C:2013:358 (*Jeremy F.*), para. 48.

[42] See also F.G. Jacobs, 'Human Rights in the European Union: the role of the Court of Justice,' *European Law Review* (26) 2001, p. 331-341, on p. 335. While the literature does argue that this could also imply that Member States must comply with the provisions of the Charter if they act in violation of fundamental Union values, as enshrined in the TEU, it is very much open to question, in light of current case law, whether it will come to that; see A. Jákab & L. Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights,' *Cambridge Yearbook of European Legal Studies* (24) 2022, p. 239-261.

[43] CJEU 30 April 2014, case C-390/12, ECLI:EU:C:2014:281 (*Pfleger and Others*), para. 36; see also J. Snell, 'Fundamental Rights Review of National Measures: Nothing New under the Charter?' *European Public Law* (21) 2015, p. 285-308, p. 298; H. de Waele, 'Het toepassingsbereik van het Handvest: *Åkerberg Fransson* in Nederland,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 46-46; FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*, Luxembourg: Publications Office of the European Union, 2020, p. 59 et seq.

> by the Court (…). As follows from that case law, where it is apparent that national rules are such as to obstruct the exercise of one or more fundamental freedoms safeguarded by the Treaty, it may benefit from the exceptions provided for by EU law in order to justify that fact only in so far as it complies with the fundamental rights enforced by the Court. This obligation to comply with fundamental rights manifestly comes within the scope of EU law and, consequently, within that of the Charter. The use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom safeguarded by the Treaty must, therefore, be regarded, as the Advocate General states in point 46 of her Opinion, as "implementing Union law" within the meaning of Article 51(1) of the Charter.'[44]

This means that the Charter applies to all cases where a Member State breaches one of its obligations under the Treaty and invokes an exception allowed by EU law to justify it.[45] Examples include the situation where a Member State invokes a fundamental right to justify infringement of the free movement of services or goods in the EU or to justify a breach of competition or state aid law.[46] In addition, a litigant may argue at the national level that not only a freedom of movement provision has been breached, but also a related Charter right, such as the freedom to conduct a business or the right to property.[47]

In both cases, the CJEU actually primarily applies the EU provisions on fundamental freedoms instead of Charter provisions.[48] The right to free movement is then deemed to encompass the specific fundamental right or leave scope for justification based on Charter rights.

In the vast majority of cases, there is, consequently, no need to focus separately on the Charter as well.[49] In such cases, the Charter is particularly helpful in highlighting the weight of the fundamental rights-related interests involved, which may be important in the proportionality review that is ultimately applied.

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[44] CJEU 30 April 2014, case C-390/12, ECLI:EU:C:2014:281 (*Pfleger and Others*), paras. 35-36. For a similar assessment of freedom of establishment, see, for example, CJEU 14 June 2017, case C-685/15, ECLI:EU:C:2017:452 (*Online Games Handels GmbH*), para. 48.

[45] In connection with the latter element, i.e. the obligation of justification, the EU Fundamental Rights Agency (FRA) speaks of the 'authorisation' situation. By accepting a justification, a Member State is effectively 'authorised' to derogate from EU law. See further FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*, Luxembourg: Publications Office of the European Union, 2020, p. 42; A. Ward, 'Article 51. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1611-1673, Section 51,132-135.

[46] See, for example, CJEU 12 May 2011, case C-391/09, ECLI:EU:C:2011:291 (*Runevič-Vardyn*). For more details and specific examples, see FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*, Luxembourg: Publications Office of the European Union, 2020, p. 59 et seq.

[47] See, for example, CJEU 11 February 2021, joined cases C-407/19 and C-471/19, ECLI:EU:C:2021:107 (*Katoen Natie Bulk Terminals and General Services Antwerp*).

[48] For example, CJEU 13 February 2014, case C-367/12, ECLI:EU:C:2014:68 (*Sokoll-Seebacher*), paras. 22-23; CJEU 30 April 2014, case C-390/12, ECLI:EU:C:2014:281 (*Pfleger and Others*), para. 57-60.

[49] For example, CJEU 20 December 2017, case C-322/16, ECLI:EU:C:2017:985 (*Global Starnet*), para. 50; CJEU 11 February 2021, joined cases C-407/19 and C-471/19, ECLI:EU:C:2021:107 (*Katoen Natie Bulk Terminals and General Services Antwerp*), para. 56.

c. Article 41 Charter

A final situation that can be distinguished within the scope of application of the Charter concerns a specific Charter provision that is of importance to administrative law, namely Article 41. In its first paragraph, this article states that everyone has the right to have 'his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.' Unlike the other Charter provisions, this provision is clearly directed at a specific addressee, in the sense that EU institutions, bodies, offices and agencies have the responsibility to respect and safeguard said rights.[50] This is why the CJEU inferred from the text of the provision that the right to good administration enshrined in Article 41 of the Charter *cannot* be invoked against the authorities of Member States.[51]

At the same time, this special exception to the scope of application does not mean that national administrative acts are not covered at all by EU fundamental rights. Indeed, in the *N.* case, the CJEU held that the codified right to good administration has an unwritten counterpart in the form of a general principle of EU law.[52] This general principle can be applied to the acts and omissions of Member States in the same way as was standard practice for unwritten fundamental rights until the Lisbon Treaty came into force. In this regard, the requirements to be imposed and the interpretation to be given are analogous to those arising from Article 41 of the Charter.[53]

4.2.3 Material scope of application

The applicability of a Charter provision obviously requires not only that a matter falls within the scope of application of EU law, as described above, it must also be shown that the case in question involves a violation of one of the fundamental rights enshrined in the Charter. The CJEU does not always heed the applicable interpretation criteria in equal measure. In many cases, the Court simply accepts that an issue relates to, for example, the right to protection of personal data or freedom of expression. Only when in doubt

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[50] See further A. Pahladsingh, 'Het Unierechtelijk verdedigingsbeginsel en de hoorplicht: een doorbraak in Nederland?' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 121-142, on p. 128, who also points out that the Explanations relating to the Charter convey a different message.

[51] See, for example, CJEU 10 February 2022, case C-219/20, ECLI:EU:C:2022:89 (*Bezirkshauptmannschaft Hartberg-Fürstenfeld (Délai de prescription)*) para. 36; see also the case law cited in the next footnote and see for more insight into how case law has developed A. Pahladsingh, 'Het Unierechtelijk verdedigingsbeginsel en de hoorplicht: een doorbraak in Nederland?' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 121-142, on p. 128-129.

[52] CJEU 8 May 2014, case C-604/12, ECLI:EU:C:2014:302 (*N.*), para. 49. This is regularly confirmed; see, for example, CJEU 20 December 2017, case C-521/15, ECLI:EU:C:2017:982 (*Spain/Council*), para. 89; CJEU 8 May 2019, case C-230/18, ECLI:EU:C:2019:383 (*PI*), para. 57; CJEU 10 February 2022, case C-219/20, ECLI:EU:C:2022:89 (*Bezirkshauptmannschaft Hartberg-Fürstenfeld (Délai de prescription)*), para. 50.

[53] See also M. Julicher, 'Hoe behoorlijk is de Grondwet?' *Nederlands Tijdschrift voor Bestuursrecht* 2019/44, issue 10, p. 441-449, on p. 444-445; A. Pahladsingh, 'Het Unierechtelijk verdedigingsbeginsel en de hoorplicht: een doorbraak in Nederland?' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 121-142, on p. 130.

does the Court address the question of the scope of application of Charter rights. In doing so, the Court sometimes refers to the Explanations relating to the Charter, which contain information about the material scope of application of a specific fundamental right, or to arguments derived from the structure of the Charter.[54] In addition, when it comes to delineating the Charter rights, the Court often seeks to tie in with its own previous case law or with ECtHR case law on corresponding fundamental rights enshrined in the ECHR.[55] The procedure in doing so will be addressed in Section 4.6 on the justification of infringements of fundamental rights and in Section 2.1 on harmonising interpretation.

One example of a case where the CJEU arrived at the conclusion that the Charter did not apply on substantive grounds is the following case: *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*.[56] This case was about a support scheme for operators of certain solar cell systems. The eligibility requirements for funds under the support scheme were changed at one point, which, according to the operators, infringed on their right to property (Article 17 of the Charter).[57] The Court examined whether this provision on the right to property did indeed apply in this case and whether the change to the scheme did indeed limit this right. In doing so, the Court referred first of all to its previous case law, which shows that the protection conferred by Article 17 of the Charter refers not only to commercial interests or opportunities but also to rights or an acquired legal position with asset value.[58] The follow-up question was whether payments under the support scheme could indeed be considered to constitute a vested legal status. In this respect, the CJEU held, also taking into account ECtHR case law on the right to property, that the operators could not assume that they could continue to enjoy the support payments unchanged.[59] Accordingly, the change to the amount of the support payments or to the conditions under a national provision could not, according to the Court, be considered an impairment of the right to property as enshrined in Article 17 of the Charter.[60] Therefore, according to the

[54] For example, CJEU 4 May 2023, case C-40/21, ECLI:EU:C:2023:367 (*Agenția Națională de Integritate*), paras. 77 and 79.

[55] See, for example, a ruling on academic freedom (Article 13 Charter), where the Court turned to ECtHR case law for inspiration on the specifics of that notion: CJEU 6 October 2020, case C-66/18, ECLI:EU:C:2020:792 (*Commission/Hungary (higher education)*), paras. 223-225. For other more recent examples, see CJEU 26 April 2022, case C-401/19, ECLI:EU:C:2022:297 (*Poland/Parliament and Council*), paras. 45-47; CJEU 5 May 2022, case C-83/20, ECLI:EU:C:2022:346 (*BPC Lux 2 Sàrl and Others*), paras. 3841; CJEU 4 May 2023, case C-40/21, ECLI:EU:C:2023:367 (*Agenția Națională de Integritate*), para. 80.

[56] CJEU 15 April 2021, joined cases C-798/18 and C-799/18, ECLI:EU:C:2021:280 (*Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*).

[57] In fact, this also went for Article 16 of the Charter, which the Court also found to not be applicable in the same case.

[58] CJEU 15 April 2021, joined cases C-798/18 and C-799/18, ECLI:EU:C:2021:280 (*Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*), para. 32.

[59] Idem, paras. 35- 54.

[60] Idem, para. 54.

CJEU, although the national court would have to verify this, it was more or less certain that the provision on the right to property did not apply and it was not necessary to examine whether there was an objective and reasonable justification for the change to the support scheme.[61]

Very exceptionally, the CJEU rejects a possible interpretation of the Charter because the scope of a fundamental right has been limited in EU law that gives concrete expression to that right. An example of this can be seen in the equality directives, which gave concrete expression to non-discrimination as protected by Article 21 of the Charter. These directives prohibit unequal treatment only on an exhaustive list of grounds and not on the basis of, for example, language. Language discrimination can sometimes still involve the indirect disadvantaging of people of a particular ethnic origin, but the CJEU has set high demands for proof of such indirect discrimination. As a result, language discrimination rarely falls within the scope of an equality directive. In the *Land Oberösterreich (Aide au logement)* case, it had been argued that this scope limitation would not have to apply to Article 21 of the Charter,[62] because this provision prohibits discrimination based on a non-exhaustive list of grounds. Article 21 of the Charter could then possibly serve as a 'safety net' for the limitations of the equality directives. However, such reasoning would, according to the CJEU, be at odds with the limitations on the scope of application arising from Article 51(1) of the Charter – as discussed in Section 4.2.2 – and with the principle of limited jurisdiction.[63] Therefore, the Charter provision could not be interpreted more broadly than allowed by the EU law that gives concrete expression to it. Similarly, provisions of the TFEU and those of the Charter must also be aligned: in a case where, for example, non-discrimination under Article 18 of the TFEU does not apply, unequal treatment cannot still be reviewed under Article 21 of the Charter.[64]

Finally, there may be cases where the CJEU finds, to some extent as it did with respect to Article 41 of the Charter[65], that although a Charter provision does not apply, a particular issue falls within the scope of a general principle of EU law. It did so, for example, in the *Agenția Națională de Integritate* case with respect to the proportionality of preventive sanctions.[66] The

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[61] Sometimes the Court also concludes that there has been no actual infringement of the fundamental right because, for example, a person's interests have not really been impaired by a measure or decision; see, for example, General Court 7 September 2022, case T-486/21, ECLI:EU:T:2022:517 (*OE*), paras. 112-116.

[62] CJEU 10 June 2021, case C-94/20, ECLI:EU:C:2021:477 (*Land Oberösterreich (Aide au logement)*), para. 28.

[63] See Section 4.2.1-4.2.2 and 2.1 respectively. In the ruling, this is constituted in para. 59.

[64] CJEU 2 September 2021, case C-930/19, ECLI:EU:C:2021:657 (*Belgian State (Droit de séjour en cas de violence domestique)*), paras. 51-53; actually, the Court did prove willing to indeed apply Article 20 of the Charter in this case, see paras. 54-55.

[65] For more about this, see Section 4.2.2 under c.

[66] CJEU 4 May 2023, case C-40/21, ECLI:EU:C:2023:367 (*Agenția Națională de Integritate*).

proportionality of punitive sanctions is governed by Article 49(3) of the Charter, but the CJEU, in line with ECtHR case law, has interpreted that provision as such that it does not extend to non-punitive sanctions.[67] However, the CJEU decided in the above ruling that the general EU law principle of proportionality, which is part of the general principles of EU law, must be applied in such cases.[68] This unwritten principle of proportionality requires that a measure be appropriate to safeguard the achievement of the aims pursued in a 'consistent and systematic manner' and not go beyond what is necessary to achieve those aims.[69] In practice, this unwritten proportionality requirement amounts to much the same as that of Article 49(3) of the Charter. This also shows that long-standing 'fundamental-rights-as-general-principles' case law remains relevant when it comes to filling gaps in the Charter.[70]

4.2.4 Personal scope of application: rightholders

The wording of the Charter distinguishes different groups that can claim one of the rights enshrined in this instrument.[71] Certain rights are specifically granted to EU citizens, such as the right to vote under Article 39 of the Charter, while others, such as the right to protection against unjustified dismissal under Article 30 of the Charter, can only be claimed by 'workers'. As to the principle of good administration, which has now been codified in Article 41 of the Charter, the General Court has ruled that it '(...) does not, in itself, confer rights on individuals, except where it constitutes the expression of specific rights.'[72]

Sometimes the personal scope of application is not even truly clear. In particular, the Charter often leaves some uncertainty as to whether rights can be relied upon only by individuals or also by legal entities. In the *DEB* case, the CJEU clarified that provisions directed at 'a person' do not 'exclude legal persons from a purely linguistic point of view.'[73] However, in order to truly determine who can rely on a Charter right, the CJEU argues that the context of the right must always be carefully considered and the provision must be interpreted 'in the light of other provisions of EU law, the

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[67] Idem, paras. 33 and 45.

[68] Idem, paras. 48- 49.

[69] Idem, para. 50.

[70] See further Section 4.8.

[71] See also D. Curtin & R. van Ooik, 'The Sting is Always in the Tail. The Personal Scope of Application of the EU Charter of Fundamental Rights,' *Maastricht Journal of European and Comparative Law* (8) 2001, p. 102-114, on p. 103; M. Julicher et al., 'Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared,' *Utrecht Law Review* (15) 2019, p. 1-25.

[72] General Court 9 June 2016, case T-276/13, ECLI:EU:T:2016:340 (*Growth Energy and Renewable Fuels Association/Raad*), para. 304.

[73] CJEU 22 December 2010, case C-279/09, ECLI:EU:C:2010:811 (*DEB*), para. 38. For an even more detailed explanation of what parts of a company can rely on Charter rights, see: CJEU 5 November 2019, joined cases C-663/17 P, C-665/17 P and C-669/17 P, ECLI:EU:C:2019:923 (*ECB/Trasta Komercbanka and Others*).

law of the Member States and the case law of the European Court of Human Rights.'[74] Based on such criteria, the CJEU has concluded that certain rights, such as the right to life, the right to human integrity, or the right to liberty, can only be invoked by people and not by legal entities.[75] The same goes for the right to personal data protection.[76]

Conversely, certain fundamental rights may be interpreted on a functional level, which may also affect the personal scope of application. The *IFSUA/Council* case, for example, concerned an EU regulation that imposed restrictions on underwater activities and recreational sea fishing.[77] The International Forum for Sustainable Underwater Activities had filed an invalidity action against it, arguing, among other things, that the regulation unjustifiably restricted the right to conduct a business (Article 16 of the Charter) for recreational sea fishermen. However, the General Court noted that recreational sea fishermen are not engaged in a commercial activity because they are not allowed to sell the fish they catch.[78] As a result, a measure could not affect them. It was arguable, however, that some commercial enterprises did suffer from the measure insofar as it restricted the rights of recreational fishermen. This allowed the General Court to leave aside whether this meant that Article 16 of the Charter could be applied in the case. And yet this ruling seems to suggest that the personal scope of application depends in part on whether a specific group is actually affected by an adverse measure.[79]

In connection with the personal scope of application of the Charter, another question is whether Charter rights can be relied upon by public bodies or legal entities closely associated with the state.[80] For the ECHR, the answer to that question is clear. The ECtHR has consistently rejected attempts by governments to rely on ECHR rights and has always clearly stipulated that

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[74] CJEU 22 December 2010, case C-279/09, ECLI:EU:C:2010:811 (*DEB*), para. 37.

[75] Idem, para. 39.

[76] CJEU 9 November 2010, case C-92/09, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*), paras. 52 and 53; CJEU 17 December 2015, case C-419/14, ECLI:EU:C:2015:832 (*WebMindLicenses*), para. 79. They can, therefore, not rely on protection under the GDPR; see CJEU 10 December 2020, case C-620/19, ECLI:EU:C:2020:1011 (*J & S Service*), paras. 46-47. For more about this, see also M. Julicher et al., 'Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared,' *Utrecht Law Review* (15) 2019, p. 1-25, on p. 7.

[77] General Court 10 March 2020, case T-251/18, ECLI:EU:T:89 (*IFSUA/Council*).

[78] Idem, para. 150.

[79] This is not entirely certain: the wording of the ruling fails to fully clarify whether the provision was inapplicable because the group in question was not 'conducting a business' under Article 16 of the Charter, or whether a violation of this provision could not be established because it could not be proven that recreational fishermen were adversely affected by the rule.

[80] About this, see, among other sources, J.H. Gerards, *Grondrechten onder spanning. Bescherming van fundamentele rechten in een complexe samenleving* (inaugural lecture, Utrecht University), 2017, https://www.uu.nl/sites/default/files/gerards_oratie_uu_2017_grondrechten_onder_spanning_v2017.03.20.pdf; M. Julicher et al., 'Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared,' *Utrecht Law Review* (15) 2019, p. 1-25.

Treaty rights can only be invoked by private parties.[81] In contrast, the CJEU has held that 'any natural person or any entity bringing an action before the Courts of the European Union' can in any case invoke the right of defence and the right to effective judicial protection, even if it is an administrative body or a public body.[82] For other rights, such as the right to good administration, the CJEU has left aside whether state-related actors can rely on them. The CJEU did, however, assume that such actors can in any case invoke the general, unwritten-principle counterpart of this article, against which the lawfulness of a decision of an EU institution can then be reviewed.[83]

4.3 Application of the Charter in disputes between private parties: horizontal effect

A key question in practice is the extent to which private parties (such as businesses or employers) can be held responsible for failure to comply with the Charter's provisions and the extent to which national courts can or should apply the Charter's provisions in civil law cases. This question of the application of fundamental rights in relations between private individuals ('horizontal effect') has posed particular problems for the CJEU, and the case law on the subject is extensive, nuanced, and complex.[84]

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[81] ECtHR 23 September 2003 (admissibility criteria), no. 53984/00, ECLI:CE:ECHR:2003:0923DEC005398400 (*Radio France and Others/France*), para. 26; ECtHR (GC) 18 November 2020 (admissibility criteria), no. 54155/16, ECLI:CE:ECHR:2020:1118JUD005415516 (*Slovenia/Croatia*). See further M. Julicher et al., 'Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared,' *Utrecht Law Review* (15) 2019, p. 1-25; J.H. Gerards, *General Principles of the European Convention on Human Rights*, second edition, Cambridge: Cambridge University Press 2023, p. 45.

[82] CJEU 18 February 2016, case C-176/13 P, ECLI:EU:C:2016:96 (*Council/Bank Mellat*), para. 49. See further Gerards, note to *Bank Mellat* in *EHRC* 2016/66; M. Julicher et al., 'Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared,' *Utrecht Law Review* (15) 2019, p. 1-25.

[83] CJEU 20 December 2017, case C-521/15, ECLI:EU:C:2017:982 (*Spain/Council*), para. 89; see also M. Julicher et al., 'Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared,' *Utrecht Law Review* (15) 2019, p. 1-25, on p. 9.

[84] See also I.V. Aronstein, *Remedies for infringements of EU law in legal relationships between private parties*, Deventer: Wolters Kluwer 2019, p. 13; E. Frantziou, '(Most of) the Charter of Fundamental Rights is horizontally applicable,' *European Constitutional Law Review* (15) 2019, p. 306-323, on p. 306; R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: *Bauer and Willmeroth, MPG*,' *Common Market Law Review* (58) 2021, p. 1173-1206, on p. 1188. In particular, there is much confusion about the use of different concepts, typologies, and distinctions. For clarity, an attempt has been made here to avoid controversial terms (such as 'direct' and 'indirect' horizontal effect) and instead describe the different types of situations as clearly as possible. For more about terminology, see M. Safjan & P. Miklasziewicz, 'Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law,' *European Review of Private Law* (18) 2010, p. 475-486; A.S. Hartkamp, 'The Concept of (Direct and Indirect) Horizontal Effect of EU Law,' in: U. Bernitz, X. Groussot & F. Schulyok (ed.), *General Principles of EU Law and European Private Law*, Deventer: Kluwer 2013, p. 189-197; M. Fornasier, 'The Impact of EU Fundamental Rights on Private Relationships: Direct or Indirect Effect?' *European Review of Private Law* (23) 2015, p. 29-46; I.V. Aronstein, *Remedies for infringements of EU law in legal relationships between private parties*, Deventer: Wolters Kluwer 2019, p. 13-26; C. Sieburgh & M. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 271-292, on p. 272; R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: *Bauer and Willmeroth, MPG*,' *Common Market Law Review* (58) 2021, p. 1173-1206, on p. 1188.

Without going too deeply into the sometimes fierce conceptual and normative debates in the literature on the subject, the following will briefly discuss three types of horizontal effect of fundamental rights: the application of EU legislation governing relations between private parties (Section 4.3.1), the interpretation of EU legislation governing relations between private parties (Section 4.3.2), and reliance on the Charter in horizontal disputes (Section 4.3.3).

4.3.1 Application of primary EU law in relations between private parties

Most of the fundamental freedoms enshrined in the EU Treaties have been accepted as applicable in horizontal relationships as well.[85] The Court of Justice has, for example, held that the free movement of workers can be impeded as easily by employers or unions as by the authorities in the Member States. Therefore, in light of the effectiveness of EU law, private parties must also comply with the relevant Treaty provisions.[86] This means, for example, that private employers can be required under Article 157 of the TFEU to guarantee the right to equal pay for men and women.[87] As briefly discussed above, some of these fundamental freedoms also have a counterpart in the form of a Charter provision. Article 45(1), for example, establishes the right to free movement and residence for EU citizens. In addition, many horizontal disputes over primary EU law will also touch on the freedom to conduct a business (Article 16 of the Charter) or the right to property (Article 17 of the Charter). According to settled CJEU case law, the rights conferred in the Treaty on the Functioning of the European Union (TFEU) must be interpreted in the light of such Charter provisions.[88] Therefore, to the extent that the rights and freedoms of the Treaty on the Functioning of the European Union have horizontal effect, that effect also extends to the Charter.

If a private party infringes on someone's freedom of movement, the infringing party will, under this case law, have to ensure that it respects the Charter rights of the person affected, such as their freedom to conduct a business or right to property.[89] On the other hand, a private party can also

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[85] I.V. Aronstein, *Remedies for infringements of EU law in legal relationships between private parties*, Deventer: Wolters Kluwer 2019, p. 31; S. Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU,' *Revista de Derecho Comunitario Europeo* 2020, https://www.cepc.gob.es/sites/default/ files/2021-12/3908404prechal.html, Section II. There is some uncertainty about the horizontal applicability of free movement of goods; see the aforementioned book by Aronstein for more about this, on p. 32, which includes further source citations.

[86] See classic case law, for example, CJEC 12 December 1974, case C-36/74, ECLI:EU:C:1974:140 (*Walrave and Koch*); CJEC 15 December 1995, case C-415/93, ECLI:EU:C:1995:463 (*Bosman*); CJEC 6 June 2000, case C-281/98, ECLI:EU:C:2000:296 (*Angonese*).

[87] CJEU 3 June 2021, case C-624/19, ECLI:EU:C:2021:429 (*Tesco Stores*), paras. 22-23.

[88] See Section 4.2.2, under b; see below also Section 4.5.3.

[89] See further in Section 4.5.3.

invoke its own fundamental rights to justify the infringement.[90] An infringing company may argue, for example, that its right to property or freedom to conduct a business outweighs another company's right to property or freedom to conduct a business. It is then up to the national court (possibly supported by an CJEU preliminary ruling) to review the justification. In these kinds of cases, there is no real difference between horizontal and vertical situations when it comes to the review of justification: the criteria used are the same.[91]

4.3.2 EU legislation governing relations between private parties

Some EU legislation is intended specifically to affect relations between private parties.[92] For example, many equality directives are specifically designed to regulate labour relations.[93] Similarly, the GDPR and media and intellectual property right directives are very important for businesses and individuals.[94] When civil law disputes arise over the implementation or application of any of the provisions of this type of EU regulation, national courts can refer them to the CJEU for a preliminary ruling. In doing so, a national court may refer to the Charter as an additional source of interpretation.[95] The Court's preliminary ruling may subsequently affect the outcome of private law disputes by determining how EU law should be interpreted and applied by national courts.[96] For example, the Court has held that the use of surveillance cameras by natural persons (such as

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[90] See especially CJEC 4 October 2004, case C-36/02, ECLI:EU:C:2004:614 (*Omega*); CJEC 11 December 2007, case C-438/05, ECLI:EU:C:2007:772 (*International Transport Workers' Federation and Finnish Seamen's Union*), paras. 33-37 and 77 et seq. See also, for example, C. Sieburgh, 'General Principles and the Charter in Private Law Relationships,' in: U. Bernitz, X. Groussot & F. Schulyok (ed.), *General Principles of EU Law and European Private Law*, Deventer: Kluwer 2013, p. 233-247, on p. 237 and 242-243.

[91] See also C. Mak, 'Unchart(er)ed territory – EU fundamental rights and national private law,' in: A.S. Hartkamp et al. (ed.), *The Influence of EU Law on National Private Law*, Deventer: Kluwer 2014, p. 323-353, on p. 325-326. For more about the review of justification, see Section 4.5.

[92] On this form of horizontal effect, see also M. Claes, 'The EU, its Member States and their Citizens,' in: D. Leczykiewicz & S. Weatherill (ed.), *The involvement of EU law in private law relationships*, Oxford: Hart 2013, p. 29-52.

[93] See, in particular, Directive 2000/43 (on race and ethnicity equality) and Directive 2000/78 (establishing a general framework for equal treatment in employment and occupation). On the effect of these directives on private law, see, for example, E. Muir, 'The Transformative Function of EU Equality Law,' *European Review of Private Law* (21) 2013, p. 1231-1254, on p. 1241.

[94] B. van der Sloot, 'Wij zijn twee vriendjes, jij en ik: de innige tango van de twee Europese hoven op het gebied van privacy en gegevensbescherming,' *SEW* 2021, issue 12, p. 582-594, on p. 589.

[95] For example, CJEU 8 September 2011, case C-297/10, ECLI:EU:C:2011:560 (*Hennigs*), paras. 65-68. See further D. Leczykiewiecz, 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in: U. Bernitz, X. Groussot & F. Schulyok (ed.), *General Principles of EU Law and European Private Law*, Deventer: Kluwer 2013, p. 171-186, p. 172.

[96] See M. Wissink, 'Interpretation of Private Law in Conformity with EU Directives,' in: A.S. Hartkamp et al. (ed.), *The Influence of EU Law on National Private Law*, Deventer: Kluwer 2014, p. 119-158. This effect is potentially far-reaching. See, for example, CJEU 1 March 2011, case C-236/09, ECLI:EU:C:2011:100 (*Association belge des Consommateurs Test-Aschats and Others*); CJEU 13 September 2011, case C-447/09, ECLI:EU:C:2011:573 (*Prigge*); see further C. Mak, 'Unchart(er)ed territory – EU fundamental rights and national private law,' in: A.S. Hartkamp et al. (ed.), *The Influence of EU Law on National Private Law*, Deventer: Kluwer 2014, p. 323353 and see below in Section 4.3.3.

homeowners) can be considered a form of data processing.[97] This use of a camera system, even for purely private purposes such as securing a home against burglars, may violate Article 7 of the Charter to the extent that the video surveillance extends to (even if only partially) the public space.[98] While exceptions to the obligation to protect personal data may be allowed,[99] individuals can be held responsible under EU law for respecting and protecting the fundamental rights of others.

4.3.3 Direct reliance on the EU Charter in disputes between private parties

Sometimes a fundamental right is directly invoked in a private law dispute. In those cases, one of two situations may arise.[100] Firstly, and this is the most common of the two possible situations within the scope of EU law, there is the situation where a provision of national law governs the private law dispute, such as a provision from employment or consumer law, and the claim is that the effect of the provision in question is incompatible with an EU fundamental right. There is a 'vertical' element to this type of case, i.e. an element relating to the lawfulness of national legislation.[101] If the CJEU concludes that the national statutory provision does indeed contravene the Charter, the Court will proceed by giving an opinion on how to remedy this unlawfulness by, for example, interpreting the national law in accordance with EU law or, if that fails, by disapplying it. This opinion will subsequently affect the outcome of the private law dispute, in the sense that the national court will use it to determine which concrete rights and obligations ensue from it for the parties.[102]

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[97] CJEU 11 December 2014, case C-212/13, ECLI:EU:C:2014:2428 (*Ryneš*).

[98] CJEU 11 December 2014, case C-212/13, ECLI:EU:C:2014:2428 (*Ryneš*), para. 33.

[99] It was left to the national court to answer this question – see CJEU 11 December 2014, case C-212/13, ECLI:EU:C:2014:2428 (*Ryneš*), para. 34.

[100] S. Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU,' *Revista de Derecho Comunitario Europeo* 2020, https://www.cepc.gob.es/sites/default/files/2021-12/3908404prechal.html.

[101] Cf. A. Eleveld, 'Rechtstreekse horizontale werking van grondrechten van de Europese Unie,' *Nederlands tijdschrift voor Europees recht* 2019, p. 88-95, on p. 92; C. Sieburgh & M. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 271-292, on p. 285. It has been argued, as a result, that there is nothing really special about these cases: it is simply a matter of effectuating the state's obligation to act in accordance with EU law (including the Charter) and either interpret provisions that conflict with it in accordance with EU law or disapply them; I.V. Aronstein, *Remedies for infringements of EU law in legal relationships between private parties*, Deventer: Wolters Kluwer 2019, p. 101 (which consequently speaks of 'indirect' horizontal effect); R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: *Bauer and Willmeroth, MPG*,' *Common Market Law Review* (58) 2021, p. 1173-1206, on p. 1193 (who in this context coins the concept of 'negative direct horizontal effect').

[102] For details of this situation, see C. Ladenburger, 'European Union Institutional Report,' in: J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon*, Tartu: Tartu University Press 2012, p. 141-215, on p. 190; C. Sieburgh & M. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 271-292, Section 6; R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: *Bauer and Willmeroth, MPG*,' *Common Market Law Review* (58) 2021, p. 1173-1206, on p. 1188 and 1194 et seq.

The second situation arises when, in a private law dispute, a private party is alleged to have violated an EU fundamental right and there is no domestic legal provision that governs the dispute.[103] This may be the case if a fundamental rights violation is caused by a contractual provision or a collective labour agreement. If, in those cases, such a contractual provision or collective labour agreement were reviewed against the Charter and the court were to rule that the provision may not be applied because it is contrary to Charter law, then both private parties would have direct rights and obligations arising from the Charter.

Although the two situations and the case law on them have a lot in common, they are slightly different. While developments in the case law of the CJEU make it appear that the Charter applies in both these situations, there are still some unanswered questions on this point. In order to be able to answer these questions, a good first step is to map out how case law on this matter has developed over the years, whereby it is very important to bear in mind that EU law disputes between two private parties often relate to rights laid down in a directive.[104] Section 4.3.2 above went into how a directive can be applied in horizontal relations in the form of the national legislation transposing that directive into national law. However, under EU law, the directive *as such* cannot impose obligations on individuals, nor can a directive be invoked against a private party in a national court.[105] Where things become difficult is when it appears that a national law has not properly transposed the directive, because an individual can then not ask the civil court to review the national legislation in light of EU law and possibly disapply it.[106] Especially if the provision leads to fundamental rights being impaired, this can create problematic situations.

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[103] See also C. Sieburgh & M. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 271-292, on p. 287-290; R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: *Bauer and Willmeroth, MPG*,' *Common Market Law Review* (58) 2021, p. 1173-1206, on p. 1188.

[104] Cf. C. Sieburgh, 'A method to substantively guide the involvement of EU primary law in private law matters,' *European Review of Private Law* (21) 2013, p. 1165-1188, on p. 1179; X. Groussot, T. Lock & G.T. Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon,' in: S.A. de Vries et al. (ed.), *The Protection of Fundamental Rights in the EU After Lisbon*, Oxford: Hart 2013, p. 97-118, on p. 109.

[105] See classic case law CJEC 14 July 1994, case C-91/92, ECLI:EU:C:1994:292 (*Faccini Dori*), para. 20; for more recent case law, see CJEU 6 November 2018, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*), para. 77. See also E. Frantziou, '(Most of) the Charter of Fundamental Rights is horizontally applicable,' *European Constitutional Law Review* (15) 2019, p. 306-323, on p. 316; M. de Mol, 'Het leerstuk van de horizontale directe werking van Uniegrondrechten op de voet gevolgd,' *Ars Aequi* 2019, p. 371-382, on p. 374; C. Sieburgh & M. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 271-292, on p. 279; S. Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU,' *Revista de Derecho Comunitario Europeo* 2020, www.cepc.gob.es/sites/default/files/2021-12/3908404prechal.html, Section III.

[106] A. Eleveld, 'Rechtstreekse horizontale werking van grondrechten van de Europese Unie,' *Nederlands tijdschrift voor Europees recht* 2019, p. 88-95, on p. 88; M. de Mol, 'Het leerstuk van de horizontale directe werking van Uniegrondrechten op de voet gevolgd,' *Ars Aequi* 2019, p. 371-382; R. Krause, 'Horizontal Effect

For this reason, the CJEU has adopted an exception to the rule that directives do not generate horizontal effect as far as (certain) fundamental rights are concerned. This is subject to the key condition that the directive provision in question is rooted in a fundamental right protected by EU law.[107] The Court already ruled this as far back as in 2005, in the *Mangold* case.[108] This case involved litigation over a provision from an employment contract that was itself compatible with domestic employment law. Mangold, however, argued that the relevant legal provision violated one of the EU equality directives. Whether or not the directive could be invoked against a private party in domestic employment law proceedings was irrelevant in this case, according to the Court, because the applicable equality directive did no more than codify the fundamental principle of non-discrimination.[109] This led the Court to find that it was the responsibility of the national court 'to provide, in a case within its jurisdiction, the judicial protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.'[110]

The Court confirmed this approach in subsequent case law, most notably in the *Kücükdeveci* case.[111] The CJEU further added to the clarity in 2018 in a series of rulings that have come to be known as the *Bauer* case law.[112] The *Bauer and Broßonn* case involved a dispute over an employer's payment of

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of the EU Charter of Fundamental Rights: *Bauer and Willmeroth, MPG*,' *Common Market Law Review* (58) 2021, p. 1173-1206, on p. 1174.

[107] For more details, see C. Sieburgh, 'A method to substantively guide the involvement of EU primary law in private law matters,' *European Review of Private Law* (21) 2013, p. 1165-1188, on p. 1179; W. Devroe & P. Van Cleynenbreughel, 'The impact of general principles of EU law on private law relationships,' in: A.S. Hartkamp et al. (ed.), *The Influence of EU Law on National Private Law*, Deventer: Kluwer 2014, p. 187218, on p. 194; I.V. Aronstein, *Remedies for infringements of EU law in legal relationships between private parties*, Deventer: Wolters Kluwer 2019, p. 103 et seq.; C. Sieburgh & M. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 271-292, on p. 279-282.

[108] CJEC 22 November 2005, case C-144/04 (*Mangold*).

[109] Idem, para. 75.

[110] Idem, para. 77. It is clear that the horizontal relationship is affected by this; see M. de Mol, '*Kücükdeveci*: *Mangold* Revisited – Horizontal Effect of a General Principle of EU Law,' *European Constitutional Law Review* (6) 2010, p. 293-308; C. Sieburgh, 'A method to substantively guide the involvement of EU primary law in private law matters,' *European Review of Private Law* (21) 2013, p. 1165-1188, on p. 1179; C. Sieburgh & M. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 271-292, on p. 280.

[111] CJEU 19 January 2010, case C-555/07, ECLI:EU:C:2010:21 (*Kücükdeveci*), para. 53; for more recent case law, see CJEU 17 April 2018, case C-414/16, ECLI:EU:C:2018:257 (*Egenberger*), paras. 75-79; CJEU 11 September 2018, case C-68/17, ECLI:EU:C:2018:696 (*IR*), para. 69. See also M. de Mol, '*Kücükdeveci*: *Mangold* Revisited – Horizontal Effect of a General Principle of EU Law,' *European Constitutional Law Review* (6) 2010, p. 293-308; C. Sieburgh & M. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 271-292, on p. 280-282.

[112] CJEU 6 November 2018, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*); CJEU 6 November 2018, case C-684/16, ECLI:EU:C:2018:874 (*Max-Planck-Gesellschaft*). The third case in this series is slightly less interesting when it comes to the Charter: CJEU 6 November 2018, case C-619/16, ECLI:EU:C:2018:872 (*Kreuziger*).

compensation for a deceased employee's outstanding holiday leave entitlements. This situation is governed by a provision from Directive 2003/88 on the right to paid annual leave, which can effectively be considered a concrete expression of Article 31(2) of the Charter, which also establishes this right. The Court ruled that national rules implementing this directive that did not allow for leave entitlements to be paid out after death were not compatible with EU law, meaning that the national provision should either be interpreted in accordance with the directive or disapplied. In this respect, the approach does not differ from what has been discussed so far. In its ruling, however, the CJEU went one essential step further by also considering whether the fundamental right protected by Article 31(2) of the Charter could be invoked in a private law situation, so that direct obligations for the employer could result from it. The Court first noted that while Article 51(1) of the Charter does not explicitly mention that individuals may also be bound to respect fundamental rights, the provision does not categorically exclude that possibility either.[113] In addition, the Court attached great importance to the fact that the fundamental right contained in Article 31(2) of the Charter is both mandatory and unconditional in nature and need not be given any further concrete expression by provisions of EU or national law.[114] As a result, Article 31(2) of the Charter grants employees a right that they can assert as such in a dispute between them and their employer in an area covered by EU law.[115] In view of this, the Court argued that the national court has a responsibility to ensure the judicial protection arising from the Charter provision, possibly by disapplying the national provision, if necessary.[116] The national court could, for example, require the employer to still pay out the unused annual leave entitlements.[117]

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[113] CJEU 6 November 2018, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*), para. 87.

[114] For details of this requirement, see also S. Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU,' *Revista de Derecho Comunitario Europeo* 2020, www.cepc.gob.es/sites/default/files/2021-12/ 3908404prechal.html.

[115] What should not be instantly inferred from this is, therefore, that other fundamental social rights will also be able to have this effect, as that will depend on whether they qualify as enforceable Charter rights; for more about this, see Section 4.4 and see also S. Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU,' *Revista de Derecho Comunitario Europeo* 2020, www.cepc.gob.es/sites/default/ files/2021-12/3908404prechal.html; R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: *Bauer and Willmeroth, MPG*,' *Common Market Law Review* (58) 2021, p. 1173-1206, on p. 1189. In fact, the latter also points out that even when a Charter right applies, this does not necessarily mean that the provision can directly be relied upon in horizontal conflicts (on p. 1193).

[116] CJEU 6 November 2018, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*), para. 91. This is also addressed in E. Frantziou, '(Most of) the Charter of Fundamental Rights is horizontally applicable,' *European Constitutional Law Review* (15) 2019, p. 306-323, on p. 314.

[117] For more about the various possible remedies that a national court can offer, see C. Sieburgh & M. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 271292, Section 6.

In the *Cresco Investigation* case, the Court built on this and took a further step toward recognising the horizontal effect of the Charter.[118] This particular case concerned national rules that said that Good Friday is a paid day off only for members of certain religious denominations. The CJEU ruled that these rules had a discriminatory effect and were, therefore, inconsistent with Article 21 of the Charter. In line with the *Bauer and Broßonn* case law, the Court found that the prohibition of discrimination under Article 21 of the Charter is mandatory law. The Court's conclusion was that until the statutory rules were brought into line with EU law, the employer would have to grant employees who do not belong to any of the religious denominations stated in the rules the right to take a paid day off on Good Friday as well, if they want.[119] So, even in the *Cresco Investigation* case, there was, to some extent, still a 'vertical' element: after all, the employer's acts were rooted directly in national legislation that was found to be in violation of the right to non-discrimination.[120] What is important to note here, however, is that the Court placed the responsibility for protecting the right to non-discrimination and finding a remedy for the violation of this fundamental right on the employer in this case.[121] This shows that certain Charter rights can indeed have a horizontal effect, in the sense that obligations for a private party can be derived from it directly.

One question not yet fully answered is whether it is possible to invoke the Charter also in private law disputes where the central issue is not the validity of a national statutory provision but where one private party argues that the other private party has certain obligations under EU law to respect its fundamental rights.[122] This situation can arise when a consumer argues that certain terms and condition violate the right to non-discrimination or when an employee argues that certain terms of employment affect their right to privacy. The exact effect of the Charter in these kinds of situations will

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[118] CJEU 2 January 2019, case C-193/17, ECLI:EU:C:2019:43 (*Cresco Investigation*).

[119] Idem, para. 85.

[120] See I.V. Aronstein, *Remedies for infringements of EU law in legal relationships between private parties*, Deventer: Wolters Kluwer 2019, p. 136; C. Sieburgh & M. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 271-292, on p. 285.

[121] M. de Mol, 'Het leerstuk van de horizontale directe werking van Uniegrondrechten op de voet gevolgd,' *Ars Aequi* 2019, p. 371-382, on p. 376; C. Sieburgh & M. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 271-292, on p. 288-289.

[122] In connection to this, see also A. Eleveld, 'Rechtstreekse horizontale werking van grondrechten van de Europese Unie,' *Nederlands tijdschrift voor Europees recht* 2019, p. 88-95, on p. 93; S. Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU,' *Revista de Derecho Comunitario Europeo* 2020, www.cepc.gob.es/ sites/default/files/2021-12/3908404prechal.html; R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: *Bauer and Willmeroth, MPG*,' *Common Market Law Review* (58) 2021, p. 1173-1206, on p. 1193.

have to take shape over time.[123] It is important to note that Article 51(1) of the Charter requires that a contested matter fall within the scope of the Charter.[124] As already noted above, the CJEU emphasised in the *Bauer* case law that 'Article 51(1) does not, however, address the question whether [...] individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.'[125] However, this can only lead to full horizontal effect if the CJEU assumes that, where appropriate, private actors are also obliged to implement EU law (the 'agent situation') or taps into the 'infringement situation' (as discussed above in Section 4.3.1).[126] While it cannot be ruled out, it will have to be worked out further.

In addition, another as yet unanswered question is which Charter provisions can have this horizontal effect. Presumably, the CJEU will want to examine for each Charter right individually whether it is sufficiently specific and precise and of such a nature that it can actually be invoked as a fundamental right against a private party, so that this private party can also reasonably be expected to protect this fundamental right.[127] If a Charter provision contains a less clearly defined right, it is unlikely to have legal effect in legal relationships under private law. The distinction between 'Charter rights' and 'Charter principles' that will be discussed in the next section will probably prove of foremost importance in qualifying Charter provisions and the future development of this case law.

4.4 Charter rights and Charter principles; protection of fundamental social and economic rights

The Charter covers a broader set of fundamental rights than the ECHR. In addition to the well-known 'classic' fundamental rights and freedoms, it also enshrines a number of social and economic rights, as well as a right to good administration and a number of rights specifically relevant to EU citizens, such as the right to diplomatic protection and the right of access to

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[123] See also A. Eleveld, 'Rechtstreekse horizontale werking van grondrechten van de Europese Unie,' *Nederlands tijdschrift voor Europees recht* 2019, p. 88-95, on p. 95.

[124] M. de Mol, 'Het leerstuk van de horizontale directe werking van Uniegrondrechten op de voet gevolgd,' *Ars Aequi* 2019, p. 371-382, on p. 377-378. See further Section 4.2.1.

[125] CJEU 6 November 2018, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*), para. 87.

[126] Cf. also M. de Mol, 'Het leerstuk van de horizontale directe werking van Uniegrondrechten op de voet gevolgd,' *Ars Aequi* 2019, p. 371-382, on p. 379.

[127] See also M. de Mol, 'Het leerstuk van de horizontale directe werking van Uniegrondrechten op de voet gevolgd,' *Ars Aequi* 2019, p. 371-382, on p. 380; S. Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU,' *Revista de Derecho Comunitario Europeo* 2020, www.cepc.gob.es/sites/default/files/2021-12/3908404prechal.html, Section V; R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: *Bauer and Willmeroth, MPG*,' *Common Market Law Review* (58) 2021, p. 1173-1206, on p. 1195.

documents.[128] This is precisely what makes the Charter such a unique fundamental rights document, as civil and political rights and social, economic and cultural treaties used to always be enshrined in different legal instruments.[129] This difference has long been a thorn in the side of many, because it is far from easy to draw a sharp distinction between classic and social fundamental rights, and, moreover, this distinction is not easily reconciled with the notion of 'indivisibility' of fundamental rights.[130] The drafters of the Charter rode the existing momentum to design a modern document that incorporated all fundamental rights that were recognised as such at the time.[131]

Even so, it instantly led to debate about whether all the rights in the Charter could be given the same legal value and whether they could all be enforceable in a court of law.[132] After all, an enforceable obligation to actively protect these rights could have a significant impact on national budgets and policy priorities.[133] The debate was such that the Charter could not immediately be adopted as a binding document in 2000; its legal force was limited to being a tool to aid interpretation of pre-existing obligations.[134]

When the intention subsequently arose to give the Charter binding force after all, initially through the Treaty establishing a Constitution for Europe and later through the Lisbon Treaty, the legal force of fundamental social and economic rights, among others, was again debated at length.[135] In the end, the decision was to add a new, fifth, paragraph to Article 52 of the Charter.[136] This new paragraph stipulates that '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

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[128] See in particular Title IV on solidarity and Title V on citizenship.

[129] An example at UN level is the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESC), while at the level of the Council of Europe there is the European Convention on Human Rights (ECHR) and the European Social Charter (ESC).

[130] For more about this, see, for example, Leijten 2018.

[131] See also M.H.S. Gijzen, 'The Charter: A Milestone for Social Protection in Europe?' *Maastricht Journal of European and Comparative Law* (8) 2001, p. 33-48.

[132] T. Lock, 'Rights and Principles in the EU Charter of Fundamental Rights,' *Common Market Law Review* (56) 2019, p. 1201-1226, on p. 1208.

[133] See further, for example, D. Guðmundsdóttir, 'A Renewed Emphasis on the Charter's Distinction between Rights and Principles: Is a Doctrine of Judicial Restraint More Appropriate?' *Common Market Law Review* (52) 2015, p. 685-720, on p. 688-689; J. Krommendijk, 'Principled silence or mere silence on principles?' *European Constitutional Law Review* (11) 2015, p. 321-356.

[134] J. Krommendijk, 'Principled silence or mere silence on principles?' *European Constitutional Law Review* (11) 2015, p. 321-356, on p. 327; T. Lock, 'Rights and Principles in the EU Charter of Fundamental Rights,' *Common Market Law Review* (56) 2019, p. 1201-1226, on p. 1208.

[135] Debate was triggered around the Treaty establishing a Constitution for Europe, which was supposed to include the Charter as the first chapter; see S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.10.

[136] See, for example, C. Ladenburger, 'European Union Institutional Report,' in: J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon*, Tartu: Tartu University Press 2012, p. 141-215, on p. 183; J. Krommendijk, 'Principled silence or mere silence on principles?' *European Constitutional Law Review* (11) 2015, p. 321-356. It is, therefore, always important to consult the right version of the Charter, i.e. 2010/C 83/02, published in the Official Journal of the European Union (OJEU) of 30 March 2010, C 83/389.

exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.' Therefore, Article 52(5) of the Charter does not make a distinction between 'classic' and 'social and economic' fundamental rights, but instead between Charter provisions containing subjective rights ('Charter rights') and provisions containing principles.[137] To prevent these principles from being confused with the unwritten 'general principles of EU law,' which may also be like fundamental rights, these latter provisions can in this context be referred to as 'Charter principles'.[138]

Today, 15 years down the line, the meaning of Article 52(5) of the Charter and the distinction it makes between rights and principles is still unclear.[139] As far as Charter rights are concerned, however, the situation is clear. Where a Charter provision includes a subjective right, as is the case with the right to paid annual leave enshrined in Article 31(2) of the Charter or with Charter provisions corresponding to rights enshrined in the ECHR, the Court can use that provision to review whether EU legislative acts are compatible with the provision and whether national (implementing) legislation is consistent with the fundamental right.[140] According to the Court, reviewing legislation against a Charter right can only be omitted if the legislation, such as an equality directive, itself gives concrete expression to a Charter right. It must then be assumed that the concrete expression of the Charter right itself cannot infringe the fundamental right.[141] A fortiori, this will mean that legislation giving concrete expression to rights can in itself not be reviewed for compatibility with the underlying Charter principle, even though the wording of Article 52(5) of the Charter does seem to leave scope for this.[142] The Charter principles are likely to serve only as guidance in the interpretation of EU law giving concrete expression to rights, including to support or reinforce the Court's reasoning.[143]

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[137] For more about this difference, see also T. Lock, 'Rights and Principles in the EU Charter of Fundamental Rights,' *Common Market Law Review* (56) 2019, p. 1201-1226, on p. 1211; FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*, Luxembourg: Publications Office of the European Union, 2020, p. 21.

[138] In line with T. Lock, 'Rights and Principles in the EU Charter of Fundamental Rights,' *Common Market Law Review* (56) 2019, p. 1201-1226, on p. 1203.

[139] Lock calls this a 'nebulous distinction'; T. Lock, 'Rights and Principles in the EU Charter of Fundamental Rights,' *Common Market Law Review* (56) 2019, p. 1201-1226, on p. 1201. In comparable sense, see S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.163 (who speak of 'a source of considerable confusion').

[140] See, for example, CJEU 22 September 2022, case C-120/21, ECLI:EU:C:2022:718 (*LB*), paras. 35-36.

[141] CJEU 8 September 2020, joined cases C-119/19 P and C-126/19 P, ECLI:EU:C:2020:676 (*Commission/Carreras Sequeros and Others*), para. 117: 'A provision, such as Article 7(1) of Directive 2003/88, which specifies, in EU law, the minimum duration of the annual period of paid leave to which every worker is entitled [...] cannot, by its very nature, constitute an adverse effect on that fundamental right [Article 31(2) of the Charter]. Article 7(1) of that directive merely gives concrete expression to that fundamental right.'

[142] See further J. Krommendijk, 'Principled silence or mere silence on principles?' *European Constitutional Law Review* (11) 2015, p. 321-356.

[143] See, for example, General Court 13 July 2018, case T-275/17, ECLI:EU:T:2018:479 (*Curto/Parliament*), para. 85. See also D. Guðmundsdóttir, 'A Renewed Emphasis on the Charter's Distinction between Rights and Principles: Is a Doctrine of Judicial Restraint More Appropriate?' *Common Market Law Review* (52) 2015, p.

The article further raises the question of how to determine which Charter provisions contain 'principles' and which are subjective rights that are enforceable in a court of law.[144] Since there is no unity in the wording of the various Charter provisions and, moreover, the language versions differ on essential points, the wording of the Charter does not always provide clear starting points as to how to identify 'principles'.[145] For some of the provisions, the Explanations relating to the Charter provide some guidance by stating relatively clearly that they contain principles. For other provisions, however, the explanations are ambiguous and not very helpful.[146] Where a provision has been placed in the Charter can also be a clue as to whether it might be a 'principle', albeit that it has turned out that some Title IV provisions on solidarity do contain Charter rights, while the opposite is true for some Title III provisions on equality.[147]

Even though the CJEU has not yet ruled on the qualification of Charter provisions in many cases, its case law does show what the relevant criteria are.[148] One example is the *Bauer and Broßonn* case, as already discussed in Section 4.3.3, where the CJEU examined Article 31(2) of the Charter, which states that every worker is entitled to paid annual leave,[149] ruling that this provision explicitly assigns a 'right' to 'every worker'.[150] On top of that, this right is 'both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law.'[151] On the other hand, the *Glatzel* case concerned Article 26 of the Charter on the recognition of the 'rights of persons with a disability.'[152] Although the wording might wrong-foot the reader, the CJEU's ruling in the *Glatzel* case pointed to the Explanations relating to the Charter, which speak of a 'principle', noting that the article could only be

685-720, on p. 691; J. Krommendijk, 'Principled silence or mere silence on principles?' *European Constitutional Law Review* (11) 2015, p. 321-356; T. Lock, 'Rights and Principles in the EU Charter of Fundamental Rights,' *Common Market Law Review* (56) 2019, p. 1201-1226, on p. 1224; S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52,182.

[144] See A.W. Heringa & L.F.M. Verhey, 'The EU Charter: Text and Structure,' *Maastricht Journal of European and Comparative Law* (8) 2001, p. 11-32, on p. 14.

[145] T. Lock, 'Rights and Principles in the EU Charter of Fundamental Rights,' *Common Market Law Review* (56) 2019, p. 1201-1226, on p. 1219; S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52,171.

[146] Cf. M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts,' *Common Market Law Review* (45) 2008, p. 617-665, on p. 663; T. von Danwitz & K. Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights,' *Fordham International Law Review* (35) 2012, p. 1396-1424, on p. 1412; K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights,' *European Constitutional Law Review* (6) 2012, p. 375-403, p. 400.

[147] T. Lock, 'Rights and Principles in the EU Charter of Fundamental Rights,' *Common Market Law Review* (56) 2019, p. 1201-1226, on p. 1214.

[148] See further D. Guðmundsdóttir, 'A Renewed Emphasis on the Charter's Distinction between Rights and Principles: Is a Doctrine of Judicial Restraint More Appropriate?' *Common Market Law Review* (52) 2015, p. 685-720, on p. 694.

[149] CJEU 6 November 2018, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*).

[150] Idem, para. 84.

[151] Idem, para. 85.

[152] CJEU 22 May 2014, case C-356/12, ECLI:EU:C:2014:350 (*Glatzel*).

fully effective if given more specific expression in EU or national law[153] and ultimately concluding that this provision contains a principle rather than a right.[154] Consequently, it seems that a Charter provision is to be considered a 'principle' when further detail or concrete expression in legislation is necessary and when a binding and unconditionally formulated right is not clearly granted.

Given the nature of many fundamental social and economic rights as best-effort obligations that require acts from the government (i.e. an effort to give them further concrete expression), it can be assumed that these rights in particular will be regarded as Charter principles. However, it cannot yet be said with certainty which provisions will qualify as Charter rights: whether the formulated criteria have been met is something that will have to be analysed further for each Charter (sub-)provision.

4.5 Justification of limitations of fundamental rights

4.5.1 The generic limitation clause of Article 52(1) of the Charter

A well-known feature of the ECHR is that many fundamental rights are immediately followed by a provision that sets criteria for justification of limitations.[155] Article 8(1) of the ECHR, for example, confers the right to respect for private and family life, but the second paragraph stipulates that a limitation of that right may be permitted under specific conditions. The limitation clauses are always formulated slightly differently, depending on the right in question, which produces a nuanced and precise, but also a rather complex system of justification options.[156]

The EU Charter of Fundamental Rights has chosen a different system.[157] The Charter provides one clear, generic limitation clause in Article 52(1) that clearly states for all fundamental rights of the Charter what criteria limitations must meet in order to be considered to be justified.[158] While this aids clarity, the generic nature of Article 52(1) of the Charter also means that it is not tailored to the content of concrete fundamental rights. It does not, for example, contain any specifically formulated legitimate objectives, which the ECHR does do for a number of its provisions, stating instead that limitations on fundamental rights may be acceptable if they 'genuinely meet

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[153] Idem, paras. 74 and 78.

[154] See also J. Krommendijk, 'Principled silence or mere silence on principles?' *European Constitutional Law Review* (11) 2015, p. 321-356.

[155] See further J.H. Gerards, *General Principles of the European Convention on Human Rights*, second edition, Cambridge: Cambridge University Press 2023, p. 21-33.

[156] Idem.

[157] For background information on this, see S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.15 et seq.

[158] In some cases, the CJEU continued to apply standards it had developed in previous case law (see, for example, CJEU 6 September 2012, case C-544/10, ECLI:EU:C:2012:526 (*Deutsches Weintor*)).

objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

Initially, Article 52(1) of the Charter seems to give the CJEU little scope to formulate specific criteria for certain fundamental rights and for special situations. In practice, however, this does not seem to cause the CJEU a great deal of problems. In cases where the justification clause of the Charter is less well tailored to the situation at hand, or where specific review criteria were already firmly anchored in existing case law, the CJEU does sometimes not refer to Article 52(1) at all, or redefines the provisions in that criteria mentioned in the article in order to fit them into its pre-Charter case law.[159] Examples of this can be found in cases concerning the scope of judicial review of punitive sanctions or the proportionality of such sanctions,[160] the freezing of funds and other EU sanctions,[161] and some issues relating to the right to effective judicial protection or to equal treatment.[162] In addition, the Court has sporadically added additional criteria to the conditions already established in the first paragraph of Article 52 of the Charter. For example, the Court found that it may be important to provide procedural safeguards to ensure effective protection of the fundamental right in question.[163]

4.5.2 Additional justification criteria in the Charter

In addition to the general Article 52(1) of the Charter, some Charter provisions include special conditions for limitation. One example is Article 8 of the Charter on the protection of personal data. The second paragraph of this article states that personal data must be processed 'fairly for specified purposes and on the basis of the consent of the person concerned or some

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[159] This is sometimes referred to as a 'cut-and-paste approach'; see J. Komárek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent,' *American Journal of Comparative Law* (61) 2013, p. 149-171, on p. 156; F. Fontanelli, 'The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights,' *Oxford Journal of Legal Studies* (36) 2016, p. 630-660, on p. 640. In fact, the CJEU sometimes refrains from a review against Article 52(1) of the Charter in cases where there is no deep-rooted case law to draw on; see, for example, CJEU 29 May 2018, case C-426/16, ECLI:EU:C:2018:335 (*Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others*).

[160] For example, CJEU 8 December 2011, case C-386/10 P, ECLI:EU:C:2011:815 (*Chalkor*), para. 57 et seq.; CJEU 26 September 2013, case C-418/11, ECLI:EU:C:2013:588 (*Texdata Software*); CJEU 8 March 2022, case C-205/20, ECLI:EU:C:2022:168 (*Bezirkshauptmannschaft Hartberg-Fürstenfeld (direct effect)*), para. 47 et seq.; CJEU 23 March 2023, case C-412/21, ECLI:EU:C:2023:234 (*Dual Prod*), paras. 27-37.

[161] For example, CJEU 15 November 2012, case C-539/10 P, ECLI:EU:C:2012:711 (*Al-Aqsa/Council*), para. 121 et seq.; CJEU 29 November 2018, case C-600/16 P, ECLI:EU:C:2018:966 (*National Iranian Tanker Company*).

[162] For example, CJEU 16 September 2010, case C-149/10, ECLI:EU:C:2010:534 (*Chatzi*), para. 64; CJEU 11 April 2013, case C-401/11, ECLI:EU:C:2013:223 (*Soukupóva*); CJEU 22 May 2014, case C-356/12, ECLI:EU:C:2014:350 (*Glatzel*); CJEU 22 September 2022, case C-159/21, ECLI:EU:C:2022:708 (*Országos Idegenrendeszeti Főigazgatóság and Others*), para. 49 et seq.

[163] For example, CJEU 8 April 2014, case C-293/12, ECLI:EU:C:2014:238 (*Digital Rights Ireland*), para. 66 et seq. The Court seems to derive this criterion from the wording of Article 8(2)(3) of the Charter. See also, for example, CJEU 26 September 2018, case C-180/17, ECLI:EU:C:2018:775 (*X and Y)(suspensory effect of appeals)*); CJEU 8 May 2019, case C-396/17, ECLI:EU:C:2019:375 (*Leitner*).

other legitimate basis laid down by law,' while the third paragraph states that compliance with these rules must be monitored by an independent authority. According to the CJEU case law, these further provisions do not replace the criteria formulated in Article 52(1). Instead, limitations on the right to the protection of personal data must be compatible with both the specific criteria of Article 8(2)(3) and the general criteria of Article 52(1).[164]

4.5.3 Consistency with fundamental rights provisions in primary and secondary EU law

A distinctive feature of EU fundamental rights protection is that fundamental rights are not only laid down in the Charter itself. Certain fundamental rights are also protected under provisions of the TEU or TFEU, such as the provisions on the independence of the judiciary or on free movement, or they can at least be invoked in that context. Section 4.2.2(b) goes into how, in those kinds of cases, the CJEU often combines the review of justification of the infringement of EU freedom of movement, competition law, or Article 19(1) of the TEU with a review against a Charter right.[165] Article 52(1) of the Charter plays little to no role in such cases.[166]
In addition, some fundamental rights have been given further concrete expression and regulated in EU legislation. This includes in particular the GDPR, the equality directives, the many EU regulations in the field of rights of suspects, victims, migrants, and asylum seekers, and the ever-growing body of rules on digital technologies, platforms, and the internet. If such statutory rules apply to an infringement of a fundamental right such as freedom of expression or the right to equal treatment, the Court primarily applies the specific clauses laid down in the relevant statutory rules, as interpreted in the light of the Charter.[167] Article 52(1) of the Charter is then particularly relevant if national legislation or a provision of a directive or

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[164] For example, CJEU 17 October 2013, case C-291/12, ECLI:EU:C:2013:670 (*Schwartz*), paras. 31 and 34; CJEU 22 November 2022, joined cases C-37/20 and C-601/20, ECLI:EU:C:2022:912 (*Luxembourg Business Registers*), para. 46.

[165] For several more recent examples, see CJEU 20 December 2017, case C-322/16, ECLI:EU:C:2017:985 (*Global Starnet*), para. 50; CJEU 24 June 2019, case C-619/18, ECLI:EU:C:2019:531 (*Commission/Poland (lowering the retirement age of judges)*), paras. 54 and 71 et seq.; CJEU 11 February 2021, joined cases C-407/19 and C-471/19, ECLI:EU:C:2021:107 (*Katoen Natie Bulk Terminals and General Services Antwerp*), para. 56. In fact, the Court sometimes opts to actually review against the Charter and not so much against the TEU (see, for example, CJEU 19 November 2018, case C-585/18 and joined cases C-624/18 and C-625/18, ECLI:EU:C:2019:982 (*A.K. (independence of the chamber of the Sąd Najwyższy)*), para. 114 et seq.) or, to use different review standards for different aspects of the complaint (see, for example, CJEU 15 July 2021, case C-791/19, ECLI:EU:C:2021:596 (*Commission/Poland (disciplinary courts)*), paras. 56-57).

[166] While the Court does review against this article in some cases, it refers back to its review of the justification of an infringement on freedoms of movement for its review; see, for example, CJEU 18 June 2020, case C-78/18, ECLI:EU:C:2020:476 (*Commission/Hungary (transparency of the financing of associations)*), para. 141.

[167] For example, CJEU 9 November 2017, case C-306/16, ECLI:EU:C:2017:844 (*Maio Marques da Rosa*), para. 50; CJEU 16 July 2020, case C-311/18, ECLI:EU:C:2020:559 (*Facebook Ireland and Schrems*), para. 105; CJEU 13 January 2022, case C-514/20, ECLI:EU:C:2022:19 (*Koch Personaldienstleistungen GmbH*), paras. 26-27.

regulation or an EU decision is reviewed against the Charter,[168] or where EU legislation itself does not provide a clear answer to a question about scope for limitation.[169] In the latter case, the Court sometimes takes the Charter into account in its interpretation in a more general sense. In those cases, the Court often interprets the exceptions permitted by EU law in the light of the applicable Charter provisions, even if they are more or less rooted in the domain of fundamental social or economic rights.[170] This is when a reference to the Charter serves mainly to emphasise the fundamental value of the fundamental right or to strengthen an argument. In these types of cases, the Court regularly points out that the national court must, in further reviewing a case, take into account the fundamental nature of the interests involved or their special weight.[171] The Court also often indicates that codification in the Charter means that exceptions allowed under a directive or regulation must be interpreted restrictively or that the scope of application of a fundamental rights provision in EU legislation must actually be interpreted broadly.[172]

In other cases, the Court goes over all the criteria of Article 52(1) of the Charter in its interpretation of EU legislation to explore the extent of the statutory limitation options.[173] In cases such as on the storage and processing of personal data, this can lead to the formulation of very extensive sets of conditions and criteria that must be met for an infringement to be considered justified.[174] In addition, the Court sometimes formulates additional criteria on the basis of the Charter that are not reflected in EU law. The Court could rule based on Article 47 of the Charter, for example, that effective legal

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[168] See, for example, CJEU 5 July 2017, case C-190/16, ECLI:EU:C:2017:513 (*Werner Fries*); CJEU 22 November 2018, case C-151/17, ECLI:EU:C:2018:938 (*Swedish Match*), para. 87; CJEU 30 January 2019, case C-220/17, ECLI:EU:C:2019:76 (*Planta Tabak*); CJEU 18 June 2020, case C-78/18, ECLI:EU:C:2020:476 (*Commission/Hungary (transparency of the financing of associations)*), para. 139; CJEU 2 September 2021, case C-570/19, ECLI:EU:C:2021:664 (*Irish Ferries*), para. 139 et seq. This kind of review is actually generally done indirectly, as an exception, stating that the unlawfulness of a specific decision arises from or is related to the unlawfulness of the statutory rules underlying it.

[169] See, for example, CJEU 25 January 2018, case C-473/16, ECLI:EU:C:2018:36 (*F.*), paras. 50 and 55.

[170] For example, CJEU 30 April 2020, case C-5/19, ECLI:EU:C:2020:343 (*Overgas Mrezhi and Balgarska gazova asotsiatsia*), where the CJEU explained the exceptions against the backdrop of Article 36 and Article 38 of the Charter, which are about access to services of general economic interest and consumer protection respectively; see also, for example, CJEU 10 February 2022, case C-485/20, ECLI:EU:C:2022:85 (*HR Rail SA*), para. 42, where the Court mentions Article 26 of the Charter (about integration of persons with disabilities). For an example where the CJEU specifically refers to the Charter in its review based on the GDPR, see: CJEU 6 October 2020, joined cases C-511/18, C-512/18 and C-520/18 (*La Quadrature du Net*).

[171] See, for example, CJEU 10 May 2017, case C-133/15, ECLI:EU:C:2017:354 (*Chavez-Vilchez and Others*), para. 70; CJEU 12 November 2019, case C-233/18, ECLI:EU:C:2019:956 (*Haqbin*), para. 46.

[172] For example, CJEU 23 April 2020, case C-507/18, ECLI:EU:C:2020:289 (*Associazione Avvocatura per i diritti LGBTI*), para. 39; CJEU 25 February 2021, case C-129/20, ECLI:EU:C:2021:140 (*Caisse pour l'avenir des enfants*), para. 44; CJEU 6 October 2022, case C-241/21, ECLI:EU:C:2022:753 (*Politsei- ja Piirivalveamet (Placement en rétention – Risque de commettre une infraction pénale)*), para. 42; CJEU 30 March 2023, case C-34/21, ECLI:EU:C:2023:270 (*Hauptpersonalrat der Lehrerinnen und Lehrer*), paras. 54-55.

[173] See, for example, CJEU 2 June 2022, case C-587/20, ECLI:EU:C:2022:419 (*HK/Danmark and HK/Privat*), paras. 42-47.

[174] This development has been ongoing for a while. For recent examples, see CJEU 6 October 2020, joined cases C-511/18, C-512/18 and C-520/18 (*La Quadrature du Net*); CJEU 5 April 2022, case C-140/20, ECLI:EU:C:2022:258 (*Commissioner of the Garda Síochána and Others*).

remedies must be provided in the event of a limitation on a right laid down in a directive.[175]

4.5.4 The meaning of Article 52(3) of the Charter

In theory, the generic nature of the justification clause of Article 52(1) of the Charter allows exceptions to all fundamental rights stated in the Charter, including absolute, non-limitable rights such as the prohibition of torture, freedom of conscience, or the prohibition on the retroactive application of criminal law provisions.[176]

However, the conclusion to draw from Article 52(3) of the Charter is that to the extent that the Charter contains rights that correspond to the rights safeguarded by the ECHR, the meaning and scope of those rights are identical.[177] Therefore, where the ECtHR has ruled that certain rights must be regarded as absolute rights, the Charter does not allow any exceptions either, regardless of the wording of Article 52(1) of the Charter.[178]
In addition, Article 52(3) of the Charter means that the CJEU – as mentioned above – must provide an interpretation of the limitation clause for rights corresponding to rights from the ECHR that is comparable to the interpretation given by the ECtHR in its own case law.[179] The Court interprets the concept of 'corresponding rights' broadly, meaning that harmonisation with ECtHR case law is not limited to provisions that are virtually identical in the ECHR and the CJEU.[180] For an example of this, there is the *Commission/Hungary* case, which was partly about the academic freedom protected under Article 13 of the Charter.[181] Even though the right to academic freedom as such is not protected by the ECHR, the CJEU did emphasise that the ECtHR has made relevant rulings on this subject in the context of the freedom of expression protected by Article 10 of the ECHR. On the back of this emphasis, the Court considered it important to comply with that case law, even though it was not obliged to do so under Article 52(3) of the Charter.

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[175] For example, CJEU 29 November 2017, case C-214/16, ECLI:EU:C:2017:914 (*King*), para. 41.

[176] The provision can actually also be interpreted as stating that this option is not available; for details, see S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.34.

[177] See also A.W. Heringa & L.F.M. Verhey, 'The EU Charter: Text and Structure,' *Maastricht Journal of European and Comparative Law* (8) 2001, p. 11-32, on p. 24-25.

[178] See also K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights,' *European Constitutional Law Review* (6) 2012, p. 375-403, on p. 388.

[179] See also S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52,105 et seq.

[180] There are, however, a few other limitations, as outlined in S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.105-52.108 and 52.111.

[181] CJEU 6 October 2020, case C-66/18, ECLI:EU:C:2020:792 (*Commission/Hungary (higher education)*), paras. 223-225.

With respect to corresponding rights, the CJEU usually explicitly mentions the criteria developed by the ECtHR, with precise case law references.[182] For example, ECtHR case law contains an extensive set of criteria to determine whether a seriously ill refugee may be deported to a country where good medical care is not assured, or to review how freedom of expression can be weighed against the right to respect for private and family life.[183] The CJEU has also explicitly modelled its own case law criteria on ECtHR case law with regard to case law on the *ne bis in idem* principle and the hearing of witnesses who have not appeared.[184] The Court usually follows the ECtHR fairly closely in this regard, but does integrate the criteria into the applicable Charter provisions and guidelines,[185] whereby the Court often puts its own spin on the criteria or adds some more. The Court can do the latter because the wording of Article 52(3) of the Charter provides scope to offer additional protection in the event of violations of fundamental rights.[186] The requirement to respect the essence of the right, as discussed below, is, for example, an additional criterion that can play a role in certain CJEU rulings, even though it is not mentioned as such in the case law of the ECtHR.[187] In other cases, the CJEU points out that certain ECtHR case law is intended for a specific context, while several essential aspects of the context of the case before the CJEU differ from the context of the ECtHR case law.[188] This, according to the CJEU, is potential justification to use a slightly different set of criteria.

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[182] See further in Section 5.2.1. For several clear examples, see General Court 14 July 2021, case T-248/18, ECLI:EU:T:2021:450 (*Diosdalo Cabello Rondón*), paras. 102-105; CJEU 15 September 2022, case C-347/21, ECLI:EU:C:2022:692 (*DD (réitération de l'audition d'un témoin)*), paras. 32-34.

[183] For more details of this way of working, see J.H. Gerards, *General Principles of the European Convention on Human Rights*, second edition, Cambridge: Cambridge University Press 2023, p. 94-97; for basic principles on deportation, see, for example, ECtHR (Grand Chamber) 13 December 2016, no. 41738/10, ECLI:CE:ECHR:2016:1213JUD004173810 (*Paposhvili/Belgium*) and ECtHR (Grand Chamber) 7 December 2021, no. 57467/15, ECLI:CE:ECHR:2021:1207JUD005746715 (*Savran/Denmark*); for extensive case law on the various criteria with respect to freedom of expression, see J.H. Gerards (ed.), *Fundamental Rights. The European and International Dimension*, Cambridge: Cambridge University Press 2023, p. 88 et seq.

[184] CJEU 22 March 2022, case C-117/20, ECLI:EU:C:2022:202 (*bpost NV*), para. 49 et seq.; CJEU 8 December 2022, case C-348/21, ECLI:EU:C:2022:965 (*HYA and Others (impossibilité d'interroger les témoins à charge)*), paras. 40-44 and 53-58.

[185] See, for example, CJEU 24 April 2018, case C-353/16, ECLI:EU:C:2018:276 (*MP*); CJEU 14 February 2019, case C-345/17, ECLI:EU:C:2019:122 (*Buividis*), para. 66; CJEU 22 November 2022, case C-69/21, ECLI:EU:C:2022:913 (*State Secretary of Justice and Security (Éloignement – Cannabis thérapeutique)*), para. 60 et seq.; CJEU 8 December 2022, case C-460/20, ECLI:EU:C:2022:962 (Google *(Déréférencement d'un contenu prétendument inexact)*), para. 60 et seq.

[186] Additionally, this may have something to do with the special nature of a case that is brought before the CJEU; the ECHR criteria cannot always be applied to a case as they are; see also General Court 14 July 2021, case T-248/18, ECLI:EU:T:2021:450 (*Diosdalo Cabello Rondón*), para. 106.

[187] See, for example, CJEU 13 June 2017, case C-258/14, ECLI:EU:C:2017:448 (*Florescu and Others*). Cf. also S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52,133.

[188] See, for example, CJEU 20 September 2022, joined cases C-793/19 and C-974/19, ECLI:EU:C:2022:702 (*SpaceNet*), para. 125; CJEU 16 February 2023, case C-349/21, ECLI:EU:C:2023:102 (*HYA and Others (Motivation des autorisations des écoutes téléphoniques)*), paras. 63-64.

4.5.5 The separate requirements of Article 52(1) of the Charter

In most cases, the CJEU applies the criteria of Article 52(1) of the Charter rigorously and systematically.[189] The Court almost always determines for each criterion separately and usually with a fairly extensive explanation as to whether it has been met in the specific case.[190] To get a good handle on this case law, it makes sense to briefly discuss the different criteria. The following will go into the criteria that (a) a limitation must be provided for by law, (b) the essence of the fundamental right must be respected, (c) the limitation must be made for a legitimate objective, and (d) the limitation must meet the requirement of proportionality.

a. Provided for by law

Article 52(1) of the Charter explicitly states that limitations 'must be provided for by law.'[191] If a limitation on a fundamental right is provided for in EU law (directives or regulations), the CJEU usually automatically assumes that this criterion has been met.[192] In such cases, the Court rarely assesses substantive quality criteria such as the foreseeability or accessibility of the rules, as the ECtHR usually does.[193]

In cases where a national legal provision is the basis for a limitation on the exercise of a fundamental right, the Court does impose such qualitative criteria.[194] This is specifically pertinent when it comes to the use of far-

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[189] In some cases, the Court tends to skip certain criteria (such as the protection of the essence of the fundamental right), or basically only reviews it against the proportionality requirement; see, for example, CJEU 25 January 2018, case C-473/16, ECLI:EU:C:2018:36 (*F.*), paras. 55 and 56. Very sporadically, the Court limits itself to the legality requirement and derives other criteria from its own previous case law; see, for example, CJEU 17 January 2019, case C-310/16, ECLI:EU:C:2019:30 (*Dzizev and Others*). This has prompted commentators to call on the CJEU to be even more systematic in reviewing against the criteria; S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.84.

[190] For example, CJEU 9 November 2010, case C-92/09, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*); CJEU 8 April 2014, case C-293/12, ECLI:EU:C:2014:238 (*Digital Rights Ireland*); CJEU 24 September 2020, case C-223/19, ECLI:EU:C:2020:753, paras. 82-93 (*YS (occupational pensions for executive staff)*). The reasoning is sometimes rather brief and superficial, but even then, most elements of Article 52(1) are touched on; see, for example, General Court 18 September 2014, case T-317/12, ECLI:EU:T:2014:782 (*Holcim (Romania)*), para. 169. There are also cases where the Court leaves virtually the whole review to the national court; see, for example, CJEU 2 June 2022, case C-353/20, ECLI:EU:C:2022:423 (*Skeyes*), paras. 66-67. The requirement that the essential content of the fundamental right must be respected is not always applied; see, for example, CJEU 22 June 2021, case C-439/19, ECLI:EU:C:2021:504 (*Latvijas Republikas Saeima (Points de pénalité)*), para. 105 et seq.

[191] The CJEU does not always explicitly apply this criterion; see further S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.37.

[192] See, for example, CJEU 5 July 2017, case C-190/16, ECLI:EU:C:2017:513 (*Werner Fries*), para. 37.

[193] The Court does do this, however, when it applies Article 49 of the Charter, which establishes the legality principle for criminal law; see, for example, CJEU 20 December 2017, case C-102/16, ECLI:EU:C:2017:1012 (*Vaditrans*), paras. 50-52. It also happens elsewhere sometimes; see, for example, Opinion 1/15 of 26 July 2017, ECLI:EU:C:2017:592, para. 147.

[194] See also S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.42.

reaching investigative powers, such as conducting a house search or telephone tapping, or when transferring personal data. The legal basis must then be clear and precise, in particular as regards the description of the scope of the rules, and must also provide a certain protection against arbitrariness.[195] In such cases, the conditions as to when a power can be applied and for what purposes it can be applied in a lawful manner must also be specified clearly.[196] Depending on the fundamental right affected, the criteria may be even stricter. The CJEU has, for example, not only stated that rules for deprivation of liberty must be accessible, precise, and predictable and offer protection against arbitrariness,[197] but also that criteria which define the basis for detention must be defined in mandatory or binding rules of general application.[198] In addition, the criteria that the CJEU sets are stricter when the infringement is committed by an automated process.[199]

The CJEU does accept, however, like the ECtHR, that regulations can be gradually refined in practice, in particular through national or European case law.[200] As such, this does not endanger the foreseeability of a fundamental rights infringement.[201] For most limitations, the CJEU has also accepted that they do not necessarily have to be provided for in legislation, but that a basis in unwritten law or case law may be sufficient, as long as the criteria of recognisability and foreseeability are met.[202]

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[195] CJEU 17 December 2015, case C-419/14, ECLI:EU:C:2015:832 (*WebMindLicenses*), para. 81; see also CJEU 17 January 2019, case C-310/16, ECLI:EU:C:2019:30 (*Dzizev and Others*), para. 36; CJEU 24 February 2022, case C-175/20, ECLI:EU:C:2022:124 (*Valsts ieņēmumu dienests (Traitement des données personnelles à des fins fiscales)*), para. 55; CJEU 21 June 2022, case C-817/19, ECLI:EU:C:2022:491 (*Ligue des droits humains*), para. 187; CJEU 26 January 2023, no. C-205/21, ECLI:EU:C:2023:49 (*Ministerstvo na vatreshnite raboti*), para. 65.

[196] This applies to rules on the processing of biometric data, for example; see CJEU 26 January 2023, no. C-205/21, ECLI:EU:C:2023:49 (*Ministerstvo na vatreshnite raboti*), para. 66.

[197] See, for example, CJEU 12 February 2019, case C-492/18 PPU, ECLI:EU:C:2019:108 (*TC*), paras. 58-59; CJEU 19 December 2019, case C-752/18, ECLI:EU:C:2019:1114 (*Deutsche Umwelthilfe eV*), para. 46.

[198] CJEU 15 March 2017, case C-528/15, ECLI:EU:C:2017:213 (*Al Chodor*), para. 45; CJEU 6 October 2022, case C-241/21, ECLI:EU:C:2022:753 (*Politsei- ja Piirivalveamet (Placement en rétention – Risque de commettre une infraction pénale)*), para. 53.

[199] CJEU 16 July 2020, case C-311/18, ECLI:EU:C:2020:559 (*Facebook Ireland and Schrems*), para. 176; CJEU 26 April 2022, case C-401/19, ECLI:EU:C:2022:297 (*Poland/Parliament and Council*), para. 67; CJEU 21 June 2022, case C-817/19, ECLI:EU:C:2022:491 (*Ligue des droits humains*), para. 117. In the latter case, the CJEU even formulated a large number of more substantive and procedural conditions that the automated algorithmic processing of personal data must meet; see paras. 182-229. As is often the case in ECtHR case law (see J.H. Gerards, *General Principles of the European Convention on Human Rights*, second edition, Cambridge: Cambridge University Press 2023, p. 309-314), the criteria of legality and necessity are often mixed.

[200] CJEU 26 April 2022, case C-401/19, ECLI:EU:C:2022:297 (*Poland/Parliament and Council*), para. 74; CJEU 21 June 2022, case C-817/19, ECLI:EU:C:2022:491 (*Ligue des droits humains*), para. 114; CJEU 8 December 2022, case C-694/20, ECLI:EU:C:2022:963 (*Orde van Vlaamse Balies and Others*), para. 35.

[201] CJEU 28 March 2017, case C-72/15, ECLI:EU:C:2017:236 (*Rosneft*), para. 167.

[202] S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.40, referring to Opinion 1/15 of 26 July 2017, ECLI:EU:C:2017:592. This opinion concerned a proposed agreement between the EU and Canada that would allow data transfers. Although such an agreement is clearly not a legislative act (para. 145), it is equivalent to a legislative act and, according to the CJEU, furthermore meets the criteria of accessibility and foreseeability (para. 146)

b. Respect for the essence of the fundamental right

Article 52(1) of the Charter provides that limitations must respect the 'essence' of Charter rights.[203] In reviewing whether this requirement is met, the Court generally examines whether the individual fundamental rights aspect claimed can be regarded as part of the essence of the right relied upon.[204] The CJEU determines on a case-by-case basis either that the essence of the right has been respected or that the essence of the fundamental right has actually been impaired in the case.[205] In the first case, the Court continues its review and examines whether the proportionality requirement has also been met.[206] In the second case, the Court can, in principle, immediately find a violation of the Charter, without having to examine whether it might be justified.[207]

The second approach appears in case law on the retention of traffic data, which the Court assumed affects a very important aspect of the right to respect for private life.[208] If there is also general and undifferentiated storage of such data, the Court deems that the right to respect for private life cannot

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[203] The subject of widespread scientific debate, this notion is defined differently in the case law of the various legal orders; see further E. Örücü, 'The Core of Rights and Freedoms: the Limit of Limits,' in: T. Campbell et al. (ed.), *Human Rights. From Rhetoric to Reality*, Oxford, Basil Blackwell 1986, p. 37-59; J.H. Gerards, 'Core rights and the interaction of normative and analytical elements in human rights scholarship,' available at http://dx.doi.org/10.2139/ssrn.3333627; M. Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,' *European Constitutional Law Review* (14) 2018, p. 332-368; A.E.M. Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge: Cambridge University Press 2018. The CJEU also applies an essence-of-the-right approach in relation to its case law on mutual trust and mutual recognition; see further Section 5.1.2 and cf., for example, M. Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice After *LM*,' *European Constitutional Law Review* (15) 2019, p. 17-47, on p. 27-28. Lenaerts explicitly links the essence-of-the-right approach to the essence requirement of Article 52(1) of the Charter (K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights, *German Law Journal* (20) 2019, p. 779-793, on p. 783).

[204] For example, CJEU 8 April 2014, case C-293/12, ECLI:EU:C:2014:238 (*Digital Rights Ireland*), paras. 38-40; CJEU 6 October 2015, case C-362/14, ECLI:EU:C:2015:650 (*Schrems*), para. 94. See further T. Ojanen, 'Making the essence of fundamental rights real: the Court of Justice of the European Union clarifies the structure of fundamental rights under the Charter,' *European Constitutional Law Review* (12) 2016, p. 318329, on p. 322 et seq.; K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights, *German Law Journal* (20) 2019, p. 779-793; T. Tridimas & G. Gentile, 'The Essence of Rights: An Unreliable Boundary?' *German Law Journal* (20) 2019, p. 794-816, on p. 807.

[205] For example, CJEU 27 March 2014, case C-314/12, ECLI:EU:C:2014:192 (*UPC Telekabel Wien*), paras. 51-53.

[206] See, for example, CJEU 5 July 2017, case C-190/16, ECLI:EU:C:2017:513 (*Werner Fries*), paras. 38-39. See also K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights, *German Law Journal* (20) 2019, p. 779-793, on p. 786.

[207] See especially CJEU 18 July 2013, case C-426/11, ECLI:EU:C:2013:521 (*Alemo-Herron*), para. 35; CJEU 6 October 2015, case C-362/14, ECLI:EU:C:2015:650 (*Schrems*), para. 94; General Court 26 September 2014, case T-614/13, ECLI:EU:T:2014:835 (*Romonta*), para. 59; CJEU 22 January 2013, case C-283/11, ECLI:EU:C:2013:28 (*Sky Österreich*), para. 59. See also T. Ojanen, 'Making the essence of fundamental rights real: the Court of Justice of the European Union clarifies the structure of fundamental rights under the Charter,' *European Constitutional Law Review* (12) 2016, p. 318-329; J.H. Gerards, 'Core rights and the interaction of normative and analytical elements in human rights scholarship,' available at http://dx.doi.org/10.2139/ssrn.3333627, Section 4.1; M. Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,' *European Constitutional Law Review* (14) 2018, p. 332-368, on p. 350; K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights,' *German Law Journal* (20) 2019, p. 779-793, on p. 781-783.

[208] For precursors to this ruling, see also M. Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,' *European Constitutional Law Review* (14) 2018, p. 332-368.

even be prejudiced by the pursuit of a 'primordial' and 'essential' interest such as protection against serious crime.[209] Another example comes from the *HN (Procès d'un accusé éloigné du territoire)* case,[210] where the Court found that the absence of information about the date of a scheduled hearing in criminal proceedings deprives the suspect of 'any real possibility of actually exercising his or her right to be present at the trial and would thus deprive the conditions laid down in that provision [Article 8(2) of Directive 2016/343 in conjunction with Article 47 and Article 48 of the Charter] of any practical effect.'[211] Although the CJEU does not say this in so many words in this ruling, it must be assumed that no justification can be accepted in such cases. The only exception is if there are special circumstances, such as a situation where a suspect has consciously, voluntarily, and unequivocally waived their right to be present at their trial.[212] These approaches raise the question of how the Court determines whether the essence of a fundamental right has been impaired and how to define the essence.[213] While the Court has not provided any general principles of interpretation[214] for this, the Court does at least seem to take into account the question of whether, despite the limitation, the fundamental right can still be exercised to a sufficient extent.[215] For example, if there is not a complete deprivation of property, but only a limitation on use, the essence of the right to property will not be impaired.[216] When retaining traffic data, the essence of the right to protection of privacy is not impaired if the data is not stored in an indiscriminate and general manner.[217] In addition, the Court makes a distinction here between traffic data and the content of communications, whereby the content of communications is closer to the essence of the fundamental right to protection of privacy than traffic data.[218] A criterion here also seems to be whether the collection and processing of

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[209] CJEU 5 April 2022, case C-140/20, ECLI:EU:C:2022:258 (*Commissioner of the Garda Síochána and Others*), para. 94.

[210] CJEU 15 September 2022, case C-420/20, ECLI:EU:C:2022:679 (*HN (Procès d'un accusé éloigné du territoire)*).

[211] Idem, para. 59.

[212] Idem, para. 60.

[213] See also T. Tridimas & G. Gentile, 'The Essence of Rights: An Unreliable Boundary?' *German Law Journal* (20) 2019, p. 794-816, on p. 804.

[214] While several sources have been identified in the literature, such as the existence of consensus in Europe on what is part of the core of a fundamental right or what has already been recognised in the case law of the CJEU and ECtHR (e.g. M. Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,' *European Constitutional Law Review* (14) 2018, p. 332-368, on p. 339 et seq.), the CJEU itself never or hardly ever seems to cite such sources in its case law.

[215] See, for example, CJEU 12 July 2018, case C-540/16, ECLI:EU:C:2018:565 (*Spika and Others*), para. 38; CJEU 16 July 2020, case C-686/18, ECLI:EU:C:2020:567 (*OC and Others*), paras. 88-89. Brkan calls this the 'subjective' essence-of-the-right approach, because it is about the extent to which the parties involved are still able to exercise their rights (M. Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,' *European Constitutional Law Review* (14) 2018, p. 332-368, on p. 356).

[216] See the example mentioned above and see, for example, CJEU 5 May 2022, case C-83/20, ECLI:EU:C:2022:346 (*BPC Lux 2 Sàrl and Others*), para. 53.

[217] See the aforementioned case CJEU 5 July 2017, case C-190/16, ECLI:EU:C:2017:513 (*Werner Fries*), paras. 38-39.

[218] CJEU 8 April 2014, case C-293/12, ECLI:EU:C:2014:238 (*Digital Rights Ireland*), para. 39.

personal data allows for compilation of 'a full overview of the private life of a person.'[219] If the information only relates to certain aspects of a person's private life, the essence of Article 7 of the Charter will not be impaired. These examples show that it is necessary to investigate for each fundamental right and for each situation what can be regarded as the essence of the right and whether that essence has been impaired in the case at hand.

In practice, the essence-of-the-right criterion is not applied very consistently. In particular, there are instances where the Court does find that the essence of the right may have been impaired, but still applies a proportionality review.[220] In the *Consob* case, what was at stake was a defendant's right to remain silent, of which the CJEU recognised that it is considered by the ECtHR to be at the heart of the right to a fair trial.[221] However, this did not lead the CJEU to conclude that every infringement on this aspect of Article 48 of the Charter is unacceptable, finding instead that certain requests to cooperate with authorities could still be justified.[222] The *MV – 98* case was another case where the Court noted that 'automatic cumulation [of measures], which is not subject to any exhaustively defined condition, cannot be regarded as respecting the essence of that right [to ne bis in idem].'[223] It led the Court to find that there appeared to be such automatic cumulation going on in the main proceedings.[224] In this case, the Court could, therefore, have sufficed with a review against the substantial essence criterion, but instead it continued its review with a comprehensive proportionality review[225], which was, in effect, redundant.

The Court sporadically chooses a line of reasoning that reverses the order of the substantial essence review and the proportionality review. One example is the *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv* case, which was about the confiscation of property belonging to a third party acting in good faith as part of a criminal case.[226] The Court found that it constituted definitive deprivation of the right of ownership in respect of the property in question, so that the person's right

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[219] CJEU 21 June 2022, case C-817/19, ECLI:EU:C:2022:491 (*Ligue des droits humains*), para. 120.

[220] See further J.H. Gerards, 'Core rights and the interaction of normative and analytical elements in human rights scholarship,' available at http://dx.doi.org/10.2139/ssrn.3333627, Section 4.2; T. Tridimas & G. Gentile, 'The Essence of Rights: An Unreliable Boundary?' *German Law Journal* (20) 2019, p. 794-816, on p. 804. The latter argue that this is basically inevitable, but Lenaerts argues that this is not the intention of the essence requirement – see K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights, *German Law Journal* (20) 2019, p. 779-793, on p. 788.

[221] CJEU 2 February 2021, case C-481/19, ECLI:EU:C:2021:84 (*Consob*), para. 38.

[222] Idem, para. 41.

[223] CJEU 4 May 2023, case C-97/21, ECLI:EU:C:2023:371 (*MV – 98*), para. 54.

[224] Idem, para. 55.

[225] Idem, paras. 56- 62.

[226] CJEU 14 January 2021, case C-393/19, ECLI:EU:C:2021:8 (*Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv*).

to property was substantially affected.[227] The Court concluded that 'as regards a third party acting in good faith, who did not know and could not have known that his or her property was used to commit an offence, such confiscation constitutes, in the light of the objective pursued, a disproportionate and intolerable interference impairing the very substance of his or her right to property.'[228] In this finding, the question of whether the essence of a right has been affected does not appear to precede the question of whether the infringement is otherwise proportionate to its stated objectives, but rather appears to be the conclusion of a proportionality review.[229]

Due to this uncertainty about how to apply and determine the 'essence' of a fundamental right, the added value of the 'substantial essence criterion' is limited for now.[230]

c. Legitimate objective

The third criterion is that of a legitimate objective. Due to the generic nature of Article 52(1) of the Charter, concrete criteria for objectives are lacking. When it comes to defining legitimate objectives, this article does not go any deeper than 'objectives of general interest recognised by the Union' and 'the need to protect the rights and freedoms of others.' The CJEU reviews against this criterion fairly regularly, albeit that such reviews rarely invalidate a justification put forward by a party.[231] This is no surprise, given the extremely broad wording of the criteria for objectives.[232]

While the CJEU's review of objectives is often general and superficial,[233] it does set further criteria for certain subjects and fundamental rights in its case law. For example, the Court accepted that the processing of certain personal data may be legitimate to the extent that it pursues the objectives of combating serious crime, but stressed that it would then be necessary to review whether this is indeed done only in the case of 'serious' crimes.[234] Member States must ensure that the processing purpose is not extended to

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[227] Idem, para. 55.

[228] Idem, para. 55.

[229] On this approach, see also T. Tridimas & G. Gentile, 'The Essence of Rights: An Unreliable Boundary?' *German Law Journal* (20) 2019, p. 794-816, on p. 804. They argue that this is essentially the only logical way to determine whether the substantial essence has been affected. However, as noted above, this position is controversial; see K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights, *German Law Journal* (20) 2019, p. 779-793.

[230] See also M. Dawson, O. Lynskey & E. Muir, 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' *German Law Journal* (20) 2019, p. 763-778, on p. 772.

[231] A rare example of a case where a justification advanced was rejected following the review of objectives is when purely budgetary considerations are put forward as an objective of general interest; see, for example, CJEU 24 February 2022, case C-262/20, ECLI:EU:C:2022:117 (*Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto'*), para. 78.

[232] See also S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.47.

[233] S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.61.

[234] CJEU 21 June 2022, case C-817/19, ECLI:EU:C:2022:491 (*Ligue des droits humains*), para. 150.

less serious offences as well, as this would lack a legitimate objective.[235] In France, for example, authorities were able to retain traffic data for purposes of combating market abuse and insider trading as well, but the Court ruled in light of its previous case law that these were not permissible objectives.[236]

In some cases, the CJEU requires not only that an objective be legitimate, but also that it actually be pursued by the rules in question. The CJEU had doubts about whether that is the case when imposing legal restrictions on foreign-funded civil society organisations operating in Hungary.[237] One of the objectives that Hungary pursued by imposing these restrictions was to protect public security. The CJEU noted that Hungary had not presented arguments showing concretely that the growth in the number of foreign-funded civil society organisations had led to a threat to public order.[238] As a result, it seemed that Hungary had not based the law on an actual threat, but rather on a general presumption that financial support from other Member States or third countries is liable to lead to a threat.[239] The Court found this too vague and insufficiently substantiated, so the reason of protecting public order and security could not be invoked to justify the rules.

d. Proportionality

Like most international fundamental rights treaties, Article 52(1) of the Charter contains a number of proportionality requirements. Basically, limitations must be 'necessary' and 'genuinely meet' the stated legitimate objectives. In applying these requirements, the Court appears to look more at the various elements of the broader proportionality review than is customary at the ECtHR. While the ECtHR often resorts to a rather general balancing method, or rather to the definition and application of specific review factors,[240] the CJEU almost always applies the requirements of appropriateness and necessity and often uses a subsidiarity review (i.e. it examines whether the stated objective could not have been achieved by other means that would have less of an impact on fundamental rights).[241] This instrumentality review is generally detailed and comprehensive,

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[235] Idem, para. 152.

[236] CJEU 20 September 2022, joined cases C-339/20 and C-397/20, ECLI:EU:C:2022:703 (*VD*), paras. 93-94.

[237] CJEU 18 June 2020, case C-78/18, ECLI:EU:C:2020:476 (*Commission/Hungary (transparency of the financing of associations)*).

[238] Idem, para. 92.

[239] Idem, para. 93.

[240] See especially J.H. Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights?' *International Journal of Constitutional Law* (11) 2013, p. 466-490; J.H. Gerards, *General Principles of the European Convention on Human Rights*, second edition, Cambridge: Cambridge University Press 2023, Chapter 11.

[241] For example, CJEU 9 November 2010, case C-92/09, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*), para. 78; CJEU 8 April 2014, case C-293/12, ECLI:EU:C:2014:238 (*Digital Rights Ireland*). See also CJEU 26 April 2022, case C-401/19, ECLI:EU:C:2022:297 (*Poland/Parliament and Council*), para. 65. See further also J.H. Gerards, 'Rechterlijke (toetsing van) belangenafwegingen,' in: N.S. Efthymiou et al. (ed.), *De vele facetten van het staatsrecht. Liber Amicorum Roel de Lange*, Nijmegen: Wolf Legal Publishers 2020, p. 225-246.

although it depends somewhat on the situation presented.[242] In many of its rulings, the CJEU then also points to specific possibilities that were (or could have been) built into limiting rules to overcome or mitigate adverse effects.[243]

Especially in comparison to its older case law on the application of the rule of reason and the proportionality review with respect to cases on free movement,[244] the CJEU currently often looks at whether a reasonable balance of interests has been struck ('proportionality in the strict sense').[245] In particular, the Court requires national authorities and EU institutions to, when making or implementing regulations, ensure a fair balance between the various rights and interests involved.[246] However, there are certain cases on fundamental rights, such as cases where the principle of equality and the right to religious freedom clash with the freedom to conduct a business, where the CJEU does not apply a balancing test and merely assesses appropriateness and necessity.[247] That being said, the most recent case law still sees the CJEU require national courts to carry out such balancing of interests.[248]

What is also important to note is that the CJEU does not always specifically address the various proportionality elements (instrumentality (appropriateness and necessity) and proportionality in the strict sense).[249] In

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[242] See below and also Section 4.6: low intensity of review can lead to a more superficial assessment of the various elements.

[243] See, for example, CJEU 14 September 2017, case C-18/16, ECLI:EU:C:2017:680 (*K.*), paras. 42-46; CJEU 2 March 2023, case C-268/21, ECLI:EU:C:2023:145 (*Norra Stockholm Bygg*), paras. 55-56.

[244] For example, CJEC 14 February 2008, case C-244/06, ECLI:EU:C:2008:85 (*Dynamic Medien*), para. 46 et seq.

[245] General Court 26 September 2014, case T-614/13, ECLI:EU:T:2014:835 (*Romonta*), para. 75 et seq.; CJEU 22 November 2022, joined cases C-37/20 and C-601/20, ECLI:EU:C:2022:912 (*Luxembourg Business Registers*), paras. 83-86. For cases on internet freedom, see specifically F. Fontanelli, 'The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights,' *Oxford Journal of Legal Studies* (36) 2016, p. 630-660, on p. 643 et seq. and see – with examples – S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.70-52.72.

[246] See, for example, CJEU 24 November 2011, case C-468/10. ECLI:EU:C:2011:777 (*ASNEF*), para. 43; CJEU 3 September 2014, case C-201/13, ECLI:EU:C:2014:2132 (*Deckmyn*), paras. 27 and 43; CJEU 14 September 2017, case C-18/16, ECLI:EU:C:2017:680 (*K.*), paras. 47-48; CJEU 24 September 2019, case C-136/17, ECLI:EU:C:2019:773 (*GC and Others/Google*), para. 66; CJEU 26 April 2022, case C-401/19, ECLI:EU:C:2022:297 (*Poland/Parliament and Council*), para. 66.

[247] See, for example, CJEU 14 March 2017, case C-157/15, ECLI:EU:C:2017:203 (*Achbita/G4S Secure Solutions*); for more about this, see J.H. Gerards, 'Non-Discrimination, the European Court of Justice and the European Court of Human Rights – who takes the lead?' in: Th. Giegerich (ed.), *The European Union as Protector and Promoter of Equality*, Springer Verlag 2020, p. 135-163 and, for a different interpretation of this case law, T. Loenen, 'Manifestaties van godsdienst in EVRM- en EU-perspectief: eenheid in verscheidenheid,' *SEW* 2021, issue 12, p. 652-665. See in a different factual context CJEU 17 October 2013, case C-291/12, ECLI:EU:C:2013:670 (*Schwartz*); CJEU 5 July 2017, case C-190/16, ECLI:EU:C:2017:513 (*Werner Fries*); CJEU 12 July 2018, case C-540/16, ECLI:EU:C:2018:565 (*Spika and Others*).

[248] See in particular CJEU (Grand Chamber) 28 November 2023, case C-148/22, ECLI:EU:C:2023:924 (*Commune d'Ans*), para. 40.

[249] See further on these various requirements J.H. Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights?' *International Journal of Constitutional Law* (11) 2013, p. 466-490.

quite a few cases, the Court leaves it entirely or partly to the national courts to shape the review to this end.[250] In other cases, however, the Court is extremely precise and elaborate, identifying very specific factors and considerations that national courts (but sometimes also other actors, such as search engine operators) must include in their assessment.[251] The degree of precision that the Court puts into determining the outcome is significantly linked to the general EU principles and procedural context described in Chapter 2. In addition, the approach may be determined in part by the intensity of review that the Court applies. This will be addressed in Section 4.6.

4.6 Intensity of review

In Section 4.5, it became clear that the CJEU sometimes examines with great precision, in detail, and rigorously whether the limitation criteria of the Charter are met, while in other cases leaving more room for assessments of appropriateness or necessity. This shows that the CJEU can vary the intensity or strictness of its review of justification, just as the ECtHR can do through the use of its famous margin of appreciation doctrine.[252] In its case law on the justification of limitations on fundamental rights, however, the CJEU has not – like the ECtHR – developed a fixed doctrine for marginal or strict review.[253] Especially in cases that pre-date the Lisbon Treaty, the CJEU has almost never indicated what factors determine the intensity of its review of infringements of fundamental rights and has only rarely pointed

[250] See, for example, CJEU 20 December 2017, case C-277/16, ECLI:EU:C:2017:989 (*Polkomtel*), para. 53; CJEU 20 December 2017, case C-322/16, ECLI:EU:C:2017:985 (*Global Starnet*), para. 51 et seq.; CJEU 16 July 2020, case C-686/18, ECLI:EU:C:2020:567 (*OC and Others*), para. 96.

[251] See, for example, CJEU 24 September 2019, case C-136/17, ECLI:EU:C:2019:772 (*GC and Others (de-referencing of sensitive data)*), para. 58 et seq.; CJEU 24 September 2019, case C-507/17, ECLI:EU:C:2019:772 (*Google (territorial scope of the right to de-referencing)*), para. 60 et seq.; CJEU 11 December 2019, case C-708/18, ECLI:EU:C:2019:1064 (*TK/Asociația de Proprietari bloc M5A-ScaraA*), para. 47 et seq.

[252] On the intensity of review at the CJEU, see G.T. Petursson, *The Proportionality Principle as Tool for Disintegration in EU Law – of Balancing and Coherence in the Light of the Fundamental Freedoms* (thesis Lund University), 2014; C. Warin, 'A Dialectic of Effective Judicial Protection and Mutual Trust in the European Administrative Space: Towards the Transnational Judicial Review of Manifest Error?' *Review of Administrative Law* 2020, issue 4; H. Eklund, 'The Margin of Discretion and the Boundary Question in EU Fundamental Rights Law,' *Common Market Law Review* (59) 2022, p. 407-1444. For details of the ECtHR's margin of appreciation doctrine, see L.R. Glas, 'De *margin of appreciation* van het Europees Hof voor de Rechten van de Mens,' in: R. Schutgens et al. (ed.), *Toetsingsintensiteit. Een vergelijkende studie naar het variëren van de toetsingsintensiteit door de rechter*, Deventer: Wolters Kluwer 2022, p. 449-465; J.H. Gerards, *General Principles of the European Convention on Human Rights*, second edition, Cambridge: Cambridge University Press 2023; and the aforementioned thesis by Petursson. For a comparison, see further J.H. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine,' *European Law Journal* (17) 2011, p. 80-120.

[253] In some cases, the Court does not even state whether it will apply a restrained, 'standard' or strict review – for example CJEU 9 November 2010, case C-92/09, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See for further analysis, for example, J.H. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine,' *European Law Journal* (17) 2011, p. 80-120; H. Eklund, 'The Margin of Discretion and the Boundary Question in EU Fundamental Rights Law,' *Common Market Law Review* (59) 2022, p. 407-1444. The latter points out that the Court does not use consistent concepts either (on p. 1408).

out the effect of that intensity of review on the criteria of review and the burden of proof.[254]

Since the Charter became binding, the Court's general approach has changed somewhat.[255] In recent years, fundamental rights being raised in a case has become a factor that the CJEU increasingly refers to in determining the strictness of its review.[256] The *Digital Rights Ireland* case provides an example of that. In this case, the Court specified factors such as the nature of the fundamental right involved, the nature and severity of the interference, and the objective pursued through the interference.[257] In the *Google Spain and Google* case, the CJEU also found that national courts must 'seek a fair balance' between the interests of protecting a person's personal data and the (commercial) interests of the company engaged in data processing, given the potential seriousness of the interference with the right to data protection.[258] In the context of cases concerning the deportation or extradition of someone to states where there is a risk of persecution or inhuman or degrading treatment, the Court of Justice leaves little discretion to the authorities of Member States,[259] just like it does in cases concerning far-reaching violations of the right to property,[260] or in collection or retention of biometric data.[261] In all these cases, the importance of a fundamental right and the seriousness of an interference call for strict scrutiny, either by the CJEU or by national courts, regardless of any factors

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[254] For more details, see J.H. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine,' *European Law Journal* (17) 2011, p. 80-120.

[255] Nowadays, the Court even refers to the margin of discretion that the ECtHR has adopted for similar types of situations, thus basically incorporating the margin of appreciation doctrine into its own case law; see, for example, CJEU 3 February 2021, case C-555/19, ECLI:EU:C:2021:89 (*Fussl Modestraße Mayr*), para. 91. About this, see also S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 1553-1610, Section 52.69; H. Eklund, 'The Margin of Discretion and the Boundary Question in EU Fundamental Rights Law,' *Common Market Law Review* (59) 2022, p. 4071444, on p. 1424-1427.

[256] See also, for example, G. Anagnostaras, 'Balancing conflicting fundamental rights: the *Sky Österreich* paradigm,' *European Law Review* (39) 2014, p. 111-24, on p. 118.

[257] CJEU 8 April 2014, case C-293/12, ECLI:EU:C:2014:238 (*Digital Rights Ireland*), para. 47. Similarly, albeit in relation to national legislation instead of EU law, see: CJEU 21 December 2016, case C-203/15, ECLI:EU:C:2016:970 (*Tele2 Sverige*).

[258] CJEU 13 May 2014, case C-131/12, ECLI:EU:C:2014:317 (*Google Spain and Google*), para. 81. This has been confirmed in more recent case law on the same matter; see CJEU 24 September 2019, case C-136/17, ECLI:EU:C:2019:772 (*GC and Others (de-referencing of sensitive data)*), para. 58 et seq.; CJEU 24 September 2019, case C-507/17, ECLI:EU:C:2019:772 (*Google (territorial scope of the right to de-referencing)*), para. 60 et seq. For a different type of situation where the Court arrived at a similar outcome, see, for example, CJEU 24 November 2011, case C-70/10, ECLI:EU:C:2011:771 (*Scarlet Extended*), paras. 48-9.

[259] See, for example, CJEU 21 December 2011, case C-411/10, ECLI:EU:C:2011:865 (*N.S.*); CJEU 24 April 2018, case C-353/16, ECLI:EU:C:2018:276 (*MP*); CJEU 22 November 2022, case C-69/21, ECLI:EU:C:2022:913 (*Staatssecretaris van Justitie en Veiligheid (Éloignement – Cannabis thérapeutique)*).

[260] CJEU 21 May 2019, case C-235/17, ECLI:EU:C:2019:432 (*Commission/Hungary (usufruct over agricultural land)*), para. 64. This also depends on the context; in a case on European limitations on the possession of weapons, the review against the right to property was considerably more restrained – see CJEU 3 December 2019, case C-482/17, ECLI:EU:C:2019:1035 (*Czech Republic/Parliament and Council*).

[261] For example, CJEU 3 October 2019, case C-70/18, ECLI:EU:C:2019:823 (*A. and Others (retention of biometric data of Turkish nationals)*), para. 56.

in favour of judicial restraint, such as the sensitivity and complexity of the objectives pursued, the policy area, or the absence of a European common basis.[262] Such a strict review means, for example, that the CJEU requires not only that a Member State provide a convincing justification for a limitation on a fundamental right, but also that it provide 'specific evidence substantiating its arguments' on the reasonableness of the limiting measure.[263] The Member State must also be able to show that the limitations are within the limits of what is 'strictly necessary' and that significant procedural and substantive safeguards are provided against abuse or arbitrariness.[264] In terms of balancing interests, a 'serious' infringement of a fundamental right must also include a 'serious,' i.e. weighty, justification.[265]

The Court seems willing to take a more restrained approach if a fundamental right does not appear to be seriously impaired, if the case concerns a minor aspect of a fundamental right, or if it involves socio-economic principles rather than subjective rights.[266] One example is the *Sky Österreich* case on the freedom to conduct a business.[267] While the CJEU did not explicitly address the intensity of its review or the extent of the regulator's discretion in this case, it did set fairly low criteria for acceptance of the justification of the interference: the Court examined only whether the disadvantages caused were 'not disproportionate to the aims pursued.'[268] It is quite conceivable that the relatively limited scope of the infringement of a fundamental right played a role in this. Additionally, the CJEU allowed a fairly wide margin of appreciation in cases where there is little European agreement on a particular issue, such as concepts of public order, or where differences of opinion between or within Member States may be significant, such as in debates about diversity policies, advertising, or banning covering clothing.[269] Even in cases where the EU institutions or Member States have exercised powers in areas requiring complex economic, technical, or medical assessments or where the precautionary principle plays an

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[262] For more about such factors' relevance to the Court's older case law, see J.H. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine,' *European Law Journal* (17) 2011, p. 80120.

[263] CJEU 21 May 2019, case C-235/17, ECLI:EU:C:2019:432 (*Commission/Hungary (usufruct over agricultural land)*), para. 94.

[264] For example, CJEU 3 October 2019, case C-70/18, ECLI:EU:C:2019:823 (*A. and Others (retention of biometric data of Turkish nationals)*), para. 56.

[265] K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights, *German Law Journal* (20) 2019, p. 779-793, on p. 787.

[266] For example, CJEU 19 June 2014, case C-501/12, ECLI:EU:C:2014:2005 (*Specht*), para. 46.

[267] CJEU 22 January 2013, case C-283/11, ECLI:EU:C:2013:28 (*Sky Österreich*).

[268] See also S. Peers & S. Prechal, 'Article 52. Scope and Interpretation of Rights and Principles,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart 2021, p. 15531610, Section 52.80.

[269] See, for example, CJEU 22 December 2010, case C-208/09, ECLI:EU:C:2010:806 (*Sayn-Wittgenstein*), para. 87; CJEU 2 June 2016, case C-438/14, ECLI:EU:C:2016:401 (*Bogendorff von Wolffersdorff*), para. 79; CJEU 3 February 2021, case C-555/19, ECLI:EU:C:2021:89 (*Fussl Modestraße Mayr*), paras. 57, 75 and 91; CJEU 13 October 2022, case C-344/20, ECLI:EU:C:2022:774 (*S.C.R.L.*), para. 48.

important role, the CJEU generally grants a margin of appreciation.[270] This generally results in a review for arbitrariness or manifest disproportionality, especially when it comes to EU law.[271]

Finally, it must be noted that marginal review is not the only way the CJEU can exercise restraint in controversial or sensitive cases. In many cases, the Court deals with national differences by sidestepping truly delicate issues,[272] limiting its interpretation to the exact circumstances of the case,[273] or leaving the review of aspects such as the necessity or proportionality of a particular limitation to the national court.[274] The Court seems particularly inclined to do so when facing more technical or tricky issues.[275]

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[270] For example, CJEU 8 December 2011, case C-386/10 P, ECLI:EU:C:2011:815 (*Chalkor*), para. 54; CJEU 22 May 2014, case C-356/12, ECLI:EU:C:2014:350 (*Glatzel*), paras. 52-53; CJEU 3 December 2019, case C-482/17, ECLI:EU:C:2019:1035 (*Czech Republic/Parliament and Council*), para. 77; CJEU 4 May 2016, case C-477/14, ECLI:EU:C:2016:324 (*Pillbox 38*), para. 49; CJEU 22 November 2018, case C-151/17, ECLI:EU:C:2018:938 (*Swedish Match*), para. 36; CJEU 5 May 2022, case C-83/20, ECLI:EU:C:2022:346 (*BPC Lux 2 Sàrl and Others*), para. 55.

[271] For example, CJEU 8 December 2011, case C-386/10 P, ECLI:EU:C:2011:815 (*Chalkor*), para. 54; CJEU 6 November 2012, case C-199/11, ECLI:EU:C:2012:684 (*Otis*), para. 59. About the difference in approach to limiting measures by Member States and EU institutions, see also J.H. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine,' *European Law Journal* (17) 2011, p. 80-120; G.T. Petursson, *The Proportionality Principle as Tool for Disintegration in EU Law – of Balancing and Coherence in the Light of the Fundamental Freedoms* (thesis Lund University), 2014

[272] For example, CJEU 18 March 2014, case C-167/12, ECLI:EU:C:2014:169 (*D.*); CJEU 18 March 2014, case C-363/12, ECLI:EU:C:2014:159 (*Z.*).

[273] For example, CJEU 18 October 2011, case C-34/10, ECLI:EU:C:2011:669 (*Brüstle*); CJEU 18 October 2014, case C-364/13 (*International Cell Corporation*).

[274] For further details of this modus operandi, see D. Sarmiento, 'The Silent Lamb and the Deaf Wolves,' in: M. Avbelj & J. Komárek (ed.), *Constitutional Pluralism in the European Union and Beyond*, Oxford: Oxford University Press 2012, p. 285-318.

[275] For example, CJEU 10 September 2014, case C-34/13, ECLI:EU:C:2014:2189 (*Kušionová*), para. 68; CJEU 2 December 2014, case C-148/13, ECLI:EU:C:2014:2406 (*A*), para. 72; Cf. also CJEU 11 December 2014, case C-212/13, ECLI:EU:C:2014:2428 (*Ryneš*), para. 34. In some cases, the Court is willing to rule at an earlier stage that something is for the national court to determine; see, for example, CJEU 3 September 2014, case C-201/13, ECLI:EU:C:2014:2132 (*Deckmyn*). For an explanation of these kinds of differences, see, among others D. Sarmiento, 'The Silent Lamb and the Deaf Wolves,' in: M. Avbelj & J. Komárek (ed.), *Constitutional Pluralism in the European Union and Beyond*, Oxford: Oxford University Press 2012, p. 285-318.

4.7 Positive obligations

Compared to the ECtHR, the CJEU has little scope to develop a full-fledged doctrine of positive obligations.[276] In the context of the ECtHR, this doctrine means that the ECtHR may determine that states have an obligation to take action to provide effective protection of ECHR rights.[277] A positive obligation to protect fundamental rights may be to have to establish a normative framework and to actually and effectively implement it, but also to have to monitor the implementation of policies or regulations or actively providing judicial protection.[278] The CJEU has so far not or only in very few cases read such obligations of proactive government action into the Charter or other EU provisions, which can be explained by the judicial context outlined in Section 2. Procedural limitations and limitations arising from the principle of limited conferral make it difficult for the CJEU to define obligations and criteria beyond those ensuing from EU Treaties and EU law.[279] As a result, the CJEU very rarely refers to the concept of 'positive obligations' in its Charter-related case law, nor does it rely on the factors used by the ECtHR to define such obligations, such as the fair balance test or the reasonable knowledge and means test.[280]

Nevertheless, the CJEU has imposed a number of obligations on Member States and EU institutions.[281] Member States must, for example, safeguard the right of defence and the right to an effective remedy in all cases where rights could be adversely affected by the application of EU law, even if the

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[276] See further C. Stubberfield, 'Lifting the Organisational Veil: Positive Obligations of the European Union Following Accession to the European Convention on Human Rights,' *Australian International Law Journal* (19) 2012, p. 117-42; M.P. Beijer, 'Active guidance of (procedural) fundamental rights protection by the European Court of Justice,' *Review of European Administrative Law* (8) 2015, p. 127-150; M.P. Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations*, Antwerp: Intersentia 2017.

[277] See further, among other sources, J.H. Gerards, *General Principles of the European Convention on Human Rights*, second edition, Cambridge: Cambridge University Press 2023, Chapter 6.

[278] Idem.

[279] Cf. S. Besson, 'The Human Rights Competences in the EU – The State of the Question after Lisbon,' in: G. Kofler et al. (ed.), *Human Rights and Taxation in Europe and the World*, IBFD: 2011, p. 37-63; P. van Cleynenbreughel, 'Judge-made standards of national procedure in the post-Lisbon constitutional framework,' *European Law Review* (37) 2012, p. 90-100.

[280] M.P. Beijer, 'Active guidance of (procedural) fundamental rights protection by the European Court of Justice,' *Review of European Administrative Law* (8) 2015, p. 127-150; M.P. Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations*, Antwerp: Intersentia 2017. For more about the ECtHR tests, see J.H. Gerards, *General Principles of the European Convention on Human Rights*, second edition, Cambridge: Cambridge University Press 2023, p. 177-187.

[281] M.P. Beijer, 'Active guidance of (procedural) fundamental rights protection by the European Court of Justice,' *Review of European Administrative Law* (8) 2015, p. 127-150; M.P. Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations*, Antwerp: Intersentia 2017; see also P. van Cleynenbreughel, 'Judge-made standards of national procedure in the post-Lisbon constitutional framework,' *European Law Review* (37) 2012, p. 90-100, on p. 92 et seq.; S. Prechal, S. de Vries & H. van Eijken (2010), 'The Principle of Attributed Powers and the "Scope of EU Law",' in: L. Besselink et al. (ed.), *The Eclipse of the Legality Principle in the European Union*, Leiden: Kluwer Law International 2010, p. 213-247, on p. 239 et seq.

applicable law does not (yet) specifically require this.[282] Member States must also continue to designate competent courts and they must provide detailed procedural rules that enable individuals to enforce their rights under EU law.[283] In some cases, Member States even have to guarantee that national courts will examine fundamental rights cases substantively and will not settle for financial compensation offered by the party responsible for the infringement.[284] When it comes to EU institutions, their procedural positive obligations include providing sound reasoning for their decisions, access to information, the opportunity to be heard, and adequate judicial review.[285]
These examples show that the positive obligations formulated by the CJEU are mostly limited to the procedural domain.[286] Given the reasons stated above, the CJEU is unlikely to be willing to impose more substantive positive obligations, such as obligations to enact legislation or adopt a particular policy.[287] Even in the rare cases where such substantive obligations have indeed been formulated, they appear to stem from provisions of EU law rather than from CJEU rulings.[288] This is the case, for example, in some recent rulings on the retention of personal and traffic data for the purpose of protection against serious crime or national security,[289] where the CJEU stressed that these cases involved a clash of fundamental rights, because the right to protection of personal data may conflict with the rights of (potential) victims. The Court held that 'as regards, in particular, effective action to combat criminal offences committed against, inter alia,

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[282] For example, CJEU 4 June 2013, case C-300/11, ECLI:EU:C:2013:363 (*ZZ*), paras. 53-55; CJEU 10 September 2013, case C-383/13 PPU, ECLI:EU:C:2013:533 (*M.G. and N.R.*); CJEU 26 September 2013, case C-418/11, ECLI:EU:C:2013:588 (*Texdata Software*), para. 79 et seq.; CJEU 3 July 2014, case C-129/13, ECLI:EU:C:2014:2041 (*Kamino International Logistics*), para. 31; CJEU 5 November 2014, case C-166/13, ECLI:EU:C:2014:2336 (*Mukarubega*), para. 46ff; CJEU 29 November 2017, case C-214/16, ECLI:EU:C:2017:914 (*King*), para. 41.

[283] For example, CJEU 3 October 2013, case C-583/11 P, ECLI:EU:C:2013:625 (*Inuit Tapiriit Kanatami and Others/Parliament and Council*), para. 102; CJEU 27 March 2014, case C-314/12, ECLI:EU:C:2014:192 (*UPC Telekabel Wien*), para. 57; CJEU 17 September 2014, case C-562/12, ECLI:EU:C:2014:2229 (*Liivimaa Lihaveis*), para. 68.

[284] For example, CJEU 15 April 2021, case C-30/19, ECLI:EU:C:2021:269 (*Braathens Regional Aviation*), paras. 41-59.

[285] For example, CJEU 15 November 2012, case C-417/11 P, ECLI:EU:C:2012:718 (*Bamba/Council*), para. 50 et seq.; General Court 28 May 2013, case T-187/11, ECLI:EU:T:2013:273 (*Trabelsi*), para. 66; CJEU 18 July 2013, case C-584/10 P (*Commission/Kadi*), para. 97 et seq.

[286] Cf. M.P. Beijer, 'Active guidance of (procedural) fundamental rights protection by the European Court of Justice,' *Review of European Administrative Law* (8) 2015, p. 127-150; M.P. Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations*, Antwerp: Intersentia 2017.

[287] It has been argued that there is sufficient basis for such recognition of positive obligations (see O. De Schutter & I. De Jesus Butler, 'Binding the EU to International Human Rights Law,' *Yearbook of European Law* (27) 2008, p. 277-320), but this has not yet been accepted by the Court.

[288] Cf. CJEU 16 September 2010, case C-149/10, ECLI:EU:C:2010:534 (*Chatzi*), para. 75; CJEU 21 December 2011, case C-411/10, ECLI:EU:C:2011:865 (*N.S.*); CJEU 14 November 2013, case C-4/11, ECLI:EU:C:2013:740 (*Puid*); CJEU 11 December 2014, case C-562/13, ECLI:EU:C:2014:2453 (*Abdida*), para. 62. See further M.P. Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations*, Antwerp: Intersentia 2017.

[289] CJEU 6 October 2020, joined cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791 (*La Quadrature du Net and Others*); CJEU 5 April 2022, case C-140/20, ECLI:EU:C:2022:258 (*Commissioner of the Garda Síochána and Others*); CJEU 20 September 2022, joined cases C-793/19 and C-974/19, ECLI:EU:C:2022:702 (*SpaceNet*).

minors and other vulnerable persons, it should be borne in mind that positive obligations of the public authorities may result from Article 7 of the Charter, requiring them to adopt legal measures to protect private and family life.'[290] In this respect, the CJEU aligned itself with the relevant case law of the ECtHR, which has held that states are obliged to provide a legal framework within which the relevant interests are reconciled. In doing so, the CJEU appeared to, on the face of it, embrace the doctrine of positive obligations after all. However, the Court carefully slotted its findings into the relevant EU legislation, which already gives Member States the required scope to make an exception to the right to protection of personal data through statutory rules.[291] The CJEU did not so much impose a new, previously non-existent positive obligation here, but rather stipulated in very precise terms when and how Member States must use the leeway provided by EU law.

[290] CJEU 6 October 2020, joined cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791 (*La Quadrature du Net and Others*), para. 126; CJEU 5 April 2022, case C-140/20, ECLI:EU:C:2022:258 (*Commissioner of the Garda Síochána and Others*), para. 49; CJEU 20 September 2022, joined cases C-793/19 and C-974/19, ECLI:EU:C:2022:702 (*SpaceNet*), paras. 64-65.

[291] See especially CJEU 5 April 2022, case C-140/20, ECLI:EU:C:2022:258 (*Commissioner of the Garda Síochána and Others*), para. 51.

5 The relationship between the Charter, national constitutional rights, and the ECHR

5.1 Relationship between the Charter, national constitutional law, and ECHR rights

5.1.1 Melloni and Åkerberg Fransson

The relationship between EU law and national constitutional law is complex, not least when it comes to fundamental rights. In the 1970s, the lack of adequate protection of fundamental rights was one of the reasons for national constitutional courts to reject the primacy of EU law in certain cases. In cases where application of EU law clashed with national constitutional rights, the national constitution would take precedence.[1] Now that the Treaty of Lisbon and the Charter provide for a binding set of fundamental rights for the European Union and its Member States, the German Federal Constitutional Court (*Bundesverfassungsgericht*) has more recently come to a different view: a lack of fundamental rights protection can no longer, as such, stand in the way of giving precedence to EU law.[2] The German Federal Constitutional Court did, however, adopt the basic principle that the Member States are 'Herren der Verträge', or masters of the treaties. This means they may apply ultra vires review and, if there is no other option, disapply EU law in cases where, under national constitutional law, fundamental rights are impermissibly impaired by EU regulations or resolutions.[3]
At first glance, this stance taken by the German Federal Constitutional Court appears to be consistent with Article 53 of the Charter, which states the following:

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

This provision seems to imply that the highest level of protection of fundamental rights must be respected even if it is not EU law but national law that provides the highest level of protection of fundamental rights, and even if

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1 See above in Section 3.1.
2 At least by the German Federal Constitutional Court; see the *Lissabon* judgment, 2 BvE 2/08, judgment of 30 June 2009, ECLI:DE:BVerfG:2009:es20090630.2bve000208, legal ground 231.
3 *Lissabon* judgment, 2 BvE 2/08, judgment of 30 June 2009, ECLI:DE:BVerfG:2009:es20090630.2bve000208, legal ground 241; see also P. Craig, 'The ECJ and ultra vires action: a conceptual analysis,' *Common Market Law Review* (48) 2011, p. 395-437.

this would mean that national constitutional law should take precedence over the application of EU law.[4] In 2013, however, the CJEU came up with its own reading of Article 53 in the *Melloni* case,[5] which concerned a European arrest warrant (EAW) for a person who had been convicted in absentia in Italy while he was in Spain. It created a situation that is subject to very strict procedural requirements under the Spanish Constitution. The relevant provisions of the EU Framework Decision on the EAW, and the resulting obligation to surrender the convicted person to the Italian authorities as requested, would violate the protection of fundamental rights stipulated in the Spanish Constitution. This was reason for the Spanish Constitutional Court to seek a preliminary ruling from the CJEU. The main question was whether Article 53 of the Charter does indeed imply that the high level of protection of procedural rights under the Spanish Constitution in a case such as this can prevail over obligations ensuing from the European arrest warrant system.

In its ruling in the *Melloni* case, the CJEU first made it clear that the Framework Decision does not leave national authorities free to refuse to execute an EAW. Moreover, the Court emphasised that the Framework Decision itself is compatible with fundamental rights as protected by the Charter.[6] The Court subsequently turned to the question of whether surrender in these circumstances could be conditioned on the level of fundamental rights protection afforded by a national constitution.[7] The Court noted that such an interpretation would lead to national constitutional law taking precedence over the application of provisions of EU law,[8] adding that 'such an interpretation of Article 53 of the Charter cannot be accepted.'[9] Indeed, such an interpretation of Article 53 'would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.'[10] This effect would be unacceptable because it is settled case law of the CJEU that '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.'[11]

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[4] See, for example, A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication*, Oxford: Oxford University Press 2009; L.F.M. Besselink, 'National and constitutional identity before and after Lisbon,' *Utrecht Law Review* (6) 2010, p. 36-49, on p. 73; K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights,' *European Constitutional Law Review* (6) 2012, p. 375-403, on p. 398; J.B. Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' *Common Market Law Review* (38) 2001, p. 1171-1199; C. van de Heyning, *Fundamental Rights lost in complexity. The protection of fundamental rights against violations by the rulemaker in converging national and European legal systems* (thesis, University of Antwerp), 2011.

[5] CJEU 26 February 2013, case C-399/11, ECLI:EU:C:2013:107 (*Melloni*). See further, for example, A. Torres Pérez, '*Melloni* in Three Acts: From Dialogue to Monologue,' *European Constitutional Law Review* (10) 2014, p. 308-31.

[6] CJEU 26 February 2013, case C-399/11, ECLI:EU:C:2013:107 (*Melloni*), paras. 49, 52-3.

[7] Idem, para. 55.

[8] Idem, para. 56.

[9] Idem, para. 57.

[10] Idem, para. 58.

[11] Idem, para. 59.

According to the Court, Article 53 of the Charter therefore allows national fundamental rights protections to be applied only if '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.'[12] In its Opinion 2/13 on EU accession to the ECHR, the Court confirmed this reasoning,[13] underlining the special nature of the transfer of sovereignty by Member States to the EU and the need to ensure the effectiveness and unity of EU law.[14] The principles of autonomy, effectiveness, unity, and efficiency thus seem likely to outweigh the protection of fundamental rights.[15]

It should be noted, however, that the *Melloni* ruling dealt with a rather unusual situation, namely one where the Member States themselves have expressly and deliberately provided for the regulation of fundamental rights issues through exhaustive, fully harmonising EU legislation in the relevant area, i.e. convictions in absentia in this case.[16] It basically goes without saying that a Member State cannot then later still invoke its own constitution to argue that further exceptions are nevertheless necessary to sufficiently protect fundamental rights.

On the same day that the Court handed down the *Melloni* ruling, it ruled in the *Åkerberg Fransson* case that less densely regulated subjects also leave more room for national fundamental rights protection:

> '...where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States *is not entirely determined by European Union law*, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.'[17]

In the *Åkerberg Fransson* ruling, the Court did, however, explain that it is then still not up to the national court to decide for itself, in case of doubt, whether national constitutional rights can still be applied. The Court ruled that 'where national courts find it necessary to interpret the Charter they may, and in some cases must, make a reference to the Court for a preliminary ruling under Article

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[12] Idem, para. 60.

[13] Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454.

[14] Idem, paras. 165-176.

[15] D. Leczykiewiecz, 'The Charter of Fundamental Rights and the EU's Shallow Constitutionalism,' in: N.W. Barber, M. Cahill & R. Ekins (ed.), *The Rise and Fall of the European Constitution*, Oxford: Hart Publishing 2019, p. 125-154, Section III. She goes into the CJEU's recognition of EU principles as 'first-order principles' and EU fundamental rights as 'second-order principles'.

[16] See also D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe,' *Common Market Law Review* (50) 2013, p. 12671304, on p. 1289; J. Ouwerkerk, 'Grenzen aan wederzijdse erkenning en wederzijds vertrouwen bij de uitvoering van Europese aanhoudingsbevelen: convergentie en divergentie in de rechtspraak van het HvJ EU en het EHRM,' *SEW* 2021, issue 12, p. 615-627, on p. 618. For a similar situation in the field of related rights, see CJEU 29 July 2019, case C-476/17, ECLI:EU:C:2019:624 (*Pelham and Others*), paras. 77-78 and 80.

[17] CJEU 26 February 2013, case C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*), para. 29; italics added.

267 of the TFEU.'[18] This means that the Court does not recognise the reasoning of national constitutional courts that Member States have retained their 'mastery' of the treaties and can autonomously decide to give precedence to their own fundamental rights. It is ultimately up to the CJEU to determine whether and to what extent the protection of national or ECHR fundamental rights can prejudice EU law.[19]

5.1.2 Mutual trust and mutual recognition

The CJEU judgment in the *Melloni* case concerned the EU EAW Framework Decision, which allows the transfer of suspected persons or persons who have been convicted in absentia to another Member State for criminal proceedings there or to serve a sentence without extensive procedures.[20] The fluidity of these processes based on the Framework Decision is based on two unwritten principles that the CJEU has designated as 'cornerstones' of European cooperation: the principles of mutual trust and mutual recognition.[21] The principle of mutual trust means that all Member States can be confident that principles of rule of law, respect for fundamental rights, procedural protection, etc. are ensured equally everywhere in the European Union and the level of respect and protection is approximately the same everywhere.[22] Member States can rely on that, in part, because the EU Charter is effective in all Member States.[23] Member States can draw on this principle of mutual trust to justify automatic recognition, without further examination, of a decision by the authorities of another Member State and allowing it to have the same effect in its legal system as in the issuing Member State, which constitutes mutual recognition.[24]

These principles certainly do not only apply to the surrender of suspects and convicts, but also play a core role in many other areas of EU law,

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[18] Idem, para. 30.

[19] Idem, paras. 184, 186 and 188. In subsequent case law, the Court has confirmed this in a nuanced manner; see especially CJEU 29 July 2019, case C-516/17, ECLI:EU:C:2019:625 (*Spiegel Online*), paras. 16-38 and 59 and, in the same sense, CJEU 29 July 2019, case C-469/17, ECLI:EU:C:2019:623 (*Funke Medien NRW*). These rulings also show the extent of the scope that national courts have in weighing EU provisions against their own national fundamental rights.

[20] See further on this system J. J. Ouwerkerk, 'Grenzen aan wederzijdse erkenning en wederzijds vertrouwen bij de uitvoering van Europese aanhoudingsbevelen: convergentie en divergentie in de rechtspraak van het HvJ EU en het EHRM,' *SEW* 2021, issue 12, p. 615-627.

[21] See recently, for example, CJEU 31 January 2023, case C-158/21, ECLI:EU:C:2023:57 (*Puig Gordi and Others*), paras. 93 and 95. See further, for example, C. Wissels & R. Grimbergen, 'Als je mekaar niet meer vertrouwen kan, waar blijf je dan? Enkele gedachten over het arrest *L.M.* en het wederzijds vertrouwensgebied,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 247-270, Section 2; C. Warin, 'A Dialectic of Effective Judicial Protection and Mutual Trust in the European Administrative Space: Towards the Transnational Judicial Review of Manifest Error?' *Review of Administrative Law* 2020, issue 4, Section 3.1.

[22] CJEU 5 April 2016, case C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 (*Aranyosi and Căldăraru*), para. 77.

[23] Idem.

[24] Idem, paras. 79- 80.

particularly the area of freedom, security, and justice.[25] Examples include being able to return asylum seekers to the country of first entry under the Dublin III Regulation, the mutual recognition of civil judgments, or the collection of fines.[26] Assuming the same level of fundamental rights protection across all Member States makes it easier to accommodate the diversity of national legal systems in such cases.[27] Automatic recognition of judgments rendered elsewhere in the EU also enables institutions to work faster and with greater efficiency, which is essential for a well-functioning European area without internal borders.[28]

However important, the reference for a preliminary ruling filed in the *Melloni* case already goes to show that not all national courts are willing to always respect the principles of mutual trust and mutual recognition, because these principles can still be at odds with national (or ECHR) fundamental rights protection.[29] Despite the fact that all Member States are bound by international treaties and EU law, and despite all the protection mechanisms that are in place, fundamental rights protection may still be inadequate in a certain Member State. It would be difficult to justify that, even then, the proper and effective functioning of European cooperation takes precedence. From this perspective, the ECtHR has on several occasions been sceptical of the principles of mutual respect and mutual trust. The ECtHR has emphasised that the principle of mutual trust does not relieve Member States of the responsibility to satisfy themselves that the level of fundamental rights protection in another Member State actually complies with the ECHR.[30] If Member States' failure to take this

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[25] See further C. Wissels & R. Grimbergen, 'Als je mekaar niet meer vertrouwen kan, waar blijf je dan? Enkele gedachten over het arrest *L.M.* en het wederzijds vertrouwensgebied,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 247-270, on p. 251; C. Warin, 'A Dialectic of Effective Judicial Protection and Mutual Trust in the European Administrative Space: Towards the Transnational Judicial Review of Manifest Error?' *Review of Administrative Law* 2020, issue 4, Section 3.

[26] For example, CJEU 26 April 2018, case C-34/17, ECLI:EU:C:2018:282 (*Donnellan*); CJEU 5 December 2019, case C-671/18, ECLI:EU:C:2019:1054 (*Centraal Justitieel Incassobureau (execution of financial penalties)*).

[27] See also C. Warin, 'A Dialectic of Effective Judicial Protection and Mutual Trust in the European Administrative Space: Towards the Transnational Judicial Review of Manifest Error?' *Review of Administrative Law* 2020, issue 4, Section 3.1.

[28] C. Wissels & R. Grimbergen, 'Als je mekaar niet meer vertrouwen kan, waar blijf je dan? Enkele gedachten over het arrest *L.M.* en het wederzijds vertrouwensgebied,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 247-270, p. 252.

[29] For a critical note, see also, for example, E. Gill-Pedro & X. Groussot, 'The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights,' *Nordic Journal of Human Rights* (35) 2017, p. 258-274, on p. 268.

[30] See especially ECtHR (Grand Chamber) 23 May 2016, no. 17502/07, ECLI:CE:ECHR:2016:0523JUD001750207 (*Avotiņš/Letland*), paras. 98 and 116; ECtHR 17 April 2018, no. 21055/11, ECLI:CE:ECHR:2018:0417JUD002105511 (*Pirozzi/ Belgium*), para. 62; ECtHR 9 July 2019, no. 8351/17, ECLI:CE:ECHR:2019:0709JUD000835117 (*Romeo Castano/Belgium*), para. 84 et seq.; ECtHR 25 March 2021, no. 40324/16 and 12623/17, ECLI:CE:ECHR:2021:0325JUD004032416 (*Bivolaru and Moldovan/France*), paras. 96-103. For more about this, see also L.R. Glas, '*Avotiņš t. Letland*: de grenzen aan wederzijds vertrouwen volgens en tussen het EHRM en het HvJ EU,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 63-92, on p. 65; J. Krommendijk & G.B.M. de Vries, 'De wisselwerking tussen het HvJ EU en het EHRM: een hernieuwde liefde?' *SEW* 2021, issue 12, p. 560-570, on p. 566-567; J. Ouwerkerk, 'Grenzen aan wederzijdse erkenning en wederzijds

responsibility causes fundamental rights protection to drop below the minimum level set by the ECHR, the ECtHR can intervene and override the principles of mutual trust and mutual recognition.[31]

The CJEU first explicitly recognised the risk of overly absolute adherence to the principles of mutual trust and mutual recognition in the *Aranyosi and Căldăraru* case.[32] This case revolved around European arrest warrants issued by Hungary for the transfer of two individuals named Aranyosi and Căldăraru, whom they wanted to prosecute in Hungary. However, there was a possible risk that after surrender they would be remanded to a correctional facility where they would be exposed to detention conditions that would violate Article 3 of the ECHR. Given the principles of mutual trust and mutual recognition, the CJEU stated that Member States are, in principle, under an obligation to comply with an EAW[33] and may only refuse to do so if any of the exceptions that are clearly formulated in the Framework Decision are met.[34] After all, a Member State refusing to surrender an individual in cases other than the exceptions formulated in the Framework Decision would undermine the unified and effective application of the EAW regime, since it would mean that each Member State could still set its own rules.[35] However, none of the exceptions formulated in the EAW Framework Decision addressed the risks of the kinds of fundamental rights violations to which Aranyosi and Căldăraru would be exposed if surrendered. In response to this, the CJEU stressed that the Framework Decision is not to have the effect of 'modifying the obligation to respect fundamental rights as enshrined in, inter alia, the Charter,'[36] noting that the prohibition of inhuman and degrading treatment, as enshrined in Article 4 of the Charter as a parallel to Article 3 of the ECHR, constitutes a fundamental value and is, therefore, absolute in nature.[37] The Court ruled that, in such circumstances, the protection of fundamental rights may prevail over the principles of mutual recognition and mutual trust and a national court in

vertrouwen bij de uitvoering van Europese aanhoudingsbevelen: convergentie en divergentie in de rechtspraak van het HvJ EU en het EHRM,' *SEW* 2021, issue 12, p. 615-627, on p. 620-621.

[31] See the ECtHR case law from the previous footnote.

[32] CJEU 5 April 2016, cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 (*Aranyosi and Căldăraru*). For more about this case, see also, for example, C. Wissels & R. Grimbergen, 'Als je mekaar niet meer vertrouwen kan, waar blijf je dan? Enkele gedachten over het arrest *L.M.* en het wederzijds vertrouwensgebied,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 247-270, p. 259; J. Ouwerkerk, 'Grenzen aan wederzijdse erkenning en wederzijds vertrouwen bij de uitvoering van Europese aanhoudingsbevelen: convergentie en divergentie in de rechtspraak van het HvJ EU en het EHRM,' *SEW* 2021, issue 12, p. 615-627, on p. 618.

[33] CJEU 5 April 2016, cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 (*Aranyosi and Căldăraru*), para. 79.

[34] Idem, para. 80.

[35] For this rationale, see especially CJEU 31 January 2023, case C-158/21, ECLI:EU:C:2023:57 (*Puig Gordi and Others*), para. 75.

[36] CJEU 5 April 2016, cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 (*Aranyosi and Căldăraru*), para. 83.

[37] Idem, paras. 84-87.

the recipient Member State may refuse to execute the EAW.[38] This is, however, allowed only if it has been sufficiently established that there is a real and concrete danger of inhuman and degrading treatment in the issuing Member State. The court in the executing Member State should go to the necessary effort to obtain the most accurate and detailed information possible to confirm this.[39]

In subsequent case law, the CJEU has made it clear that a similar exception can be accepted with respect to other fundamental rights that it considers to be of particularly fundamental importance,[40] which so far applies only to the right to a fair trial before an independent tribunal, as set forth in Article 47(2) of the Charter,[41] the right to respect for family life (Article 7 of the Charter) in certain cases of detention, and the best interests of the child (Article 24(2) of the Charter).[42] In addition, the Court has applied the exception not only with respect to EAWs, but also in other cases involving the principles of mutual trust and mutual recognition. Examples include the return of asylum seekers to a Member State where reception or living conditions are seriously deficient[43] and the recognition of judgments rendered in a Member State where the independence of the judiciary is under pressure.[44]

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[38] For the exact consequences, see further L.R. Glas, '*Avotiņš t. Letland*: de grenzen aan wederzijds vertrouwen volgens en tussen het EHRM en het HvJ EU,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 63-92, on p. 68.

[39] CJEU 5 April 2016, cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 (*Aranyosi and Căldăraru*), paras. 89-103.

[40] It seems that the CJEU is less likely to accept an exception when it does not concern rights that it considers of paramount importance. The Court deemed it unacceptable, albeit rather implicitly, that Member States base an exception on respect for the rights of the child, as laid down in Article 24(2) of the Charter; see CJEU 23 January 2018, case C-367/16, ECLI:EU:C:2018:27 (*Piotrowski*), para. 49 et seq.

[41] CJEU 25 July 2018, case C-216/18 PPU, ECLI:EU:C:2018:586 (*Minister for Justice and Equality (deficiencies in the judicial system)*), para. 48 (this case is also known as the *LM* or *Celmer* case, which is the name of the original litigant in the main proceedings – see, for example, M. Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice After *LM*,' *European Constitutional Law Review* (15) 2019, p. 17-47. See also CJEU 17 December 2020, joined cases C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033 (*Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*), para. 39; CJEU 22 February 2022, joined cases C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100 (*Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*), para 46; CJEU 31 January 2023, case C-158/21, ECLI:EU:C:2023:57 (*Puig Gordi and Others)*), para. 96. The Court seems to consider other fundamental rights of less clear fundamental importance, whereby it applies slightly different reasoning. This applies, for example, to Article 7 (protection of private and family life) and Article 24(2) (rights of the child) of the Charter. See CJEU 22 February 2022, case C-483/20, ECLI:EU:C:2022:103 (*Commissaris-generaal voor de Vluchtelingen en de Staatlozen*), paras. 35-36. Moreover, the constellation of facts in this case was slightly different, leaving more discretion to Member States to find a solution within the limits of Article 52(1) of the Charter.

[42] CJEU 21 December 2023, case C-261/22, ECLI:EU:C:2023:1017 (*GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*), para. 45.

[43] CJEU 19 March 2019, case C-163/17, ECLI:EU:C:2019:218 (*Jawo*); CJEU 19 March 2019, joined cases C-297/17, C-318/17, C-319/17 and C-438/17, ECLI:EU:C:2019:219 (*Ibrahim*); CJEU 22 February 2022, case C-483/20, ECLI:EU:C:2022:103 (*Commissaris-generaal voor de Vluchtelingen en de Staatlozen*). For more details of this case law, see G. Anagnostaras, 'The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection,' *German Law Journal* (21) 2020, p. 1180-1197.

[44] CJEU 25 July 2018, case C-216/18 PPU, ECLI:EU:C:2018:586 (*Minister for Justice and Equality (deficiencies in the judicial system)*).

The scope that the CJEU's *Aranyosi* case law leaves for exceptions with respect to fundamental rights protection is particularly small; mutual trust in each other's fundamental rights protection can only be denied in very exceptional circumstances. [45] In the words of the CJEU: application of the exception is reasonable only if 'deficiencies must attain a particularly high level of severity'.[46] As mentioned above, this means that an exception will not be possible for every fundamental right, but only when key aspects of fundamental rights are at issue that leave little or no room for limitation.[47]

The CJEU has, furthermore, set stringent standards for national courts when it comes to establishing whether or not there is a risk of very serious deficiencies in protecting these fundamental rights,[48] requiring national courts to conduct a two-step examination.[49] The first step requires the national court to establish an abstract presumption of systemic or structural and fundamental deficiencies in the other Member State, based on factual grounds. Such a presumption may be justified when ECtHR or previous CJEU case law has revealed serious deficiencies in the protection of procedural rights or detention conditions, or where this is evidenced by European and international reports.[50] In any case, the sources used must include objective, reliable, accurate, and properly updated data.[51]

Moreover, in order for a fundamental right to take precedence over the principles of mutual trust and mutual recognition, the examination must include a second step [52] that consists in the competent national authority

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[45] CJEU 5 April 2016, cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 (*Aranyosi and Căldăraru*), paras. 82-84.

[46] CJEU 19 March 2019, case C-163/17, ECLI:EU:C:2019:218 (*Jawo*), para. 91; CJEU 19 March 2019, joined cases C-297/17, C-318/17, C-319/17 and C-438/17, ECLI:EU:C:2019:219 (*Ibrahim*), para. 89.

[47] See also M. Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice After *LM*,' *European Constitutional Law Review* (15) 2019, p. 17-47, on p. 18 and 26; G. Anagnostaras, 'The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection,' *German Law Journal* (21) 2020, p. 1180-1197, on p. 1190.

[48] These standards put a considerable burden on national courts; see C. Wissels & R. Grimbergen, 'Als je mekaar niet meer vertrouwen kan, waar blijf je dan? Enkele gedachten over het arrest *L.M.* en het wederzijds vertrouwensgebied,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 247-270, p. 261.

[49] CJEU 17 December 2020, joined cases C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033 (*Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*), punt 53; CJEU 31 January 2023, case C-158/21, ECLI:EU:C:2023:57 (*Puig Gordi and Others)*), para. 97. For more about EAW cases, see also J. Ouwerkerk, 'Grenzen aan wederzijdse erkenning en wederzijds vertrouwen bij de uitvoering van Europese aanhoudingsbevelen: convergentie en divergentie in de rechtspraak van het HvJ EU en het EHRM,' *SEW* 2021, issue 12, p. 615-627, on p. 619.

[50] In CJEU 25 July 2018, case C-216/18 PPU, ECLI:EU:C:2018:586 (*Minister for Justice and Equality (deficiencies in the judicial system)*), the CJEU pointed to, for example, a reasoned report by the European Commission on the independence of judges in Poland. In subsequent cases on this subject, the Court often refers to previous findings from its own case law and that of the ECtHR; see, for example, CJEU 22 February 2022, joined cases C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100 (*Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*), paras. 78-79.

[51] CJEU 5 April 2016, cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 (*Aranyosi and Căldăraru*), para. 89; CJEU 25 July 2018, case C-216/18 PPU, ECLI:EU:C:2018:586 (*Minister for Justice and Equality (deficiencies in the judicial system)*), para. 61.

[52] For further substantiation of this in EAW cases, see CJEU 17 December 2020, joined cases C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033 (*Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*), paras. 62-68.

verifying specifically and precisely whether, in the circumstances of the specific case, there are substantial and factual grounds to believe that the person concerned is actually at systemic risk.[53] The CJEU requires national courts to establish, with respect to procedures concerning the surrender of asylum seekers, whether 'the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity.'[54] In EAW cases, too, the national court must assess on the basis of information to be obtained in the issuing Member State whether there is a real risk of inhuman and degrading treatment, violation of procedural rights, or detention without respect for essential fundamental rights.[55] In cases on the right to a fair trial, the CJEU has set stringent criteria for the plausibility that the individual litigant will actually be adversely affected by a problematic general rule of law situation in the exercise of procedural rights in their own lawsuit.[56] This assessment may also look at, for example, the individual's personal situation and the nature of the proceedings.[57]

5.2 Parallel validity of the Charter and the ECHR

The fundamental rights contained in the ECHR are, to a large extent, also contained in the Charter. As discussed above, the ECtHR has also always taken as its guiding principle that Member States fully retain their responsibility to protect ECHR rights, even when they have no discretion in implementing EU law – although it will in those cases, given the Bosphorus doctrine, be very

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[53] CJEU 5 April 2016, cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 (*Aranyosi and Căldăraru*), paras. 92 and 94; CJEU 25 July 2018, case C-216/18 PPU, ECLI:EU:C:2018:586 (*Minister for Justice and Equality (deficiencies in the judicial system)*) para. 68.

[54] CJEU 19 March 2019, case C-163/17, ECLI:EU:C:2019:218 (*Jawo*), para. 92; CJEU 19 March 2019, joined cases C-297/17, C-318/17, C-319/17 and C-438/17, ECLI:EU:C:2019:219 (*Ibrahim*); CJEU 22 February 2022, case C-483/20, ECLI:EU:C:2022:103 (*Commissaris-generaal voor de Vluchtelingen en de Staatlozen*), para, 32. For a critical note on the extremely high criteria this sets, see G. Anagnostaras, 'The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection,' *German Law Journal* (21) 2020, p. 1180-1197, on p. 1192 et seq.

[55] For further specification of the criteria, see, for example CJEU 25 July 2018, case C-220/18 PPU, ECLI:EU:C:2018:589 (*ML (detention conditions in Hungary)*); CJEU 22 February 2022, joined cases C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100 (*Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*); CJEU 21 December 2023, case C-261/22, ECLI:EU:C:2023:1017 (*GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*), paras. 48-49.

[56] See further J. Ouwerkerk, 'Grenzen aan wederzijdse erkenning en wederzijds vertrouwen bij de uitvoering van Europese aanhoudingsbevelen: convergentie en divergentie in de rechtspraak van het HvJ EU en het EHRM,' *SEW* 2021, issue 12, p. 615-627, on p. 619-620. Incidentally, the ECtHR does not impose such a condition in similar cases concerning Article 6 of the ECHR; for a comparison of the two courts' case law, see further J.J.J. Sillen, 'Straatsburg, Luxemburg en twee perspectieven op rechterlijke onafhankelijkheid,' *SEW* 2021, issue 12, p. 628.

[57] CJEU 25 July 2018, case C-216/18 PPU, ECLI:EU:C:2018:586 (*Minister for Justice and Equality (deficiencies in the judicial system)*) para. 73; CJEU 22 February 2022, joined cases C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100 (*Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*), para. 97.

cautious in its review of whether the ECHR has been violated.[58] For national authorities, the simultaneous validity of two European systems of fundamental rights protection can create tricky situations, especially when the respective European courts provide different interpretations of those fundamental rights.[59] For the purposes of national law, it is, therefore, important to know how to deal with the parallel validity of EU law and the ECHR. Differences between these courts' respective case law can in practice be avoided in two ways, which will be addressed in this section. The first option is that of harmonising interpretation (Section 5.2.1) and the second is EU accession to the ECHR (Section 5.2.2).

5.2.1 Harmonising interpretation

According to Article 52(3) of the Charter, rights under the Charter that correspond to rights safeguarded by the ECHR must be given the same substance and scope as ECHR rights.[60] In its case law, the CJEU has confirmed that ECtHR case law in this regard is the primary guiding principle.[61] Indeed, CJEU case law from the past 15 years does show that the CJEU respects ECtHR precedents.[62] However, the number of references to ECHR case law has diminished somewhat over time; such references are now often replaced by references to the Court's own precedents and to the Charter.[63] In that sense, it is not surprising that CJEU case law on fundamental rights is constantly developing and that the CJEU often applies criteria specifically tailored to the

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[58] See further J.H. Gerards, 'Chapter 5. Relationship Between the Convention and the EU,' in: P. van Dijk et al. (ed.), *Theory and Practice of the European Convention on Human Rights*, fifth edition, Antwerp: Intersentia 2018, p. 331-350, on p. 339-343. For details of the Bosphorus doctrine, see ECtHR (Grand Chamber) 30 June 2006, no. 45036/98, ECLI:CE:ECHR:2006:0630JUD004503698 (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi/ Ireland*). The link between the Bosphorus doctrine and CJEU case law on mutual trust and mutual recognition is discussed in L.R. Glas, '*Avotiņš t. Letland*: de grenzen aan wederzijds vertrouwen volgens en tussen het EHRM en het HvJ EU,' in: H. de Waele, J. Krommendijk & K. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment*, Deventer: Wolters Kluwer 2019, p. 63-92.

[59] See, among other sources, J.H. Gerards, 'Non-Discrimination, the European Court of Justice and the European Court of Human Rights – who takes the lead?' in: Th. Giegerich (ed.), *The European Union as Protector and Promoter of Equality*, Springer Verlag 2020, p. 135-163; J. Krommendijk & G.B.M. de Vries, 'De wisselwerking tussen het HvJ EU en het EHRM: een hernieuwde liefde?' *SEW* 2021, issue 12, p. 560-570.

[60] For details of the background and editorial history of this provision, see P. Lemmens, 'The Relationship between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects,' *Maastricht Journal of European and Comparative Law* (8) 2001, p. 49-67.

[61] For example, CJEU 5 October 2010, case C-400/10 PPU, ECLI:EU:C:2010:582 (*McB.*), para. 53. What is interesting to highlight here is that the General Court has even continued to apply the ECHR instead of the Charter in some cases; see General Court 28 January 2015, case T-341/12, ECLI:EU:T:2015:51 (*Degussa*), paras. 123-6.

[62] See also above, Section 4.5.4.

[63] Cf. S. Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights,' *Common Market Law Review* (49) 2012, p. 1565161, on p. 1604; G. De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' *Maastricht Journal of European and Comparative Law* (20) 2013, p. 168-184; J. Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice after Lisbon: the View of Luxembourg Insiders,' *Maastricht Journal of European and Comparative Law* 22 (2015), p. 812-835; J. Krommendijk, 'The CJEU's Reliance on the Case Law by the ECtHR since 2015*: Opinion 2/13* as a Game Changer?' in: E. Bribosia & I. Rorive (ed.), *Towards a Global and Integrated Approach of Human Rights: Promises and Challenges*, Antwerp/Oxford/Portland: Intersentia 2018; G. De Búrca, 'The Evolution of EU Human Rights Law,' in: P. Craig & G. De Búrca (ed.), *The Evolution of EU Law*, third edition, Oxford, Oxford University Press 2021, p. 480-505, on p. 498. J. Krommendijk & G.B.M. de Vries, 'De wisselwerking tussen het HvJ EU en het EHRM: een hernieuwde liefde?' *SEW* 2021, issue 12, p. 560-570.

types of cases it itself faces. As a result, references do still mainly occur when there is a risk or perception of possible divergence, when new questions arise for which relevant Strasbourg Court jurisprudence is already available, or when the CJEU wants to emphasise coherence between the two human rights instruments for other reasons.[64]

What is more striking in this respect is that the CJEU emphasised for a while that it was no longer necessary to refer to the ECHR in cases where a fundamental right is also expressed in the Charter. The CJEU has ruled that the examination 'must be undertaken solely in the light of the fundamental rights safeguarded by the Charter'[65] because of the fact that the EU itself is not a party to the ECHR and the ECHR is not a legal instrument that has been formally incorporated into the legal order of the European Union.[66] In addition, the CJEU stressed the need to ensure consistency without affecting the autonomy of EU law or the CJEU.[67] While this seems to be indicative of some tension between the two courts, there are signs that relations between them have since improved. In recent years, the number of references by the CJEU to ECtHR case law seems to be increasing again somewhat,[68] and the CJEU now makes less frequent mention of abovementioned findings on its own

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[64] See, for example, CJEU 22 December 2010, case C-279/09, ECLI:EU:C:2010:811 (*DEB*); CJEU 5 October 2010, case C-400/10 PPU, ECLI:EU:C:2010:582 (*McB.*), para. 54; CJEU 21 December 2011, case C-411/10, ECLI:EU:C:2011:865 (*N.S.*), ECLI:EU:C:2011:865, paras. 88 et seq.; CJEU 30 May 2013, case C-168/13 PPU, ECLI:EU:C:2013:358 (*Jeremy F.*), para. 43; CJEU 18 December 2014, case C-542/13, ECLI:EU:C:2014:2452 (*M'Bodj*), para. 39; CJEU 11 December 2014, case C-562/13, ECLI:EU:C:2014:2453 (*Abdida*), para. 47; CJEU 5 April 2017, joined cases C-217/15 and C-350/15 (*Orsi*), para. 24; CJEU 26 March 2019, case C-129/18, ECLI:EU:C:2019:248 (*SM (Child in permanent legal guardianship under the Algerian kafala (provision of care) system)*), para. 66; CJEU 19 December 2019, case C-502/19, ECLI:EU:C:2019:1115 (*Junqueras Vies*), para. 84; CJEU 18 June 2020, case C-78/18, ECLI:EU:C:2020:476 (*Commission/Hungary (transparency of the financing of associations)*), paras. 111-134; CJEU 17 December 2020, case C-336/19, ECLI:EU:C:2020:1031 (*Centraal Israëlitisch Consistorie van België and Others*), paras. 56-57, 67 and 77; CJEU 15 July 2021, case C-791/19, ECLI:EU:C:2021:596 (*Commission/Poland (disciplinary courts)*), paras. 165 and 190; CJEU 2 September 2021, case C-579/19, ECLI:EU:C:2021:665 (*Food Standards Agency*), paras. 78-80; CJEU 6 October 2021, case C-487/19, ECLI:EU:C:2021:798 (*W.Ż.*), paras. 123-130; CJEU 6 October 2021, case C-338/20, ECLI:EU:C:2021:805 (*Prokuratura Rejonowa Łódź-Bałuty*), paras. 29 et seq.; CJEU 15 March 2022, case C-302/20, ECLI:EU:C:2022:190 (*Autorité des marchés financiers (AMF)*), paras. 68 and 88; CJEU 22 March 2022, case C-117/20, ECLI:EU:C:2022:202 (*bpost NV*), paras. 49 et seq.; CJEU 8 December 2022, case C-348/21, ECLI:EU:C:2022:965 (*HYA and Others (Impossibilité d'interroger les témoins à charge)*), paras. 40-44 and 53-58; CJEU 22 June 2023, case C-660/21, ECLI:EU:C:2023:498 (*K.B. and F.S. (Relevé d'office dans le domaine pénal)*), paras. 45-48.

[65] CJEU 14 September 2017, case C-18/16, ECLI:EU:C:2017:680 (*K.*), para. 32. For previous case law, see, for example, CJEU 8 December 2011, case C-386/10 P, ECLI:EU:C:2011:815 (*Chalkor*), para. 51; CJEU 6 November 2012, case C-199/11, ECLI:EU:C:2012:684 (*Otis*), para. 47; see for more recent case law, for example, CJEU 20 March 2018, case C-537/16, ECLI:EU:C:2018:193 (*Garlsson Real Estate SA*), para. 26; CJEU 16 July 2020, case C-311/18, ECLI:EU:C:2020:559 (*Facebook Ireland and Schrems)*, para. 98.

[66] CJEU 20 March 2018, case C-537/16, ECLI:EU:C:2018:193 (*Garlsson Real Estate SA*), para. 26. See also, for example, CJEU 29 May 2018, case C-426/16, ECLI:EU:C:2018:335 (*Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others*), para. 40; CJEU 16 July 2020, case C-311/18, ECLI:EU:C:2020:559 (*Facebook Ireland and Schrems*), para. 98. For more about this, see J. Krommendijk & G.B.M. de Vries, 'De wisselwerking tussen het HvJ EU en het EHRM: een hernieuwde liefde?' *SEW* 2021, issue 12, p. 560-570, on p. 564. While Article 6(3) of the TEU specifically mentions the ECHR as a relevant source of fundamental rights, this does not make the EU formally bound by the ECHR as such, because that would require EU accession to the ECHR.

[67] CJEU 20 March 2018, case C-537/16, ECLI:EU:C:2018:193 (*Garlsson Real Estate SA*), para. 26.

[68] See also J. Krommendijk & G.B.M. de Vries, 'De wisselwerking tussen het HvJ EU en het EHRM: een hernieuwde liefde?' *SEW* 2021, issue 12, p. 560-570, on p. 564 and 570.

autonomy.[69] Even though some commentators have pointed out that the two European courts sometimes adopt different approaches to fundamental rights issues and that they may approach similar factual and legal situations differently,[70] their case law seems to generally be carefully aligned and problematic divergences rarely occur.[71]

This means that national actors can generally assume that EU law and the ECHR will offer the same level of protection. There have, however, been suggestions in this regard to primarily apply the EU fundamental rights provisions when parties have simultaneously invoked the EU Charter of Fundamental Rights and the ECHR. These EU fundamental rights provisions can, subsequently, be interpreted in accordance with both CJEU case law and ECtHR case law, in line with Article 52(3) of the Charter.[72] In case of doubt, the national court can submit preliminary questions to the CJEU, which can, in turn, ensure proper alignment with ECtHR case law.

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[69] The finding is, however, still referenced, especially with respect to instruments for which there is only limited ECtHR case law available, such as the GDPR; see, for example, CJEU 16 July 2020, case C-311/18, ECLI:EU:C:2020:559 (*Facebook Ireland and Schrems*), paras. 98-99.

[70] See especially G. De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' *Maastricht Journal of European and Comparative Law* (20) 2013, p. 168-184; see also J. Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: *Schmidberger* and *Omega* in the Light of the European Constitution,' *European Law Journal* (12) 2006, p. 15-40. For more recent background, specifically with respect to rights to privacy and data protection and the prohibition of discrimination respectively, see B. van der Sloot, 'Wij zijn twee vriendjes, jij en ik: de innige tango van de twee Europese hoven op het gebied van privacy en gegevensbescherming,' *SEW* 2021, issue 12, p. 582-594; J.H. Gerards, 'Non-discrimination in the case-law of the European Court of Justice and the European Court of Human Rights,' in: C. O'Cinneide, J. Ringelheim & I. Solanke, *Research Handbook on European Anti-Discrimination Law* (Edward Elgar) (to be published in 2024)

[71] See further B. van der Sloot, 'Wij zijn twee vriendjes, jij en ik: de innige tango van de twee Europese hoven op het gebied van privacy en gegevensbescherming,' *SEW* 2021, issue 12, p. 582-594; J.H. Gerards, 'Non-discrimination in the case-law of the European Court of Justice and the European Court of Human Rights,' in: C. O'Cinneide, J. Ringelheim & I. Solanke, *Research Handbook on European Anti-Discrimination Law* (Edward Elgar) (to be published in 2024). This goes for the case law referenced in Section 4.6 on the deportation of seriously ill asylum seekers; see, for example, CJEU 24 April 2018, case C-353/16, ECLI:EU:C:2018:276 (*MP*). Also with respect to other topics, the CJEU carefully follows ECtHR case law; see, for example, on the rights of access to a lawyer in criminal proceedings CJEU 5 June 2018, case C-612/15, ECLI:EU:C:2018:392 (*Kolev*); CJEU 5 September 2019, case C-377/18, ECLI:EU:C:2019:670 (*AH and Others (presumption of innocence)*); about the rights of same-sex couples, see, for example, CJEU 5 June 2018, case C-673/16, ECLI:EU:C:2018:385 (*Coman*); and for the question of independence of Poland's highest courts, see, for example, CJEU 19 November 2018, case C-585/18 and joined cases C-624/18 and C-625/18, ECLI:EU:C:2019:982 (*A.K. (independence of the chamber of the Sąd Najwyższy)*), paras. 126-130.

[72] See, for example, FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*, Luxembourg: Publications Office of the European Union, 2020, p. 77.

5.2.2 EU accession to the ECHR

Another way to counteract (potential) divergence between the fundamental rights case law of the CJEU and the ECtHR is for the EU to accede to the ECHR. The EU being a party to the ECHR would mean that the EU institutions would be bound in all their acts not only by the EU Charter, but also by the ECHR, in a similar way that national authorities are bound both by their national fundamental rights provisions and by the EU Charter of Fundamental Rights and the ECHR. In cases where natural persons or legal entities feel that their fundamental rights have not been sufficiently respected by the EU institutions, they could turn to the ECtHR by filing an individual complaint against the EU.[73] As a last resort, the ECtHR could then assess the compatibility of an EU act, such as a decree or statutory regulation, with the ECHR. The ECtHR's interpretation and application of the ECHR would then also be binding on the CJEU. Although there may be temporary divergence problems in case law, such problems could always eventually be resolved through proceedings before the ECtHR: after all, settled ECtHR case law would then be de facto binding on all lower courts, including the CJEU.[74]
Given this and other benefits of EU accession to the ECHR (such as reinforced judicial protection against EU legislation for private individuals), accession has long been intended.[75] Initially, there were some legal obstacles to an international organisation joining the ECHR,[76] but the Treaty of Lisbon and the almost simultaneous entry into force of Protocol 14 to the ECHR removed those obstacles in 2010.[77] It prompted determined preparations for accession, although it was clear from the outset that accession was going to be difficult to reconcile with the EU's special claim to autonomy of the EU legal order.[78] In the negotiations on accession, representatives of Member States, the EU, and the ECtHR tried to find a way around this. They succeeded in drafting an

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[73] This is currently not possible; see further J.H. Gerards, 'Chapter 5. Relationship Between the Convention and the EU,' in: P. van Dijk et al. (ed.), *Theory and Practice of the European Convention on Human Rights*, fifth edition, Antwerp: Intersentia 2018, p. 331-350, on p. 348.

[74] J.H. Gerards, 'Chapter 5. Relationship Between the Convention and the EU,' in: P. van Dijk et al. (ed.), *Theory and Practice of the European Convention on Human Rights*, fifth edition, Antwerp: Intersentia 2018, p. 331-350, on p. 349. This would go through the so-called 'res interpretata' of the ECtHR's fixed interpretation of fundamental rights; for more about this, see J.H. Gerards, *General Principles of the European Convention on Human Rights*, second edition, Cambridge: Cambridge University Press 2023, p. 97-99.

[75] See further J.P. Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms,' *Common Market Law Review* (48) 2011, p. 995-1023; P. Gragl, *The Accession of the EU to the European Convention on Human Rights*, Oxford: Hart 2013; J.H. Gerards, 'Chapter 5. Relationship Between the Convention and the EU,' in: P. van Dijk et al. (ed.), *Theory and Practice of the European Convention on Human Rights*, fifth edition, Antwerp: Intersentia 2018, p. 331-350.

[76] With further source citations: P. Gragl, *The Accession of the EU to the European Convention on Human Rights*, Oxford: Hart 2013; J.H. Gerards, 'Chapter 5. Relationship Between the Convention and the EU,' in: P. van Dijk et al. (ed.), *Theory and Practice of the European Convention on Human Rights*, fifth edition, Antwerp: Intersentia 2018, p. 331-350, p. 348.

[77] J.H. Gerards, 'Chapter 5. Relationship Between the Convention and the EU,' in: P. van Dijk et al. (ed.), *Theory and Practice of the European Convention on Human Rights*, fifth edition, Antwerp: Intersentia 2018, p. 331-350, p. 349, with further source citations.

[78] For more about this, see, for example, G. De Búrca, 'The Evolution of EU Human Rights Law,' in: P. Craig & G. De Búrca (ed.), *The Evolution of EU Law*, third edition, Oxford, Oxford University Press 2021, p. 480-505.

accession agreement that all (then) 47 Member States of the Council of Europe and the European Commission could accept. The agreement included a number of complex procedural elements to ensure EU involvement at all stages of the proceedings before the ECtHR.[79] However, when the CJEU was asked to issue a (binding) opinion on the compatibility of the accession agreement with EU law and the fundamental principles of the EU, it turned out that the Court had a much stronger position on the need to protect the autonomy of the EU than the negotiating parties had expected. In 2014, the CJEU issued a negative opinion on accession, specifying a number of consequences of accession that would be incompatible with the autonomy of EU law and could jeopardise the effectiveness of EU law.[80] It specifically highlighted the special features of the EU as a supranational organisation and its own role as the highest court tasked with ensuring harmonised and uniform interpretations of EU law, including fundamental rights. No matter how diligently the negotiators had tried to find solutions to this problem, the CJEU deemed the solutions insufficient.[81]

Since the CJEU's opinions on international cooperation by the EU are binding, the Accession Agreement could not be adopted. After having been suspended for several years, the debate and negotiations resumed in 2020.[82] Meanwhile, there are new proposals to accommodate the CJEU's objections without making the procedure overly complex and without undermining effective and accessible judicial protection against EU fundamental rights violations.[83] Whether this will ultimately lead to a widely supported new accession agreement that the CJEU can also sign off on was still unclear at the time of writing.[84] For now, this makes streamlining via the case law of the two

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[79] See further, for example, X. Groussot, T. Lock & L. Pech, 'EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011,' Fondation Robert Schuman Policy Paper, *European Issues No. 218*, 7 November 2011; T. Lock, 'End of an epic? The draft agreement on the EU's accession to the ECHR,' *Yearbook of European Law* (31) 2012, 162-97; P. Gragl, *The Accession of the EU to the European Convention on Human Rights*, Oxford: Hart 2013; J.H. Gerards, 'Chapter 5. Relationship Between the Convention and the EU,' in: P. van Dijk et al. (ed.), *Theory and Practice of the European Convention on Human Rights*, fifth edition, Antwerp: Intersentia 2018, p. 331-350.

[80] Opinion 2/13 of the CJEU of 18 December 2014, ECLI:EU:C:2014:2454.

[81] See further, among other sources, P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' *Fordham International Law Journal* (38) 2015, p. 955-992; D. Halberstam, '"It's the Autonomy, Stupid!", A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward,' *German Law Journal* (16) 2015, p. 105-146; L. Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection – On *Opinion 2/13* on EU Accession to the ECHR,' *Human Rights Law Review* (15) 2015, p. 485-521; T. Lock, 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: is it still Possible and is it still Desirable?' *European Constitutional Law Review* (11) 2015, p. 239-273; G. De Búrca, 'The Evolution of EU Human Rights Law,' in: P. Craig & G. De Búrca (ed.), *The Evolution of EU Law*, third edition, Oxford, Oxford University Press 2021, p. 480-505, on p. 496.

[82] 'The EU's accession to the European Convention on Human Rights: Joint statement on behalf of the Council of Europe and the European Commission,' press release of 29 September 2020, https://www.coe.int/en/web/ portal/-/the-eu-s-accession-to-the-european-convention-on-human-rights. See further www.coe.int/en/web/ human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights.

[83] For a list of the various relevant documents, including a consolidated version of the new Accession Agreement as it is now, see https://rm.coe.int/2-liste-documents-46-1/1680a9d279.

[84] Doubt has been cast on the need for and desirability of EU accession to the ECHR; see, for example, J. Callewaert, 'Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences,' *Common Market Law Review* (55) 2018, p. 1685-1716. See also J. Krommendijk & G.B.M. de

European courts the only realistic option to avoid divergent case law within the EU and ECHR legal orders.

Vries, 'De wisselwerking tussen het HvJ EU en het EHRM: een hernieuwde liefde?' *SEW* 2021, issue 12, p. 560-570, on p. 569.

6 Conclusion

The CJEU has come a long way from its very first steps in the protection of fundamental rights in its judgments in the *Nold*, *Stauder* and *Internationale Handelsgesellschaft* cases to the current application of the Charter of Fundamental Rights of the European Union in cases on data protection, obligations for Internet service providers, or the surrender of asylum seekers. Initially accused of being too economically oriented and not sufficiently protecting fundamental rights, the Luxembourg-based CJEU can now actually be considered a champion of these rights in many areas. What is clear, however, is that the Court still diligently safeguards the autonomy of the EU, the effectiveness and unity of EU law, the primacy of EU law over national law, and the principles of mutual trust and mutual recognition.

The way in which the CJEU has shaped general fundamental rights doctrines over the past 15 years shows that it, on the one hand, has been strongly inspired by the modus operandi of the ECtHR, while on the other formulating its very own set of principles and assumptions. This is largely due to the special characteristics of the EU legal order and the EU Charter of Fundamental Rights itself. The case law on the scope of application of the Charter, its horizontal effect, and the difference between Charter rights and Charter principles is assembled entirely around the relevant horizontal Charter provisions (especially Articles 51 and 52) and is strongly coloured by the core principles of EU law and by the case law established by the CJEU outside the context of fundamental rights. When it comes to 'familiar' fundamental rights doctrines such as those of justification of limitations, intensity of review, and positive obligations, there are somewhat stronger parallels between CJEU case law and the ECtHR's approach. Even there, however, the CJEU often steers its own course, if only because the design of the EU legal order leaves little scope for something like defining positive obligations and because the significance of – often very concrete and precise – EU legislation means that the CJEU has much less interpretative freedom than the ECtHR.

Reinforced EU protection of fundamental rights means that Member States now have little reason to want to place their own, national, or ECHR levels of protection above those of EU law. That said, clashes may still arise as a result of divergent national and European views on the level of protection for certain fundamental rights. Such divergent views can lead to complex interactions between the CJEU and national courts, with the CJEU stubbornly sticking to its premise that it always has the last word when it comes to fundamental rights protection in EU law, while some Member States continue to claim that last word equally stubbornly. The ECtHR also occasionally joins in the debate, such as by reminding Member States that they, even as 'agents' of the EU, are

always responsible for their actions under the ECHR. One of the challenges for the future will be to provide an adequate response to the difficulties arising from these interactions, especially as uncertainty remains as to whether and under what conditions the EU will accede to the ECHR.

At the same time, it needs to be stressed here that these tensions rarely lead to major problems. While there are differences, the CJEU clearly relies on similar principles of interpretation, similar notions of respect and intensity of review, and similar principles and conditions for justification of limitations as developed in ECtHR case law. Moreover, CJEU rulings rendered since the Charter became binding in 2009 show an increasing sophistication in this regard, so much so that some rulings are exemplary of the ECtHR, rather than the other way around. The CJEU's approach to the review of necessity and proportionality, as well as its approach to the essence of the rights, is commendable, even if not yet fully clarified and developed. Needless to say, there are still many open questions, such as those relating to the development of the doctrine of horizontal effect, the difference between principles and rights, and the further possibilities of exceptions to the principles of mutual recognition and mutual trust. However, CJEU case law on this shows an increasingly fundamental rights-oriented approach that does justice not only to the proper and unified functioning of Union law, but also to individual and collective fundamental rights. For the coming years, there is, therefore, the promise of ever better and more sophisticated protection of fundamental rights at EU level.

Does the emperor have new clothes?

Hanna Sevenster[1]

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Recommendations

Bibliography

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1 Introduction

What do the quality of crisis shelters,[1] the transfer of asylum seekers to Belgium,[2] tattoo removal,[3] coercive detention of civil servants for the purpose of enforcing environmental rulings,[4] an offensive attorney[5], and a one-eyed lorry driver's fitness to drive have in common?[6] Given the topic of this preliminary opinion, the above riddle is obviously a bit of a giveaway: the Charter of Fundamental Rights of the European Union (hereinafter: the Charter).

It has become impossible to imagine administrative law without the Charter. Traditionally, as of 2009 that is, administrative law was always the area of law where the Charter's influence was most felt. This is easily explained by the fact that much of all the EU law is, in fact, administrative law, or at least transposed into it and enforced as such. Examples include the classic 'community' areas of agriculture and competition. When communal agricultural and competition laws were implemented, people were already used to the effect of the ECHR, including through the general legal principles of what was the EEC at the time.[7] Major areas of law have meanwhile been added to that: environmental law, telecommunications and energy law, not to mention migration law, which has rapidly moved from being exclusively national law to almost entirely EU law.

This preliminary opinion will take the perspective of the practice of the law, asking how administrative courts navigate and invoke the Charter. And what has it brought us? In this preliminary opinion, I will first discuss in more general terms the (empirical) significance of the Charter in the domain of administrative law (Section 2), focusing specifically on administrative case law.[8] This has already been the subject of various (quantitative) studies. The

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1 Netherlands Central Appeals Tribunal 23 May 2023, ECLI:NL:CRVB:2023:1087 (Article 1 of the Charter, human dignity).

2 See, inter alia, Court of The Hague 27 June 2023, ECLI:NL:RBDHA:2023:10313 (Article 4 of the Charter, inhuman treatment).

3 The case of a third-country national with a Christian cross tattooed on his hand, Administrative Jurisdiction Division of the Council of State 31 May 2018, ECLI:NL:RVS:2018:1802 (Article 3 of the Charter, integrity of the person).

4 CJEU 19 December 2019, C-752/18, ECLI:EU:C:2019:1114 (*Deutsche Umwelthilfe*) (Article 47 of the Charter, effective judicial protection).

5 See, inter alia, Supreme Court of the Netherlands 28 February 2020, ECLI:NL:PHR:2020:184 and Supreme Court of the Netherlands 6 November 2020, ECLI:NL:HR:2020:1730 (Article 41 (good administration) and Article 47 (effective judicial protection) of the Charter.

6 Pending reference for a preliminary ruling from the Division, C-703/22 (*Central Office for Motor Vehicle Driver Testing (hemianopsia)*) (Article 15 of the Charter, freedom to choose an occupation).

7 CJEU 17 December 1970, ECLI:EU:C:1970:114 (*Internationale Handelsgesellschaft*). See further Gerards' preliminary opinion, Section 3.1.

8 It also goes without saying that the legislator must take due account of the Charter and the Court of Justice's case law on it. This should, in particular, manifest itself in an explanatory memorandum and in the opinions of the Netherlands Council of State's Advisory Division, see further Section 3.2. However, the most visible and tangible significance of the Charter is when it becomes the subject of litigation (whether or not also before the Court of Justice). My focus on the case law is, therefore, not solely motivated by time constraints.

picture that emerges from these studies is confirmed in the most recent case law of the Netherlands' highest administrative courts. This is followed by a more substantive reflection on the value of the Charter and, in that context, the sense and nonsense of the much-discussed 'added value' of the Charter in administrative law compared to the good-old ECHR (Section 3). I will close with a brief look back and look ahead (Section 4). Along the way in this preliminary opinion, I will collect several recommendations for the CJEU, national courts, the legislator, and law scholars that I have compiled in a list at the end.

2 Significance of the Charter in administrative case law

2.1 Focus on the figures

Krommendijk has made several quantitative assessments of the use of the Charter in administrative case law.[1] A simple tally of how often a certain Charter article is mentioned in rulings gives some idea as to the extent to which the Charter features in such case law. This is an equally effective way to identify an increase or decrease in focus on the Charter.[2] However, using this simple method alone will not let you gauge whether the provision actually had an impact during proceedings. Parties may, for example, invoke the Charter when it does not apply at all or will not make a difference to resolution of the dispute in any way. The latter, by the way, should not be considered exclusively in cases where rules or a resolution are overturned using the Charter. That would, in my view, be an overly narrow definition of 'making a difference'. What is also important to note is the fact that national provisions or resolutions are held up to the light of the Charter in various cases, i.e. using the Charter as a touchstone of national procedural law in particular.[3] An early example of this, which has been cited heavily in the first publications after 2009, was the Division's 2011 ruling on the consequences of not paying court fees in an immigration case in the light of Article 47 of the Charter.[4]

What do the figures collected over the first ten years show? The first book from 2015 on the Charter in Dutch practice shows a hesitant transition from form to substance. In those early days, much of the litigation is about the matter of applicability, Article 51(1) of the Charter.[5] Many rulings subsequently fail to rule on whether or not the Charter applies.[6] This can be explained, and is

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[1] See, among other sources, Krommendijk, 'Totstandkoming en ontwikkeling van het Handvest,' in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 15-54 and Krommendijk, 'Een inleidende schets van de status quo,' in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 1-44. The periods studied are 2009-2013 and 2014-2018 respectively.

[2] There is, for example, a clear increase over the years in how many times Article 4 of the Charter has been invoked in Dutch legal practice, and a decrease in the number of cases where the scope of application (Article 51(1) of the Charter) is not commented on, see Krommendijk in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 8 and 12-15.

[3] See further Section 2.2 and Section 2.3 below.

[4] Administrative Jurisdiction Division of the Council of State 4 July 2011, ECLI:NL:RVS:2011:BR1257 (in the appeal case on an unwanted Union citizen) and in the same sense – also beyond the Charter's scope of application – Administrative Jurisdiction Division of the Council of State 6 March 2013, ECLI:NL:RVS:2013:BZ4443.

[5] Bozia, too, identified ample confusion on the scope of application in those days: Bozia, 'Het toepassingsbereik van het Handvest,' in: VVBW 2018, p. 87 and further, with examples on p. 93-96.

[6] See Van Heijningen & Wissels, 'Doorwerking EU-Handvest in de rechtspraak van de Afdeling bestuursrechtspraak van de Raad van State: van vorm naar inhoud?' in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 137-158 and Dieben, 'Vijf jaar bindend

actually justifiable as well, by the fact that clear lines in the Court of Justice's case law were still lacking at the time.

In addition to a clear increase in the use of the Charter in Dutch case law, Krommendijk notes in the second volume from 2019, published on the occasion of the Charter's tenth anniversary, that the Charter features the most in administrative law rulings.[7] Within that domain, the Charter appears the most in immigration law rulings, followed by tax law rulings.[8] On the back of the Charter's significant presence in immigration case law, the Division is also the highest tribunal with the most applications of the Charter in an absolute sense.[9] In tax law, we are now seeing the number of Charter references drop because it has now been clarified that many cases in this domain fall outside the scope of application of EU law.[10] The Charter provisions that are most frequently cited in administrative law rulings are Article 47 (effective legal remedy), Article 4 (inhuman treatment), Article 7 (privacy and family life), Article 24 (rights of the child), and Article 41 (good administration).[11] Article 47 is, in fact, also a frequently cited article in other European countries. Like Article 41, Article 47 represents clear substantive added value ('success') to tax and general administrative law according to this tally of article citations.[12] This also goes for Article 4 of the Charter (inhuman treatment) since the Court of Justice's *NS* and *CK* rulings.[13]

2.2 Recent case law of the highest law courts; a summary

In order to compile an up-to-date picture, I have reviewed the case law of the highest administrative courts over the past five years (2018-2023) using the keyword 'Charter' (of Fundamental Rights of the European Union), which largely revealed the same picture as the earlier studies summarised above. In the following, I will break down the relevant rulings by tribunal and go into

EU-Handvest en het financieel toezichtrecht,' in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 277-350.

7 Krommendijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 1-44.

8 Krommendijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 3, 4 and 29-35.

9 Krommendijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 5.

10 Krommendijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 4.

11 Krommendijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 8, 29.

12 Krommendijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 16 and 17, with further examples through to 2018 on p. 29 et seq. See also previously Niessen, 'Betekenis van het Handvest voor het belastingrecht,' in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 277-350, which showed some predictive capacity.

13 CJEU 21 December 2011, ECLI:EU:C:2011:865 (*NS*) and CJEU 16 February 2017, ECLI:EU:C:2017:127 (*CK*). For details, see Wissels & Grimbergen, 'Als je mekaar niet meer vertrouwen kan, waar blijf je dan?' in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 247-270. See also below, Section 2.2 under Division.

greater detail to illustrate the influence of the Charter and topics that tend to come up in legal practice. The aim was not to put together a comprehensive account.

Trade and Industry Appeals Tribunal

Looking at the case law of the Trade and Industry Appeals Tribunal, what stands out is that parties to the cases before this tribunal regularly invoke the ECHR rather than the Charter. This is remarkable because the areas of law that the Tribunal deals with, such as agriculture in particular, are mostly about implementation of EU law.[14] Could it be that some attorneys are simply not yet familiar with the Charter or consider the Charter and ECHR much of a muchness because, for example, Article 47 of the Charter is effectively the same as Article 6 of the ECHR? Accordingly, there are several cases where the Tribunal adds Article 47 of the Charter when Article 6 of the ECHR is invoked, subsequently listing the Charter provision first in its review.[15] As I will argue below (see Section 3), this much-of-a-muchness mindset is not without risk, especially in the area of Article 47 of the Charter, since the Court of Justice has already produced a broad range of case law on the subject. All that case law may very well contain useful discourse that cannot be found in ECHR case law, albeit that this is, of course, not always the case. Where the proportionality of fines is concerned, Article 47 of the Charter, Article 6 of the ECHR and, for that matter, Section 5:47(3) of the Dutch General Administrative Law Act all basically provide for the same. The Charter and ECHR are also aligned when it comes to exceeding the reasonable term,[16] as well as on the presumption of innocence of Article 48 of the Charter (Article 6(2) of the ECHR) and the *lex certa* principle (Article 49 of the Charter, Article 7 of the ECHR).[17]

This may not apply to the Trade and Industry Appeals Tribunal's reference in the *Pesticide Action Network Europe (PANE)* case.[18] One issue in this case was whether a non-governmental organisation such as PANE has an effective remedy under Article 47 of the Charter to challenge the approval of an active substance before a court.[19] The Trade and Industry Appeals Tribunal asks this in case it would follow from the applicable regulation that the endocrine

[14] And the opposite of what happens at the Central Appeals Tribunal, see below in Section 2.2.

[15] See, for example, Trade and Industry Appeals Tribunal 20 June 2023, ECLI:NL:CBB:2023:300; Trade and Industry Appeals Tribunal 20 June 2023, ECLI:NL:CBB:2023:301; Trade and Industry Appeals Tribunal 20 June 2023, ECLI:NL:CBB:2023:302; Trade and Industry Appeals Tribunal 20 June 2023, ECLI:NL:CBB:2023:303; Trade and Industry Appeals Tribunal 20 June 2023, ECLI:NL:CBB:2023:299 and Trade and Industry Appeals Tribunal 18 July 2023, ECLI:NL:CBB:2023:378. These cases involve fines issued to slaughterhouses for violating EU regulations.

[16] See, for example, the assessment based on Article 47 of the Charter and Article 6 of the ECHR in Trade and Industry Appeals Tribunal 28 February 2023, ECLI:NL:CBB:2023:87 and Trade and Industry Appeals Tribunal 28 February 2023, ECLI:NL:CBB:2023:88, in cases on phosphate rights.

[17] For more detail, see the opinion of the Advocate General in three cases before the Trade and Industry Appeals Tribunal, Trade and Industry Appeals Tribunal 22 May 2018, ECLI:NL:CBB:2018:187.

[18] Trade and Industry Appeals Tribunal 3 May 2022, ECLI:NL:CBB:2022:214. These cases are registered as C-309 and 310/22 with the Court of Justice.

[19] Trade and Industry Appeals Tribunal 3 May 2022, ECLI:NL:CBB:2022:214. The third preliminary question.

disrupting properties of an active substance may not be assessed in the national approval of plant protection products.[20] This is a question that may lead to interesting findings on the (personal) scope of application of Article 47 Charter, *if* the Court gets around to it, i.e. only if the aforementioned assessment for national approval is indeed not allowed.

It is precisely in disciplinary courts for auditors where the Charter does generally not apply and is, therefore, invoked in vain.[21] There are other cases, too, where the Charter is cited without being applicable, such as invocation of Article 16 of the Charter in a case on ex officio deregistration from the Chamber of Commerce's trade register.[22]

In addition to Article 47 of the Charter, the right to property also regularly features in cases before the Tribunal (Article 17 of the Charter). For now, review under that article proceeds the same as under Article 1 of the First Protocol, which entails a great deal of ECtHR case law. In a number of rulings, the Trade and Industry Appeals Tribunal found in explicit terms that there are (as yet) no indications that Article 17 of the Charter offers more protection of the right to property than Article 1 of the First Protocol.[23] Appeals to these articles often fail, but they do sometimes succeed. In a ruling of 27 September 2022, for example, the Trade and Industry Appeals Tribunal ruled that the introduction of the phosphate rights system imposed an individual and excessive burden on the appellant, which, without any compensation, violated Article 17 of the Charter and Article 1 of the First Protocol.[24] Two things stand out to me. Firstly, that the Tribunal does not mince its words in this ruling about the applicability of the Charter, which is apparently so obvious when it comes to phosphate rights that it needs no explanation. And secondly, that in this case, too, the Trade and Industry Appeals Tribunal cites the Charter provision first. It seems to me that the Trade and Industry Appeals Tribunal does this systematically in cases concerning implementation of EU law.

One provision that is relatively frequently invoked before the Tribunal is the principle of legality under Article 49 of the Charter (*lex certa* and *nulla poena*, as also enshrined in Article 7 of the ECHR). These appeals are settled substantively along the lines of Article 7 of the ECHR. In certain cases, this leads to successful appeals, such as in the rulings on whether a pension fund's investment activities constitute a violation of Section 116 of the Dutch Pension Act.[25] However, it usually does not lead to a violation, as shown by, for

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[20] Trade and Industry Appeals Tribunal 3 May 2022, ECLI:NL:CBB:2022:214. First preliminary question.

[21] See, for example, Trade and Industry Appeals Tribunal 30 May 2023, ECLI:NL:CBB:2023:254, where the applicant invoked Article 21 (non-discrimination) and Article 47 (effective judicial protection) of the Charter. Also Trade and Industry Appeals Tribunal 3 May 2022, ECLI:NL:CBB:2022:210 (legal ground 5.1).

[22] Trade and Industry Appeals Tribunal 15 March 2022, ECLI:NL:CBB:2022:111.

[23] Trade and Industry Appeals Tribunal 23 July 2019, ECLI:NL:CBB:2019:291, legal ground 6.1.5, and Trade and Industry Appeals Tribunal 17 March 2020, ECLI:NL:CBB:2020:159, legal ground 5.3. Idem Administrative Jurisdiction Division of the Council of State 29 April 2020, ECLI:NL:RVS:2020:1166 (legal ground 7.3).

[24] Trade and Industry Appeals Tribunal 27 September 2022, ECLI:NL:CBB:2022:649, legal ground 6.2.9.

[25] See, for example, Trade and Industry Appeals Tribunal 26 October 2021, ECLI:NL:CBB:2021:960 and Trade and Industry Appeals Tribunal 26 October 2021, ECLI:NL:CBB:2021:961, legal ground 5.3.

example, two recent cases involving fines under the Dutch Fertilizer Act imposed on a transportation company.[26]
Looking at this case law of the Trade and Industry Appeals Tribunal, my conclusion is that the Charter is often invoked and mentioned, but that cases are ultimately settled based on the ECHR and the associated case law.

Central Appeals Tribunal
What stands out in the case law of the Central Appeals Tribunal is that Article 1 (human dignity) is regularly invoked. Article 7 (right to private and family life) and Article 24 (rights of the child) also feature regularly. However, the Charter does often not apply at all in the area of social security. One example of this comes in a ruling on a conditional dismissal with transfer. The case was about an alleged violation of Article 41 (good administration by EU institutions) and Article 42 (right of access to documents of EU institutions) of the Charter. The Central Appeals Tribunal had to conclude that the Charter did not apply.[27] In fact, it is all but clear what these articles could have contributed here. Another example is the ruling of 13 December 2022 on the revision and reclaiming of benefits following violation of the obligation to provide information laid down in Section 17(1) of the Dutch Participation Act.[28] The appellants had argued that the decision-making violated Article 34(1) of the Charter (right to social security and social assistance). The Central Appeals Tribunal ruled that implementation of any provision of EU law is not at issue.[29] In a ruling dated 17 November 2022, the appellant litigated to be considered a resident of the Netherlands in order to be entitled to child support.[30] Her claim of violation of the UN Convention on the Rights of the Child (UNCRC) was dismissed. In addition, the appellant had invoked Article 24 of the Charter (rights of the child), which also failed because it did not concern implementation of any provision of EU law.[31] What is striking is that the Charter is regularly invoked without any real connection to EU law. This often makes such invocations seem like a 'hail Mary' argument, such as invoking Article 17 of the Charter (property) in certain cases concerning Dutch state pension legislation.[32] It is unclear whether this is – also – due to a lack of knowledge of the Charter's scope. In the child support case mentioned above, the argument was more grounded, though, claiming that the fact that the son is not a migrant worker does not make the Charter inapplicable to him. A

[26] Trade and Industry Appeals Tribunal 25 July 2023, ECLI:NL:CBB:2023:384 and Trade and Industry Appeals Tribunal 25 July 2023, ECLI:NL:CBB:2023:385, legal ground 4.4 in both cases. And Trade and Industry Appeals Tribunal 23 March 2021, ECLI:NL:CBB:2021:324.
[27] Central Appeals Tribunal 13 January 2023, ECLI:NL:CRVB:2023:77, legal ground 4.2.1.
[28] Central Appeals Tribunal 13 December 2022, ECLI:NL:CRVB:2022:2715.
[29] Central Appeals Tribunal 13 December 2022, ECLI:NL:CRVB:2022:2715, legal ground 4.8.
[30] Central Appeals Tribunal 17 November 2022, ECLI:NL:CRVB:2022:2438. After having lived in Curaçao for several years, she had returned to the Netherlands with her son.
[31] Central Appeals Tribunal 17 November 2022, ECLI:NL:CRVB:2022:2438, legal ground 4.12.
[32] Central Appeals Tribunal 17 June 2022, ECLI:NL:CRVB:2022:1386, legal ground 5.3.4 and Central Appeals Tribunal 22 July 2021, ECLI:NL:CRVB:2021:1840, legal ground 4.3.

distinction in this regard between an EU citizen moving within the EU and an EU citizen moving from outside the EU to their home Member State is not justified, according to the appellant.[33] While the Central Appeals Tribunal does not go into this argument any further, it does find, as noted above, along the lines of Article 51(1) of the Charter, that it is not a case of implementation as defined in that provision.

As pointed out, what stands out in the Central Appeals Tribunal's case law is that Article 1 of the Charter (human dignity) conditions the right to (crisis) shelter and assistance. Just recently, this article featured in proceedings to request a continuation of crisis shelter under the Dutch Social Support Act.[34] Where neither Article 8 of the ECHR nor Article 3 of the UNCRC allows for a right to housing, Article 8 of the ECHR creates an obligation to provide shelter to vulnerable persons only under special circumstances. However, it must be inferred from the *CG* ruling of the Court of Justice that Articles 1, 7, and 24 of the Charter contain an obligation to provide housing and financial assistance if the absence thereof would lead to a threat of a degrading existence. The *CG* case involved a single mother who was both a Croatian and Dutch national and her two young children, who had been granted temporary right of residence under Irish law but were not eligible for social security benefits.[35] The case before the Central Appeals Tribunal differed from the Irish case before the Court of Justice in that it involved a Dutch person who had lived and worked in the United Kingdom, but was back in the Netherlands at the time of the application for shelter. This is why the Central Appeals Tribunal did not rule on whether or not the Charter applied ('To the extent that it should be assumed that the Charter applies to the appellant's situation merely because she took advantage of freedom of movement […]').[36] And the Tribunal subsequently ruled that there was no threat of violation of the aforementioned fundamental rights in any case. This in itself is a frequently used and safe judicial technique that consists in not pronouncing on the scope of application and proceeding to a substantive review.[37] It must be noted, however, that this technique is conducive to a consequential effect (see further Section 4.2).

Like the Division, the Central Appeals Tribunal has used Article 24 of the Charter on the rights of the child in its application of the so-called *Chavez-*

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[33] Central Appeals Tribunal 17 June 2022, ECLI:NL:CRVB:2022:1386, legal ground 3.

[34] Central Appeals Tribunal 23 May 2023, ECLI:NL:CRVB:2023:1087, legal grounds 4.4. and 4.5.

[35] CJEU 15 July 2021, ECLI:EU:C:2021:602 (*CG*).

[36] Let it be noted that, in the *CG* case, the Court itself already resorted to a rather creative interpretation of the scope of application of the Charter. CG had moved to and settled in Ireland under Article 21 of the TFEU and her situation fell, therefore, 'within the scope of EU law,' according to the Court. Since CG and her children had subsequently been granted a temporary right of residence in Ireland, even though she did not meet the conditions of Directive 2004/38 on the right of residence of EU citizens in other Member States, the Court held that Ireland had recognised her rights under Article 21(1) of the TFEU, thereby giving effect to EU law. For a critical note on this reasoning (on objectives?), see, among other sources, Pennings 2022.

[37] Similar in Central Appeals Tribunal 9 March 2022, ECLI:NL:CRVB:2022:522, legal ground 4.3, in the context of shelter based on the Dutch Social Support Act.

Vilchez case law,[38] albeit in the context of social security. Whereas this case law is used by the Division in the context of the right of residence and does, therefore, play a part in cases about allowances, it is addressed in child benefits cases before the Central Appeals Tribunal. Although the Central Appeals Tribunal ruled that, in itself, denial of child benefits could not result in children who are Dutch nationals being forced to leave the EU together with their parent(s), thus preventing a violation of Article 20 of the TFEU, the Tribunal subsequently also reviewed whether the denial of child benefits could result in an EU citizen (the child) being unable to lead a dignified existence or that their fundamental rights were violated (Article 1 (human dignity), Article 7 (family life) and Article 24 (rights of the child) of the Charter).[39] Given that shelter is available in another form, such as staying in a holiday cottage and having a living allowance, these articles have not been violated.

Supreme Court of the Netherlands

The Charter also regularly comes up in the case law of the Tax Chamber of the Supreme Court of the Netherlands.[40] The Supreme Court of the Netherlands still sees a large number of cases on the applicability of the Charter, i.e. about Article 51(1) of the Charter. Parties in these cases most commonly invoke Article 41(2)(a) of the Charter, or at least its equivalent as a general principle of law, namely the principle of defence. After all, Article 41 of the Charter does not apply directly to the acts of Member States, but its substance applies to Member States as well because the Court of Justice has declared it a general principle of law.[41] This particularly concerns the right to be heard as part of the right to defence.[42] The Court's case law shows that this must be done in the case of incriminating decisions and that annulment is required if it cannot be ruled out that the decision-making could have turned out differently with a hearing.[43] This was the case, according to the Supreme Court, in the ruling on a motor vehicle tax assessment of 23 December 2022.[44] The Supreme Court

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[38] CJEU 27 May 2017, ECLI:EU:C:2017:354 (*Chavez Vilchez*).

[39] See, for example, Central Appeals Tribunal 20 January 2022, ECLI:NL:CRVB:2022:147, legal grounds 4.8.1 and 4.8.2 and Central Appeals Tribunal 20 January 2022, ECLI:NL:CRVB:2022:151, legal grounds 4.9.1 and 4.9.2.

[40] In 2028, the Netherlands Tax Science Society (*Vereniging voor belastingwetenschap*) published a report with 'selected' expectations on the Charter in Dutch tax law (writings of the Netherlands Tax Science Society no. 258). These expectations are party reflected in the post-2018 case law, such as on Article 41 of the Charter, see Poelmann, 'Het recht op behoorlijk bestuur en het recht op documenten,' in: Netherlands Tax Science Society (VVBW) 2018, p. 35-48,

[41] See Gerards' preliminary opinion, Section 3.1. See, for example, Supreme Court of the Netherlands 19 September 2014, ECLI:NL:HR:2014:2707.

[42] The tone had already been set by the CJEU ruling of 18 December 2008, ECLI:EU:C:2008:746 (*Sopropé*). For details of all kinds of manifestations of the defence principles, see the Procurator General's Office's opinion in Supreme Court 21 May 2019, ECLI:NL:PHR:2019:780. The Sopropé saga started earlier before the tax chamber of the Supreme Court, see also Pahladsingh, 'Het Unierechtelijk verdedigingsbeginsel en de hoorplicht, een doorbraak in Nederland?' in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 121-142.

[43] CJEU 3 July 2014, ECLI:EU:C:2014:2041 (*Kamino and Datema*).

[44] Supreme Court 23 December 2022, ECLI:NL:HR:2022:1917, with an interesting discussion on the effect of the *Pfleger* case law in the context of Article 110 of the TFEU, legal ground 4.2.3.

reasoned that it was clear that a hearing could have produced a different outcome because the tax inspector had already reduced the tax assessment after receiving the objection, thus violating the defence principle, and remarkably attached consequences to the entire tax assessment.[45] In the ruling of 10 February 2023, the Supreme Court also ruled, based on violation of the defence principle, that it was appropriate to award a – considerable – reduction of the liability to pay additional sales tax.[46] In a ruling of 2021, the Supreme Court was also confronted with remedies before the Supreme Court with respect to violation of this principle by the tax inspector's failure to hear the appellant (Sections 7:2 and 7:3 of the Dutch General Administrative Law Act) about their intention to declare an objection inadmissible because of an inexcusable failure to meet the deadline (Sections 6:6 and 6:11 of the Dutch General Administrative Law Act). The Supreme Court ratified the ruling by the 's-Hertogenbosch Court of Appeal, where these arguments failed.[47] Given the exception to the requirement of a hearing for certain financial decisions under Section 4:12 of the Dutch General Administrative Law Act, it makes sense to try to construe an obligation to hear by drawing on the Charter in those cases as well, even though this is sometimes in vain, either because the Charter does not apply or it does not hold in a substantive sense.[48]

Other articles have also been invoked, even though the Charter does not apply. Article 17 (property), Article 21 (freedom of movement), Article 52(3) (corresponding rights, broader protection possible) and Article 53 (abuse) of the Charter were invoked in proceedings on the crisis levy (Section 32(b)(d) 1964 Dutch Wage Tax Act). This could have been interesting, but the Supreme Court made a careful assessment of whether the violation of freedom of movement provisions constituted implementation of EU law and concluded that this was not the case.[49] Article 48 of the Charter (*nemo tenetur*) is also invoked before the Supreme Court on occasions, such as in the case on the obligation to rectify an incorrect turnover tax return under Section 10(a) of the Dutch State Taxes Act in conjunction with Article 15 of the Dutch Turnover Tax Implementation Decree.[50] Advocate General Ettema dismissed this argument based on Article 6 of the ECHR and the case law of the ECtHR on the *nemo tenetur* principle.[51]

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[45] Supreme Court 23 December 2022, ECLI:NL:HR:2022:1917, legal ground 5.2.

[46] Supreme Court 10 February 2023, ECLI:NL:HR:2023:183.

[47] Supreme Court 22 January 2021, ECLI:NL:HR:2021:84.

[48] See, for example, the Procurator General's Office's opinion in Supreme Court 25 September 2018, ECLI:NL:PHR:2018:1056; Advocate General IJzerman argued that the Charter does not apply. The Supreme Court arrives at the same conclusion in its ruling of 9 November 2018, ECLI:NL:HR:2018:2082.

[49] Supreme Court 25 October 2019, ECLI:NL:HR:2019:1624, legal ground 2.3.4.

[50] Supreme Court 16 June 2021, ECLI:NL:PHR:2021:611.

[51] The Supreme Court went with the Advocate General's opinion, Supreme Court 24 September 2021, ECLI:NL:HR:2021:1351. What is striking is that this concerns the obligation to rectify an erroneous tax return for turnover tax, which could raise the question as to whether the Charter might still apply via the route of the *Åkerberg Fransson* ruling (CJEU 26 February 2013, ECLI:EU:C:2013:105). See also Gerards' preliminary opinion, Section 4.2.2, under a. Neither the advisory opinion nor the ruling go into this. The *BCF* ruling on the VAT compensation fund does address this: Supreme Court 9 June 2023, ECLI:NL:HR:2023:815, legal ground 3.5.2.

There are also various rulings on Article 47 (effective judicial protection). The Supreme Court ruling of 7 July 2023 rendered a judgment on the compatibility of the rule of Section 8:45(1) of the Dutch General Administrative Law Act (petitions from the administrative court for written information or documents from the parties) with Article 47 of the Charter.[52] The plea argued that the Amsterdam Court of Appeal ruling's limitation of the power contained in Section 8:45(1) of the Dutch General Administrative Law Act to the criterion 'that documents must be indispensable for the resolution of the dispute' is inconsistent with the case law of the ECtHR and the Court of Justice.[53] What stands out in this ruling is that the Supreme Court's judgment that the rule is compatible with Article 47 of the Charter[54] is not further substantiated and, according to the Supreme Court, is also implicit in the judgment of the (trial) court.[55] Another interesting ruling is the one on the question whether Section 8:54 of the Dutch General Administrative Law Act (out-of-court dismissal in case of obvious unfoundedness) is consistent with Article 47 of the Charter.[56] The Supreme Court ruled that this is indeed the case, in part because Section 8:55 of the Dutch General Administrative Law Act allows the ruling to be reviewed outside of a hearing in an opposition procedure. In doing so, the Supreme Court also addressed the doctrine of national procedural autonomy. If there are no EU law rules on procedural law, national procedural rules apply under the preconditions of equivalence and effectiveness (*Rewe* case law).[57] The precise interrelationship of this *Rewe* case law with Article 47 of the Charter has not been made clear in the case law of the Court of Justice, which is probably why the Supreme Court reviews against both.[58] The Supreme Court approaches this interrelationship as follows in this ruling (legal ground 2.5.2): since neither Article 47 of the Charter nor any other provision of EU law contains concrete rules for the judicial review of a dispute over motor vehicle tax, the only option is to fall back on national procedural autonomy. Article 47 of the Charter was again invoked, among other sources of law, in a Supreme Court case on a judge in an opposition procedure who had refused to accept an attorney who had used offensive and inappropriate language (Section 8:25 of the Dutch General Administrative Law Act). Advocate General Wattel concluded that, even if a case did indeed concern implementation of EU law, the Charter was not violated.[59] An attorney also

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[52] Supreme Court 7 July 2023, ECLI:NL:HR:2023:1049.

[53] Supreme Court 7 July 2023, ECLI:NL:HR:2023:1049, legal ground 4.1.

[54] And Article 6 of the ECHR, which the Supreme Court references as the first relevant provision, even though the matter falls within the scope of Union law (turnover tax, intra-community supplies).

[55] Supreme Court 7 July 2023, ECLI:NL:HR:2023:1049, legal grounds 4.2.1 and 4.3.

[56] Supreme Court 18 June 2021, ECLI:NL:HR:2021:966, legal grounds 2.5.1 to 2.5.4.

[57] See also Section 2.3 below.

[58] See also recommendation 3 below.

[59] Supreme Court 30 June 2020, ECLI:NL:PHR:2020:665, invoking Article 17 and 47 of the Charter. In its ruling, the Supreme Court dismisses this part by applying Section 81 of the Dutch Spatial Planning Act without providing reasons, Supreme Court 6 November 2020, ECLI:NL:HR:2020:1730. The same attorney was also involved in a case on the possible violation of the obligation to hear, because the hearing in question degenerated into an

runs the risk that any of their drafted documents containing offensive language will not be covered as legal costs. According to the Supreme Court, this does not violate Article 47 of the Charter.[60]

In the ruling of 19 April 2019, the Supreme Court reviews whether a claim for damages on account of the reasonable time limit having been exceeded must be heard by judges other than those of the main proceedings that were delayed.[61] The appellant invoked Article 47 of the Charter, but the Supreme Court, based on ECtHR case law on Article 6 of the ECHR, ruled that there was no violation and that it was not open to reasonable doubt that Article 47 did not preclude such a course of action either.[62] As for the argument that the appellant is entitled, under Sections 8:73 and 8:74 of the Dutch General Administrative Law Act, to interest on court fees paid when these are reimbursed by the inspector, the Supreme Court found that EU law does not compel this.[63] Here, too, the Supreme Court applied the *Rewe* case law.

Three recent opinions by the Procurator General's Office address the interesting question of whether administrative law courts should review against the Charter on an ex officio basis.[64] In the first case, the court (of appeal) should have reviewed against Article 20 (principle of equality) and Article 21 (non-discrimination) of the Charter on an ex officio basis, or at least added to the legal grounds on an ex officio basis, because the interested party had invoked 'horizontal discrimination' in the context of treaty freedoms in the proceedings. According to Advocate General Wattel, the Court did not have to do the former, in accordance with established CJEU case law. Also, the Court did not have to construe the complaints about the freedoms of movement (Article 63 of the TFEU) as invoking the Charter in the context of ex officio supplementation of legal grounds. Moreover, the Advocate General argued that the Charter does not apply at all because this is a case of voluntary harmonisation:[65] an extension by the Netherlands of the so-called 'linking rule' to third-country cases not covered by the EU rule and, therefore, not an

argument, Supreme Court 28 February 2020, ECLI:NL:PHR:2020:184, Advocate General Wattel's opinion, invoking Articles 41 (defence principle) and 47 of the Charter. What is noteworthy is the Advocate General's view in this opinion that the Charter also applies when answering the question of whether freedom of movement has been impeded. Contrary to what the Supreme Court ruled in its ruling of 25 October 2019, ECLI:NL:HR:2019:1624, i.e. that if there is no obstacle to free movement, the Charter cannot be invoked based on *Pfleger* case law (legal ground 2.3.4). In its ruling on the hearing that degenerated into an argument, the Supreme Court held that there was no violation of the obligation to hear and did not address this *Pfleger* issue, Supreme Court 6 November 2020, ECLI:NL:HR:2020:1728.

[60] Supreme Court 17 November 2023, ECLI:NL:HR:2023:1370, legal grounds 4.6.5 and further. This judgment is not explained further.

[61] Supreme Court 19 April 2019, ECLI:NL:HR:2019:623.

[62] Supreme Court 19 April 2019, ECLI:NL:HR:2019:623, legal ground 2.2.3.

[63] Supreme Court 19 April 2019, ECLI:NL:HR:2019:623, legal ground 2.4.3.

[64] Supreme Court 12 April 2023, ECLI:NL:PHR:2023:420, participation exemption, parent-subsidiary directive, and Supreme Court 26 May 2023, ECLI:NL:PHR:2023:541, dividend tax, abuse, parent-subsidiary directive, and idem Supreme Court 26 May 2023, ECLI:NL:PHR:2023:540. At the time of writing, rulings had not yet been rendered in these cases.

[65] Also referred to as 'over-implementation'. On the applicability of the Charter in such a case, see Gerards' preliminary opinion, Section 4.2.2, under a.

implementation of EU law.[66] What is also interesting in this first opinion is the Advocate General's superfluous assertion that if there is no discrimination under the Treaty freedoms, there will, in principle, not be any discrimination under the Charter either. In any event, the interested party would have to argue why a review against the Charter would work out differently in this regard than under the Treaty freedoms.[67] In the second case where the Court had found abuse of rights, the interested party also invokes Articles 20 and 21 of the Charter too late, namely not until the case was brought before the Supreme Court. As far as the ex officio review against and supplementation of EU law is concerned, Advocate General Wattel arrives at the same conclusion.[68] What is particularly interesting is the addition that if abuse of the Directive (parent-subsidiary directive[69]) has been established, the case law of the Court[70] states that freedoms of movement cannot be invoked either (Articles 20, 49, and 63 of the TFEU had been invoked in this case), and that any reliance on another primary EU right, such as the Charter, will then also be excluded.[71] The Advocate General argued that fundamental rights are not there to facilitate tax evasion. The Court of Justice has thus far not explicitly stated anything along these lines. Case law on when certain conduct can be considered an abuse of Charter provisions, either under Article 54 of the Charter itself or under the prohibition of abuse of rights as a general principle of law,[72] is still lacking.[73]

Administrative Jurisdiction Division of the Council of State

Many of the rulings by the Division make mention of the Charter, and in many different areas. Of the various provisions of the Charter, the following feature most commonly in recent case law: Article 4 (prohibition of torture and inhuman treatment), Article 7 (privacy), and Article 24 (rights of the child), which we also saw at the Central Appeals Tribunal, and here, too, Article 47 (effective legal remedy). The Charter is generally invoked here when it actually applies. Compared to the Central Appeals Tribunal and the Supreme Court, there are relatively few cases where it turns out that the Charter does not apply when it is invoked. A rare example is provided by the ruling of 10 May 2023 on an environmental permit for the felling of three American oaks in the town of Oosterbeek.[74] Besides invoking Article 6 of the ECHR, the appellant sought to rely on Article 47 of the Charter (effective legal remedy)

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[66] Supreme Court 12 April 2023, ECLI:NL:PHR:2023:420, legal ground 9.4.

[67] Supreme Court 12 April 2023, ECLI:NL:PHR:2023:420, legal ground 9.6.

[68] Supreme Court 12 April 2023, ECLI:NL:PHR:2023:420, legal ground 5.17.

[69] Directive 2011/96/EU of the Council of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (*Official Journal of the European Union (OJEU)* 2011, L 345).

[70] Ruling in joined cases C-116 and 117/16, CJEU 26 February 2019, ECLI:EU:C:2019:135.

[71] Supreme Court 12 April 2023, ECLI:NL:PHR:2023:420, legal ground 5.18.

[72] CJEU 22 November 2017, ECLI:EU:C:2017:881 (*Cussens*).

[73] See, therefore, Section 4.2 below.

[74] Administrative Jurisdiction Division of the Council of State 10 May 2023, ECLI:NL:RVS:2023:1819.

on account of an alleged violation of the right to be heard before the court. The Division dismissed the argument on substance, without even mentioning whether or not the Charter was applicable. In addition, the Division, too, sometimes leaves applicability of the Charter open, such as in its ruling of 18 January 2023 on an order subject to a penalty in connection with the parking of a trailer and a resulting request for compensation by the appellant,[75] which the chief of police declared inadmissible. Since there was no unlawful decision to rule on, the court rightly determined that it was not competent to hear the request for compensation on the basis of Section 8:88(1), preamble and under a, of the Dutch General Administrative Law Act. The appellant stated that the lack of an administrative legal process was contrary to 'EU law'. After the Division conducted its review against Article 6 of the ECHR, the Division judged simply that, regardless of whether or not the Charter applies to this case, this would make no difference in view of Article 52(3) of the Charter.[76] In a case before the preliminary relief judge of the Division, Holland Casino raised the issue that the preliminary relief judge in the first instance had violated the right to a fair trial, which meant that the ban on appeal would have to be broken.[77] The dispute revolved around an order subject to a penalty for unauthorised gaming casino advertising in offering online gambling (Article 4.2(5), Dutch Remote Gambling Decree). One of the reasons behind Holland Casino's claim that it had been denied a fair trial was that the preliminary relief judge in the first instance had weighed the interests and given a preliminary lawfulness assessment, which, according to Holland Casino, would not have resulted in the required 'full jurisdiction' as defined in Article 6 of the ECHR and the Charter.[78] The preliminary relief judge of the Division rejected the argument on substance and did not address the question of whether the Charter applied or not.[79] However, the Division did go into the Kansspelautoriteit's (Dutch gambling authority) argument that Holland Casino cannot rely on Article 6 of the ECHR and the Charter because it is a state-owned company. This is left open in the ruling by the wording 'in any event,' because the Division already judged on substance that there is no conflict. The preliminary relief judge apparently deemed it beyond the scope of preliminary relief to crack this nut on principle without this being necessary for the settlement.[80]

Once again, Article 47 of the Charter features in a ruling on the rules governing subsidised legal aid of Section 12 of the Dutch Legal Aid Act.[81] The

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[75] Administrative Jurisdiction Division of the Council of State 18 January 2023, ECLI:NL:RVS:2023:178.

[76] Administrative Jurisdiction Division of the Council of State 18 January 2023, ECLI:NL:RVS:2023:178, legal ground 7.2 and 7.3.

[77] Administrative Jurisdiction Division of the Council of State 1 December 2022, ECLI:NL:RVS:2022:3531.

[78] The article is not specified, but it is obviously Article 47 of the Charter.

[79] Administrative Jurisdiction Division of the Council of State 1 December 2022, ECLI:NL:RVS:2022:3531, legal ground 10.

[80] See Gerards' preliminary opinion, Section 4.2.4, and CJEU 18 February 2016, ECLI:EU:C:2016:96 (*Council/Bank Mellat*).

[81] Administrative Jurisdiction Division of the Council of State 25 January 2023, ECLI:NL:RVS:2023:289.

appellant had submitted petitions under the GDPR to gain access to personal data held by health insurers, and he also sought subsidised legal aid for that. He was denied the subsidised legal aid because it was not plausible that the complexity requirement had been met (Section 12(2)(g) of the Dutch Legal Aid Act). The appellant claimed that this contravened Article 47 of the Charter because it denied him access to the courts, and the court had not recognised this. This argument could be rejected citing an earlier ruling of the Division.[82] Finally, what can also be mentioned here is the Division's reference with respect to the preliminary question as to whether Article 47 of the Charter requires automatic suspensive effect to be granted to appeals in asylum cases. According to the Court of Justice, this is not the case.[83]

It is not just Article 47 that gets all the spotlights, as other articles of the Charter have also been discussed in cases of the General Chamber of the Administrative Jurisdiction Division of the Council of State. One of them is Article 15 of the Charter (freedom of profession and the right to work), which the Division mentions in its reference ruling on a sight-impaired lorry driver's fitness to drive.[84] The Division noted that in the context of the question of the proportionality of the Dutch Central Office for Motor Vehicle Driver Testing's refusal to certify the lorry driver, who suffered from a reduced field of vision, as being suitable to drive, could be subject to Article 15 of the Charter. It now remains to be seen whether the Court of Justice will consider Article 15 of the Charter in its ruling, in the interpretation of the Dutch driving licence directive or, as the Division suggests, in the proportionality review.[85]

In the ruling of 19 May 2021 on the Dutch Tax and Customs Administration's refusal to admit 'a person against whom there are serious objections' as a representative (Section 2:2(1) of the Dutch General Administrative Law Act), some substantive provisions also feature in addition to Article 47 of the Charter, namely Article 11 (freedom of expression), Article 16 (right to freedom to conduct a business), and Article 17 (right to property).[86] First, the Division determined that the Charter applied to the case (the director of the Dutch Tax and Customs Administration had argued that it did not).[87] It did apply because the fact that the representative in question acted on behalf of clients in the Netherlands and other Member States was not contested.

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[82] Legal ground 5.3, with reference to Administrative Jurisdiction Division of the Council of State 22 July 2020, ECLI:NL:RVS:2020:1743.

[83] Final judgment after referral: Administrative Jurisdiction Division of the Council of State 20 February 2019, ECLI:NL:RVS:2019:505.

[84] Administrative Jurisdiction Division of the Council of State 16 November 2022, ECLI:NL:RVS:2022:3273, legal ground 5.12.

[85] The reference has meanwhile been registered with the Court of Justice under number C-703/22 (*Central Office for Motor Vehicle Driver Testing (hemianopsia)*).

[86] Administrative Jurisdiction Division of the Council of State 19 May 2021, ECLI:NL:RVS:2021:1058; Administrative Jurisdiction Division of the Council of State 19 May 2021, ECLI:NL:RVS:2021:1060 and Administrative Jurisdiction Division of the Council of State 19 May 2021, ECLI:NL:RVS:2021:1061.

[87] Administrative Jurisdiction Division of the Council of State 19 May 2021, ECLI:NL:RVS:2021:1060, legal ground 4.1 and ECLI:NL:RVS:20221:1061, legal ground 5. The Charter does not apply in the case with ECLI number 1058, legal ground 4.1.

Therefore, refusing to accept him as a representative curtails his right to freedom to provide services.[88] Section 2:2(1) of the Dutch General Administrative Law Act can, therefore, be reviewed against the Charter. When it comes to Article 11 of the Charter, the Division dismisses the argument based on ECtHR case law on the corresponding Article 10 of the ECHR,[89] ruling that there was no interference with freedom of expression. The Division dismissed the invocation of Articles 16 and 17 on the basis of EU law alone, with reference to the Court of Justice's *YS* ruling.[90] The appeal to Article 47 of the Charter was also unsuccessful, as the Division relied on the Court of Justice's *Sacko* ruling in this case.[91] This ruling by the Division is a good illustration of how the Division gradually retreated from ECtHR case law in areas of EU law where the EU Court of Justice had already delivered 'useful' rulings, simply because a review against the ECHR does not add anything when there are CJEU rulings to go by. The case law of the Court of Justice also shows that, once there is some case law, the Charter ceases to be interpreted with reference to the ECHR.[92] In the ruling on the prohibition of advertising/promotion of online gambling under the Dutch Betting and Gaming Act, the Division performed the review against Article 11 of the Charter (freedom of expression) in conjunction with a review against Article 10 of the ECHR.[93] The review against Article 16 of the Charter (freedom to conduct a business) runs in parallel to the review against Article 56 of the TFEU (free movement of services).[94]

This overview confirms the Charter's major significance as a touchstone for all kinds of issues of administrative procedural law. It is not surprising that the Charter also features heavily in immigration cases before the Division, because, as mentioned, immigration issues are now largely governed by EU law in terms of substantive standards. Here, too, it is noticeable that the plethora of EU legislation and the ever-growing case law about it from Luxembourg, interpreted based on the Charter, is pushing the ECHR into the background.[95] When it comes to reviewing cases against substantive

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[88] The so-called *ERT* or *Pfleger* situation, CJEU 18 June 1991, ECLI:EU:C:1991:254 (*ERT*) and CJEU 30 April 2014, ECLI:EU:C:2014:281 (*Pfleger*). See also Gerards' preliminary opinion, Section 4.2.2, under b.

[89] ECLI:NL:RVS:20221:1061, legal ground 5.6.

[90] CJEU 14 September 2020, ECLI:EU:C:2020:753 (*YS*), legal grounds 5.7 and 5.8.

[91] CJEU 26 July 2017, ECLI:EU:C:2017:591 (*Sacko*), legal ground 5.9.

[92] For example, in the *DEB* ruling (CJEU 22 December 2010, ECLI:EU:C:2010:811) on the interpretation of Article 47 of the Charter, the Court of Justice still leans heavily on ECtHR case law on Article 6 of the ECHR, while in CJEU 6 October 2020 (ECLI:EU:C:2020:795 (*Luxemburg/B*)), for example, it merely mentions an ECtHR ruling on an element on which it has not provided an interpretation, i.e. the rights of 'tax third parties' to access to the court. See, without any reference to the ECtHR, also e.g. CJEU 1 August 2022, ECLI:EU:C:2022:605 (*I, S*) on Articles 7, 24 and 47 of the Charter.

[93] Administrative Jurisdiction Division of the Council of State 22 January 2020, ECLI:NL:RVS:2020:169, legal ground 10.

[94] Administrative Jurisdiction Division of the Council of State 22 January 2020, ECLI:NL:RVS:2020:169, legal ground 10.1.

[95] Apart from any interim measures, jurisprudence is generally developed at a slower rate in Strasbourg than in Luxembourg, Barkhuysen & Van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht (SBR Wetenschap)* 2023, p.178.

fundamental rights, Article 4 of the Charter trumps all others in a quantitative sense, because this article is the benchmark for transfer decisions under the EU's Dublin system.[96] This is the article for reviews of asylum seeker transfers to countries such as Greece,[97] Italy,[98] Malta,[99] Croatia,[100] Denmark,[101] Bulgaria,[102] Romania,[103] Slovenia,[104] Poland,[105] and Belgium.[106]

Article 24 of the Charter plays a key role in case law on the right of residence of third-country parents of Dutch children.[107] The Division has ruled, for example, that the interests of the child require that the child's emotional balance be taken into account in determining whether the child will be forced to leave the EU.[108] Article 24 of the Charter also plays a role in the question of whether a minor's asylum application can be declared inadmissible because they have already been granted temporary admission in another Member State. In the case of an unaccompanied minor who was to be deported to Romania, the Division ruled that it was unclear whether it was in the best interest of the child.[109]

The Charter was extraordinarily invoked in a migration law context – in addition to the ECHR – in the so-called 'reunification cases', namely by the Dutch State Secretary for Justice and Security.[110] These cases were about the legality of postponing family reunification for family members of asylum seekers who had been granted temporary admission (the so-called 'reunification measure'). In these cases, the State Secretary invoked 'the

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[96] Based on the rulings CJEU 19 March 2019, ECLI:EU:C:2019:218 (*Jawo*) and CJEU 16 February 2017, ECLI:EU:C:2017:127 (*CK*).

[97] Administrative Jurisdiction Division of the Council of State 23 October 2019, ECLI:NL:RVS:2019:3537.

[98] Administrative Jurisdiction Division of the Council of State 26 April 2023, ECLI:NL:RVS:2023:1655.

[99] Administrative Jurisdiction Division of the Council of State 15 December 2021, ECLI:NL:RVS:2021:2791.

[100] Administrative Jurisdiction Division of the Council of State 13 September 2023, ECLI:NL:RVS:2023:3411 and Administrative Jurisdiction Division of the Council of State 13 April 2022, ECLI:NL:RVS:2022:1043.

[101] Administrative Jurisdiction Division of the Council of State 6 July 2022, ECLI:NL:RVS:2022:1864.

[102] Administrative Jurisdiction Division of the Council of State 19 August 2023, ECLI:NL:RVS:2023:3133 and 3134.

[103] Administrative Jurisdiction Division of the Council of State 27 December 2023, ECLI:NL:RVS:2023:4844.

[104] Administrative Jurisdiction Division of the Council of State 8 September 2022, ECLI:NL:RVS:2022:2645.

[105] See, for example, Administrative Jurisdiction Division of the Council of State 12 November 2019, ECLI:NL:RVS:2019:380.

[106] See, among other sources, Court of The Hague 27 June 2023, ECLI:NL:RBDHA:2023:10313.

[107] So-called *Zambrano* case law, CJEU 8 March 2011, ECLI:EU:C:2011:124 (*Zambrano*) and more recently CJEU 10 May 2017, ECLI:EU:C:2017:354 (*Chavez Vilchez*): Article 20 of the TFEU prevents a minor who is a national of a Member State from having to leave the Union if its parents are deported because they are not entitled to a residence permit. The parent or parents, in turn, is or are then eligible for a residence permit because their minor child has one.

[108] For example, Administrative Jurisdiction Division of the Council of State 14 February 2022, ECLI:NL:RVS:2022:458, legal ground 5.2.

[109] Administrative Jurisdiction Division of the Council of State 31 March 2023, ECLI:NL:RVS:2023:1270. See also Administrative Jurisdiction Division of the Council of State 15 December 2023, ECLI:NL:RVS:2023:4685, with a clear assessment framework in legal ground 3.2 for the review against Article 24 of the Charter in this context.

[110] Administrative Jurisdiction Division of the Council of State 8 February 2023, ECLI:NL:RVS:2023:506; Administrative Jurisdiction Division of the Council of State 8 February 2023, ECLI:NL:RVS:2023:507 and Administrative Jurisdiction Division of the Council of State 8 February 2023, ECLI:NL:RVS:2023:508. As mentioned, administrative bodies can appeal to the Charter. In this case, however, the appeal was not so much intended to protect the State Secretary, but rather to protect the asylum seekers with a temporary residence permit and their families: they should be protected against inhuman treatment due to deficiencies in asylum seeker reception and processing practices.

hierarchy of legal standards', where the prevention of an imminent violation of Article 3 of the ECHR and Article 4 of the Charter would justify a violation of the Dutch Family Reunification Directive. As mentioned, administrative bodies can appeal to the Charter.[111] In this case, however, the appeal was not so much intended to protect the State Secretary, but rather to protect the asylum seekers with a temporary residence permit and their families: they should be protected against inhuman treatment due to deficiencies in Dutch asylum seeker reception and processing practices. Just like the courts had done, the Division rejected that argument, because of the mere fact that there was no (imminent) violation of those articles. In doing so, Court of Justice case law served as a yardstick.[112]

The Charter is also frequently invoked in cases on revocation of Dutch citizenship. The Charter applies here because withdrawal of Dutch nationality also means loss of EU citizenship and rights under Part II of the TFEU.[113] The Court found that a proportionality review must be conducted in such cases, albeit that granting and loss of nationality is, in principle, a matter for the Member States.[114] This brings the matter of withdrawal of nationality within the scope of EU law and makes it potentially subject to the Charter. The same applies when nationality is lost by operation of law.[115] The Division dismissed all appeals to Article 20 (equality before the law), Article 21 (non-discrimination), and Article 47 of the Charter both in cases where nationality was revoked on account of an irrevocable conviction for a terrorist offence[116] and in cases where nationality was revoked on account of conduct showing that a person has joined an organisation on the list of organisations that participate in a national or international armed conflict.[117] Even so, these articles continue to be invoked time after time. Especially the distinction that the Netherlands Nationality Act makes by only allowing revocation of nationality if the person concerned has another nationality apparently remains unacceptable.[118] In the first cases, the Division extensively reviewed whether the notification procedure under the Netherlands Nationality Act is consistent with Article 47 of the Charter.[119] The Division ultimately ruled that it is,

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[111] See Gerards' preliminary opinion, Section 4.2.4.

[112] With reference to rulings CJEU 21 December 2011, ECLI:EU:C:2011:865 (*NS*) and CJEU 19 March 2019, ECLI:EU:C:2019:219 (*Ibrahim*).

[113] In particular the right to travel and reside (and possibly work) in other Member States and the right to vote in municipal and European Parliament elections in another Member State.

[114] The so-called *Rottmann* review (CJEU 2 March 2010, ECLI:EU:C:2010:104 (*Rottmann*).

[115] CJEU 12 March 2019, ECLI:EU:C:2019:189 (*Tjebbes*), see final judgment of the Administrative Jurisdiction Division of the Council of State of 12 February 2020, ECLI:NL:RVS:2020:423, with a supporting role for the review against Articles 7 and 24 of the Charter.

[116] Section 14(2) Netherlands Nationality Act.

[117] Section 14(4) Netherlands Nationality Act, referred to as 'Syria fighters'.

[118] See for recent case law Administrative Jurisdiction Division of the Council of State 5 October 2022, ECLI:NL:RVS:2022:2861 (Section 14(2) Netherlands Nationality Act) and Administrative Jurisdiction Division of the Council of State 17 May 2023, ECLI:NL:RVS:2023:1938 (Section 14(4) Netherlands Nationality Act) with reference to prior case law.

[119] Administrative Jurisdiction Division of the Council of State 17 April 2019, ECLI:NL:RVS:2019:990, legal grounds 8.3 et seq.

because the resulting limitation on the right to effective judicial protection can be justified on the basis of the limitation clause of Article 52(1) of the Charter. The Division ruled that there is a lack of legal certainty for persons who left the country before Article 14(4) of the Netherlands Nationality Act came into effect.[120]

In proceedings on revocation of Dutch nationality on the basis of Article 14(1) of the Netherlands Nationality Act (non-disclosure of facts that were relevant to the granting of Dutch nationality), the Division had to rule on whether the procedure under Article 8:29 of the General Administrative Law Act (inspection of secret documents by the administrative judge) was compatible with the Charter.[121] The Division did so extensively, based on the Court of Justice's *ZZ* ruling.[122] Following a prior ruling,[123] the Division's judgment was ultimately that the rule under Section 8:29 of the Dutch General Administrative Law Act, as applied in this case, meets the criteria of Article 47 of the Charter. A key aspect of the reasoning is that the essential substance of the right to effective legal remedy under Article 47 of the Charter is not impaired.[124] The ruling also addresses the presumption of innocence under Article 48 of the Charter, which the appellant invokes because this provision allows for Dutch nationality to be revoked based on a suspicion. According to the Division, Article 48 of the Charter does not apply to the revocation of nationality, because it does not constitute a punitive sanction.[125] In its assessment of the proportionality review under EU law, the Division once again makes it clear that while family life under Article 7 of the Charter and the interests of children under Article 24 of the Charter do play a role on the basis of the *Tjebbes* ruling,[126] there must first and foremost be a situation where the person concerned really suffers consequences under EU law. According to the Division, this is not the case here.

A real EU law bonanza in administrative law is the obligation to review the legality of immigrant detention ex officio, i.e. regardless of the grounds of appeal. When asked, the Court of Justice interpreted EU law, and then in particular Article 6 of the Charter (right to freedom and security) as elaborated in secondary legislation in the field of migration law[127] and in the light of

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[120] Administrative Jurisdiction Division of the Council of State 17 April 2019, ECLI:NL:RVS:2019:990, legal grounds 10.3 and 10.4.

[121] Administrative Jurisdiction Division of the Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, legal grounds 9-9.5.

[122] CJEU 4 June 2013, ECLI:EU:C:2013:363 (*ZZ*).

[123] Administrative Jurisdiction Division of the Council of State 30 April 2021, ECLI:NL:RVS:2021:926, legal ground 16.2.

[124] A requirement clearly stipulated by Article 52(1) of the Charter (limitation clause). See Gerards' preliminary opinion, Section 4.5.5, under b.

[125] Administrative Jurisdiction Division of the Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, legal ground 6.3. whereby it follows the judgment of the court that invoked the rulings of the Court of Justice.

[126] CJEU 12 March 2019, ECLI:EU:C:2019:189 (*Tjebbes*).

[127] The Reception Conditions Directive (Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (*OJEU* 2013, L 180); the Return Directive (Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008

Article 47 of the Charter (effective judicial protection), in such a way that the court must assess legality regardless of the grounds put forward.[128] In the final judgment of 26 July 2023, the Division adjusts this obligation to the specifics of the Dutch situation[129] by considering the legality of immigrant detention a matter of public order, so that ex officio review of such detention fits within the system of Section 8:69 of the Dutch General Administrative Law Act. In fact, the judgment also compels periodic review of the legality of ongoing detention (para. 85), even if the person concerned does not request such a review. If detention continues, a double ex officio approach ensues, i.e. the court assessing the legality on its own initiative, and if necessary, proceeding to an ex officio review of aspects that were not put forward in the argument. This is what the courts have done pending legislation on this matter.[130]

2.3 And the winner is …

As already noted on several occasions in the foregoing, the Charter has a clear direct influence on administrative procedural law, especially in the case law of the Tax Chamber of the Supreme Court of the Netherlands and the Administrative Jurisdiction Division of the Council of State.
In recent case law of the Supreme Court, too, the *Kamino and Datema* ruling on the obligation to hear derived from Article 41 of the Charter as a legal principle plays a key role, because it allows for a correction to the exception provided by Section 4:12 of the General Administrative Law Act. The inspector may only do away with a hearing if it can be ruled out that a hearing could have made a difference for the case.[131] The Supreme Court also had to issue a ruling on whether Section 8:54 of the Dutch General Administrative Law Act (out-of-court dismissal with the option of opposition based on Section 8:55 of the Dutch General Administrative Law Act) conformed to the Charter.[132] The Supreme Court was also petitioned to assess whether Sections 7:2 and 7:3 of the General Administrative Law Act contravene Article 47 of

on common standards and procedures in Member States for returning illegally staying third-country nationals (*OJEU* 2008, L 348) and the Dublin Regulation (Regulation (EU) no. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (*OJEU* 2013, L180).

[128] CJEU 8 November 2022, ECLI:EU:C:2022:858 (*C, B and X*).

[129] Administrative Jurisdiction Division of the Council of State 26 July 2023, ECLI:NL:RVS:2023:2829.

[130] See, for example, Court of The Hague 6 March 2023, ECLI:NL:RBDHA:2023:2726.

[131] This started earlier following the *Kamino and Datema* case, see Supreme Court ruling after reference of 26 June 2025, ECLI:NL:HR:2015:1667. In immigration law, Article 41 of the Charter had already caused some commotion in 2013 through a CJEU ruling of 10 September 2013, ECLI:EU:C:2013:533 (*M.G. and N.R.*), which was a ruling along the same lines as the *Kamino and Datema* ruling and concerned the issue of (not) hearing someone prior to detention. Again, abstaining from a hearing is possible only if the decision could not have turned out differently with a hearing. In 2018, the Division also applied the *M.G. and N.R.* ruling to detention of Dublin claimants, Administrative Jurisdiction Division of the Council of State 2 May 2018, ECLI:NL:RVS:2018:1491. The defence principle was also successfully invoked before the Division to secure legal assistance for an immigrant, Administrative Jurisdiction Division of the Council of State 4 June 2018, ECLI:NL:RVS:2018:1814; for more about these latter two cases, see also A. Pahladsingh 2020, p. 11/12.

[132] Supreme Court 18 June 2021, ECLI:NL:HR:2021:966.

the Charter and the principle of defence if the inspector decides not to hear an appellant about an intention to declare an application inadmissible because the deadline was exceeded.[133] Article 47 was the touchstone for refusal to recognise a representative based on Section 8:25 of the Dutch General Administrative Law Act,[134] as it also was for a claim for compensation of interest paid as part of a reimbursement of court fees (Section 8:73 and 8:74 Dutch General Administrative Law Act).[135]

The Division was, in turn, confronted with arguments on incompatibility with Article 47 of the Charter of Section 1:4 of the Dutch Crisis and Recovery Act,[136] Section 8:29 of the Dutch General Administrative Law Act,[137] the abolition of the administrative and judicial penalty for asylum decisions,[138] the rules on subsidised legal aid,[139] the charging of court fees,[140] the competencies of a preliminary relief judge,[141] the notification procedure when revoking the Dutch nationality of Syria fighters under Section 14(4) of the Netherlands Nationality Act,[142] and of Section 2:2(1) of the Dutch General Administrative Law Act.[143] Add to this that in 2016 the Division ruled that asylum decisions had to be reviewed more rigorously under the influence of Article 47 of the Charter in the context of the so-called Procedural Directive,[144] and Article 47 clearly seems to be the pound-for-pound champion of Charter articles that has led to the most substantial and interesting rulings in the domain of administrative (procedural) law.

The Trade and Industry Appeals Tribunal also deals with procedural law issues, in particular *nemo tenetur* (Article 48 of the Charter) and legality (Article 49 of the Charter).[145] In addition, Article 16 (freedom to conduct a business) and

[133] Supreme Court 22 January 2021, ECLI:NL:HR:2021:84.
[134] Supreme Court 31 January 2020, ECLI:NL:HR:2020:173.
[135] Supreme Court 19 April 2019, ECLI:NL:HR:2019:623.
[136] Administrative Jurisdiction Division of the Council of State 29 July 2011, ECLI:NL:RVS:2011:BR4025.
[137] Administrative Jurisdiction Division of the Council of State 11 May 2022, ECLI:NL:RVS:2022:1267.
[138] Administrative Jurisdiction Division of the Council of State 30 November 2022, ECLI:NL:RVS:2022:3352 and Administrative Jurisdiction Division of the Council of State 30 November 2022, ECLI:NL:RVS:2022:3353.
[139] Administrative Jurisdiction Division of the Council of State 25 January 2023, ECLI:NL:RVS:2023:289.
[140] Administrative Jurisdiction Division of the Council of State 04 July 2011, ECLI:NL:RVS:2011:BR1257.
[141] Administrative Jurisdiction Division of the Council of State 1 December 2022, ECLI:NL:RVS:2022:3531.
[142] See Administrative Jurisdiction Division of the Council of State 17 April 2019, ECLI:NL:RVS:2019:990.
[143] Disqualification as attorney, Administrative Jurisdiction Division of the Council of State 19 May 2021, ECLI:NL:RVS:2021:1060 and Administrative Jurisdiction Division of the Council of State 19 May 2021, ECLI:NL:RVS:2021:1061.
[144] Administrative Jurisdiction Division of the Council of State 13 April 2016, ECLI:NL:RVS:2016:890 and Administrative Jurisdiction Division of the Council of State 13 April 2016, ECLI:NL:RVS:2016:891. See also Pahladsingh 2020, p. 13 and 14.
[145] See detailed opinion of the Advocate General in three cases before the Trade and Industry Appeals Tribunal: Trade and Industry Appeals Tribunal 22 May 2018, ECLI:NL:CBB:2018:187 and, for example, Trade and Industry Appeals Tribunal 26 October 2021, ECLI:NL:CBB:2021:960 and Trade and Industry Appeals Tribunal 26 October 2021, ECLI:NL:CBB:2021:961, legal ground 5.3.

Article 17 of the Charter (property) are regularly invoked before this tribunal.[146]

At the Trade and Industry Appeals Tribunal is where we see, in relative terms, the fewest procedural law provisions invoked (Article 41 (defence principle) sometimes) and actually more substantive provisions. Article 1 (human dignity), Article 4 (torture and inhuman treatment), Article 7 (private life), and Article 24 (rights of the child) of the Charter regularly feature in Trade and Industry Appeals Tribunal case law.[147]
To close this brief summary, the role of administrative bodies in this context should also be noted. Being official bodies of the Member State of the Netherlands, they, too, must apply the Charter.[148] It would be interesting to investigate how they fulfil and have fulfilled that role. Unfortunately, I didn't have the time to do that.

[146] Such as Trade and Industry Appeals Tribunal 23 July 2019, ECLI:NL:CBB:2019:291, legal ground 6.1.5 and Trade and Industry Appeals Tribunal 17 March 2020, ECLI:NL:CBB:2020:159, legal ground 5.3.
[147] See, for example, Central Appeals Tribunal 23 May 2023, ECLI:NL:CRVB:2023:1087, legal grounds 4.4. and 4.5.
[148] CJEU 22 June 1989, ECLI:EU:C:1989:256 (*Fratelli Costanzo*).

3 The (added) value of the Charter

3.1 Compared to the ECHR

Gerards' preliminary opinion has already gone into the added value of the Charter compared to the ECHR in general terms,[1] pointing out that the Charter contains more rights than the ECHR, for example, and government bodies and state holdings can also invoke it.[2] Article 52(3) of the Charter explicitly allows ECHR-corresponding rights from the Charter to be interpreted more broadly.[3] This prompted Widdershoven and Barkhuysen to argue that, within the scope of EU law ('implementing', Article 51(1) Charter), the review must always start with the Charter.[4] After all, the Charter offers at least the same protection as the ECHR and the review must be against the instrument that offers the most protection (***recommendation 1***). Whether or not to then also review against the ECHR is another question. Advocate General Widdershoven goes quite far in this respect. In his own words '[…] A third reason why it is important to determine that a rule falls within the scope of Union law is of a principled nature. In my view, the primacy of the Charter under Union law prevails over the primacy of the ECHR or UNCRC under Sections 93 and 94 of the Constitution. Therefore, whether or not to apply the ECHR ceases to be an issue when the Charter applies.'[5] Personally, I would generally not want to go that far at this point in time. Firstly, ECtHR case law is sometimes still needed to interpret provisions of the Charter.[6] Secondly, as described below, it is not always clear when the Court of Justice uses the possibility to interpret provisions of the Charter more broadly (Article 52(3) of the Charter). In day-to-day legal practice, it may be wise under certain circumstances to review against both instruments.

As pointed out earlier, the Charter allows the European Commission to bring infringement proceedings and courts to submit references for a preliminary ruling about the provisions of the Charter.[7] Meanwhile, Protocol 16 offers the highest courts the option under the ECHR to submit questions to

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1 Barkhuysen & Van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht (SBR Wetenschap)* 2023, Section 2.4 and 5.3. See Gerards' preliminary opinion, Section 5.

2 For an example, see Administrative Jurisdiction Division of the Council of State 29 July 2011, ECLI:NL:RVS:2011:BR4025 (*Kerkrade*).

3 This comes in addition to the fact that some rights, such as Article 47 of the Charter, have already been formulated more broadly; for the complete overview by the Fundamental Rights Agency, see FRA (FRA 2018 (FRA classifies Article 8 (personal data), Article 9 (marriage and founding a family), Article 12 (meeting and association), Article 14 (education), Article 47 (judicial protection) and Article 50 (ne bis) of the Charter as 'broader' than the ECHR).

4 Barkhuysen 2011, p. 27.

5 Opinion Administrative Jurisdiction Division of the Council of State 18 May 2022, ECLI:NL:RVS:2022:1440, para. 5.4.

6 See also Gerards' preliminary opinion, Section 5.2.1.

7 Barkhuysen & Van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht (SBR Wetenschap)* 2023, p. 178 and 179.

the Strasbourg Court. However, the Strasbourg Court will only return a non-binding opinion. It remains to be seen whether this instrument will properly take off.[8] Moreover, it seems that as soon as EU law is applicable, it is no longer relevant to seek an opinion from Strasbourg, given the highest courts' obligation to refer under the *Cilfit* doctrine.[9] It must also be noted here that the Charter has a reflex effect on ECtHR case law.[10] The possibility of extraterritorial effect of the Charter, through secondary legislation, has also been broached.[11]

In an essay for a book entitled *20 jaar Vreemdelingenwet 2000*, I described together with Daalder and Fernandez how the much-cited broader protection by the Charter for corresponding rights as referred to in Article 52(3) of the Charter takes concrete form.[12] This is firstly because the Charter is most often interpreted and applied within the framework of secondary EU legislation.[13] This has a kind of flywheel effect on the result. The influence of Article 7 (privacy) and Article 8 (data protection) of the Charter in the context of the former Privacy Directive and now the General Data Protection Regulation (GDPR) is, for example, stronger than that of Article 8 ECHR (which also includes the right to data protection).[14] In such cases, the mixing of substantive legislation with fundamental rights often results in a stricter review for national measures than a review against only the independent fundamental rights of the ECHR.[15] Other authors have also noted that the interpretation of certain fundamental rights in the context of EU law continues: freedom of religion (Article 10 of the Charter) in the context of asylum law,[16] human dignity (Article 1 of the Charter) placing higher demands on assistance than Article 8 ECHR,[17] the stricter requirements for substantiating a deportation measure on grounds of public security based on Article 47 of the Charter compared to Article 6 of the ECHR,[18] and the more far-reaching protection of other sexual orientations in asylum law because greater weight is attached to self-

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[8] Netherlands Research and Data Centre; which shows low use of the instrument in ECHR countries and no use of the instrument at all in the Netherlands.

[9] Article 267 of the TFEU; ruling CJEC 6 October 1982, ECLI:EU:C:1982:335 (*Cilfit*) and recently CJEU 6 October 2021, ECLI:EU:C:2021:799 (*Consorzio*).

[10] See Daalder 2021, Section 2.

[11] Barkhuysen & Van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht (SBR Wetenschap)* 2023, p. 43 and 44, where he mentions ruling CJEU 13 May 2014, ECLI:EU:C:2014:317 (*Google Spain*) as an example.

[12] Daalder 2021, p. 147-164.

[13] Within the scope of EU law, Article 51(1) Charter. For more about his scope of application, see Gerards' preliminary opinion, Section 4.2. The Charter also applies when national measures limit freedom of movement.

[14] Daalder 2021, Section 6.

[15] De Heer & de Vries, 'Over Google Spain en Schrems,' in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 101-120, on the influence of Article 7 (privacy) and Article 8 (data protection) of the Charter.

[16] CJEU 5 September 2012, ECLI:EU:C:2012:518 (*Y and Z*); see Zwaan & Terlouw, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 83-100, on p. 90-91: in this context, it is important that the subjective experience of faith also falls under religion and that it is not allowed to require discretion in expressing one's faith (in the country of origin).

[17] See Pennings 2022.

[18] CJEU 4 June 2013, ECLI:EU:C:2013:363 (*ZZ*), see De Waele, in: Pahladsingh 2016, p. 261-282, who even goes so far as to state that this ruling from Luxembourg undermines state security.

identification.[19] Secondly, we found a clearly broader interpretation in accordance with Article 52(3) in three cases from the Court's case law of up to the time of writing of the aforementioned essay (2020). The broader interpretation of the prohibition of ne bis in idem (Article 50),[20] a broader interpretation of academic freedom (Article 13),[21] and – via the Reception Conditions Directive – a broader interpretation of the concept of 'detention' (Article 6) than under the ECtHR.[22] Actually, the Court of Justice does not systematically state the fact that it is providing a broader interpretation. In the ruling on academic freedom, the Court does state this explicitly,[23] but in the *FMS* case it does, unfortunately, not do so at all,[24] while it does so indirectly in the *Menci* case by following the Advocate General's opinion, who had advocated a broader interpretation and because the Court does explain in the ruling that the end result after application of the limitation clause of Article 52(1) of the Charter 'is not contrary to the ECHR'.[25] In the aforementioned contribution, we argued that the Court of Justice should not be too liberal in making use of broader protection under Article 52(3) of the Charter, and that, if it does happen, this should be explicitly for the benefit of legal practice (***recommendation 2***). In a more recent ruling, the Court did make this clear by indicating that Article 15(c) of the Qualification Directive is broader than the protection of Article 3 of the ECHR.[26] Thirdly, it is important to note that the limitation clause of Article 52(1) of the Charter, which allows for justification of limitations, potentially involves a stricter review than the second paragraph of the corresponding articles of the ECHR. The requirement that the limitation must be provided for by law,[27] the lack of a generally applicable 'margin of appreciation'[28] and 'fair balance' doctrine, the requirement that the essence of the right may not be infringed, the proportionality review under EU law that may potentially pick holes in the appropriateness and strict necessity of a

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[19] CJEU 2 December 2014, ECLI:EU:C:2014:2406 (*ABC*). See Zwaan & Terlouw, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 143-158, on p. 151.

[20] CJEU 20 March 2018, ECLI:EU:C:2018:197 (*Menci*), whereby the Court in Luxembourg is more likely to find an infringement, but where the result was ultimately similar to the ECtHR ruling of 15 November 2016, ECLI:CE:ECHR:2016:1115JUD002413011 (*A and B vs Norway*) via the limitation clause of Article 52(1) of the Charter.

[21] General Court 6 October 2020, ECLI:EU:C:2020:792 (*Commission/Hungary*).

[22] CJEU 14 May 2020, ECLI:EU:C:2020:367 (*FMS*).

[23] CJEU 14 May 2020, ECLI:EU:C:2020:367, para. 226.

[24] The Court even entirely ignores the ECtHR ruling that delivers a different interpretation of Article 5 of the ECHR in the same context (the detention of asylum seekers in the Röszke transit area (Hungary)), ECtHR 21 November 2019, ECLI:CE:ECHR:2019:1121JUD004728715 (*Ilias and Ahmed*).

[25] ECtHR 21 November 2019, ECLI:CE:ECHR:2019:1121JUD004728715 ruling (*Ilias and Ahmed*), paras. 61 and 62.

[26] CJEU 9 November 2023, ECLI:EU:C:2023:843 (*X and Y*), para. 66.

[27] In the context of the ECHR, the concept of 'prescribed by law' can also constitute unwritten law or policy rules, provided that these are knowable and foreseeable, cf. also Barkhuysen & Van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht (SBR Wetenschap)* 2023, p. 51.

[28] See further Gerards' preliminary opinion, Section 4.5 and 4.6. According to Barkhuysen & Van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht (SBR Wetenschap)* 2023, p. 172, this doctrine is actually intended primarily for the relationship between the ECHR and the Treaty Countries, and not a margin that the national court must also use.

measure[29] – it could all lead to a stricter regime for Member States.[30] One explanation for this is a system difference: Article 52(1) of the Charter is applied within the EU legal order where consistent and unified interpretation and application are of great importance, while the Strasbourg rulings concern the more case-based question of whether a conviction is appropriate. Whether a stricter review is actually performed via Article 52(1) of the Charter subsequently depends partly on the jurisdiction. The Court of Justice also gives Member States a relatively great deal of discretion in certain areas of law, such as public order and security.[31] Nevertheless, the review of whether the limitation is justified may be strict even in such an area.[32] As a result, whether the criteria of Article 52(1) of the Charter in a specific case actually lead to a different review than under the comparable article of the ECHR may, therefore, differ from one case to the next.[33]

3.2 The Charter's autonomy

It is tempting to measure the value of an instrument like the Charter, which has been added to the fundamental rights toolbox relatively recently, against what was already there, but what does that really get us? The obvious comparison is, of course, with the ECHR, as discussed in Section 3.1. Or should I say that that is the comparison that is always lurking? The way I see it, the significance of the Charter cannot be extrapolated from such a comparison. First of all, the effect of the two instruments is different, which makes them difficult to compare, at least in an administrative law context. It is still somewhat a case of comparing apples and oranges.[34] As outlined above, the Charter gives substance to secondary EU law and the resulting substantive standards can hardly be viewed in isolation of this, while standards set in the ECHR are only derived from the fundamental right in question. One example is the standard for privacy protection when bulking data: *Ms Marper* based on Article 8 of the ECHR on the one hand and rulings such as *Digital Rights* and *Tele2 Sverige* based on Article 7 of the Charter on the other.[35] However, the same goes for

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[29] In the context of limitations on fundamental rights under Article 51(1) Charter, the Court uses the strict necessity review, see, for example, CJEU 15 February 2016, ECLI:EU:C:2016:84 (*J.N.*), para. 56, and CJEU 23 March 2023, ECLI:EU:C:20230:234 (*DualProd*), para. 67.

[30] For more details of this regime, see Daalder 2021 p. 157-160. In this sense also on the application of Article 7 and 8 of the Charter for tax law, e.g. Vissers, in: Netherlands Tax Science Society (VVBW) 2018, p. 17 and 18, and Pauwels, in: Netherlands Tax Science Society (VVBW) 2018 on Article 17 of the Charter. The intensity of review is, in his view, greater than under Article 1 of the First Protocol, p. 29.

[31] CJEU 22 May 2012, ECLI:EU:C:2012:300 (*P.I.*), para. 23.

[32] See, for example, CJEU 4 June 2013, ECLI:EU:C:2013:363, para. 64 et seq. (limitation of the infringement of Article 47 of the Charter to 'that what is strictly necessary'). And also according to De Waele, 'Effectieve rechtsbescherming tegen verwijderingsmaatregelen,' in: Pahladsingh 2016 p. 278.

[33] See Gerards' preliminary opinion, Section 4.6, and the literature cited there.

[34] For the role of these system factors, see also Gerards' preliminary opinion, Section 2.

[35] See Daalder 2021, Section 4 and 5. This issue (data retention for the fight against crime) is actually still pending a ruling from the Luxembourg Court, opinion CJEU 28 September 2023, ECLI:EU:C:2023:711 (*La Quadrature du Net II*) and has meanwhile been referred to the full Court. It is not unthinkable that the case law will be adjusted slightly in the future to approximate that of the ECtHR.

the observation that the concept of 'freedom of religion' (Article 10 Charter) in EU asylum law has a different meaning than Article 9 ECHR as a 'separate' right to this freedom.[36] Another example is the obligation of ex officio review of immigrant detention that the Court of Justice has derived from the effect of Article 6 of the Charter (right to freedom and security) in three directives in the field of migration, also viewed in the light of Article 47 of the Charter (effective judicial protection).[37] In addition, the Court of Justice does not always indicate whether the interpretation of a corresponding law derogates from the case law of the ECtHR.[38] Also, cases under review are rarely exactly the same. As the case law from Luxembourg moves away from the interpretation used by the ECtHR, as is already happening in a number of areas, it becomes increasingly difficult and less meaningful to ask whether it yields something different: it is simply stand-alone case law that makes up the measure of things within the European Union. A good example of this is the case law on the right to an effective judicial protection (Article 47), one of the fundamental rights that has major impact on administrative law.[39] While the Court of Justice initially referred to the Strasbourg case law on effective judicial protection under Articles 6 and 13 of the ECHR,[40] such reference is often no longer made in rulings on Article 47 of the Charter. The Court builds on its own case law and applies it to all areas of EU law. Given the great importance of Article 47 in both Court of Justice case law and in Dutch administrative law, it is regrettable that the Court has still not succeeded in clarifying the precise relationship of this article with the so-called *Rewe* case law.[41] Regardless of the approach and reasoning,[42] it is unclear why the Court in certain cases only reviews national procedural law against the *Rewe* principles,[43] or only against Article 47 of the Charter,[44] or both.[45] As a result, national courts do not know when to do what[46] (***recommendation 3***).

Secondly, determining the added value is complicated by the fact that the criteria are not clear. Is the added value of the Charter backed up by figures on

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[36] According to Zwaan & Terlouw, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p.83-108, op p. 90-92.

[37] CJEU 8 November 2022, ECLI:EU:C:2022:858 (*C, B and X*).

[38] See Section 3.1.

[39] See Section 2.3.

[40] CJEU 22 December 2010, ECLI:EU:C:2010:811 (*DEB*).

[41] CJEU 16 December 1976, ECLI:EU:C:1976:188 (*Rewe*). This ruling says that when there are no specific EU procedural rules, Union law must be implemented in accordance with national procedural law under what is known as Member States' procedural autonomy. This is subject to two preconditions: equality and effectiveness.

[42] For more details, see Van Heijningen & Sevenster 2013, p.51-76, op p. 57-67.

[43] As it did recently in CJEU 5 September 2023, ECLI:EU:C:2023:626 (*X*).

[44] As in CJEU 6 October 2020, ECLI:EU:C:2020:795 (*Luxembourg/B*).

[45] As in CJEU 21 August 2022, ECLI:EU:C:2022:611 (*TL*).

[46] See also Timmermans, 'Het doeltreffendheidsbeginsel na Puskar,' in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 225-246 and the literature cited there. For a recent balancing act in this area, see the Division's rulings on the administrative (*Rewe* case law) and judicial penalty (Article 47 Charter), Administrative Jurisdiction Division of the Council of State 30 November 2022, ECLI:NL:RVS:2022:3352 and 3353.

how often it is cited in national case law?[47] Does the Charter only have added value if national legislation or decisions have failed? The fact that national legislation and decision-making within the scope of EU law, i.e. in many areas of administrative law,[48] must comply with the Charter, meaning that many more regulations and resolutions must conform to fundamental rights, seems in itself beneficial for everyone, even if they are upheld in the case law. Especially because the ECHR has a limited scope and, for the time being, constitutional review of formal legislation is lacking in our country.

Apart from the possible added value of the Charter compared to the corresponding provisions from the ECHR (which are indeed important, but they make up only fifteen of the total of fifty Charter provisions), the Charter has its own autonomous value and right to exist. The provisions may, therefore, have a direct effect (unlike, for example, certain equivalents in treaties[49]). The EU Fundamental Rights Agency (FRA) also points out that the Charter can help raise the visibility of fundamental rights more generally.[50] The more fundamental rights, the better, the FRA must have thought in this regard. This, in turn, can lead to a certain reflex effect in national law through fundamental international rights, such as with the inclusion of a right to effective judicial protection in Section 17 of the Constitution.[51]

The value of the Charter further lies in the fact that it applies in full to areas of law affected by EU law. The entire catalogue of rights must be observed when making and applying national legislation that comes within that scope. The review against fundamental rights from other instruments, such as the ECHR or UNCRC, is more incidental.

In legal practice, the Charter has, therefore, been functioning for some time, albeit that it is increasingly also used as a touchstone and measure of things in Dutch administrative law. This is, of course, also the case on the legislative side.[52] Explanatory notes to proposals in the field of administrative law increasingly also address how the proposal relates to the Charter, whereby the Charter is sometimes mentioned in one and the same breath as the ECHR or other fundamental rights provisions. Sometimes it is not referenced at all, however, as in the case of the request for information on the bill on data processing by collaborative organisations, where the focus was mainly on

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[47] Cf. the highly informative studies by Krommendijk, who took a primarily quantitative approach to this impact assessment. See section 2.1.

[48] Even those that are not fully covered by the ECHR, such as migration law and parts of tax law.

[49] Case law originally assumed that Article 3 of the UNCRC was not a 'universally binding' provision within the meaning of Sections 93 and 94 of the Constitution. At a later stage, the Division added further nuance here on the back of Article 24 of the Charter, which contains the same provision, and the Central Appeals Tribunal later followed suit; for the most recent case law in this regard, see Administrative Jurisdiction Division of the Council of State 15 December 2023, ECLI:NL:RVS:2023:4685, legal ground 3.2.

[50] FRA 2018.

[51] Based on both Article 6 of the ECHR and Article 47 of the Charter.

[52] FRA 2018 already mentions the example of an opinion on a 2017 bill on financial supervision legislation, where the Council of State requested further justification in light of Article 17 of the Charter.

conformity with Section 1 of the Constitution.[53] If no or insufficient account is rendered on compliance with the Charter, the Advisory Division of the Council of State does usually address this, so as to enable the government to rectify and provide proper substantiation in the subsequent report. One example of this is the Division's opinion on the proposal to amend the Aliens Act of 2000 to extend the term within which asylum and family reunification cases must be settled.[54] In its opinion, the Division asked the government to further consider how the proposal related to Article 47 of the Charter (effective legal remedy) and whether the stacking of time limits is consistent with Article 7 of the Charter (family life) and the UNCRC, among other things.[55] In most cases, the Advisory Division's comments are limited to asking the government 'to further consider' questions relating to the Charter. In some cases, however, a substantive discussion also unfolds, mostly because the government itself already addresses the Charter's significance with respect to the bill in its explanatory statement. For an example of this, I would point to the bill for legislation to evaluate the Dutch Political Party Financing Act, which triggered a substantive debate between government and the Division on the meaning of several articles from the Charter, including Article 7 (privacy) and Article 8 (personal data).[56] Incidentally, in the vast majority of cases, even the Advisory Division addresses both the ECHR and the Charter (and other treaties and the Constitution) in one and the same breath. This is even more understandable when dealing with legislation, as everything must be checked. It may actually not be possible at that stage to foresee precisely in which cases the Charter may apply.

We have seen above that there can be ambiguity surrounding the applicability of the Charter in administrative law practice. On top of that, the meaning of the Charter and legislation's conformity to the Charter is not always clear either, in part because the often limited review against the Charter traditionally follows a comprehensive review against the ECHR. To maximise clarity for legal practice, legislators should include a Charter-oriented justification in the explanatory memorandum when a bill interfaces with the Charter (***recommendation 4***). This should also address the question of when and how the Charter will apply. If the legislator introducing additional rules without being obliged to, such as declaring a directive applicable by analogy, leads to 'over-implementation', it would be good to indicate whether the intention is then also that the Charter applies by analogy. This might prevent proceedings but will at least spare administrative law practitioners a lot of

[53] Opinion of the Council of State 18 November 2021 W16.21.0223/II/Vo, Advisory information regarding the bill for the Dutch Data Processing by Collaborative Organisations Act, see paragraph 5 of the Advisory Information, which states that Article 20 and Article 21 of the Charter are also relevant.

[54] Opinion of the Council of State 8 February 2023 W16.22.00182/II, Amendment of the Aliens Act of 2000 to extend the term within which asylum and family reunification cases must be settled, paras. 2 and 3.

[55] Oddly enough, the Division does not refer to Article 24 of the Charter here.

[56] Opinion of the Council of State 26 August 2020 W04.20.0035/I, Political Party Financing Act Evaluation Act, para. 6a.

hassle figuring out what applies and what does not. Failing that, it will be up to the Advisory Division to continue to draw attention to this.
In conclusion, I thus advocate abandoning the way the significance of the Charter is still usually interpreted in Dutch administrative law practice, i.e. by comparison to the ECHR in particular (***recommendation 5***). On the occasion of its fifteenth anniversary, let us give the Charter its autonomy as a gift.[57]

[57] Of course, this does not alter the fact that when it comes to (judicial) reviews, it is important to know what the Charter offers relative to the ECHR. After all, there may still be cases where it is unclear whether and how the Charter provides broader protection than the ECHR and a review against both will be required.

4 A look back and ahead

4.1 A look back

In the early days after the Charter became binding in 2009, courts and legislators struggled with its scope of application. How should Article 51(1) be interpreted exactly?[1] By now, courts know how to navigate the Charter's scope of application, which does not mean, however, that attorneys never invoke the Charter when it does not apply.[2] After all, nothing ventured, nothing gained.[3] Today, in 2023, it would be good if, in response to such shots from the hip by attorneys, courts would use the 'regardless of whether the Charter applies' construction as little as possible, so as to prevent unnecessary confusion (***recommendation 6***). Now that the dust of Article 51 of the Charter has more or less settled with the help of many rulings of the Court of Justice, we are seeing that the Charter plays a permanent role as a touchstone in various areas. This goes especially for Article 47 (effective judicial protection), but also for the rights of the defence (Article 48(2)) and the obligation to hear (Article 41, as a legal principle). And it goes for Article 7 (private life) and Article 24 (rights of the child) in cases before the Division and the Trade and Industry Appeals Tribunal.

We can conclude that, at European level, the Court of Justice is increasingly dominant in case law on fundamental rights. There is a rapidly growing body of Luxembourg case law on the Charter, and in several areas the ECtHR no longer intervenes in the case law.[4] Following on from this, we also see that the (supreme) courts are reviewing more and more cases solely on the basis of the Charter, where they initially reviewed against the ECHR.[5] Seeing as the Charter offers at least the same protection, this is understandable, provided that the Court has provided sufficiently clear lines. This latter caveat is important to add because these clear lines are not yet provided in all cases.[6] The ECHR is, consequently, gradually withdrawing from the scope of EU law. The

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[1] See also Wissels & Van Heijningen, 'Doorwerking EU-Handvest in de rechtspraak van de Afdeling bestuursrechtspraak: van vorm naar inhoud?' in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p.137-156.

[2] See Section 2.2.

[3] And sometimes these ventures are successful, such as in the case of the splendid review against Article 16 of the Charter (freedom to conduct a business) in a ruling on which parties are subject to a designation order on the mandatory use of face masks, Court of Rotterdam, 16 December 2021, ECLI:NL:RBROT:2021:12796, legal grounds 5.6-5.8. It is not clear why Article 16 of the Charter is considered applicable in this case.

[4] See, for example, CJEU 18 January 2024, ECLI:EU:C:2024:54 (*RTL Nederland*). The Division had addressed not only Article 11 of the Charter (freedom of expression) but also Article 10 of the ECHR, but the Court does not mention the latter at all.

[5] See, for example, Administrative Jurisdiction Division of the Council of State 30 November 2022, ECLI:NL:RVS:2022:3353; abolition of judicial penalty in asylum cases is only reviewed against (and found to be in conflict with) Article 47 of the Charter.

[6] The Trade and Industry Appeals Tribunal, for example, still often rules based on the ECHR, including lex certa (Article 49 of the Charter, Article 7 of the ECHR), and property (Article 17 of the Charter, Article 1 of the First Protocol), see Section 2.2 for details.

dilemma of two partly overlapping fundamental rights catalogues for national legal practice may thus also be resolved automatically.[7] To avoid misunderstandings, I would like to emphasise the obvious and undiminished importance of the ECHR for countries that are not also members of the European Union.

So, yes, the emperor does indeed have new clothes. Within the scope of EU law, there is a brand-new catalogue with a wide variety of fashion items, including both timeless classics with a modern twist (such as Article 8 of the ECHR in Article 7 of the Charter) and a new collection (such as the rights of the child (Article 24 of the Charter) and the principles[8]).

4.2 A look ahead; consequential effect and a crystal ball

The rise of Article 47 as a benchmark for administrative procedural law is striking. This provision affects many areas of EU law and many aspects of litigation.[9] The Court of Justice sometimes sets detailed criteria for judicial protection.[10] In this way, a form of European procedural law could emerge, especially now that the Court also appears to require provisions that are not actually available on a national level.[11] Such European procedural law will undoubtedly have a reflex effect outside the scope of the Charter. It is, of course, always a choice whether or not to seek alignment with EU criteria, as there may be good reasons not to.[12] However, the question that will inevitably arise is whether there are also good reasons to seek alignment with EU criteria, as happened with the reflex effect of the transparency[13] and proportionality principles under EU law.[14] The Division's line of reasoning on court fees in light of Article 47 of the Charter[15] has also been followed outside the scope of

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[7] In my opinion, this is actually a bit of a 'luxury problem' or, as my daughters would say: 'first world problem!'.

[8] See Gerards' preliminary opinion, Section 4.4.

[9] See Section 2.2 and Section 2.3 above.

[10] Cf. Gerards' preliminary opinion, Section 4.7 and Beijer 2015.

[11] As early as in the *Factortame* ruling, the Court inferred from the principle of effective judicial protection that preliminary rulings must be provided as an option, CJEU 19 June 1990, ECLI:EU:C:1990:257 (*Factortame*). See also Lange 2023.

[12] The Supreme Court of the Netherlands seems to, for example, simply apply Section 4:12 of the Dutch General Administrative Law Act (no obligation to hear) outside the scope of EU law, thus limiting the *Kamino* case law to EU law. See also Pahladsingh, p. Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 138/139. In Netherlands Tax Science Society (VVBW), p. 73 et seq., Weijers argues for uniform procedural law in all cases within and outside the scope of application of EU law, on p. 83-85.

[13] Administrative Jurisdiction Division of the Council of State 2 November 2016, ECLI:NL:RVS:2016:2927 (*slot machines Vlaardingen*). With opinion of the Advocate General, Administrative Jurisdiction Division of the Council 25 May 2016, ECLI:NL:RVS:2016:1421, including references to Supreme Court case law. See also Trade and Industry Appeals Tribunal 3 June 2009, ECLI:NL:CBB:2009:BI6466.

[14] Administrative Jurisdiction Division of the Council of State 2 February 2022, ECLI:NL:RVS:2022:285 (*Harderwijk*), with accompanying opinion, Administrative Jurisdiction Division of the Council of State 7 July 2021, ECLI:NL:RVS:2021:1468.

[15] Administrative Jurisdiction Division of the Council of State 4 July 2011, ECLI:NL:RVS:2011:BR1257.

application of EU law.[16] Moreover, experience with reviewing against the Services Directive in internal situations[17] has shown that use of a 'regardless of whether the Charter applies' construction is conducive to a reflex effect, simply because cases not in scope of the Charter are then still reviewed against the same criteria[18] (***recommendation 7***).

While the position of rights of a more procedural nature, such as Article 41 (good administration), Article 47 (effective judicial protection), and Article 48 (rights of defence), has gradually become anchored in national legal practice, it is further expected that some more substantive standards will still gain in importance. We are currently already seeing that certain fundamental rights serve to clarify secondary law, thereby tightening the rules of that secondary law.[19] This concerns the more well-known fundamental rights that correspond with ECHR rights. However, just as the right to human dignity, which many thought was a kind of general symbolic kick-off in Article 1, still became substantive, including in the assessment of asylum applications on the grounds of sexual orientation, and of assistance and reception,[20] other rights that are still underexposed may also gain in importance. One such other right may very well be the equality of women and men (Article 23 of the Charter). The principles of a 'high level of environmental protection' (Article 37) and a 'high level of human health protection' (Article 35) could in the future also gain in importance on a national level in areas where secondary law applies.[21]

Interpretation of the rights of the child (Article 24) will also develop further.[22] What is interesting in this context is that these rights appear to have a bigger impact on case law formation in civil law than in administrative law so far.[23]

I furthermore expect the Court of Justice to provide greater clarity on the concept of 'essence of the right' in the limitation clause of Article 52(1).[24] Finally, the Court will sooner or later have to rule on the question of when something can be considered an abuse of Charter rights. Article 54 of the Charter contains an anti-abuse clause comparable to Article 35** of the ECHR

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[16] Administrative Jurisdiction Division of the Council of State 19 March 2014, ECLI:NL:RVS:2014:914; Administrative Jurisdiction Division of the Council of State 19 March 2014, ECLI:NL:RVS:2014:915, legal ground 5.3 and Supreme Court of the Netherlands 28 March 2014, ECLI:NL:HR:2014:699, legal ground 3.3.7.

[17] Before the *Appingedam* ruling cleared this up, CJEU 30 January 2018, ECLI:EU:C:2018:44 (*X and Visser*).

[18] See, for example, the extensive 'to the extent applicable' review in Administrative Jurisdiction Division of the Council of State 19 January 2011, ECLI:NL:RVS:2011:BP1354 (*Hornbach*), legal grounds 2.4.3-2.4.7.

[19] Article 7 and 8 for the GDPR, Article 4 for the Dublin Regulation, Article 7 and 24 for the application the Family Reunification Directive and the *Chavez* case law. See also above Section 2.2 and 3.2.

[20] CJEU 15 July 2021, ECLI:EU:C:2021:602 (*CG*) 1 and CJEU 27 September 2012, ECLI:EU:C:2012:594 (*Cimade*).

[21] On Article 37, see Sanderink & Nymeijer, 'De invloed van het EU-Handvest op het omgevingsrecht,' in Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 463-482.

[22] The great potential of Article 24 of the Charter is apparent in, for example, CJEU 6 June 2013, ECLI:EU:C:2013:367 (*M.A.*). From this Article (24(2)), the Court infers a prohibition on the transfer of minor asylum seekers to other Member States, outside the wording of the Dublin Regulation (Dublin II) that was applicable at the time. See Rodrigues, in: Pahladsingh 2016, p. 245-260.

[23] See *Toepassing van het IVRK in de Nederlandse rechtspraak, Deel III*, 2021, Centre for Children's Rights, Amsterdam.

[24] See Boekestein 2022.

(abuse of one fundamental right to restrict another), but EU law also has a general legal principle that prevents abuse of EU law.[25] It will be interesting to see how this discussion develops.[26] Given that Dutch administrative bodies will also be closely involved in all these developments, it would be good to look into how they apply the Charter in practice (***recommendation 8***).

[25] CJEU 22 November 2017, ECLI:EU:C:2017:881 (*Cussens*).

[26] See Advocate General Wattel's preamble in this sense, as mentioned in Section 2.2., Supreme Court of the Netherlands 12 April 2023, ECLI:NL:PHR:2023:420, legal ground 5.18.

Recommendations

To the Court of Justice of the European Union

2 If the Court of Justice interprets a corresponding right more broadly than the ECtHR, it must, for the benefit of legal practice in EU Member States, explicitly mention this in the ruling (Section 3.1).

3 Given the great importance of Article 47 of the Charter as a touchstone in Dutch administrative procedural law practice, the Court of Justice must provide national courts with clarity on how it relates to the *Rewe* case law (section 3.2).

To national courts

1 If the Charter applies on the basis of Article 51(1) of the Charter and there are rights that correspond with rights from the ECHR, the administrative court must first review against the Charter provision and then, if necessary, against the relevant ECHR provision (Section 3.1).

6 Even though Court of Justice case law on the Charter's scope of application is clear and unambiguous, there appears to still be confusion among appellants, which is why Dutch administrative courts must refrain as much as possible from using the 'regardless of whether the Charter applies' construction in their rulings (Section 4.1).

7 Another reason to be careful with this construction is that the reflex effect of the Charter is increased beyond its scope of application when administrative courts review against the Charter 'regardless of whether the Charter applies' (Section 4.2).

To the legislator

4 To maximise clarity for legal practitioners, legislators must include a Charter-oriented justification in the explanatory memorandum when submitting a bill that falls within the Charter's scope of application (Section 3.2).

To law scholars

5 In administrative law, it makes no sense to measure the significance of the Charter by comparing it to the ECHR (Section 3.2).

8 Research is needed into the role of administrative bodies in the application of the Charter in legal practice (Section 4.2).

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The Charter's impact on Dutch criminal law

Pieter Verrest[1]

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1 Introduction: the Charter and criminal law

The Charter is a powerful source of law, an important benchmark for our criminal law. However, this was not so obvious for a long time; only in recent years has the role of the Charter become clear. As a result, we are still in a transitional phase in the field of criminal law in Europe, and certainly in Dutch criminal law practice. This is basically a process of getting used to having the Charter. Since the body of case law from the Court of Justice has been growing in recent years, we are now at a stage where a review with an adequate number of concrete examples is both possible and necessary for the very first time. Against this backdrop, the main purpose of this preliminary opinion is to make the influence of the Charter on Dutch criminal law practice tangible for the reader: what is it based on, what does it entail, where is it heading?

In examining the influence of the Charter of Fundamental Rights of the European Union on our criminal law, we must take into account that the increasing role that the Charter plays in criminal law in the EU and especially in Court of Justice case law in the criminal field is not an isolated one. This role is part of the development of criminal law in the EU in a broader sense.

This preliminary opinion is structured as follows. Given that the relatively short history of the impact of the Charter is very helpful in understanding its increasing influence, this preliminary opinion will start off with a brief historical overview in Chapter 2. Next, Chapter 3 will describe the EU criminal law acquis, which serves as the necessary basis for application of the Charter. Chapter 4 will go into how the Charter is implemented, discussing the role the Charter plays in the development of new EU legislation and how the Court of Justice of the European Union deals with references for a preliminary ruling regarding application of the Charter. Chapter 5 will address the influence of the Charter on the various parts of criminal law, based on the case law of the Court. Chapter 6 will look ahead to the near future: what can we expect? What lines can we discern in application of the Charter in EU law and in the Court's case law? How do we anticipate this in our law? Finally, the concluding remarks will address the question of how we should deal with the increasing influence of the Charter on criminal law in a more general sense.

2 Development of the Charter from a criminal law perspective

2.1 The early years: an invisible existence

The Charter of Fundamental Rights of the European Union was drawn up in 2000 as a collection of fundamental rights for the EU legal order.[1] Interestingly, the rapid development of judicial cooperation in criminal matters in the European Union began around the same time.[2] The legal framework for cooperation in this field between police and judicial authorities in the Member States consists of instruments for cooperation in criminal matters in the narrow sense (Article 82(1) of the TFEU), but also instruments for harmonisation of substantive criminal law (Article 83 of the TFEU). If necessary, the EU legislator can also harmonise criminal procedure (Article 82 of the TFEU). The criminal law instruments thus created, the so-called 'framework decisions', often contain provisions that limit, or have a limiting effect on, fundamental rights. In this context, the EU legislator is bound by Article 6 of the TEU, which contains an instruction to respect fundamental rights. The EU legislator showed itself to be aware of this by including a specific clause that is basically an instructional standard for the authorities in charge of implementation in (usually) the first article of the new criminal legislation, which reads as follows: '*This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU].*'[3]

Article 6 of the TEU provides as follows in the second paragraph of the version of the article from before the Lisbon Treaty: '*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*' The Charter was not mentioned in the pre-Lisbon version of Article 6 of the TEU. Nevertheless, the EU legislator did assign some value to the Charter in connection with the safeguarding of fundamental rights. This is evident, for example, in the short recital devoted to the fundamental rights clause in the preamble of framework decisions, and where the Charter was mentioned,

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1 *OJEC* 2000, C 364/1.

2 This was kicked off by the European Council of Tampere in 1999.

3 For example, Article 1(3) of the Framework Decision on the European arrest warrant (2002/584/JBZ).

including in the case of recital 12 of the preamble to the Framework Decision on the European arrest warrant.[4] This was, however, no more than a very general indication. Where the EU legislator felt that substantive consideration of the compatibility of a provision from an EU criminal instrument with fundamental rights was necessary, this was based on the ECHR and ECtHR case law.[5] This approach was a good match with criminal law practice as it was at the time, where the ECHR and ECtHR case law had already been given a clear place across the entire spectrum from the preparation of criminal legislation to its application in the case law.

When the Treaty of Lisbon entered into force on 1 December 2009, the Charter acquired the status of binding Union law. This is established in an amendment that changed the wording of Article 6 of the TEU to what it is today. After all, Article 6(1), first sentence, of the TEU reads as follows: '*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*'

From the point of view of the EU legislator and national legislators trying to interpret the new position enshrined in the Charter, the third paragraph of the same Article 6 was perhaps somewhat confusing when it stated that, '*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*' If we take a closer look at Article 6 of the TEU, we can see that it is oriented towards both the Charter and the ECHR. How the EU (criminal) legislator and legislators in Member States handle this dual focus creates the impression that it is easily resolved by assuming that the Charter and the ECHR largely contain corresponding provisions. In this context, it is important to note that the brief official explanation of the Charter, which was published in 2007 specifically to clarify provisions that are significant in criminal law, states as a basic principle that the substance of Articles 47 and 48 of the Charter, which include the right to a fair trial, are consistent with Article 6 of the ECHR and the associated ECtHR case law, despite being worded differently.[6]

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[4] Recital 12 of the preamble to the Framework Decision on the European arrest warrant, for example, reads as follows: '(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof.'

[5] See, for example, the proposal for amendment of Framework Decision 2002/475/JBZ on combating terrorism, COM(2007)650.

[6] *Official Journal of the European Union (OJEU)* 12 December 2007, C 303/17, p. 29-30. The brief explanation of Article 47 of the Charter states, among other things that: 'The first paragraph is based on Article 13 of the ECHR (…) However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. (…) The second paragraph corresponds to Article 6(1) of the ECHR which reads as

When it comes to Article 48 of the Charter, for example, it says no more than that: '*Article 48 is the same as Article 6(2) and (3) of the ECHR, which reads as follows:* (…). *In accordance with Article 52(3), this right has the same meaning and scope as the right guaranteed by the ECHR.*'[7]
The marginal role that the Charter played in the development of EU criminal law is perhaps best illustrated by the fact that precisely when there was debate within the EU about fundamental rights in relation to criminal law, the Charter was absent in that debate as a frame of reference.

Shortly after the successful start of the development of judicial cooperation on criminal matters in the EU, some discomfort arose in criminal law practice in Member States, especially regarding the Framework Decision on the European arrest warrant (hereinafter also: EAW). Did application of the EAW Framework Decision, based on the principle of mutual recognition of judicial decisions, not lead to too few opportunities to consider the potential consequences of surrender for the fundamental rights of the persons involved?[8] This is all the more important because the fundamental rights of suspects are not protected equally everywhere in criminal law and protection may even be inadequate in some respects, and that despite the fact that all EU Member States are parties to the ECHR. The Hague Programme to strengthen freedom, security and justice in the European Union (2004)[9] emphasised that mutual recognition only works if there is mutual trust between Member States, and that mutual trust is conditional on there being equivalent standards for procedural rights[10] in criminal cases.[11] Ultimately, on 30 November 2009, one day before the Lison Treaty entered into force, and therefore one day before the Charter gained formal effect in EU law, a Roadmap was adopted by the Council to strengthen procedural rights of suspected and accused persons in criminal proceedings.[12] This Roadmap starts with the following recital: '*In the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms*

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follows: (…) With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (…).'

[7] What also stands out is that the reference to Article 54(3) of the Charter is incomplete, as the final sentence is missing. This final sentence reads as follows: 'This provision shall not prevent Union law providing more extensive protection.' While the substance and scope must at least be the same, it does leave a clear opening to ensure that the protection offered by the fundamental rights under the Charter is of a higher level for corresponding provisions in the Charter and the ECHR.

[8] See V. Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Oxford: Hart 2016, p. 154-160; P. Verrest, *Europese idealen*, The Hague: Boom Juridisch 2016, p. 15-16.

[9] Doc. 16054/04.

[10] The term 'procedural rights' arose in EU law to refer to fundamental rights that accrue to individuals in criminal proceedings.

[11] The first initiative to this effect came in the form of the proposal for a Framework Decision on certain procedural rights in criminal proceedings (COM(2004)328), which briefly referred to the Charter in recitals 12 and 13. This proposal did not receive sufficient support from the Member States.

[12] Resolution of the Council of 30 November 2009 on a roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings.

(the 'Convention') constitutes the common basis for the protection of the rights of suspected or accused persons in criminal proceedings, which for the purposes of this Resolution includes the pre-trial and trial stages.' [13]

The charter is (once again) largely absent in the explanatory memoranda to the proposals for directives on procedural rights implementing the Roadmap presented by the Commission in the period between 2010 and 2013 on the basis of the explicit legal basis created by the Treaty of Lisbon for the harmonisation of criminal procedure, including in the form of minimum standards relating to the rights of individuals in criminal proceedings (Article 82(2)(b) of the TFEU). One example is the explanatory memorandum to the Commission's proposal for the Directive on strengthening the presumption of innocence from November 2013. In it, the Commission focuses at length on the substance and desired effect of the directive. [14] The Charter provision establishing the presumption of innocence (Article 48(1) of the Charter) is mentioned only a few times. The explanatory memorandum includes, among other things, the following passage, which reflects the view of the EU legislator: '*This Directive lays down minimum requirements at EU level governing certain aspects of the right of suspects or accused persons to be presumed innocent, in line with the Stockholm Programme and the ECtHR case law. It thus promotes the application of the Charter, and in particular Articles 6, 47 and 48 therein, by building upon Article 6 of the ECHR as interpreted by the ECtHR.*' [15]

Therefore, the starting point seems to be, in the context of the EU and with regard to the protection of the right to the presumption of innocence, to build on Article 6 of the ECHR and how the ECtHR interprets it in its case law. And it states something else as well: in this way the Charter is also applied (at the same time). [16] This promotion of the application of the Charter in legal practice should perhaps primarily be understood as the expectation that this will produce case law by the Court of Justice. At the time, i.e. in 2013, the body of case law in that area was still rather small.

[13] C 295/01. Recital 8, on the need to introduce secondary legislation (directives) to guarantee fundamental rights in criminal proceedings, seems to completely overlook the existence of the Charter: 'Mutual recognition presupposes that the competent authorities of the Member States trust the criminal justice systems of the other Member States. For the purpose of enhancing mutual trust within the European Union, it is important that, complementary to the Convention, there exist European Union standards for the protection of procedural rights which are properly implemented and applied in the Member States.'

[14] COM(2013)821.

[15] COM(2013)821, p. 5.

[16] This passage also says something about how the Charter relates to secondary law on procedural rights; more about that later.

2.2 Emancipation of the Charter on the back of Court of Justice case law

In order to bring the position of the Charter in the EU legal order to life, the Court of Justice's interpretation of two issues seems crucial. The first issue is that of the effect of the Charter, the second issue is that of the substantive relationship to the ECHR. On 26 February 2013, the Court largely settled these issues in the *Åkerberg Fransson* and *Melloni* cases. The Court's rulings in these cases are considered key rulings. Gerards has already gone into them at length in Sections 4.2.2 and 5.1.1 of her introduction. The following can be added specifically for a criminal law perspective.

In the *Åkerberg Fransson* case, the question at hand was whether the offender in a tax fraud case in Sweden could be convicted both in an administrative procedure and in a criminal procedure.[17] Is this a case of application of EU law, where application of Article 51 of the Charter means that Article 50 of the Charter (ne bis in idem) automatically applies as well? Determining the effect of EU law in tax matters is complex. Member States collect tax at national level under their own tax legislation, but there is also a VAT Directive at EU level to establish a common VAT system. EU regulations also oblige Member States to combat fraud. The Court of Justice ruled as follows: '*It follows that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter. The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.*'[18]

This means that criminal statutory provisions in force in the context of Member States' national law that are not specifically established for the implementation or enforcement of EU legislation, but which in practice, in addition to their operation in a national perspective, also implement EU legislation, fall within the scope of EU law and their application is, therefore, also subject to the Charter. Take the situation that arose, for example, when a new directive was adopted in 2018 requiring Member

[17] CJEU 26 February 2013, C-617/10 (*Åkerberg Fransson*), ECLI:EU:C:2013:105.
[18] Idem, legal grounds 27-28.

States to criminalise money laundering. In the Netherlands, money laundering had already been criminalised extensively under the Dutch Criminal Code, which meant that no implementing legislation was needed to comply with the EU obligation to legislate. In such a case, the government simply sends a notification of completed implementation to the European Commission. We must realise that, in the future, existing legislation will also implement EU law and that the Charter will, therefore, apply.[19] The same occurred, albeit that it was even more difficult to observe for professionals in criminal practice, in the context of the Directive on strengthening the presumption of innocence (2016/343), where the government indicated that it had effectively already been implemented through a large number of existing provisions in the Dutch Code of Criminal Procedure, all of which help to safeguard the presumption of innocence in our criminal proceedings.[20]

The *Åkerberg Fransson* ruling also (further) explained the dominance of the Charter over the ECHR: as long as the EU is not a party to the ECHR, the ECHR is not a legal instrument formally incorporated into the legal order of the EU, and review against the Charter must be assumed.[21] This, too, is an important clarification. It means that in cases where the substance of provisions of the Charter is intended to be closely aligned with the ECHR and the case law of the ECtHR, conformity must be examined through the link between the applicable provisions of the Charter.[22]
In the *Melloni* case, the Court of Justice ruled on the same day on the question of whether and how the right to be present at one's trial should be considered in the context of an EAW requesting the surrender of a person convicted in absentia. The Court assessed this question on the basis of Articles 47 and 48(2) of the Charter and its own case law. This is the starting point for Member States: review against fundamental rights as safeguarded by the national constitutional law of a Member State is not sufficient. The latter is only possible if neither the level of protection of the Charter nor the primacy, unity, and effectiveness of EU law are at stake.[23]
The conclusion is that the Court ensures emancipation of the Charter and also clearly gives concrete substance to this, and that in two criminal cases.

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[19] Notification of conformity with Directive (EU) 2018/1673.
[20] Notification of conformity with Directive 2016/343/EU: *Government Gazette* 2018/18991.
[21] CJEU 26 February 2013, C-617/10 (*Åkerberg Fransson*), ECLI:EU:C:2013:105, legal ground 44.
[22] See also CJEU 26 May 2017, C-682/15 (Berlioz), ECLI:EU:C:2017:373, legal ground 54: 'Article 47 (Charter) secures in EU law the protection afforded by Article 6(1) and Article 13 of the ECHR. It is necessary, therefore, to refer only to Article 47.'
[23] CJEU 26 February 2013, C-399/11 (*Melloni*), ECLI:EU:C:2013:107, legal ground 60.

2.3 From (still) largely unknown to major impact

This development was not immediately embraced and sometimes even played down by European and Dutch criminal law scholars.[24] [25] A short time later, the EU legislator's attitude started to change. In the explanatory memorandum to the proposal for the Directive on combating terrorism of the autumn of 2015, the otherwise scant fundamental rights section focused entirely on the Charter.[26]

In order to make the Charter's influence on criminal law clear to everyone, the Court had to issue rulings in the field of criminal law, as there was only some case law in the field of judicial cooperation in criminal matters, and especially the EAW, and the Charter needed to feature prominently in those rulings. Until then, this combination was only visible in bis in idem reviews (Article 50 Charter). Other than that, the case law on criminal law in combination with the Charter still had to develop.[27]

The *Taricco* rulings in 2015 and 2017 provide a strong signal that the Court was starting to explicitly delve into (substantive) criminal law.[28] These rulings went into the interpretation of general principles of EU law, the principle of proportionality and the principle of legality, which are also guaranteed by the Charter, but which are presented here in a different context. In the context of the protection of the EU's financial interests, with the separate basis in Article 325 of the TFEU, Member States are obliged to provide 'effective protection' against EU fraud with measures that should have a deterrent effect. In the first case, *Taricco I*, the Court found that if national limitation periods are too short to effectively combat criminal offences of EU fraud, the national court must set aside those limitation periods. The resulting extension of the limitation period was briefly

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[24] There is also another possible approach. Would the mere existence of the EU legislator's competency to make secondary legislation on a certain subject be sufficient to assume applicability of EU law and, therefore, also the effect of the Charter? Cf. V. Scalia, 'Protection of Fundamental Rights and Criminal Law. The Dialogue between the EU Court of Justice and the National Courts,' *EUCRIM* 2015, no. 3, p. 100-110.

[25] J. Vervaele, 'The Application of the EU Charter of Fundamental Rights (CFR) and its Ne bis in idem Principle in the Member,' *Review of European Administrative Law* 2013-1, p. 113-134, for example, focused mainly on the substance of *Åkerberg Fransson* (ne bis in idem). The title of the contribution by R. van der Hulle & R. van der Hulle, 'De arresten *Åkerberg Fransson* en *Melloni* gerelativeerd,' *SEW* 2014, no. 1, p. 102-116 says it all ('gerelativeerd' = 'put into perspective'). P. de Hert, 'EU criminal law and fundamental rights,' in: V. Mitsilegas, M. Bergström & T. Konstadinides (ed.), *Research Handbook on EU Criminal Law*, Elgar 2016, p. 110 writes that he sees indications in *Åkerberg Fransson* that the interpretation of the effect should be put into perspective. However, see also P.H.P.H.M.C. van Kempen & J.H.B. Bemelmans, 'Over de betekenis van het EU-Handvest voor het materiële strafrecht. Onder- en overontwikkeling van fundamentele strafrechtelijke beginselen in Unierechtelijke context,' in: J.H. Gerards, H.C.F.J.A. de Waele & K.M. Zwaan (ed.), *Vijf jaar bindend EU-Grondrechtenhandvest. Doorwerking, consequenties, perspectieven (Staat en Recht nr. 26)*, Deventer: Wolters Kluwer 2015, p. 543.

[26] COM(2015)625, p. 15-16.

[27] However, CJEU 8 April 2014, C-293/12 and C-594/12, ECLI:EU:C:2014:238 (*Digital Rights Ireland*).

[28] CJEU 8 September 2015, C-105/14, ECLI:EU:C:2015:555 (*Taricco I*) and CJEU 5 December 2017, C-42/17, ECLI:EU:C:2017:936 (*Taricco II*).

reviewed against the legality principle of Article 49(1) of the Charter, as explained by comparing it to Article 7 of the ECHR and the case law of the ECtHR. The *Taricco II* case puts the *Taricco I* ruling into perspective somewhat, stating that it can only have consequences for cases after *Taricco I*. This is the kind of case law that stimulates the senses.[29] Since the Charter is only applied as an aside, it is not really noticeable.

Even if the Charter is applied more clearly in criminal cases, legal practitioners and law scientists may be distracted by other aspects of the relevant rulings and overlook the emerging role of the Charter in the Court's interpretation of EU criminal law legislation. In the *Aranyosi and Căldăraru* case of 2016 and the subsequent *ML* and *Dorobantu*[30] cases, the Court had to determine when the obligation of judicial cooperation in criminal matters based on the principle of mutual recognition (on which the EAW Framework Decision is based) should give way to the protection of fundamental rights. The Court introduced a two-step examination based partly on the instruction standard of Article 1(3) of the EAW Framework Decision, which obliges courts to first determine whether there is a real risk of a violation of fundamental rights in the issuing Member State, and to then assess whether that risk also applies specifically to the person concerned in the individual case.[31] Legal commentators' focus was mostly on how the principle of mutual recognition of judicial decisions on the one hand related to the importance of preventing a possible human rights violation on the other. Their focus was much less on the fact that the Court applied various provisions of the Charter.[32] The same happened, albeit to a lesser extent, in the subsequent rulings of the Court of Justice on the application of the EAW Framework Decision and the risk of violation of fundamental rights in connection with a threat to the independence of the judiciary in Poland (the *LM* and *L.P.* cases):[33] in those rulings, application of Article 47 of the Charter was overshadowed by the question of whether judicial cooperation in criminal matters can still be achieved with the authorities of a Member State where the principles of the democratic rule of law are threatened (which in the case of Poland and Hungary is underlined by deployment of

[29] For an interesting follow-up, see CJEU 24 July 2023, C-107/23 PPU, ECLI:EU:C:2023:606 (*C.I. and Others*).

[30] CJEU 5 April 2016, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 (*Aranyosi and Căldăraru*); CJEU 25 July 2018, C-220/18 PPU, ECLI:EU:C:2018:589 (*ML*); CJEU 15 October 2019, C-128/18, ECLI:EU:C:2019:857 (*Dorobantu*).

[31] See, among other sources, Mitsilegas 2021, p. 263-264.

[32] See, for example, M.I. Veldt-Foglia, 'Wederzijds vertrouwen in EAB-zaken op de helling? Law in action vs. law in the books,' *NtEr* 2016, no. 8, p. 259-266. On top of that, the Court's ruling on detention conditions ties in with ECtHR case law in substance, including ECtHR 20 October 2016, no. 7334/13 (*Mursic vs Croatia*); CJEU 25 July 2018, C-220/18 PPU, ECLI:EU:C:2018:589, legal grounds 92-98 (*ML*).

[33] CJEU 25 July 2018, C-216/18 PPU, ECLI:EU:C:2018:586 (*LM*); CJEU 17 December 2020, C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033 (*L. and P.*). Further P.A.M. Verrest, 'Zorgen om de rechtsstaat in Polen bij uitvoering van een Europees aanhoudingsbevel,' *NtEr* 2021, no. 3-4, p. 81-89. See also CJEU 22 February 2022, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100 (*X and Y*).

the Rule of Law mechanism of Article 7(1) of the TEU against both Member States).

The same situation occurred again in the Court of Justice's rulings on the concept of 'judicial authority' in the EAW Framework Decision. In the first of these rulings, in May 2019, the Court explained that a public prosecutor who is subject to a power of a Ministry of Justice to issue an instruction does not qualify as a judicial authority and may, therefore, not issue an EAW to require the authorities of another Member State to surrender a wanted person.[34] This particular ruling caused quite a bit of commotion, especially in the Netherlands. The ruling interpreted a provision of the EAW Framework Decision, which had been applied in practice without any problems since 2004. What was less conspicuous is that the Court arrived at the interpretation from a fundamental rights perspective; partly because the ruling only refers to the Charter in a general sense once (to Article 6 of the Charter on deprivation of liberty).[35] Application of the Charter is more clearly visible in Advocate General Campos Sánchez-Bordona's opinion. He states that Article 47 of the Charter requires access to a court in the event of deprivation of liberty, and Article 47 of the Charter requires that this be an independent judicial authority.[36] The response to the ruling, and subsequent rulings, focused mostly on the restrictive interpretation of the concept of 'judicial authority',[37] and not so much on what reasoning and source of law the Court of Justice uses to conclude that the issuance of an EAW results in the (provisional) arrest of a person and, therefore, constitutes a custodial measure that can only be ordered by or after the intervention of an independent court.[38]

One might also get the wrong impression of the Charter's importance from the fact that fundamental rights in criminal law at EU level are also protected – and apparently in more detail – by the Procedural Rights Directives. Since around 2018, the Court of Justice has been producing case law on the interpretation of the substance of those directives. The Charter does not necessarily feature in that case law.[39] It took the Court some time

[34] CJEU 27 May 2019, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456 (*OG and PI*).

[35] CJEU 27 May 2019, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, legal round 68 (*OG and PI*).

[36] Opinion of Advocate General 30 April 2019, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:337 (*OG en PI*), legal grounds 65-68.

[37] The explanatory memorandum to the emergency amendment to the Dutch Surrender Act that followed the ruling, see *Parliamentary Papers II* 2019/20, 35 224, no. 3, does not mention the Charter at all. On the occasion of the subsequent bill to reimplement the European Arrest Warrant Framework Decision, the explanatory memorandum does address the role of the Charter (*Parliamentary Papers II* 2019/20, 35 535, no. 3).

[38] For more details, see Ouwerkerk et al. 2021. See further, among others, CJEU 24 November 2020, C-510/19, ECLI:EU:C:2020:953 (*AZ*), where the Charter is not cited.

[39] See, among other rulings, CJEU 19 September 2018, C-310/18 PPU, ECLI:EU:C:2018:732 (*Milev*); CJEU 28 November 2019, C-653/19 PPU, ECLI:EU:C:2019:1024 (*DK*).

to start including the underlying fundamental rights of Articles 47 and 48 of the Charter in its case law on the Procedural Rights Directives.
The major tipping point came in March 2021 in the *H.K. (Prokuratuur) case.*[40] In its ruling in this case, the Court explains the application of Directive 2002/58/EC (Directive on privacy and electronic communications): what criteria under Article 7 (the right to respect of privacy), Article 8 (protection of personal data) and Article 52(1) (possibility of limitations on fundamental rights protected under the Charter) of the Charter must be imposed when law enforcement authorities requisition and access telecommunications data? This ruling follows previous rulings on the same directive, which in retrospect contained almost all the elements that were brought together in a five-part message in the *Prokuratuur* ruling. Firstly, the principle of proportionality means that access to traffic and location data from communications services is only permitted when combating serious crime and preventing serious threats to public security. A series of traffic or location data offers the opportunity to draw precise conclusions about the privacy of data subjects.[41] Secondly, the proportionality requirement also means that criteria must be imposed on the rules that enable access to the data. Those rules should enable the reviewing authority to determine, on the basis of objective criteria, in what circumstances and under what conditions access is proportionate in an individual case.[42] Thirdly, the above review must take place prior to access, except in very urgent cases.[43] Fourthly, the review can only be performed by a judicial body or an independent administrative authority. Only such a body or entity is able to ensure a fair balance between, on the one hand, the interests related to the investigation of crime and, on the other hand, the fundamental rights to respect for privacy and protection of personal data.[44] Finally, the Court makes it clear that acting in violation of these conditions is unlawful, leaving it to (the courts in) the Member States to attach concrete consequences to that in the context of specific criminal cases. This is not as easy as it seems, but we will come back to this in Section 4.3.5.

The *Prokuratuur* ruling made it clear for everyone working in criminal law in the EU that a Court of Justice ruling can have major consequences, and that the Charter is used as a benchmark in the Court of Justice's case law.[45]

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[40] CJEU 2 March 2021 C-746/18, ECLI:EU:C:2021:152 (*H.K., Prokuratuur)*.
[41] Idem, legal grounds 32-36.
[42] Idem, legal ground 48.
[43] Idem, legal ground 51.
[44] Idem, legal grounds 51-53.
[45] The Court interprets the text of an act in connection with findings. The methods the Court uses in this context is a textual, contextual, and teleological interpretation. The Charter fulfils a role as a basis for assessment. See CJEU 19 May 2022, C-569/20, ECLI:EU:C:2022:40 (*IR*), legal grounds 32 and 38; CJEU 28 January 2021, C-649/19, ECLI:EU:C:2021:75 (*Letter of rights*), legal ground 42.

2.4 Unfamiliarity with the Charter in Dutch criminal law

The extent to which the Charter is referenced in Dutch criminal law is in line with the development outlined in the previous sections. For a long time, there was no suggestion that the Charter had an independent value in legislation and case law, and this has changed only recently, as shown by the criminal case law of the Supreme Court of the Netherlands. The Charter initially barely featured in that case law.[46] The exception is Article 50 of the Charter – in line with the Court's prior case law based on Article 54 of the Convention implementing the Schengen Agreement (CISA). The Supreme Court mentions both articles in juxtaposition.[47] The legality principle of Article 49 of the Charter is also cited sometimes, also generally in juxtaposition with the corresponding provision of the ECHR (Article 7 of the ECHR). Closer examination of the case law in the first years after the Charter formally came into force reveals that the Charter is sometimes not applicable, because there is no EU law being applied. The defence and the Supreme Court do not seem to notice that.[48] The Supreme Court became more alert to this at a later stage.[49] In fact, lawyers often rely on the Charter even though there is no EU law being applied: for traffic surveillance (non-discrimination),[50] for life imprisonment,[51] or for an amendment to the compensation measure (principle of legality).[52] In other cases, the Charter is invoked and EU law (on drug trafficking) does apply, although it is doubtful whether the attorney was actively aware of it.[53] There has actually only been one case before the Supreme Court where the Charter was applied in a truly meaningful manner. This was when the definition of the offence under Section 197 of the Dutch Criminal Code, which, among other things, implements the EC Return Directive and the requirements arising from it, was reviewed against the principle of legality included in Article 49 of the Charter.[54]

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[46] Based on rulings in criminal cases published on Rechtspraak.nl in the period from 1 December 2009 to March 2021, i.e. when the *Prokuratuur* ruling was delivered, the Supreme Court of the Netherlands cited the Charter thirty times (a search for 'Charter' and 'Supreme Court ruling sentence' on Rechtspraak.nl yields 37 results, three of which are references to the United Nations Charter and four are references to the European Social Charter).

[47] However, Article 50 of the Charter and Article 54 of the Convention implementing the Schengen Agreement have different scopes: the latter provision applies only to bis in idem situations in cross-border cases.

[48] Supreme Court 5 May 2012, ECLI:NL:HR:2012:BW5166.

[49] Supreme Court 14 February 2017, ECLI:NL:HR:2017:241.

[50] Supreme Court 9 October 2018, ECLI:NL:HR:2018:1872.

[51] Supreme Court 19 December 2017, ECLI:NL:HR:2017:3185.

[52] Supreme Court 26 May 2020, ECLI:NL:HR:2020:914.

[53] Supreme Court 12 April 2022, ECLI:NL:HR:2022:530 (and 527, 531 and 532): defence of violation of presumption of innocence in a cocaine import case by considering the offence for which an acquittal was imposed when sentencing.

[54] Supreme Court 1 December 2020, ECLI:NL:HR:2020:1893, following preliminary questions, to which the Court of Justice does not apply the Charter: CJEU 17 September 2020, C-806/18, ECLI:EU:C:2020:724 (*JZ*).

Initially, many working in the Dutch criminal law domain failed to pick up on the change in the EU legislator's approach to the Charter, which came around 2015, partly on the back of case law of the Court of Justice. Van Kempen and Bemelmans are an exception, because they did write an essay on the significance of the Charter for substantive criminal law, describing the impact of the Charter and pointing out the potential impact of the Charter on our criminal law.[55] A few years later, Luchtman examined the influence of fundamental rights on judicial cooperation in criminal matters in the EU in his 2017 inaugural lecture, focusing on the question whether sufficient judicial protection can always be provided for persons involved in cooperation between Member States.[56] He looks at the role that the Roadmap and the Procedural Rights Guidelines can play in this regard. While Luchtman does not refer to the Charter much, he does close his argument by pointing out the significance of Article 51(1) of the Charter in connection with the Procedural Rights Directives, thus bringing large parts of national criminal procedural law within the scope of the Charter.[57] In an article that Luchtman and Widdershoven published in Ars Aequi the following year, they explicitly draw attention to the growing role of the Charter.[58] In retrospect, this contribution is a good basis for understanding of what was to come.

At the time, the Dutch legislator was still not very keen on the Charter as a source of law for criminal cases, as is evident from the fact that the very extensive explanatory memorandum to the new Dutch Code of Criminal Procedure initially, in the official version of July 2020, only contains four references to the Charter.[59] Fortunately, the final version of the explanatory memorandum to the bill for the new Dutch Code of Criminal Procedure in March 2023 was very different in this respect, presenting the Charter as an independent source of law and addressing its implications in relation to the Code, while referencing the *Prokuratuur* case law throughout.[60]

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[55] Van Kempen & Bemelmans 2015, p. 533-563.

[56] M. Luchtman, *Transnationale rechtshandhaving. Over fundamentele rechten in de Europese strafrechtelijke samenwerking*, The Hague: Boom Juridisch 2017, p. 53.

[57] Luchtman does actually not see a development of judicial protection in the context of judicial cooperation in criminal matters in EU legislation on procedural rights. He questions the added value of such legislation compared to the dynamic development of the ECHR. The author would prefer to see more balance built into instruments that regulate judicial cooperation in criminal matters, such as by including a proportionality review.

[58] M. Luchtman & R. Widdershoven, 'Het Nederlandse strafrecht in de ban van het Unierecht,' *AA* 2018, p. 873889.

[59] Official version of the explanatory memorandum to the bill establishing the new Dutch Code of Criminal Procedure, July 2020. Previously noted in J.W. Ouwerkerk & P.A.M. Verrest, 'De struisvogel voorbij. Pleidooi voor een actieve participatie in de Europese rechtsontwikkeling inzake fundamentele rechten in de strafrechtspleging,' *DD* 2021/47, p. 594-595.

[60] *Parliamentary Papers II* 2022/23, 36 327, no. 3 p. 62.

The *Prokuratuur* case was a wake-up call in the Dutch criminal law domain.[61] Concerns arose in legal practice over the legality of the legal provisions regarding powers to demand telecommunications data.[62] A working method has been developed where the examining magistrate is asked for authorisation if the requested data is not limited to identifying data. The Supreme Court subsequently confirmed this line in its ruling of 5 April 2022 in a case where an appeal to the Supreme Court had been lodged in the interest of the law.[63] A look at recent Supreme Court rulings featuring the Charter shows how the case law of the Court of Justice allows the Supreme Court to apply the Charter in cases on matters such as access to a lawyer[64] and service and default.[65]

However, in order to ensure proper understanding of the Charter in a broader context and to ensure its adequate application in Dutch criminal law practice, it seems appropriate to conduct a structured review of the impact of the Charter and its application by the EU legislator and the Court of Justice.

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[61] Among others G.P. Sholeh, 'De betekenis van het Prokuratuur-arrest: digitale opsporing en privacy onder de loep,' *DD* 2022/15; D.A.G. van Toor, 'Prokuratuur (CJEU, C-746/18) – Differentiatie en beperkingen van dataretentie door telecommunicatieaanbieders en de vorderingsvoorwaarden,' *EHCR* 2021-0088.

[62] Not only is there uncertainty about the compatibility of the system of powers to request data in the Dutch Code of Criminal Procedure, case law on the limitation of the role of the public prosecutor in the context of the EAW now also creates uncertainty regarding the role of the public prosecutor in the system of investigative powers in Dutch criminal procedure. See S. Crijns-Zuidwijk & E. Sikkema, 'Prokuratuur en magistratuur,' *TBS&H* 2022, p. 203-205 and, in a broader context, J.W. Ouwerkerk et al., *De rol en positie van het Openbaar Ministerie als justitiële autoriteit in Europees strafrecht. Een verkennende studie naar een toekomstbestendige vormgeving van de rol en de positie van het Openbaar Ministerie in de EU-brede justitiële samenwerking in strafzaken*, The Hague, Netherlands Research and Data Centre 2021 and P.A.M. Verrest, 'Het Nederlandse OM in Europees perspectief,' in: J.H. Crijns, E.R. Muller & R. Robroek (ed.), *Openbaar Ministerie. Organisatie en functioneren van het Openbaar Ministerie in Nederland (Handboeken veiligheid)*, Deventer: Wolters Kluwer 2023, p. 615-637.

[63] Supreme Court 5 April 2022, ECLI:NL:HR:2022:475, *NJ* (Dutch Jurisprudence) 2022/355, with an annotation by Ouwerkerk.

[64] An interesting case is the one where the defence argued that the suspect did allegedly not receive adequate legal assistance during an interrogation in Spain under a European Investigation Order issued by the Dutch authorities, because the Spanish lawyer who assisted him had no knowledge of Dutch criminal procedure. Therefore, a Dutch lawyer should also have been provided. The defence's approach relied on the Directive on the right of access to a lawyer (2013/48/EU) and Article 47 of the Charter. The Supreme Court of the Netherlands could not rightly infer such a right from the Directive or from Article 47 of the Charter, noting that neither the Spanish lawyer nor the suspect indicated at the time of the interrogation that there was no adequate legal assistance. See Supreme Court 22 June 2021, ECLI:NL:HR:2021:962.

[65] Supreme Court 18 October 2022, ECLI:NL:HR:2022:1469.

3 EU criminal law legislation: the formal basis for Charter effect

3.1 Introduction

In this chapter, we will briefly study the formal basis for the implementation of the Charter in criminal law: the application of EU criminal law legislation. Article 51(1) of the Charter determines when the Charter must be applied by EU institutions and by Member States, i.e. when an act (partly) implements EU law. What EU legislation is there in the context of criminal law?
This is actually not so easy to demarcate. There are completely different types of EU legislation in a criminal law context. In this chapter, we will examine these types of legislation and classify them into a number of categories, in anticipation of an analysis of application of the Charter by the EU legislator and the Court of Justice. The categorisation will prove useful in this regard because the difference in nature, substance, and context of EU criminal law legislation has a bearing on the role the Charter plays in that legislation.

3.2 The EU criminal law acquis

3.2.1 Introduction

The EU criminal law acquis includes dozens of very different instruments, and this number keeps growing as new legislation is adopted. The criminal law acquis can roughly be divided into five types of legislation, which I will discuss on the basis of the general chronology of when they were passed.

3.2.2 Instruments for judicial cooperation in criminal matters

First of all, there are instruments regulating judicial cooperation in criminal matters between the Member States of the European Union (Article 82(1) of the TFEU). This mainly concerns ten instruments that are based partly on the principle of mutual recognition of judicial decisions and that guide the mutual legal assistance relationship between judicial authorities in the EU. Examples include the EAW Framework Decision, the Framework Decision on the application of the principle of mutual recognition of criminal sentences imposing custodial sentences or measures involving deprivation of liberty,[1] the

[1] Framework Decision 2008/909/JBZ.

European Investigation Order Directive (EIO),[2] the Protection Order,[3] and the Regulation on the mutual recognition of freezing orders and confiscation orders.[4] This category of instruments also includes other instruments, such as the Prüm resolutions, the ECRIS regulations, the Schengen Convention, and the establishment and operating regulations of Europol, Eurojust, and the European Public Prosecutor's Office (EPPO).[5]

3.2.3 Instruments in the area of quasi-criminal law

The second category is that of criminal statutory provisions in Member States' (special) criminal law to maintain standards in all forms of EU regulations where a decision has been made at EU level that Member States must take adequate measures in response to a violation of these regulations. This does not concern criminal offences specified in Article 83 of the TFEU, which means that the EU does not have the power to oblige Member States to criminalise violations of regulations. However, Member States often choose to enforce mandatory and prohibitory provisions laid down in EU regulations by criminalising non-compliance. We could refer to this second category of EU legislation as 'quasi-criminal law'. Examples are available in tax law, financial supervision legislation,[6] and environmental law.

3.2.4 Instruments in the area of harmonisation of substantive criminal law

A third category concerns instruments aimed at harmonising Member States' substantive criminal law. Article 83 of the TFEU mentions two categories of criminal offences that may become the subject of harmonisation.[7] An additional basis for harmonisation of substantive criminal law, specifically for EU financial interests, is provided in Article 325 of the TFEU. Harmonisation takes shape in the establishment of minimum standards for the substance of criminal offences, the establishment of jurisdiction, the determination of applicable sanctions, and, where appropriate, also the level of sanctions by determining the maximum penalty that must at least be meted out for a violation. This concerns dozens of framework decisions and directives, on topics as diverse as racism and xenophobia, euro counterfeiting, child pornography, human trafficking, combating terrorism, money laundering, and corruption in the private sector.

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[2] Directive 2014/41/EU.
[3] Directive 2011/99/EU.
[4] Regulation (EU) 2018/1805.
[5] Regulation (EU) 2017/1939.
[6] For example, the Market Abuse Regulation (EU) 596/2014.
[7] For further explanation, see Klip 2021, p. 228-232 and J.W. Ouwerkerk, *Herijking van Uniestrafrecht. Over grondslagen voor strafrechtelijke regelgeving in de Europese Unie*, Den Haag: Boom Juridisch, 2017.

3.2.5 Instruments for harmonisation of criminal procedure

A fourth category concerns the harmonisation of criminal procedure, as referred to in Article 82(2) of the TFEU. Such harmonisation can take place by extension to rules on judicial cooperation in criminal matters in order to achieve effective judicial cooperation in criminal matters, but it has increasingly acquired an independent value. This concerns rules on various topics, such as confiscation,[8] victims' rights,[9] and the six directives on the protection of procedural rights of suspects (the directives on the right to interpretation and translation, the right to information, the right of access to a lawyer, the strengthening of the presumption of innocence, the rights of under-age suspects, and the right to legal aid). The rights guaranteed by those directives apply in all criminal cases in Member States, even if those criminal cases do not involve crimes for which the EU has provided harmonisation or judicial cooperation in criminal matters between Member States.[10] The rights also apply during the entire criminal procedure from the suspect being informed of a suspicion until the judgment in the criminal case becomes final.[11] This ensures a broad horizontal effect, in the wake of which the Charter also applies.

3.2.6 Instruments that set preconditions for criminal procedure

A fifth category consists of instruments that are, partly or entirely, based on EU powers in areas other than criminal law, but that provide tools that are used for investigative purposes or that regulate a related area of law, such as personal data protection. This category can perhaps best be interpreted as setting preconditions for the application of criminal procedural law. An important instrument in this category of regulations is Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). A second important EU regulation is Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. The difference is that Directive 2002/58 only concerns the processing of personal data by providers of communications services.

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[8] Directive 2014/42/EU.

[9] Directive 2012/29/EU.

[10] See Ouwerkerk & Verrest 2021, p. 589-590 and V. Mitsilegas, 'Mutual Recognition and Fundamental Rights in EU Criminal Law,' in: S. Iglesias Sánchez & M. Gonzalez Pascual (ed.), *Fundamental Rights in the EU Area of Freedom, Security and Justice*, CUP 2021, p. 269.

[11] See Article 1 and Article 2 of the Directives on the right to interpretation and translation, the right to information, the right to access to a lawyer, and the right to the presumption of innocence. CJEU 14 May 2020, C-615/18, ECLI:EU:C:2020:376 (*UY*) ruled that a right to information also concerns the service of an order, especially if failure to accept service of the order ordering the person to refrain from certain actions (driving ban) leads to the convicted person being guilty of a new criminal offence (legal ground 65).

Consequently, this Directive only regulates the investigative powers exercised in relation to a provider of a communications service to the extent that the provider processes personal data under this Directive in order to give effect to a requisitioning based on such an investigative power.[12] This must be distinguished from the collection and processing of criminal data in a different, general sense, which is governed by Directive 2016/689.[13]

3.2.7 Other

Finally, the Court's criminal case law contains very specific rules that do not fall into any of the five categories but do make the Charter applicable to criminal cases.

This includes provisions included in the EU treaties, such as Article 21 of the TFEU (right of free movement and residence within the territory of the Member States), which precludes criminalisation of child abduction in Member State A of a child who is staying in Member State B where child abduction is criminalised to a lesser degree.[14] Another example is Article 20(2)(b) of the TFEU and Article 14(3) of the TEU, which together enshrine the right to vote in European Parliament elections, which arose in the context of a national criminal case (on a murder, which is a crime not harmonised by EU criminal law) where deprivation of the right to vote (including the right to vote in European Parliament elections) had been imposed on the convicted person as an additional penalty: the disqualification had to be reviewed against the proportionality of penalties as guaranteed by Article 49(3) of the Charter.[15]

[12] CJEU 6 October 2020, C-511/18, ECLI:EU:C:2020:791 (*La Quadrature du Net*), legal ground 103.

[13] Opinion of Advocate General Campos Sánchez-Bordona 20 April 2023, C-548/21, ECLI:EU:C:2023:313, legal ground 37.

[14] CJEU 19 November 2020, C-454/19, ECLI:EU:C:2020:947 (*ZW*). Charter not applied.

[15] CJEU 6 October 2015, C-650/13, ECLI:EU:C:2015:648 (*Delvigne*).

4 The Charter applied by the EU legislator and by the Court of Justice

4.1 Introduction

After this high-level description of the Charter's formal scope of application in the sense of the EU acquis of rules relating to criminal law, the next step is to examine the question of how the Charter is actually applied at EU level. This concerns the question of how the EU legislator takes rights protected under the Charter into account in drafting new legislation in the area of criminal law, as well as the question of how the Court of Justice applies the Charter and what role the Charter plays in the Court's case law.

4.2 Application of the Charter by the EU legislator

The EU legislator has the important task of ensuring that legislation complies with the fundamental rights safeguarded by the Charter. As explained by Gerards in Section 4.5.1 of her introduction, the Charter does not specify the possibilities for limitations on fundamental rights at the level of individual provisions, which undermines its clarity and predictability. Article 52(1) of the Charter does, however, provide a general rule on limitations and the criteria that a limitation must meet: '*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*'
This specifically concerns the criteria that say that the limitation must be provided for by law, and that (despite the limitation) the essence of the rights and freedoms under the Charter must still be protected. A limitation must be reviewed against the principle of proportionality: limitations are only permissible if they are necessary and actually meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. Gerards goes into the substance of this review in detail in Section 4.5.5 of her introduction.
However, the fundamental rights section of bills for new EU criminal legislation is not worded as standard in a way that ensures a very concrete and precise assessment of where the proposed new legislation may contain bottlenecks in relation to the rights guaranteed by the Charter, let alone that Court of Justice case law is cited in and 'translated' to the substance of the

proposed legislation.[1] Those fundamental rights sections merely offer general findings on the protection of fundamental rights in relation to the purpose of the instrument, which is usually to foment an effective fight against crime.

This seems to be changing somewhat of late. See, for example, the fundamental rights section of the proposal for rules to prevent and combat sexual abuse of children that prioritises a review against the principle of proportionality on the basis of Article 52(1) of the Charter.[2] The same can be observed in the fundamental rights section of the proposal for a directive on asset recovery and confiscation.[3] However, the depth and completeness of the review against the principle of proportionality is still quite disappointing. For example, the proposal for the Confiscation and Asset Recovery Directive only addresses the fact that, in order to effectively combat crime, it is justified to infringe the right to property, and does not go into the need for judicial protection in the form of access to justice in application of freezing and confiscation. The proposal for the new Victims' Rights Directive does try, and even touches on how it relates to a suspect's right to a fair trial, but ultimately also fails to go into great depth.[4] This gives the Council and the European Parliament little to go by in their reviews as part of the EU legislative process. There is also little guidance for national legislators, who are the ones having to implement EU law or pass implementing legislation, and for national courts.

The EU legislator may also include a reference to the Charter in the body of the legislative instrument. As already discussed, this happens as standard in the first articles of cooperation instruments and guidelines on the harmonisation of substantive criminal law. This is an instructional standard: the instrument *shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]*. This general standard can be made concrete and tested in case law, including by means of the two-step examination, which has also already been discussed. What is striking is that this instructional standard is lacking in instruments in the area of (harmonisation of) criminal procedure.[5]
A version of it can be found in Article 5(1) and Article 41(1) of the Directive implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO).[6] The instructional standard is more

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[1] Governments usually seek an opinion from the EU fundamental rights agency (FRA) when preparing a proposal for new legislation.

[2] COM(2022)209, p. 14-15.

[3] COM(2022)245, p. 11-12.

[4] COM(2023)424, p. 12-13.

[5] See, for example, the proposal for a Confiscation and Asset Recovery Directive and the proposal for an update to the Victims' Rights Directive. The absence of the instructional standard is logical in procedural law directives, as it would result in a rather odd duplication of provisions.

[6] Article 5(1) reads as follows: '*1. The EPPO shall ensure that its activities respect the rights enshrined in the Charter.'* Article 41(1) reads as follows: '*1. The activities of the EPPO shall be carried out in full compliance with*

concrete here, aimed at executive bodies (Delegated Prosecutors of the EPPO), and constitutes a standard of review for a supervisory court. In the Court of Justice's recent ruling in the *G.K.* case, the standard was implemented in concrete terms: the handling delegated prosecutor who has an investigative act carried out by a delegated prosecutor in another Member State (under Article 31 of the EPPO Regulation) must first complete the legal formalities required for application, including obtaining judicial consent, if applicable. When it comes to investigative measures involving serious interference with fundamental rights, such as domiciliary visits, precautionary measures in relation to personal property and freezing of assets, the Court adds that the Member State of the handling Delegated Prosecutor must provide for appropriate and adequate safeguards, such as prior judicial review, to safeguard the legality and necessity of such measures.[7]

4.3 The Charter and the Court of Justice

4.3.1 Getting the Court to apply the Charter

The Court of Justice has the option to include the Charter in its case law on EU law, provided that it is presented with a question about the application of EU law. For that, we have to first look at the possible ways to commence proceedings before the Court.

The Court of Justice offers three ways to commence proceedings that are relevant in this context, albeit to varying degrees. See Section 2.2 of Gerards' preliminary opinion for more about this. In the following, we will focus on the most obvious way to get the Court to review application of EU law against the Charter, i.e. the reference for a preliminary ruling procedure (Article 267 of the TFEU).[8]
The preliminary ruling procedure is always about the interpretation of EU law. The focus is not on whether or not an infringement of the Charter has occurred in the case brought before the Court. This became clear in a recent case, where, in analogy to the procedure before the ECtHR, the French government recognised the infringement of a fundamental right protected by the Charter and expressed the expectation that the reference for a preliminary ruling was, therefore, inadmissible. The Court did not think so: only after answering the questions submitted in the reference for a preliminary ruling procedure, the

the rights of suspects and accused persons enshrined in the Charter, including the right to a fair trial and the rights of defence.'

7 CJEU 21 December 2023, C-281/22, ECLI:EU:C:2023:1018 (*G.K.*), legal ground 75.

8 I will not go into the question of when a reference for a preliminary ruling must be submitted and by what court; for details of that, see, for example, F. Amtenbrink & H.H.B. Vedder, *Recht van de Europese Unie*, seventh edition, The Hague: Boom Juridisch, 2022, p. 334-346.

usefulness of which must be viewed in a broader context (the usefulness of the interpretation of the law transcends the specific case), the procedure was concluded.[9]

4.3.2 What interpretation can the Court be asked for?

The theory is that the Court limits itself in its ruling to the interpretation of EU law and, for example, does not provide an explanation of the national law of the court submitting a reference for a preliminary ruling. This theory is both right and not right.[10] In practice, the step towards reviewing the *conformity* of the relevant national legislation implementing the EU law at issue is a very small one, which is why the Court often takes that step. When it does, it pronounces on national law, but does not interpret the meaning of that national law as such. The Court does not consider itself competent to truly determine the substance of the applicable national law.[11]
The Court is forgiving towards courts that do not explicitly seek an interpretation of EU law in their reference for a preliminary ruling, asking only whether national implementing legislation has been implemented correctly. The Court takes this as a request for an interpretation of EU law, which means that the Court is, in principle, obliged to respond. There is a presumption of relevance with regard to the questions asked by national courts.[12]

The Court did, however, want to set itself some boundaries: '*It must be borne in mind that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions. According to settled case-law, the Court may, however, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions.*'[13]

In many cases, including cases where a preliminary ruling was sought regarding the functioning of the Procedural Rights Directives, the Court of Justice must indeed consider the facts and circumstances of the individual case that gave rise to the reference. The Court then ultimately arrives at a ruling on a situation that is apparently the result of a national legal provision that implements a provision from an EU directive, and on the question of whether

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[9] CJEU 22 June 2023, C-660-21, ECLI:EU:C:2023:498 (*K.B. and F.S.*). Or: opinion of Advocate General Campos Sánchez-Bordona 20 April 2023, C-548/21, ECLI:EU:C:2023:313 (*Landeck*), legal grounds 47-48.
[10] Klip 2021, p. 214-216.
[11] See, for example, Advocate General Campos Sánchez-Bordona's opinion of 20 April 2023, C-548/21, ECLI:EU:C:2023:313 (*Landeck*), legal grounds 77-78.
[12] CJEU 26 January 2023, C-205/21, ECLI:EU:C:2023:49 (*V.S.*), legal grounds 53-57.
[13] CJEU 16 February 2023, C-349/21, ECLI:EU:C:2023:102 (*HYA*), legal ground 49.

this is in accordance with the interpretation that must be given to the relevant provision.[14] Especially when a reference for a preliminary ruling raises the question of whether the procedure in a specific criminal case, as per national criminal procedure, is in accordance with provisions from several Procedural Rights Directives (for example the Right to Information Directive and the Access to a Lawyer Directive), the Court's review delves deeply into the facts and circumstances of a case. For example, when a motorist was stopped, the passengers were searched, and narcotics were found, the Court asks the following questions: who was informed of their rights at what time in the context of the criminal proceedings, and on what basis was this done?[15] Such cases return rulings that, with an interpretation of EU law provisions thrown in as a bonus, include a judgment on the facts and circumstances that are apparently possible under national law.[16]

There may be another dimension to or reason for delving into the facts and circumstances of an individual case. Instruments sometimes explicitly require Member States to ensure effective law enforcement or to take proportionate and effective measures to combat a particular form of crime. In this way, the Court reaches a judgment, on the basis of a review of these facts and circumstances in an individual case based on the objective of the applicable EU law, about the conformity of national law that evidently gives rise to the practice, and the proportionality of any limitations on Charter-protected rights in combating crime. The *Taricco* rulings already provided an example of this.

Another question is whether the Court of Justice only takes the Charter into account when responding to a reference for a preliminary ruling if the reference refers to the Charter. This is not the case. The Court may also regard the Charter as relevant law on an ex officio basis: '*The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its questions.*'[17]

4.3.3 No Charter effect if matter is outside the scope of secondary EU law?

If the Court concludes that the question raised concerns a subject that is not covered by EU law, i.e. it is not covered by the substance of any of the Procedural Rights Directives, the Charter does not apply either, even if there might be a conflict with a Charter provision. The Court's reasoning in this

[14] CJEU 15 September 2022, C-347/21, ECLI:EU:C:2022:692 (*DD*).
[15] CJEU 7 September 2023, C-209/22, ECLI: EU:C:2023:634 (*AB*).
[16] For an example that goes into the facts and circumstances judged, see CJEU 23 November 2021, C-564/19, ECLI:EU:C:2021:949 (*IS*).
[17] CJEU 22 June 2023, C-660/21, ECLI:EU:C:2023:498 (*K.B. and F.S.*), legal ground 26. In concrete terms, Article 47 of the Charter is added as a basis for review of a possible infringement of the right to remain silent. For another example, see also CJEU 14 May 2020, C-615/18, ECLI:EU:C:2020:376 (*UY*). Further CJEU 13 June 2019, C-646/17, ECLI:EU:C:2019:489 (*Moro*), legal grounds 39-40.

respect is (for example) that the Procedural Rights Directives concern minimum harmonisation and Member States should remain free to regulate elements of criminal procedure that do not fall within the scope of the Directive. This is equally true of how exactly a requirement arising from a directive is regulated. However, in a seemingly similar situation, the Court may also choose a different reasoning. The Court has indicated on several occasions that (parts of) Procedural Rights Directives should be seen as directives that specifically implement Articles 47 and 48 of the Charter, and that their joint purpose is to ensure a fair trial. The Court then marks this by 'interpreting provisions of the Procedural Rights Directives in conjunction with,' 'in the light of,' etc. This basically amounts to linking the relevant provisions to the (application of) Articles 47 and 48 Charter. The principles of equivalence and effectiveness are also used as justification for this. This allows the Court to comment on an element of criminal procedure in a Member State that is not (explicitly) regulated by the directive in question, in order to nevertheless review its conformity with Articles 47 and 48 of the Charter.[18] This also enables the Court to include the important overarching assessment, derived from ECtHR case law, of whether the criminal process as a whole meets the requirements of a fair trial (*overall fairness*) in its review. What we are seeing here is a kind of circular reasoning: although a situation strictly speaking falls outside the scope of the directive (and application of the Charter is basically not possible), the link between the substance of the directive and provisions of the Charter means that a part of national criminal procedure not governed by the directive is still subject to review under that same Charter.

4.3.4 Application of the Charter and the consequences for criminal law

In addition to what has already been discussed briefly in this regard, it is important to take a broader view of the implications of a Court of Justice ruling interpreting EU law.

A Court of Justice ruling in a case constitutes a mandatory interpretation of EU law, which is part of the national legal order. A ruling that national legislation is inconsistent with the interpretation of applicable EU law may have implications for the legislature, which in the absence of the possibility of interpreting national law in conformity with EU law will have to amend the law, and for the judiciary, which will have to apply the interpretation in all pending and future criminal cases. There is one complicating factor, namely the *ex tunc* nature of the Court of Justice's interpretation of the substance of EU law: that interpretation is deemed to have always applied as it is.[19]

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[18] See, for example, CJEU 7 September 2023, C-209/22, ECLI:EU:C:2023:634 (*AB*) and CJEU 1 August 2022, C-242/22 PPU, ECLI:EU:C:2022:611 (*TL*), legal grounds 75-82.

[19] See also Amtenbrink & Vedder, 2022, p. 346.

Amending legislation

Amending national legislation on the back of a Court of Justice ruling takes time. The French Cour de Cassation submitted a reference for a preliminary ruling asking about the possibility of giving the national legislator a specific time period to implement a legislative amendment in the event that the legislation (on the requisitioning of telecommunications data) was found to be in violation of Directive 2002/58. It would benefit legal certainty and allow data already collected and retained still to be used in criminal cases.[20] The Court of Justice dismissed it. Such a temporal limitation on the effects of a ruling can only be provided by the Court of Justice for compelling reasons of legal certainty and can only be provided in the ruling interpreting that particular part of EU law.[21] This interpreting of the conditions under which telecommunications data can be collected and retained under Directive 2002/58 should have been done in a previous ruling, i.e. the ruling where this interpretation was given for the first time.

Effect in case law

To identify the effect in national case law, we are going to look at three types of instruments where Court decisions can have significant consequences, and we will go into three situations that may arise in each case. It concerns the unlawful application of an investigative power (cf. the *Prokuratuur* case), the lack of protection of procedural rights, and criminalisation that violates EU law. The three situations exist in a specific pending criminal case during which a reference for a preliminary ruling was submitted, other pending criminal cases, and closed cases.

Consequences for the case as part of which a reference for a preliminary ruling was submitted

In several of its rulings, the Court explained when national courts must disapply national law. This is not soon the case: '*It is only where it is unable to interpret national law in compliance with the requirements of EU law, that the national court, which is called upon within the exercise of its jurisdiction to apply provisions of EU law, is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means.*'[22]

Usually, the Court of Justice's ruling on a preliminary question will be delivered at a time when it is still possible to take the ruling into account in the

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[20] CJEU 20 September 2022, C-339/20 and C-397/20, ECLI:EU:C:2022:703 (*VD*).

[21] Idem, legal ground 98.

[22] CJEU 21 October 2021, C-282/20, ECLI:EU:C:2021:874 (*ZX*), legal grounds 39-40.

remainder of the national criminal proceedings for which the court sought a preliminary ruling. This happens when a Court of Justice ruling deems criminalisation of a certain matter (which implements EU law) to be contrary to Article 49 of the Charter. The court can then, following the Court of Justice's ruling, disapply the national criminalisation provision and discharge the suspect from all legal proceedings. In the other two situations, i.e. the unlawful application of an investigative power or the lack of procedural rights, the Court's ruling leads to a procedural error that can be dealt with in accordance with the rules of national law. After all, EU law does not have any harmonising rules for the handling and appreciation of evidence. The TFEU does provide a legal basis for that, but it has not been used so far.[23]

In the *TL* case, the Court set out the framework for what national courts must do when finding a violation of rights included in the Right to Information Directive and the Right to Interpretation and Translation Directive. Since those directives do not contain specific rules on that, it is a matter for the internal legal order of Member States to lay down further rules on the basis of the principle of procedural autonomy of the Member States. '*However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness)*.'[24]
In the *Prokuratuur* case, the Court further addressed the question of what national courts must do if an investigative power has been exercised (requisitioning telecommunications data) in a way that failed to meet the relevant conditions under EU law. '*In deciding whether to exclude information and evidence obtained in contravention of the requirements of EU law, regard must be had, in particular, to the risk of breach of the adversarial principle and, therefore, of the right to a fair trial entailed by the admissibility of such information and evidence.* (…) *Therefore, the principle of effectiveness requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of traffic and location data in breach of EU law or by means of access of the competent authority thereto in breach of EU law, in the context of criminal proceedings against persons suspected of having committed criminal offences, where those persons are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact*.'[25]

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[23] Cf. also the reflection in Advocate General Ćapeta's opinion of 26 October 2023, C-670/22, ECLI:EU:C:2023:817 (*Encrochat*), legal grounds 118-125.
[24] CJEU 1 August 2022, C-242/22 PPU, ECLI:EU:C:2022:611 (*TL*), legal ground 75.
[25] Idem, legal ground 44.

In its ruling of 5 April 2022, the Supreme Court of the Netherlands faced the challenge of implementing this part of the *Prokuratuur* ruling. In Dutch criminal procedure, unlawful application of powers is dealt with under Section 359(a) of the Dutch Code of Criminal Procedure, which prompted the Supreme Court to argue:[26] '(…) *The circumstance that the public prosecutor has requisitioned traffic or location data (other than exclusively identifying data) without prior authorisation from the examining magistrate, while such authorisation (...) was indeed required, does as such not provide grounds for exclusion of evidence. Whether or not the sentence should be reduced in response to the unlawful exercise of powers depends on the question of whether and the extent to which the suspect's privacy has been violated, which partly determines the seriousness of the omission and the harm actually suffered as a result of the omission. For a reduced sentence to be pertinent, there must be a sufficiently serious procedural error that has concretely affected the interests of the suspect in the criminal case. If the right to protection of privacy has been infringed to no more than a minor extent as a result of the procedural error, the court may suffice with the mere finding of that procedural error.*'[27]

Consequences for other pending criminal cases

An important question is what consequences Court of Justice rulings have for other (national) cases involving the same legal constellation. Again, the *ex tunc* nature comes into play here: '*It should be recalled that, according to settled case-law, the interpretation that the Court gives to a rule of EU law, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may and must be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation*.'[28] In this sense, there is a retroactive effect. There is no suggestion of a dynamic development of law, which we do see in the case law of the ECtHR, meaning that there is no basis for only allowing the legal situation to take effect from the Court's ruling onwards (cf. the right to social assistance after the *Salduz* ruling of the ECtHR). This is important because although the positional aspect in many cases, i.e. the interpretation in response to a reference for a preliminary ruling delivered while criminal proceedings are ongoing, makes it possible to consider the interpretation of EU law given by the Court and to prevent or compensate for unlawfulness, the question is how this works in a broader context: the interpretation of EU law given by the Court must also be taken into account in other ongoing cases, not just in the

[26] Supreme Court of the Netherlands 5 April 2022, ECLI:NL:HR:2022:475, *NJ* 2022/355, with an annotation by Ouwerkerk.
[27] Supreme Court of the Netherlands 5 April 2022, ECLI:NL:HR:2022:475, legal grounds 6.12.3-6.12.5.
[28] CJEU 5 April 2022, C-140/20, ECLI:EU:C:2022:258 (*G.D.*), legal ground 125.

case where the court submitted a reference for a preliminary ruling to the Court of Justice.

In cases where the investigation took place before the *Prokuratuur* ruling, the Supreme Court of the Netherlands set a high threshold for success of a defence regarding the use of telecommunications data without prior authorisation from the examining magistrate.[29] Merely stating that the suspect's interests were harmed because traffic and location data for a two-month period were requisitioned without the intervention of the examining magistrate is not enough. Evidence must be provided of the extent to which the suspect's privacy has allegedly been violated and of the harm actually suffered by the suspect as a result of that violation. Otherwise, there is no way to conclude that the procedural error was so serious that it specifically harmed the interests of the suspect in the criminal case, or that there has been another procedural error that has led to such a serious violation of a criminal law provision or legal principle that exclusion of evidence or reduction of sentence would be appropriate.

Consequences for closed criminal cases

Yet another question is what happens with closed cases where rulings were rendered based on what later turned out to be an incorrect interpretation of EU law, or, in other words, what happens if national legislation is deemed to conflict with EU law via the interpretative scope of applicable EU regulations, regardless of whether or not it conflicts with a fundamental right guaranteed by the Charter? Should these other cases then be reopened if there is an error that would have led to unlawfulness of evidence or if there is a conviction on the basis of a criminal statutory provision that turns out to be incorrect?[30]

In a ruling of April 2019, the Supreme Court of the Netherlands addressed this question and answered in the negative.[31] This concerned the case of a person who had been convicted of a criminal offence that, following a subsequent ruling by the Court of Justice, had been defined based on an incorrect interpretation of EU law. The Supreme Court of the Netherlands stated '*that EU law does not require that the special remedy of review – which allows a criminal conviction that has become final to be revised on the grounds referred to in Art. 457 of the Dutch Code of Criminal Procedure, which includes an established violation of the ECHR – be extended in the sense that a conflict with Union law, in particular with Directive 2001/83/EC and the interpretation thereof given by the CJEU in its ruling of 10 July 2014, ECLI:EU:C:2014:2060 regarding the concept of 'medicinal product'*.[32] There

[29] Supreme Court of the Netherlands 21 February 2023, ECLI:NL:HR:2023:241, legal ground 2.4.2.
[30] Cf. Ouwerkerk & Verrest 2021, p. 602.
[31] Supreme Court 9 April 2019, ECLI:NL:HR:2019:546.
[32] Supreme Court 9 April 2019, ECLI:NL:HR:2019:546, legal ground 4.3.2.

are quite a few holes to pick in this ruling by the Supreme Court of the Netherlands. First of all, the ruling by the Court of Justice in case C-234/17 (*XC and Others*), which the above ruling refers to, was rendered in a case involving bis in idem. The Court of Justice saw no reason to review the case in a manner similar to that applied in Member States following condemnatory rulings by the ECtHR[33] because the suspect in this case would have had sufficient opportunities to raise the bis-in-idem situation with the court.[34] That the Court takes this approach is not entirely incomprehensible. In analogy to a case involving bis in idem, it could be sufficient to argue in the case of the unlawful requisitioning of telecommunications data on the basis of the *Prokuratuur* case law that the person concerned has had the opportunity to put up a defence during the criminal proceedings. This suspect also seems to be able to rely on Court of Justice case law on compensation for an infringement of procedural rights. However, it is doubtful whether this line of reasoning, which the Supreme Court seems to assume in its ruling of April 2019, will be effective with respect to EU instruments of substantive criminal law. It is also doubtful whether the second argument put forward by the Supreme Court in that ruling is appropriate, given the *ex tunc* nature of the interpretation of EU law. That second argument means that a court arriving at a different interpretation of the law at a later stage will not produce a new point of law that is required to proceed to a review of the previous conviction, because a miscarriage of justice does not provide a new point of law.[35]

4.4 The Charter applies, but to what extent?

An important question with a view to determining the impact of the Charter in EU legislation and, in particular, in the case law of the Court of Justice is the relationship between the EU legal instrument in force and the provisions of the Charter against which the instrument is reviewed.

An instrument of a substantive criminal law nature, regardless of whether it concerns harmonisation of substantive criminal law or quasi-criminal law, contains criminalisation and/or standards to be enforced, and sanctions. It is obvious here that the standard/criminalisation is reviewed against the principle of legality (Article 49(1) Charter) and sanctions against the principle of proportionality of penalties (Article 49(3) Charter). In rulings concerning quasi-criminal law, and in particular the obligation to take action against fraud with EU funds/taxation, the Court also sees an opportunity for further review against the principle of effectiveness. This can go as far as examining whether

[33] This concerns a different situation, because the ECtHR generally hears cases that have been closed in the national judicial process and have led to an irrevocable conviction.

[34] CJEU 24 October 2018, C-234/17, ECLI:EU:C:2018:853 (*XC and Others*), legal ground 59.

[35] Idem, legal ground 4.4.2.

there are sufficient resources (investigative powers, no obstacles to prosecution) for effective investigation and prosecution (*Taricco*).[36]

Can the regulation of those investigative powers – which may result in a limitation on fundamental rights under the Charter (such as Articles 7, 8, 47, and 48) – subsequently, in turn, be reviewed against the Charter?
To answer this question, we can draw clues from a study of the fundamental rights section of recent proposals for new criminal legislation: what does the EU legislator consider to be a relevant review of these instruments against provisions of the Charter?

In April 2023, the European Commission proposed a regulation on the transfer of criminal proceedings. This regulation completes the EU instruments for judicial cooperation between Member States in criminal proceedings. In short, the regulation regulates the circumstances and conditions under which the authorities of a Member State may ask the authorities of another Member State to take over an ongoing criminal case from them. In the fundamental rights paragraph, the European Commission first points out that transferring criminal proceedings is a good way to prevent situations of bis in idem. The section subsequently focuses on providing sufficient legal remedies to challenge a decision to transfer criminal proceedings. This is in line with the case law of the Court of Justice as we will discuss below in Section 5.2.2. However, the explanatory memorandum continues by saying that '*since the proposal regulates the transfer of criminal proceedings, all criminal law procedural safeguards apply to those criminal proceedings. This includes in particular the right to a fair trial and the rights of defence, as enshrined in Article 6 of the European Convention on Human Rights and Articles 47 and 48 of the Charter. It also includes the relevant legislation at EU level on procedural rights for suspects and accused persons in criminal proceedings* (…).'[37]

A recent example of a proposal for a new EU instrument in the field of harmonisation of substantive criminal law is the proposal for a Corruption Directive. The fundamental rights section of this proposal first goes into the review of criminalisation and sanctions included in the draft directive against the principle of legality and the principle of proportionality. The Commission continues: '*The use of investigative tools, which the Directive seeks to ensure,*

[36] The case law of the Court of Justice thus increasingly relates to the implementation of criminal law in practice, while – as Klip 2021, p. 192-193 noted – Article 276 of the TFEU still says that 'the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.'

[37] COM(2023)185, p. 10-11. Might this be a case of two intertwined lines of reasoning? That the Procedural Rights Directive applies to any prosecution (including subsequent criminal proceedings in the recipient Member State) speaks for itself. Or is the idea (also) that Articles 47 and 48 of the Charter apply, because of the force of EU law in the form of the Regulation on the transfer of criminal proceedings, which makes the Charter applicable?

has to respect fundamental rights, such as the right to an effective remedy and to a fair trial (Article 47) and the presumption of innocence and the right of defence (Article 48). The use of such tools, in accordance with national law, should be targeted and take into account the principle of proportionality and the nature and seriousness of the offences under investigation and should respect the right to the protection of personal data. Moreover, when applying the Directive, Member States must respect their obligations under Union law with regard to procedural rights of suspects or accused persons in criminal proceedings.'[38] What we are witnessing here is an important relaxation of the law, resulting from the inclusion of a provision on investigative powers (criminal procedural law) in a substantive criminal law instrument. Article 23 reads as follows: '*Member States shall take the necessary measures to ensure that effective investigative tools, such as those used in countering organised crime or other serious crimes, are available to persons, units or services responsible for investigating or prosecuting the criminal offences referred to in this Directive.*'

In my view, the conclusion to draw is that a *hop-step-and-jump model* applies in some cases. When an instrument of quasi-criminal law applies, a reference for a preliminary ruling involving the Charter may be submitted, because the Charter applies while EU law is being applied (hop). It is obvious that it must be possible to review the criminalisation of certain acts under the instrument against the principles of legality and proportionality of penalties under Article 49 of the Charter (step). And when it comes to sentencing, the right to a fair trial applies (Article 47 of the Charter)[39] (jump). If such a directive also includes effective combating of this form of crime, adequate investigative powers must obviously be available to be able to investigate criminal offences. The exercise of those powers may, in turn, be subject to review against the Charter (jump). In short: applicability of an EU criminal law instrument gives reason to review its functioning, its application in practice, and any criminal proceedings on the basis thereof, against the full breadth of relevant provisions from the Charter and not only against provisions from the Charter that relate directly to the substantive law aspects of the instrument.

[38] COM(2023)234, p. 18-19.
[39] CJEU 4 May 2023, C-40/21, ECLI:EU:C:2023:367 (*T.A.C.*).

5 The Charter and criminal law: an analysis of the Court's jurisprudence

5.1 Introduction

In recent years, the Court of Justice has dealt with more and more cases in the criminal law domain. The Court often also applies the Charter in these cases. On the basis of this application of the Charter in interpreting EU law based on facts and circumstances and national law in concrete cases, we can gradually, or perhaps even quickly, learn more about the substance of fundamental rights included in the Charter. The following is a brief analysis of application of the Charter in the case law of the Court of Justice. Since the role or effect of the Charter differs per category of regulation in the field of EU criminal law (see Chapter 3), I will go by the same categories here.

5.2 Judicial cooperation in criminal matters

5.2.1 Reviewing the risk of infringement of fundamental rights

I will start off by briefly focusing on how the Court interprets the Member States' obligation, partly under the instructional standard included in instruments such as the EAW Framework Decision, as discussed in section 4.1, to prevent fundamental rights of persons from being impaired by judicial cooperation. This case law of the Court was already discussed in Chapter 2, as well as in Gerards' introduction (Section 5.1.2). The basis for the review is the principle of mutual trust and the principle of mutual recognition. The Court emphasises the importance of these principles: they are necessary as a basis for effective judicial cooperation in criminal matters, which, in turn, is necessary to create and maintain an area without internal borders. The principle of mutual trust requires, among other things, '*each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.*'[1]

This is the reason behind the two-step examination that an (executive) judicial authority must apply in the event of a real risk of fundamental rights being impaired as a result of judicial cooperation. This two-step examination means that only where there is objective, reliable, accurate, and duly updated information showing that there are permanent or fundamental flaws in the law

[1] CJEU 22 February 2022, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100 (*X and Y*), legal grounds 40-41.

and practice of another Member State that give rise to such a risk, the decision to cooperate must be put on hold. This is the first step. Such information includes international judicial resolutions, decisions, reports, or other documents of the Council of Europe or the UN, as well as information from the database of the EU fundamental rights agency FRA.[2] Putting a decision on hold provides an opportunity to investigate the situation further and to ask questions about it to the (issuing) judicial authorities of the other Member State. The second step is to assess, both specifically and accurately, whether there are compelling and fact-based grounds to assume that the circumstances create a risk of the fundamental rights of the persons concerned being violated.[3] In the *Puig Gordi* case, the Court determined that the fact that a legal remedy against the issuance of an EAW was available in the issuing Member State does not decide the outcome of the two-step examination, nor its validity and interpretation.[4]

In an Italian case, the question arose whether the surrender of a mother with two small children living with her, who had been sentenced to a prison term of five years in the issuing Member State, could be refused on the grounds of violation of the rights of the child (Article 24 of the Charter). While the Advocate General in this case explored the perspective of the children,[5] she did not consider their perspective reason to deviate from the two-step examination. The Court subsequently not only followed this line of reasoning but was even firmer in its judgment.[6]

Finally, a recent case has made it clear that the two-step examination applies not only in surrender cases but also when enforcement of a custodial sentence is taken over on the basis of the Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences.[7] In this case, a German court asked whether it could refuse to enforce a custodial sentence imposed in Poland if it has information showing that the right to a fair trial in that Member State has serious or permanent deficiencies, in particular as regards the independence of the judiciary. The Court ruled that it could, provided that the second step also returns an affirmative answer, i.e. that there are serious reasons to assume that these deficiencies could have had actual consequences for the criminal proceedings instituted against the person concerned. What stands out is that

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[2] CJEU 31 January 2023, C-158/21, ECLI:EU:C:2023:57 (*Puig Gordi*) stresses (again) that a mere report from, in this case, the Working Group on Arbitrary Detention is not enough to deny execution of an EAW.

[3] See, for example, CJEU 21 December 2023, C-261/22, ECLI:EU:C:2023:1017 (*GN*), legal grounds 43-55.

[4] CJEU 31 January 2023, C-158/21, ECLI:EU:C:2023:57 (*Puig Gordi*), legal ground 120.

[5] Opinion of Advocate General Ćapeta 13 July 2023, C-261/22, ECLI:EU:C:2023:582 (*GN*). In this case, the Advocate General found that application of Article 4(6) of the EAW Framework Decision would be the best solution, which would be to deny surrender and at the same time take over enforcement of the sentence.

[6] CJEU 21 December 2023, C-261/22, ECLI:EU:C:2023:1017 (*GN*).

[7] CJEU 9 November 2023, C-819/21, ECLI:EU:C:2023:841 (*M.D.*).

the Court places a lot of emphasis on the fact that it is up to the court in the executing Member State to reach a conclusion on the basis of the two-step examination. A difference with the two-step examination in surrender cases is that the examination in cases on enforcement of a custodial sentence must establish whether there was a violation of fundamental rights when the conviction was handed down in the issuing Member State.[8]

5.2.2 Remedy

In the context of judicial cooperation in criminal matters, the Court of Justice is keen on the possibilities available to the persons concerned to maintain their legal position, in particular the right to an effective legal remedy under Article 47 of the Charter. There is a dual orientation in the issuing and the executing Member State, in two dimensions: effects now (protection of personal freedom, property) and effects in the future (for example with respect to the right to a fair trial). This is where Article 47 of the Charter differs from Article 6 of the ECHR, which does not fully apply to judicial cooperation in criminal matters.

Case law on the safeguards that apply when an EAW is issued, which was already discussed in Section 2.3, contains clear examples of this line. This case law assumes twofold protection of persons against deprivation of liberty as a result of the issuance of an EAW: by the decision to arrest and deprive of liberty (a national arrest warrant), and subsequently by the decision to issue an EAW. One of these two decisions should be taken by a court, so as to ensure judicial review of the decision to issue an EAW. If neither decision is taken by a court, there should be a legal remedy available against the issuance of an EAW. The Court of Justice has determined this in cases such as the *PI* case.[9]

One of the questions raised in the *Gavanozov II*[10] case was whether there should be a legal remedy against the issuance of an EIO for the purpose of search and seizure in another Member State, as well as the use of video conferencing to interrogate a witness in the other Member State. The Court sees concrete entries in the EIO Directive, interpreted in conjunction with Article 47 of the Charter, to indeed impose this requirement.[11] There must be a legal provision that guarantees a legal remedy.[12] This requirement applies regardless of whether an EIO has been issued by a court, which means that

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[8] Idem, legal grounds 36-39.

[9] CJEU 10 March 2021, C-648/20 PPU, ECLI:EU:C:2021:187 (*PI*), legal grounds 59-60 and CJEU 27 May 2019, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456 (*OG and PI*), legal grounds 67-68.

[10] CJEU 11 November 2021, C-852/19, ECLI:EU:C:2021:902 (*Gavanozov II*).

[11] Idem, legal grounds 60-62.

[12] Idem, legal grounds 48-50. This concerns the possibility of prior judicial review and not the fact that the defence can challenge the EIO at a later point in the criminal proceedings in the issuing Member State.

judicial review would already be guaranteed. The Dutch legislator has so far seen no reason to provide a separate legal remedy against the issuance of an EIO, adhering to consistent case law on the basis of which a complaint against seizure can be filed if this is covered by the EIO or, if necessary, summary proceedings can be initiated.[13]

What does the review entail?
In the *Encrochat* case, which is pending before the Court of Justice, preliminary questions have been asked that are in line with the *Gavanozov II* case. In her opinion, Advocate General Ćapeta states that the required legal remedy against the issuance of an EIO allows the national court to, among other things, control the necessity and proportionality of the EIO (and the application of an investigative power requested therein) under Article 6(1)(2) of the EIO Directive. When issuing the EIO, the issuing authority does not have to consider whether the evidence was lawfully collected in the other Member State (under the law of that Member State).[14]

Another point concerns the question whether, in the context of the protection of the rights of individuals, requirements should also be imposed on the safeguards that must apply under the national law of the issuing Member State when it comes to application of the investigative powers included in the issued EIO. In the *G.K.* ruling about the EPPO, as discussed in Section 4.1, the Court does do that in its interpretation of Article 32 of the EPPO Regulation, which is somewhat comparable to Article 6 of the EIO Directive. However, this is because, unlike in the EIO Directive, the EPPO Regulation (Article 30) contains EU law that obliges Member States to enable certain investigative powers in their legislation and that review of the use of those powers against instruments such as the Charter subsequently goes without saying.[15]

5.2.3 Proportionality with regard to the criminal offence underlying judicial cooperation in criminal matters

The Court of Justice has dismissed the suggestion that an executing authority, in the context of a decision on the execution of an EAW (or EIO), would have to judge whether the criminal offence or the (expected) penalty in the case in the issuing Member State is compatible with the principle of proportionality of penalties under Article 49(3) of the Charter, let alone that this could lead to refusal to execute an EAW. Several arguments come together in this position of the Court. First of all, guaranteeing fundamental rights in (underlying)

[13] See *T&C Sv*, note 4 to Article 5.4.21 of the Dutch Code of Criminal Procedure.
[14] Opinion of Advocate General Ćapeta 26 October 2023, C-670/22, ECLI:EU:C:2023:817 (*Encrochat*).
[15] See, however, the superfluous finding in CJEU 16 December 2021, C-724/19, ECLI:EU:C:2021:1020 (*HP*), legal ground 42.

criminal proceedings against the suspect is the responsibility of the authorities of the Member State where those proceedings are conducted, i.e. in the issuing Member State. Furthermore, the instruments for judicial cooperation in criminal matters do not contain any grounds for refusal based on a review against the principle of proportionality. Finally, such a review is not included in the requirement of double criminality to the extent that this applies in the instruments.[16]

5.2.4 Non-discrimination

Non-discrimination is an important principle (Article 18 of the TFEU) and a fundamental right (Article 21 of the Charter) in the European Union. This has an effect in judicial cooperation in criminal matters, such as when it comes to the distinction that Member States acting as executing authority in an EAW procedure may make between requested persons who are residents of the executing Member State and others. The surrender of a Member State's own nationals or persons with permanent residence in the executing Member State may be refused on the basis of Article 4(6) of the EAW Framework Decision, provided that the Member State offers to take over enforcement of the sentence. Surrender for the purpose of criminal prosecution may, under Article 5(3) of the EAW Framework Decision and provided that it concerns the same category of persons, be made conditional on the requested person convicted in the issuing Member State being able to serve their sentence in the executing Member State. This is the situation within the EU, but Member States often also apply such requirements in the context of extradition to a third country. In the *Petruhhin* case, the Court saw an unjustified distinction between EU citizens in such extradition cases, i.e. a distinction between nationals of an EU Member State and persons residing in that Member State who are nationals of another EU Member State.[17] According to the Court, this distinction can be prevented by reviewing the extradition request from the third country in the Member State of which the requested person is a national and where they, therefore, enjoy those additional rights. To achieve this, the Member State that was first requested is obliged to inform the Member State of which the requested person is a national and, where appropriate, to surrender that national to that Member State on the basis of a separately issued EAW.[18]

Following this ruling, the Court found in the *Pisciotti* case that the fact that a Member State has fulfilled its obligation to inform the other Member State, and that other Member State did not take any action in terms of issuing an

[16] CJEU 14 July 2022, C-168/21, ECLI:EU:C:2022:558 (*KL*), legal grounds 65-69.

[17] Under Article 18 of the TFEU (prohibition of discrimination based on nationality (in this case, the corresponding Charter article, i.e. Article 21(3), is not cited)) in conjunction with Article 21 of the TFEU (Union citizens' right to move and reside freely within the territory of the Member States).

[18] CJEU 6 September 2016, C-182/15, ECLI:EU:C:2016:630 (*Petruhhin*).

EAW to have the requested person surrendered, is sufficient to directly extradite the requested person to the third country (a non-EU Member State).[19] In the *Raugevicius* case, the Court ruled that the requested Member State whose national law precludes the extradition of its own nationals to countries outside the Union for the purpose of enforcing a sentence and provides for the possibility to enforce a sentence on its territory, is obliged to grant the same legal status to (other) Union citizens who permanently reside in that Member State.[20] The Court has meanwhile ruled that, in this situation, the requested Member State is obliged to check with the third country whether it consents to enforcement of the sentence in the executing Member State. If not, extradition is still possible, because otherwise the Member State would probably be in breach of an obligation under an extradition treaty between it and the third country, 'in so far as that extradition does not infringe the rights guaranteed by the Charter of Fundamental Rights of the European Union.'[21]

In a recent case, a different question arose about application of Article 4(6) of the EAW Framework Decision and the principle of non-discrimination. An EAW had been issued for the surrender of a person with the nationality of a non-EU Member State (for enforcement of a sentence). The requested person had his permanent residence in the executing Member State, but because he was neither a national of the executing Member State nor a permanent resident and a national of another EU Member State,[22] he did not qualify for application of Article 4(6) of the EAW Framework Decision. The Court found that Article 20 of the Charter (equality before the law) must be used as a basis for review, and, by way of that link, case law based on non-discrimination would still have to be applied.[23]

Can we conclude from all of this that the Court takes a broad view of possible discriminatory effects of judicial cooperation in criminal matters? An example of such a discriminatory effect is when a person, due to the transfer of prosecution to another Member State, may receive a higher sentence in that other Member State than they could have faced in the transferring Member State for the criminal offence they are suspected of having committed. The *JL* case touched on this issue in the context of harmonisation of substantive criminal law, which we will go into below. The Court was asked to interpret Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. The question was whether the 'significant quantity' criterion,

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[19] CJEU 10 April 2018, C-191/16, ECLI:EU:C:2018:222 (*Pisciotti*).

[20] CJEU 13 November 2018, C-247/17, ECLI:EU:C:2018:898 (*Raugevicius*).

[21] CJEU 22 December 2022, C-237/21, ECLI:EU:C:2022:1017 (*S.M.*). The reference to the Charter is to Article 19, which is about protection against removal, deportation, and extradition.

[22] This latter condition does not feature in Article 4(6) of the EAW Framework Decision.

[23] CJEU 6 June 2023, C-700/21, ECLI:EU:C:2023:444 (*O.G. Brasov*).

which the Framework Decision considers a deciding factor in setting a sanction as a deterrent for a drug offence, conflicts with, among other things, the prohibition of discrimination (Articles 20 and 21 of the Charter) because it has not been further specified by the EU legislator and can, therefore, be interpreted differently by Member States' national courts. The Court of Justice does not think it does. After all, against the background of the principle of minimum harmonisation that governs the harmonisation of substantive criminal law in the EU, the EU legislator has left it to the national legislator to work out this concept. This results in a risk of Member States imposing different sanctions for the same offence, but it was apparently a conscious decision to leave this kind of imparity. Moreover, sanction imparity is inherent to minimum harmonisation and, therefore, cannot be considered discrimination on the grounds of nationality. However, the national courts' interpretation must be reasonably foreseeable.[24]

5.2.5 Ne bis in idem

Article 54 of the CISA, interpreted in conjunction with Article 50 of the Charter, can carry considerable weight in the decision-making on judicial cooperation in criminal matters. For example, the Court of Justice ruled that these provisions prohibit Germany from extraditing a requested person (a non-EU national) to the United States. There was a bis in idem situation, because the requested person had previously been convicted in Slovenia for the same offences for which extradition was requested and had served the sentence, but the applicable extradition treaty between Germany and the United States only provided a ground for refusal for bis in idem in case of a previous conviction in the requested state.[25]

[24] CJEU 11 June 2020, C-634/18, ECLI:EU:C:2020:455 (*JL*), legal grounds 40-50 Article 5(2)(b) of the proposal for a regulation on the transfer of proceedings in criminal matters (COM(2023)185) makes the transfer of prosecution for a criminal offence to another Member State conditional on the suspect being a national or resident of the requested Member State. This could lead to a suspect being prosecuted in another Member State partly on grounds of their nationality, and possibly receiving a higher sentence in that Member State for an offence they committed in the requesting Member State. This is overcome in Article 20(6) of the proposal for the regulation, which provides that '*the requested authority may take into consideration (...) the maximum sentence set out in the law of the requesting State, when the criminal offence has been perpetrated in the territory of the requesting State. Where the jurisdiction is exclusively based on Article 3, the sentence imposed in the requested State shall not be more severe than the maximum sentence set out in the law of the requesting State.'* Other than that, it will probably be sufficient, in line with the previous topic (legal remedy), for the proposal for the regulation to provide for an additional legal remedy (compared to the current instruments) against the decision of the requested Member State to assume the criminal proceedings.

[25] CJEU 28 October 2022, C-435/22 PPU, ECLI:EU:C:2022:852 (*HF*).

5.3 Quasi-criminal law

The Court of Justice's case law on instruments of quasi-criminal law in relation to the fundamental rights included in the Charter covers many different topics and has already developed significantly in some areas.

5.3.1 Ne bis in idem

Bis in idem is a subject that, in the context of quasi-criminal law instruments, regularly draws references for a preliminary ruling to the Court of Justice. In a sense, it is inherent to the nature of quasi-criminal law instruments that leave it to the Member States to choose the method of enforcement of the standards set in the instrument, that Member States make different choices in this regard. In its case law, the Court of Justice is rather quick to assume that sanctions relate to the same fact (broad concept of facts)[26] and goes by the basic principle that review against the *ne bis in idem* principle also applies when it concerns different types of sanctions (criminal law, administrative law). This latter review was applied in the recent *Volkswagen Group Italia* case,[27] where the Court reiterated that an administrative measure qualifies as a criminal sanction under Article 50 of the Charter if it seeks to repress and has a certain severity, even if it is classified as an administrative sanction under national law.[28] Cumulation of proceedings and sanctions for the same offences is not ruled out, provided that the conditions that Article 52(1) of the Charter stipulates for a limitation are met. Firstly, cumulation must not place an excessive burden on the person concerned. Secondly, there must be clear and precise rules on the basis of which a determination can be made of which acts and omissions allow cumulation. And thirdly, the proceedings in question must be sufficiently coordinated and be conducted shortly after each other. This also applies in purely national proceedings in the Member States.[29] The court imposing the second sanction must have the opportunity to review all measures in response to the offence and to tailor the sanction accordingly.[30]

5.3.2 The principle of proportionality of penalties

In the area of quasi-criminal law, where there is no basis for the Union to prescribe criminal sanctions for violations of norms, and where the only

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[26] See also J.W. Ouwerkerk, 'Het feitsbegrip bij ne bis in idem opnieuw bekeken,' *DD* 2023/47, who points to the difference compared to the Supreme Court case law on Section 68 of Dutch Penal Code, which assumes a narrower interpretation of that which is to be considered the same offence.

[27] CJEU 14 September 2023, C 27/22, ECLI:EU:C:2023:663 (*Volkswagen Group Italia*).

[28] See also CJEU 22 June 2021, C-439/19, ECLI:EU:C:2021:504 (*Strafpunten*), legal ground 88.

[29] CJEU 14 September 2023, C 27/22, ECLI:EU:C:2023:663 (*Volkswagen Group Italia*). See also L. Neumann, 'Limitations of the Transnational ne bis in idem Principle in EU Law. Remarks on the ECJ's Diesel Scandal Volkswagen Case,' *EUCRIM* 2023, no. 1, p. 99-104.

[30] CJEU 4 May 2023, C-97/21, ECLI:EU:C:2023:371 (*MV – 98*).

requirement is usually that sanctions and measures must be effective, proportionate, and dissuasive,[31] the principle of proportionality of penalties plays an important role. The Court of Justice further establishes a link between safeguarding the principle of proportionality of penalties and Article 47 of the Charter, in the sense that a person who has been given a sanction must be able to challenge the proportionality of that penalty.[32]

As regards the substantive assessment of whether the penalty under national law is incompatible with the principle of proportionality of penalties, a ruling of the Court of Justice on enforcement of the Directive on the enforcement of intellectual property rights (2004/48/ EC) offers some starting points. Bulgarian criminal law provides for various penalties for unauthorised use of trademarks in commercial transactions. If unauthorised use of trademarks was repeated or had significant harmful consequences, Bulgarian criminal law imposes a *minimum sentence* of five years' imprisonment. The Court deemed this to be in conflict with Article 49(3) of the Charter. The Court found that it leaves the national court insufficient scope to consider the facts and circumstances of the case at the sentencing stage, because even though the infringement was repeated, the effects on economic activity may have been limited.[33]

5.3.3 The legality principle

In Chapter 2, we went into the Court of Justice's *Taricco* case law, and the one point that you will likely remember is that the Court is, under certain circumstances, willing to set aside the limitation period. It is willing to do so if that limitation period stands in the way of an effective fight against fraud with EU funds. At the same time, however, the Court had also indicated that the principle of legality (especially with regard to legal certainty and foreseeability), which according to the Court is to be interpreted the same as Article 7 of the ECHR, should not be compromised.[34] It is precisely this consideration that divided courts in Romania in a recent case. In its answer, the Court of Justice basically stated once again that both interests, i.e. effective combating of fraud and application of the principle of legality, are at issue, and adds that if the two interests have been weighed on the basis of national law, the outcome is not wrong. To make matters even more complex, the Court states that another part of the principle of legality, i.e. the *lex mitior* principle (the principle that the most favourable criminal law is applied retroactively),

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[31] See, for example, Article 58(1) of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

[32] CJEU 4 May 2023, C-40/21, ECLI:EU:C:2023:367 (*T.A.C.*), legal ground 88.

[33] CJEU 19 October 2023, C-655/21, ECLI:EU:C:2023:791 (*G. ST. T.*), legal grounds 80-84.

[34] CJEU 5 December 2017, C-42/17, ECLI:EU:C:2017:936 (*Taricco II*), legal ground 54.

must be disregarded if this prevents interruption of the limitation period (when that blocks application of a new longer limitation period regulated by law).[35]

*5.3.4 The right to silence/*nemo tenetur

The Court of Justice pronounced further on the *nemo tenetur* principle in the *Consob* case.[36] This was a case where an administrative sanction had been imposed in Italy for market abuse, a matter governed by EU law (Directive 2003/6/EC and Regulation (EU) No 596/2014). The Court infers the *nemo tenetur* principle from Articles 47 and 48 of the Charter,[37] stating that those provisions allow Member States to decide not to impose a penalty on a natural person[38] who, in the context of an investigation carried out against them by the competent authority under the aforementioned Directive or Regulation, refuses to provide answers to this authority that could show that they have committed an infringement punishable by administrative sanctions of a criminal nature or that they are criminally liable. This interpretation of how the *nemo tenetur* principle works is in line with the case law of the ECtHR.[39] The case is an example of the hop-skip-jump application of the Charter. Said Directive and Regulation contain an obligation for Member States to provide for legislation that allows appropriate sanctions to be imposed against acts of market abuse. However, the Court ruled that, in the context of the effectiveness of the fight against market abuse, legislation must not go so far as to impose sanctions on persons who do not cooperate in the investigation and may, consequently, be incriminating themselves.

5.4 Harmonisation of substantive criminal law

It is striking that although there are many EU instruments on the harmonisation of substantive criminal law, and they have been in force for a long time, there is little case law from the Court of Justice on those instruments. And there is even less of that kind of case law that also features the Charter. This is odd, actually, because the Court could, for example, be asked to review criminal statutory provisions and sanctions included in instruments against Article 49 of the Charter, the principle of legality, and the principle of proportionality of penalties.

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[35] CJEU 24 July 2023, C-107/23 PPU, ECLI:EU:C:2023:606 (*C.I. and Others*).

[36] CJEU 2 February 2021, C-481/19, ECLI:EU:C:2021:84 (*Consob*).

[37] The Directive to strengthen the presumption of innocence that includes the *nemo tenetur* principle in Article 7 does not apply here, because it is not a case of criminal prosecution.

[38] This is different for legal entities.

[39] M.A.A. Traousis, 'Hof van Justitie sluit zich voor het zwijgrecht en het nemo tenetur-beginsel voor natuurlijke personen aan bij het EHRM,' *NtEr* 2021, no. 5/6, p. 110-117.

In this context, the previously mentioned *JL* case on the Illicit Drug Trafficking Framework Decision merits a closer look. As a reminder, the central issue was whether national courts should be able to independently interpret the open concept of 'significant quantity of narcotics.' The Court does not see any conflict between leaving national courts this discretion and the principle of legality of Article 49(1) of the Charter, as long as the national court reviews the interpretation of the concept on a case-by-case basis, and provided that that interpretation is reasonably foreseeable.[40] It would have been interesting to hear the Court's opinion in a case where a Slovak court had raised questions about the compatibility of criminal statutory provisions under national law with the same Framework Decision. The Slovak court wanted to know whether the minimum sentence of 20 years for certain drug offences was in accordance with the right to a fair trial and the principle of proportionality of penalties (Article 49(3) of the Charter). However, the reference for a preliminary ruling was withdrawn by the referring court before it reached the Court of Justice.[41]

Finally, it is remarkable that the substance of substantive criminal law is also rarely, if at all, reviewed against other rights protected by the Charter. Article 11 of the Charter (right to freedom of expression), for example, would be an obvious touchstone for legislation in the area of racism and xenophobia, and the fight against child pornography.

5.5 Harmonisation of criminal procedure

5.5.1 Introduction

When it comes to harmonisation of criminal procedure across the European Union, there are three topics we should go into in some detail. The first of these topics to discuss, and perhaps the most important one, is the set of directives on procedural rights that are often linked to the Charter in Court of Justice case law. After that, we will focus on harmonisation of confiscation and harmonisation of victims' rights.

5.5.2 Right to information

In the application of the entirety of directives on procedural rights, the Right to Information Directive (2012/13/EU) is the first benchmark for enforcement of procedural rights and the starting point for the actual exercise of those rights. A suspect must, for example, be informed of their right of access to a lawyer, which is further described in the Access to Lawyer Directive (2013/48/EU), of their right to remain silent, which is safeguarded by the Directive on

[40] CJEU 11 June 2020, C-634/18, ECLI:EU:C:2020:455.
[41] Case C-149/19. See Pres. CJ 12 June 2019, C-149/19, ECLI:EU:C:2019:532.

strengthening the presumption of innocence (2016/343/EU), and of their right to interpretation and translation under the Interpretation and Translation Directive (2010/64/ EU). The Court leaves it to the Member States to determine the manner in which information is communicated to individuals.[42] However, the Court stated in the *Moro* case that provisions from the Directive aim to ensure that the suspect receives a fair trial and can put up an effective defence. There is a certain connection between the substance of the Directive and Articles 47 and 48 of the Charter. In this case, this is expressed in concrete terms in the fact that the suspect has the right to be informed about a change in the charge under Article 6(4) of the Directive, and the Court subsequently reviews by drawing on Article 48(2) of the Charter whether the suspect, after having been informed, can adequately contest the change to the charge.[43]

In the *Kolev* case, the Court of Justice provided further explanation of Article 6(3) of the Right to Information Directive. What is remarkable in this case is that the Court deviates from the literal text of the provision. Article 6(3) of the Directive stipulates that the suspect must be provided with detailed information about the accusation no later than when a court is requested to rule on the merits of the accusation. The Court of Justice can also accept, based on the underlying rights from Articles 47 and 48 of the Charter, for the information to be provided *after* a court has been asked to give a ruling on the validity of the accusation, as long as the information is provided before the start of the substantive handling of the case and in such a way that the rights of defence are respected and the procedure is fair.[44]

The *UY* case is an interesting one in this respect, where Article 47 of the Charter reinforces Article 6 of the Directive on the right to information on an accusation in the Court's reasoning: '*that directive builds on the rights laid down in, inter alia, Article 47 of the Charter of Fundamental Rights ('the Charter') and seeks to promote those rights. As has been stated in paragraph 49 of the present judgment, the objective of Article 6 of that directive is to guarantee the effective exercise of the rights of the defence and the fairness of the proceedings. A provision of that kind therefore expressly establishes one aspect of the right to an effective remedy, enshrined in Article 47 of the Charter.* (…) *Consequently, it is for the referring court, within the limits of its jurisdiction, to take all necessary measures to guarantee the full effectiveness of Article 6 of that directive.*'[45] In this case, this leads the Court to deduce an obligation from Article 6 of the Directive that is not explicitly provided, namely an obligation to actively inform a person, even if they live abroad, of a driving ban that has

[42] CJEU 13 June 2019, C-646/17, ECLI:EU:C:2019:489 (*Moro*), legal ground 51.
[43] CJEU 13 June 2019, C-646/17, ECLI:EU:C:2019:489 (*Moro*), legal grounds 67, 69-73.
[44] CJEU 5 June 2018, C-612/15, ECLI:EU:C:2018:392 (*Kolev*), especially legal grounds 88, 92.
[45] CJEU 14 May 2020, C-615/18, ECLI:EU:C:2020:376 (*UY*), legal grounds 70-73.

been imposed, because otherwise the person would be committing a criminal offence.

In the *TL* case, Portuguese law afforded the suspect a very short period to file a legal remedy against violation of his right to interpretation and translation. Moreover, that period had already started before he realised that one essential procedural document had not been translated. The Court ruled that such a national rule is contrary to the core provisions of the Interpretation and Translation Directive and of the Right to Information Directive, interpreted as per Articles 47 and 48 of the Charter and the principle of effectiveness.[46]

In a recent French case (*K.B. and F.S.*), the suspect was not informed of his right to remain silent at the time of arrest, but only well after he had been taken into custody. The suspect was thwarted in their attempt to denounce this violation by the fact that French law does not allow this after the preliminary investigation has been concluded: the trial judge is not allowed to rule on the alleged unlawfulness of an investigative act in the preliminary investigation. However, the Court found the latter insufficient reason to recognise a violation of the right to information, interpreted based on Articles 47 and 48 of the Charter, because the suspect had previously, during the preliminary investigation, been able to raise the violation through access to a lawyer and the opportunity to seek legal remedy.[47] In the *AB* case, which the Court heard a few months later, the opposite was the case. The suspect could not challenge the legality of the search and seizure before the court during the preliminary review. However, the suspect was able to do so at a later stage during the criminal proceedings. The Court allows that.[48]

The Court interprets Article 6(2) of the Right to Information Directive in such a way that if a suspect is taken into detention, they must be informed of the reasons for this at the start of the deprivation of liberty or shortly afterwards. The criterion is that all information necessary to actually challenge the lawfulness of the detention must be provided, including (taking into account the current phase of the investigation and in such a way that it does not harm the progress of the investigation) a description of all relevant facts, including the time and place of the facts, the nature of the person's involvement in these facts, and the provisional qualification used.[49]

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[46] CJEU 1 August 2022, C-242/22 PPU, ECLI:EU:C:2022:611 (*TL*).

[47] CJEU 22 June 2023, C-660-21, ECLI:EU:C:2023:498 (*K.B. and F.S.*). For those who are interested: in its ruling on a preliminary question (2023-1062 QPC) of 23 September 2023, the French Conseil Constitutionnel ruled that the underlying Article 385 of the CPP (French Code of Criminal Procedure) was to be considered to conflict partially with the French constitution.

[48] CJEU 7 September 2023, C-209/22, ECLI:EU:C:2023:634 (*AB*).

[49] CJEU 25 May 2023, C-608/21, ECLI:EU:C:2023:426 (*XN*). This case showed a link between the right to information and Article 6 of the Charter (right to liberty and security).

5.5.3 Right to access to a lawyer

In a number of judgments, the Court has, by interpreting Article 3 of the Directive on access to a lawyer (2013/48), clarified when exactly suspects must have access to a lawyer, This must be before they are questioned, immediately after deprivation of liberty, and when attending confrontations and reconstructions. When they have been summoned to appear before a court, access to a lawyer must be enabled in due time before they appear before that court.[50] The right of access to a lawyer does, therefore, not extend to the investigative acts of search and seizure, as these do, in principle, not involve any kind of interrogation.[51] Access to a lawyer must not be subject to an additional requirement that the suspect has appeared before an investigating judge: this is not acceptable to the Court on the basis of Article 3 of the Access to a Lawyer Directive, interpreted against the background of Article 47 of the Charter.[52]

5.5.4 Right to presumption of innocence

There is ample case law on the right to presumption of innocence, usually based on an interpretation of the Directive on strengthening the presumption of innocence (2016/343). Application of the Charter is especially relevant in judgments dealing with the right to remain silent/*nemo tenetur* (Article 7 of the Directive) and the right to be present and the issue of a trial in absentia (Articles 8 and 9 of the Directive).

Right to be present

The Court of Justice has, for example, now examined the right of a suspect to be present at their criminal trial and the related question of when, and under what conditions, a trial can be held in absentia. This is an example of the Court's mixed case law: some rulings are based solely on Article 8 of Directive 2016/343, which specifically describes the right to be present at one's trial. Other rulings concern the right to be present in a broader sense, including the opportunity to question prosecution witnesses at the hearing in the context of a fair trial, which a suspect only has when they are present at their trial, and the right to effective defence, as laid down in Articles 47 and 48 of the Charter. If we look at the substance, the Court clearly, often explicitly, seeks to tie in with the case law of the ECtHR.[53]

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[50] Article 3(2)(3), Directive on the right to access to a lawyer.

[51] CJEU 7 September 2023, C-209/22, ECLI:EU:C:2023:634 (*AB*).

[52] CJEU 12 March 2020, C-659/18, ECLI:EU:C:2020:201 (*VW*), legal ground 47.

[53] See CJEU 15 September 2022, C-420/20, ECLI:EU:C:2022:679 (*HN*), legal grounds 54-55; CJEU 19 May 2022, C-569/20, ECLI:EU:C:2022:401 (*IR*), legal ground 51; CJEU 23 November 2021, C-564/19, ECLI:EU:C:2021:949 (*IS*), legal ground 101.

Let's first take a look at several rulings on the right to be present at one's trial in a narrow sense. A condition for a trial to be held in absentia is that the accused was served properly. Service is not regulated under EU law. The Court ruled that the method of service may, therefore, be determined by national law, because Directive 2016/343 concerns minimum harmonisation and does not intend to regulate the entire criminal procedure exhaustively. '*Detailed rules of that kind laid down by national law cannot undermine that directive's aim of safeguarding the fairness of the proceedings and thus of enabling the person concerned to be present at the trial, which entails the ability to prepare his or her defence*.'[54] A conflict with the right to be present arises if a suspect cannot be present at their own trial in a Member State due to, for example, an entry ban imposed on them by the relevant Member State.[55] The Court also considered the question of whether an obligation to appear is permitted under Directive 2016/343. Since the directive does not regulate this, the national legislator can provide for this, according to the Court.[56]

The right to question witnesses

The Court has addressed the right to question witnesses on several occasions based on Article 8 of Directive 2016/343, and generally 'in conjunction with' Articles 47 and 48(2) of the Charter. In the *HYA (I)* case, the Court set out the relevant assessment framework: The Court started by stating that '*the ability for an accused person to be confronted with the witnesses in the presence of the judge who ultimately hands down the decision on the guilt or innocence of that person, is one of the important aspects of fair criminal proceedings, as the assessment of the trustworthiness of a witness is a complex task, which, usually, cannot be achieved by a mere reading of the content of the witness's statements, as recorded in the minutes of the hearings*.' The right to be present must be guaranteed in such a way '*that it can be exercised, at the judicial stage of criminal proceedings, in a manner which complies with the requirements of a fair trial. Thus, that right is not limited to ensuring the mere presence of the accused person at the hearings held in the context of the trial to which he or she is subject, but requires that the accused person be able to participate effectively in that trial and to exercise, to that end, the rights of the defence, which include the right to examine or have examined prosecution witnesses at that judicial stage.'*

An investigation at the hearing based on the principle of immediacy is, therefore, the starting point. To deviate from this principle and admit witness statements in a criminal case taken while the suspect was not present, certain conditions have to be met.[57] What stands out is that, in its explanation of the

[54] CJEU 19 May 2022, C-569/20, ECLI:EU:C:2022:401 (*IR*), legal ground 43.
[55] CJEU 15 September 2022, C-420/20, ECLI:EU:C:2022:679 (*HN*), legal ground 66.
[56] CJEU 15 September 2022, C-420/20, ECLI:EU:C:2022:679 (*HN*), legal grounds 41-43.
[57] CJEU 8 December 2022, C-348/21, ECLI:EU:C:2022:965 (*HYA I*), legal grounds 43-46.

scope for exception, the Court falls back on Article 52(1) of the Charter: the general conditions for limiting the rights protected under the Charter. These conditions are that limitations on the exercise of fundamental rights must be provided for by law, which in this context means that the possibility of considering statements of absent witnesses must be provided for by the relevant national law. Furthermore, the essence of the suspect's fundamental rights must remain safeguarded. The Court explicitly refers to the ECtHR ruling in the *Schatschaschwili vs Germany case:*[58] '*In that regard, it is important to state that such an assessment complies with the relevant case-law of the European Court of Human Rights, which shows that the use as evidence of witness testimony obtained during the pre-trial stage of criminal proceedings is not, in itself, inconsistent with Article 6(1), and (3)(d) ECHR, subject to the respect for the rights of the defence, which require, as a general rule, that the accused person be given an adequate and proper opportunity to challenge the evidence against them and to question the witness giving that evidence, either at the time of their testimony or at a later stage.*'[59] And the final condition that applies here is the principle of proportionality: '*That principle requires that any limitations which may, in particular, be imposed by acts of EU law on rights and freedoms enshrined in the Charter do not exceed the limits of what is appropriate and necessary in order to meet the legitimate aims pursued or the need to protect the rights and freedoms of others, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least onerous measure.'* Three further conditions were subsequently imposed in the context of the principle of proportionality, which will be up to national courts in Member States to review. Firstly: the absence of prosecution witness at the hearing must be justified by a weighty reason (such as fear, health, or because they cannot be found). Secondly, an absent witness' evidence must not be of decisive importance within the whole of all the evidence against the suspect. Thirdly, the defence must have sufficient alternatives available to them to compensate for the lack of the opportunity to question the witness at the hearing, in particular the possibility to request to question the witness during the criminal investigation and a legal remedy against any rejection thereof. Applied to the specific question posed by the referring court in this case, the fact that the witness was questioned in the absence of the suspect or their lawyer before a court during the preliminary investigation is in itself sufficient, albeit only if three further conditions are met as well.[60]

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[58] ECtHR 15 December 2015, no. 9154/10, ECLI:CE:ECHR:2015:1215JUD000915410 (*Schatschaschwili vs Germany*).

[59] CJEU 8 December 2022, C-348/21, ECLI:EU:C:2022:965 (*HYA I*), legal grounds 50-54.

[60] CJEU 8 December 2022, C-348/21, ECLI:EU:C:2022:965 (*HYA I*). See also CJEU 15 September 2022, C-347/21, ECLI:EU:C:2022:692 (*DD*), based on which a witness hearing conducted without the defence present does not have to be repeated in full if the defence is able to interrogate the witness without limitations, and provided that the accused and their lawyer have received a copy of the report of the previous interrogation of the same witness.

5.5.5 Victims' rights

The Union has reinforced the protection of victims of crime, including through Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime. In an interesting ruling, the Court of Justice ruled on the relationship between some rights that accrue to the victim on the basis of the directive and the right of the suspect to a fair trial and the right of defence – Articles 47 and 48, second paragraph, Charter. Under the same directive, the right of a victim to be questioned as little as possible during the criminal investigation, i.e. only if strictly necessary, applies 'without prejudice to the rights of the defence.' In a general sense, the Court ruled that '*the EU legislature thus establishes in Directive 2012/29 rights for victims, the exercise of which does not undermine the right to a fair trial or the rights of defence of the defendant as provided for in the second paragraph of Article 47 and Article 48(2), respectively, of the Charter.*' [61] This means that a national criminal procedure rule that requires the victim to be questioned again after a change in the composition of the court does not conflict with the Victims Directive.[62]

5.5.6 Confiscation

The Court has developed case law on confiscation where it also applies the Charter. As a reminder, the EU criminal law acquis contains both instruments on confiscation in the area of judicial cooperation in criminal matters (Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders) and instruments on confiscation in the context of harmonisation of criminal procedural law (Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property, and Directive 2014 /42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union). Based on the latter Directive, when an offender has been convicted of a criminal offence specified in the Directive, any objects acquired through other criminal activity may also be confiscated.[63] Article 47 of the Charter plays a role in the Court's finding that the Directive allows confiscation of property allegedly belonging to a third party, provided that that third party has the opportunity to participate as a party to the confiscation

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[61] CJEU 29 July 2019, C-38/18, ECLI:EU:C:2019:628 (*Gambino and Hyka*), legal ground 53. This does not alter the fact that the national court in the case must consider whether the victim may require specific protection during the investigation at the hearing, such as being heard in a separate room or via a video link, pursuant to Article 23 of Directive 2012/29/EU.

[62] CJEU 29 July 2019, C-38/18, ECLI:EU:C:2019:628 (*Gambino and Hyka*).

[63] CJEU 21 October 2021, C-845/19 and C-863/19, ECLI:EU:C:2021:864 (*DR and TS*).

proceedings.[64] The Court of Justice was also asked at one point whether *non-conviction based confiscation*, i.e. confiscation of property without prior criminal conviction of a person, is in accordance with the Charter, and then in particular with Article 48(1) of the Charter (presumption of innocence) and Article 48(2) of the Charter (rights of defence). The Court did not address this question because such confiscation did, in the cases presented, not take place through criminal proceedings and does, therefore, not fall within the scope of Directive 2014/42/EU (and Framework Decision 2005/212/JHA), which means that the Charter does not apply either.[65]

5.6 Instruments that set preconditions for criminal procedure[66]

5.6.1 Introduction

The most eye-catching development in the case law based on the Charter occurs in the area of instruments that set preconditions for the application of criminal procedure. It concerns the compatibility of the application of two instruments – Directive 2002/58/EC on privacy and electronic communications and Directive EU 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purpose of the prevention, investigation, detection, or prosecution of criminal offences or the execution of criminal penalties – with Article 7 (respect for private and family life), Article 8 (protection of personal data), and Article 11 (freedom of expression and information) of the Charter. In addition, Articles 47 and 48 of the Charter sometimes play a role.

5.6.2 The assessment framework developed for Directive 2002/58/EG[67]

I have chosen to take the *Prokuratuur* ruling as a starting point for the discussion, because that is a ruling where the Court brings together elements from various previous rulings (in particular *Ministerio Fiscal, La Quadrature du Net I*).

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[64] CJEU 21 October 2021, C-845/19 and C-863/19, ECLI:EU:C:2021:864 (*DR and TS*) and CJEU 14 January 2021, C-393/19, ECLI:EU:C:2021:8 (*OM*).

[65] CJEU 28 October 2021, C-319/19, ECLI:EU:C:2021:883 (*ZV*) and CJEU 19 March 2020, C-234/18, ECLI:EU:C:2020:221 (*BP and Others*).

[66] For more about this, see K.C. van Horssen's detailed analysis in 'Aan het uitkristalliseren: De betekenis van het EU-recht voor de opsporingsbevoegdheden,' *TBS&H* 2024, no. 1 (yet to be published). I benefited greatly from the exchange of ideas with this author in writing this section.

[67] See also G.P. Sholeh, 'De betekenis van het Prokuratuur-arrest: digitale opsporing en privacy onder de loep,' *DD* 2022/15.

As we have seen above, the Court of Justice assesses the question of compatibility of legislation that may limit a fundamental right protected by the Charter on the basis of Article 52(1) of the Charter.

In Directive 2002/58/EC, the Court discerns two elements that constitute a limitation of Articles 7 and 8 of the Charter in particular: the (scope of the) generic retention obligation for telecommunications data, and the possibility for authorities to gain access to stored data. I will focus mainly on the second element, because it affects the investigation of criminal offences. In the ruling in the *Prokuratuur* case, the Court of Justice discusses in detail the review of these limitations against the principle of proportionality.

The Court sees a balance between the importance of preventing, detecting, and prosecuting criminal offences and the seriousness of the limitation (interference). As a starting point, the objective of preventing, detecting, and prosecuting criminal offences can only justify non-serious interference. The seriousness of the interference is to be assessed primarily on the basis of the extent to which the application of a certain power enables (in a general sense) conclusions to be drawn on the private lives of the persons concerned.[68]

It is important to point out that the Court of Justice appears to be opting for a different approach than the Supreme Court of the Netherlands in the *Smartphone* ruling[69] and especially also the legislator in its bill for the new Dutch Code of Criminal Procedure.[70] The case law of the Supreme Court focuses on the result of the application of the power and the rule in the new Code is based on the question whether that result is reasonably foreseeable in advance – or whether it is foreseeable that a more or less complete picture of certain aspects of a data subject's personal life is obtained.

When only requisitioning identifying data from telecommunications users, there is a balance between the objective of investigating criminal offences and the degree of seriousness of the limitation. This is not the case with access to traffic and location data, because, according to the Court, this kind of data does indeed make it possible to draw precise conclusions about people's private lives. This criterion is independent of the nature and especially the time period over which the data is provided. Only the objectives of combating serious crime and preventing serious threats to public security can justify the infringement of Articles 7 and 8 of the Charter that the requisitioning traffic and location data represents.[71]

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[68] CJEU 2 March 2021, C-746/18, ECLI:EU:C:2021:152 (*H.K., Prokuratuur*), legal grounds 35-40.
[69] Supreme Court 04 April 2017, ECLI:NL:HR:2017:584.
[70] *Parliamentary Papers II* 2022/23, 36 327, no. 3 p. 572-576.
[71] CJEU 2 March 2021, C-746/18, ECLI:EU:C:2021:152 (*H.K., Prokuratuur*), legal grounds 34-35.

The requirement of proportionality implies that limitations must be, in each individual case, limited to what is strictly necessary for the investigation in question. The latter requires prior assessment, in that individual case, by a judicial body or an independent administrative authority. That body must provide all necessary safeguards (PV: in terms of independence and impartiality) to ensure that the different interests and rights involved (fight against crime and fundamental rights to respect for privacy and to the protection of personal data) are reconciled. The requirement of independence of the body carrying out the prior assessment implies that this body must have the status of a third party vis-à-vis the person requesting access to data, so that the assessment can be carried out objectively and impartially and without outside influence. This requires independence in the field of criminal law. This is not the case with the Public Prosecution Service, which leads the investigation and acts as public prosecutor.[72]
The judicial review must be conducted prior to application of the power to access data, because that is when the interests involved can be adequately weighed to ensure a balanced use of the powers. Things only change in case of urgency.
In summary, a framework is proposed that distinguishes between telecommunications data that does not provide a precise impression of someone's personal life and telecommunications data that does. No requirements are imposed on the first category of access, while strict requirements are imposed on the second category of access. These requirements are purpose limitation (limitation to serious crime) and prior judicial review. There appears to be no room for further differentiation based on a further distinction in degrees of seriousness of the limitation of the right to protection of privacy, with different conditions for the application of powers.

5.6.3 Implementation in Dutch law

In its ruling of 5 April 2022, the Supreme Court of the Netherlands examined the concrete consequences for Dutch criminal procedure. This concerns the manner in which the system of powers to requisition telecommunications data in the Dutch Code of Criminal Procedure can meet the requirements arising from the case law of the Court of Justice of 1) limiting application of those powers to 'serious crime' and 2) prior assessment by a judicial authority.
The Court of Justice makes it clear that these requirements in connection with the principle of proportionality must be rooted in law. If I understand it correctly, the Court of Justice does not impose this requirement on prior assessment by a court. The possibility of interpretation in accordance with the directive also applies, as long as it does not conflict with national law. The Supreme Court uses this scope to ratify the procedure developed in practice,

[72] Idem, legal grounds 38, 51-55.

whereby the public prosecutor requests authorisation from the examining magistrate before exercising a power. The idea is that the examining magistrate will then assess the requirements set out in the legal provisions for the requisitioning of telecommunications data. The Supreme Court subsequently decided to submit a reference for a preliminary ruling to the Court of Justice – this case is pending before the Court as the *DX* case.[73] The first question from the reference for a preliminary ruling concerns the requisitioning of telecommunications data that has not been retained by telecommunications providers under a general retention obligation: do the same conditions still apply? A negative answer would set aside application of the *Prokuratuur* conditions in the Dutch situation, where such a retention obligation does not exist. In the second question, the Supreme Court requests clarity on the question of whether the concept of 'serious crime' is an autonomous one at EU level (a question that, as we have seen, is currently relevant in several pending cases). The third question focuses on the possibility of an exception for the requisitioning of traffic and location data if this (as can be determined in advance) only causes a minor infringement of the user's privacy. The preliminary questions from the Supreme Court are yet to be answered by the Court of Justice.

5.6.4 Further specification of the assessment framework developed for Directive 2002/58/EC

In post-*Prokuratuur* rulings, the Court of Justice further developed the lines for reviewing the application of powers under Directive 2002/58/EC against the Charter. The case law is still developing, with references for a preliminary ruling submitted by various courts pending before the Court.

Forms of investigative powers that fall under the assessment framework
The *Prokuratuur* case dealt with the requisitioning of traffic and location data from telecommunications providers. Given the explanation of the requirements for access to telecommunications data, the framework outlined in the *Prokuratuur* case obviously also applies to recording and storing telephone conversations, as confirmed by the Court in the *HYA II* case.[74]

Purpose limitation
In the recent *A.G.* case, the Court of Justice explained that telecommunications data (i.e. traffic and location data) collected by competent authorities may be retained as such and passed on to other authorities. However, when this data is

[73] C-241/22.
[74] CJEU 16 February 2023, C-349/21, ECLI:EU:C:2023:102 (*HYA II*).

used in a subsequent criminal investigation, the investigation must always be part of the fight against serious crime.[75]

Serious crime

The Court of Justice has so far not ruled on how exactly the concept of 'serious crime' should be interpreted.[76] Advocates General disagree on whether the interpretation of the concept should be left to the Member States[77] or whether an autonomous definition should be provided at EU level, i.e. by the Court. In his opinion in the *Tribunale di Bolzano* case, Advocate General Collins states that he, like the ten intervening Member States in that case and the European Commission, assumes that it is up to the Member States to determine whether a particular crime qualifies as serious crime. His first argument is that the Court has previously failed to define the concept of 'national security' at Union level. The second argument is that '*article 4(2) TEU requires the European Union to respect the national identities of the Member States inherent in their fundamental political and constitutional structures.* (…) *The definition of criminal offences and penalties (37) reflects national sensitivities and traditions that vary considerably not only as between Member States but also over time in tandem with societal change. It may be observed in that context that, when defining criminal offences and penalties, Member States take a variety of different factors into account to varying degrees. A Member State's assessment of the "seriousness" of a particular offence is often, if not invariably, reflected in the gravity of the penalty imposed. The length of a custodial sentence may reflect an analysis of a number of factors, including the perceived intrinsic 'seriousness' of an offence and its relative 'seriousness' as compared to other offences.*' [78] Advocate General Campos Sánchez-Bordona disagrees and points out that if no definition is established at EU level, there is a risk that Member States may, through their own definition of serious crime, end up falling short of the requirements set by the Court on the basis of the *Prokuratuur* ruling.[79]

Meanwhile, the Court has clarified that the investigation must be a criminal investigation into serious crime: an administrative investigation (disciplinary procedure) into dereliction of duty, consisting of the passing on of information from a criminal investigation by a public prosecutor to the suspect, culminating

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[75] CJEU 7 September 2023, C-162/22, ECLI:EU:C:2023:631 (*A.G.*), legal ground 41.

[76] In fact, the concept has appeared in rulings, but worded differently, which may be due to differences in translation.

[77] Advocate General Pitruzzella, among others, suggests leaving it to the Member States to define 'serious crime,' see opinion of Advocate General 21 January 2020, C-746/18, ECLI:EU:C:2020:18 (*H.K., Prokuratuur*), legal grounds 91-93.

[78] Opinion of Advocate General Collins 8 June 2023, C-178/22, ECLI:EU:C:2023:463 (*Tribunale di Bolzano*), legal grounds 25-31.

[79] Opinion of Advocate Campos Sánchez-Bordona 27 October 2022, C-548/21, ECLI:EU:C:2022:838 (*La Quadrature du Net II*), legal ground 74.

in a dismissal procedure, is not considered a criminal investigation and does, therefore, does not justify access to telecommunications data.[80]

In the pending case before the Court of Justice where Advocate General Collins took the aforementioned position against an autonomous definition of serious crime at EU level, the central question is whether Italian criminal procedure limits access to traffic and location data to cases of investigations on the basis of a suspicion of a criminal offence punishable by at least a maximum prison sentence of three years, is sufficiently restrictive in the context of the requirement that access to telecommunications data be reserved for cases of serious crime. In his opinion, the Advocate General emphasises that this is only an initial formal requirement. After all, in the context of prior consent, the reviewing judge will also have to assess whether it is proportionate in the individual case to gain access to traffic and location data.[81]

Prior authorisation by a judicial authority

In the *HYA II* case, the question arose as to when prior authorisation of telephone tapping can be granted, i.e. what requirements such justification has to meet. The Court states that, on the basis of Article 47(2) of the Charter, the authorisation granted does not have to contain individualised reasons and can merely state that the legal requirements have been met, provided that it is easy to do so through a cross-reading of the reasoned and detailed request for authorisation and that it can be unequivocally deduced that the legal requirements have been met. This does require that, after the authorisation has been granted, both the authorisation and the requisition be made public – and be added to the case file.[82]

Identifying data

In the *Prokuratuur* case, the Court seems to intend to clearly distinguish access to identifying data (IP address and name, etc.) from the more intrusive access to traffic and location data. This means that access to that data is not limited to cases of serious crime and that no prior judicial authorisation is required. But is the case law completely clear on this point? In later cases such as the *SpaceNet* case, the Court seems to – referring to different findings in the *La Quadrature du Net I* case – take a different view, namely '*that only action to combat serious crime, the prevention of serious threats to public security and the safeguarding of national security are capable of justifying the general retention of IP addresses assigned to the source of a connection.*'[83]

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[80] CJEU 7 September 2023, C-162/22, ECLI:EU:C:2023:631 (*A.G.*), legal ground 43.
[81] Opinion of Advocate General Collins 8 June 2023, C-178/22, ECLI:EU:C:2023:463 (*Tribunale di Bolzano*).
[82] CJEU 16 February 2023, C-349/21, ECLI:EU:C:2023:102 (*HYA II*).
[83] CJEU 20 September 2022, C-793/19 and C-794/19, ECLI:EU:C:2022:702 (*SpaceNet*), legal ground 103.

Through his second opinion in the *La Quadrature du Net II* case, Advocate General Szpunar seeks clarity on this point. The case in question is about what he considers necessary access to identifying data for a French administrative supervisory authority (Hadopi) that investigates online copyright breaches. The identifying data allows the supervisory authority to issue a warning to the internet user, but also, if the warning is not heeded, to pass the case on to the French Public Prosecution Service. This is believed to be crucial for effective law enforcement. However, the case did not involve serious crime, and neither was prior judicial authorisation granted. The Advocate General nevertheless believes that the need for effective law enforcement in combination with the minor invasion of privacy is sufficient to argue for the possibility of using identifying data in the cases in question.[84]

Put into perspective?

What is interesting is that Advocate General Szpunar's opinion in the *La Quadrature du Net II* case uses the argument that the Court adopts a case-by-case approach and its case law may, therefore, not always be linear: '*The Court's case-law since the judgments in Tele2 and in La Quadrature du Net and Others must be welcomed in that it has enabled a framework that protects the fundamental rights of users of electronic communications services to be put in place, it nonetheless bears the hallmarks of a somewhat case-by-case approach. In the course of dealing with the cases referred to it, the Court has progressively refined its case-law in a way that has allowed it to examine various national legislative provisions in the light of Article 15(1) of Directive 2002/58. However, it is impossible for the Court to predict virtually all the measures that might be the subject of an analysis in the light of that provision. That is evidenced by the number of references for a preliminary ruling of which that provision has formed the subject matter since the judgment in Tele2, which in my view attests to the difficulty which the national courts may experience in applying the principles laid down in the Court's case-law to situations that differ from those that gave rise to the judgments in question. It therefore follows that a certain flexibility seems to me to be called for when measures which could not be envisaged at the time of previous judgments are examined by the Court, such as legislation aimed at offences which can be prosecuted only in so far as the civil identity data corresponding to IP addresses are retained and accessible.*' [85] The Advocate General denies that this would constitute 'reconsidering' the case law: *'accepting that, on the basis of the principles that underlie that case-law, a more nuanced solution might be identified, in very limited circumstances.*'

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[84] Opinion of Advocate General Szpunar 28 September 2023, C-470/21, ECLI:EU:C:2023:711 (*La Quadrature du Net II*), legal grounds 87-89.

[85] Opinion of Advocate General Szpunar 28 September 2023, C-470/21, ECLI:EU:C:2023:711 (*La Quadrature du Net II*), legal grounds 86-87.

In his opinion in the pending *Landeck* case, Advocate General Campos Sánchez-Bordona states that there is agreement – referring to a finding of the Court in *La Quadrature du Net I* – that the requirements from the *Prokuratuur* case law for the requisitioning and use of telecommunications data does not apply if telecommunications data has been obtained in a manner other than through a retention obligation.[86] Advocate General Ćapeta states the same in her opinion in the *Encrochat* case.[87] This is interesting, because it may give the Court some reason for differentiation, and it may make the *Prokuratuur* conditions inapplicable to the Dutch situation.

5.6.5 Assessment framework for Directive EU 2016/680

A new development in the case law of the Court of Justice is how it interprets Directive 2016/680. Review against the Charter also plays a role in this development, and then in particular review against Articles 7, 8, 47, and 48 of the Charter. I will disregard the part of that case law that concerns the retention of data, to the extent possible, and focus only on the lines of reasoning that the Court appears to be setting out on the basis of the Directive for the application of investigative powers in criminal cases. The latter is a potentially very important development for Dutch criminal procedure.
In the *V.S.* case, the Court of Justice was asked whether Directive (EU) 2016/680, and then in particular Article 10 of the Directive (processing of special categories of personal data), applies to the collection of biometric data, such as DNA. While it is clear that the directive applies to the retention of biometric and genetic data, the question is whether the directive also applies to the method of collecting that data and the powers used for this purpose. If it does, what requirements must such data collection practices meet?

The Court reviews the limitation on fundamental rights resulting from Article 10 of Directive 2016/680 and national legislation implementing that article against the conditions of Article 52(1) of the Charter. An important requirement in this context is that limitations must be imposed by law, and in a manner that provides a sufficiently clear and precise description of the scope. The Court subsequently addressed the question of whether genetic and biometric material can be more or less automatically forcibly collected from suspects of criminal offences for further investigation in the criminal case, but also for comparison with stored material collected in investigation of other criminal offences. In Bulgarian law, this is apparently regulated in such a way

[86] Opinion of Advocate General Campos Sánchez-Bordona 20 April 2023, C-548/21, ECLI:EU:C:2023:313 (*Landeck*), legal ground 65.
[87] Opinion of Advocate General Ćapeta 26 October 2023, C-670/22, ECLI:EU:C:2023:817 (*Encrochat*), legal ground 91-96.

that the court authorising the forcible collection of material is informed of the suspicion that exists against the suspect but is unable to consider the substantive merits of the suspicion. This raises questions about compliance with the suspect's right to an effective remedy (Article 47 of the Charter) and with the presumption of innocence (Article 48 of the Charter), and ultimately also with the necessity criterion that is already included in Directive 2016/680.

The Court of Justice rules that compliance with the condition of an effective judicial remedy does not require that the court authorising the forcible collection of biometric and genetic material must be able to consider the merits of the suspicion. Provided that national law safeguards that an effective judicial review is provided of the conditions for the suspicion on which the authorisation of data collection is based is provided at a later stage (at the judicial stage, during the trial).[88] In accordance with the case law on the Presumption of Innocence Directive, the Court clarifies that formulating a suspicion does not constitute a violation of the presumption of innocence, and the fact that the court authorising forcible collection of material does not substantively alter the suspicion does not either.[89]

Finally, national regulations on the collection of biometric and genetic material should ensure that authorities only proceed to such collection when strictly necessary. In the eyes of the Court, this requires an individual assessment: the competent authority must establish or demonstrate that the data collection is strictly necessary to achieve the objectives pursued (in this case, investigation as part of the criminal case where the data subject is a suspect and an investigation into possible other criminal offences), and that those objectives cannot otherwise be achieved by less drastic means. In that context, the Court also wants the competent authority to take into account that there may already be sufficient evidence against the suspect in the ongoing criminal case. When it comes to comparing the suspect's biometric and genetic material with material collected in the context of an investigation into other criminal offences, necessity must be assessed on the basis of, in particular, the nature and seriousness of the crime the suspect has been charged with, the special circumstances of that criminal offence, the possible connection of that criminal offence with other ongoing proceedings, and the suspect's antecedents or personal profile.[90]

The ruling of the Court of Justice in the *V.S.* case seems to provide a basis for a possible broader scope of application of Directive 2016/680, i.e. that the provisions on criminal data processing and the requirements imposed in that

[88] CJEU 26 January 2023, C-205/21, ECLI:EU:C:2023:49 (*V.S.*), legal ground 101.
[89] CJEU 26 January 2023, C-205/21, ECLI:EU:C:2023:49 (*V.S.*), legal grounds 102-110.
[90] CJEU 26 January 2023, C-205/21, ECLI:EU:C:2023:49 (*V.S.*), legal ground 132.

context on the grounds that they limit fundamental rights extend to powers to collect that data for the purpose of criminal proceedings. This is the perspective that is central to the *Landeck* case, which is currently pending before the Court of Justice.[91]

In the pending *Landeck* case, Austrian police had attempted, without an order to that effect from the public prosecutor or a judicial authorisation, examine a confiscated mobile phone. In his opinion for this case, Advocate General Campos Sánchez-Bordona stresses that, in his view, it is not so much the confiscation of the mobile phone that falls within the scope of Directive 2016/680 but rather the act of examining that phone to access personal data stored on that phone. In its intervention in the case, the Commission takes the position that (any) application of an investigative power aimed at obtaining data that includes personal data would fall within the scope of the directive,[92] in the same way as seeking judicial authorisation to obtain the data would already constitute the start of a data processing operation.[93]

In any event, gaining access to data stored on a mobile phone constitutes a significant limitation on the rights under Articles 7 and 8 of the Charter: '*The intrusion upon the rights protected by Articles 7 and 8 of the Charter will be all the greater where, through that intrusion: (a) access is sought to sensitive data ordinarily recorded on mobile phones, knowledge of which may reveal aspects of their owners' lives that should be kept from being known by third parties; and (b) access is afforded to the content of communications.*'[94]

It could be argued that such a limitation is of the same nature, and therefore requires the same conditions, as access to traffic and location data under Directive 2002/58/EC, meaning that it should be limited to cases of serious crime. The Advocate General is not willing to accept this kind of extrapolation.[95] First of all, the content, objective, and scope of Directive 2016/680 differ from those of Directive 2002/58/EC. Directive 2016/680 has a general effect and is not limited to the purpose of combating serious crime, setting rules for any form of processing of criminal personal data. These are rules governing the collection of personal data in investigations into all criminal offences, rules that are intended to be applied in an individual criminal case. This is different with Directive 2002/58/EC, which sets rules for the retention of types of data by telecommunications providers and constitutes the generic retention obligation arising from Directive 2002/58/EC that requires

[91] Opinion of Advocate General Campos Sánchez-Bordona 20 April 2023, C-548/21, ECLI:EU:C:2023:313 (*Landeck*).
[92] Idem, legal ground 51.
[93] CJEU 2 October 2018, C-207/16, ECLI:EU:C:2018:788 (*Ministerio Fiscal*).
[94] Opinion of Advocate General Campos Sánchez-Bordona 20 April 2023, C-548/21, ECLI:EU:C:2023:313, legal ground 60.
[95] Idem, legal ground 69.

the condition of purpose limitation to be set, i.e. the condition that it is permitted only in the context of combating serious crime.[96]

This means, according to the Advocate General, that – under Article 52(1) of the Charter – the processing in each individual case must be proportionate to (a) the nature of the offences and (b) the type of personal data processed.[97] When examining the data stored on a mobile phone, it cannot be ensured that it will '*not lead to "reconstruction of a detailed and in-depth picture of almost all areas of the private life" of the data subject. On that basis, the law-enforcement authorities cannot dispense with the prior authorisation referred to in the judgment in Prokuratuur.'* [98] Access must be justified in each individual case and must be limited to what is strictly necessary and proportionate, which depends on the nature of the offences prosecuted and the personal data to which the intended access relates. This must be done through prior review based on the protection afforded by Articles 7 and 8 of the Charter. The authority conducting the review must be able to ensure a proper balance between, on the one hand, the interests related to the needs of investigation in the context of combating crime and, on the other hand, the fundamental rights to respect for privacy and to protection of the personal data of the persons to whom the access relates. This implies prior review by a judicial authority. The conclusion is that police forces may not, in the context of a criminal investigation, gain full and uncontrolled access to all data stored on a mobile phone on their own initiative, without prior authorisation from a judicial authority, when that data can be used to construe an accurate picture of a person's private life.[99]

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[96] Idem, legal ground 65.

[97] Opinion of Advocate General Campos Sánchez-Bordona 20 April 2023, C-548/21, ECLI:EU:C:2023:313, legal grounds 70-72.

[98] Opinion of Advocate General Campos Sánchez-Bordona 20 April 2023, C-548/21, ECLI:EU:C:2023:313, legal ground 89.

[99] Opinion of Advocate General Campos Sánchez-Bordona 20 April 2023, C-548/21, ECLI:EU:C:2023:313.

6 A look ahead: the Charter's effect in the near future

6.1 Introduction

It is the rapidly evolving case law of the Court of Justice in particular that makes it clear that application of the Charter covers and affects the whole spectrum of criminal law. The EU legislature follows this development in case law, basically searching for the best way to review proposals for new legislation against the Charter. While it is difficult to predict exactly how the Charter's influence on criminal law will evolve in the coming years, we can still discern some lines along which this is likely to happen, based on the description in Chapters 4 and 5, taking into account proposals for new EU legislation and looking at the cases pending before the Court.

6.2 The development of the Charter in relation to ECtHR case law

In the context of how the Charter's impact on our criminal law is developing, the question of how the Charter relates to the ECHR and especially the case law of the ECtHR is a relevant one to consider. As we saw above, the Court of Justice aligns its case law on Articles 47 and 48 Charter in the context of harmonisation of criminal procedure with ECtHR case law on Article 6 of the ECHR. The notes to the Charter explain that the objective for Articles 47 and 48 is to converge with Article of 6 ECHR, as the Court has regularly stated. The objective of convergence materialises mainly in the Court citing relevant ECHR judgments in its rulings. They also do so when interpreting the content of the Procedural Rights Directives, which connection to Articles 47 and 48 Charter the Court never fails to emphasise. This is what happens in, for example, the application of the criterion of overall fairness as the ultimate test of whether the right to a fair trial has been safeguarded. That said, it remains to be seen whether the Court's case law on the right to a fair trial will really keep pace with ECtHR case law in the near future. For example, if the Court has precedent in its own case law, the Court will largely focus on that and let the ECtHR case law fade into the background. This could potentially lead to an assessment that differs from the ECtHR's case law and de facto constitute development of law of its own. This is legitimised as long as the clause of Article 52(3) of the Charter is met, which wants the Charter to provide at least the same level of protection as the ECHR in the case of corresponding rights.

The Court also actively links case law on the principle of legality, contained in Article 49(1)(2) of the Charter, to case law on Article 7 of the ECHR. The Court's focus on ECtHR case law in interpreting the Charter is considerably

weaker in other cases. Article 49(3) of the Charter lacks an equivalent in the ECHR. Unlike the scope of Article 6 of the ECHR, the scope of Article 47 of the Charter also extends to the procedure of judicial cooperation in criminal matters, to name but a few examples. This is certainly also true for the review against Articles 7 and 8 of the Charter in the context of instruments that set the framework conditions for criminal procedure. In that domain, the Court has its own development of law, which is different and seeks to be different from the case law of the ECtHR based on Article 8 of the ECHR.

6.3 The effect of the Charter: towards an ever-broader basis for application?

Two developments are expected to further increase the impact of the Charter in criminal law in the coming period.
The first development is easy to foresee. The formal basis for the Charter's effect in terms of applicable EU law is already extensive. After all, many national criminal cases involve different strands of EU criminal law, such as a combination of the application of an instrument (or several instruments) in the area of judicial cooperation in criminal matters, Procedural Rights Directives that apply in all criminal proceedings, and a criminal statutory provision harmonised on the basis of substantive EU criminal law. Add to this the EU instruments that set framework conditions for criminal procedure, such as those on the retention and use of (telecommunications) data and the protection of criminal data. Many new EU laws are in the pipeline, which will make the Charter even more applicable in the near future. These include legislation that we already know will be interesting for the actual application of the Charter, such as the e-Evidence Regulation,[1] a new Environmental Crime Directive, a new Directive on confiscation, an EU Regulation on rules to prevent and combat sexual abuse of children, and an EU Regulation on the transfer of criminal proceedings.

The second development is the hop-step-jump application of the Charter. This development is, so far, most clearly visible in case law on instruments of quasi-criminal law, which include the obligation for Member States to provide for adequate (investigative) measures and effective penalties in the context of combating a violation of a norm.[2] This means that the use of instruments of quasi-criminal law leads to parts of (national) criminal

[1] Regulation (EU) 2023/1543.

[2] Another example is the case law following the meanwhile discontinued Cooperation and Verification Mechanism for Bulgaria and Romania on specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime (Commission Decisions 2006/928/EC and 2006/929/EC); see, among other rulings, CJEU 4 May 2023, C-40/21, ECLI:EU:C:2023:367 (*T.A.C.*).

procedure also coming under the scope of EU law. This, in turn, leads to review under the Charter both in terms of the proportionality of penalties, and, for example, the legality of applying those investigative powers and ensuring a fair trial (the hop-step-jump approach). As the European legislature begins to enrich instruments for the harmonisation of substantive criminal law, i.e. forms of crime specified in Article 83 of the TFEU, with general objectives and instructions for the combating of forms of crime,[3] the hop-step-jump approach for application of the Charter will come into play there as well.

6.4 The Charter: development prospects for substantive criminal law

Of particular interest in the development of application of the Charter in the field of substantive criminal law is the principle of proportionality of penalties (Article 49(3) of the Charter), which is not protected in the same form by the ECHR. It may seem contradictory at first glance, but the scope for review against the principle of proportionality of penalties is greater in the realm of quasi-criminal law, where the EU legislature may not prescribe criminal penalties, than in the realm of harmonisation of substantive criminal law where it can and does. For example, the Court of Justice pronounced on the proportionality of penalties (e.g. the level of minimum penalties for infringement of the right to intellectual property) when applying instruments of quasi-criminal law but is very reticent in the few cases where a question is raised about penalties in instruments of the harmonisation of substantive criminal law. In the latter case, the Court points to the power of the EU legislature to establish sanctions (and its freedom to refrain from doing so) and to the fact that harmonisation of substantive criminal law is a form of minimum harmonisation, meaning that Member States can, for the sake of effective combating of crime, independently choose higher penalties than those provided for in a directive harmonising substantive criminal law. The Court's case law seems to reveal some scepticism on the use of minimum penalties by Member States (in the area of quasi-criminal law), but this should probably not be taken as a sign of blanket disapproval. The case law does highlight conditions that should be placed on the provision of minimum penalties. Weighing the seriousness of the offence is an important aspect, as is the possibility of being able to adequately consider the facts and circumstances in sentencing in an individual case.

[3] This is to check, when evaluating Member States' implementation or execution of the relevant regulations, whether those regulations actually work in practice, so as to confirm that compliance does not only exist on paper and whether adequate resources are provided for effective law enforcement.

A development that might be expected, in my view, could be a review of the reasons (effectiveness, necessity) that Member States claim to have for choosing a particular statutory maximum penalty when implementing a directive harmonising substantive criminal law, if it deviates greatly from the sanction instruments provided for in the relevant directive. The legislator would, therefore, be well advised to explicitly (in the sense of devoting recitals to it in the explanatory memorandum of new legislation) review the principle of proportionality of penalties when choosing (maximum) penalties for offences that are subject to harmonisation of substantive criminal law at EU level.

6.5 The Charter: development prospects for criminal procedure

The first development in the area of criminal procedural law is the continuation and further crystallisation of the objective to safeguard the right to a fair trial, based on the Procedural Rights Directives combined with Articles 47 and 48 of the Charter. The fact that the Court sees a connection between the body of procedural rights directives and the underlying Articles 47 and 48 of the Charter leads to an expansive interpretation of the provisions contained in those directives. We already pointed out the convergence between the case law of the Court of Justice and that of the ECtHR when it comes to the right to a fair trial. As explained there, deviations are to be expected, despite convergence being an objective. All the more reason, therefore, to continue to closely monitor developments in the Court's case law.

The Court's case law clearly shows that it, like the ECtHR, has a strong preference for a hearing based on the immediacy principle as a way to safeguard the right to a fair trial. Exceptions are possible, in the form of an exception to the immediacy principle as in 'yes, unless...' This contrasts with Dutch criminal procedure where the rule with respect to the immediacy principle is 'no, provided that...' While both these approaches may produce the same outcome in practice, this is not necessarily the case. This particular issue of the Charter's effect is, therefore, also something that is worth looking at.

The second development concerns application of the Charter in the instruments that set framework conditions for criminal procedure. We explained that the Court's case law on retention and retrieval of telecommunications data under Directive 2002/58/EC appears to be in flux. Given the successive references for a preliminary ruling, Advocates General

to the Court whose opinions highlight inconsistency in the Court's case law and draw attention to the fact that the rules set forth by the Court as to how to deal with limitations on Article 7 and 8 of the Charter do not provide enough flexibility to deal with very different cases, as well as the critical stance of intervening Member States, the Court actually needs to take steps towards a comprehensive structure that incorporates more differentiation in the short term. This would be very possible in rulings in cases currently pending before the Court.

However, a second front has meanwhile opened up in the Court's case law, centred on the processing of criminal data under Directive 2016/680.[4] This clearly suggests that requirements that apply to processing (and use) already apply to (visibility of) access to criminal information, which boils down to a review of investigative powers. On this point, too, there are still many question marks in the Court's case law. The ambiguity, which can easily degenerate into a situation of legal uncertainty in criminal law practice, must be remedied quickly.

Be this as it may, it seems to me that we are about to reach a point where EU law will, one way or the other, prescribe a general assessment framework based on the Charter for (rules governing) the collection of criminal law information. Dutch criminal procedure legislation on investigative powers will have to be brought into line with this in terms of structure and substance. There are several concerns that come into this. We have noted that the Court's approach to determining whether the seriousness of the intrusion into personal privacy necessitates requirements for (the provision of safeguards for) the application of powers used to gain access to data appears to correspond neither to the approach taken so far in Dutch case law nor to the approach adopted in the new Dutch Code of Criminal Procedure. The EU approach focuses on the potency of the power, where in Dutch law it focuses on the foreseeable outcome of the application of the power in a concrete case. Another point is the observation that the Court of Justice wants to see compensatory safeguards for any, however minor, limitation on the rights of Articles 7 and 8 of the Charter, which tend to rapidly become extensive. The highest level of safeguards – for serious crime only, subject to prior authorisation by a court – is quickly reached. The case law of the ECtHR protecting the rights contained in Article 8 ECHR shows similar compensatory safeguards, but the ECtHR seems to be less eager to climb the escalation ladder than the Court. Also in this regard, it is important that the Court's case law provide for more differentiation in

[4] What can also be noted is that data collection in connection with/or prior to an investigation is also used in other instruments, which the Court has not yet subjected to its review, such as anti-money laundering instruments, unusual transaction reporting, etc. under the EU anti-money laundering directives.

compensatory safeguards according to different degrees of limitation of fundamental rights that different investigative powers provide.

6.6 The Charter: development prospects for judicial cooperation in criminal matters

If there is one thing we can note with some level of certainty on how application of Charter rights to judicial cooperation in criminal matters in the EU has developed it is that there is a clear trend of the Court insisting on the two-step examination, which serves as a yardstick in preventing violation of a person's fundamental rights as a result of judicial cooperation in criminal matters – in surrender cases for EAW proceedings, but also in cases of mutual recognition of custodial sentences imposed. In fact, it is obvious that the two-step examination can come into play across the spectrum of judicial cooperation in criminal matters, including in the execution of EIO cases.

A second line of interest in the context of judicial cooperation in criminal matters concerns that of ensuring adequate remedies for persons concerned. Unlike Article 6 of the ECHR, which does not apply to the procedure for judicial cooperation as such, Article 47 of the Charter is the basis for seeking a remedy against decisions affecting the rights of those involved. This involves a dual orientation, in the issuing and executing Member States, and in two dimensions: effects now (protection of personal liberty, property) and effects in the future (e.g. for the right to a fair trial in the underlying criminal case).

7 Close

Although familiarity with the Charter has increased rapidly in criminal law practice in recent years on the back of the criminal case law of the Court of Justice and the prominent role the Charter plays in it, knowledge of how to apply the Charter is still low among criminal law practitioners. I think the reasons for that are a lack of expertise and experience with EU law in general, the level of complexity of the doctrine of the effect, the suspected overlap with the ECHR and the case law of the ECtHR, and certainly also a dose of scepticism. Regarding the latter: law development was, until recently, fuelled by references for a preliminary ruling submitted by only a handful of courts from only a handful of Member States, spurred on by defences from only a handful of lawyers. The resulting preliminary rulings subsequently came from a Court that is a general court and not particularly versed in criminal law. Viewed in this way, the Charter's influence on criminal law took shape more or less arbitrarily, such as on the basis of the Court's preliminary rulings in response to references for a preliminary ruling from Bulgarian courts that were critical of the regime of seizure of objects, or the right of presence, in their domestic law. This likely leads people to think, 'What battle are they fighting, and with whom, *through* the nexus of EU law? And what do *we* have to do with that?'

We need to get over this critical view because it is outdated, and it distracts from what really matters. The Court of Justice has been creating broad criminal case law for several years now, often relying on the Charter. What I wanted to achieve with this preliminary opinion is for the reader to see and feel the Charter's significance for Dutch criminal law. It is clear that the Court is trying to steer the development, including by pursuing convergence with the ECtHR in some areas, so as to ensure that preliminary rulings in response to preliminary questions with references to the fundamental rights protected by the Charter will lead to an increasingly sophisticated interpretation of EU law. Dutch criminal law practice cannot but track this development with great attention and participate in it whenever possible.[1] Some recommendations are, therefore, in order, which could also be considered to be theses.

Recommendations for the Dutch government

Greater effort is needed to raise awareness of the Charter and especially to explain its applicability, not only to legal practitioners but also to citizens.

It is particularly important to actively participate in the development of our criminal law, which is increasingly developed on an EU level. This includes actively monitoring and intervening, either coordinated with the intervention

[1] As previously argued in Ouwerkerk & Verrest 2021, p. 599-602.

of other member states or not, in criminal cases pending before the Court of Justice. While (slightly) more human resources have been deployed for this since recently, the overall deployment of human resources for monitoring and intervention is still out of kilter with the potential impact of the case law. There are other ways to influence the role of the Charter in the application of EU criminal law instruments. During negotiations for new legislation, for example, it would be an option to take a closer look at what is included in the text and recitals of bills in terms of the compatibility of elements of new legislation with the fundamental rights protected by the Charter. For subjects where the case law of the Court of Justice based on the Charter shows an impactful development (step by step, creating legal uncertainty) that does not seem to be well aligned with what is desirable in Member States' criminal law practice, serious consideration could be given to clarifying EU law and structuring the application of norms at the level of the law through harmonisation of (criminal procedure) legislation (e.g. on powers to requisition data).

Recommendations for the legislator

When preparing new legislation, compatibility with EU law and Court of Justice case law should be actively considered,[2] bearing in mind the rapidly developing case law combined with the *ex tunc* nature of the interpretation by the Court of Justice. The preparation of new legislation should, therefore, explicitly include a review of the fundamental rights protected by the Charter, along the lines of Article 52(1) of the Charter. We are on the brink of EU law likely directing us towards a general framework of review for the regulation of investigative powers. The same is true for the review of substantive criminal law against the principles of legality and proportionality.

A framework should be sought for the implementation of retroactive Court rulings. This applies more broadly than just to the cases we discussed in this preliminary opinion that involve application of the Charter, extending also to, for example, the interpretation of the substance of obligations to criminalise in the context of harmonising substantive criminal law and interpretation of the substance of obligations to enforce norms in quasi-criminal law.

Recommendations for criminal law practice

There is a lack of knowledge of EU law and certainly of the Charter's effect in criminal law practice in the Netherlands. This is going to have to change soon if we want to avoid running the risk of violating EU law. It is up to organisations working in the field to make that improvement happen, which

[2] One example is the proposal to amend the DNA Testing of Convicted Persons Act (*Wet DNA-onderzoek bij veroordeelden*) and the Dutch Code of Criminal Procedure in connection with the introduction of seizure of cellular material and some other changes related to DNA testing (consultation of April 2023).

may include ensuing better access to Court of Justice case law[3] and especially providing notes to this case law.

The Supreme Court of the Netherlands can play an important role in interpreting EU law, including by encouraging lower courts to use the procedure for submitting references for a preliminary ruling to the Supreme Court in criminal cases when in doubt about EU law.

Recommendations for criminal law scholars

Looking at the manuals and textbooks on Dutch substantive criminal law and criminal procedure, there is definitely a clear task ahead for criminal law scholars to integrate EU criminal law into the description of our laws in a general sense and especially to integrate the role of the Charter into the description of our laws.

[3] One way in which this is done is through the *Nieuwsbrief Rechtspraak Europa* newsletter.

The Charter as an instrument of private law

Kasper Jansen[1]

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3.4.2 Right to equal treatment in employment relationships (Art. 21(1) Charter)
3.4.3 Right to paid annual leave (Art. 31(2) Charter)

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3.5 Other property right-related Charter provisions (Art. 37-38 and 47 Charter)

4 Significance of the Charter in private law

4.1 The Charter as 'civiliser' of fundamental rights: the effect of Charter rights in private relationships (constitutionalisation 2.0)

4.2 The Charter as 'constitutional crumple zone': how Charter rights can refine European private law (Europeanisation 2.0)

5 Conclusion

Points for discussion

1 Introduction

1.1 The preliminary opinion at a glance

This preliminary opinion is about the significance of the Charter of Fundamental Rights of the European Union (hereinafter: Charter) for Dutch private law. The emphasis will be on the general part of property law. Judging from the available body of case law and literature, the Charter seems to have little significance in the domain of property law. Despite some spectacular but also specialist applications in employment law and intellectual property law, the Charter still seems to have little or no penetration into the core of property law in 2024, fifteen years after the Charter became binding. This is remarkable, because EU law as such actually exerts a great and also growing influence on our property law.[1]

In this preliminary opinion, I want to show that the Charter does have private law potential. The fact that this private law potential has remained 'under the radar' until now, I believe, has to do with the reservations that many civil lawyers have traditionally harboured towards the phenomenon of 'constitutionalisation' (the effect of fundamental rights from the ECHR and other fundamental rights catalogues in private law). While fundamental rights are regularly and often successfully invoked in support of civil claims (especially against governments), they are still only accorded 'indirect horizontal effect'. This means that fundamental rights in horizontal legal relationships usually serve only as a point of view for the interpretation of open standards, such as reasonableness and fairness or social decency. Civil lawyers are highly attached to this indirect approach, putting fundamental rights on an equal footing with other private law rights and interests, based on the idea that fundamental rights belong in the domain of *public law*.[2]

The Charter sheds new light on this discussion, because in addition to typical public law-related fundamental rights such as the right to asylum and the presumption of innocence in criminal cases (Articles 18 and 48 of the Charter), the Charter also contains several more property-oriented fundamental rights, such as the freedom to conduct a business, the right to property and IP protection, and the right to consumer protection (Articles 16, 17 and 38 of the Charter).[3] In addition, the Court of Justice of the European Union (hereinafter: CJEU or Court) has in a series of rulings given direct horizontal effect to specific Charter provisions, with the result that it has now been established that several Charter rights create rights and

[1] See Section 1.2 of this preliminary opinion.
[2] See Section 2.2 of this preliminary opinion.
[3] See Section 3.2 of this preliminary opinion.

obligations for individuals directly, without the intervention of national private law.[4]

This 'privatisation' of fundamental rights under the influence of the Charter presents challenges but also opportunities for private law. On the one hand, it means that Charter rights are subject to the limitation system of Article 52(1) of the Charter in situations governed by EU law. This means that the familiar civil law approach, where fundamental rights inspire a context-specific balancing of interests, cannot just be adopted when applying Charter rights in horizontal relationships. This fact, in my view, forces civil lawyers to rethink the private law mantra that fundamental rights should (have) only indirect horizontal effects. In this preliminary opinion, I will argue, inspired by the Charter and the relevant case law of the CJEU, for a more direct approach where fundamental rights, in terms of their essence, prevail over (other) private law rights and interests as a starting point. If fundamental rights in private legal relationships are affected at their core, a fundamental rights-related argument is, in my view, (also) required. In this respect, there is work for civil lawyers to do: we must be able to interpret the importance of our private law values in terms of fundamental rights.[5]

At the same time, the Charter's aforementioned property law orientation also means that it offers opportunities precisely to make that translation from a private law to a public law (constitutional) framework, and thus to better protect the autonomy of private law and the private autonomy of private parties in matters governed by EU law. The Charter can serve to bridge the gap between national private law and the often more public law-oriented rules of EU law, which in the eyes of civil lawyers often lack the flexibility and sophistication that traditionally characterise private law rules. Since the established case law of the CJEU allows Charter rights to be used as a perspective in the interpretation of EU law and even as a justification for violations thereof, the Charter provides civil law specialists, and then lawyers in particular, with ammunition to further develop European private law (or have it developed) in a way that is more in line with the essential characteristics of private law.[6]

In my view, the Charter can help us in taking the next step towards the integration of fundamental rights into the property law discourse ('constitutionalisation 2.0') and in further refining EU-imposed property law rules ('Europeanisation 2.0'). That the Charter can thus also contribute to further unification of national property law systems in Europe by

[4] See Section 3.4.2 et seq. of this preliminary opinion.
[5] See Section 4.1 of this preliminary opinion.
[6] See Section 4.2 of this preliminary opinion.

challenging civil lawyers to translate private law arguments into terms of shared European fundamental rights is a nice bonus ('unification 2.0').[7]

1.2 The Charter and private law: 'not on the radar' for fifteen years

In late 2011, two years after the Charter became binding,[8] Barkhuysen, Bos, and Ten Have wrote a review article in a Dutch civil law journal (*Nederlands Tijdschrift voor Burgerlijk Recht (NTBR)*) on the significance of the Charter for Dutch private law.[9] They highlighted that the Charter contains several fundamental rights novelties that may be of particular interest to private law, and that several Charter rights offer substantive added value compared to the corresponding ECHR rights. They also pointed to the institutional added value of the Charter as an EU law instrument vis-à-vis the ECHR and other fundamental rights catalogues. Nevertheless, these authors had to note – with regret – at the time that the Charter was 'on civil lawyers' radar to a limited extent only'.[10]

Today, in the year 2024, fifteen years after the Charter was implemented as a binding instrument, this situation does not seem to have changed substantially, at least if we limit ourselves to the core of private law: general property law. While the Charter is familiar territory for many civil lawyers, as evidenced by the fact that many ECHR citations today are accompanied by obligatory references to the Charter, current property law literature does not reveal any clear added value and autonomous significance of the Charter.[11] Despite ground-breaking publications by EU law-oriented civil lawyers such as Hartkamp, Sieburgh, Van de Moosdijk, and De Mol,[12] the

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[7] See Section 5 of this preliminary opinion.

[8] Charter of Fundamental Rights of the European Union, *Official Journal of the European Union (OJEU)* 2007, C 303/01, entry into force on 1 December 2009 (along with the Treaty of Lisbon).

[9] T. Barkhuysen, A.W. Bos & F. ten Have, 'Een verkenning van de betekenis van het Handvest van de grondrechten van de Europese Unie voor het Privaatrecht,' *NTBR* 2011/68, p. 479 et seq. (Part 1) and *NTBR* 2011/76, p. 547 et seq. (Part 2).

[10] Barkhuysen, Bos & Ten Have, *NTBR* 2011/68, p. 479. See also p. 480 et seq. (on the Charter's relevance to private law), p. 547 et seq. (on the substantive added value of the Charter compared to the ECHR) and p. 553 et seq. (on the institutional added value of the Charter compared to the ECHR).

[11] See, for example, J.M. Smits, *Constitutionalisering van het vermogensrecht* (preliminary opinion, Dutch Association for the Judiciary no. 64), Deventer: Kluwer 2003, no. 2; J.M. Emaus, *Handhaving van EVRM-rechten via het aansprakelijkheidsrecht* (thesis, Utrecht), The Hague: BJU 2013, p. 6; Schelhaas, *Redelijkheid en billijkheid (Mon. BW no. A5)* 2017/6; Lindenbergh, in: *Verbintenissen uit de wet en Schadevergoeding* 2021, no. 11; and Verheij, *Onrechtmatige daad (Mon. Pr. no. 4)* 2023/1.10.1, the authors of which mention the Charter only in passing (alongside the ECHR), but they do not go into the substance of it. I adopted this same approach in Jansen, *GS Onrechtmatige daad* (online, updated through to 1 December 2020), note 4.2.3.1. C.C. van Dam, *Aansprakelijkheidsrecht*, The Hague: Boom Juridisch 2023, no. 108 dedicates one paragraph to it (for liability law). De Vries, *De overeenkomst in het algemeen (Mon. BW no. B54)* 2016 goes into it in no. 3 and no. 15.

[12] See especially A.S. Hartkamp, 'De invloed van het EU Handvest van de grondrechten op het privaatrecht,' *WPNR* 2014/7035, p. 961-966; M. de Mol, *De directe werking van de grondrechten van de Europese Unie* (thesis, Maastricht), Oisterwijk: Wolf Legal Publishers 2014, p. 193 et seq.; C.H. Sieburgh, 'Waarom het Unierecht de invloed van grondrechten op het privaatrecht aanjaagt en versterkt,' *RMThemis* 2015, issue 1, p. 3-13; C.H. Sieburgh, 'Het EU-Handvest van de Grondrechten en het algemene vermogensrecht,' in: J.H.

Charter still does not seem to have penetrated the core of property law. What is particularly illustrative of this is how the Charter is discussed in property law textbooks. Sieburgh, a great advocate of the Charter as an instrument of private law, only modestly accommodates the Charter in her Asser volumes on law of obligations.[13] Hartkamp, also a protagonist from the early days, treats the Charter in his Asser volume on the Europeanisation of property law relatively briefly and subordinately, in the context of a much more comprehensive chapter on the horizontal effect of the ECHR.[14] Review publications on constitutionalisation of property law also focus mainly on the ECHR, with the Charter usually mentioned only indirectly,[15] although there is, of course, also literature where the Charter does feature prominently.[16]

Published case law confirms the impression that the Charter so far plays only a modest (or barely visible) role in general property law. A search on rechtspraak.nl within the areas of property law, business law, and law of obligations returns only a few dozen rulings, and not a single eye-catcher. Even when broadening the search to the entire field of civil law, the number of hits is still low, with over 500 rulings compared to over 1,500 rulings in criminal law and 3,000 in administrative law.[17] These findings, which, admittedly, lack scientific rigour, are consistent with Krommendijk's 2019 quantitative case law research, which found that the Charter has 'little significance' for civil law. Of all areas of law, civil law returned the fewest 'autonomous' references to the Charter. In the majority of civil rulings, the Charter was deemed inapplicable or mentioned only in conjunction with the

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Gerards, H.C.F.J.A. de Waele & K.M. Zwaan (ed.), *Vijf jaar bindend EU-Grondrechtenhandvest. Doorwerking, consequenties, perspectieven (Research Centre for State and Law no. 26)*, Deventer: Wolters Kluwer 2015, p. 505-538; and C.H. Sieburgh & M.M.C. van de Moosdijk, '*Bauer*: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke rechtsverhoudingen,' in: J. Krommendijk, H.C.F.J.A. de Waele & K.M. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment (Research Centre for State and Law no. 47)*, Deventer: Wolters Kluwer 2019, p. 271-292.

[13] I counted eight (generally indirect) references. See *Asser/Sieburgh 6-III* 2022/58, 305 and 325a; and *Asser/Sieburgh 6-IV* 2023/16, 71, 78, 155 and 460a respectively.

[14] See *Asser/Hartkamp 3-I* 2023/231a-231j (added in the third edition of 2015). Keus is even more concise on the Charter (L.A.D. Keus, *Europees Privaatrecht (Monografieën BW no. A30)*, Deventer: Wolters Kluwer 2019/20).

[15] See, for example, P.S. Bakker, *Grondrechten in het vermogensrecht*, Nijmegen: Ars Aequi Libri 2023, who only goes into the Charter separately on p. 14-15 and p. 78-79 and furthermore only mentions it indirectly.

[16] Apart from the aforementioned publications, see also H.C.F.J.A. de Waele, 'Horizontale werking van het EU-Grondrechtenhandvest: de kogel lijkt door de kerk,' *NtER* 2014, p. 158-164; J.M. Emaus, 'Rechten, beginselen en horizontale directe werking van de grondrechten uit het EU-Handvest,' *NTBR* 2015/10, issue 3, p. 67-76; I.V. Aronstein, *Remedies for infringements of EU law in legal relationships between private parties*, Deventer: Wolters Kluwer 2019, p. 286 et seq.; A. Eleveld, 'Rechtstreekse horizontale werking van grondrechten van de Europese Unie,' *NtER* 2019, p. 88-95; J.M. Emaus, 'Grondrechten, gamechangers. Over recente ontwikkelingen op het gebied van de doorwerking van de Europese grondrechten in het vermogensrecht,' *MvV* 2019, issue 7/8, p. 246-254; A.S. Hartkamp, 'Rechtstreekse doorwerking van het EU Handvest van de grondrechten in privaatrechtelijke rechtsverhoudingen,' *AA* 2019, issue 3, p. 218-224; and M. de Mol, 'Het leerstuk van de horizontale directe werking van Uniegrondrechten op de voet gevolgd,' *AA* 2019, issue 5, p. 371-382.

[17] I found 28 rulings within the areas of property law, business law, and law of obligations, 546 rulings within the entire area of civil law, 1,580 rulings within the area of criminal law and 3,024 rulings within the area of administrative law on 31 January 2024 using the search term 'Charter of Fundamental Rights'. Similar searches (e.g. 'EU Charter' or 'Charter' and 'fundamental rights') returned similar results.

ECHR. The most frequently cited Charter provision in civil law was Article 24 of the Charter, on the rights of the child, i.e. not a property law provision.[18]

Two specialist areas of property law that *are* specifically affected by the Charter are IP law and employment law, which are, not coincidentally, two areas of law that are already heavily influenced by EU law.[19] Importantly for *IP law*,[20] the CJEU has used Article 16 of the Charter (freedom to conduct a business) in a number of cases to limit the scope of a prohibition or injunction in IP infringement proceedings to protect infringers' business interests. [21] Conversely, the CJEU reinforced the protection of IP rightholders by ruling that Article 17(2) of the Charter (right to IP protection) is subject to the limitation clause of Article 52(1) of the Charter, which prevents third-country rightholders from being denied EU law-harmonised IP rights without a sound basis in EU law.[22] This decision led to a high-profile ruling by the Supreme Court of the Netherlands in 2023, which raised preliminary questions about copyright protection for US-made designer chairs, which would be lacking under the applicable IP convention, but may need to be recognised under the Charter.[23]

For employment law, the Charter is of such fundamental and also specialist significance that this compilation includes a separate preliminary opinion on it.[24] From a broader civil law perspective, it is important to note that the CJEU has rendered landmark rulings on the direct horizontal effect of Charter rights precisely in two employment law cases: *Bauer and Broßonn* on Article 31(2) of the Charter (right to paid annual leave)[25] and *Cresco* on Article 21 of the Charter (non-discrimination).[26] These rulings will be discussed below in Section 3.4.2 et seq.

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[18] See J. Krommendijk, 'Tien jaar bindend EU-Grondrechtenhandvest in de Nederlandse rechtspraktijk: een inleidende schets van de status quo,' in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 10, 18 and 26 et seq. Cf. also H. van Harten & H. Grootelaar, 'Doorwerking van het Handvest van de Grondrechten van de Europese Unie in de Nederlandse rechtspraak: een kwantitatieve stand van zaken,' *NTM/NJCM-bull* 2014/14, issue 2, p. 182-200.

[19] Sieburgh also points this out, in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 506; and Krommendijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 27.

[20] See further on the significance of the Charter for IP law, C. Alberdingk Thijm & C. de Vries, 'De toenemende invloed van het Handvest op het recht van intellectuele eigendom,' *BIE* 2015, p. 174-183; and P.G.F.A. Geerts & A.M.E. Verschuur (ed.), *Kort begrip van het intellectuele eigendomsrecht*, Deventer: Wolters Kluwer 2022, no. 6 et seq. and 31 et seq.

[21] See, for example, CJEU 27 March 2014, case C-314/12, ECLI:EU:C:2014:192 (*UPC Telekabel Wien*), discussed below in Section 3.3.1. On the role of the Charter in IP infringement proceedings, see also L. Dijkman, *The Proportionality Test in European Patent Law* (thesis, EUI), Oxford etc.: Hart 2023, *p.* 153 et seq.

[22] See CJEU 8 September 2020, case C-265/19, ECLI:EU:C:2020:677 (*RAAP*), discussed below in Section 3.3.2.

[23] See Supreme Court 31 March 2023, ECLI:NL:HR:2023:508, *NJ* 2023/168, with an annotation by D.W.F. Verkade (*Kwantum/Vitra*), discussed below in Section 3.3.2.

[24] See Laagland's preliminary opinion, especially Section 4 and 5.

[25] CJEU 6 November 2018, cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*).

[26] CJEU 22 January 2019, case C-193/17, ECLI:EU:C:2019:43 (*Cresco*).

1.3 Background: Europeanisation in abundance, constitutionalisation in moderation

Away from IP law and employment law, the significance of the Charter in property law seems limited so far, as noted above.[27] At first glance, this is remarkable, since EU law as such (of which the Charter is a part[28]) has long had major and still growing impact on our property law.[29] This impact has certainly not gone unnoticed. For years, civil lawyers have complained about the (alleged) excesses of Europeanisation, claiming that it erodes the foundations of our property law. A common thread in that discussion seems to be that EU law, through its public law perspective, with correspondingly strict rules and firm remedies, detracts from the flexibility and intricacy of our private law. Civil courts' scope to provide customisation through case-by-case balancing of interests (the trademark of civil courts) is often (more) limited when applying European private law. In a previous publication, I branded this the 'steamroller effect'. [30] This effect is illustrated by Jongeneel's claim that EU law overrides our 'national civil dogmas'.[31] He based this claim on the CJEU's *Dexia* ruling from 2021, which held that an unfair term as defined in Directive 93/13/EEC may not be replaced by a national rule of supplementary law after being annulled, because such a replacement would be contrary to the EU law principle of effectiveness.[32] Compared to this, the Charter seems to be a quiet asset for civil lawyers, because there have so far not been any spectacular rulings where the Charter is used to challenge general rules or principles of property law.

Viewed from a broader fundamental rights perspective, the Charter's low significance or visibility in the property law domain is not surprising, because although the topic of constitutionalisation of property law has been 'on civil lawyers' radar' for some time now and has received considerable attention in civil law literature,[33] fundamental rights have only minor impact

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[27] For more about the (as yet marginal) significance of the Charter for *securities law*, see *Asser/De Serière 2-IV* 2023/846, and for *pension law*, see *Asser/Lutjens 7-XI* 2023/53 and 750.

[28] As part of primary EU law, the Charter is aligned with the EU treaties and EU principles. See Art. 6(1) of the TEU and also, for example, *Asser/Hartkamp 3-I* 2023/6.

[29] For a comprehensive analysis of this Europeanisation, see *Asser/Hartkamp 3-I* 2023/1 et seq.

[30] See K.J.O. Jansen, *Stoomwals en wegbereider* (inaugural lecture in Rotterdam), The Hague: Boom Juridisch 2022, p. 16 et seq. and 27-28 (with further references).

[31] See R.H.C. Jongeneel, 'Europese civiele dogmatiek,' *NJB* 2021/1393, p. 1570-1571.

[32] CJEU 27 January 2021, cases C-229/19 and C-289/19, ECLI:EU:C:2021:68 (*Dexia*).

[33] For authoritative review publications, see, for example, L.F.M. Verhey, *Horizontale werking van grondrechten, in het bijzonder van het recht op privacy* (thesis, Utrecht), Zwolle: W.E.J. Tjeenk Willink 1992; Smits, *Constitutionalisering van het vermogensrecht* (preliminary opinion, Dutch Association for the Judiciary) 2003; O.O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (thesis, Utrecht), Munich: Sellier 2007; C. Mak, *Fundamental Rights in European Contract Law* (thesis, University of Amsterdam), Alphen aan den Rijn: Kluwer Law International 2007; G.E. van Maanen & S.D. Lindenbergh, in: *EVRM en privaatrecht: is alles van waarde weerloos?* (preliminary opinions, VBR), Deventer: Kluwer 2011, p. 9-70 and p. 71-122; Emaus, *Handhaving van EVRM-rechten via het aansprakelijkheidsrecht* 2013, p. 17 et seq.; C.H. Sieburgh, 'De betekenis van grondrechten voor het algemene vermogensrecht,' in: J.H. Gerards & C.H. Sieburgh, *De invloed van fundamentele rechten op het materiële recht*, Deventer: Kluwer 2013, p. 429-452; and *Asser/Hartkamp 3-I* 2023/198 et seq.

on our property law. The ECHR, on the other hand, has been applied in high-profile government cases,[34] with the *Urgenda* ruling being the most prominent of them all,[35] but it is precisely in the horizontal relationship between private individuals – the normal type of private legal relationship – where the ECHR and other fundamental rights have usually not played a prominent role until now.[36] This has to do with how we allow fundamental rights to have an effect in private law. The prevailing doctrine assigns only an 'indirect horizontal effect' to fundamental rights, which means that fundamental rights in private legal relationships usually only serve as a perspective for the interpretation of open norms, such as those of reasonableness and fairness (Section 3:12 of the Dutch Civil Code) or social decency (Section 6:162 of the Dutch Civil Code). Civil lawyers value this indirect approach very highly, as it puts fundamental rights on an equal footing with other private law rights and interests. The underlying idea is that fundamental rights come from public law and are primarily intended to apply in the vertical relationship between government and citizen. Against this background, there have been warnings of the dangers of 'framing' private law discussions in terms of fundamental rights, as that is feared to lead to a 'proliferation' of fundamental rights in private law.[37] The dominant doctrine prefers a case-by-case approach out of principle, or perhaps out of convenience. This is because, according to Bakker, 'admissibility is reviewed more intensely in one case and less intensely in another.'[38] 'Constitutionalisation in moderation,' is what Cherednychenko aptly calls it.[39]

1.4 Question: the Charter as an instrument of private law?

The question that arises is whether the Charter will (be able to) change the state of affairs outlined above regarding the effect of fundamental rights in private legal relationships. We already saw that the Charter currently has only limited significance for property law. However, we also know that the

[34] For a run-down, see, for example, E.C. Gijselaar & E.R. de Jong, 'Overheidsfalen en het EVRM bij ernstige bedreigingen van de fysieke veiligheid,' *NTBR* 2016/6, p. 36-45; and E.C. Gijselaar, *Positieve verplichtingen en aansprakelijkheid* (thesis, Utrecht), The Hague: Boom Juridisch 2021, p. 137 et seq.

[35] Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, with an annotation by J. Spier (*Urgenda*).

[36] Cf. *Asser/Hartkamp 3-I* 2023/198, who argues that the ECHR is significant for property law 'on a relatively modest scale, but to an increasing degree.' The qualification of 'relatively modest' appeared as far back as in the first edition of 2008 (and then in no. 158). The addition of 'to an increasing degree' appeared in the second edition of 2011. In the same vein, see also Smits, *Constitutionalisering van het vermogensrecht* (preliminary opinion, Dutch Association for the Judiciary) 2003, no. 64 ('only limited significance').

[37] Bakker, *Grondrechten in het vermogensrecht* 2023, p. 103 et seq. See further the literature discussed in Section 2.2.

[38] Bakker, *Grondrechten in het vermogensrecht* 2023, p. 24-25 (and in a similar vein p. 102-103).

[39] O.O. Cherednychenko, 'Grondrechten en het contractenrecht: een pleidooi voor constitutionalisering met mate,' *NTBR* 2008/30, p. 220-230.

ECHR took more than 25 years to 'break through' into the Dutch legal order.[40] By comparison, the Charter is still young, at least if we limit ourselves to the period since it was declared binding (late 2009).[41] Moreover, there is already reason to believe based on the current state of law that the Charter's potential significance in the private law domain is considerably greater than that of the ECHR.[42] There are at least three reasons why the Charter's potential significance for private law merits further examination.

To begin with, compared to other fundamental rights catalogues such as the ECHR, the Charter is clearly more private law oriented. This is because the Charter contains not only typical public law fundamental rights, such as the right to asylum and the presumption of innocence in criminal cases (Article 18 and 48 of the Charter),[43] but also various more property law-oriented fundamental rights, such as freedom to conduct a business, the right to property and IP protection, and the right to consumer protection (Article 16, 17, and 38 of the Charter). This greater orientation on property law has to do with the EU law status and origin of the Charter.[44] On the one hand, the Charter consists of provisions that build on the ECHR and the relevant ECtHR case law (cf. Article 52(3) of the Charter), but on the other hand it also has provisions derived from EU law and the relevant case law of the CJEU (in particular the general principles of EU law accepted by the Court).[45] EU law is primarily geared towards forging a common European market,[46] although the EU now also embraces human rights as the basis of primarily economically motivated European cooperation.[47] Given EU law's economic orientation, the Charter is more tailored to economic issues than other fundamental rights catalogues such as the ECHR,[48] and therefore

[40] The first ECtHR ruling with private law consequences (for family law) is ECtHR 13 June 1979, case 58442, *NJ* 1980/462, with an annotation by E.A. Alkema (*Marckx*). See *Asser/Hartkamp 3-I* 2023/203. See further on the history of reception of the ECHR in the Netherlands W.E. Hommes, *Co-Creating European human rights* (thesis, University of Amsterdam), 2023.

[41] The Charter contains codifications of the principles of EU law from the case law of the CJEU and was used as a source of such principles even before it became binding. See Section 3.1 of Gerards' preliminary opinion.

[42] Cf. Sieburgh, in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 506, who argues that the Charter 'offers more opportunity for private law to set off fireworks than other fundamental rights catalogues.'

[43] Moreover, typical public law-related fundamental rights may also have private law relevance. Cf., for example, Court of Amsterdam 30 August 2023, ECLI:NL:RBAMS:2023:5518, *JOR* 2024/12, with an annotation by T.M. Stevens, legal grounds 6.11 and 6.32, where the presumption of innocence in criminal cases (Article 48 of the Charter) was used to mitigate the obligation under financial law to disclose insider trading (Article 17(4) of the Market Abuse Regulation), in a dispute over liability in a private law context.

[44] More generally, EU law does not usually make a sharp distinction between public and private law rules. See *Asser/Hartkamp 3-I* 2023/133.

[45] See, for example, Article 8 of the Charter (personal data protection), in conjunction with Article 16 of the TFEU and the General Data Protection Regulation (GDPR). The ECHR or EU origin of the various Charter provision comes to the fore in the Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, *OJEU* 14 December 2007, C 303/17 (hereinafter: the Explanations).

[46] Cf. Article 26 et seq. of the TFEU. See also *Asser/Hartkamp 3-I* 2023/22 et seq.

[47] Cf. Article 2 and 6 of the TEU. See also Section 3 of Gerards' preliminary opinion.

[48] This is pointed out by E.A. Alkema in his note to the Supreme Court ruling of 16 December 2016, ECLI:NL:HR:2016:2888, *Dutch Jurisprudence* 2017/132 (fur farmers), under 7. Cf. also Section 2.1 of Gerards' preliminary opinion on the EU's economic '*raison d'être*'.

potentially also of greater (or actually: broader[49]) significance for property law. In this context, there has been criticism in the literature that the Charter is based too much on liberal-economic ideas and pays too little attention to 'social justice'.[50] If this is indeed the case, it places the proliferation of fundamental rights so feared by civil lawyers in a different light: the Charter threatens to make our private law less social. This once again underlines the importance of an investigation into the Charter's significance in the area of private law.

A second, even more pressing reason to examine the Charter's significance for private law lies in the case law of the CJEU on the direct horizontal effect of Charter rights. In Section 1.2, we already saw that the CJEU attributed direct horizontal effect to Article 21 of the Charter (non-discrimination) and Article 31(2) of the Charter (right to paid annual leave) in two employment law cases. It is, therefore, undeniable that these two Charter rights directly create rights and obligations for private individuals, without the intervention of national private law. The aforementioned IP case law of the CJEU is also important in this context. IP rights are – again in a horizontal context – deemed subject to the limitation clause of Article 52(1) of the Charter, with the spectacular result that copyright protection may have to be provided where it was lacking under the applicable IP convention. This means that the prevailing doctrine of the indirect horizontal effect of fundamental rights in the context of the Charter may no longer be tenable, or at least need tweaking. While it may sound disruptive, I believe it actually offers opportunities to better embed fundamental rights (from the Charter and other fundamental rights catalogues such as the ECHR) in our national property law (Section 4.1).

In another respect, I also believe that the Charter offers opportunities to improve our national property law, and there is, therefore, reason to examine its private law significance. Above, it became apparent that EU law, due to its public law slant, sometimes conflicts with our national property law, because it detracts from its flexibility and finely meshed nature. In this context, the Charter can serve as a 'constitutional crumple zone', because it protects both public law and more private law-oriented fundamental rights. It is important that the CJEU uses the Charter – including private law-oriented provisions such as Article 16 of the Charter (freedom to conduct a business) and Article 38 of the Charter (consumer protection) – as a frame of reference for the interpretation and application of EU law.[51] Moreover,

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[49] Traditional fundamental rights also have property law significance (see Section 2.1 below).

[50] See, for example, C. Mak, 'Unchart(er)ed Territory. EU Fundamental Rights and National Private Law,' in: A.S. Hartkamp et al., *The Influence of EU Law on National Private Law, Vol. I, General Part (Onderneming en Recht, no. 81-I)*, Deventer: Kluwer 2014, p. 323-353; and M.W. Hesselink, 'The Justice Dimensions of the Relationship between Fundamental Rights and Private Law,' *ERPL* 2016, issue 3-4, p. 425-455.

[51] See J. Basedow, *EU Private Law: Anatomy of a Growing Legal Order*, Cambridge etc.: Intersentia 2021, p. 214-216 (with further references). See also Section 4.4 of Gerards' preliminary opinion and Section 4.2 below.

according to the case law of the CJEU, the fundamental rights enshrined in the Charter can serve as grounds for justifying infringements of EU law.[52] Hartkamp and Sieburgh have previously noted that the direct horizontal effect of fundamental rights can provide a necessary counterbalance to undesirable outcomes of the direct horizontal effect of primary EU law, in particular the freedoms of movement under the EU treaties.[53] A next step in this development could be for the CJEU to also review secondary EU law affecting our private law against fundamental rights under the Charter (more often), and thus 'civilise' it. Precisely because the Charter has a partly private law nature, it offers civil lawyers ammunition to further develop European private law in a way that better reflects the essential characteristics of private law (Section 4.2).

1.5 Structure and demarcation

In this preliminary opinion, I will examine the Charter's significance and potential with respect to private law, whereby my focus will be on the general part of Dutch property law in a substantive sense and on the relevant Charter provisions and CJEU rulings. I by no means claim that my discussion of relevant sources is exhaustive, simply because that is not possible within the scope of this preliminary opinion.[54] However, I do strive to give civil lawyers without specialist knowledge of the Charter a representative picture and sense of its potential in the property law domain. I will only discuss employment law and IP law sources insofar as they are relevant from a general property law perspective, i.e. without going into the specialist details. I will almost entirely ignore non-Dutch literature, as my examination focuses on the significance of the Charter for our national property law.[55] In a substantive law sense, I will mainly focus on the significance of the Charter for *law of obligations* (contract and liability law).

Given the limited significance of the Charter for Dutch property law, I will refrain from taking stock of the various applications of the Charter in a property law context in Dutch case law to date. That would, in my view, result in a fragmented picture that would teach specialists nothing new and that generalists would be able to make head nor tail of. In this preliminary

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[52] See CJEC 12 June 2003, case C-112/00, ECLI:EU:C:2003:333 (*Schmidberger*); CJEC 14 October 2004, case C-36/02, ECLI:EU:C:2004:614 (*Omega Spielhallen*); and CJEC 11 December 2007, case C-438/05, ECLI:EU:C:2007:772 (*Viking*), discussed below in Section 3.2.1-3.2.2.

[53] See Hartkamp, *WPNR* 2014/7035, p. 965; Sieburgh, *RMThemis* 2015, p. 4; Sieburgh, in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 516-517; Hartkamp, *AA* 2019, p. 224; and *Asser/Hartkamp 3-I* 2023/64, 66a and 231j (with further references). See also Basedow, *EU Private Law* 2021, p. 216.

[54] See for extensive article-based commentary on the Charter S. Peers et al. (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford etc.: Hart Publishing 2021. For an exhaustive analysis from a private law perspective, see Basedow, *EU Private Law* 2021, p. 203 et seq. A full and up-to-date run-down of all CJEU case law by Charter provision is available at https://ecer.minbuza.nl/ecer/eu- essentieel/handvest-grondrechten (linked to the eur-lex.europa.eu search engine).

[55] For foreign literature on the horizontal effect of the Charter, see Section 4.3 of Gerards' preliminary opinion.

opinion, I will focus on the potential significance of the Charter for property law. I will look for this significance primarily at a dogmatic level by examining which starting points the Charter and the case law of the CJEU provide for granting *horizontal effect* to Charter rights. By extension, I want to look into what we can glean from this for the horizontal effect of fundamental rights in general.

Below, I will first discuss the property law status of fundamental rights in general (Section 2.1). In that context, I will discuss the prevailing doctrine of the indirect horizontal effect of fundamental rights (Section 2.2) and an alternative, more direct approach where fundamental rights are regarded as personality rights under private law (Section 2.3). I will then analyse the Charter provisions with the greatest significance for property law, partly on the basis of examples from CJEU case law, in private law terms (Section 3). In that context, I will also discuss the employment law case law of the CJEU on the direct horizontal effect of Charter rights (Section 3.4.2 et seq.) Building on this, I will map out the significance of the Charter in property law, both for our national private law (Section 4.1) and for European private law (Section 4.2). Finally, I will take a look ahead and explore the bearing that the Charter can have on the topics of constitutionalisation, Europeanisation, and unification of private law (Section 5).

To conclude this introduction, I need to make some terminological comments for clarification. As has already been pointed out above, I use terms such as 'private law', 'civil law', and 'property law' interchangeably in this preliminary opinion. Unless stated otherwise, these are always references to the general property law that is the subject of this preliminary opinion. I use 'European private law' to refer to private law rules of EU law origin, as laid down in the EU treaties, EU directives, and EU regulations.[56] I use the term 'Europeanisation' in a broader sense, i.e. also to indicate ECHR influences in private law. I refer to rights, freedoms, and principles from fundamental rights catalogues such as the Charter, the ECHR, and the Dutch Constitution as 'fundamental rights', in accordance with the title of the Charter (and therefore as equivalent to 'human rights'). The impact of such rights in private law is what I call 'constitutionalisation'. I refer to the provisions of the Charter as 'Charter provisions', whereby, in accordance with Article 52(5) of the Charter, I distinguish, where necessary, between 'Charter rights' (rights and freedoms of citizens) and 'Charter principles' (principles for the implementation of EU law by EU institutions and Member States).[57]

[56] For this definition, see, for example, *Asser/Hartkamp 3-I* 2023/1 and Keus, *Europees Privaatrecht (Mon. BW no. A30)* 2019/6.

[57] See further about the (diffuse) distinction between Charter rights and principles, Section 4.4 of Gerards' preliminary opinion.

2 Fundamental rights and private law

2.1 Property right: everything of value

What is a fundamental right in a property law sense? Judging from the text of the Dutch Civil Code, the answer seems to be 'nothing'. Fundamental rights have not been assigned a (separate) place in the legal system of property law,[1] which revolves around goods and property rights (Section 3:1 of the Dutch Civil Code). Property rights are rights that are transferable and/or represent monetary value (Section 3:6 of the Dutch Civil Code). Accordingly, objective property law is usually described as the law that regulates the rights (and obligations) that can form part of a *property*.[2] This is aptly illustrated by the following depiction of property law by Van Boom:

> 'If I had to draw a picture of property law, it would be of two people shaking hands, while one gives money and the other gives property. In my opinion, property law is primarily about the consensual exchange of items of value belonging to a person. This exchange takes place in markets. And in our society, those markets are subject to rules. Dutch property law is part of those rules.'[3]

When we take a closer look at the legal system of property law, it turns out that this picture needs some adjustments. Property rights are not the only rights with property law relevance, and property law is not only about items of value that can be measured in monetary terms.[4] According to Section 6:162(2) of the Dutch Civil Code, not only property rights are protected by property law but so are other *subjective rights,* and in such a way that an infringement thereof is, in principle, unlawful and creates an obligation to pay compensation. Subjective rights as defined in Section 6:162(2) of the Dutch Civil Code are generally divided into *absolute property rights* on the one hand, such as ownership, limited ius in re and *personality rights* on the other, such as the right to physical integrity, the protection of honour and good name, privacy, and (other) fundamental rights.[5]

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1 Cf. Emaus, *Handhaving van EVRM-rechten via het aansprakelijkheidsrecht* 2013, p. 325 et seq., who argues for a system change against this background, seeking recognition for the 'fundamental violation of law' as a new source of obligations and basis for violation-preventing remedies. For a critical take on this, see G.E. van Maanen, 'Hoe moet het EVRM doorwerken in het Nederlandse aansprakelijkheidsrecht?' *NTBR* 2013/38, p. 327, who argues that this 'duplicates our liability system unnecessarily'.

2 See *Asser/Bartels & Van Mierlo 3-IV* 2021/1; and Hijma & Olthof, *Compendium Nederlands vermogensrecht* 2023/2.

3 W.H. van Boom, *Privaatrecht en markt*, The Hague: Boom Juridisch 2020, p. 5 (preface).

4 See *Asser/Bartels & Van Mierlo 3-IV* 2021/1. Cf. also J.H. Nieuwenhuis, *Waartoe is het recht op aarde?* The Hague: Boom Juridisch 2006, p. 156; and Lindenbergh, in: *EVRM en privaatrecht* (preliminary opinions, VBR) 2011, p. 75-76.

5 See, for example, *Asser/Sieburgh 6-IV* 2023/46; Van Dam, *Aansprakelijkheidsrecht* 2023, no. 226-1; and Jansen, *GS Onrechtmatige daad* (online, updated through to 1 December 2020), note 4.2.4. The legislator has left it up to scholars and case law to come up with an interpretation of the concept of 'subjective right'. See TM, *Parliamentary Papers BW Book 6* 1981, p. 614.

In the legal system of property law, fundamental rights are, therefore, accommodated within the category of subjective rights, and more specifically personality rights.[6] As such, they are – at least potentially – on a par with property rights as specified in Section 3:6 of the Dutch Civil Code. These are rights that, although not measurable in monetary terms, are protected by substantive property law, so that commitments and other legal obligations can arise from them, namely an obligation to pay compensation on account of an infringement of law (Section 6:162(2) of the Dutch Civil Code) and a legal obligation on third parties to respect personality rights (Section 3:296 of the Dutch Civil Code).

While Van Boom's picture is, given the foregoing, not incorrect, it is one-sided: property law is not only about market rules that govern the economic exchange of assets between persons, but also about personality rights that make this exchange possible, because they protect the relevant actors in their personalities, also towards each other. Van Boom goes into this when he discusses the *autonomy principle* as the ultimate basis of property law: 'the fundamental right and ultimate responsibility of individuals to determine their own destiny through their free will actions.'[7] Viewed in this way, property law relationships are not possible without the recognition of fundamental rights, and property law is not primarily about the exchange of *items of value*, but about the protection of property law *values*, namely property rights and personality rights.

The question is, therefore, not whether fundamental rights have a place in property law (they do), but *what* place we give them. There are different opinions on this. The translation of fundamental rights into subjective rights suggested above is not self-evident, because such a translation implies horizontal effect of fundamental rights. The prevailing doctrine is reluctant to do so, based on the idea that fundamental rights belong in the domain of *public law*. De Mol calls this the 'exogenous' view, where fundamental rights 'are outside the private law system.' She distinguishes this from the 'endogenous' view, where fundamental rights are 'integrated into the private law system.'[8] Below, I will first discuss the exogenous view, which constitutes the prevailing doctrine, and then the endogenous view, which I believe is more in line with how Charter Rights impact our private law.

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[6] See further on how fundamental rights relate to personality rights S.D. Lindenbergh, 'De positie en de handhaving van persoonlijkheidsrechten in het Nederlandse privaatrecht' (preliminary opinion VVSR), *TPR* 1999, p. 1665 et seq. (available on www.tpr.be).

[7] Van Boom, *Privaatrecht en markt* 2020, p. 67.

[8] De Mol, *De directe werking van de grondrechten van de Europese Unie* 2014, p. 200 et seq. The exogenous view clearly comes to the fore in Van Maanen, in: *EVRM en privaatrecht* (preliminary opinions VBR) 2011, p. 19, who confesses that he long considered the ECHR to be something 'from the outside'. He reports on a 'journey of discovery in a world that I hardly knew until recently' (p. 20 et seq.).

2.2 Prevailing doctrine: fundamental rights as exotic factors in public law

The prevailing doctrine traditionally regards fundamental rights as defensive rights against the government, and therefore as 'exotic factors in public law.' Against this background, the assumption is that fundamental rights can only have an impact on private legal relationships if and to the extent that they can be translated into private law terms. In this context, this is the 'indirect horizontal effect' of fundamental rights, which means that fundamental rights cannot be applied as such, i.e. directly, in horizontal legal relationships (the so-called 'direct horizontal effect'), but acquire horizontal effect by having them reflected in open private law norms and concepts such as good morals and public order (Section 3:40 of the Dutch Civil Code), reasonableness and fairness (Sections 3:12, 6:2 and 6:248 of the Dutch Civil Code) and social decency (Section 6:162(2) of the Dutch Civil Code).[9] At first glance, this seems to be a matter of requalification, but when viewed properly it is a revaluation, and potentially a devaluation of the fundamental rights in question. The prevailing doctrine assumes that fundamental rights, once they have been transformed into a private law argument, are on an equal footing with other private law rights and interests. As early as in 1994, Alkema argued that when fundamental rights apply horizontally, there is 'no difference in principle between fundamental rights and ordinary rights.'[10] Smits followed the same line of reasoning in 2003, in his authoritative preliminary opinion on the constitutionalisation of private law, when he stated that a fundamental right in horizontal relationships is a 'right like any other.'[11] More than ten years later, Sieburgh argued in the same vein that the force of fundamental rights' effect in horizontal relationships 'remains limited.'[12] In 2023, Bakker noted and apparently agreed that fundamental rights are 'often not treated with (much) more respect' by civil courts than other interests.[13] The consequence of this levelling out is that fundamental rights in horizontal relationships can be 'contracted away' by way of a free-form agreement, or 'reasoned away' on the basis of open private law norms such as reasonableness and fairness and

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[9] For the prevailing doctrine, see, for example, Smits, *Constitutionalisering van het vermogensrecht* (preliminary opinion, NVvR) 2003, no. 19; Sieburgh, in: *De invloed van fundamentele rechten op het materiële 2013 recht*, p. 449 et seq. (whereby it must be noted that the Charter may change this); Schelhaas, *Redelijkheid en billijkheid (Mon. BW no. A5)* 2017/6; De Vries, *De overeenkomst in het algemeen (Mon. BW no. B54)* 2016/15; *Asser/Sieburgh 6-III* 2022/59 et seq.; *Asser/Hartkamp 3-I* 2023/227 and 231; Hartkamp, *Aard en opzet van het vermogensrecht (Mon. BW A1)* 2023/25; Van der Kruk & Möhring, *GS Verbintenissenrecht*, Section 6:2 of the Dutch Civil Code (online, updated up to 9 January 2024), note 1.7.2 (with further references).

[10] E.A. Alkema, *NJ* 1994/347 (*HIV test*), under 1.

[11] Smits, *Constitutionalisering van het vermogensrecht* (preliminary opinion NVvR) 2003, no. 20.

[12] Sieburgh, *RMThemis* 2015, p. 8.

[13] Bakker, *Grondrechten in het vermogensrecht* 2023, p. 102.

social care.[14] Therefore, fundamental rights do not offer the rightholder under civil law a stronger legal position from the outset.

This indirect approach is illustrated by the HIV test ruling from 1993, where the Supreme Court of the Netherlands ruled that a rapist had to cooperate in a blood test on the basis of an unwritten duty of care as (currently) defined in Section 6:162(2) of the Dutch Civil Code, in order to rule out a possible HIV infection for the rape victim. The rapist invoked his fundamental right to protection of physical integrity, but this was rejected by the Supreme Court based on the argument that this right 'is limited by limitations to be imposed by or pursuant to the law,' which in this case means the rapist's duty of care under Section 6:162(2) of the Dutch Civil Code.[15] Annotator Alkema considers the ruling an example of indirect horizontal effect, whereby the fundamental right of one party (here: the rapist) 'does not inherently outweigh other interests' (here: the victim's interests).[16] A similar levelling out occurs in the *HIV test II* ruling ten years later. This second case involved the same legal question, but now the plaintiff was not a rape victim but a dentist who had come into contact with the blood of a patient who was suspected of having HIV. Here, too, the Supreme Court accepted that the defendant had a duty of care to submit to a blood test. To this end, the Supreme Court considered that the fundamental right to privacy and physical integrity between citizens can be limited on the basis of Section 6:162 of the Dutch Civil Code, an agreement between the parties based on reasonableness and fairness.[17]

The results of the *HIV* rulings are appealing because both cases involved a relatively minor infringement of the respective defendants' fundamental rights, which served important health interests of the plaintiffs that are also protected as fundamental rights.[18] However, the indirect approach chosen is also somewhat unsatisfactory. What is striking in the reasoning that went into both rulings is that the fundamental right of the defendants does not fulfil a real argumentative purpose. The Supreme Court takes a duty of care (an obligation to cooperate with a blood test) as a starting point and the same duty of care then serves to justify the infringement of fundamental rights. On balance, the fundamental right is basically (rendered) meaningless as the duty of care dictates the outcome. This is unsatisfactory (in terms of argumentation) because both cases involved a clash of fundamental rights

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[14] See, for example, P.S. Bakker, 'Wegcontracteren van grondrechten,' *ORP* 2022/126, issue 6, p. 16 et seq.; and Bakker, *Grondrechten in het vermogensrecht* 2023, p. 24 et seq.

[15] Supreme Court of the Netherlands 18 June 1993, ECLI:NL:HR:1993:ZC1002, *NJ* 1994/347, with an annotation by C.J.H. Brunner & E.A. Alkema (*HIV test*), legal ground 3.2.

[16] E.A. Alkema, *NJ* 1994/347 (*HIV test*), under 1.

[17] Supreme Court of the Netherlands 12 December 2003, ECLI:NL:HR:2003:AL8442, *NJ* 2004/117 (*HIV test II*), legal ground 3.4.2 (in conjunction with legal ground 4.8 of the contested ruling, as explained in legal ground 3.3 of the Supreme Court ruling).

[18] Cf. C.J.H. Brunner, who commented in his annotation to the first *HIV test* ruling (*NJ* 1994/347, under 3) that the rapist's invocation of the fundamental right of the inviolability of the body 'shows an almost unsurpassable level of hypocrisy'.

(the physical integrity of the plaintiff versus that of the defendant), meaning that one person's fundamental right had to be weighed against another person's fundamental right. Public law provides rules and guidelines for such situations, such as limitation clauses in fundamental rights (such as Article 52(1) of the Charter[19]), anti-abuse provisions (such as Article 54 of the Charter[20]), and jurisprudential assessment mechanisms.[21] Public law also accepts the possibility of contractual *renunciation* of fundamental rights (the so-called 'waiver'), by means of 'a knowing, voluntary and intelligent act, done with sufficient awareness of the relevant circumstances.'[22]

Private law could draw inspiration from these limitation, weighing, and waiver mechanisms from public law, but the prevailing doctrine is negative about this. The idea is that this would put too much of a strain on the autonomy of private law, and with that also on the autonomy of private parties. The main objection, which is indeed valid in itself, is that *limitation clauses* in public law are less suitable for application in horizontal relationships, because their consistent application would be too much of a restriction on citizens' freedom to act.[23] Against this background, Bakker warns about the dangers of 'framing' private law discussions in terms of fundamental rights, which, according to him, leads to an undesirable proliferation of fundamental rights, at the expense of private freedom to act.[24] Smits also argues that 'a consistent impact of fundamental rights in private relationships would place too heavy a burden on private autonomy.'[25] These positions already show that the choice for indirect horizontal effect is (or can be) partly a *legal-political* choice, namely a choice for a more limited impact of fundamental rights in private law.[26]

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[19] For more about the limitation clause of Article 52(1) of the Charter, see Section 4.5 of Gerards' preliminary opinion.

[20] For more about the anti-abuse provision of Article 54 of the Charter, see P.E. de Morree, *Rights and Wrongs under the ECHR. The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights* (thesis, Utrecht), Antwerp/Cambridge: Intersentia 2016, p. 117 et seq. (with a comparison to the civil law doctrine on abuse of law on p. 121 et seq.).

[21] See, for example, CJEU 22 January 2013, case C-283/11, ECLI:EU:C:2013:28 (*Sky Österreich*), para. 60, on the 'fair balance' between Charter rights (in this case Article 11, 16, and 17 of the Charter). See further on weighing mechanisms in the ECtHR and CJEU case law F.M.J. den Houdijker, *Afweging van grondrechten in een veellagig rechtssysteem* (thesis, Leiden), Nijmegen: Wolf Legal Publishers 2012.

[22] According to ECtHR 24 April 2012, no. 1413/05 (*Damir Sibgatullin/Rusland*), legal ground 48 (with respect to Article 6 ECHR). See in the same vein ECtHR 5 December 2023, no. 70267/17 (*Ţîmpău/Roemenië*), legal ground 192 (with respect to Article 8 ECHR). Cf. also CJEU 6 November 2018, case C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*), paras. 55-56 (with respect to Article 31(2) of the Charter), hereinafter discussed in Section 3.4.3.

[23] See, for example, Basedow, *EU Private Law* 2021, p. 205-206; and *Asser/Hartkamp 3-I* 2023/227. Public law literature also sees problems with direct horizontal effect of fundamental rights. See, for example, J.H. Gerards, *General Principles of the European Convention on Human Rights*, Cambridge: Cambridge University Press 2023, p. 221 et seq.

[24] Bakker, *Grondrechten in het vermogensrecht* 2023, p. 100, 103 et seq.

[25] Smits, *Constitutionalisering van het vermogensrecht* (preliminary opinion, NVvR) 2003, no. 64.

[26] This is pointed out by S.D. Lindenbergh, 'Constitutionalisering van contractenrecht,' *WPNR* 2004/6602, p. 979. He adds that from the point of view of the technical side of the law, one form of effect does not necessarily have to lead to a greater effect than the other.

Advocates for indirect horizontal effect also put forward other, more pragmatic arguments. Smits, for example, argues that fundamental rights do not have 'anything extra' to offer private law,[27] which is indeed the case if no independent meaning is attributed to them. Hartkamp argues that application of fundamental rights in horizontal relationships 'would lead to a deadlock if both the plaintiff and the defendant can rely on a fundamental right.' He supposes that a conflict of fundamental rights cannot be resolved using fundamental rights arguments.[28] Looking at the foregoing, this supposition is questionable at best. Where Hartkamp is right is in that a conflict of fundamental rights is, of course, more likely to occur in horizontal than in vertical relationships, because private parties can invoke fundamental rights *on both sides*. This is complicated, especially since the proliferation of fundamental rights means that more and more conflicts of interest can be interpreted in terms of fundamental rights. As a result, in Gerards' words, 'an extra weight is placed on both sides of the scales (...).'[29] However, this does not rule out that one of the two sides carries the most weight in a fundamental rights sense.[30]

What is typical of the prevailing doctrine is not so much the indirect character of the advocated impact. By definition, fundamental rights derived from public law cannot be applied in private law in any way other than indirectly, i.e. through private law effect mechanisms.[31] What is typical is the aforementioned *devaluation* or *levelling out* that occurs when fundamental rights have an effect in civil law. This is most evident in the area of tort. The prevailing doctrine does not want to regard fundamental rights in horizontal relationships as a subjective right as defined in Section 6:162(2) of the Dutch Civil Code, but preferably only as a point of view for interpretation of a context-related duty of care.[32] In practice, this means that fundamental rights usually do not play a prominent role in horizontal tort cases, as illustrated by the *HIV* rulings discussed above. In line with this, contract law also assumes that the mere fact that an agreement serves to

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[27] Smits, *Constitutionalisering van het vermogensrecht* (preliminary opinion NVvR) 2003, no. 23. Cf. also Basedow, *EU Private Law* 2021, p. 207, who raises the question as to what Article 7 of the Charter (right to respect for private and family life, home) and Article 17 of the Charter (right to property) add in a dispute on an eviction from a rental property.

[28] *Asser/Hartkamp 3-I* 2023/227. See in the same vein Basedow, *EU Private Law* 2021, p. 205-206 and 528.

[29] J.H. Gerards, 'Grondrechten in de platformeconomie,' in: A.C. van Schaick & J.H. Gerards, *Digitalisering, vermogensrecht, de platformeconomie en grondrechten* (preliminary opinions VBR), Zutphen: Paris 2019, p. 122-123.

[30] Cf., for example, the Supreme Court case law on a child's fundamental right to information about its biological parents, which takes precedence over the biological parent's or parents' fundamental right to privacy, as discussed below in Section 2.3.

[31] Cf. C. Mak, 'De meerwaarde van grondrechten in het privaatrecht,' *NTBR* 2004/20, issue 3, p. 127 (response to Smits, *Constitutionalisering van het vermogensrecht* (preliminary opinion, Dutch Association for the Judiciary) 2003).

[32] See *Asser/Sieburgh 6-IV* 2023/71. I have set out this prevailing doctrine as such in Jansen, *GS Onrechtmatige daad* (online, updated through to 1 December 2020), note 4.2.3.2. On the effect of fundamental rights in the test of due care, see also K.J.O. Jansen, 'Het enigma van de *Afzinkkelder*: subjectieve rechten als bron van aansprakelijkheid,' *NTBR* 2024/6.

limit a fundamental right is insufficient to conclude, for the time being, that the agreement is null and void, or that an appeal to it is unacceptable by standards of reasonableness and fairness.[33] The prevailing doctrine wants to assess this on a case-by-case basis, meaning that fundamental rights only serve as a point of view for a context-related weighing of interests. Taking a lead from Cherednychenko, I called this 'constitutionalisation in moderation' earlier (Section 1.3).

2.3 Alternative: fundamental rights as personality rights under private law

A different, more direct and more transparent, form of effect of fundamental rights in horizontal relationships is possible and has also been put to the test in the case law of the Supreme Court of the Netherlands but has not yet come to fruition in practice. According to this approach, which is sometimes also referred to as the 'fundamental values method,'[34] fundamental rights are not exotic factors from public law, intended for the vertical relationship between government and citizen, but essentially (also) of a private law nature. The idea is that classical fundamental rights such as the right to life, physical integrity, freedom of expression, and privacy protection are so fundamental in nature that they transcend the distinction between private and public law.[35] Nieuwenhuis says that fundamental rights belong to 'common law', i.e. to the law that private and public law have in common.[36] Against this background, Lindenbergh speaks of 'private law reception' of fundamental rights, which can occur by recognising 'fundamental rights' in private law, partly inspired by public law, rendering effect issues redundant.[37] Gerards accordingly distinguishes between a narrow and a broad view of fundamental rights. Fundamental rights in the narrow sense are only 'rights that have been recognised as fundamental rights through codification in international treaty instruments and in the Constitution.' The broader view, which Gerards endorses, considers fundamental rights as

[33] See *Asser/Sieburgh 6-III* 2022/62 (focused on Section 3:40 of the Dutch Civil Code), with reference to Supreme Court of the Netherlands 31 October 1969, ECLI:NL:HR:1969:AC4967, *NJ* 1970/57, with an annotation by G.J. Scholten (*Mensendieck*). See also Schelhaas, *Redelijkheid en billijkheid (Mon. BW no. A5)* 2017/6, with reference to Supreme Court of the Netherlands 12 December 2003, ECLI:NL:HR:2003:AL8442, *NJ* 2004/117 (*HIV test II*). Idem Bakker, *Grondrechten in het vermogensrecht* 2023, p. 24-25 and 102-103.

[34] Bakker, *Grondrechten in het vermogensrecht* 2023, p. 27-28. He refers to J.C.A. de Poorter & H.J.Th.M. van Roosmalen, *Rol en betekenis van de Grondwet. Constitutionale toetsing in relatie tot de Raad van State*, The Hague: Council of State 2010, p. 19, who discuss the interpretation of constitution provisions invoking fundamental values. For the civil law equivalent of this constitutional interpretation method, see Lindenbergh, in: *EVRM en privaatrecht* (preliminary opinions VBR) 2011, p. 77-78.

[35] See also Jansen, *Stoomwals en wegbereider* 2022, p. 22 et seq., where I opted for 'socialisation' instead of 'constitutionalisation'.

[36] Nieuwenhuis, *Waartoe is het recht op aarde?* 2006, p. 57-58. Cf. also J.H. Nieuwenhuis, 'De Constitutie van het burgerlijk recht,' *RMThemis* 2000, issue 6, p. 203-211, where he argues that fundamental rights constitute a 'value system' that 'encompasses all law, and therefore also civil law.'

[37] Lindenbergh, in: *EVRM en privaatrecht* (preliminary opinions, VBR) 2011, p. 74-75, 77.

'manifestations or refinements of *core values* that are considered essential for people to be able to lead a good life.'[38]

From this 'endogenous' perspective, it goes without saying that classical fundamental rights must also be respected by private parties in horizontal relationships,[39] and it is not obvious to outright relegate such fundamental rights in civil law to 'merely' a point of view of the same calibre as any other private law rights and interests. In this view, fundamental rights can be qualified as subjective rights as defined in Section 6:162(2) of the Dutch Civil Code, namely as *personality rights*. More concretely, this means that an infringement of these rights, regardless by whom, can in principle be considered *unlawful* towards the rightholder (Section 6:162(2) of the Dutch Civil Code),[40] and (in a contractual context) contrary to *good morals and/or public order* respectively (Section 3:40 of the Dutch Civil Code), or (in a contractual, pre-contractual, or post-contractual context) contrary to *reasonableness and fairness* (Section 3:12, 6:2 and 6:248 of the Dutch Civil Code).[41] Against this background, the rightholder has, in principle, also sufficient interest (Section 3:303 of the Dutch Civil Code) in a declaratory decision (Section 3:302 of the Dutch Civil Code) that their fundamental rights have been infringed.[42] In this view, an infringement of fundamental rights can, provided it is of sufficient severity, also be qualified as *trespass to the person* in a way other than that defined in Section 6:106(b) of the Dutch Civil Code, making it a potential basis for awarding damages.[43] Furthermore, a fundamental right interpreted as a subjective personality right may result in legal obligations for third parties (to respect the

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[38] Gerards, in: *Digitalisering, vermogensrecht, de platformeconomie en grondrechten* 2019, p. 115-116 (italics added).

[39] At the same time, this endogenous perspective explains why the government must also observe fundamental rights in private law relationships, for example when exercising ownership powers. See Snijders, *Overheidsprivaatrecht algemeen deel (Mon. BW no. A26a)* 2011/4f, with reference to MvT, *Parliamentary Papers II* 1975/76, 13 872, no. 3 p. 15 and Supreme Court of the Netherlands 26 April 1996, ECLI:NL:HR:1996:ZC2052, *NJ* 1996/728, with an annotation by E.A. Alkema (*Rasti Rostelli*), legal ground 3.5.1.

[40] I will not go into the controversial question as to what can be considered an 'infringement' of a right (as in a recent Supreme Court ruling of 12 January 2024, ECLI:NL:HR:2024:17 (*Afzinkkelder*)). For the full array of different views on this, see, for example, *Asser/Sieburgh 6-IV* 2023/48. More specifically on the violation of personality rights as an infringement of the law, see S.D. Lindenbergh, *TPR* 1999, p. 1677 et seq. and on the effect of fundamental rights in the due care test, see Jansen, *NTBR* 2024/6.

[41] Cf., for example, Court of Amsterdam 12 August 2004, ECLI:NL:GHAMS:2004:AR2333, *NJF* 2004/543: Dutch national railway operator NS invoked the statutory limitation of liability for serious injury sustained by a rail passenger. It was ruled inadmissible by standards of reasonableness and fairness due to conflict with Article 1 FP ECHR

[42] Cf. Supreme Court of the Netherlands 19 March 2010, ECLI: NL: HR:2010:BK8146, *NJ* 2010/172 (*Chipshol*), legal ground 3.6: in case of a 'serious infringement' of Article 6 of the ECHR, a declaratory decision may be requested 'as compensation for this infringement'. In the same sense, see, for example, Lindenbergh, in: *EVRM en privaatrecht* (preliminary opinions VBR) 2011, p. 86; K.J.O. Jansen, 'Het schadebegrip in de eenentwintigste eeuw,' *WPNR* 2017/7133, p. 45; and Van Boom, *Privaatrecht en markt* 2020, p. 89.

[43] Cf. Supreme Court of the Netherlands 15 March 2019, ECLI:NL:HR:2019:376, *NJ* 2019/162, with an annotation by S.D. Lindenbergh (*EBI*): the mere infringement of a fundamental right is not enough to assume a trespass to the person (legal ground 4.2.2), but the nature and seriousness of the violation of norms may mean that the relevant adverse consequences for the injured party in this context are so obvious that a trespass to the person can be assumed (legal ground 4.2.1).

fundamental right), which legal obligations the rightholder can enforce via Section 3:296 of the Dutch Civil Code.[44]

Strictly speaking, the endogenous view does not lead to direct horizontal effect of fundamental rights. After all, there is still a translation to the civil law assessment framework. However, this translation does not entail any significant loss of meaning: the fundamental rights in question are translated more or less one-on-one into private law subjective rights, so it could basically be called a *semi-direct* horizontal effect. The fundamental and practical difference compared to the usual indirect approach is that, according to the semi-direct approach, the rightholder whose fundamental right has been or is at risk of being infringed is 1-0 up in civil law (assuming that the other party cannot also invoke a mirror-image fundamental right infringement). After all, an infringement of a subjective right requires a justification to be put forward, under penalty of liability for tort, and it is up to the infringer to furnish and prove that justification (Section 6:162(2) of the Dutch Civil Code). While the civil court may (still) make a context-related assessment of interests in the review of justification, the starting point is that an infringement of fundamental rights (also) requires special justification in civil law. When fleshing out justifications in civil law, a civil court can draw inspiration from the public law limitation and review mechanisms mentioned above in Section 2.2.[45] The civil court will also *have to* do this in appropriate cases, because civil justice is a form of exercise of power by the government, and therefore also a 'vertical' matter, meaning that the court, as a body of the state, is obliged to safeguard the fundamental rights of citizens to the best of its ability, even in civil law disputes.[46]

Illustrative of the semi-direct approach is the *Valkenhorst* ruling where the Supreme Court, inspired by German law and with reference to 'fundamental rights such as the right to respect for private life, the right to freedom of thought, conscience and religion and the right to freedom of expression,' accepted *a general personality right* that also includes the right to know who one's parents are. On this basis, the Supreme Court ruled that a private home for unmarried mothers had to provide parentage information to a child who had grown up there and was meanwhile an adult, against the will of the child's mother. The child's right to know who its parents are

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[44] On the enforcement of fundamental rights using Section 3:296 of the Dutch Civil Code J.J. van der Helm, *Het rechterlijk bevel en verbod als remedie (Burgerlijk Proces & Praktijk no. XXIII)* (thesis, Leiden), Deventer: Wolters Kluwer 2023, p. 315 et seq. (especially about the ECHR in government cases). On the role of Section 6:162 of the Dutch Civil Code in this respect, see K.J.O. Jansen, 'De rol van art. 6:162 BW in verbods- en bevelsacties,' *NTBR* 2020/40, p. 295-297.

[45] Cf. M.E. Franke, *Over de grens van de onrechtmatige daad* (thesis, Leiden), The Hague: Boom Juridisch 2021, p. 245 et seq., who argues for effect of the criminal law principles of proportionality and subsidiarity in the review of justification in civil law. She points out that ECtHR case law offers 'a wealth of information' for this but does not go into that case law (footnote 12 on p. 248).

[46] Cf. Mak, *NTBR* 2004/20, p. 126; and Gerards, *General Principles of the European Convention on Human Rights* 2023, p. 235 et seq.

prevailed over the mother's fundamental right to privacy protection.[47] In his opinion for the ruling, Advocate General Koopmans drew attention to the property law dimension of general personality law, which, according to him, forms the basis of 'the autonomy of the individual, which underlies a large part of our property law.'[48] In 2022, the Supreme Court confirmed that the 'right to information about one's own (biological) descent' is a fundamental right that 'takes precedence' over the right of the parent to hide such information from the child, even if the parent is potentially the biological father and this information must be obtained through a DNA test. The Supreme Court did not refer to general personality law in this case, as it had before, but instead referred directly to Article 8 of the ECHR.[49]

Another example of the semi-direct approach is the 2007 *Hyatt* ruling on a contractual limitation of the right to privacy in an employment relationship. A casino employee was summarily dismissed after testing positive for cocaine use during working hours. Her dismissal came under the employer's anti-drug policy, which the employee had signed (after completing a course). Following the employee's appeal to Article 8 of the ECHR, the Supreme Court considered that the employer's anti-drug policy infringed on employees' privacy, since drug use during an employee's private life could also lead to them testing positive during working hours and being fired. The Supreme Court subsequently examined, by analogy with Article 8(2) of the ECHR, whether this infringement served a legitimate purpose and met the requirements of necessity, proportionality, and subsidiarity. This review came out positive in this case, because the employer's interest in maintaining its good name and being an attractive place for its guests outweighed the employee's interest in being able to use cocaine in her spare time (and preventing the employer from becoming aware of their cocaine use).[50] Annotator Verhulp noted that, in this case, the Supreme Court applied the assessment framework of Article 8 of the ECHR for the first time 'directly in an employment law dispute.'[51]

A third, high-profile example of the semi-direct approach is the ruling that to this day is known as, not very woke, the *Woman from Edam on benefits (Edamse bijstandsvrouw*) ruling. It is the case of a woman who had been spied on by her neighbour (who worked at the benefits agency but was

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[47] Supreme Court of the Netherlands 15 April 1994, ECLI:NL:HR:1994:ZC1337, *NJ* 1994/608, with an annotation by W.C.E. Hammerstein-Schoonderwoerd (*Valkenhorst*), legal ground 3.2 and Section 3.4.3. See further on general personality law, for example, Lindenbergh, *TPR* 1999, p. 1672 et seq.; De Vries, *De overeenkomst in het algemeen (Mon. BW no. B54)* 2016/16; and Bakker, *Grondrechten in het vermogensrecht* 2023, p. 4 et seq.

[48] See the opinion of Advocate General Koopmans for the *Valkenhorst* ruling (*NJ* (Dutch Jurisprudence) 1994/608), under 19.

[49] Supreme Court 11 March 2022, ECLI:NL:HR:2022:349, *NJ* 2022/169, with an annotation by S.F.M. Wortmann, legal grounds 3.1.2-3.1.4.

[50] Supreme Court of the Netherlands 14 September 2007, ECLI:NL:HR:2007:BA5802, *NJ* 2008/334, with an annotation by E. Verhulp (*Hyatt*), legal ground 3.4.2 et seq.

[51] E. Verhulp, *NJ* 2008/334 (*Hyatt*), under 3.

not acting in a professional capacity) and reported on a suspicion of benefit fraud. In the summary proceedings that ensued, she requested that the infringement on her private life be ceased, and that the collected personal data not be shared with third parties. The court rejected her petition on the grounds that citizens are free to collect personal information about others for investigative purposes and share it with the competent authorities. The Supreme Court overturned that decision, ruling that the right to privacy protection, 'which in terms of its content is partly determined by Article 8 of the ECHR,' 'also has effect between citizens.' According to the Supreme Court, an infringement of this right effectively 'constitutes an unlawful act.' This does, in the Supreme Court's view, not alter the fact that, 'in accordance with Article 8(2) of the ECHR,' 'a basis for justification may arise from written or unwritten law.' To review this in this case, the 'seriousness of the infringement' had to be weighed against 'the interests served or that can reasonably be served by collecting and sharing the data in question with the authorities' (to be assessed by the referral court).[52] In his accompanying *NJ* (Dutch Jurisprudence) annotation, Alkema found that the approach chosen comes 'very close to the direct horizontal effect.' In his view, this approach 'inevitably leads to interpretation problems' when assessing the justification of the infringement. For justification of the infringement, the Supreme Court turned to Article 8(2) of the ECHR, but its reasoning would 'have been better suited' if a social duty of care had been applied, according to Alkema.[53]

This latter point could not have escaped the Supreme Court. The fact that the Supreme Court still goes to the trouble of reviewing the infringement – indeed by pulling out all the stops – against Article 8(2) of the ECHR seems to me to be a clear signal, namely that classical fundamental rights, such as in this case the right to the protection of privacy, also have a high, quasi-constitutional status in civil law, which means that any infringement – also in the relationship between citizens – requires special justification.[54] This same signal also came in the *Valkenhorst* ruling from 1994, in the *Hyatt* ruling from 2007, in the subsequent *Hyatt II* ruling from 2019,[55] and in the confirmation of the *Valkenhorst* ruling from 2022.[56] However, this signal does not seem to have been picked up on as such in civil law literature, because, as mentioned, the prevailing doctrine prefers a form of indirect horizontal effect where fundamental rights only function as a neutral point

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[52] Supreme Court of the Netherlands 9 January 1987, ECLI:NL:HR:1987:AG5500, *NJ* 1987/928, with an annotation by E.A. Alkema (*Edamse bijstandsvrouw*), legal ground 4.4, 4.6 and 4.7.

[53] E.A. Alkema, *NJ* 1987/928 (*Edamse bijstandsvrouw*), under 3 and 6.

[54] Cf. Advocate General Koopmans' opinion for *NJ* 1994/347 (*HIV test*), under 14: the constitutional anchoring of physical integrity sends a signal to the court 'that it must place it high on the scale of values.'

[55] Supreme Court 22 November 2019, ECLI:NL:HR:2019:1834, *NJ* 2022/257, with an annotation by B. Barentsen (*Hyatt II*), on the constitutional admissibility of a mandatory alcohol and drugs test for employees. 56 Supreme Court of the Netherlands 11 March 2022, ECLI:NL:HR:2022:349, *NJ* 2022/169, with an annotation by S.F.M. Wortmann.

[56] Supreme Court 11 March 2022, ECLI:NL:HR:2022:349, *NJ* 2022/169, with an annotation by S.F.M. Wortmann.

of view for the interpretation of open norms (Section 2.2). The Charter sheds new light on this state of affairs, as I will now explain in more detail.

3 Charter rights and private law

3.1 Profit warning: a growth fund with limits

Before taking stock of the main property law provisions of the Charter, it seems useful to make a few general points on the Charter's potential for property law as a fundamental rights document under EU law, because this potential is not unequivocal.

On the one hand, as I already noted in Section 1.4, there are good grounds to argue that the Charter has more potential in private law than other fundamental rights catalogues such as the ECHR. I have already pointed out the *economic orientation* of the Charter and the fact that the CJEU has accepted the possibility of direct horizontal effect of Charter rights. Where the Charter also adds value in the private law domain is in the fact that the Charter, in line with its economic nature, also contains fundamental rights that are primarily intended for *companies* or *entrepreneurs* (such as Article 16 of the Charter),[1] while the ECHR is primarily geared towards protecting the fundamental rights of citizens.[2] A fourth argument for the Charter's potential in private law lies in the Charter's status as being part of primary EU law (Article 6(1) of the TEU). EU law, including the Charter, is part of our domestic legal order and intrinsically takes precedence over our national law. This means that the impact of the Charter does not, as with the ECHR, go through the conduit of Sections 93 and 94 of the Dutch Constitution.[3] This is what potentially makes the Charter a more 'horizontal' instrument than the ECHR: the Charter contains internal private law of European origin.[4] Fifthly, the scope of the Charter is not limited to cross-border situations: the Charter can also apply in purely domestic situations governed by EU law (such as issues of European consumer law).[5]

On the other hand, there are reasons to seriously question the added value of the Charter in terms of property law. A significant limitation lies in the *connexity requirement* of Article 51(1) of the Charter. According to the current state of case law, this requirement means that the Charter can only apply alongside another rule of EU law.[6] In more concrete terms, this means that the Charter is only relevant to Dutch private law insofar as it has

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1 See also Basedow, *EU Private Law* 2021, p. 210 and Section 4.2.4 of Gerards' preliminary opinion.

2 While the ECHR does protect legal entities as well, it is less geared towards that. Cf. A.J.P. Schild, *De invloed van het EVRM op het ondernemingsrecht (Instituut voor Ondernemingsrecht no. 91)* (thesis, Leiden), Deventer: Kluwer 2012, p. 23 et seq. For more about the protection of the fundamental rights of legal entities, see also *Asser/Kroeze 2-I* 2021/61 et seq.

3 See *Asser/Hartkamp 3-I* 2023/8 et seq.

4 See further on this constitutional added value Barkhuysen, Bos & Ten Have, *NTBR* 2011/76, p. 553 et seq. This fourth argument is partly the basis for the second argument (the fact that the CJEU has assigned direct horizontal effect to certain Charter rights).

5 See Basedow, *EU Private Law* 2021, p. 212.

6 See further Section 4.2 of Gerards' preliminary opinion.

(already) been Europeanised.[7] The background to this is determined by the principle of subsidiarity under Union law and the powers of the Union demarcated in the EU Treaties. These powers are not extended by the Charter (Article 51(2) of the Charter).[8] This is why you always need a 'hook' in other EU law to be able to review its national application against the Charter. Pennings aptly coined this the 'EU entrance ticket.'[9] The CJEU has so far interpreted the connexity requirement strictly. The mere fact that a situation falls 'within the scope' of EU law is insufficient, the dispute must actually concern the implementation of EU law at national level.[10] Consequently, the Charter cannot be applied to so-called 'more far-reaching protection measures,' i.e. national legal rules that award a higher level of protection than required by EU law.[11] The connexity requirement also complicates the application of the Charter to fundamental rights violations by 'purely private acts,' i.e. acts by private parties that are not based on national implementing rules (such as a contract).[12] The case law of the Court on the direct horizontal effect of Articles 21 and 31(2) of the Charter provides indications that this could change in the future (see Section 3.4.3). In any case, despite its treaty law status,[13] the Charter certainly does not constitute a comprehensive and autonomous fundamental rights catalogue like the ECHR. It is a typical EU product: ambitious, but bound hand and foot.

Apart from the connexity requirement, there are other, additional reasons why the Charter's significance for private law is rather more limited than one might think at first glance. To begin with, many Charter rights are derived from the ECHR. Although Article 52(3) of the Charter allows the CJEU to attribute broader substance to these rights than the ECtHR attributes to the corresponding ECHR rights, this rarely happens in practice. The so-called 'crowding out effect' (Charter rights crowd out the ECHR because of their greater reach) failed to materialise.[14] This is why, in practice, the ECHR is still the most important source of constitutionalisation

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[7] Emaus, *NTBR* 2015/10, p. 67.

[8] See Explanation to Article 51(2) of the Charter, on the relationship between paragraph 1 and paragraph 2.

[9] F.J.L. Pennings, 'Heeft het Handvest van de Grondrechten van de EU meerwaarde?' *TRA* 2022/4, p. 18.

[10] See CJEU 26 February 2013, case C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*), para. 17 et seq.; CJEU 10 July 2014, case C-198/13, ECLI:EU:C:2014:2055 (*Hernández*), para. 34 et seq.; and CJEU 7 July 2022, cases C-257/21 and C-258/21, ECLI:EU:C:2022:529 (*Coca-Cola European Partners*), para. 40 et seq.

[11] See CJEU 19 November 2019, case C-609/17, ECLI:EU:C:2019:981 (*TSN and AKT*). See also M. de Mol, 'De toepasselijkheid van Uniegrondrechten op nationale verdergaande beschermingsmaatregelen,' *NtER* 2020, issue 5/6, p. 155-162, with a note on p.160 saying that the Charter is applicable, provided that EU law sets preconditions for more far-reaching protection measures.

[12] See also Section 4.3.3 of Gerards' preliminary opinion.

[13] Cf. the Explanation to Article 51(2) of the Charter: the reference to the Charter in Article 6(1) of the TEU can 'not (…) be taken as an automatic extension' of the Charter's scope of application.

[14] See, for example, J.H. Gerards, H.C.F.J.A. de Waele & K.M. Zwaan, 'Vijf jaar bindend EU-Handvest van de Grondrechten – inleiding en bevindingen,' in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 9 et seq.; and Krommendijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 21-22. Cf. also Section 3.2 and 5 of Gerards' preliminary opinion.

of private law, as already shown in Section 1.2. What may also play a role here is that courts are reluctant to apply the Charter *ex officio*, although this reluctance is not evident from the *Kwantum/Vitra* ruling to be discussed below in Section 3.3.2, where the Supreme Court formulated preliminary questions on an ex officio basis, i.e. outside the cassation appeal, about Article 17(2) of the Charter.[15]

Another 'brake' on the proliferation of Charter rights in private law relates to their wording and substance. Provisions for potential in a private law context are often strikingly poorly delimited, as noted by Basedow.[16] Especially the *Charter principles*, such as the right to healthcare (Article 35 Charter) and the right to a clean environment (Article 37 Charter), need, according to Gerards et al., 'further concrete expression to be able to become interesting for legal practitioners.'[17] In the employment law cases where the Charter has so far been applied 'horizontally', this concrete expression was (partly) found in the relevant employment law guidelines.[18] In a similar way, the GDPR gives concrete expression to the right to personal data protection (Article 8 of the Charter). Without EU rules that give concrete expression to Charter provisions, many of them seem to be fairly superficial.[19] This effect is further reinforced by the fact that the CJEU sometimes seems inclined in fundamental rights cases to resort to apodictic grounds, leaving the weighing of interests to national courts,[20] which ultimately leads to Charter rights gaining little traction.[21] This is a striking difference compared to the case law of the ECtHR, which can be very clear-cut and guiding by formulating general principles and concrete 'reviews'.[22]

All in all, the Charter can, from a private law perspective, be called a 'growth fund', which is the term that Nieuwenhuis once coined for Article 1 of the First Protocol to the ECHR (the right to property protection),[23] albeit a growth fund with *limits*. Given its substance, the Charter certainly has potential in private law, but in the short term it is not expected to soon match the ECHR's broad significance for private law. The substantive scope of the Charter is simply too limited for that. As long as EU law does not yet cover

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[15] Supreme Court 31 March 2023, ECLI:NL:HR:2023:508, *NJ* 2023/168, with an annotation by D.W.F. Verkade (*Kwantum/Vitra*). Cf. on the procedural law aspects of Verkade's annotation in *NJ*, under 16.

[16] Basedow, *EU Private Law* 2021 p. 527. He notes this based on Title IV of the Charter (Solidarity), albeit in a general sense.

[17] Gerards et al., in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 7.

[18] In Section 6 of her preliminary opinion, Laagland refers to this as the 'golden combination'.

[19] Cf. Basedow, *EU Private Law* 2021, p. 210-211. On the question whether EU rules that give concrete expression to rights are needed for applicability of the Charter, see also 3.4.3 below.

[20] See, for example, CJEU 17 April 2018, case C-414/16, ECLI:EU:C:2018:257 (*Egenberger*), para. 42 et seq. (on the question whether a church was allowed to reject an applicant because of their faith).

[21] Cf. R.W.E. van Leuken, *Rechtsverhoudingen tussen particulieren en de verdragsrechtelijke verkeersvrijheden (Onderneming en Recht no. 85)* (thesis, Nijmegen), Deventer: Wolters Kluwer 2015, p. 260, who argues that the CJEU 'rarely explicitly' weighs interests.

[22] See further Section 2.2 of Gerards' preliminary opinion.

[23] Nieuwenhuis, *Waartoe is het recht op aarde?* 2006, p. 77.

our entire property law, the Charter will have limited significance for private law.[24] From an EU perspective, this is not a strange observation, because the Charter was primarily intended to strengthen fundamental rights protection at EU level. For the Member States, the ECHR largely fulfilled and continues to fulfil that function.[25]

3.2 Personality rights

3.2.1 Human dignity (Art. 1-3 Charter)

Anyone who looks at the Charter through a property law lens will first encounter a series of classical fundamental rights that can be regarded as personality rights, and therefore as subjective rights as defined in Section 6:162(2) of the Dutch Civil Code (see Section 2.1).

Interestingly, the Charter opens with a fundamental right that is effectively the equivalent of the 'general personality right' that the Supreme Court of the Netherlands accepted as a source of constitutionalisation in the *Valkenhorst* ruling,[26] namely human dignity (Article 1 of the Charter). According to the Explanation, this fundamental right is, just like the general personality right, 'the basis of all fundamental rights' that follow it, meaning that human dignity may not be limited under any circumstances, not even by invoking another fundamental right.[27] The right to respect for human dignity is derived from the case law of the CJEU, which predates the Charter's entry into force.[28] From a private law perspective, it is important that this right can serve as a justification for infringements of primary EU law.[29] This is evident from the ruling in the *Omega Spielhallen* case of a provider of laser games who was banned from the German market on the grounds of national public order because the games were deemed a 'trivialisation of violence'. In its ruling in this case, the Court accepted 'human dignity as a general principle' of EU law. According to the Court, protection of human dignity constitutes a 'legitimate interest' that 'can, in principle, constitute a justification' for a limitation on freedom of movement, such as the free movement of services (currently Article 56 of the TFEU). Against this background, the limitation on the free movement

[24] See in the same vein Basedow, *EU Private Law* 2021, p. 214.

[25] Cf. M. Bobek & J. Adams-Prassl, in: *The EU Charter of Fundamental Rights in the Member States*, Oxford etc.: Hart Publishing 2020, p. 571-572.

[26] Supreme Court of the Netherlands 15 April 1994, ECLI:NL:HR:1994:ZC1337, *NJ* 1994/608, with an annotation by W.C.E. Hammerstein-Schoonderwoerd (*Valkenhorst*), as discussed in Section 2.3.

[27] See Explanation relating to Article 1 of the Charter.

[28] At the time, fundamental rights were applied as 'general principles of Union law' based on Article 220(1) of the EC (currently Article 19(1) of the TEU). See *Asser/Hartkamp 3-I* 2023/108 and 231a. See also Section 3.1 of Gerards' preliminary opinion.

[29] See further Van Leuken, *Rechtsverhoudingen tussen particulieren en de verdragsrechtelijke verkeersvrijheden (O&R no. 85)* 2015, p. 156 et seq.

of goods and services resulting from the ban was justified.[30] From a private law perspective, it is interesting that, in this case, the Court subjects the freedoms of movement – which are also called the 'fundamental economic rights of Europe'[31] – to a fundamental right that can be regarded as the foundation of our property law: [32] human dignity, or (the basis of) the principle of autonomy.[33]

At least equally fundamental are the two Charter rights that follow it, i.e. the right to life (Article 2 of the Charter) and the right to the integrity of the person (Article of the 3 Charter).[34] These provisions cover the same area as Article 2 of the ECHR (right to life), albeit that Article 3(2) of the Charter contains specific provisions in the medical domain, such as the requirement of 'free and informed consent' for medical treatment. One could discern a confirmation and effect of the aforementioned autonomy principle (Article 1 of the Charter). Article 2 and 3 of the Charter are rarely applied in CJEU case law.[35] They are overshadowed by Article 2 of the ECHR (right to life) and Article 8 of the ECHR (right to private life), which are the basis for a rich body of ECtHR case law that can be considered the equivalent of our national *hazardous negligence jurisprudence*, albeit especially for governments.[36] These provisions' potential in a property law and social context is evident from the *Urgenda* ruling where Articles 2 and 8 of the ECHR were used as the basis for an assumed positive climate obligation for the Dutch State[37] and the *Milieudefensie/Shell* ruling where, by analogy, Section 6:162 of the Dutch Civil Code (interpreted on the basis of Articles 2 and 8 of the ECHR) was deemed to imply a similar obligation for Shell as an oil-producing company.[38]

3.2.2 Privacy, personal data, and freedom rights (Art. 7-8 and 10-12 Charter)

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[30] CJEC 14 October 2004, case C-36/02, ECLI:EU:C:2004:614 (*Omega Spielhallen*), para. 34 et seq.

[31] *Asser/Hartkamp 3-I* 2023/220.

[32] Cf. the opinion of Advocate General Koopmans for the *Valkenhorst* ruling (*NJ* 1994/608), under 19, cited in Section 2.3.

[33] On the autonomy principle as a principle of EU law, see Basedow, *EU Private Law* 2021, p. 405 et seq.

[34] For details of the private law status of the right to protection of physical integrity, see Advocate General Koopmans' opinion in the *HIV test* case (*NJ* 1994/347), under 14.

[35] On eur-lex.europa.eu, I found 35 references to Article 2 of the Charter and 49 references to Article 3 of the Charter (mainly by Advocate Generals) on 31 January 2024.

[36] For a comparison between Articles 2 and 8 of the ECHR and the hazardous negligence doctrine, see E.C. Gijselaar, 'Positieve verplichtingen om feitelijke maatregelen te nemen: voldoet het Nederlandse aansprakelijkheidsrecht?' *NTM/ NJCM-bull* 2016/11, p. 174-187. For more about analogous application of Articles 2 and 8 of the ECRM in horizontal relationships, see K.J.O. Jansen, 'Het EVRM en de aansprakelijkheid van de indirecte veroorzaker,' *NTBR* 2020/27, p. 196-201.

[37] Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, with an annotation by J. Spier (*Urgenda*), legal ground 5.1 et seq.

[38] Court of Den Haag 26 May 2021, ECLI:NL:HR:2021:5337 (*Milieudefensie/Shell*), legal grounds 4.4.1-4.4.2 and 4.4.9-4.4.10.

Another one of the personality rights in the Charter with a typical private law nature is the right to privacy (Article 7 of the Charter). This is the reason why the right to privacy featured in all my examples of the 'semi-direct' horizontal effect in Section 2.3. Article 7 of the Charter corresponds to Article 8 of the ECHR and is equally often applied, albeit mostly in a public law context, such as in asylum and extradition cases, or in a family law context in divorce cases and/or cases on child abduction. For application of this Charter article in a property law context, we have to look to a recent ruling on an imminent eviction due to a relative minor mortgage payment arrears. Under the mortgage agreement and applicable Slovak law, the borrowers could be evicted, but the CJEU ruled that the unfairness assessment under Directive 93/13 should in this case also include a proportionality review, and then more specifically a review of the seriousness of the consumer's failure to meet their contractual obligations. In this review, the court must consider the consequences of the eviction for the consumer and their family, according to the Court, referring to the right to respect for one's *home*, which is safeguarded by Article 7 of the Charter.[39] The ruling shows that (and how) fundamental rights can refine European private law, as I will go into further below in Section 4.2.

The property law significance of Article 7 of the Charter further lies primarily in the area of *information technology law*, which usually includes privacy law. Significantly, the CJEU derived a right to oblivion in connection with the right to personal data protection (Article 8 of the Charter) from the right to privacy (Article 7 of the Charter) in the well-known *Google Spain* case. This right to oblivion, or right to be forgotten, constitutes a right to removal of personal search results on the internet that can also be enforced in horizontal relationships.[40] What is special about this right to oblivion is that it is an unwritten Charter right developed by the Court itself, which implies a positive obligation to protect fundamental rights in the private sphere.[41] Precisely on the issue of data protection, therefore, EU law offers broader and more detailed protection than Article 8 of the ECHR,[42] albeit that it is primarily the General Data Protection Regulation (hereinafter: GDPR) that provides this protection. The GDPR is a more detailed and extensive version of Article 8 of the Charter (and the corresponding Article 16 of the TFEU), and also applies to horizontal relationships. The right to oblivion has meanwhile also been codified in that regulation (Article 17 of the GDPR). Viewed this way, Article 8 of the Charter does not offer a great deal of added value for property law, although

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[39] CJEU 9 November 2023, case C-598/21, ECLI:EU:C:2023:845 (*Všeobecná úverová banka*), paras. 84-85.

[40] See CJEU 13 May 2014, case C-131/12, ECLI:EU:C:2013:424 (*Google Spain*), para. 97.

[41] Cf. Section 4.7 of Gerards' preliminary opinion, which shows that (and why) positive obligations in the context of the Charter are rare.

[42] See Section 3.2 of Gerards' preliminary opinion, which refers to personal data protection under EU law as a kind of 'super fundamental right'.

the Court might quite conceivably – as it did in the *Google Spain* case – derive unwritten data protection rights and obligations from Article 8 of the Charter in addition to the GDPR.[43]

The classic rights of freedom, i.e. freedom of thought, conscience and religion (Article 10 of the Charter), freedom of expression and information (Article 11 of the Charter), and freedom of association and assembly (Article 12 of the Charter) – can also be considered personality rights under private law.[44] The fundamental importance of these freedoms is evidenced by the *Schmidberger* ruling, which was the first to recognise fundamental rights as justification for violations of EU law. The case was about an environmental demonstration that blocked the Brenner motorway in Austria for nearly 30 hours. An Austrian transport company held the Austrian state, which had permitted the demonstration, liable for their resulting loss of sales, claiming that the free movement of goods had been violated (now Article 28 et seq. of the TFEU). The Austrian state defended itself by invoking protection of fundamental rights, in this case protesters' right to freedom of expression and assembly under Articles 10 and 11 of the ECHR (now also Articles 11-12 of the Charter). The Court upheld that defence, finding that the free movement of goods, although one of the 'fundamental principles' of the EU, may be restricted for the sake of protecting fundamental rights, and that the parties' interests must be balanced to this end. In this case, the Court accepted the balance of interests struck by the Austrian authorities: freedom of demonstration prevailed over the free movement of goods.[45]

The *Omega Spielhallen*, *Google Spain* and *Schmidberger* rulings that I discussed above show that economic interests do not automatically prevail over fundamental rights in the EU context. This is confirmed by the *Viking* ruling on a strike by Finnish seamen who opposed their employer Viking's intention to 'reflag' Finnish ships to Estonia in order to be able to hire cheaper Estonian crews. Viking argued that allowing the strike violated the freedom of establishment (now Article 49 of the TFEU). The Court again considered that the protection of fundamental rights, i.e. workers' right to strike (Article 28 of the Charter) in this case, can justify a limitation on freedoms of movement. More generally, the Court recognised 'the protection of workers' as 'one of the overriding reasons of public interest' that can justify restrictions on freedom of establishment.[46] Interestingly, the

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[43] Cf. Sieburgh & Van de Moosdijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 292, who expect to see Article 8 of the Charter given horizontal effect.

[44] In my view, the economic freedoms safeguarded by Articles 15-16 of the Charter are a separate category in civil law terms (see Section 3.3).

[45] CJEC 12 June 2003, case C-112/00, ECLI:EU:C:2003:333 (*Schmidberger*), para. 71 et seq.

[46] CJEC 11 December 2007, case C-438/05, ECLI:EU:C:2007:772 (*Viking*), paras. 43 et seq. and 75 et seq., especially para. 90. Incidentally, the Court did not go so far as to hold that the right to strike automatically justified the infringement. For a critical view on this, see Section 3 of Laagland's preliminary opinion.

Court converts what is a typical private law notion, i.e. the protection of weaker parties in unbalanced contractual relationships, or the *principle of solidarity*, into a public law justification.[47]

3.3 Economic freedoms

3.3.1 Freedom of profession and to conduct a business (Art. 15-16 Charter)

The economic and EU law orientation of the Charter is particularly evident in Article 15 et seq. of the Charter, which capture rights built on freedoms of movement from EU law.[48] Following Laagland, I will refer to these rights as 'economic freedoms'.[49] These are the freedom to choose an occupation and right to engage in work (Article 15 of the Charter), freedom to conduct a business (Article 16 of the Charter), and right to property and protection of intellectual property (Article 17 of the Charter). These rights protect not the personality of EU citizens, but their market position as an employee or professional (Article 15 of the Charter), entrepreneur (Article 16 of the Charter), and/or business owner/rightholder (Article 17 of the Charter). Like all Charter rights, these fundamental rights can be traced back to the principle of autonomy (Article 1 of the Charter). They are manifestations of what Van Boom calls the 'freedom of wealth accumulation.'[50] In a free market economy, every market participant has, within certain limits, the freedom to accumulate assets and, correspondingly, the right to protection of their resulting financial position. Consequently, these fundamental rights may correspond to property rights as defined in Section 3:6 of the Dutch Civil Code,[51] but they are not themselves property rights, as they are (only) protective provisions, or *defence rights*. As such, they do have relevance in property law, as the CJEU can give indirect substance to property rights through the application of Articles 15, 16 and 17 of the Charter, for example when it involves the freedom to conduct a business (Article 16 of the Charter) in the interpretation of EU law. Combined with the limitation clause of Article 52(1) of the Charter, this can even lead to quite spectacular results, namely the recognition of apparently 'new' property rights (see Section 3.3.2).

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[47] Cf. Van Leuken, *Rechtsverhoudingen tussen particulieren en de verdragsrechtelijke verkeersvrijheden (Onderneming & Recht no. 85)* 2015, p. 158. See further on 'workers' protection' as an EU principle Basedow, *EU Private Law* 2021, p. 522 et seq.

[48] Cf. also Article 45 of the Charter (freedom of movement and of residence).

[49] See Section 5.1 of Laagland's preliminary opinion.

[50] Cf. Van Boom, *Privaatrecht en markt* 2020, p. 46, which links this freedom to the autonomy principle.

[51] I also consider, following *Asser/Bartels & Van Mierlo 3-IV 2021/1*, the right to property as a property right as defined in Section 3:6 of the Dutch Civil Code.

Article 15 of the Charter (freedom to choose an occupation and right to engage in work) provides that everyone has the right to work and to freely choose or accept an occupation (paragraph 1).[52] The second paragraph refers to the freedoms of movement under Articles 26, 45, 49, and 56 of the TFEU (the freedom to seek employment, work, live, and provide services in any Member State). The third paragraph contains an employment law requirement: third-country nationals are entitled to employment terms and conditions equivalent to those of EU citizens. This requirement is rooted in Article 19(4) of the European Social Charter,[53] and is rather similar in substance and wording to Article 31(2) of the Charter (right to paid annual leave), which the CJEU has given direct horizontal effect (see Section 3.4.3).[54] Viewed this way, Article 15(3) of the Charter has the potential to be a source of property rights as per Section 3:6 of the Dutch Civil Code. Otherwise, Article of the 15 Charter seems to have limited significance in a general property law sense. One could – with some creativity – derive an argument from it to combat the Supreme Court of the Netherlands' controversial *Iranian refugee* ruling, where the Supreme Court held that a refugee who was wrongly denied a residence permit was not entitled to compensation for income lost as a result, because the procedural requirements for refugee admission were not designed to enable refugees to earn income from work.[55] Article of the 15 of the Charter rather seems to indicate that those who lawfully reside in Europe are also entitled to earn income from employment (although, of course, attributing that same tenor to the relevant *procedural rules* goes one step further).

From a private law perspective, Article 16 of the Charter (freedom to conduct a business) is particularly interesting, as also noted by other authors,[56] because this Charter right matches the 'freedom of trade and commerce' that also underpins Dutch private law – especially the case law on unfair competition.[57] What should be taken into consideration here is that German private law gives a related right, namely the right to run a business ('*Recht am Gewerbebetrieb*'), a similar pivotal role in non-contractual

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[52] Incidentally, this freedom can to some extent also be considered a *personality right*, namely as the freedom to pursue personal professional development. As such, this freedom is also protected by Article 8 of the ECHR. Cf. ECHR, *Guide on Article 8 of the European Convention on Human Right* (version of 31 August 2022), no. 95 et seq. (with further references).

[53] See the Explanation to Article 15(3) of the Charter.

[54] See CJEU 6 November 2018, cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*), discussed below in Section 3.4.3.

[55] Supreme Court of the Netherlands 13 April 2007, ECLI:NL:HR:2007:AZ8754, *NJ* 2008/576, with an annotation by J.B.M. Vranken (*Iranian refugee*), legal ground 3.4. Vranken addresses the criticism of this ruling in para. 6 of his *NJ* (Dutch Jurisprudence) annotation.

[56] See, for example, Van Leuken, *Rechtsverhoudingen tussen particulieren en de verdragsrechtelijke verkeersvrijheden (Onderneming & Recht no. 85)* 2015, p. 186; and L.G. Verburg, 'Ter Visie – Het grondrecht van de vrijheid van ondernemerschap: een nieuw geluid?' *TvAO* 2017, p. 115-117.

[57] See, for example, Supreme Court of the Netherlands 27 June 1986, ECLI:NL:HR:1986:AD7158, *NJ* 1987/191, with an annotation by E.A. van Nieuwenhoven Helbach (*Holland Nautic/Decca*), legal ground 4.3. See also Van Nispen, *GS Onrechtmatige daad* (online, updated through to 2 December 2023), note IV.1.3 (with further references).

liability law as our social duty of care standard from the *Lindenbaum/Cohen* ruling. The '*Recht am Gewerbebetrieb*' right was also used as a point of departure in 'breaking open' the closed system of illegality grounds from Section 823 I of the German Civil Code.[58] Even in the context of the Charter, the freedom to conduct a business, as interpreted and applied by the CJEU, unmistakably provides an opening for consideration of typically private law arguments in the interpretation and application of EU law.

According to established CJEU case law,[59] freedom to conduct a business includes first and foremost the freedom to engage in an *economic activity or a commercial activity*. This freedom can be seen as the basis of our contract law, as it constitutes the freedom to serve one's own interests through profitable transactions (by lawful means, of course).[60] As a consequence, Article 16 of the Charter also safeguards *freedom of contract*, especially the 'free choice of partners in economic transactions,' and *free competition*, two basic principles of our contract and liability law. In my view, these principles can also be relevant to non-entrepreneurs, and with that to our property law on a broader scale.[61] Even non-entrepreneurs are 'entrepreneurial' when they enter into contracts for the purpose of financial gain. And so, they deserve protection of their European market position on an equal footing with entrepreneurs. Therefore, in my view, they will be able to invoke Article 16 of the Charter (in conjunction with Article 1 of the Charter, if necessary) to claim protection of their freedom of contract, for example as a potential justification for a limitation of other fundamental rights and freedoms (Article 52(1) of the Charter). This is where the Charter offers scope to allay civil lawyers' fear that fundamental rights might encroach excessively on citizens' private autonomy.[62]

Freedom to conduct a business further includes the right for any business to, 'within the limits of its liability for its own acts' (i.e. subject to contractual or extra-contractual liability), 'freely use the economic, technical and financial resources available to it.'[63] The CJEU uses this (sub-)right to freedom to conduct a business as a point of reference to review the permissibility of limitations that entrepreneurs face in their business operations due to legal rules or judicial decisions (also in horizontal

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[58] See, for example, G. Wagner, *Deliktsrecht*, Munich: Verlag Franz Vahlen 2021, p. 44-45 and 169-170.

[59] See, for example, CJEU 22 January 2013, case C-283/11, ECLI:EU:C:2013:28 (*Sky Österreich*), para. 42; CJEU 30 June 2016, case C-134/15, ECLI:EU:C:2016:498 (*Lidl*), para. 28; CJEU 21 December 2021, case C-124/20, ECLI:EU:C:2021:1035 (*Bank Melli Iran*), para. 79; and CJEU 12 January 2023, case C-356/21, *TRA* 2023/74, with an annotation by M.A.N. van Schadewijk, para. 74. See also the Explanation relating to Article 16 of the Charter (with further references).

[60] Cf. J.H. Nieuwenhuis, 'Een gevaar op de weg,' *AA* 1986, p. 319: 'well-understood self-interest is the stake in the contract game' and 'the pivot (…) of the contract mechanism.'

[61] Anders Basedow, *EU Private Law* 2021, p. 413, who deems the letter of Article 16 of the Charter to be limited to '*entrepreneurial freedom, not everybody's freedom of contract.*'

[62] Cf. on the recognition of the autonomy principle as a general principle of EU law Basedow, *EU Private Law* 2021, p. 405 et seq.; and *Asser/Hartkamp 3-I* 2023/95.

[63] See CJEU 27 March 2014, case C-314/12, ECLI:EU:C:2014:192 (*UPC Telekabel Wien*), para. 49; and CJEU 30 June 2016, case C-134/15, ECLI:EU:C:2016:498 (*Lidl*), para. 27.

relationships). Such restrictions must meet the limitation conditions of Article 52(1) of the Charter (legal provision, no interference with the essential content of the right, legitimate purpose, and proportionality).[64] On this basis, the *Sky Österreich* ruling, for example, reviewed whether remuneration obligations agreed in a media contract for the broadcasting of news items during football matches could be prohibited by invoking freedom of expression and freedom of information (Article 11 of the Charter). The answer was affirmative, which meant that freedom of contract, and more specifically the principle of *pacta sunt servanda*, had to give way to the protection of fundamental rights. In this regard, the Court considered that freedom to conduct a business 'is not absolute' and 'must be viewed in relation to its social function.'[65] The idea, so it seems, is that businesses should also do their bit for the materialisation of fundamental rights. This ruling shows once again that the CJEU is 'serious about' the protection of fundamental rights in the EU context, even when economic interests are at stake. However, freedom to conduct a business can also prevail over other fundamental rights, as shown by the *G4S Secure Solutions* ruling that will be discussed below.

What is already clear from the foregoing is that freedom to conduct a business is not absolute, because it is susceptible to limitation under Article 52(1) of the Charter. Article 16 of the Charter itself also introduces a limitation when it states that the freedom to conduct a business is (only) recognised 'in accordance with Union law and national laws and practices.' Basedow considers this a substantial limitation. He refers to freedom to conduct a business as a fundamental right of the 'conditional type' and believes that the fundamental right is 'downgraded' by the reference to European and national law.[66] For me, the case law of the CJEU paints a different picture. An illustrative ruling in this context is the *G4S Secure Solutions* ruling, where the Court held that freedom to conduct a business can be used to justify a discriminatory headscarf ban in the workplace. The private employer in question invoked its company policy of wanting to present 'political, philosophical, and religious neutrality' in relationships with customers. The CJEU considered this to be a legitimate purpose, namely as a corollary from the freedom to conduct a business that is recognised in Article 16 of the Charter. However, the neutrality policy had to be limited to employees who actually had customer contact and the employer had to look into whether the employee in question could be given a job that did not involve customer contact, rather than firing her.[67] This ruling shows that the freedom to conduct a business can actually prevail

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[64] The Explanation relating to Article 16 of the Charter states this in so many words. For more on Article 52(1) of the Charter, see Section 4.5 of Gerards' preliminary opinion.

[65] CJEU 22 January 2013, case C-283/11, ECLI:EU:C:2013:28 (*Sky*), para. 41 et seq. (para. 45).

[66] Basedow, *EU Private Law* 2021, p. 210-211 and 413.

[67] CJEU 14 March 2017, case C-157/15, ECLI:EU:C:2017:203 (*G4S Secure Solutions*), para. 37 et seq.

over other fundamental rights, including in the relationship between private parties. In this sense, Article 16 of the Charter protects not only entrepreneurs but more generally the autonomy of private law vis-à-vis public law, by allowing companies' and entrepreneurs' private freedom to act to take precedence over (other) fundamental rights enshrined in public law in certain cases.

That Article 16 of the Charter can act as a 'constitutional crumple zone' in collisions between European public law and national private law is also evident from the *UPC Telekabel Wien* ruling. In this case about internet piracy, the holder of an intellectual property right sought an 'injunction' against an internet service provider who hosted a website containing infringing content. The CJEU weighed the provider's freedom to conduct a business and internet users' right to information against the rightholder's intellectual property right. The injunction was granted, but the CJEU did set conditions for its substance. In order to prevent the injunction from affecting the provider's freedom to conduct business 'at its core' (which Article 52(1) of the Charter prohibits), the injunction (i) left it to the provider to 'determine the specific measures to be taken in order to achieve the result sought,' i.e. to prevent internet users from infringing the IP right by accessing the website in question, and (ii) allowed the provider to avoid liability for non-compliance with the injunction by 'proving that he has taken all reasonable measures.' In this regard, the Court held that the provider 'will not be required to make unbearable sacrifices,' since he 'is not the author of the infringement.'[68] According to Mak, the ruling is 'at odds with the basic principle of liability law that each person bears their own damages in principle and with the basic principle of contract law that a party is bound only by consent.'[69] Her thinking is apparently that the provider should not be held liable for IP infringements by internet users with whom it has no contractual relationship. In my opinion, the quoted findings show precisely that the CJEU is mindful of the provider's property law position as a 'collateral injuring party.' Once again, Article 16 of the Charter provides the desired scope to factor in typical private law notions like 'each person bears their own damages' and 'liability for own conduct only,' and thus to take the edge off some more public law-oriented rules of EU law.

3.3.2 Right to property and protection of intellectual property (Art. 17 Charter)

[68] CJEU 27 March 2014, case C-314/12, ECLI:EU:C:2014:192 (*UPC Telekabel Wien*), paras. 51-53. In the same vein, see CJEU 15 September 2016, case C-484/14, ECLI:EU:C:2016:689 (*Mc Fadden*), para. 84 et seq.

[69] C. Mak, *EHRC* 2014/138 (*UPC Telekabel Wien*), under 8.

I also count Article 17 of the Charter (right to property and IP protection) among the economic freedoms, as this article basically boils down to a safeguard of free enjoyment of legal positions under property law. Article 17(1) of the Charter (right to property) corresponds to Article 1 of the First Protocol of the ECHR.[70] As is known, the concept of ownership in that provision has been interpreted more broadly than the concept of ownership under property law specifically related to proprietary rights and interests under our Section 5:1 of the Dutch Civil Code. In short, all rights and interests that represent a real asset value are, in principle, eligible for protection under Article 1 of the First Protocol of the ECHR, and consequently also based on Article 17(1) of the Charter.[71] This article thus covers the entire area of property law, i.e. claims under both law of obligations and property law relating specifically to proprietary rights and interests. In the ECHR context, this property protection has, in principle, a vertical effect only, while Article 17(1) of the Charter can also be applied in horizontal relationships.[72] In theory, this means that the Charter represents significant added value, but in practice Article 17(1) of the Charter is still applied relatively little.[73] This article is mainly invoked alongside Article 1 of the First Protocol of the ECHR in government cases.[74] The CJEU has so far not attached many of its own parameters to the EU fundamental right to protection of property.[75] The potential of Article 17(1) of the Charter in the property law domain is limited by the fact that private disputes usually do not concern *confiscation* of property,[76] but rather (regulation of) the *use* of property. It is precisely in this context of use where fundamental property protection is limited.[77] And rightly so from a property law perspective, because restrictions on use basically concern the substantive scope of the subjective property right in question. This scope is demarcated by the substantive property right, and not by the fundamental right of Article 1 of

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[70] See Explanation relating to Article 17(1).

[71] See, for example, CJEU 22 January 2013, case C-283/11, ECLI:EU:C:2013:28 (*Sky Österreich*), para. 34. See further on property protection under Article 1 of the First Protocol of the ECHR, for example, T. Barkhuysen & M.L. van Emmerik, in: *De eigendomsbescherming van artikel 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht* (preliminary opinions VBR), Deventer: Kluwer 2005, p. 10 et seq.; and *Asser/Hartkamp 3-I* 2023/211 et seq.

[72] See also Basedow, *EU Private Law* 2021, p. 439-440.

[73] See Krommendijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 18-19. For claims for pension indexation under Article 17(1) of the Charter, which were rejected twice, see The Hague Court of Appeal 28 November 2023, ECLI:NL:GHDHA:2023:2301 and Court of The Hague (sub-district court) 7 February 2024, ECLI:NL:RBDHA:2024:1395. On the significance of Article 17(1) of the Charter for securities law, see *Asser/De Serière 2-IV* 2023/846.

[74] See, for example, Court of The Hague 30 November 2022, ECLI:NL:RBDHA:2022:12653, *JA* 2023/5: prohibiting coal-fired power plants as a way to prevent climate change is, given the transitional period given, a justified infringement of Article 1 of the First Protocol of the ECHR and Article 17 of the Charter.

[75] See Basedow, *EU Private Law* 2021, p. 449.

[76] Cf. for a confiscation of property in a private law context (legal limitation of liability) Court of Amsterdam 12 August 2004, ECLI:NL:GHAMS:2004:AR2333, *NJF* 2004/543.

[77] This is pointed out by Basedow, *EU Private Law* 2021, p. 444-445.

the First Protocol of the ECHR and Article 17(1) of the Charter, which only guarantees the *protection* of a financial position founded elsewhere.

The Charter's EU law-based economic nature also reverberates in Article 17(2) of the Charter (right to protection of intellectual property). This is one of the shortest Charter provisions: 'Intellectual property shall be protected' is all it says. The Explanation states that intellectual property has been included as 'one of the aspects of the right to property due to its growing importance and Community secondary legislation.' Intellectual property law has indeed been highly Europeanised[78] through guidelines that, in Basedow's words, come '*close to codifications*.'[79] Due to this high 'EU density', intellectual property disputes soon fall within the scope of Article 17(2) of the Charter, which also brings into view the limitation clause of Article 52(1) of the Charter. This means that limitations on Europeanised intellectual property rights must be provided for by law, must respect the essential substance of the intellectual property right, must serve a legitimate purpose, and must comply with the proportionality requirement.[80]

The exhaustive limitation grounds of Article 52(1) of the Charter can give the protection of intellectual property rights a significant boost, as shown by the *RAAP* ruling from 2020. In this ruling, it was held on the basis of Article 17(2) in conjunction with Article 52(1) of the Charter that performers' and music producers' right to equitable remuneration for the use of phonograms (a neighbouring right, harmonised by Article 8(2) of Directive 2006/115/EC) cannot be withheld from rightholders from third countries without a sound basis in EU law. A national reservation of reciprocity under the applicable intellectual property convention did not meet this legality requirement under EU law, so that third-country nationals should also be eligible for remuneration.[81] What is remarkable about this ruling is that the CJEU, by reviewing against the limitation conditions of Article 52(1) of the Charter, de facto expands the substantive scope of intellectual property law (to third-country nationals).[82] In this case, this was possible because the applicable intellectual property directive offered a 'stepping stone' for the protection of the intellectual property of third-country nationals (as well).

A subsequent question that arises is whether Article 17(2) in conjunction with Article 52(1) of the Charter can also serve as a basis for creation of 'new' intellectual property rights *without* there being an explicit basis for that in substantive EU law. This is precisely the question that arose in the Dutch *Vitra* case, which saw the Supreme Court of the Netherlands submit a reference for a preliminary ruling to the CJEU in 2023. The main point of

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[78] See Geerts & Verschuur, *Kort begrip van het intellectuele eigendomsrecht* 2022, no. 31 et seq.

[79] Basedow, *EU Private Law* 2021, p. 434-435.

[80] For further discussion of these requirements, see Section 4.5 of Gerards' preliminary opinion.

[81] CJEU 8 September 2020, case C-265/19, ECLI:EU:C:2020:677 (*RAAP*), para. 85 et seq.

[82] See C.H. Sieburgh, 'Redactionele signalen,' *SEW* 2022/38, p. 119.

dispute in this case was whether an originally American designer chair enjoyed copyright protection as a 'work of applied art' in the Netherlands. The copyright concept of work has been harmonised within the EU (by Article 2(a) of Directive 2001/29/EC, as interpreted in European case law), but the intellectual property protection of works of applied art as such has not, except to the extent that they fall under the harmonised concept of work. The applicable intellectual property convention (the Berne Convention), to which the Netherlands is a party and the EU is not, subjects the copyright protection of works of applied art from third countries to a criterion of 'material reciprocity', which means that 'third-country works' can only enjoy copyright protection in the Netherlands to the extent that they enjoy the same protection in the third country. According to the Supreme Court, this reciprocity criterion under a convention constitutes a limitation of the intellectual property rights of third-country nationals, as protected by Article 17(2) of the Charter, and it must, therefore, be examined whether this limitation meets the conditions of Article 52(1) of the Charter. With this in mind, the Supreme Court asked the CJEU whether, as in the *RAAP* judgment, the criterion that limitations on intellectual property law require a basis in EU law also applies here.[83] An affirmative answer will be a spectacular outcome because the Charter will then independently, without an explicit basis in EU law, create intellectual property protection for third-country nationals.[84]

In my view, such use of the limitation clause as a point of departure for expansion of the scope of application of intellectual property law (or other property law) is dubious from a property law perspective.[85] As with Article 17(1) of the Charter (right to property), I would think that the scope of protection of subjective property rights (in this case copyright on works of applied art) must initially be demarcated on the basis of tangible property law (in this case, in the absence of EU harmonisation, national intellectual property law, which refers to the Berne Convention). In my opinion, such a demarcation cannot itself be seen as a 'limitation' under Article 52(1) of the Charter, because otherwise the fundamental right to protection of intellectual property rights coincides with the relevant *intellectual property right* itself. Economic freedom (free enjoyment of intellectual property rights) would then, in other words, be converted into a property right (the intellectual property right). It is a kind of chicken-and-egg problem: an intellectual property right that does not exist (in the absence of material reciprocity) is not eligible for protection under Article 17(2) of the Charter,

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[83] Supreme Court 31 March 2023, ECLI:NL:HR:2023:508, *NJ* 2023/168, with an annotation by D.W.F. Verkade (*Kwantum/Vitra*), legal ground 3.2 et seq. (especially legal ground 3.15). In para. 10 et seq. of his *NJ* annotation, Verkade goes into the remarkable nature of the ruling.

[84] At the time of completing this preliminary opinion, the case (C-227/23) was still pending at the CJEU.

[85] For various, generally EU law-based, objections against a confirmative answer to the preliminary question, see the further opinion of Advocate General Drijber, ECLI:NL:PHR:2023:30, under 4.11 et seq.

and its non-existence can, therefore, not be considered as a limitation within the meaning of Article 52(1) of the Charter. If you do consider it a limitation under that article, the fundamental right to property protection would, in my view, be stretched beyond its constitutional limits. However, I do not rule out that the CJEU will proceed to do so at some point, given that it has often shown a willingness to 'go a little bit further' in issues that have only been partially harmonised.[86] Seen from a broader EU law perspective, such a development would also be in line with previous CJEU case law that attributes – in the words of Sieburgh and Van de Moosdijk – a 'generative function' to general principles of EU law, in such a way that these principles have become a source of new legal rules and legal remedies.[87] The CJEU's employment law jurisprudence to be discussed below shows that the Charter (which, among other things, codifies EU principles) has the same potential (Section 3.4.2 et seq.)

3.4 Legal duties and property rights

3.4.1 Non-discrimination and other prohibitory provisions (Art. 4-5, 21 and 32 Charter)

The Charter also contains provisions that do lend themselves to varying degrees of direct effect in property law. This is primarily about prohibitory provisions such as Article 4 of the Charter (prohibition of torture), Article 5 of the Charter (prohibition of slavery and forced labour), and Article 32 of the Charter (prohibition of child labour). From a property law perspective, these are *legal obligations*, the fulfilment of which can be enforced, if necessary (Section 3:296 of the Dutch Civil Code), and the violation of which constitutes an unlawful act (Section 6:162(2) of the Dutch Civil Code). Legal acts that contravene these legal obligations, such as a slavery contract or an agreement to perform child labour, will be void due to conflict with good morals and/or public order on the basis of Section 3:40(1) of the Dutch Civil Code. This does require, however, that they be discussed in a dispute concerning the implementation of EU law, because otherwise the Charter would not apply (Article 51(1) of the Charter). Here we are reaching the 'limits of the growth fund' I talked about earlier (Section 3.1).

A prohibitory provision that is of central significance to EU law is the prohibition of discrimination (Article 21 of the Charter). This prohibition

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[86] Cf. (for a critical take) L. Timmerman, 'Willen we dit?' *Ondernemingsrecht* 2009/18, p. 68-69; B.J. Drijber, 'Willen we dit?' *Ondernemingsrecht* 2019/47, p. 251-254; J.R. Vos, 'Op reis met de vakantiewetgeving: het Handvest biedt nieuw uitzicht, *ArA* 2019, issue 2, p. 51 et seq.; and K.J.O. Jansen, 'Een algemeen en autonoom recht,' *AV&S* 2022/27, p. 145 et seq.

[87] See C.H. Sieburgh, 'Principles in Private Law: From Luxury to Necessity – Multi-layered Legal Systems and the Generative Force of Principles,' *ERPL* 2012, 2, p. 295 et seq.; and M.M.C. van de Moosdijk, 'De generatieve functie van het verbod van ongerechtvaardigde verrijking als algemeen beginsel van Unierecht,' in: C.J.H. Jansen et al. (ed.), *Nijmeegs Europees privaatrecht*, Deventer: Wolters Kluwer 2018, p. 171 et seq.

corresponds to the preceding principle of equality (Article 20 of the Charter) and builds on Article 18 et seq. of the TFEU (non-discrimination and Union citizenship).[88] The principle of equality is one of the fundamental principles of European cooperation, because it creates a 'level playing field' for market participants. From a civil law perspective, the status of the prohibition of discrimination is diffuse.[89] On the one hand, private law is based on the principle that every citizen is equally free and entitled to enjoy civil rights (Section 1:1 of the Dutch Civil Code). On the other hand, private law accepts to a certain extent that citizens 'discriminate' against each other in their mutual relationships, especially when entering into contracts.[90] It has already been shown that Article 16 of the Charter, in principle, permits such a form of discrimination, i.e. the 'free choice of partners in economic transactions,' as a consequence of the freedom of contract (Section 3.3.1). More generally, property law as a legal system is aimed at making distinctions, for example because it requires the court to consider the 'personal interests involved in the given case' when interpreting reasonableness and fairness (Article 3:12 of the Dutch Civil Code). Such a distinction is also permissible from a fundamental rights perspective because it concerns unequal cases. Against this background, Sieburgh concludes, rightly in my opinion, that property law as such has no provisions that 'directly or indirectly endorse' the making of an unlawful distinction.[91]

The foregoing does not alter the fact that special legislation in the field of property law may result in prohibited discrimination, as can *actual* acts or *legal acts* of private parties. Property law is then faced with the question as to what legal consequences this will have. This question may arise in particular in employment relationships, given that the prohibition of discrimination in employment relationships has been laid down and detailed in the Employment Equality Directive (Directive 2000/78/EC). This Directive was at issue in a series of rulings by the CJEU on the horizontal effect of fundamental rights in employment relationships. This case law also addressed Article 31(2) of the Charter (right to paid annual leave) and the underlying Working Time Directive (Directive 2003/88/EC). From a property law perspective, it is important to note that, in this case law, the CJEU has accepted that the Charter can function as a source of obligations, and consequently as a source of property rights. I will now analyse that case law in broad terms.[92]

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[88] See Explanation relating to Article 21 of the Charter.

[89] Cf. *Asser/Hartkamp 3-I* 2023/229, who calls it an 'atypical' fundamental right.

[90] See, for example, Smits, *Constitutionalisering van het vermogensrecht* (preliminary opinion, NVvR) 2003, no. 64; and Basedow, *EU Private Law* 2021, p. 458.

[91] C.H. Sieburgh, 'Het Unierechtelijke beginsel van gelijkheid en zijn inwerking op het burgerlijk recht,' *WPNR* 2011/6901, p. 807 (she adds a caveat for the law of persons and family law).

[92] For a further run-down, see Section 4.3 of Gerards' preliminary opinion.

3.4.2 Right to equal treatment in employment relationships (Art. 21(1) Charter)

The case law of the CJEU on the horizontal effect of fundamental rights in employment relations began with the 1976 *Defrenne* ruling in a case regarding unequal pay for men and women that stated that Article 119 of the EEC (now Article 157 of the TFEU), which lays down the principle of equal pay for men and women, also applies to 'contracts between private individuals.' [93] Therefore, the possibility of reviewing 'purely private actions' (namely an employment contract) against fundamental rights was already accepted. To limit the private law consequences of this for existing contracts, 'the direct effect of Article 119' was not given retroactive effect.[94]

A next step was taken in the (pre-Charter) *Mangold* case from 2005. In it, the Court held that a national rule allowing unlimited fixed-term employment contracts for employees aged 52 or over should be disapplied as it was incompatible with the prohibition of age discrimination, which was (still) a general principle of EU law at the time.[95] This ruling also had indirect private law consequences for the parties involved, namely that the fixed-term employment contract concluded between them was null and void and possibly had to be converted into a permanent contract.[96] In the *Kücükdeveci* case from 2010, the CJEU rendered a similar ruling, albeit now on the basis of Article 21(1) of the Charter (which had meanwhile become binding).[97]

In the *Egenberger* case from 2018, an additional complication arose, namely a conflict between the prohibition of discrimination (Article 21(1) of the Charter) and the right to freedom of religion (Article 10 of the Charter). This case concerned a church institution that had rejected a job applicant on the grounds that she did not belong to an evangelical religious community, as required by the job description. In this case, the Court left it to the national court to ensure a 'fair balance' between the fundamental rights at stake.[98] This is a statement of the apodictic type, which I went into earlier (Section 3.1). From a property law perspective, it is important that the Court did go into the civil law consequences of a possible case of prohibited discrimination for the parties involved in this case. The Court considered that the prohibition of discrimination under Article 21(1) of the Charter 'is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU

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[93] CJEC 8 April 1976, case C-43/75, ECLI:EU:C:1976:56 (*Defrenne*), para. 39.
[94] Idem, para. 69 et seq. (para. 75).
[95] CJEC 22 November 2005, case C-144/04, ECLI:EU:C:2005:709 (*Mangold*), para. 55 et seq.
[96] For a critical note on this legal insecurity, cf. M.R. Mok, *NJ* 2006/227 (*Mangold*), under 3.
[97] CJEU 19 January 2010, case C-555/07, ECLI:EU:C:2010:21 (*Kücükdeveci*), para. 18 et seq.
[98] CJEU 17 April 2018, case C-414/16, ECLI:EU:C:2018:257 (*Egenberger*), para. 42 et seq. (para. 52).

law.'[99] In doing so, the Court built on the *AMS* ruling from 2014, where this possibility of conferral of rights under private law had already been accepted in the abstract, but rejected in concrete terms, with respect to Article 27 of the Charter, which was central to that case (workers' right to information and consultation within the undertaking).[100]

The (provisional) final piece of this case law is formed by the *Cresco* ruling from 2019, which concerned the admissibility of an Austrian rule of employment law that only granted Christian employees an extra day of leave on Good Friday, and a public holiday allowance if they did want to work on Good Friday. The Court saw this as a prohibited form of discrimination. In terms of the private law consequences of this, the Court considered, building on *Egenberger*, that Article 21(1) of the Charter 'is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law.' According to the Court, in this case it was 'for the employers to ensure' that non-Christian employees 'enjoy the same treatment' as Christian employees. To this end, employers had to also 'grant' the right to a day off on Good Friday to non-Christian employees, if they requested it. The Court also specified that denying such a request leads to an employee having a 'right to pay' in the form of the public holiday allowance from the employer.[101]

These findings show that Article 21(1) of the Charter not only entails a fundamental right and a prohibitory provision but also a *source of obligations*.[102] Article 21(1) of the Charter (in connection with the Equal Treatment in Employment and Occupation Directive) can directly, without the intervention of national private law, create property rights and obligations for private individuals: on the one hand, an obligation for the employer to grant a day of leave and pay a public holiday allowance to employees who request it, and on the other hand, a corresponding right of the employees to claim that day of leave and public holiday allowance. The employer's obligation is (the passive side of) an *obligation* as defined in Section 6:1 of the Dutch Civil Code. Workers' corresponding right to claim the allowance is a *property right* within the meaning of Section 3:6 of the Dutch Civil Code.

3.4.3 Right to paid annual leave (Art. 31(2) Charter)

[99] CJEU 17 April 2018, case C-414/16, ECLI:EU:C:2018:257 (*Egenberger*), para. 70 et seq. (para. 76).
[100] CJEU 15 January 2014, case C-176/12, ECLI:EU:C:2014:2 (*AMS*), para. 47.
[101] CJEU 22 January 2019, case C-193/17, ECLI:EU:C:2019:43 (*Cresco*), para. 70 et seq. (especially paras. 76, 83, 85, and 86).
[102] See R. de Graaff, 'Het Europese recht als bron van verbintenissen,' in: F.Q. van de Pol et al. (ed.), *Vijftig weeffouten in het BW*, Nijmegen: Ars Aequi Libri 2017, p. 199-208, who concludes that 'European contracts' can be fit into the legal system by opting for a broader interpretation of the concept of 'law' in Section 6:1 of the Dutch Civil Code (p. 208).

In a similar manner to Article 21(1) of the Charter (non-discrimination), Article 31(2) of the Charter (right to an annual period of paid leave) also functions as a source of obligations. This is evident from the CJEU ruling in the joined cases of *Bauer* and *Broßonn* from 2018. Both cases concerned the question of whether the heirs of a deceased employee could claim compensation from the employer, which was a private party in the *Broßonn* case, for the holiday leave entitlement that the employee/legator had not taken. Article 31(2) of the Charter and the underlying Working Time Directive (Directive 2003/88/EC) did not provide a definite answer as to whether or not such compensation was payable. The Court ruled, building on its previous 'holiday leave case law,'[103] that the fundamental right of Article 31(2) of the Charter includes not only the right to paid annual leave as such, but also 'the right, inherent in the former, to an allowance in lieu of annual leave not taken upon termination of the employment relationship.' This right to an allowance – which must therefore be read into Article 31(2) of the Charter – does, according to the Court, 'as regards its very existence,' not need 'to be given concrete expression' by national or EU law provisions that determine the duration of the leave and specify any conditions for exercising the right. The Court concluded from this that Article 31(2) of the Charter 'is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter.' Furthermore, the Court held that this right of the employee 'entails, by its very nature, a corresponding obligation on the employer, which is to grant such periods of paid leave.'[104]

Here, too, the CJEU inferred an independent and enforceable 'right' for the employee (or their heirs) from the text of the Charter, as well as a corresponding 'obligation' of the employer to pay a financial allowance. In the *Max-Planck* ruling a few months later, the Court specified that the right to paid annual leave, including the associated right to an allowance, is subject to the limitation system of Article 52(1) of the Charter. This means that the right may not automatically lapse on the grounds that the employee has not claimed it in the reference year. Only if the employee 'has refrained from taking his paid annual leave deliberately and in full knowledge of the ensuing consequences, after having been given the opportunity to actually exercise his right thereto' can this be considered a waiver of right.[105] The Court thus effectively recognises a variant of the benchmark that the ECtHR uses for waiver of ECHR rights (discussed above in Section 2.2).

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[103] For details about this, see, for example, Vos, *ArA* 2019, p. 47 et seq.

[104] CJEU 6 November 2018, cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*), paras. 83 (in conjunction with paras. 39 and 58), 85 and 90. In the same sense, see CJEU 6 November 2018, case C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*), para. 74; and CJEU 9 November 2023, case C-271/22, ECLI:EU:C:2023:834, para. 23.

[105] CJEU 6 November 2018, case C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*), paras. 55-56. In the same vein, see CJEU 18 January 2024, case C-218/22, ECLI:EU:C:2024:51 (*Commune di Copertino*), paras. 47-48.

This means that Article 31(2) of the Charter serves, just like Article 21(1) of the Charter, as a source of obligations (and property rights) in private legal relationships. What makes the ruling in *Bauer and Broßonn* so special is that the right to an allowance that was read into Article 31(2) of the Charter was not (or barely[106]) given concrete expression in the underlying Working Time Directive. The Court held that this was not required,[107] which made it a case of an autonomous interpretation of rules of law by the Court within the context of the Charter. According to Krause, the Court follows a '"stand-alone" approach', by which he means that, if a Charter right in itself is sufficient to confer rights on private individuals, a reference to a directive that gives concrete expression to it is no longer necessary to assume direct horizontal effect.[108] De Mol also suspects that an interplay with EU legislation that gives concrete expression to the Charter right in question is 'not decisive.'[109] Hartkamp believes that connexity with an underlying directive remains required, but that its function is limited to 'activating the applicability of the Charter.'[110]

If Krause is right, the connexity requirement – and thus the main obstacle to right creation in a civil law sense under the Charter (Section 3.1) – would have been abandoned or at least put into perspective. A whole new world could then potentially open up for the horizontal effect of Charter rights. A cautious sign in that direction is provided by the generous description given by the Court in the *Bauer and Broßonn* and *Cresco* cases of the condition for the application of Article 51(1) of the Charter: Charter rights with direct effect can be applied to any dispute between private parties 'in a field covered by EU law.'[111] This description, which was also used previously in the *Egenberger* case,[112] seems to offer (more) scope for 'purely private acts' that do not concern the implementation of EU law, but are situated in a field covered by EU law (such as a general condition contrary to the prohibition of discrimination) within the scope of the Charter.[113] For the time being, I

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[106] In para. 22 of the *Max-Planck* ruling (CJEU 6 November 2018, case C-684/16, ECLI:EU:C:2018:874), the CJEU refers to Article 7(2) of the Working Time Directive, which only stipulates that the right to paid annual leave in the event of termination of employment 'can' be replaced by financial compensation.

[107] CJEU 6 November 2018, cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*), para. 85.

[108] R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: Bauer and Willmeroth,' *CML Rev.* 2021, vol. 58, issue 4, p. 1190.

[109] De Mol, *AA* 2019, p. 382, with a reference to para. 2 of the *Cresco* dictum, where only Article 21 of the Charter is mentioned and not the underlying directive (which is mentioned in para. 1 of the dictum).

[110] Hartkamp, *AA* 2019, p. 223.

[111] CJEU 6 November 2018, cases C-569/16 and C-570/16, ECLI:EU:C:2018:871, para. 85; and CJEU 22 January 2019, case C-193/17, ECLI:EU:C:2019:43 (*Cresco*), para. 76.

[112] CJEU 17 April 2018, case C-414/16, ECLI:EU:C:2018:257 (*Egenberger*), para. 76. For a more recent ruling, see CJEU 29 October 2020, case C-243/19, ECLI:EU:C:2020:872 (*Veselības ministrija*), para. 36. The similar description in Article 16(2) of the TFEU means, according to Advocate General Szpunar, the same as 'implementing Union law' in Article 51(1) of the Charter (opinion dated 11 May 2023, case C-33/22, ECLI:EU:C:2023:397 (*Österreichische Datenschutzbehörde*), para. 37, with a reference to CJEU 26 February 2013, case C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*), para. 21, which is actually about a *national rule* that implements EU law).

[113] Cf. Section 4.3.3 of Gerards' preliminary opinion, where this is used as an example of a question that has not yet been answered in full.

expect that things will not change that quickly, since the connexity requirement of Article 51(1) of the Charter is based on the allocation of powers in the EU treaties, which the CJEU will not (or cannot) simply set aside. It should be borne in mind that direct horizontal effect of Charter rights is highly controversial in some Member States, especially Germany.[114] It is, therefore, obvious that the CJEU will (continue to) exercise caution here. In more recent case law, the CJEU continues to consider that the Working Time Directive 'gives concrete expression' to the fundamental right laid down in Article 31(2) of the Charter.[115]

3.5 Other property right-related Charter provisions (Art. 37-38 and 47 Charter)

For this, I took stock of the main Charter provisions that relate to property law, distinguishing between personality rights (Section 3.2), economic freedoms (Section 3.3), and legal obligations and property rights (Section 3.4). What these Charter provisions have in common is that they are relevant to property law, either in the sense that they themselves contain a subjective property right (such as personality rights and property rights under employment law), or in the sense that they (can) *correspond* to a subjective property right (such as the economic freedoms and legal obligations). The Charter also contains provisions that (may) have relevance to property law, namely as an argument in disputes under property law, without corresponding to a subjective property right. For the sake of brevity, I will suffice here with two eye-catching examples.

First of all, there is Article 38 of the Charter (consumer protection). This article is included in 'Title IV Solidarity' and reads, 'Union policies shall ensure a high level of consumer protection.' Worded in this way, it is clear that it is not a *right* but a *principle* as defined in Article 52(5) of the Charter,[116] and consequently a guideline for legislative and implementing acts of EU institutions and Member States, as well as a benchmark for judicial interpretation and review thereof. Accordingly, Article 38 of the Charter is used in CJEU case law on European consumer law (increasingly so, in my impression) as an argument in support of a certain consumer-friendly interpretation.[117] Such a reference adds nothing in terms of

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[114] See, for example, Basedow, *EU Private Law* 2021, p. 204 et seq. (especially p. 222-223).

[115] See, for example, CJEU 25 November 2021, case C-233/20, ECLI:EU:C:2021:960, para. 25 (*Job-medium*); CJEU 9 November 2023, case C-271/22-C-275/22, ECLI:EU:C:2023:834 (*Keolis Agen*), para. 18; and CJEU 18 January 2024, case C-218/22, ECLI:EU:C:2024:51 (*Comune di Copertino*), para. 26. In his annotation to *Cresco*, Meij already expressed a suspicion that the idea of giving concrete expression has 'not been abandoned completely after all' (*NJ* 2019/360, under 6).

[116] Also according to the Explanation to Article 38 of the Charter.

[117] See, for example, CJEU 7 April 2022, ECLI:EU:C:2022:269, case C-249/21 (*Fuhrmann-2*), para. 21; CJEU 5 May 2022, case C-179/21, ECLI:EU:C:2022:353, para. 38; and CJEU 9 November 2023, case C-598/21, ECLI:EU:C:2023:845 (*Všeobecná úverová banka*), para. 47.

substance, because the objective of consumer protection is already enshrined in Article 169 of the TFEU and is invariably repeated in the preamble to directives in the field of consumer rights. Apparently, Article 38 of the Charter is mainly used rhetorically here to further emphasise the (constitutional) weight of the objective of consumer protection. In my opinion, the article's significance in a property law sense is limited to that rhetorical-interpretive function, which should not be underestimated.[118] The same applies, for the same reasons, to Article 37 of the Charter (environmental protection).

I also want to draw attention to Article 47 of the Charter (right to an effective remedy and to a fair trial) in this context. The first paragraph of this article is based on Article 13 of the ECHR (the right to an effective remedy for ECHR violations) and the second paragraph on Article 6 of the ECHR (right to a fair and public hearing).[119] While Article 47 of the Charter is primarily significant in terms of procedural law, it can also indirectly affect the substantive examination (and therefore the outcome) of property law disputes.[120] This applies especially to the right to an effective legal remedy, which is the procedural counterpart of the famous *principle of effectiveness*.[121] This is illustrated by a recent employment law case where the CJEU ruled that termination of a temporary employment contract without stating reasons constitutes an impermissible prejudice of the worker's right of access to justice, because the worker is unable to determine their legal position in possible proceedings against the employer because the worker does not know why they were fired. Therefore, the substantive rule of Polish employment law that allowed termination of a temporary employment contract without stating reasons had to be disapplied because if contravenes Article 47 of the Charter.[122] The right to a fair trial, i.e. the second part of Article 47 of the Charter, also has substantive significance in the property law domain, namely insofar as it concerns claims for damages due to violations of the reasonable notice period.[123] This falls outside the remit of this preliminary opinion.[124]

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[118] Cf., for example, Supreme Court of the Netherlands 7 July 2023, ECLI:NL:HR:2023:1075, *RvdW* 2023/816, where a consumer/leaseholder's invocation of Article 38 of the Charter (consumer protection) was rejected without reasons being provided (Section 81 of the Dutch Judiciary Organisation Act). In his opinion, Valk referred (under 3.22) to the nature of Article 38 of the Charter as a principle rather than a right.

[119] See Explanation relating to Article 47 of the Charter.

[120] For a critical view, cf. A.C. van Schaick, 'Instrumentalisering van burgerlijk procesrecht,' *TCR* 2023, issue 3, p. 72, who argues that Article 47 of the Charter is inclined towards being a right to a fair outcome ('substantive conformity'). For more about the substantive dimension of Article 47 of the Charter, see also Basedow, *EU Private Law* 2021, p. 221.

[121] For details of how Article 47 of the Charter relates to the effectiveness principle, see the opinion of Advocate General Tanchev for CJEU 17 May 2022, case C-869/19, ECLI:EU:C:2022:397 (*Unicaja Banco*), under 38.

[122] See CJEU (Grand Chamber) 20 February 2024, case C-715/20, ECLI:EU:C:2024:139 (*K.L./X sp.*), para. 79.

[123] For more, see, for example, Lindenbergh, in: *EVRM en privaatrecht* (preliminary opinions VBR) 2011, p. 101 et seq.

[124] See further on Article 47 of the Charter from a property law perspective *Asser Procesrecht/Giesen 1* 2015/62 et seq.; and J.M.L. van Duin, *Effective judicial protection in consumer litigation. Article 47 of the EU Charter*

in practice (thesis, University of Amsterdam), Cambridge: Intersentia 2022 (focused specifically on consumer procedural law).

4 Significance of the Charter in private law

4.1 The Charter as 'civiliser' of fundamental rights: the effect of Charter rights in private relationships (constitutionalisation 2.0)

The previous inventory of property law-related Charter provisions and Charter case law of the CJEU shows that Charter rights can have an impact on private legal relationships in various ways. In this context, the prevailing doctrine distinguishes between direct and indirect horizontal effect. Direct horizontal effect means that the Charter (itself) leads to the creation, modification, or extinction of rights and obligations between private parties. Indirect horizontal effect means that the Charter influences the legal relationship between private parties through national law, for example because the CJEU interprets a national legal provision in accordance with the Charter or disapplies it due to conflict with the Charter.[1]

In older rulings, such as *Mangold* and *Kücükdeveci*, the Court used the indirect method. These judgments 'only' held that national law should not be applied due to a conflict with the Charter, and the Court left the legal consequences of this under private law to national courts.[2] While the Court still cites the indirect method in more recent rulings, such as *Bauer and Broßonn* and *Cresco*, it presents the direct method as an alternative in the event that the applicable Charter provision *grants a right* to private individuals and a Charter-compliant interpretation of national law is not possible. In that case, the national court is obliged to 'ensure the judicial protection flowing from the Charter provision.'[3] What this can lead to becomes clear in, for example, the *Cresco* ruling: an obligation for employers flowing directly from Article 21(1) of the Charter to grant their workers an extra day of holiday leave and possibly a public holiday allowance.

And so, the Charter confronts us with a phenomenon that has so far been rejected by many civil lawyers in the Netherlands: the direct horizontal effect of fundamental rights (cf. Section 2.2). In its Charter-related case law, the CJEU does exactly what civil lawyers feared they would do in their assessment of the constitutionalisation of private law: the Court requires private parties to safeguard fundamental rights (*Sky Österreich*),[4] including through positive obligations (*Google Spain*),[5] the Court subjects rights under private law to the

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[1] See, for example, Sieburgh & Van de Moosdijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 271-272; Hartkamp, *AA* 2019, p. 223; and *Asser/Hartkamp 3-I* 2023/231c-231d.

[2] CJEC 22 November 2005, case C-144/04, ECLI:EU:C:2005:709 (*Mangold*), para. 77; and CJEU 19 January 2010, case C-555/07, ECLI:EU:C:2010:21 (*Kücükdeveci*), para. 51.

[3] CJEU 6 November 2018, case C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*), paras. 91-92; CJEU 22 January 2019, case C-193/17, ECLI:EU:C:2019:43 (*Cresco*), para. 78.

[4] CJEU 22 January 2013, case C-283/11, ECLI:EU:C:2013:28 (*Sky Österreich*).

[5] CJEU 13 May 2014, case C-131/12, ECLI:EU:C:2013:424 (*Google Spain*).

limitation clause from public law (*RAAP*, *Max-Planck*)[6], and the Court does not hesitate to frame private law disputes in terms of fundamental rights, even to the extent that it considers some Charter rights as sources of obligations (*Bauer and Broßonn*, *Cresco*).[7] At the same time, the CJEU mitigates the private law consequences of the 'proliferation' of Charter rights by also granting fundamental law status to typical private law notions such as freedom of contract (*Sky Österreich*) and the freedom to conduct a business, on the basis of Article 16 of the Charter (freedom to conduct a business) (*UPC Telekabel Wien, G4S Secure Solutions*), [8] and by specifically providing scope for the possibility of contractually renouncing Charter rights in the context of Article 52(1) of the Charter (*Max-Planck*).

Consequently, the Charter is a kind of 'civiliser' of fundamental rights in the case law of the CJEU. I think private law can benefit from this. In 2015, Sieburgh predicted that as a result of the direct horizontal effect of Charter rights, 'the fundamental rights argument [will] become a more natural part of the structure of private law'.[9] In my opinion, the Charter and the CJEU's Charter case law can indeed be harnessed to take the next step in the debate on the constitutionalisation of private law ('constitutionalisation 2.0'). The semi-direct approach discussed in Section 2.3, where classical fundamental rights are interpreted as private *personality rights*, is a better fit with how the CJEU applies Charter rights to private relationships. The case law of the CJEU also shows that this approach does not have to lead to the undermining of private law so feared by civil lawyers, provided that civil lawyers are able to explain the significance of private law values in terms of fundamental rights. This is where the Charter shows the way. Even in cases that fall outside the substantive scope of the Charter, Charter rights and the CJEU's Charter case law can, in my view, serve as a source of inspiration with respect to the effect and weighing of fundamental rights in private legal relationships ('reflex effect').[10]

The classical approach where fundamental rights serve as inspiration for the interpretation of open standards can and will obviously continue to be fit for purpose, especially in private legal relationships where *both* parties can invoke fundamental rights reciprocally, without either fundamental right clearly prevailing over the other (cf. the cases discussed in Section 2.2). The same applies in private law disputes where fundamental rights feature indirectly at most, or are even dragged into a very far-fetched line of

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[6] CJEU 6 November 2018, case C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*); CJEU 8 September 2020, case C-265/19, ECLI:EU:C:2020:677 (*RAAP*).

[7] CJEU 6 November 2018, cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Broßonn*); CJEU 22 January 2019, case C-193/17, ECLI:EU:C:2019:43 (*Cresco*).

[8] CJEU 27 March 2014, case C-314/12, ECLI:EU:C:2014:192 (*UPC Telekabel Wien*); CJEU 14 March 2017, case C-157/15, ECLI:EU:C:2017:203 (*G4S Secure Solutions*).

[9] Sieburgh, in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 531. In the same vein, see Sieburgh, *RMThemis* 2015, p. 4.

[10] Cf. K.J.O. Jansen, 'Reflexwerking van Europees privaatrecht,' *NTBR* 2022/1, p. 1-4.

reasoning.[11] When that happens, the argument invoking fundamental rights does not carry decisive weight, meaning that attention can shift to other private law arguments. However, if a fundamental right of one party is in danger of being impaired in its essence by a private law action by the other party (cf. the cases discussed in Section 2.3),[12] a more direct application of fundamental rights may indeed offer added value. For such situations, I advocate an approach, also for fundamental rights other than Charter rights, that is as close as possible to the direct method used by the CJEU in its case law on the Charter.[13] The crux of this semi-direct approach is that in the reworking of fundamental rights in civil law, there is still a recharacterisation (namely, a qualification of classical fundamental rights as private-law personality rights), but no depreciation. This puts the holder of a fundamental right at an advantage even in civil law, in the sense that the justification of a violation of their fundamental right (also) requires a constitutional argument. In this approach, fundamental rights no longer function merely as a 'source of inspiration' for civil courts, but as 'preliminary opinion' for civil case law formation. If a fundamental right is impaired or threatened in its essence,[14] I believe that the principle of 'apply or explain' applies (also) to civil courts. The case law of the CJEU shows how such an interpretation can take shape at the intersection of public and private law. Moreover, an additional advantage of this approach is that, compared with indirect horizontal effect through open norms such as reasonableness and fairness, it provides more scope for review in appeal cases, thus strengthening the Supreme Court's 'grip' on the horizontal effect of fundamental rights.

The foregoing does, of course, not mean that the Charter (already) provides ready-made answers to all questions of constitutionalisation of private law. The CJEU's Charter case law is clearly a 'work in progress' and many unanswered questions remain. From a property law perspective, the main question is which other Charter rights, in addition to Articles 21(1) and 31(2) of the Charter, are sufficient in themselves to confer rights on individuals as a requirement for direct horizontal effect.[15] This requirement is the fundamental law counterpart of the requirement of relativity under EU law from the high-profile *Frankovich* case law on Member State liability for violation of EU law.[16] The requirement of relativity under EU law also raises the question of whether provisions of EU

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[11] For more about such 'peripheral matters,' see Gerards, in: *Digitalisering, vermogensrecht, de platformeconomie en grondrechten* 2019, p. 120 et seq., who uses the example of a prohibition on walking in the forest with a dog off the leash. Cf. also J.H. Gerards, *Het prisma van de grondrechten* (inaugural lecture, Nijmegen), 2011, where Gerards argues for a clearer demarcation of fundamental (essential) rights.

[12] Cf. A.J. Nieuwenhuis, 'De kernrechtbenadering bij grondrechten,' *TvCR* 2012, p. 138-159.

[13] Incidentally, Aronstein also considers the method used by the CJEU to be a mixture of direct and indirect horizontal effect. See Aronstein, *Remedies for infringements of EU law in legal relationships between private parties* 2019, p. 288.

[14] Cf. Article 52(1) of the Charter: limitations on Charter rights must respect the 'essence' of those rights.

[15] See also Section 4.3 of Gerards' preliminary opinion and Section 4.2 of Laagland's preliminary opinion.

[16] See CJEC 19 November 1991, cases C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Frankovich*), which is covered in, for example, *Asser/Sieburgh 6-IV* 2023/342 et seq.

law ‘confer rights’ on individuals, and that requirement, too, is still far from solidified in the CJEU’s case law.[17] It is to be hoped that the CJEU will seek convergence of the (Charter-based) fundamental law requirement of legal adjudication and the (EU law-based) property law requirement of relativity. Both doctrines still have room for improvement when it comes to consistency and predictability.[18]

Without getting too far ahead of myself, I will in the following tentatively assess further development of law with respect to the horizontal effect of Charter rights. It seems plausible to me that at least the *personality rights* discussed above in Section 3.2 can be classified as horizontal ‘rights’ with a direct effect within the meaning of Charter case law. Indeed, the Charter provisions in question are sufficient in themselves to confer a right on individuals, namely a fundamental right cum personality right under private law, which individuals can assert as such in civil law disputes, without the need for further concrete expression of the right.[19] The *economic freedoms* discussed in Section 3.3 may also have direct horizontal effect,[20] but the caveat that should, in my view, be made here is that these are defence rights (Section 3.3.1). They protect the rightholder against impairment of their legal position as an employee, professional, entrepreneur, and/or business owner/rightholder, but do not themselves delineate the concrete substance of that legal position. Therefore, in my view, these Charter rights cannot be sufficient in themselves to confer a ‘right’ on individuals but can only have direct horizontal effect in disputes over the interpretation and limitation of rights that have their basis in substantive property law (Section 3.3.2). The *legal obligations* discussed in Section 3.4.1 are suitable for direct horizontal effect in the sense that a right to performance can be derived from the prohibitions in question, which (in disputes about the application of EU law) can be enforced on the basis of Section 3:296 of the Dutch Civil Code, also in horizontal relationships. Moreover, to the extent that these legal obligations meet the requirement of conferral of rights under private law, as used by the CJEU in its employment case law (Section 3.4.2 et seq.), they can be enforced (as subjective rights) via Section 6:162 of the Dutch Civil Code. The *legal obligations* discussed in Section 3.5 are not, in my view, suitable for direct horizontal effect. They do, however, have an important rhetorical-interpretive function, even in horizontal disputes.

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[17] See (for a critical take) K.J.O. Jansen, ‘Relativiteit en rechtstoekenning: wie klaart de lucht in Europa?’ *NTBR* 2023/5, p. 33-36.

[18] Cf. on the lack of consistency with respect to the requirement of relativity under EU law B. Spaan, ‘Het Europese relativiteitsvereiste bij lidstaataansprakelijkheid bezien vanuit persoonlijk perspectief,’ in: J.G.C.M. Galle et al., *Persoonlijk privaatrecht*, The Hague: Boom Juridisch 2023, p. 259 et seq.

[19] While the requirement of connexity of Article 51(1) of the Charter does remain applicable here, it is quite conceivable that the CJEU will ultimately (further) stretch this requirement towards direct horizontal effect in ‘purely private’ situations (Section 3.4.3).

[20] See Sieburgh & Van de Moosdijk, in: Krommendijk, De Waele & Zwaan, *Tien jaar EU-Grondrechtenhandvest in Nederland (Research Centre for State and Law no. 47)* 2019, p. 292 (with respect to Article 17(1) of the Charter); and *Asser/Hartkamp* 3-I 2023/231g (with respect to Articles 16 and 17(2) of the Charter).

4.2 The Charter as 'constitutional crumple zone': how Charter rights can refine European private law (Europeanisation 2.0)

Above, I discussed the significance of the Charter for our *national* private law, which is the core of this preliminary opinion. In my view, the Charter's potential is not limited to the property law domain. Private law of *European* origin, including the European private law that permeates our national legal order through implementing legislation, is also subject to Charter influences. For now, those influences are limited, but I expect them to increase. In fact, I hope they will, because I see in them an important opportunity for civil lawyers to ensure (better) protection of essential values of private law in a European context.

In Section 1.3, it became apparent that European private law, due to its public law slant, sometimes conflicts with our national property law, because it detracts from its flexibility and finely meshed nature. In this context, the Charter can serve as a 'constitutional crumple zone,' because it protects both public law and more private law-oriented fundamental rights. The (pre-)Charter case law discussed above shows that the CJEU considers fundamental rights, under the Charter and/or general principles of EU law, as potential justifications for infringements of primary EU law, including in horizontal relationships (*Schmidberger*, *Omega*, *Viking*).[21] Hartkamp and Sieburgh have previously noted that the direct effect of EU fundamental rights can provide a necessary counterbalance to undesirable outcomes of the direct horizontal effect of primary EU law, in particular the freedoms of movement under the EU Treaties.[22] A next step in this development could be for the CJEU to also review secondary EU law affecting our private law against fundamental rights under the Charter (more often), and thus 'civilise' it. Precisely because the Charter has a partly private law nature, it offers civil lawyers ammunition to further develop European private law in a way that better reflects the essential characteristics of private law. Without pretending to be exhaustive, I will give three examples of a possible development in this direction, drawn from recent European case law.

The 2022 *Victorinox* case revolved around the question of whether the online seller of a pocketknife should have informed the consumer/buyer of the warranty terms used by the manufacturer of the pocketknife. Article 6(1)(m) of Directive 2011/83 on consumer rights, implemented through Section 6:230(m) of the Dutch Civil Code, requires the trader in a distance selling

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[21] CJEC 12 June 2003, case C-112/00, ECLI:EU:C:2003:333 (*Schmidberger*); CJEC 14 October 2004, case C-36/02, ECLI:EU:C:2004:614 (*Omega Spielhallen*); CJEC 11 December 2007, case C-438/05, ECLI:EU:C:2007:772 (*Viking*).

[22] See Hartkamp, *WPNR* 2014, p. 965; Sieburgh, *RMThemis* 2015, p. 4; Sieburgh, in: Gerards, De Waele & Zwaan, *Vijf jaar bindend EU-Grondrechtenhandvest (Research Centre for State and Law no. 26)* 2015, p. 516-517; Hartkamp, *AA* 2019, p. 224; and *Asser/Hartkamp 3-I* 2023/64, 66a and 231j (with further references). See also Basedow, *EU Private Law* 2021, p. 216.

transaction (an online shop in this case) to inform the consumer/buyer about the existence and conditions of 'commercial warranties'. According to the letter of the Directive and the implementing legislation, this includes manufacturer's warranties, but it is likely that the seller (who is not the manufacturer) will not always be able to easily provide such information, nor will the consumer always have a real need for it when making their purchase decision. In this regard, the Court, also referring to Article 38 of the Charter (consumer protection), ruled that the 'right balance' must be struck between a 'high level of consumer protection' on the one hand and 'the competitiveness of enterprises' on the other (as mentioned in recital 4 of the Directive), while safeguarding the entrepreneur's *freedom to conduct a business*, as enshrined in Article 16 of the Charter. Following on from this, the Court held that if the seller is not the manufacturer of the item sold, the seller must inform the buyer of the manufacturer's warranty terms only if a buyer has a 'legitimate interest' in obtaining information on the warranty, which, according to the Court, is the case only if the manufacturer's warranty is a 'central or decisive element' of the seller's offer. To assess this, various factors must be used to examine whether, with respect to disclosure of the manufacturer's warranty, there is 'an objective need to protect the consumer.'[23] Pavillon and Tigelaar conclude that this ruling clarifies that the rationale behind Section 6:230(m) of the Dutch Civil Code is 'to prevent wrong decisions about an agreement.'[24] This seems to me to be a typically private law notion used by the Court to keep overzealous consumer protection within certain bounds. These bounds are set (in part) by the Charter.

Another example of (potential) refinement of European private law using Charter rights is the widely referenced *Fuhrmann 2* judgment on the requirements that European consumer law sets for an 'electronic order button' on a website, which basically say that consumers must be warned in unambiguous terms that they are placing an 'order with an obligation to pay.' In this same judgment, the Court ruled that the 'right balance' had to be struck between the interests of consumer protection on the one hand and the competitiveness of enterprises on the other, while safeguarding the freedom to conduct a business. In this case, this did not lead to an entrepreneur-friendly or entrepreneur-friendlier interpretation of the relevant Directive provision, because adjusting the text on an electronic order button was – rightly – not considered a 'significant burden' on the business,[25] but what matters is the principle that in Europe even the overall objective of consumer protection does not justify all private law means. Article 16 of the Charter can help us prevent European consumer law from tipping too far towards unlimited consumer

[23] CJEU 5 May 2022, case C-179/21, ECLI:EU:C:2022:353 (*Victorinox*), paras. 38, 43-44 and 47.

[24] C.M.D.S. Pavillon & L.B.A. Tigelaar, 'Een prijskorting voor de consument bij gebrekkige informatieverstrekking: een onevenredige sanctie,' *NTBR* 2022/28, p. 236.

[25] CJEU 7 April 2022, case C-249/21, ECLI:EU:C:2022:269 (*Fuhrmann-2*), para. 31.

protection. Article 38 of the Charter does, in my view, not prevent this, since it is a Charter principle that, as such, has no direct horizontal effect (see Section 3.5).

Another, unfortunately negative example of the property law potential of the Charter as a 'civiliser' of European private law comes from the 2022 *JP/Ministre* ruling, which I believe was a failure by the CJEU in the domain of fundamental rights.[26] The *JP/Ministre* case involved a resident of the agglomeration of Paris holding the French government liable for serious health damage he claimed to have suffered as a result of poor air quality in the area where he lived. In support of this claim, he relied on the air quality limit values under Directive 2008/50/EC on ambient air quality and cleaner air for Europe. The fact was that these limit values had been systematically exceeded in the Paris agglomeration for years, without any action being taken by the French government. France thereby acted in violation of the Directive, but the claim for damages was held not to be admissible on EU law grounds, because, according to the Court, the directive only served 'a general objective of protecting human health and the environment as a whole' and did not seek to 'confer rights on individuals.' Consequently, the requirement of relativity under EU law was not met.[27]

The grounds for the ruling are visibly weak, especially since the proverbial elephant in the room is never addressed: the fundamental right of EU citizens to protection of life and physical integrity (Article 2-3 of the Charter) and, more generally, the fundamental right to environmental protection (Article 37 of the Charter). In her counter-opinion, Advocate General Kokott specifically pointed to this constitutional dimension and argued, correctly in my view, that the health interest of citizens is 'highly personal and thus individual in nature.' Not being an interest that involves a financial claim by citizens does not make it any less weighty in nature. On the contrary, the issue here is the infringement of 'a legal interest which is much more important than the abovementioned asset-related interests,' namely protection of 'physical and mental integrity,' according to Kokott.[28] I wholeheartedly concur with her on this. The ruling may be justifiable on legal policy grounds (there are better ways to serve the environment and public health than by eliciting and honouring health damage claims), but without attention to the fundamental law dimension, I think this ruling is difficult to defend. This ruling injures the private health interests of European citizens, and that when the Charter could – and should – have served as a constitutional crumple zone.[29]

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[26] See also Jansen, *NTBR* 2023/5, p. 33 et seq.

[27] CJEU 22 December 2022, case C-61/21, ECLI:EU:C:2022:1015 (*JP/Ministre de la Transition écologique*), para. 55 et seq.

[28] Advocate General Kokott's opinion for *JP/Ministre* (C-61/21), under 73, 77-78 and 89 et seq.

[29] Cf. W.Th. Douma, *JM* 2023/33, who wonders whether the judgment is ECHR-proof.

5 Conclusion

The Charter was introduced to make fundamental rights 'more visible' in Europe.[1] Against this background, it is surprising – and regrettable – to note that fundamental rights have so far played only a modest, often invisible role in Dutch private law. The average civil lawyer does not really seem to have the Charter itself top of mind. With this preliminary opinion, I aimed to change that by interpreting fundamental and Charter rights in private law terms. I think civil lawyers can benefit from this, because the Charter offers opportunities to improve both our national private law and European private law. The Charter provides starting points for two new types of law formation at the intersection of private law, European law, and fundamental rights (Sections 4.1-4.2): on the one hand, the semi-direct horizontal effect of fundamental rights in our national private law ('constitutionalisation 2.0') and on the other hand, the constitutionalisation of European private law ('Europeanisation 2.0').

In addition to these two areas of application, I believe the Charter offers our national and European private law a third opportunity, which I cannot work out in this preliminary opinion, but would still like to mention. While the Europeanisation of private law has been booming over the past decades, it is still highly fragmented. A 'general element' of European private law is sorely missed, and has been for years.[2] The intention was initially for a common frame of reference to provide this, but that project got bogged down in (overly) steep ambitions on the part of its creators.[3] In my view, the Charter and the Court's Charter case law offer starting points for a more natural, less ambitious, but potentially much more effective form of harmonisation of the general element of European private law ('unification 2.0'). We are already seeing the CJEU develop general private law notions in its Charter case law, such as the principle of autonomy (Article 1 of the Charter; *Omega*), freedom of contract (Article 16 of the Charter; *Sky Österreich*), and the protection of weaker parties (Article 28 of the Charter; *Viking*). If the Court continues down this path, it will offer opportunities for further unification of private law systems in Europe.[4] The Court can then, on the basis of the Charter combined with unwritten general principles of EU law, build that initially intended 'common frame of reference' on a constitutional basis.[5]

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1 See the fourth paragraph of the Charter's preamble.

2 See, for example, J.M. Smits, 'Europa en het Nederlandse privaatrecht,' *NTBR* 2004/87, p. 497.

3 See, for example, A.U. Janssen, 'Het Europees privaatrecht is dood (…) lang leve het Europees privaatrecht?' *AA* 2023, issue 3, p. 181-185 (with further references).

4 Cf. Smits, *Constitutionalisering van het vermogensrecht* (preliminary opinion, NVvR) 2003, no. 1 et seq., who explored the ECHR's role as 'unificator' of European private law. He considered that role limited (no. 65), but explicitly left out the possible unifying effect of EU law and the Charter (no. 2). Cf. also Mak, *NTBR* 2004/20, p. 130.

5 For thoughts in that direction, see Basedow, *EU Private Law* 2021, p. 325 et seq.; and *Asser/Hartkamp 3-I* 2023/133 et seq.

In order to empower the Court to do that, however, civil law practitioners, and then lawyers first and foremost, must provide the Court with the arguments necessary to translate rights and interests under private law into terms of fundamental rights. This way, national private law and EU law can mutually influence and reinforce each other via the fundamental rights enshrined in the Charter. While this preliminary opinion gives an initial impetus in this direction, it certainly does not claim to provide a definitive answer. I see numerous opportunities for follow-up research on, for example, the 'transformation' of public law limitation clauses into private law terms, on the balancing of fundamental rights in horizontal relations, and on the substance of the requirement of conferral of rights under private law as used by the Court in attributing direct horizontal effect to Charter rights. And so, this preliminary opinion ends on a more positive note than on which it began: the Charter and private law have a lot to offer each other!

Points for discussion

1. The Charter does not put a strain on the solidarity of our private law (Section 1.4 and 3.2 et seq.).
2. Stand-alone application of the Charter in horizontal relationships does not seem reasonable (Section 3.4.3).
3. Instead of the usual *indirect* horizontal effect (Section 2.2), fundamental rights should have *semi-direct* horizontal effect (Section 2.3 and 4.1).
4. The Charter can and should be used more to refine rules of European private law (Section 4.2).
5. Civil law practitioners need to study the Charter and the relevant case law more in order to make private law 'Charter-proof' and make EU law 'private law-friendly' (Section 5).

The Charter as a driver for employment law: fact or fiction?

Femke Laagland LLM

1 Introduction, problem definition, and demarcation

2 The discussion from the outset

3 The Charter's relationship with the ECHR, ESC, and ILO

4 Normative influence at EU level
4.1 Employment law-related Charter provisions in European legislation
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4.2.1 Rights, principles, or a combination thereof
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5 Effect and influence on Dutch employment law
5.1 Scope of employment law-related Charter provisions
5.2 Reinforcing worker protection …
5.3 … but also a risk of erosion of worker protection

6 Concluding analysis

7 Recommendations to the Dutch legislator and courts
7.1 Apply employment law-related Charter provisions in case of over-implementation
7.2 Always bear specifically Dutch dynamics in mind
7.3 Dare to be critical and seek preliminary rulings

1 Introduction, problem definition, and demarcation

Employment law contains a set of rules that differs from general law of obligations. This distinction is justified by the particular purpose of this area of law: employment law confers rights on (economically) subordinate workers vis-à-vis their employer to compensate the inequality between them. It mainly concerns provisions of imperative law that limit the freedom of contract between parties and that employees and employers may deviate from only in collective labour agreements. Which subjects the legislator regulates and to what extent the legislator allows an infringement of the freedom of contract is a political choice made on a national and, increasingly, European Union level. However, the legislator is not entirely free in making this choice. Several European treaties enshrine fundamental rights for everyone who has a job, and these can be traced back to human dignity.[1] These rights are laid down in the European Convention on Human Rights (ECHR) and the European Social Charter (ESC), as well as in Chapter IV of the Charter of Fundamental Rights of the European Union (Charter). Entitled 'Solidarity', Chapter IV of the Charter contains a total of 12 fundamental social rights, six of which are related to workers (hereafter: employment law-related Charter provisions). The anchoring of fundamental social rights in general and employment law provisions in particular is seen as a step towards a more social Europe.[2]

The employment law-related Charter provisions include the right to information and consultation (Article 27), the right to collective bargaining and action (Article 28), protection in case of unjustified dismissal (Article 30),[3] the right to just and equitable working conditions and terms of employment (Article 31), protection of young people at work (Article 32),[4] and protection against dismissal for a reason connected with maternity (Article 33(2)). It follows from Article 51 of the Charter that institutions, bodies, and agencies of the EU and Member States, to the extent that they implement EU law, must respect the rights set forth in the Charter; principles must be observed, and

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[1] For example, the notes to Article 1 of the Charter state that human dignity is not only a fundamental right in itself, but also the foundation of all fundamental rights. Moreover, the connection between human dignity and work is excellently described by E. Anderson, 'Human Dignity as a Concept for the Economy,' in: M. Düwell et al. (ed.), *The Cambridge Handbook of Human Dignity; interdisciplinary perspectives*, Cambridge: Cambridge University Press: 2014, p. 496: 'Work is a domain in which people are especially vulnerable to loss of dignity […] The rights to enjoy safe and decent conditions of work […] and to have limited working hours […] mark their bearers as respectable human beings, not mere tools until they wear out.'

[2] K. Lenaerts & S. Adam, 'Solidariteit als leidraad en uitdaging voor een sociaal Europa,' *SEW* 7/8 (2021), p. 297-299.

[3] The Dutch version ('kennelijk onredelijk ontslag', which translates as 'manifestly unreasonable dismissal') does not seem to be in line with the English, French, and German versions, which use 'unjustified dismissal,' 'licenciement injustifié,' and 'ungerechtfertigte Entlassung' respectively, which would translate as 'ongerechtvaardigd ontslag' in Dutch. For the remainder, however, the Dutch text of the Charter will be followed.

[4] The absolute prohibition of child labour will not be addressed in this preliminary opinion.

their application promoted. What this instruction means in concrete terms, however, is unclear. Moreover, the fact that the wording refers to a provision as a right does not mean that it is indeed a right; it could just as easily be a principle. Nor are rights absolute, subject as they are to limitations under Article 52 of the Charter, whereby it is relevant that the Charter also has more economically oriented fundamental rights, such as the freedom to conduct a business (Article 16).[5] Therefore, the text of the Charter does not provide a basis to speak of the true meaning of the employment law-related Charter provisions; different interpretations and applications may be the correct ones.

The first objective of this preliminary opinion is to provide insight into the normative value of the employment law-related Charter provisions on a European Union level and its significance for Dutch employment law. The second objective is to explore ways in which the Charter can serve as a driving force for employment law, and to what extent. This preliminary opinion is structured as follows. Sections 2 and 3 will put the employment law-related Charter provisions into perspective. I will delve into the discussion around the Charter's creation (Section 2) and analyse how the employment law-related Charter provisions relate to similar rights under the European Convention on Human Rights (ECHR), the European Social Charter (ESC), and the ILO (Section 3). Sections 4 and 5 make up the core of my preliminary opinion. I will first examine the normative value on European Union level and zoom in on the European legislator and the Court of Justice successively (Section 4). A text acquires meaning only when one has knowledge of what those who interpret the text do with it. For both instances, I will examine the interpretation given to the employment law-related Charter provisions from the time the Charter was promulgated in 2000. Below, I will shift the focus to the national level and analyse the extent to which the normative value identified in Section 4 affects Dutch employment law (Section 5). Finally, I will summarise the main findings (Section 6) and formulate some recommendations (Section 7).

In these examinations, I have afforded myself the following limitation. Charter rights or principles that have some relevance to employment law are not found only in Title IV. Title II, for example, includes the protection of personal data (Article 8), freedom of expression (Article 11), and freedom of assembly and association (Article 12), and Title III lays down the right to equality. I will, however, not go into these provisions in this preliminary opinion. A discussion of all these provisions would yield a fragmented picture, and it would also add little to the essays by Verburg (2015) and Krommendijk (2019).[6] My focus will

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[5] This includes freedom of contract, see CJEU 18 July 2013, case C-426/11, ECLI:EU:C:2013:521 (*Alemo-Herron*), legal ground 35.

[6] L.G. Verburg, 'De invloed van het EU-Handvest van de Grondrechten op het Nederlandse arbeidsrecht,' in: J.H. Gerards, H.C.F.J.A. de Waele & K.M. Zwaan (ed.), *Vijf jaar bindend EU-Grondrechtenhandvest. Doorwerking, consequenties, perspectieven (Research Centre for State and Law no. 26)*, Deventer: Wolters Kluwer 2015, p. 159194; J. Krommendijk, 'Tien jaar bindend EU-grondrechtenhandvest in de Nederlandse rechtspraktijk: een inleidende schets van de status quo,' in: J. Krommendijk, H.C.F.J.A. de Waele & K.M. Zwaan (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment (Bundel ter gelegenheid van het symposium op 6*

be on the significance of the Charter provisions that were written specifically for employment law in Chapter IV, because an overarching examination of this topic has so far been lacking. Another limitation lies in the tools available to the European legislator to achieve their objectives. These are diverse and range from regulations, directives, and resolutions to *soft law*, self-regulation, and recommendations. This preliminary opinion focuses on regulations and directives because of their legally binding force.

december 2019 te Nijmegen) (Research Centre for State and Law no. 47), Deventer: Wolters Kluwer 2019, Section 3.1.2.

2 The discussion from the outset

The decision to draw up a European Charter of Fundamental Rights was made at the Cologne European Council meeting of 3 and 4 June 1999. The European Council mandated the Forum (later called 'Convention')[1] of national and European representatives to draw up the Charter, stressing the need to consider fundamental social rights, including fundamental rights for everyone who performs work.[2] The mandate included an important caveat: fundamental social rights had to be included, to the extent that they did not merely set objectives for action by the Union. In other words, they were not to be purely political objectives.

At the end of March 2000, the Praesidium of the Convention drew up an initial list of fundamental social rights to be included in the Charter.[3] This list was subsequently extensively discussed by the Convention, partly in light of comments made by the European Council.[4] Major points of contention were the substance and wording of these fundamental rights, their scope, and their binding force.[5] Some Convention members saw the real added value of the Charter in the fundamental social rights. Other Convention members tried to keep fundamental social rights out of the picture (as much as possible). They foresaw a flood of legal proceedings and a shift of powers to the EU level.[6] According to them, the Court of Justice would, through judicial activism, replace fundamental social rights from national legal systems with unified European standards, on the basis of which it would formulate positive obligations for the European or national legislator.[7] To allay these fears and persuade opponents, several Convention members emphasised the limited enforceability of fundamental social rights. For example, French Convention member Guy Braibant pointed out, with reference to a ruling by the French Constitutional Court, that social rights can (only) be used to interpret and review certain legislative and policy acts.[8] Spanish Convention member

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1 The name '*Forum*' was fairly quickly changed to '*Convention*'.

2 The Charter Convention's mandate, *SN* 2960/99.

3 CHARTE 4112/00, BODY 4 (26 January 2000).

4 For the first time on 3 and 4 April 2000 (CHARTE 4304/00, CONVENT 30), and subsequently on 27 and 28 April 2000 (CHARTE 4306/00, CONVENT 32).

5 The place and nature of the fundamental social rights in the Charter was, right up to the Convention's final session, one of three matters addressed in the debates in drafting the Charter. The other two were the inclusion of so-called '*modern fundamental rights*' in the Charter and how the Charter was to relate to the ECHR. See: CHARTE 4959/00, CONTRIB 54 (20 October 2000).

6 CHARTE 4304/00, CONVENT 30 (3 and 4 April 2000), and more detailed: J.H. Gerards, H.C.F.J.A. de Waele & K.M. Zwaan (ed.), *Vijf jaar bindend EU-Grondrechtenhandvest. Doorwerking, consequenties, perspectieven (Research Centre for State and Law no. 26*), Deventer: Wolters Kluwer 2015, Section 2.1.3.

7 K. Lenaerts, 'Exploring the limits of the EU Charter of fundamental rights,' *EuConst* 2012, 8, p. 376.

8 CHARTE 4280/00, CONTRIB 153 (2 May 2000).

Rodríguez Bereijo proposed a distinction between 'rights' and 'principles'.[9] This is in line with the Spanish Constitution, which has a Chapter II on '*rights and freedoms*' and a Chapter III on '*principles of economic and social policy.*'[10]

With regard to the list of fundamental social rights that had to be included in the Charter, a compromise proposal[11] was ultimately reached that could largely count on the support of the Convention.[12] A number of compromises were subsequently reached. First of all, freedom to conduct a business was included in the Charter as a counterpart to fundamental social rights. Freedom to conduct a business was intended to prevent the Charter from being too closely related to workers' rights.[13] Secondly, the passage '*in accordance with national laws and practices*' was added to a number of fundamental social rights, including a number of employment law-related provisions.[14] Finally, in accordance with the aforementioned proposal by Convention member Rodríguez Bereijo, it was agreed that the Charter would make a distinction between rights and principles.[15] What specifically made the difference in all of this and ultimately led to the sceptical group of Convention members agreeing to the inclusion of fundamental social rights in the Charter is not unequivocally apparent from parliamentary history. The literature is also divided on this point. Some authors seem to specifically point to the unenforceable nature of fundamental social rights.[16] Other authors point to another turning point, such as the compromise proposal.[17]

Title IV of the Charter ultimately came to contain twelve rights and principles. The list differs significantly from the list that served as the basis for the Convention discussions at the end of March 2000. With regard to the employment law-related provisions, it is striking that the right to protection in

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[9] CHARTE 4414/00, CONTRIB 270 (12 July 2000). See also: J. Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice,' *European Constitutional Law Review* 2015/2, p. 326.

[10] According to Article 53(3) of the Spanish Constitution, these principles 'may only be invoked before the ordinary courts in accordance with the legal provisions implementing them.'

[11] CHARTE 4401/00, CONTRIB 258 (4 July 2000). The text of this compromise was drawn up by French Convention member Guy Braibant and his German colleague Jürgen Meyer jointly.

[12] M. Engels, 'Die Europäische Grundrechtecharta: Auf dem Weg zu einer europäischen Verfassung?' *Reihe Eurokolleg 45*, 2001, p. 13. Not all Member States agreed. This is why Protocol no. 30 was created. Through Article 1(2) of this Protocol, Poland and the United Kingdom managed to secure that Title IV of the Charter, which encompasses the fundamental social rights, does not create enforceable rights against them in cases where their national law provides rights. This Protocol still applies to Poland to this day.

[13] For details, see the eulogy by German Convention member Meyer: https://www.fernuni-hagen.de/dtiev/docs/laudatio-meyer.pdf – p. 6.

[14] Hüpers & Reese, in: *Charta der Grundrechte der Europäischen Union*, Titel IV Solidarität, Vorbemerkungen, marginal number 16, and the reference included there to Meyer's laudation, as pronounced on 20 October 2015.

[15] This distinction is anchored in Article 51(1) of the Charter.

[16] See, for example: J. Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice,' *European Constitutional Law Review* 2015/2, p. 326 and J.H. Gerards, H.C.F.J.A. de Waele & K.M. Zwaan (ed.), *Vijf jaar bindend EU-Grondrechtenhandvest. Doorwerking, consequenties, perspectieven (Research Centre for State and Law no. 26*), Deventer: Wolters Kluwer 2015, Section 2.1.3.

[17] See, for example: Hüpers & Reese, 'Diskussion im Grundrechtekonvent,' in: Meyer et al., *Charta der Grundrechte der Europäischen Union*, Nomos 2019, Titel IV Solidarität, Vorbemerkungen, titel II, Section 2.

the event of unjustified dismissal (Article 30) was added to the list,[18] while the right to work and the right to fair remuneration were not. Both were thought to involve political objectives. While the right to strike and the right to a minimum wage did make it into the definitive version of the Charter, they are no longer independent rights. They were included in the – more comprehensive – right to collective bargaining and collective action (Article 28) and the right to social assistance (Article 34) respectively.[19] The Convention was unable to reach agreement on the interpretation of the employment law-related provisions as rights or principles. In the explanation to the Charter, which was drawn up under the responsibility of the Praesidium of the Convention, a number of provisions from Title IV are regarded as principles only by way of example.[20] This concerns paragraph 1 of Article 34 (social security and social assistance), as well as Article 35 (health protection), Article 36 (access to services of general economic interest), Article 37 (environmental protection), and Article 38 (consumer protection). What stands out is that none of the identified principles from Title IV cover employment law-related provisions. The discussion about the distinction between rights and principles flared up again during the Convention on the Future of Europe in 2002 and 2003.[21] The United Kingdom and Denmark expressed objections to the fundamental economic and social rights of the Charter becoming legally binding. To address their concerns, Article 52(5) was added to the Charter, emphasising that principles can be applied through legislative or implementing acts. However, the Convention on the Future of Europe also failed to establish which of the employment law-related Charter provisions are principles. This task was, therefore, left to the Court of Justice (see further Section 4.2.1).

[18] The Praesidium submitted the proposal for inclusion of this right on 27 March 2000, in CHARTE 4192/00, CONTRIB 18 (27 March 2000). Why this right was ultimately not included is unknown.

[19] The reason for this is unknown. Inclusion of the right to strike in the Charter did actually generate considerable debate. For more details, see: Hüpers & Reese, in: *Charta der Grundrechte der Europäischen Union*, Article 28, marginal number 14-19.

[20] Explanations relating to the Charter, *OJEU* (2007/C303/02), on C-303/35.

[21] This Convention was tasked with drawing up a draft version of the European constitution.

3 The Charter's relationship with the ECHR, ESC, and ILO

The other preliminary opinions in this compilation focus extensively on the Charter's added value compared to the ECHR. While also relevant in this preliminary opinion, this value relationship between these two instruments features to a lesser extent here because only the right to collective bargaining and the associated right to strike from Article 28 of the Charter have an equivalent in the ECHR. The other five employment law-related Charter provisions do not have equivalents in the ECHR.[1] When applying Article 28 of the Charter, the Court of Justice may offer more protection than is provided under the ECHR, but not less (Article 52(3) of the Charter). Where there is friction between the two instruments is on the issue of the right to strike.[2]

In 2021, the ECtHR ruled on the dynamics between European economic freedoms of movement on the one hand and the right to strike on the other. The ECtHR held that: '*freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality.*'[3] This balancing act differs from the case law of the Court of Justice. Referring to Article 28 of the Charter, the Court held in the 2007 *Viking* ruling that the right to collective action must be exercised in accordance with EU law and must be justified as a restriction on market freedoms. This approach requires that the strike '*pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it.*'[4] The Court of Justice used a similar wording in the *Laval* judgment on the freedom to provide services.[5] In both rulings, the right to strike was defeated, whereby it is particularly noteworthy that the Court interprets the proportionality review autonomously and strictly.[6] For example, the Court held in the *Viking* case that a strike is only justified if it is used as a last resort and in the *Laval* case that a strike is justified only if the

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1 Since 2009, the right to strike has been read into Article 11 ECHR, which includes the freedom of assembly and association, see ECtHR 21 April 2009, Application No. 68959/01 (*Yapi-Yol Sen/Turkey*).

2 There was no friction between the Court of Justice and the ECtHR when it comes to collective bargaining, which became an inherent part of Article 11 of the ECHR since the ECtHR's ruling of 12 November 2008, *EHRC* 2009,4, with an annotation by Gerards (*Demir and Baykara*).

3 ECtHR 10 June 2021, ECLI:CE:ECHR:2021:0610JUD004548717, *JAR* 2021/180 (*LO AND NTF*).

4 CJEC 11 December 2007, case C-438/05 (*Viking*), legal grounds 44 and 75.

5 CJEC 18 December 2007, case C-341/05 (*Laval*), legal ground 101.

6 S. de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice,' *Utrecht Law Review* 2013/1, p. 189.

demands of the trade unions do not exceed the minimum level of protection under the Posted Workers Directive.

The approach of the Court of Justice was met with much criticism from the employment law community.[7] Criticism also came from the European Committee of Social Rights (ECSR), the body that monitors application of the European Social Charter (ESC), which was also adopted by the Council of Europe.[8] In a 2013 ruling on the Swedish right to strike, the ECSR held that market freedoms under EU law are important and valuable economic freedoms, but '*from the point of view of the system of values, principles and fundamental rights contained in the Charter, cannot be treated as having a priori greater value than fundamental employment rights, including the right to seek further protection through collective action and to demand better protection of workers' economic and social rights*.'[9] The ECtHR endorses this criticism in its aforementioned 2021 ruling. When interpreting the ILO Conventions, the criticism of the case law of the Court of Justice is even more pointed. The Committee of Experts on the Application of Conventions and Recommendations (ILO Committee), which oversees the correct interpretation and application of ILO Conventions, ruled that '*the [Committee] in stating its position regarding the permissible restrictions can be imposed on the right to strike, has never mentioned the need to assess the proportionality of the interests taking into account a notion of freedom of establishment or freedom to provide services*. *[…] The committee finds that there is no reason to revise its position in this regard.*'[10] With this finding, the ILO Committee in fact challenges the very idea that the right to collective action can be balanced against European economic freedoms.[11]

While the ECHR is only relevant to Article 28 of the Charter, the European Social Charter has much broader relevance to the Charter of Fundamental Rights, as the other five employment law-related Charter provisions also have an equivalent in the ESC. The ILO also has treaties that show a connection to the other five employment law-related Charter provisions.[12] However, the

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[7] See, among others: N. Hös, 'The Principle of Proportionality in *Viking* and *Laval*: An Appropriate Standard of Judicial Review?' *ELLJ* 2010/2, Vol. 1, par. 1 & 4; C. Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future,' *CLP* 2014/1, Vol. 67, p. 205-206 and 218-219; V. Velyvyte, 'The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence,' *HRLR* 2015/1, Vol. 15, p. 74-75, 92-93 and 98-99; S. Giubboni, 'The rise and fall of EU labour law,' *ELJ* 2018/1, Vol. 24, p. 12-13; S. Garben, 'Balancing social and economic fundamental rights in the EU legal order,' *ELLJ* 2020/4, Vol. 11, p. 374-378.

[8] The ESC was drawn up in 1966 and revised in 1996. What is important to note is that the right to strike in Dutch law is based on Article 6(4) of the ESC (see further Section 5.2.).

[9] ECSR 3 July 2013, *JAR* 2014/36, legal ground 122. The Swedish right to strike was amended following the *Laval* ruling. The ECSR ruled that Sweden acted in contravention of the ESC in making this amendment.

[10] Report III (Part 1A) of the Committee of Experts on the Application of Conventions and Recommendations, Geneva: International Labour Conference 99th session 2010, p. 209.

[11] O. de Schutter, 'The European Social Charter as the Social Constitution of Europe,' in: N. Bruun et al. (ed.), *The European Social Charter and the Employment Relation*, Oxford and Portland, Oregon: Hart Publishing 2017, p. 31.

[12] Consider, for example, ILO Convention 52 on the right to pay while on holiday leave.

normative value of the rulings of the ECSR and the ILO Committee for the Court of Justice is not nearly as strong as that of the rulings of the ECtHR. After all, Article 52(3) of the Charter does not refer to the rulings of the ECSR and the ILO Committee.[13] Nevertheless, there are authors who say that, when applying Charter provisions that correspond to the ESC, the Court of Justice should take into account the underlying ESC provisions[14] and the opinions of the ECSR in this regard. [15] The same would apply to the ILO Conventions.[16] With regard to the ESC, this view is supported by the fact that, according to the Explanations relating to the Charter, the employment law-related Charter provisions are inspired by and based on corresponding ESC provisions. According to De Schutter, it would (therefore) benefit legal certainty if the Court were to read these Charter provisions in light of the line followed by the ECSR.[17]

In addition, paragraph 5 of the preamble to the Charter states that the Charter confirms the rights arising from common constitutional traditions and international obligations of the Member States, such as those resulting from the social charters adopted by the Council of Europe, including the ESC. While anchored in Article 53 of the Charter, this paragraph is worded slightly differently there. This provision states that it concerns (international) human rights treaties to which '*all the Member States are party.*'

The latter is not always the case.[18] However, according to De Witte, this is no reason to offer less protection under the Charter than the ESC prescribes. In his view, this would be an '*absurd consequence*' given the Charter's aim to improve fundamental rights protection in Europe.[19] De Witte's vision does mean that EU Member States that have not ratified the ESC or its revised version for whatever reason will still *indirectly* experience a certain effect through the Charter.
The ECtHR did not let this kind of reasoning hold it back in the case in 2008. In this case, Turkey argued that the ECtHR should not attach any value to

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[13] This does not alter the fact that Member States that are also members of the ESC and/or the ILO may find themselves in a difficult position in the event of a different ruling from Luxembourg, because they are, at least if they have ratified the relevant ESC provision or the relevant ILO Convention, bound by the ESC and/or the ILO as well as by EU law.

[14] S. Peers & A. Prechal, 'Art. 52 – Scope and Interpretation of Rights and Principles,' in: S Peers et al., *The EU Charter of Fundamental Rights: a commentary,* Oxford: Hart Publishing 2021, p. 1645.

[15] See, among others, Barkhuysen & Ten Have, 'Een verkenning van de betekenis van het Handvest van de Grondrechten van de Europese Unie voor het privaatrecht,' *NTBR* 2011/76, Section 2.1; F.J.L. Pennings et al., *Europees arbeidsrecht (Monografieën Sociaal Recht no. 2)*, Deventer: Wolters Kluwer 2021/2.3.1.

[16] T. Teklè, 'Labour Rights and the Case Law of the European Court of Justice: What Role for International Labour Standards?' *ELLJ* 2018/3, Vol. 9, p. 240 & 256-257.

[17] O. de Schutter, 'The European Social Charter as the Social Constitution of Europe,' in: N. Bruun et al. (ed.), *The European Social Charter and the Employment Relation*, Oxford and Portland, Oregon: Hart Publishing 2017, p. 21.

[18] For a list of ratifications, see the website of the Council of Europe (also in a table).

[19] B. de Witte, 'Art 53 – Level of Protection,' in: S. Peers et al., *The EU Charter of Fundamental Rights: a commentary,* Oxford: Hart Publishing 2021, p. 1678.

Articles 5 and 6 of the European Social Charter when interpreting Article 11 of the ECHR, because Turkey had not ratified these provisions. In response, the ECtHR considered that, when interpreting the ECHR, it can and must take into account instruments of international law other than the ECHR to determine whether there are common standards in the contracting states, regardless of whether the defendant state has ratified all of them.[20] This approach by the ECtHR met with considerable criticism, including that it lacks an adequate legal basis in the ECHR.[21] In view of this criticism, it cannot be ruled out that the Court of Justice will be reluctant to adopt the same modus operandi. At the same time, Article 53 of the Charter (unlike the ECHR) does provide an adequate legal basis for an interpretation of the Charter in the light of other (international) treaties, such as the ESC and possibly also the relevant ILO Conventions.

Nevertheless, the Court of Justice has so far taken little notice of rulings by the ECSR and the ILO Committee.[22] When discussing the right to an annual period of paid leave under Article 31(2) of the Charter, the Court's case law does quite regularly refer to that particular right's roots in the ESC, but it does not go further than a reference.[23] The exception to this rule comes from a judgment where the Court interpreted the right to paid annual leave based on Article 2 of the ESC. The Court held as follows: *'Setting a period of paid annual leave that exceeds the minimum requirements of Article 7(1) of Directive*[24] *2003/88, 003/88 is also intended to contribute to compliance with the objective laid down in Article 2 of the European Social Charter. It is apparent from that article of the European Social Charter that the contracting parties to that charter agreed that a minimum period of paid annual leave of four weeks "[ensures] the effective exercise of the right to just conditions of work."'*[25] However, too much importance should not be attached to this equal treatment, because the substance of the ESC on this point corresponds to the substance of the Working Time Directive. The effect of the ESC is sometimes addressed in more detail in the Advocate General's opinions. For example, in his opinion for the *AGET Iraklis* judgment, Advocate General Wahl drew inspiration for

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[20] ECtHR 12 November 2008, *EHRC* 2009/4 (*Demir and Baykara*), with an annotation by Dorssemont & Gerards.

[21] This criticism is addressed, and rebutted, by: K. Lörcher, 'The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The *Demir and Baykara* Judgment, its Methodology and Follow-up,' in: F. Dorssemont, K. Lörcher & I. Schömann (eds.), *The European Convention on Human Rights and the Employment Relation*, Oxford and Portland, Oregon: Hart Publishing 2013, p. 16; E. Sychenko & A. Perulli, *Employment Law and the European Convention on Human Rights*, Alphen aan den Rijn: Kluwer Law International 2023, p. 8 & 86-87.

[22] See more extensively about (the lack of) references by the Court of Justice to ILO Conventions and rulings of ILO supervisory bodies: T. Teklè, 'Labour Rights and the Case Law of the European Court of Justice: What Role for International Labour Standards?' *ELLJ* 2018/3, Vol. 9, p. 242-243.

[23] See, among others, CJEU 6 November 2018, case C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*); CJEU 6 November 2018, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer*); CJEU 19 September 2013, case C-579/12, ECLI:EU:C:2013:570 (*Réexamen Commission/Strack*).

[24] The Dutch version erroneously uses 'verordening' (regulation) here instead of 'richtlijn' (directive).

[25] CJEU 8 September 2020, joined cases C-119/19P and C-126/19P, ECLI:EU:C:2020:676 (*Franciso Carreras Sequeros*), legal ground 122-123.

his interpretation of Article 30 of the Charter from Article 24 of the ESC and its non-exhaustive list of unlawful grounds for dismissal.[26]

Although there are several possible reasons that may underlie the Court of Justice's cautious attitude in its use of international law in the interpretation of Charter provisions in general,[27] I believe that a more far-reaching conception of the ESC and the ILO Conventions could bolster the power of employment law-related Charter provisions. The ECSR and the ILO Committee are both bodies composed of independent experts in the field of social rights, and their interpretations of similar rights are, in my view, ideally suited for the (further) development of the employment law-related Charter provisions in the legal order of the European Union.

[26] Opinion of Advocate General Wahl 9 June 2016, C-201/15, ECLI:EU:C:2016:429 (*AGET Iraklis*).

[27] For more general insight into this, see: G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' *Maastricht Journal of European and Comparative Law* 2013/2, Vol. 20, Section 3 mentions, and counters, various possible reasons.

4 Normative influence at EU level

4.1 Employment law-related Charter provisions in European legislation

Article 51 of the Charter places a duty on the European legislator to respect rights and to observe and promote principles. Since the promulgation of the Charter in 2000, references to the Charter have been included in twenty employment law directives and one regulation. This concerns a total of thirty references in either the preamble or the legislative process.[1] Of these thirty, twenty-two refer to an employment law-related Charter provision.[2] The right to fair and just working conditions (Article 31) is cited the most at sixteen times, with far behind three references to the right to information and consultation (Article 27). The right to collective bargaining and collective action (Article 28) is mentioned twice, the protection against dismissal for a reason connected with maternity or adoption of a child (Article 33(2)) once, and there are no references at all to protection in the event of unjustified dismissal (Article 30) and the protection of young people at work (Article 32). After the Charter was declared legally binding in 2009, relatively more employment law directives were adopted that referred to the Charter than before it was declared legally binding.[3]
To determine the normative influence of the employment law-related Charter provisions, it is relevant what importance the European legislator attaches to the provisions in the legislative process. Below I will make a distinction between the situation where the legislator respects rights and adheres to principles (section 4.1.1) and promotes principles, which presupposes a more active approach (section 4.1.2).

4.1.1 Respecting rights and observing principles

The preamble of thirteen employment law-related directives and one regulation states that Charter rights are respected and Charter principles

[1] As confirmed by a legislation assessment on EUR-LEX. I ran a search on 'Charter' and subsequently made a selection based on employment law directives and regulations. These were assessed in terms of substance, firstly examining whether the document is actually of an employment law nature and then whether the document refers to the Charter of Fundamental Rights of the EU (and not another Charter).

[2] The other eight references are references in employment law directives and regulations to, for example, Articles 21 and 23 of the Charter, which relate to non-discrimination and equality, which are important in employment law in the context of, for example, the principle of equal opportunities and equal treatment of men and women in work and occupation. These are beyond the scope of this research.

[3] This is not to say that declaring the Charter legally binding has led to more references. That conclusion is not correct because it is logical that the number of references to the Charter rises as more employment law directives are adopted. The fact that more employment law directives have been adopted may but does not necessarily have to do with declaring the Charter legally binding.

observed, or words to the same effect, whereby – after this general wording[4] – reference is made to one or more employment law-related Charter provisions.[5] In 2005, the European Commission developed a methodology entitled 'Compliance with the Charter of Fundamental Rights in Commission legislative proposals.' [6] This methodology assumes that the Commission provides an overview of the implications for Charter provisions in the impact assessment of a proposal. Furthermore, a limitation on a Charter provision requires explanation of why that limitation is necessary and proportionate, having regard to the policy options and the objectives pursued. This methodology has subsequently been repeated in Commission documents from 2010 and 2020.[7] Although the thirteen directives and regulations were all adopted after 2005, this methodology is not reflected in the legislative process. Neither the text nor the legislative procedure shows that more has been done than merely verifying whether the legislation complies with what is included in the Charter.

An example is provided by Directive 2019/983 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work.[8] Recital 2 of the preamble states that this Directive respects the fundamental rights and principles recognised in the Charter, including the right to fair and just working conditions (Article 31). The impact assessment states that the objectives of the Directive are in accordance with Article 31 of the Charter and that the various policy options are in line with the Charter in general.[9] The explanation to the Commission proposal also states that the objectives of the proposal are in accordance with the fundamental rights in the Charter, in particular Article 2 and Article 31 of the Charter.[10] In fact, it basically says the same thing three

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[4] This fairly general wording can be traced back to a communication from the European Commission in 2001, see: Application de la charte des droits fondamentaux de l'Union Européenne SEC(2001)380, p. 3 (available in French only).

[5] Directive 2014/67/EU ('respects and observes'), Directive 2014/36/EU ('respects and observes'), Directive (EU) 2016/2341 ('respects and observes'); Directive (EU) 2017/159 ('respects'), Directive 2014/112/EU ('respects'), Directive 2009/13/EG ('respects'), Directive (EU) 2019/983 ('respects'), Directive (EU) 2017/2398 ('respects'), Directive (EU) 2018/131 ('respects'), Directive (EU) 2015/1794 ('respects'), Regulation (EU) 2019/1149 ('respects'), Directive 2014/66/EU ('respects'), Directive (EU) 2019/130 ('respects'), and Directive 2014/54/EU ('respects and observes'). What is notable is that all directives, as well as the regulation, were drawn up after the Lisbon Treaty came into effect in December 2009.

[6] Communication from the Commission on compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final.

[7] Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a strategy to strengthen the application of the Charter of Fundamental Rights in the EU, COM(2020) 711 final, p. 17; Communication from the Commission on a strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final. This document was drawn up following an evaluation that showed that there was scope in the methodology to make it more systematic, rigorous, and better readable and the commitment that the Commission would ensure more internal training on fundamental rights, see COM(2009) 205.

[8] Directive (EU) 2019/983 of the European Parliament and the Council of 5 June 2019 amending Directive 2004/37/EG on the protection of workers from the risks related to exposure to carcinogens or mutagens at work. This Directive also refers to Article 2, right to life.

[9] Commission Staff Working Document, Impact Assessment, SWD(2017) 7 final, p. 18.

[10] COM(2018) 171 def., p. 5.

times. It is quite conceivable, in my view, that Article 31 of the Charter served as a guideline and, therefore, as a compass for the legislative work that when into this Directive, which essentially concerns exposure to hazardous substances at work. This turns out not to be the case. In fact, it is not even explained why the Directive is compatible with Article 31 of the Charter, which is what the then applicable 2010 Commission Communication requires. The 2018 annual report from the European Commission on the application of the Charter, which discusses this proposal for a directive, does not reveal at all either what role Article 31 of the Charter played in initiating the proposal or in its substance.[11] The result of this is that it is not clear whether, and to what extent, the relevant employment law-related Charter provision has been taken into account and to what extent the provision has had actual consequences for legislation.

The exception is the Enforcement Directive on the cross-border posting of workers.[12] Recital 48 of the preamble states with regard to Articles 28 and 31 of the Charter that the Directive respects these rights and principles. Once again, the preamble does not state more than that, but it is noticeable that the European legislator refers to the employment law-related Charter provisions as rights and principles and, therefore, refrains from an explicit interpretation as a right or a principle. The impact assessment is more extensive and examines the effect that different policy options have on the two employment law-related Charter provisions in relation to the freedom to conduct a business under Article 16 of the Charter and the freedom to provide services under Article 56 of the TFEU and Article 15(2) of the Charter.[13] Based on methodology established in 2010, the Commission examines how these fundamental rights are limited and to what extent a limitation can be justified. The aim was, therefore, very specifically to strike a balance between social rights and economic freedoms. The policy options do not suggest that the freedom to provide services and the freedom to conduct a business are paramount and that the two employment law-related Charter provisions must be justified in that light, but the opposite is not the case either. Ultimately, for economic reasons, the policy option chosen was the one that targets better enforcement of existing rights of posted workers rather than the one extending their rights. In this proposal, the Commission makes the application of its methodology very transparent; the choice of one of the policy options is ultimately political. This extensive consideration can perhaps be explained by the purpose of the Directive, which is aimed at combating improper use of

[11] European Commission, 2018 report on the application of the EU Charter of Fundamental rights, Luxembourg: Publications Office of the European Union, 2019, p. 115.
[12] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System.
[13] Commission Staff Working Document, Impact Assessment SWD(2012) 63 final, p. 56-66.

cross-border posting arrangements. This topic very specifically requires a trade-off between various Charter provisions that conflict and where a limitation of Charter provisions is explicitly at issue.

4.1.2 Promoting principles

The 2010 Commission Communication also states that the Charter serves as a guideline for the Commission's legislative work and decision-making.[14] The Commission's Communication of late 2020 proposed specific actions to strengthen the application of the Charter, including promoting the use of the Charter as a compass for EU institutions. There is little information about this in the employment law guidelines. One directive explicitly mentions promotion of the Charter: the Directive on work-life balance for parents and carers.[15] Although recital three of the preamble merely repeats the text of Article 33(2) of the Charter, the explanatory memorandum to the proposal explicitly shows that the Commission *promotes* the exercise of the provisions of Article 33(2) through the Directive.[16]

In six other directives, the text tends to promote the principles without mentioning this in so many words.[17] These directives differ on a number of points from the directives mentioned in Section 4.1.1. First of all, it is striking in five of the six directives that the employment law-related Charter provision is always mentioned in one of the first recitals of the preamble. This puts the provision in the spotlight much more than if it were mentioned somewhere at the end of the preamble. Secondly, in all six directives the wording is more specific than the general wording used by the Commission when respecting and observing employment law-related Charter provisions. The Temporary Agency Work Directive is illustrative in this respect.[18] The first recital of the preamble to the Temporary Agency Work Directive states that the directive aims in particular to ensure full compliance with Article 31 of the Charter. From this, I infer that the directive provides a more concrete interpretation of

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[14] Communication from the Commission on a strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final. This document was drawn up following an evaluation that showed that there was scope in the methodology to make it more systematic, rigorous, and better readable and the commitment that the Commission would ensure more internal training on fundamental rights, see COM(2009) 205.

[15] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. Article 33 of the Charter is mentioned alongside other conventions, namely the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child.

[16] COM(2017) 253 def., p. 11.

[17] In addition to the four directives mentioned in the main text, this concerns Directive 2013/35/EU of the European Parliament and of the Council of 26 June 2013 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents and Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council and the Council Directives 98/59/EC and 2001/23/EC as regards seafarers.

[18] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

the meaning of Article 31 of the Charter for temporary agency workers. Where respect and observance are passive, i.e. we make legislation and we verify if it complies with the Charter, ensuring full compliance is a more active pursuit that amounts to promotion. The 2022 Minimum Wage Directive provides another example.[19] The reference to Articles 27, 28, and 31 of the Charter in one of the first recitals within the set of objectives of the Union in the field of social law suggests that the Charter provisions serve as a compass to achieve harmonisation in the field of minimum wages. The same applies to the 2019 Directive on transparent and predictable working conditions.[20] What stands out with regard to this last directive is that the sixth recital stipulates that a directive must, therefore, be adopted that provides for transparency and predictability of working conditions. The word 'therefore' seems to refer to Article 31 of the Charter referred to in the first recital, as well as the provisions of the European Pillar of Social Rights referred to in the second and third recitals.

At first glance, the Directive on information and consultation of employees of European Works Councils[21] seems to be about respecting, as one of the last recitals of the preamble states that the Directive respects Article 27 of the Charter. It is notable that, contrary to the legislation discussed in Section 4.1.1, the recital speaks of ensuring *full* respect. The impact assessment of the draft directive also states that the initiative contributes to the effectiveness of employees' right to information and consultation within the company, as stated in Article 27 of the Charter. More specifically, the Commission cites Article 27 of the Charter when discussing the legal basis of the directive.[22] The placement suggests that Article 27 serves as the reason for the initiative and is, consequently, promoted.

The examples mentioned give the impression that the Commission does not know whether, and if so how, it can justify that an employment law-related Charter provision (partly) underlies the directive. I do not rule out that this has to do with the diffuse distinction between rights and principles and the wording of Article 51(1) of the Charter, which explicitly links promotion to principles. Article 52(5) of the Charter also states quite explicitly that the European legislator can implement principles through legislative and implementing acts; rights already contain subjective rights of their own. Perhaps the European Commission wants to avoid unintentionally branding an employment law-

[19] Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union.
[20] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.
[21] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees
[22] Commission Staff Working Document, Procedure 2008/0141/COD, p. 25.

related Charter provision as a principle by promoting it, while the Court of Justice believes that it is a right. Nevertheless, the analysis makes it clear that the European legislator uses Article 27 and Article 31 of the Charter in particular for more than simply determining whether European legislation respects or observes the Charter.

4.2 Employment law-related Charter provisions in European jurisprudence

Article 51 of the Charter also addresses the Court of Justice as an institution of the EU. In paragraph 2, it turned out that the drafters of the Charter have left interpretation of the employment law-related Charter provisions as a right or principle to the Court of Justice. This is a point that merits further scrutiny (Section 4.2.1). After that, the focus will be on the influence of the employment law-related Charter provisions on the case law of the Court of Justice. This influence can manifest itself in two ways: through review of legality of secondary EU law (Section 4.2.2) and through the interpretation of primary and secondary EU law (Section 4.2.3).

4.2.1 Rights, principles, or a combination thereof

As mentioned, Articles 51 and 52 of the Charter distinguish between, on the one hand, provisions containing subjective rights and having the status of a right and, on the other hand, provisions containing principles that can be implemented.[23] The Court of Justice has assigned the status of 'right' to the right to an annual period of paid leave under Article 31(2) of the Charter.[24] The Court considered relevant that the text is both mandatory and unconditional in nature and does not need to be further specified by provisions of EU law or national law. In his opinion in the *Obreras* case, Advocate General Pitruzzella concluded that the right to a limitation on maximum working hours and daily and weekly rest periods, as also laid down in Article 31(2) of the Charter, is also a right.[25] Although the Court did not expressly comment on this, it has qualified these rights as fundamental rights.[26] It is unclear whether the same applies to the more generally formulated right to working conditions which respect health, safety, and dignity under Article 31(1) of the Charter. On the

[23] See also Section 4.4 of Gerard's paper in this compilation.

[24] CJEU 6 November 2018, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Willmeroth*); CJEU 6 November 2018, case C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*); CJEU 8 September 2020, joined cases C-119/19P and C-126/19P, ECLI:EU:C:2020:676 (*Francisco Carreras Sequeros and Others*).

[25] Advocate General Pitruzzella 31 January 2019, case C-55/18, ECLI:EU:C:2019:87 (*Obreras*), legal ground 94. According to the Advocate General, the reach of Article 31(2) extends so far that even the implementation of a system that records the actual number of hours worked daily would be governed by it.

[26] CJEU 14 May 2009, case C-55/18, ECLI:EU:C:2019:402 (*Obreras*), legal ground 31 and 32.

one hand, the text is fairly vague. On the other hand, paragraph 1 – like paragraph 2 – offers every worker an unconditional right, which is to say a right that exists regardless of whether or not EU or Member State legislation gives concrete expression to it. In addition, Article 31, which is a specific expression of respect for human dignity,[27] is regarded by some legal scholars as a provision with very great normative weight and importance. The article is also labelled as the most fundamental employment law-related Charter provision that must (therefore) be qualified as a right in its entirety.[28] The right to protection against dismissal for reasons related to maternity from Article 33(2) of the Charter also seems to me to have the status of a right, given its concrete formulation. The same applies to the protection of young people at work under Article 32 of the Charter.

With regard to Articles 27, 28, and 30 of the Charter, it is notable that the text refers to '*under the conditions provided for by Union law and national law and practice*s' (Article 27) and '*in accordance with Union law and national law and practices*' (Articles 28 and 30). The historical explanation in paragraph 2 shows that this phrase was added to these provisions, among others, at the end of the negotiations. In a 2016 ruling, the General Court referred to the wording of Article 27 when it held that '*it follows that Article 27 of the Charter of Fundamental Rights, which does not lay down any directly applicable rule of law, is not in itself sufficient to confer on individuals an individual right to consultation and information which they may invoke as such.*'[29] The trade union could, therefore, not rely directly on the right to consultation and information under Article 27 of the Charter in this case against the European Central Bank.[30] The Court of Justice ruled along the same lines in the *AMS* judgment,[31] also noting that the incompleteness of the wording of Article 27 of the Charter cannot be remedied by reading the article in conjunction with the provisions of Directive 2002/14 establishing a general framework for informing and consulting employees in the European Community. In other words: further concrete expression in European legislation does not supplement the unclear formulation of the Charter provision.

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[27] The Explanation relating to Article 31(1) of the Charter explicitly states that this provision is inspired by Article 26 of the ESC on the right to dignity at work.

[28] R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: Bauer and Willmeroth, MPG,' *Common Market Law Review* 2021/58, p. 1204, with a reference to Advocate General Tanchev's opinion of 8 June 2017, case C-214/16, ECLI:EU:C:2017:439, para. 36 (*King*) and A. Bogg & M. Ford, 'Commentary on Art. 31,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing 2021, p. 889-890. Pennings et al., *Europees arbeidsrecht (MSR no. 2)* 2021/2.4.4.4 also qualify Article 31 of the Charter as a right.

[29] CJEU 13 December 2016, case T-713/14, ECLI:EU:T:2016:727, legal ground 86.

[30] Article 27 of the Charter can, in my view, play a role in the interpretation of Directive 2002/14/EC and any framework agreement between the trade union and the ECB based on that directive. The General Court did not deliver a substantive judgment on that.

[31] CJEU 15 January 2015, case C-176/12, ECLI:EU:C:2014:2 (*AMS*). In this case, too, it was not established that it supposedly concerned a principle, even though the Advocate General had argued that it was.

Although neither the General Court nor the Court of Justice explicitly refers to Article 27 of the Charter as a principle, their respective rulings do actually amount to exactly that.

A similar fate appears to have befallen the right to protection in the event of unjustified dismissal under Article 30 of the Charter. The Court of Justice has not (yet) ruled on this provision, but Advocate General Wahl held in his opinion with the *AGET Iraklis* judgment that the aforementioned *AMS* judgment also appears to apply to Article 30 of the Charter in many respects. In this context, he argued that equally few specific rights can be derived from Article 30.[32] In the immediately following sentence he held as follows: '*All that I can infer directly from the wording of Article 30 of the Charter is, on the one hand, that it does not guarantee a right to permanent employment and, on the other hand, that the essential question is to ascertain what amounts, for the purpose of a restructuring exercise, to a "justified dismissal"*.' In support of his position, the Advocate General refers to two rulings of the General Court of 4 December 2013.[33] Both cases were about a dismissal resolution by the European Parliament. The General Court appears to apply Article 30 of the Charter through the interpretation of Articles 2 and 47 of the Regulation laying down staff regulations of officials and the conditions of employment of other servants of the European Union. However, I have doubts because the articles in this regulation do not contain vague concepts that require explanation. This means that the method of assessment is fairly direct, which is only possible in the case of rights. Nevertheless, the literature, like Advocate General Wahl, currently assumes that Article 30 of the Charter is a principle and relies heavily on the wording of the text that refers to further concrete expression in legislation.[34]

A 2021 General Court judgment proves that the reference to giving concrete expression in legislation is not necessarily what awards the status of principle. Despite the fact that the Charter only recognises the right to collective action 'in accordance with Union law and national law and practices,' according to the General Court, no other standard than Article 28 of the Charter appears necessary to recognise the existence of the right to strike and to review a limitation against that right.[35] The case concerned the decision of the European Parliament's Director-General for Personnel to ban interpreters from going on

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[32] Opinion of Advocate General Wahl 9 June 2016, C-201/15, ECLI:EU:C:2016:429 (*AGET Iraklis*), legal ground 59.

[33] General Court EU 4 December 2013, case T-107/11P, ECLI:EU:T:2013:624 (*EFT/Schuerings*) and case T-108/11P, ECLI:EU:T:2013:625 (*EFT/Michel*).

[34] R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: Bauer and Willmeroth, MPG,' *Common Market Law Review* 2021/58, p. 1204; Pennings et al., *Europees arbeidsrecht (MSR no. 2)* 2021/2.4.4.3.

[35] General Court EU 29 January 2020, case T-402/18, ECLI:EU:T:2020:13 (*Aquino and Others/European Parliament*). For more details of this ruling, see: F. Dorssemont, 'Goed nieuws: Hof van Justitie beschermt stakingsrecht voor de happy few,' *ArA* 2021 (15), 1.

strike. The interpreters did not agree with the ban and initiated proceedings to annul the decision and claim compensation.[36] The interpreters put forward three grounds for their case, the first of which concerned violation of the right to collective action as safeguarded by the Charter and other catalogues. The General Court concluded that there was no legal basis, as required by Article 52 of the Charter, to justify a limitation on the right to strike, thus reviewing the ban directly against Article 28 of the Charter. In the literature, the difference compared to Article 27 of the Charter is attributed to the status of Article 28 of the Charter as a freedom right (the freedom to strike).[37] The reference to giving concrete expression in legislation would, therefore, only relate to the exercise of the right (step 2) and not to its existence (step 1).

4.2.2 Review of legality of secondary EU law

The distinction between a right and a principle is reflected in the review of legality. According to the 2010 Commission Communication mentioned in Section 4.1.2, the considerations in European legislation make judicial review of the Charter possible and easy.[38] The emphasis is on checking whether European legislation is compatible with the Charter and respects the rights and observes principles, as stated in Article 51(1) of the Charter.[39] If a Charter provision includes a subjective right, as is the case with the right to paid annual leave under Article 31(2) and the right to collective action under Article 28, the Court can use that provision to assess whether European legislation is compatible with it (full review of legality).[40]

What role principles play is harder to establish. The aforementioned Article 52(5) of the Charter provides as follows: '*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.*' (underlined by FL). A strict reading of the wording suggests that a review of legality based on principles is only possible if they have been implemented and, therefore, promoted. This

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[36] The procedure rested on Article 270 of the TFEU.

[37] R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: Bauer and Willmeroth, MPG,' *Common Market Law Review* 58 (2021), p. 1204-1205.

[38] Communication from the Commission on a strategy for effective implementation of the Charter of Fundamental Rights of the European Union, COM(2010) 573 final, p. 8.

[39] The Court of Justice can rule on the legality of European legislation in a preliminary ruling procedure (Article 346 of the TFEU) or in a procedure instituted by a Member State, the Parliament, the Commission, or the Council (Article 263 of the TFEU).

[40] Gerards points out that a review against a right is impossible if the regulation to be reviewed, for example an Equality Directive, itself specifically gives concrete expression to the relevant Charter provision; according to her, it must be assumed that the concrete expression itself cannot infringe the fundamental right (see Section 4 of Gerards' contribution in this volume).

reading is convincingly rejected in the literature by referring to the useful effect doctrine.[41] Moreover, it is notable that the aforementioned Commission Communication from 2010 does not in any way link the oversight function of principles to legislation promoting the principle. This does not alter the fact that the intensity of a legality review against a principle will be much more limited than when it concerns a right.[42] Unlike a right, a principle requires concrete expression in policy, so that the European legislator has a broad margin of appreciation.

I am not aware of any cases where the Court of Justice reviews the legality of secondary EU law against one of the six employment law-related Charter provisions. That is why I am adopting a somewhat broader focus this time. In the field of employment law, one ruling stands out that teaches us more about what such a review can look like: the *Test-Aschats* judgment from 2011.[43] It concerned a dispute between an employers' organisation and the Belgian Council of Ministers. The employers' organisation had filed a claim for annulment of the Belgian law on combating discrimination between women and men in insurance matters. In this law, the Belgian legislator made use of an exception to the principle of equality provided for in Article 5(2) of Directive 2004/113/EC. The preamble to Directive 2004/113/EC refers to Articles 21 and 23 of the Charter and states that equality between men and women is a fundamental principle of the Union. In a reference for a preliminary ruling, the Belgian court asked the Court of Justice whether Article 5(2) of Directive 2004/113/EC was in line with these Charter provisions. The Court considered that Article 5(2) is incompatible with Articles 21 and 23 of the Charter, because the Directive provision offers Member States the unlimited possibility to allow an exception to the principle of equality. The result was that the directive provision had to be considered invalid after a certain transitional period because it conflicted with the Charter. The Belgian provision has, therefore, suffered the same fate as a national implementing act.

The broad scope for derogation allowed under Directive 2004/113/EC is similar to Directive 2003/88/EC on certain aspects of the organisation of working time. This directive, also called the Working Time Directive, offers Member States fairly ample scope to deviate from the maximum number of working hours per week and month. This may conflict with Article 31(2) of the Charter, which stipulates that every employee is entitled to a limitation of the maximum working hours and to daily and weekly rest periods. In view of

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[41] J. Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice,' *European Constitutional Law Review* 2015/2, p. 337.

[42] S. Peers & A. Prechal, 'Commentary on Article 52,' in: S. Peers et al. (ed.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing 2021, p. 1663; J. Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice,' *European Constitutional Law Review* 2015, 2, p. 338 and the reference to other literature in note 103.

[43] CJEU 1 March 2011, case C-236/09, ECLI:EU:C:2011:100 (*Test-Aschats*).

the *Test-Aschats* judgment, it is not inconceivable that the Court will consider the broad discretion that the Working Time Directive offers Member States to be contrary to Article 31(2) of the Charter. Such a full review of legality is conditional on there being a right to review against. The *Test-Aschats* judgment revolves around Articles 21 and 23 of the Charter. The right to equality has traditionally been of a fundamental nature and has been labelled as a right by the Court of Justice.[44] As explained in the previous section, I expect that the maximum number of working hours and rest periods per week from Article 31(2) of the Charter is also a right, which makes a full review of legality possible.

4.2.3 Interpretation of EU law

The legal obligation to both respect and promote rights and principles also translates into an obligation for the Court of Justice to promote the employment law-related Charter provisions in the interpretation of EU law, unless there is another fundamental right that outweighs the employment law-related Charter provisions.

Interpretation of primary EU law

The 2015 *AGET Iraklis* judgment[45] revolved around the closure of three Greek factories and the related collective dismissals of employees. Greek law provided that the Minister of Social Affairs could prohibit collective dismissals based on job market conditions, the situation of the company, and the interests of the national economy. This Greek rule was challenged by the company *AGET Iraklis* on the basis of freedom of establishment and freedom to conduct a business. In the context of proportionality, the Court of Justice held as follows: '*Thus, a national regime imposing a framework, as referred to in paragraph 83 of this judgment, must seek, in this sensitive area, to reconcile and to strike a fair balance between the interests connected with the protection of workers and of employment, in particular protection against unjustified dismissal and against the consequences of collective dismissals for workers, and those relating to freedom of establishment and the freedom of economic operators to conduct a business enshrined in Articles 49 TFEU and Article 16 of the Charter.*'[46] Although the Court deemed a preventive review of collective dismissals potentially compatible with economic freedoms, the national rule, and thus the right to protection in the event of unjustified dismissal under Article 30 of the Charter, lost out because of the national implementing provisions that were formulated too vaguely and generally.

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[44] CJEU 19 January 2010, case C-555/07, ECLI:EU:C:2010:21 (*Kücükdeveci*).

[45] CJEU 21 December 2016, case C-201/15, ECLI:EU:C:2016:972 (*AGET Iraklis*).

[46] CJEU 21 December 2016, case C-201/15, ECLI:EU:C:2016:972 (*AGET Iraklis*), legal ground 90. Legal ground 89 explicitly ties in with Article 30 of the Charter when it comes to the protection against unjustified dismissal.

Just like the right to strike under Article 28 of the Charter did in the *Viking* judgment from 2007 (see Section 3), Article 30 of the Charter fulfils a defensive role in the balancing act as a possible justification for the infringement of the employer's freedom of establishment. It is also notable that the Court, in addition to Article 30, also considered Article 16 of the Charter when assessing whether the national scheme can be justified as an infringement. The Court considered that any justification of the freedom of establishment must be consistent with the fundamental rights under the Charter, and therefore also with the freedom to conduct a business under Article 16. As a result, the right to protection against unjustified dismissal had to compete not only with the freedom of establishment, as the right to strike had to do in the *Viking* judgment, but also with the freedom to conduct a business in the context of proportionality. Although freedom to conduct a business is derived from the freedom of establishment and the substance of the two rights does not appear to differ essentially,[47] it cannot be denied that the economic objectives in the balancing act appear to be given extra weight because they are now brought up twice during the review stage.

Interpretation of secondary EU law

In interpreting secondary law, the Court also relied on the employment law-related Charter provisions. The right to strike under Article 28 of the Charter was invoked in three judgments interpreting Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and flight cancellation or a long delay.[48] Article 5 of this Regulation provides that an airline need not offer passengers compensation if the flight delay or cancellation was *caused by extraordinary circumstances*. In short, the Court held that a strike announced in advance in a timely manner does not constitute extraordinary circumstances. In these cases, the Court used the fundamental right not to protect the group for which it was written (the workers and unions), but to protect passengers.

The other aspect of Article 28 of the Charter – the right to collective bargaining – featured prominently in four judgments interpreting Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.[49] Article 6 of the Directive allows Member States to stipulate that

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[47] For a more extensive examination of the freedom to conduct a business, see: B.P. ter Haar, 'Sociaal recht in conflict met de vrijheid van ondernemerschap: is het HvJ EU een nieuwe constitutionele rechter,' *TAP* 2018, 16: L.G. Verburg, 'Ter Visie – het grondrecht van de vrijheid van ondernemerschap: een nieuw geluid,' *TAO* 2017, 3.

[48] CJEU 23 March 2021, case C-28/20, ECLI:EU:C:2021:226 (*Airhelp*); CJEU 6 October 2021, case C-613/20, ECLI:EU:C:2021:820 (*Eurowings*).

[49] CJEU 12 October 2010, case C-45/09 (*Rosenbladt*); CJEU 8 September 2011, joined cases C-297/10 and C-298/10, ECLI:EU:C:2011:560 (*Hennings en Mai*); CJEU 13 September 2011, case C-447/09, ECLI:EU:C:2011:573 (*Deutsche Lufthansa A-G*); CJEU 19 September 2018, case C-312/17 (*Surjit Singh Bedi*). Incidentally, the employer's right to collective bargaining, also enshrined in Article 28 of the Charter, also played a role in *Airhelp*

differences of treatment on grounds of age do not constitute discrimination, provided that they are objectively and reasonably justified by a legitimate purpose under national law and the means of achieving that purpose are appropriate and necessary. Although the text refers to Member States, the case law makes it clear that social partners can also adopt measures that justify age-based discrimination. According to Advocate General Trstenjak, this interpretation does justice to the realisation of the fundamental right of freedom of contract of social partners under Article 28 of the Charter.[50]

It is interesting how far Article 28 of the Charter can or even should be taken into account when reviewing the legitimate purpose and the measure as appropriate and necessary. The national court asked this question in one of four rulings: the *Hennings and Mai* case. In response, the Court of Justice held as follows: '*The nature of measures adopted by way of a collective agreement differs from the nature of those adopted unilaterally by way of legislation or regulation by the Member States in that the social partners, when exercising their fundamental right to collective bargaining recognised in Article 28 of the Charter, have taken care to strike a balance between their respective interests.*'[51] In one of the other rulings, the *Rosenbladt* ruling, the Court furthermore noted that: '*The fact that the task of striking a balance between their respective interests is entrusted to the social partners offers considerable flexibility, as each of the parties may, where appropriate, opt not to adopt the agreement*.'[52] The Court's intention with these general formulations is unclear to me. Advocate General Cruz Villalón argued, also in light of the *Rosenbladt* ruling, that the fact that a provision in a collective bargaining agreement is the result of collective bargaining strengthens the legitimacy of that provision in the context of justification.[53] However, the Court's substantive review in the four judgments does not show this. In fact, in the *Surjit Singh Bedi* case, the German government had raised that social partners would not be obliged to choose the most just, reasonable or appropriate solution in the collective bargaining agreement and that they would enjoy privileges under Article 28 of the Charter because of freedom of collective bargaining. The Court did not address this and merely repeated the general wording from the *Hennings and Mai* judgment quoted above.[54]

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and *Eurowings*, where the airline argued that having to compensate passengers violated its right to collective bargaining because it would (have to) agree to the strikers' demands sooner.

[50] Advocate General Trstenjak's opinion of 28 April 2010, case C-45/09, ECLI:EU:C:2010:227 (*Rosenbladt*), legal ground 102. The reference to the Charter is included in note 49 in the relevant recital. It also follows from recital 36 of the preamble to Directive 2000/78 that Member States may entrust the social partners with the implementation of the Directive (this time without reference to Article 28 of the Charter).

[51] CJEU 8 September 2011, joined cases C-297/10 and C-298/10, ECLI:EU:C:2011:560 (*Hennings and Mai*), legal ground 66.

[52] CJEU 12 October 2010, case C-45/09 (*Rosenbladt*), legal ground 67.

[53] Advocate General Cruz Villalón 19 May 2011, case C-447/09, ECLI:EU:C:2011:321 (*Deutsche Lufthansa A-G*), legal ground 82.

[54] CJEU 19 September 2018, case C-312/17 (*Surjit Singh Bedi*), legal ground 68.

Where a Charter provision has asserted its influence without discussion is in case law interpreting Article 7 of the Working Time Directive. This provision in paragraph 1 of that article reads as follows: '*Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.*' Paragraph 2 adds: '*The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.*' As early as in 2001, Advocate General Tizzanon recognised the importance of the right to annual leave from Article 32(2) of the Charter. In the light of Article 32(2) of the Charter, he argued that Article 7 of the Working Time Directive precluded a national regulation providing that the right to annual leave only arises once a worker has worked for 13 continuous weeks.[55] The Court reached the same conclusion, albeit without referring to Article 31(2) of the Charter.[56] After the Charter became binding in 2009, the Court also embraced Article 31(2) of the Charter as a means of interpretation for Article 7 of the Working Time Directive. This first occurred in the 2011 *Williams* ruling where the Court found as follows: '*The right to such an annual period of paid leave is, moreover, expressly laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union, which Article 6(1) EU recognises as having the same legal value as the Treaties.*' [57] This general standard formulation is repeated[58] many times in subsequent judgments and seems to be a kind of mantra that is repeatedly invoked without properly clarifying what normative impact the fundamental right has on the interpretation of Article 7 of the Working Time Directive in concrete terms.[59] Yet the weight of this general standard formulation should not be underestimated. On this basis, a trend has begun that has led to a broad and thus employee-friendly interpretation of Article 7 of the Working Time Directive.

Although most of the judgments cite Article 31(2) of the Charter as the provision in light of which Article 7 of the Working Time Directive is interpreted, it is notable that the Court's 2012 *Heimann and Toltschin* judgment

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[55] Advocate General Tizzanon 8 February 2001, case C-173/99, ECLI:EU:C:2001:81 (*BECTU*), legal ground 26-28.

[56] CJEU 26 June 2001, case C-173/99, ECLI:EU:C:2001:356 (*BECTU*), legal ground 41 and 43. The Court considered relevant that Article 7 of the Working Time Directive did not allow for a derogation.

[57] CJEU 15 September 2011, case C-155/10, ECLI:EU:C:2011:588 (*Williams*), legal ground 18. This reasoning also governs financial compensation for annual leave not taken at the end of the employment relationship, see CJEU 19 September 2013, case C-579/12, ECLI:EU:C:2013:570 (*Strack*).

[58] The same happens with respect to other topics from the Working Time Directive, such as the right to a maximum number of weekly working hours (48) and daily rest time. See CJEU 14 May 2019, case C-55/18, ECLI:EU:C:2019:402 (*CCOO*); CJEU 17 March 2021, case C-585/19, ECLI:EU:C:2021:210; CJEU 2 March 2023, case C-477/21. ECLI:EU:C:2023:140.

[59] For recent case law, see: CJEU 2 March 2023, case C-477/21, ECLI:EU:C:2023:140 (*MÁV-START Vasúti Személyszállító Zrt*); CJEU 25 November 2021, case C-214/20, ECLI:EU:C:2021:909 (*MG*).

provides an interpretation of both Article 31(2) of the Charter and Article 7 of the Working Time Directive. This ruling appears to have been a prelude to the high-profile 2018 *Bauer and Willmeroth* rulings.[60] In these rulings, the Court held that the death of an employee does not result in the total retroactive loss of the vested right to an end-of-service financial benefit. National law to the contrary had to be disapplied under Article 31(2) of the Charter if a Directive-compliant interpretation was not possible (which was the case according to the national court). The Court thereby attributed horizontal direct effect to Article 31(2) of the Charter,[61] meaning that an individual can invoke the Charter provision before another individual.[62] The Court went so far as to stipulate that the national court must ensure that the legal successor of a deceased worker obtains financial compensation for outstanding paid annual leave entitlement. This finding is quite startling, since the Court usually leaves it to the national court to determine what should replace the national law that is to be disapplied.[63] The Court confirmed the horizontal direct effect in the *Max Planck* ruling of the same date, where the Court introduced a duty of care and information on the part of the employer as a condition for the expiration of holiday leave entitlement after a certain reference period, or carry-over period.[64]

Horizontal direct effect seems to be reserved for employment law-related Charter provisions with the status of a right, such as Article 31(2) of the Charter. In the *AMS* ruling, the Court held that the right to information and consultation under Article 27 of the Charter is not sufficient to confer a subjective right on individuals that can be invoked as such.[65] Although the Court does not explicitly state the distinction between rights and principles, several authors attribute the anomalous outcome in *AMS* to the interpretation of Article 27 of the Charter as a principle.[66]

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[60] CJEU 6 November 2018, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer and Willmeroth*).

[61] Cf. A. Hartkamp, 'Rechtstreekse doorwerking van het EU Handvest van de grondrechten in privaatrechtelijke rechtsverhoudingen,' *AA* 2019/0218. See also: A. Eleveld, 'Rechtstreekse horizontale werking van grondrechten van de Europese Unie. De lessen uit Egenberger, Bauer en Cresco Investigation,' *NTER* 2019/34, p. 88-95; M. de Mol, 'Het leerstuk van de horizontale directe werking van Unie-grondrechten op de voet gevolgd,' *AA* 2019.

[62] Needless to say, invoking this in a national dispute requires a link to EU law under Article 51(1) of the Charter (see below Section 5.1). For this reason, Ter Haar speaks of a multi-stage form of horizontal direct effect, see: B. ter Haar, 'Rechtstreekse horizontale werking van het EU Handvest in getrapte vorm,' *ArA* 2021/3, p. 84.

[63] Another employment law-related example is provided in CJEU 23 January 2019, case C-193/17, ECLI:EU:C:2019:43 (*Cresco Investigation*). In this judgment, the Court ruled that discriminatory national legislation, which gave the right to a day off on Good Friday only to people with certain religious beliefs, must not only be disapplied in the absence of a Directive-compliant interpretation, but also grant a right to a day off to everyone (upward equalisation). This followed directly from Article 21 of the Charter.

[64] CJEU 6 November 2018, case C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*). The same goes for a limitation period, CJEU 22 September 2022, case C-120/21, ECLI:EU:C:2022:718 (*LB*). For a critical analysis of procedural impact in the context of the division of powers between the EU and Member States, see: E.F. Grosheide, Het principe van procedurele autonomie bij recht op vakantie: ten onrechte buitenspel gezet?' *TRA* 2022/93.

[65] CJEU 15 January 2014, case C-176/12, ECLI:EU:C:2014:2 (*AMS*).

[66] R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: Bauer and Willmeroth, MPG,' *Common Market Law Review 2021*/58, p. 1189 & 1204; M. Delfino, The Court and the Charter. A 'Consistent' Interpretation of Fundamental Social Rights and Principles,' *European Labour Law Journal* 2015/1, p. 91. Nevertheless, there are other, more nuanced voices in the literature. For a run-down, see: P.H. Olsson, 'Possible Shielding Effects of

Article 27 on Workers' Rights to Information and Consultation in the EU Charter of Fundamental Rights,' *International Journal of Comparative Labour Law and Industrial Relations* 2016/2, Section 4. See also: N. Lazzerini, '(Some of) the Fundamental Rights Granted by the Charter May Be a Source of Obligations for Private Parties: AMS,' *Common Market Law Review* 2014/51, Section 6.3.

5 Effect and influence on Dutch employment law

5.1 Scope of employment law-related Charter provisions

Member States are bound by the Charter when they implement EU law (Article 51(1) of the Charter), which, according to the explanation, means 'acting within the scope of EU law.' A feature of employment law is the shared competence between the Union and the Member States (Article 2(2) of the TFEU). In line with this, the TFEU provides that employment law directives contain minimum rules (Article 153(2) of the TFEU) allowing Member States to introduce or maintain a higher degree of protection (Article 153(4) of the TFEU). If Member States decide on a higher level of protection, they are no longer implementing EU law, the 2019 *TSN* and *AKT* rulings show. Both rulings involved a national rule on holiday leave entitlement over and above the statutory minimum. Although Article 15 of the Working Time Directive 2003/88 allows Member States to provide workers with more protection than the directive requires, it does not mean that Member States who do so do so on the basis of EU law, the Court ruled.[1] With this finding, the Court limited the role of Article 31(2) of the Charter to the minimum effect given to it by the European legislator in Article 7 of the Working Time Directive.[2] This line is also reflected in Dutch case law. In an opinion from 2023, Advocate General De Bock held as follows: '*[…] The Directive does not apply to (the conditions for granting and lapsing of) such additional days of holiday leave (the holiday leave entitlement over and above the statutory minimum), nor do the "protective rules" that the CJEU has laid down with respect to the minimum period of Article 7(1)*.'[3]

In previous judgments in the field of social law, too, the Court of Justice used a restrictive interpretation of 'implementing EU law.' According to the Court, there must be a direct link between the EU law and the relevant national measure challenged under the Charter. The 2014 *Hernández* ruling centred on a Spanish rule that compensates employers for wages paid while a dismissal procedure in court takes longer than 60 days. If the employer goes insolvent, the employee can claim these wages from a fund. The Insolvency Directive

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1 CJEU 19 November 2019, joined cases C-609/17 and C-610/09, ECLI:EU:C:2019:981 (*TSN and AKT*), legal ground 67.

2 B. ter Haar, 'Rechtstreekse horizontale werking van het EU Handvest in getrapte vorm,' *ArA* 2021/3 Ter Haar shows that it ensues from the *TSN* and *AKT* judgments that the independent meaning of Article 31(2) of the Charter is limited (if not non-existent); Article 7 of the Working Time Directive is always used to give substance to this Charter provision.

3 Opinion of Advocate General De Bock 12 May 2023, ECLI:NL:PHR:2023:494, Section 6.4. See also opinion of Advocate General De Bock 20 January 2023, ECLI:NL:PHR:2023:93, Section 4.11. The Supreme Court of the Netherlands has since handed down its judgment but does not comment on this aspect, Supreme Court 17 November 2023, ECLI:NL:HR:2023:1603.

invoked to argue that EU law was being implemented was judged insufficient by the Court because the purpose of the national rule differed from that of the Insolvency Directive.[4] The *Hernández* ruling sought to invalidate the national rule by invoking the general principle of equality under Article 20 of the Charter. Two more recent rulings raised the more employment law-related right to protection against unjustified dismissal from Article 30 of the Charter, in addition to Article 20 of the Charter.[5] Again, the Court opted for a restrictive interpretation. Both cases involved collective dismissals where workers were covered by two different national rules that imposed their own sanctions for unjustified dismissal. The Court ruled that the further rules for protection afforded to workers who are the victim of unlawful collective dismissal are not related to the procedural notification and consultation obligations arising from Directive 98/59 in the event of collective dismissal.[6] Since the subject therefore remains within the competence of the Member States, the Charter does not apply.

These three rulings involved an additional, related right in addition to the rights set forth in the relevant employment law-related minimum directive. In this sense, the rulings differ from the *TSN* and *AKT* rulings, which involved the extension of a specific minimum right granted by the directive (also known as over-implementation). However, in my view, the *Hernández* ruling does serve as a precursor to the *TSN* and *AKT* rulings. Indeed, the Court already held in the *Hernández* ruling that the Charter does not apply if Member States apply more favourable regulations outside the framework of the system of directives.[7]

There is something to be said against the restrictive interpretation. Advocate General Bot argued in his opinion prior to the *TSN* and *AKT* rulings that it cannot be assumed that Member States, when they go beyond the essence of minimum protection, enter a legal space where they are completely free. Advocate General Bot seems to interpret the shared competence enshrined in EU law differently. Vos also points this out when he writes that Advocate General Bot regards Article 15 of the Working Time Directive as the authority for Member States to adopt more favourable rules (i.e. implementation), while the Court of Justice emphasises that Article 15 only retains the competence of Member States to take more far-reaching measures.[8]

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4 CJEU 10 July 2014, case C-198/13, ECLI:EU:C:2014:2055 (*Hernández*). The insolvency aspect in the national rule was insufficient by itself.

5 CJEU 17 March 2021, case C-652/19, ECLI:EU:C:2021:208 (*KO/Consulmarketing SpA*); CJEU 4 June 2020, case C-32/20, ECLI:EU:C:2020:441 (*TJ/Balga Sri*).

6 In the *AGET Iraklis* ruling, too, the Court states that Directive 98/95 deals only with the procedural aspects of collective dismissal.

7 CJEU 10 July 2014, case C-198/13, ECLI:EU:C:2014:2055 (*Hernández*), legal grounds 44-45.

8 See also J. Vos, 'Bovenwettelijke vakantie en de reikwijdte van het EU-recht,' *AR Updates* 4 March 2020. Advocate General Bobek embraces Advocate General Bot's view in an opinion rendered after the *TSN* and *AKT* rulings, opinion of Advocate General Bobek of 2 July 2020, case C-826/18, ECLI:EU:C:2020:514 (*Stichting Varkens in Nood*), legal ground 106.

Advocate General Bot also refers to the *Parkwood* ruling from 2013[9] to back up his view that the Charter should indeed apply to over-implementation in *TSN* and *AKT*. The *Parkwood* case was about the interpretation of Article 8 of Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of undertakings or businesses. It provides that Member States are allowed to apply or introduce provisions that are more favourable to workers; the same minimum provision as Article 15 of the Working Time Directive. In this case, too, the legality of a national measure that went beyond the minimum level of the directive was at issue. According to the Court, the national extension in question was not permitted because it conflicted with the freedom to conduct a business under Article 16 of the Charter. What stands out is that this time the Court did not ask itself whether or not the Charter applied, while it could now also be argued that it was a matter of over-implementation. What is the difference compared to the *TSN* and *AKT* rulings? I do not rule out that the Court will attach a different value to Article 16 of the Charter than to the employment law-related Charter provisions because of the economic background of the European Union.[10] This possible explanation leads to the strange situation that over-implementation in the field of social policy can be limited for the sake of freedom to conduct a business, but cannot be strengthened using the employment law-related Charter provisions.

5.2 Reinforcing worker protection …

The most important way in which the employment law-related Charter provisions have a bearing on Dutch employment law is through the transposition of directives into national law. In transposing the 22 directives from section 4.1.1, the Dutch legislator did not consider the employment law-related Charter provision referenced in the relevant directive. This in itself is not surprising, because it turned out previously that the European legislator often does no more than repeat the text of an employment law-related Charter provision in the preamble of the directive. Even where it concerns promotion or could concern promotion, the European legislator does not, barring a few

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[9] CJEU 18 July 2013, case C-426/11, ECLI:EU:C:2013:521 (*Alemo-Herron/Parkwood*).

[10] It is also striking that the Court has no qualms about bringing a stated case within the scope of the Charter. One example is CJEC 18 June 1991, case C-260/89, ECLI:EG:C:1991:254 (*ERT*). In this judgment, the Court provided a broad interpretation of Article 51(1) of the Charter by accepting that there is already 'implementation of Union law' if a Member State relies on a justification for an obstacle to free movement. CJEU 15 July 2021, case C-709/20, ECLI:EU:C:2021:515 (*CG*), legal grounds 87-88 is always worth a mention in this context. On this latter ruling, Pennings writes in his article 'Heeft het Handvest van de Grondrechten van de EU meerwaarde?' *TRA* 2022/4, Section 4.2.1 that this is another case that illustrates how broadly the Court is able to interpret the Charter's scope of application under certain circumstances. Interestingly, this case also concerned a national scheme that was more favourable than the minimum level prescribed in Directive 2004/38/EC. The Court nevertheless ruled that the Charter was applicable, basing itself on the fundamental right of free movement granted in Article 21(1) of the TFEU.

exceptions, provide insight into what effect this has had on the legislative process. It is, therefore, mainly the rulings of the Court of Justice that introduce the employment law-related Charter provisions into Dutch employment law. In light of the analysis in Section 4.2.2, it will not be surprising that the right to annual leave under Article 31(2) of the Charter – through the link with Article 7 of the Working Time Directive – has left an important mark on Dutch employment law, more specifically the application and interpretation of Sections 7:634 to 7:645 of the Dutch Civil Code. Under the influence of the case law of the Court of Justice, these provisions have been given a broad worker protection-oriented interpretation in Dutch case law.[11]

The rulings of the Court of Justice on the right to collective bargaining from Article 28 of the Charter also have an impact on Dutch employment law, but their effect is relatively limited. While underlying the importance of the right to collective bargaining, the rulings actually only make it clear that the right does not give social partners licence to make discriminatory agreements. The limited influence results from the fact that it concerns the interpretation of a directive provision that is not based on Article 28 of the Charter, but on the right to equality. In that sense, the rulings differ essentially from the rulings on the interpretation of Article 7 of the Working Time Directive, which is a concrete expression of Article 31(2) of the Charter. In these rulings, Article 31(2) of the Charter undoubtedly played a leading role in European case law and thus strengthened the right to paid annual leave in Dutch employment law.

The impact of Article 31(2) of the Charter is partly due to the interpretation of this provision as a right. As follows from Section 4.1.2, the Court of Justice formulated a concrete instruction in the joined *Bauer* and *Willmeroth* cases on how national courts must safeguard the violated employment law-related Charter provision in a private employment law dispute: in the event of conflict, courts must override national law. This application has made its mark on Dutch employment law, provisionally culminating in a Supreme Court ruling of 6 June 2023.[12] The case before the Supreme Court concerned an employee who worked as a lawyer at a law firm and, after the end of the employment relationship, demanded that unused holiday leave entitlement accrued since commencement of employment (2005 to 2020) be paid out to him. With regard to statutory holiday leave, the Court of Appeal in The Hague rejected the employer's appeal to both the expiration period (Section 7:640a of the Dutch Civil Code) and the limitation period (Section 7:642 of the Dutch Civil Code). According to The Hague Court of Appeal, the employer had not fulfilled its duty of care and information under Article 7 of the Working Time Directive

[11] See, for example: Court of Zeeland-West-Brabant 6 August 2021, ECLI:NL:RBZWB:2021:4070, legal ground 4.124.14; The Hague Court of Appeal, 16 November 2021, ECLI:NL:GHDHA:2021:2386, legal ground 5.12-5.20.
[12] Supreme Court of the Netherlands 23 June 2023, ECLI:NL:HR:2023:955, *JAR* 2023/195.

and Article 31(2) of the Charter. These provisions oblige employers to actually enable employees to exercise their right to statutory holiday leave. The employer failed to do so in this case, or fell short at least, because the employer had not informed the employee of the applicable expiration and limitation periods for statutory holiday leave entitlements. While the statutory expiration period from Section 7:640(1) of the Dutch Civil Code could be interpreted in accordance with the Directive, this was not possible with the limitation period from Section 7:642 of the Dutch Civil Code. As a result, this provision remained inapplicable due to conflict with Article 31(2) of the Charter. In line with the opinion of Advocate General De Bock, the Supreme Court rejected the appeal against this ruling.

The Supreme Court's decision makes it clear that entitlement to statutory holiday leave does not expire and claiming it is not subject to expiration simply by the passage of time. The terms are subject to conditions: the employer is expected to ensure in concrete terms and in all transparency that the employee actually has the opportunity to take their statutory paid holiday leave and, if necessary, to formally encourage employees to take their leave. The employer cannot evade its duty of care and information by claiming that it is the employee's own responsibility. The case before the Supreme Court involved a lawyer whose legal practice actually revolved around holiday leave legislation. He was, therefore, very well aware, probably even more so than his employer, of the statutory expiration and limitation periods that would apply if he were to not take his holiday leave. The employer had nevertheless failed to fulfil its duty of care and information, with the Court of Appeal in The Hague pointing to the unequal power relationship between the parties. This is an interesting observation. Employees' social position plays a role in what parties can and may expect from each other in the context of good employee and employer practices (Section 7:611 of the Dutch Civil Code). In my opinion, the fact that the social position of the employee in question is not relevant to the compatibility of the limitation period with the right to paid annual leave can only be explained by the fundamental nature of Article 31(2) of the Charter.
This approach taken by the Supreme Court could have significant consequences for Dutch law in the short term. There has been uncertainty in the Netherlands for some time over the question of whether a worker is a self-employed person or an employee. This lack of clarity is such that the Dutch Tax and Customs Administration has not enforced this distinction for years. A recent bill submitted for consultation is intended to lead to legislation that clears up this distinction.[13] This would be a clarification based on existing case law and the idea is for the Dutch Tax and Customs Administration to resume

[13] Draft bill on clarification on the classification of employment relationships and presumption of law: https://www.internetconsultatie.nl/wetverduidelijkingbeoordelingarbeidsrelatiesenrechtsvermoeden/ b1#sectie-waarkuntuopreageren.

enforcement from January 2025. There is a great risk that the Dutch Tax and Customs Administration will soon designate a large group of self-employed people as 'employees', and consider them to have been employees from the moment they were contracted.[14] Since self-employed professionals are not entitled to paid holiday leave, their reclassification as 'employees' means that they can claim pay for statutory holiday leave with retroactive effect, backdated to the start of their employment. The decision of 6 June 2023 suggests that the Supreme Court will disapply the expiration and limitation period, since (as it turns out) the employer has not fulfilled its duty of care and information in the past. This notion is reinforced by the *King* ruling, where the Court of Justice held, referring to Article 31(2) of the Charter, that it is not important that the employer wrongly believed that the worker was self-employed and was, therefore, not entitled to paid annual leave. In the words of the Court, it is up to the employer (and not the employee) to gather all information on obligations regarding the right to holiday leave. The lack of clarity on whether a worker is to be classified as an 'employee' or as a 'self-employed professional' creates a responsibility in terms of risk and costs that is for the employer to bear.[15]

Dutch lower case law already provides examples of cases where such a claim was successfully brought by a worker and the expiration period and limitation period were disapplied with reference to Article 31(2) of the Charter.[16] This outcome is fair for workers who were 'forced' by a company to go self-employed, while it was clear to everyone that they were indeed employees. However, this is not always clear. There are plenty of (small) employers who actually do not know whether their workers are 'employees' or 'self-employed'. You can hardly blame them, since even the Dutch Tax and Customs Administration does not enforce this distinction because it is so diffuse. In addition, there are many workers (in healthcare and IT, for example) who, out of their own free will, chose to become self-employed because of the higher hourly rate compared to the hourly rate that employees are paid.[17] In my opinion, these aspects should play a role in assessing whether an employer has fulfilled its duty of care and information. Dutch courts must ensure that the fundamental nature of Article 31(2) of the Charter does not block their view of

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[14] See E. Verhulp, 'Werknemer met terugwerkende kracht?' *TRA* 202/51.

[15] CJEU 29 November 2017, case C-214/16, *JAR* 2018/17 (*King*). In this case, the English court had already established that the worker was to be considered an 'employee' under the Working Time Directive, while the employer had assumed that the worker was a self-employed person and, therefore, fell outside the scope of the Directive. See my annotation in *ECHR* 2018/33 for more details about this judgment.

[16] See, for example, Court of The Hague 30 March 2022, ECLI:NL:RBDHA:2022:2997, *JAR* 2022/112, with an annotation by Stege.

[17] In healthcare, workers often refuse to go onto the payroll as employees and are willing only to work on a self-employed basis. The same goes for IT professionals. However, if they perform work for a company that is part of the organisational structure, there is a good chance that they are and were employees, and not self-employed.

reasonableness and fairness within the typical dynamics of Dutch employment law. After all, the right to holiday leave is not absolute.

5.3 … but also a risk of erosion of worker protection

A core subject of employment law is the right to strike. This also, however, happens to be an area where the EU has no specific regulatory competence (Article 153(5) of the TFEU), meaning that the European legislator is not allowed to adopt directives on the basis of the ordinary legislative procedure to give concrete expression to Article 28 of the Charter.[18] Even so, the lack of concrete expression does not put the topic of industrial action out of bounds for the Court of Justice. As shown in Section 4.2.3, the Court takes Article 28 of the Charter into account in the interpretation of secondary EU law, which as such is not based on the employment law-related Charter provision. Specifically for the right to strike, the *Airhelp* and *Eurowings* rulings discussed in that section, on the interpretation of Article 5(3) of Regulation 261/2004, are relevant.[19] As mentioned, the strike action in both these cases did not count as a special circumstance on the basis of which the airline did not have to compensate passengers. The strike was inherent in the normal course of business over which the company could exercise effective influence by agreeing to the union's demands. I have already noted that the rulings relate to passenger rights and do not explicitly state that only legitimate strikes cannot constitute special circumstances. Yet there seems to be something of a distinction. It is notable that the Court explicitly explains, superfluously, when a strike can be considered a special circumstance, namely if the strike has its origins in demands that only the government can meet.[20] The Court also repeatedly points out the importance of the fact that the strike was announced in a timely manner in the case in question, which suggests that a strike that was not announced in a timely manner (earlier) can be interpreted as being a special circumstance.[21] In both cases, the company could be deemed to have no actual influence on the strike.

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[18] It seems possible to me to adopt legislation on the subject on the basis of unanimity (otherwise: opinion of Advocate General Mengozzi of 23 May 2007, case C-341/05, ECLI:EU:C:2007:291, legal ground 57 (*Laval*)). The European Commission attempted to do this with the so-called Monti II proposal (COM(2012) 130), which sought to reconcile fundamental economic and social rights. The proposal met with resistance from the Member States.

[19] The relevance of these rulings to the employment law-related right to strike under Article 28 of the Charter is disputed in the literature. Some authors believe that there is something that can be learnt from this, cf: Verheyen & Pecinovsky, 'Staking als buitengewone omstandigheid: Hof van Justitie verzoent belangen van reizigers en werknemers,' *Arbeidsrecht Journaal* 2021, Sections 13 & 21; Truxal & Drew, 'Consumers, air carriers and workers in the European Union: two sides of the triangle,' *Air & Space Law* 2022/1, p. 123-124, and others believe there is not, see F. Dorssemont, 'Het recht op collectieve actie versus de economische vrijheden,' *ArA* 2021/3, p. 49-51.

[20] CJEU 23 March 2021, case C-28/20, ECLI:EU:C:2021:226 (*Airhelp*), legal ground 45.

[21] CJEU 23 March 2021, case C-28/20, ECLI:EU:C:2021:226 (*Airhelp*), legal ground 30 (where the Court links this circumstance to the criterion that the strike action must be inherent in the normal exercise of that undertaking's activity) and legal grounds 32-33 (where it is linked to the criterion of foreseeability). The *Krusemann* ruling does not detract from this. In this ruling, the Court of Justice did not identify a wildcat strike (i.e. a strike without union involvement) as an extraordinary circumstance either, as the company had abruptly announced a restructuring plan that led to some of the workers calling in sick in protest. For that reason, the company could not argue that the

These findings of the Court are interesting because it is not outrageous to think that if the employer has no actual influence on the strike, the strike will be disproportionate in relation to the freedom of establishment and freedom to conduct a business under Article 16 of the Charter. This observation is very reminiscent of the 2007 *Viking* and *Laval* rulings where the right to strike collided with economic freedoms of movement (see also Section 3). The *Viking* ruling is particularly relevant in this regard, as it saw the Court hold that strike action violates the freedom of establishment and is only permissible as a last resort. In other words, only if the union has no other means left to achieve the result sought can a strike be justified. I do not exclude the possibility that the Court of Justice may also find that an infringement is not justified if the employer has no influence on the strike, and in particular on its termination.

In *Viking*, the Court explicitly formulated the last resort review as a ground rule that it must always be met in order to justify the strike in the context of freedom of establishment. In light of the *Airhelp* and *Eurowings* rulings, it cannot be ruled out that the same applies to advance notice of the strike. This approach differs from Dutch strike law. The Dutch right to strike is based on Article 6(4) of the ESC, to which the Supreme Court of the Netherlands granted direct effect as early as in 1961.[22] For a long time, even the Supreme Court used both elements as rules, meaning that both had to be met as an independent condition for the legality of the strike. However, with the 2015 *AMSTA* ruling, the Supreme Court initiated a change of course and stripped both elements of the status of rule.[23] The elements have been transferred to Article G of the ESC, on the basis of which a strike authorised as such under Article 6(4) of the ESC can be restricted or prohibited in the light of all the circumstances of the case. Therefore, even an unannounced strike or a strike called without exhausting all other alternatives first can be lawful under current Dutch law. Any other interpretation would constitute an excessive limitation on the right to strike and its fundamental nature. With the *AMSTA* ruling, the Supreme Court aligned itself with the conclusions of the ECSR, which has long opposed the status of both elements as rules on the basis of Article 6(4) and Article G of the ESC.

We can conclude from this that the rule review, which we have not seen applied in Dutch jurisprudence since 2015 when applying Article 6(4) of the ESC, means that the right to collective action under Article 28 of the Charter appears to be subject to more restrictions than the aforementioned ESC article. So far,

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wildcat strike was an extraordinary circumstance that was not inherent in the normal exercise of the company's activity, see CJEU 17 March 2018, case C-195-17, ECLI:EU:C:2018:258 (*Krusemann*).

[22] Supreme Court 30 May 1986, ECLI:NL:HR:1986:AC9402, *NJ* 1986/688 (*NS*).

[23] Supreme Court 19 June 2015, ECLI:NL:HR:2015:1687, *JOR* 2015/286, with an annotation by Verburg (*Amsta*).

CJEU case law has not led to an actual downward revision of the right to strike in the Netherlands, which is, in itself, not strange. European freedoms of movement require a cross-border element, and most strikes in the Netherlands take place within the Dutch legal sphere. At least, it seems that way. Reality proves more unruly. The CJEU's *AGET Iraklis* ruling, as already discussed, shows that it does not take much for there to be a cross-border element that makes that freedom of establishment comes into play. Although the *AGET Iraklis* case involved a Greek company that wanted to collectively dismiss Greek employees under Greek law, a cross-border element was deemed to exist in that the majority of the shares in the Greek company were held by a French company. Therefore, a Dutch company that is being wound up only needs to have a foreign parent to trigger the freedom of establishment.[24] In that case, there is a risk that the Court of Justice will invoke the rule review in preliminary proceedings to assess the legality of the strike. This risk exists all the more since the analysis in Section 3 shows that the Court of Justice has so far seemed to care very little about the ESC and ECSR rulings. The only body through which the CJEU may have to (and will) be redirected is the ECtHR (see Section 3). Even though the ECtHR ruled in 2021 that the '*freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality,*'[25] this does allow an unequivocal deduction that the use of rules would not be permitted under Article 11 of the ECHR.

Dutch legislation governing collective dismissals is also at risk of erosion, despite the protection under Article 30 of the Charter against unjustified dismissal. Although the European legislature does have the power to adopt legislation on this subject on the basis of the ordinary legislative procedure (Article 153(1)(d) of the TFEU), it has, to date, not done so with regard to the substantive reasons that can lead to collective dismissals.[26] Like it did with the right to strike, the Court of Justice reviewed the substantive requirements for collective dismissal enshrined in national law against the benchmark of freedom of establishment. The Court did so in the *AGET Iraklis* ruling cited above. As explained in Section 4.2.3, Greek legislation on collective dismissal did not pass the review against the freedom of establishment. The reason was that the national scheme lacked transparency, with the result that collective dismissals could effectively be impossible. Citing the *AGET Iraklis* ruling, budget airline Ryanair sought to override Dutch rules on collective dismissal. Ryanair wanted to relocate its Dutch operations to another EU Member State.

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[24] Court of Midden-Nederland 26 April 2018, ECLI:NL:RBMNE:2018:1786, *RAR* 2018/115 refused, wrongfully in my view, to stretch the scope of European law to such an extent.

[25] ECtHR 10 June 2021, ECLI:CE:ECHR:2021:0610JUD004548717, *JAR* 2021/180 (*LO AND NTF*).

[26] Directive 98/59/EU focuses solely on the procedural aspects around collective dismissal.

After the dismissal requests were denied by the relevant competent authority in the Netherlands (the UWV employee insurance agency), Ryanair took the case to the district court, arguing that the Dutch system of a preventive review is not based on concrete, objective, and verifiable criteria. According to Ryanair, the Dutch rules and their application violated the freedom of establishment and freedom to conduct a business. Based on this claim, Ryanair had attempted to collectively dismiss 73 of its employees without preventive review. Ryanair also wanted the district court to submit a reference for a preliminary ruling to the EU Court of Justice. The district court rejected Ryanair's arguments quite easily, emphasising in its reasoning that economic freedoms are not a licence to proceed with collective dismissals without reasonable cause.[27] This ruling by a district court by no means settled the debate, as the academic literature also shows.[28] Ultimately, the Court of Justice has the final say.

[27] Court of Oost-Brabant 2 October 2019, ECLI:NL:RBOBR:2019:5646, *JAR* 2019/2634, legal grounds 7.15-7.16. This concerns several cases where Ryanair filed a dissolution request with the Oost-Brabant District Court on business-related grounds. The court used the same wording in each of these cases. Also of interest is Oost-Brabant District case JAR 2018/291 of 1 November 2018, where Ryanair invoked its freedom of establishment prior to the dismissal proceedings to implement a change of location of its pilots; this appeal also failed.

[28] This view has also been posited in the literature, see L.G. Verburg, 'De vrijheden van vestiging en ondernemerschap en de preventieve toetsing van de a-grond door het UWV: is de toetsing in overeenstemming met AGET Iraklis?' *ArA* 2020/1. There is some debate about this in the literature, see the contribution by F.J.L. Pennings and the contribution by D.M.A. De Vaate in F.G. Laagland et al. (ed.), *Verburg: Geciteerd en besproken. Liber Amicorium ter gelegenheid van het emeritaat van professor mr. Leonard Gerardus Verburg, hoogleraar Sociaal recht aan de Radboud Universiteit (Onderneming en Recht no. 124)*, Deventer: Wolters Kluwer 2021.

6 Concluding analysis

The first objective of this preliminary opinion was to provide insight into the normative value of employment law-related Charter provisions on a European level and their significance for Dutch employment law. My research shows a mixed picture. The right to paid annual leave under Article 31(2) of the Charter has by far the strongest position. This Charter provision has modelled the regulation of Dutch employment law to a considerable degree, both in a substantive sense and in a procedural sense where Dutch limitation and expiration periods are concerned. This far-reaching impact is due to the further concrete expression given to Article 31(2) of the Charter in Article 7 of the Working Time Directive, together with the status of this Charter provision as a right. This has turned out to be a 'golden' combination. Following on from this, I do not rule out the possibility that Article 31(2) of the Charter will in the future continue to exert its influence on Dutch rules on maximum working hours and rest periods, which also come from the Working Time Directive. The only other employment law-related provision with the same 'golden' combination as Article 31(2) of the Charter is the right to protection against dismissal for a reason related to maternity or adoption of a child under Article 33(2) of the Charter. This provision, I suspect, has the status of a right, and is detailed in Article 12 of Directive 2019/1158, which provides employees with dismissal protection when taking parental and care leave. However, the Court of Justice has so far not ruled on this provision. Even if that were to happen in the future, I do not expect this provision to lead to an upward revision of Dutch employment law, since Dutch legislation governing dismissal already provides a fairly high level of protection compared to legislation in other EU Member States.

For the employment law-related Charter provisions that lack the 'golden' combination, the added value of the Charter under the European system as it stands is, in my view, virtually zero. The right to information and consultation under Article 27 of the Charter is the right that has been worked out to the greatest degree in European legislation after Article 31 of the Charter, as shown in Section 4.1, but it has the status of a principle. In that case, the influence on Dutch employment law runs through the implementation of directives 'promoting' the Charter provision, but it is not clear from the history of these directives' inception how Article 27 of the Charter actually influenced their substance. The same applies to the right to protection in case of unjustified dismissal under Article 30 of the Charter. On top of that, the CJEU considers that a principle as such has no subjective substance, so that little value seems

to be attached to the principle when interpreting the directives in question: it is the directive provision that takes precedence in the interpretation and not the Charter provision that (partly) underlies the directive.

The right to collective bargaining and the associated right to strike from Article 28 of the Charter does have the status of a right, but again concrete expression has not been given to it in European legislation. Its qualification as a right suggests that concrete expression is not necessary; after all, Article 28 of the Charter already of itself encompasses subjective rights. However, those subjective rights cannot be invoked in an employment (and therefore horizontal) dispute without a link to EU law. In the absence of concrete expression in European legislation, Article 28 of the Charter is, unlike Article 11 of the ECHR, never paramount in a Dutch strike dispute, but rather fulfils a defensive role in the context of economic freedom of movement or the interpretation of directives that are not based on Article 28 of the Charter.

This brings me to the second objective of this preliminary opinion. Does the Charter now have the power and potential to serve as a driver of employment law? All things considered, the Charter is currently a booster only if the aforementioned ‘golden’ combination is present. This has to do with the European system and how the Charter is positioned within it. We Dutch lawyers cannot easily change that European system. That said, even within the current system, the Dutch legislature and the Dutch courts are in a position to attach a certain value to employment law-related provisions. I have three recommendations to that end.

7 Recommendations to the Dutch legislator and courts

7.1 Apply employment law-related Charter provisions in case of over-implementation

As noted above, Dutch courts do not apply the Charter in cases of over-implementation. It is logical for there to be some differences between the EU law framework on the minimum level of worker protection in any given area and the 'extra' implemented in national legislation. More specifically, it is defensible that the degree of protection of statutory holiday leave differs from that of holiday leave entitlement over and above the statutory minimum, because these latter leave entitlements over and above the statutory minimum are 'extra' leave and not strictly necessary for the purpose for which leave is intended, i.e. to give workers rest from their work duties. However, the non-applicability of the employment law-related Charter provisions to the national 'extra' leave must not detract from notions of unity and legal certainty: it is often not clear to a litigant where implementation of a directive begins and where it ends.

In addition, there is a risk that the inapplicability of the Charter will be used to erode the national 'extra' right. This occurred in the interpretation of the definition of 'wage' in the context of leave entitlement over and above the statutory minimum. It is unclear whether Section 7:639 of the Dutch Civil Code allows for a narrower definition of 'wage' for leave entitlement over and above the statutory minimum compared to statutory leave entitlement. In a number of cases, employers have invoked the minimum protection and limited scope of the Charter to argue that a lower wage may be agreed for holiday leave over and above the statutory minimum.[1] This contention has been rejected by Dutch courts, albeit not by citing the right to paid annual leave under Article 31(2) of the Charter.[2] So, while the national 'extra' was not eroded, these cases do illustrate the risk of this happening if the employment law-related Charter provisions do not apply to the national 'extra'.

This brings me to my first recommendation. I advise the Dutch legislature to apply the employment law-related Charter provisions in case of over-implementation, and to make them also apply to the national 'extra'. This is

[1] See, for example: 's-Hertogenbosch Court of Appeal 14 March 2023, ECLI:NL:GHSHE:2023:839, legal ground 4.13-4.14.

[2] The contention was not accepted, because Section 7:639 of the Dutch Civil Code does not distinguish between statutory holiday leave entitlement and leave entitlement over and above the statutory minimum, and Section 7:645 of the Dutch Civil Code does not allow deviation from the statutory regime to the detriment of the employee.

not to say that the employment law-related Charter provisions should necessarily have the same normative effect with respect to the national 'extra' as the minimum requirement under the Directive. However, it is important in the context of unity and legal certainty, plus the prevention of erosion, that a court be able to include the instrument of the Charter in its findings as and when needed given the rationale behind over-implementation. It seems to me that the Dutch courts are quite capable of making this assessment.

I believe the Dutch legislature should take the lead here. Whether the Dutch court can independently apply the employment law-related Charter provisions to the national 'extra' (i.e. if the Dutch legislature has not held anything in this regard), I find more difficult to determine. This question touches on the limit of the discretionary interpretation latitude the national court has in interpreting the national 'extra'. Moreover, a national court will be reluctant to *independently* apply the employment law-related Charter provisions to the national 'extra,' given the clear case law of the Court of Justice saying that the Charter lacks application. As a result, the ball is, in my view, firmly in the Dutch legislature's court.

7.2 Always bear specifically Dutch dynamics in mind

In the area of employment law, there is shared competence between the EU and Member States. As a result, each Member State's employment law has its own nuances, based in part on political considerations, as explained in the introduction to this preliminary opinion. Obviously, each Member State's employment law starts from the concept of the employment contract, and essential topics such as rules governing (collective) dismissal, collective bargaining, and the right to strike are laid down in the laws of each Member State, albeit that the precise interpretation of these topics varies from country to country, as does the political context in which employment law is set. Also, each Member State has its own labour market-related frictions. While the Court of Justice's rulings interpret European law and the judgments are, therefore, relevant to all Member States, it is also notable that the Court often includes the national context in its findings. This brings me to my second recommendation: Dutch courts should always keep the specifically Dutch dynamics in mind when applying CJEU rulings in the Dutch context. Do not apply the legal rules from the judgments too black and white, but rather consider judgments against the background of national law.
That this does not always happen yet is demonstrated by how the Court of Justice's rulings on the right to paid annual leave under Article 31(2) of the Charter have been applied. Dutch case law seems to have adopted this as an absolute fundamental right on the basis of Court of Justice rulings. Do not

overdo this. Think back to the distinction between self-employed workers and salaried employees that, and this is what is so typical of the Netherlands, has not been enforced for years and where politicians continue to be unable to find a solution. Ensure that this nuance be reflected in Dutch rulings on the prescription of minimum holiday leave entitlement by including the social position of the worker in the findings through, for example, a national instrument such as reasonableness and fairness.

7.3 Dare to be critical and seek preliminary rulings

The previous two recommendations take the CJEU rulings as their starting point. However, it is also conceivable that there are good arguments to argue that things should (by now) be different. This is where my third recommendation comes in.

One example are the dynamics between economic freedoms of movement and the right to strike. In cross-border situations, the CJEU seems to give rules surrounding strikes (notice and last resort) a role. This interpretation undermines the Dutch right to strike, which is based on the ESC, by which the Netherlands is also bound. Although a reference for a preliminary ruling is not pleasant for the parties involved in the proceedings, as it often takes a long time, while a strike dispute demands a quick judgment, the development of case law benefits from a preliminary ruling. In fact, the right to strike calls for this. Increasingly, there is a cross-border element that gives companies the opportunity to erode Dutch strike law by invoking the economic freedoms of movement, supported by the *Viking* and *Laval* judgments. The question, however, is whether the Court of Justice still endorses its judgment from these rulings, which are now almost seventeen years old. The European Union is no longer the same as it was in 2007: the Charter has become binding, there is a Social Pillar, and social objectives have been given a more prominent place. Moreover, the *Viking* and *Laval* rulings are inconsistent with how economic freedoms of movement relate to the right to strike according to the ECtHR, ECSR, and ILO Committee.

Dutch courts can use the preliminary ruling procedure to 'tempt' the CJEU to leave the *Viking* and *Laval* rulings behind them and give the right to strike under Article 28 of the Charter (much) greater weight in the proportionality review of economic freedoms of movement. Nothing prevents the Court of Justice from changing tack, but it must be given the opportunity to do so. The reason for submitting a reference for a preliminary ruling is important.[3] In doing so, look not only at the EU context, but also consider ECtHR, ECSR and ILO Committee rulings. This is conducive to legal unity.

[3] Justifying the reference for a preliminary ruling and outlining the national context where the question arises are also relevant here, see for example how the Court of Justice's *Smallsteps* and *Heiploeg* rulings came about.

Appendix

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

(2012/C 326/02)

PREAMBLE

TITLE I DIGNITY

TITLE II FREEDOMS

TITLE EQUALITY

TITEL IV SOLIDARITY

TITEL V CITIZENS' RIGHTS

TITLE VI JUSTICE

TITLE VII GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Preamble

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

TITLE I

DIGNITY

Article 1

Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2

Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3

Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:

a) the free and informed consent of the person concerned, according to the procedures laid down by law;
b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
c) the prohibition on making the human body and its parts as such a source of financial gain;
d) the prohibition of the reproductive cloning of human beings.

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

TITLE II
FREEDOMS

Article 6

Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 9

Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
   The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11

Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 12

Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13

Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14

Right to education

1. Everyone has the right to education and to have access to vocational and continuing training
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15

Freedom to choose an occupation and right to engage in work

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

Article 16

Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

Article 17

Right to property

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

Article 18

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

Article 19

Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

TITLE III

EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25

The rights of the elderly

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

Article 26

Integration of persons with disabilities

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

TITEL IV
SOLIDARITY

Article 27

Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

Article 28

Right of collective bargaining and action

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

Article 29

Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30

Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

Article 31

Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32

Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33

Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34

Social security and social assistance

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

Article 35

Health care

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

Article 36

Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Article 37

Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38

Consumer protection

Union policies shall ensure a high level of consumer protection.

TITEL V
CITIZENS' RIGHTS

Article 39

Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40

Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41

Right to good administration

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

Article 42

Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

Article 43

European Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

Article 44

Right to petition

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

Article 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Article 46

Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

TITLE VI

JUSTICE

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

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

Article 48

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

TITLE VII

GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. 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.

Article 52

Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. 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.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53

Level of protection

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

Article 54

Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

The above text adapts the wording of the Charter proclaimed on 7 December 2000 and will replace it as from the date of entry into force of the Treaty of Lisbon.