

HANDBOOK **ON THE EU CHARTER OF FUNDAMENTAL RIGHTS**

A PRACTICAL GUIDE FOR LAWYERS

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Acronyms and Abbreviations

EU European Union

TEU Treaty on European Union

TFEU Treaty on the Functioning of the European Union

EChFR European Charter of Fundamental Rights

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

CJEU Court of Justice of the European Union

ECLI European Case Law Identifier

1. Introduction and Overview

1.1 Purpose of this handbook, what the reader is expected to find and how to use it

This handbook is designed to provide trainee lawyers with a practical understanding of the **European Charter of Fundamental Rights (EChFR)** and its application in legal practice. It aims to bridge the gap between theoretical knowledge and real-world practice, equipping lawyers with the tools they need to effectively invoke the Charter in various legal context.

1.2 Learning Objectives

By the end of this handbook, readers will:

1. **Understand the Scope and Applicability of the Charter:**
 - Learn when and how the Charter applies to cases involving EU institutions, Member States, and private parties.
 - Grasp the significance of the **trigger rule** and its implications for invoking the Charter.
2. **Develop Expertise in Key Rights:**
 - Gain an in-depth understanding of specific rights, such as human dignity, data protection, asylum, and fair working conditions.
 - Learn how these rights are interpreted by the **Court of Justice of the European Union (CJEU)** and their interaction with national law.
3. **Master the Legal Framework of the Charter:**
 - Understand the Charter's structure, including its chapters and principles, and how it complements national constitutions and the European Convention on Human Rights (ECHR).
4. **Build Strong Legal Arguments:**
 - Discover practical strategies for using the Charter in legal proceedings, including referencing **key case law** and leveraging the principles of legality and proportionality.
5. **Navigate Challenges in Applying the Charter:**
 - Address common obstacles in invoking the Charter and learn how to integrate EU law into domestic proceedings.
 - Explore the role of the **preliminary reference procedure** in ensuring consistent interpretation of EU law.
6. **Access Resources for Further Study:**
 - Engage with **information sheets** for deeper insights into specific rights and hypothetical scenarios to practice applying the Charter.



1.3 Approach of the Handbook

This handbook adopts a **practical, lawyer-centric approach**, focusing on real-world application rather than abstract theory. Key features include:

1. **Case Law Integration:**
 - Each chapter highlights **landmark rulings from the CJEU**, showcasing how the Charter has been interpreted and enforced in practice.
2. **Practical Tips:**
 - Each section provides actionable advice for trainee lawyers, helping them navigate complex legal issues and build persuasive arguments.
3. **Hypothetical Scenarios:**
 - Designed to simulate real-world cases, these scenarios encourage readers to apply their knowledge and test their understanding of the Charter's provisions.
4. **References to Information Sheets:**
 - Selected rights (e.g., Articles 1, 4, 7, 8, 18, 31) are linked to standalone **information sheets** for a deeper dive into their legal and practical implications.
5. **User-Friendly Structure:**
 - Each chapter begins with a clear explanation of what readers will learn, providing a roadmap for understanding and applying the Charter.

2. Historical background of the EChFR



What You will Learn

This section explores the historical development of the European Charter of Fundamental Rights (EChFR), tracing its origins from early EU treaties to its current status as a legally binding instrument. Readers will gain insights into:

1. **The Motivations Behind the Charter:** Why the EU sought to codify fundamental rights and the role of the CJEU in shaping early human rights protections within EU law.
2. **The Transition to Full Legal Status:** How the Charter evolved from a political proclamation in 2000 to a binding legal instrument with the Lisbon Treaty, ensuring a comprehensive framework for protecting rights within the EU legal order.

Key Themes

- The gap in early EU treaties regarding fundamental rights and how this was addressed through judicial innovation by the CJEU.
- The influence of international human rights instruments, such as the European Convention on Human Rights (ECHR), in shaping the Charter.
- The significance of the Charter's legal status today, both as a reaffirmation of existing rights and as a foundation for new rights

Respect for human rights is an essential value of the European Union. Article 2 of the Treaty on European Union (TEU) states that the EU *“is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”*. To apply for EU membership, a State must respect and promote these values (Art. 49 TEU). Additionally, once a member, each State must respect and protect these principles, and any breach may trigger sanctions set forth in Article 7 TEU.



2.1 Origins and motivations for the Charter

Early EU Treaties and Fundamental Rights

Initially, the original founding Treaties of the European Communities did not regulate the protection of fundamental rights. At said time, the establishment of instruments to protect human rights was not considered necessary for the achievement of the common market.

Key EU Treaty Provisions on Fundamental Rights :

- Art 2 TEU : Defines the EU's foundational values, including respect for human rights, democracy and the rule of law.
- Art 49 TEU : Requires prospective EU member States to demonstrate respect for these values as a condition of membership.
- Art 7 TEU : provides a mechanism to ensure that EU Member States uphold the Union's fundamental values, allowing for preventive measures or sanctions, including suspending certain membership rights, if a Member State risks breaching or seriously violates these values.



Judicial Recognition of Fundamental Rights

Few decades on, the Court of Justice of the European Union (CJEU) established a framework for protecting fundamental rights within the scope of EU law. In a series of landmark decisions, the CJEU recognised that these rights form part of the EU's general principles of law, ensuring their relevance and enforceability within the Union's legal system.

The Court as the guardian of the Charter – an introduction to development of fundamental rights protection in the European Union



CJEU Judgement, 12 November 1969, *Stauder v. City of Ulm - Sozialamt*, C-29/69, ECLI:EU:C:1969:57

Facts :

Mr. Stauder was a beneficiary of the war-disabled welfare plan. Pursuant to Decision 69/71 ECC Mr. Stauder was entitled to buy butter at a reduced price. In order to acquire the butter, a coupon with the beneficiary's name and address was required. Mr. Stauder felt that this requirement violated his dignity, as it mandated the display of his name on the coupon. Consequently, he filed the corresponding legal claim.

Ruling :

The CJEU considered that a correct interpretation of the relevant European regulation did not require a name to appear on the coupon. One of the main arguments behind the Court's decision was to **include human rights as part of the general principles of EU law**:

"3. When a single decision is addressed to all the member states the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, and in the light in particular of the versions in all [...] languages. [...] 7. Interpreted in this way the 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."

The CJEU started considering the constitutional traditions common to Member States and started incorporating guidance from international instruments related to the protection of human rights. Notably, the CJEU made frequent invocations of the European Convention on Human Rights (ECHR) which was adopted on November 4, 1950.



CJEU Judgement, 17 december 1970, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, C-11/70, ECLI:EU:C:1970:114

Facts :

Also known as Solange I, this case involved a conflict between national and EU law. The Common Agricultural Policy established as a requirement a deposit of a sum of money to obtain export licenses. If the export was not carried out during the period of validity of the license, the deposit would be lost. The Internationale Handelsgesellschaft mbH claimed that this licensing system was a violation of its right to conduct a business enshrined in the German constitution. The German Administrative Court submitted a preliminary question to the CJEU.

Ruling :

Despite not finding any violation of rights in the specific case, the CJEU indicated that national law, even at constitutional level, cannot determine the validity of EU law:

“3. Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. [...]”.

However, the CJEU acknowledged that constitutional texts could broaden the scope of general legal principles:

Important Insight :

“4. However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions



2.2 From the proclamation to its full legal status with the Lisbon Treaty

With a gradual introduction of material references to treaties, there was a growing case law addressing human rights issues. In 2000, a political agreement was reached on the content of the EChFR which holds the same legal status as other EU primary law since the entry into force of the Treaty of Lisbon.

Referred to as the EU's *Bill of Rights*, the EChFR sets out a comprehensive spectrum of civil, political, economic, social and other more modern categories of rights within the EU legal order. Nowadays, the EChFR enjoys the status of a legally binding instrument. The adoption of the Charter is not the EU's first activity in the human rights field. This is an important issue to address, as the EChFR is often perceived as creating and formulating new rights. Instead, its purpose is to reaffirm the rights already existing in EU law. Nevertheless, the explicit formulation of certain rights within the EChFR does not have parallels in international law or other human rights instruments.



Art 6 TEU

Indicates the means of protection of rights such as :

- The EChFR with the same legal value as the Treaties ;
- The future accession of the EU to the ECHR and ;
- The general principles of EU law as they result from the constitutional traditions common to Member States.

3. Structure and content of the Charter

What You will Learn



Discover what makes the Charter unique, including its clear formulation of rights and its limited yet impactful scope of application within EU law.

3.1 The unique contributions and scope of the European Charter of Fundamental Rights

The principal contribution of the EChFR arises from the fact that the EU is an instrument containing a binding set of clearly and transparently formulated rights.

However, the application of these rights is not universal. The EChFR only applies in specific situations where **the EU Member States or the institutions of the Union are implementing EU law** (Art. 51 EChFR). The “implementation of EU law” in a particular case is often a complex question which requires clarifications made by the CJEU and will be outlined below.

Nevertheless, this limited scope presents an opportunity to extend fundamental rights and their protection into areas which States previously did not intend to regulate. At this point, it is helpful to illustrate the uniqueness of the Charter and its usability in the actual legal practice by looking at **migration issues**. **These remain generally perceived as a matter of national discretion** (it is often stated that migration is the *domaine réservé* of sovereign States).



CJEU Judgment, 13 december 2017, Soufiane El Hassani v Minister Spraw Zagranicznych, C-403/16, ECLI:EU:C:2017:960

Facts :

Mr El Hassani, a Moroccan national, applied for a short-stay visa at the Polish Consulate in Rabat as he intended to visit his wife and child, both of Polish nationality, in Poland. His application and subsequent appeal against the visa refusal were rejected due to doubt about his intention to leave Poland before the visa expired. Mr El Hassani brought an action against the visa refusal before the Regional Administrative Court in Warsaw which ruled that it lacked jurisdiction to review the Consul's decision. Mr El Hassani took his case to the Polish Supreme Administrative Court, which referred a preliminary ruling request to the CJEU.

Ruling :

The CJEU concluded that **the provisions of the secondary legislation (namely provision of the Visa Code), interpreted in the light of Article 47 of EChFR, oblige Member States to guarantee, at a certain stage of the proceedings, the possibility to challenge the visa refusal before a court.**

"36. Although it is true that in examining a visa application the national authorities have a broad discretion as regards the conditions for applying the grounds of refusal laid down by the Visa Code and the evaluation of the relevant facts, the fact remains that such discretion has no influence on the fact that the authorities directly apply a provision of EU law [...]

37. It is clear that the Charter is applicable where a Member State adopts a decision refusing to issue a visa under Article 32(1) of the Visa Code [...]

39. Furthermore, the second paragraph of Article 47 of the Charter provides that everyone is entitled to a hearing by an independent and impartial tribunal. Compliance with that right assumes that a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues [...]


41. It follows [...] that Article 47 of the Charter requires the Member States to guarantee, at a certain stage of the proceedings, the possibility to bring the case concerning a final decision refusing a visa before a court".

Against this background, the European Court of Human Rights (ECtHR) does not omit to stress in its immigration-related judgments that States are entitled, under international law, to decide on the residence of foreigners on their territory and that the framework of the ECHR contains no right exclusively related to migration. However, the CJEU stated that **Article 47** of the EChFR gives the right to an effective remedy and a fair trial to everyone whose rights and freedoms guaranteed by the law of the Union are violated. A practical corollary of the right under Article 47 of the Charter is the **individual's access to an impartial and independent tribunal established by law, including those individuals of foreign nationality seeking a short stay visa to enter the European Union.**



For many Member States, this was a practical call to amend their legislation. Since the issuance of short-stay visas to foreigners is an implementation of EU law, the applicability of EChFR, including Article 47, becomes relevant.

This is just one of many practical contributions of the EChFR, demonstrating that the EU's protection standards can exceed those established by human rights instruments. For example, the ECHR ensures the right to a fair trial and access to a court only in criminal and civil commitment cases. However, the EChFR offers more than this, as it includes **several newly formulated rights that are not explicitly found in other human rights instruments**, including the ECHR. For instance, the EChFR protects the individual's right to dignity, the right to good administration and, quite uniquely, also recognises explicitly both the right to data protection and individual's right to asylum.



EChFR's impact on National Juridictions :

Example : Migration issues are typically viewed as a matter of national discretion. However, the CJEU ruled that Article 47 of the EChFR guarantees the right to an effective remedy and fair trial for all individuals, including foreign individuals seeking a short-stay visa.

3.2 General Overview of the Charter

In total, the EChFR contains 54 articles with rights divided into 7 chapters. The rights are grouped into six major headings:

- **Dignity**, which includes the rights to human dignity, life, the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment and the prohibition of slavery and forced labour.
- **Freedoms**, encompassing the rights to liberty and security, respect for private and family life, data protection, marry and found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association, freedom of the arts and sciences, education, freedom to choose an occupation and engage in work, conduct a business, property, asylum and protection in the event of removal, expulsion or extradition.
- **Equality**, which covers the rights to equality before the law, non-discrimination, cultural, religious, and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly and integration of persons with disabilities.



- **Solidarity**, which includes the following rights: workers' rights to information and consultation within the undertaking, the right of collective bargaining and action, access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection and consumer protection.
- **Citizens' rights**: to vote and to stand as a candidate at elections to the European Parliament, to vote and to stand as a candidate at municipal elections, good administration, access to documents, Ombudsman, to petition the European Parliament, freedom of movement and of residence and diplomatic and consular protection.
- **Justice**, which admits the rights to an effective remedy and to a fair trial, presumption of innocence and right of defence, principles of legality and proportionality of criminal offences and penalties and not to be tried or punished twice in criminal proceedings for the same criminal offence.

Based on their recognition in the EChFR, each one of these fundamental rights may be subject to legislative development to specify their content and scope. **Certain fundamental rights laid down in the Charter apply exclusively to EU citizens**, notably: the right to work and freedom to choose an occupation (Article 15(1)) or the freedom to conduct a business (Article 16).



EChFR Rights Overview :

- **Total Articles : 54**
- **Key rights covered:**
Dignity, Freedoms,
Equality, Solidarity
Citizens' Rights,
Justice.

The seventh chapter is perceived by many as the most significant: its four articles establish rules of interpretation and application of EChFR's rights. As will be explained in detail below, pursuant to Article 51, **the EChFR applies only in situations in which EU law is implemented**; the same provision also reiterates that the EChFR does not establish any new powers for the Union. Furthermore, Article 52 EChFR recalls the **principles of legality and proportionality**. The same provision refers to the ECHR and indicates that **the protection granted by the EChFR cannot fall below the standard enshrined in the ECHR**. But there is nothing in EChFR preventing this standard to be even higher.



3.3 Analysis of Key rights most relevant to legal practice

This section highlights the fundamental rights within the European Charter of Fundamental Rights (EChFR) that have significant implications for legal practice. For some of these rights, dedicated **information sheets** have been included as part of the Training Kit to provide a more detailed analysis and practical guidance. When applicable, references to these sheets are noted.

1. Dignity

- **Human Dignity (Article 1)** (*See Information Sheet on Article 1*):
 - Recognized as the foundational principle of the Charter.
 - **Practical Relevance:** Often invoked in cases concerning inhuman or degrading treatment, such as detention or deportation.
- **Key Case:** *Case C-404/15, P v. Q* – Deporting a seriously ill individual to a country without adequate medical care was found to violate their dignity.
- **Prohibition of Torture and Inhuman or Degrading Treatment (Article 4)** (*See Information Sheet on Article 4*):
 - An absolute right that allows no derogation under any circumstances.
 - **Practical Relevance:** Central to cases involving prison conditions, refugee treatment, or police misconduct.

2. Freedoms

- **Respect for Private and Family Life (Article 7)** (*See Information Sheet on Article 7*):
 - Protects individuals from interference in their private and family life, home, and communications.
 - **Practical Relevance:** Frequently invoked in cases of government surveillance, deportation affecting family unity, and custody disputes.
-
- **Right to Data Protection (Article 8)** (*See Information Sheet on Article 8*):
 - Provides individuals with control over their personal data, ensuring transparency and accountability in data processing.
 - **Practical Relevance:** Significant in cases concerning automated decision-making, data breaches, and cross-border data transfers.
- **Freedom of Thought, Conscience, and Religion (Article 10)** :
 - Guarantees freedom of personal beliefs and practices, including religious expression.
 - **Practical Relevance:** Common in cases involving workplace accommodations for religious practices and challenges to laws restricting religious attire.

- **Right to Asylum (Article 18)** (*See Information Sheet on Article 18*):
 - Recognizes the legal right to asylum under EU law and international obligations.
 - **Practical Relevance:** Commonly invoked in immigration disputes where Member States' asylum systems or procedures are challenged.

3. Equality

- **Non-Discrimination (Article 21):**
 - Prohibits discrimination on grounds such as sex, race, age, disability, or sexual orientation.
- **Equality Between Men and Women (Article 23):**
 - Ensures gender equality in all areas, including employment and pay.
Practical Relevance: Central in cases challenging unequal pay practices, hiring discrimination, or workplace harassment.
- **Integration of Persons with Disabilities (Article 26):**
 - Guarantees equal opportunities and protection for individuals with disabilities.
 - **Practical Relevance:** Often used to challenge inaccessible public services or discriminatory practices in the workplace.

4. Solidarity

- **Fair and Just Working Conditions (Article 31)** (*See Information Sheet on Article 31*):
 - Protects workers' rights to safe and dignified working conditions.
 - **Practical Relevance:** Frequently invoked in disputes over unpaid overtime, hazardous workplace conditions, or exploitative practices

5. Citizens' Rights

- **Right to Good Administration (Article 41):**
 - Ensures transparency, fairness, and accountability in administrative actions by EU institutions.
Practical Relevance: Frequently used in cases challenging decisions made by EU bodies or institutions.
- **Right to Petition the European Parliament (Article 44):**
 - Grants individuals the right to address grievances directly to the EU legislature.



6. Justice

- **Right to an Effective Remedy and a Fair Trial (Article 47)** (*See Information Sheet on Article 47*):
 - Guarantees access to an independent and impartial tribunal to challenge violations of EU law.
- **Presumption of Innocence and Right of Defence (Article 48)**:
 - Ensures fairness and due process in criminal proceedings.
 - **Practical Relevance:** Central to defending individuals in high-stakes investigations or trials.

4. Applying the Charter: scope, principles and limitations

What You will Learn



This section focuses on the practical application of the European Charter of Fundamental Rights (EChFR), providing trainee lawyers with the tools to determine when and how the Charter applies. It explains the principles governing its use, the limitations imposed on its scope, and the interaction between the Charter and other legal frameworks.

Key themes :

1. **Understanding the Scope:** When the Charter applies, the role of the **trigger rule**, and the entities bound by its provisions.
2. **Rights vs. Principles:** Distinguishing between directly enforceable rights and principles that require legislative development.
3. **Interaction with National Law:** How the Charter coexists with Member States' constitutions and ensures harmonized fundamental rights protection across the EU.
4. **Limitations on Rights:** The principles of legality and proportionality governing restrictions on Charter rights, as well as absolute rights that cannot be limited.

Practical Value for Lawyers:

This section equips lawyers with the knowledge to:

- Identify situations where the Charter applies and link cases to EU law.
- Frame arguments based on enforceable rights and principles.
- Navigate conflicts between national and EU law using the Charter as a reference point.
- Challenge limitations on rights by demonstrating disproportionate or unlawful restrictions.

4.1 When does the Charter Apply? Understanding the scope and Trigger Rule

Article 51 EChFR establishes that the institutions and other organs of the Union, as well as the Member states, are bound by the Charter only when they are applying EU law. Importantly, this provision emphasises that the EChFR does not extend the competences and the missions conferred by the EU treaties.



Institutions and organs of the EU

According to Article 51(1), the Charter is addressed to “*the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity*”.

Practical examples of Fundamental Rights violations :

Daily practice within the EU provides several examples of fundamental rights’ violations within the

EU institutional framework. For instance:

- The adoption of a legal Act, Directive or Regulation that does not provide adequate safeguards as to the treatment of personal data;
- The refusal to grant access to certain documents in the workplace;
- An investigation by Commission officials infringing on the right to respect for private life while examining competition rules violations.



Member States Obligations

Member States are also bound by the EChFR but only “when they are implementing EU law”. As for the notion of “State”, it should be considered in a broad sense. Therefore, central authorities, as well as regional or local bodies, and public bodies are included in the mandate. The Charter is also binding on Member States when they act as employers.

Given this subjective scope, the Charter can be relied upon for recourse against any infringement of fundamental rights deriving from an Act adopted by the EU institutions, bodies, offices and agencies. Moreover, individuals may invoke the protection afforded by the Charter in response to an infringement derived from a national act implementing EU law. This means that the protection offered by the Charter cannot be triggered by simply claiming that the case in question concerns the violation of a fundamental right.



The Charter can be invoked only when a provision of EU primary or secondary law, other than the provisions of the Charter itself, is applicable to the case. In other words, there must be a sufficient link between the EU Law provision applicable to the case and the national acts or provisions allegedly violating the Charter.

The “Trigger rule”

The invocation of the Charter depends on the non-compliance situation being governed by EU law. **At least one specific rule of EU law must necessarily be identifiable.**



The Charter applies to national measures adopted to fulfil obligations deriving from EU law, such as EU directives or regulations. Even national measures enacted before the EU law obligation came into force may fall under the Charter’s scope.

As stated in **Article 51(2)**, the Charter does neither establish any new power or task for the Community or the Union nor does it modify those powers and tasks as defined in the Treaties.

The fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law. Where provisions of EU law do not regulate a specific aspect of a given situation and impose no specific obligation on Member States in that respect, the national legislation enacted by a Member State regarding that aspect falls outside the scope of the Charter. To that end, this situation cannot be assessed under the Charter’s provisions.

The concept of “situations governed by Union law” is interpreted quite broadly by the Court. However, there must be a clear link between the case and at least one rule of Union law other than the Charter itself.

CJEU Judgment, 7 may 2013, Åklagaren v Hans Åkerberg Fransson, C-617/10, ECLI:EU:C:2013:280



Facts : Mr Fransson allegedly provided false information about his income and value added taxes. After the initial tax fines, criminal proceedings for serious tax offences were initiated. Mr. Fransson's defense argued that the criminal proceedings violated the *ne bis in idem* principle established in art. 50 of the Charter. The case was referred to the CJEU raising the issue of jurisdiction over whether the case fell within the scope of EU law.

Ruling :

“19. The Court’s settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law”.



The existence of a EU rule cannot be replaced by the mere attribution of a competence of the EU. **It is necessary that the exercise of the competence has become effective and that the rule resulting from this exercise of competence governs the specific case.**

For example, while Article 30 of the Charter provides protection against unjust dismissal, the EU's competence to regulate dismissals has not been exercised. Thus, in the absence of any connection to EU law, a decision to dismiss an employee cannot be challenged under Article 30 of the Charter.



CJEU, Grd. Ch., 5 February 2015, C-117/14, Grima Janet Nisttahuz Pclava v Jose Maria Ariza Toledano, ECLI:EU:C:2015:60

Facts :

Ms. Nisttahuz Poclava worked as a cook for the Taberna del Marqués hotel company under a full-time indefinite employment contract signed in 2013. The contract provided for a one-year trial period. Ms. Nisttahuz Poclava was informed by letter dated May 31, 2013 that she was no longer with the company as of that date, as she had not successfully completed her trial period. The employee contested the length of the trial period, invoking article 30 of the Charter.

Ruling :

It should be recalled that, so far as actions of the Member States are concerned, the scope of the Charter is defined in Article 51(1) thereof, which states that **the provisions of the Charter are addressed to the Member States only when they are implementing EU law**. Therefore, a contract such as the “employment contract of indefinite duration to support entrepreneurs”, provided for under Spanish law, is not a fixed-term contract that falls within the scope of Directive 1999/70. It follows that the situation at issue in the main proceedings does not fall



Test your understanding

Situation 1: A worker in a Member State claims they were discriminated against due to their disability during a hiring process. The employer argues that the national legislation governing employment does not explicitly prohibit such discrimination in this context. The applicant seeks to invoke Article 21 of the Charter, which prohibits discrimination on the grounds of disability, to challenge the employer's decision.

1. Does the Charter apply in this case?
2. What connection to EU law is required to invoke the Charter effectively?
3. What role does the **trigger rule** play in determining the Charter's applicability?

Analysis :

1. **Connection to EU Law:**
 - o The **Employment Equality Directive (Directive 2000/78/EC)** establishes a general framework for equal treatment in employment and occupation. Since this directive is part of EU law and requires implementation by Member States, Article 21 of the Charter may be applicable if the case concerns the implementation of this directive.
2. **Triggering the Charter:**
 - o For the Charter to apply, there must be a **clear link** between the alleged discrimination and the implementation of EU law. If the employer's conduct or the national legislation is assessed within the framework of the directive, the Charter's provisions become relevant.
 - o For example, if the Member State has transposed the directive into national law but left significant gaps or failed to ensure adequate remedies for discrimination claims, the Charter can be invoked to address these deficiencies.
3. **Questions for Consideration:**
 - o Was the discrimination related to a provision of EU law (e.g., the Employment Equality Directive)?
 - o Did the Member State fail to fully implement the directive, or does the national law contradict its principles?
 - o Can the worker demonstrate that the case involves a situation governed by EU law?

Solution :

The worker can argue that:

- The lack of effective protection under national law contravenes the **Employment Equality Directive**.
- Article 21 of the Charter applies because the case involves the implementation of EU law (the directive).
- The employer's actions, in the absence of effective national remedies, violate the fundamental principle of non-discrimination guaranteed by the Charter.



Situation 2: A Member State introduces a law restricting freedom of expression on the internet, citing national security concerns. The law mandates the removal of certain types of online content but does not explicitly reference any EU regulation or directive. An individual challenges this law, invoking Article 11 of the Charter (freedom of expression) and arguing that the measure violates fundamental rights guaranteed by the Charter.

1. Does the **Charter of Fundamental Rights of the EU (EChFR)** apply in this situation?
2. What criteria determine whether the Charter is applicable?
3. How does the **Court of Justice of the European Union (CJEU)** interpret the concept of "implementing EU law"?

Analysis :

1. **Applicability of the Charter:**
 - Under **Article 51 EChFR**, the Charter applies to Member States **only when they are implementing EU law**.
 - The law in question appears to regulate a purely national matter without a clear link to the implementation of an EU directive or regulation. If no EU legal obligation exists that requires or influences the Member State's action, the Charter is unlikely to apply.
2. **Criteria for the Trigger Rule:**
 - To trigger the Charter, the following conditions must be met:
 - The national law must implement or apply **specific EU legislation**.
 - The national measure must affect the **effectiveness or objectives of EU law**.
 - The **CJEU's judgment in Åkerberg Fransson** clarified that the Charter applies whenever national legislation falls **within the scope of EU law**. However, in cases without a sufficient connection to EU law, the Charter does not apply.
3. **CJEU's Interpretation:**
 - In cases like **Ymeraga v. Luxembourg**, the CJEU ruled that the Charter does not apply to situations that are entirely internal and lack a connection to EU law.
 - The Court emphasizes that a **direct and concrete link** to EU law is required, and the mere existence of a fundamental right in the Charter does not automatically make it enforceable in purely national matters.

4.2 Protection Afforded by the Charter to Individuals

Individuals are beneficiaries of the protection afforded by the EChFR, and in certain cases the Charter generates legal obligations to them.



CJEU, Grd. Ch., 15 January 2014, Association de médiation sociale v Union locale des syndicats CGT and others, C-176/12, ECLI:EU: C:2014:2


This case addressed the applicability of the Charter in disputes between private parties. It concerned Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002, which establishes a general framework for informing and consulting employees in the European Community particularly regarding the calculation of staff numbers in an undertaking.

Key Points :


- Article 27 of the Charter, titled “Workers’ right to information and consultation within the undertaking” guarantees that workers are entitled to information and consultation according to EU law and national laws. For this article to be effective, it must be articulated in EU or national law.
- If a national provision conflicts with EU law, the Charter cannot be invoked by individuals to disapply the national provision in disputes.

Facts : The dispute arose between trade unions and their employer, Association de Médiation Sociale (AMS), regarding the establishment of employee representation, such as the election of a staff representative. AMS argued that it employed fewer than eleven employees, and a fortiori fewer than fifty, and thus was not required under French law to hold such elections. AMS maintained that, in accordance with article L. 1111 3 of the French Labour Code, apprentices, workers on initiative-employment contracts or employment support contracts, and workers on professionalisation contracts should be excluded from the calculation of its workforce.

Ruling : The Court concluded that the wording of Article 27 of the Charter necessitates that it be given specific expression in EU or national law. Moreover, it indicated that a prohibition, as provided for in Article 3(1) of Directive 2002/14, on excluding particular categories of employees from the calculation of the staff numbers in an undertaking cannot be inferred as a directly applicable rule of law from the wording of Article 27 of the Charter.



According to the CJEU, a provision of the EChFR sufficient by itself to confer a right upon individuals. It may be invoked to request the non-application of conflicting national provisions even in proceedings between individuals.



CJEU, Grd. Ch., 17 April 2018, *Van Egenberger v Evangelisches Werk für Diakonie und Entwicklung* ev, C-414/16, ECLI:EU:C:2018:257

Key Point: The Charter can be used directly by a private party against another.

Facts : This case involved a claim by Ms Egenberger for compensation for discrimination on grounds of religion allegedly suffered by her in a recruitment process.

Ruling :

The prohibition of discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer a right that individuals may rely on in disputes covered by EU law (see, with respect to the principle of non-discrimination on grounds of age).

The non-application rule is essential when a State has not transposed a Directive, or has transposed it incorrectly, as established by the CJEU's case law. **Even a clear, precise and unconditional provision of a Directive seeking to confer rights or impose obligations on individuals cannot upon itself apply in proceedings exclusively between private parties.**



CJEU, Grd. Ch, 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu, C-684/16, ECLI:EU: C:2018:874

Facts :

In this case, the employer refused to pay to an employee an allowance for paid annual leave not taken before the termination of their employment relationship.

Key Points :

- **Article 31(2) of the Charter** : This article affirms every worker's right to paid annual leave, a right that is both mandatory and unconditional in its existence. The unconditional nature of this right does not require further definition by EU or national laws, except to set the specific duration and conditions for exercising the right to paid annual leave.
- **Direct applicability** : The provisions of Article 31(2) are sufficiently concrete to grant workers a right they can invoke in disputes with their employers within the scope of EU law.

Ruling :

The CJEU concluded that, in the event that it is impossible to interpret national law consistently with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, a national Court hearing a dispute between an employee and a private employer must set aside the conflicting national legislation. Specifically:

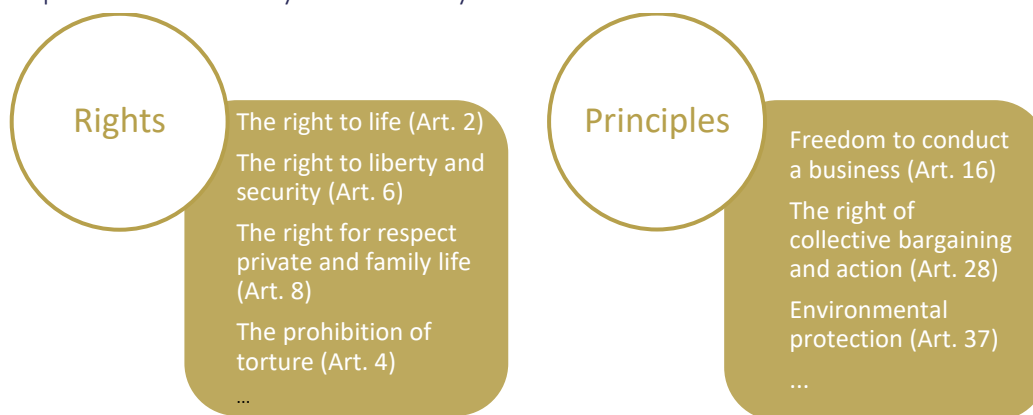
- The employer must prove they exercised all due diligence to enable the worker to take the entitled paid annual leave
- If the employer cannot demonstrate such diligence, the employee retains their right to paid annual leave. Upon termination of employment, this right translates into an entitlement of an allowance in lieu of untaken leave, which must be paid directly by the employer.

4.3 Rights vs Principles: what can be directly invoked?

According to the **direct effect principle**, a provision must be clear, precise and unconditional to be invoked by individuals. Therefore, rights listed in the charter may be invoked, but principles must be specified and developed in EU or national law.

Article 51(1) EChFR points out that principles require clarification and development in EU or national law. Similarly, **Article 52(5) EChFR** emphasises the central role of principles in the interpretation and the development of rules.

However, the definition of rights and principles and the distinction between these two concepts have not been yet clarified by the CJEU.



Even before the Charter entered into force, the CJEU used general principles of European Union law as guidance for national judges in disputes between private parties.



CJEU, Grd. Ch., 19 January 2010, Seda Kucukdeveci v Swedex GmbH & Co. KG, C-555/07, ECLI:EU: C:2010:21.

Facts :

This case concerned a claim regarding a measure which allegedly discriminated on grounds of age. German national law provided that periods of employment completed before the age of 25 would not be taken into account when calculating the notice period for dismissal.

Ms Küçükdeveci was dismissed by her employer, Swedex by letter dated December 19, 2006. The employer calculated her notice period based on three years of service, despite her actual ten years with the company, leading her to argue that this law constituted age discrimination contrary to EU law.

Ruling :

The CJEU held that the **principle of non-discrimination on grounds of age**, as given expression by Directive 2000/78, precludes national legislation which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.



Test your understanding

Situation: A non-governmental organization (NGO) advocates for stronger environmental protections in a Member State. The NGO bases its argument on Article 37 of the Charter, which states that a high level of environmental protection and improvement of environmental quality must be integrated into EU policies. A local administrative authority denies their request to block a project that allegedly harms the environment, arguing that Article 37 is not directly enforceable and cannot be invoked in court.

1. Is Article 37 a **right** or a **principle**, and how does this affect its enforceability?
2. What steps can the NGO take to strengthen its legal argument using the Charter?
3. What distinction should the court make when interpreting rights and principles under the Charter?

Analysis:

1. **Rights vs. Principles:**
 - **Rights** under the Charter (e.g., Article 8 on data protection or Article 21 on non-discrimination) are **clear, precise, and unconditional**, making them directly enforceable in legal proceedings.
 - **Principles**, such as Article 37 on environmental protection, serve as **guidelines** for EU institutions and Member States when implementing EU law. They require legislative or regulatory measures to give them effect and cannot, on their own, confer direct rights to individuals.
2. **Applicability of Article 37:**
 - The NGO cannot directly invoke Article 37 to block the project. However, they can argue that the **principle of environmental protection** should guide the interpretation and implementation of relevant EU law, such as the **Environmental Impact Assessment Directive (Directive 2011/92/EU)**.
 - If the Member State has transposed the directive inadequately, or the project fails to comply with its provisions, the NGO may argue that Article 37 requires national authorities to ensure compliance with the directive.
3. **Court's Role:**
 - The court must determine whether the principle in Article 37 can be used to interpret national or EU legislation in line with the Charter.
 - The **principle of harmonious interpretation** obliges national courts to interpret laws in a way that aligns with EU objectives, including environmental protection.

Solution:

The NGO should:

1. **Demonstrate a Link to EU Law:**
 - Argue that the project falls under the scope of the Environmental Impact Assessment Directive, which integrates environmental protection into its framework.
2. **Rely on the Principle of Consistent Interpretation:**
 - Urge the court to interpret national regulations implementing the directive in light of Article 37.
3. **Support with Additional Rights:**
 - Highlight any directly enforceable rights linked to the case, such as the right to health (Article 35), which could strengthen the environmental protection argument.

4.4 Interaction between the Charter and national constitutions

Regarding the coexistence between the Charter and national constitutions, **Article 52 (4)** points out the necessity of harmonic interpretation between the Charter rights and the constitutional traditions of the Member States. This rule of interpretation is based on the wording of **Article 6(3) TEU** and takes due account of the approach to common constitutional traditions followed

by the Court of Justice. Under that rule, rather than following a rigid approach of a “lowest common denominator”, **the Charter rights concerned should be interpreted in a way that offers a high standard of protection, which is adequate for the law of the Union and in harmony with the common constitutional traditions.**

Where the specific level of protection is provided by the Charter, it overrides the national constitutional provisions of Member States.

In contrast, **if the Charter is silent on the specific level of protection**, then domestic standards can apply, provided that two conditions are met:

- First, the application of domestic standards must not compromise the level of protection provided by the Charter;
- Second, the “primacy, unity and effectiveness” of EU law must be ensured.

Primacy, Unity and Effectiveness of EU Law

- **Primacy:** EU law supersedes national laws when conflicts arise
- **Unity:** Ensures uniform application of EU law across all Member States
- **Effectiveness:** Member States must implement EU law in a way that achieves its objectives.





CJEU, Grd. Ch., 26 february 2013, *Stephano Melloni v Ministerio Fiscal*, C-399/11,

ECLI:EU:C:2013:107

Facts :

This case involved the execution of a European arrest warrant issued by Italy based on a sentence in absentia against Mr. Melloni. The latter argued that Spanish constitutional law was more protective of fundamental rights than EU standards and should therefore apply, allowing him to avoid extradition.

Ruling :

The CJEU rejected the possibility of using national constitutional law to override the European arrest warrant's primacy.

It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection

4.5 Framework for Rights Limitations and Absolute Guarantees

Rights guaranteed by the EChFR are subject to the **legality and proportionality principles**:

- **Legality:** Limitations must be legally grounded and must not undermine the essence of the restricted right.
- **Proportionality** imposes an additional condition: limitations on the rights enshrined in the EChFR may only be made if such limitations are **necessary** and **if they correspond to objectives of general interest** or **to the need to protect the rights and freedoms of others**.



CJEU, Grd. Ch., 21 October 2022, *Bundesrepublik Deutschland v SpaceNet AG, Telekom Deutschland GmbH*, C-793/19 and C-749/19, ECLI:EU: C:2022:702

Facts :

The case examined whether national laws requiring telecommunications companies to retain customers' data for prosecuting serious crimes or addressing national security threats violated Charter rights.

Ruling :

The CJEU held that **Articles 7, 8 and 11 of the Charter**, while fundamental, are not absolute rights, but must be considered in relation to their function in society. Per Article 52(1) of the Charter, limitations may be placed on the exercise of those rights, if those limitations are provided for by law, that they respect the essence of the rights and that, in compliance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

The purpose of Article 52(1) EChFR is not to undermine the substance or essence of the rights. However the case law of the Court of Justice varies widely. Against this background, it should be noted that the same criteria are applied in the case law of the European Court of Human Rights.



CJEU, Grd. Ch., 9 november 2010, Volker und Markus Schecke GbR, and Hartmut Eifert v Land Hessen, C-92/07 and C-93/09, ECLI:EU: C:2010: 662

Facts :

The case examined whether public disclosure of personal data about beneficiaries of EU agricultural funds, published on a government website, infringed on the rights to data protection and private life.

Article 8(1) of the Charter states that *“everyone has the right to the protection of personal data concerning him or her”*. That fundamental right is closely connected with the right to respect of private life expressed in **Article 7 of the Charter**.

Ruling :

The CJEU ruled that the right to the protection of personal data is not an absolute right, but must be considered in relation to its functions in society. Article 8(2) of the Charter thus authorises the processing of personal data if certain conditions are satisfied.

Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights, such as those set forth in Articles 7 and 8 of the Charter, as long as the limitations are provided

Although Article 52(1) of the Charter permits some rights limitations, certain rights remain absolute. Since the ECHR acts as a minimum standard of protection, by virtue of Article 52(3) of the Charter, fundamental rights that are characterised as absolute rights under the ECHR (such as the right to life, or the prohibition of torture, inhuman and degrading treatment) cannot be limited under the Charter either.

5. Relationship and convergence of the EU Charter and the ECHR

What You will Learn



This section delves into the interplay between the **European Charter of Fundamental Rights (EChFR)** and the **European Convention on Human Rights (ECHR)**, two pivotal instruments in the protection of fundamental rights in Europe. It explores their similarities, differences, and complementary nature, offering practical insights for lawyers working across these frameworks.

5.1 Overview of the EU Charter and the European Convention on Human Rights

The ECHR adopted in 1950 alongside its Additional Protocols, guarantees a smaller number of rights compared to the 2012 EChFR. The ECHR mainly excludes the economic and social rights enshrined in the Council of Europe's European Social Charter.

Examples include the rights set out in Title IV of the Charter on Solidarity, most of which are not covered by the ECHR, or freedom to choose an occupation and work (article 15 of the Charter). But the evolving interpretation given to the ECHR by the ECtHR means that certain Charter rights not specifically guaranteed by the Convention can be covered (e.g. data protection under article 8 of the Charter through article 8 of the Convention). The European Court points out that the ECHR is a living instrument to be interpreted in the light of current conditions.

5.2 EU Accession to the European Convention on Human Rights

The European Union is not yet a signatory to the European Convention on Human Rights. The Union has been considering accession for some time, particularly since the adoption of the EChFR in 2000. Following the Lisbon Treaty's entry into force on December 1, 2009, accession became a Treaty obligation under Article 6(2) of the TEU.



In Opinion 2/13 issued on December 18, 2014, the CJEU found the draft accession agreement incompatible with Union law, which almost put an end to accession negotiations. However, these were resumed towards the end of 2019 and a favourable outcome is now foreseeable in the near future.

The Union's accession will mean that, in addition to the protection of fundamental rights under EU law (and in particular the Charter), the European Union will be bound by the Convention's standards and will be subject to the control of the ECtHR. Indeed, EU acts will be subject to the control exercised by the ECtHR with regard to the rights guaranteed by the Convention.

5.3 Interplay between the Charter and the European Convention on Human Rights: Articles 6(3) TEU and 52(3) EChFR

Depending on the nature of the dispute, the lawyer must examine both the Charter and the Convention to identify the right most appropriate to the case, and potentially apply both fundamental texts as interpreted by the CJEU and the ECtHR.

It is essential to reference EU primary law regarding the interaction between these legal instruments. Under **Article 6(3) TEU**, the rights enshrined in the ECHR constitute part of the general principles of EU law. Additionally, Article 52(3) EChFR states that rights contained in both legal instruments share the same *"meaning and scope"*. In fact, this provision recognises that **the protection conferred by the ECHR is a minimum to be respected in the EU** as it states that *"This provision shall not prevent Union law providing more extensive protection."*

In other words, **the ECHR represents a minimum standard of protection insofar as "corresponding rights" are concerned**. Accordingly, all EU acts, as well as national legal provisions implementing EU law must provide a level of protection to corresponding rights consistent with the ECHR's standards.



CJEU, Grd. Ch., 20 september 2022, Bundesrepublik Deutschland v SpaceNet AG, Telekom Deutschland GmbH, C-793/19 and C-749/19, ECLI:EU: C:2022:702

Facts : This case examined the interpretation of Article 15(1) of Directive 2002/58/EC on the obligation imposed on companies in the electronics sector to retain traffic and location data relating to their customers' telecommunications and the protection of, read in light of the Charter of Fundamental Rights of the European Union.

Ruling :

The CJEU clarified that while Article 52(3) of the Charter ensures coherence with ECHR standards, EU law retains autonomy.

*"125. Furthermore, the judgments of the European Court of Human Rights of 25 May 2021, Big Brother Watch and Others v. the United Kingdom, and of 25 May 2021, Centrum för Rättvisa v. Sweden concerned the bulk interception of data relating to international communications. Thus, as the Commission observed at the hearing, the European Court of Human Rights did not rule, in those judgments, on the compatibility with the ECHR of a general and indiscriminate retention of traffic and location data on national territory or even a large-scale interception of those data for the purposes of the prevention, detection and investigation of serious criminal offences. In any event, it should be borne in mind that **Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR**, without adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union, with the result that, for the purpose of interpreting the Charter, account must be taken of the corresponding rights of the ECHR only as the minimum threshold of protection."*

The scope and meaning of the corresponding rights must be determined by taking into consideration the text of the ECHR and its Protocols, as interpreted by the ECtHR. This means that where the ECHR imposes limitations on certain rights, these limitations must also be observed when interpreting corresponding rights under the Charter. Conversely, where the ECHR does not impose limitations, no such limitations can be applied under the Charter either.

The interaction between the Charter and the ECHR has positive effects for both systems regarding the scope and interpretation of rights and principles. At the current stage, **the ECHR rights corresponding to ECHR rights with the same meaning and scope**, can be summarised in the following table:



| | <i>EChFR</i> | <i>ECHR</i> |
|--|---|-------------------------------|
| Right to life | Article 2 | Article 2 |
| Prohibition of torture and inhuman or degrading treatment or punishment | Article 4 | Article 3 |
| Prohibition of slavery and forced labour | Article 5 (1) and 5 (2) | Article 4 |
| Right to liberty and security | Article 6 | Article 5 |
| Respect for private and family life | Article 7 | Article 8 |
| Freedom of thought, conscience and religion | Article 10 (1) | Article 9 |
| Freedom of expression and information | Article 11 | Article 10 |
| Right to property | Article 17 | Article 1 Additional Protocol |
| Collective expulsions prohibition | Article 19 (1) | Article 4 Protocol 4 |
| <i>Non refoulement</i> principle | Article 19 (2) | Article 3 |
| Presumption of innocence and right of defence | Article 48 | Article 6 (2) and 6 (3) |
| Legality and Proportionality principles of criminal offences and penalties | Article 49 (2), 49 (1) except the last sentence | Article 7 |



By comparing both instruments, it is also possible to identify **several EChFR rights with the same meaning but a broader scope as rights in ECHR:**

| | <i>EChFR</i> | <i>Scope of application</i> | <i>ECHR</i> |
|---|---------------------------|---|-------------------------------|
| Right to marry and right to found a family | Article 9 | Expandable to other forms of marriage if national legislation contemplates it | Article 12 |
| Freedom of assembly and of association | Article 12 (1) | Extended to EU level | Article 11 |
| Right to education | Article 14 (1) | Access to professional and continuing training is expanded | Article 2 Additional Protocol |
| Right to education | Article 14 (3) | Regarding parental rights | Article 2 Protocol |
| Right to an effective remedy and to a fair trial | Article 47 (2) and 47 (3) | In EU law, the limitation does not apply to disputes over rights and obligations of a civil nature or over accusations in criminal matters. | Article 6 (1) |
| Right not to be tried or punished twice in criminal proceedings for the same criminal offence | Article 50 | Its scope is expanded among the jurisdictional bodies of the Member States | Article 4 Protocol 7 |
| Citizen's rights | Article 39 to 46 | EU citizens are not considered as foreigners in member states | Article 16 |



In cases where the EChFR provides greater protection than the ECHR, the ECtHR interprets the Convention in a way that also enhances the protection of fundamental rights under its auspices. For example, the ECtHR has interpreted Article 12 ECHR extensively, referring to the broader protection offered by the EChFR regarding the possibility of transgender people to marry. Likewise, the ECtHR contributes to the protection of Union law, for example by declaring that the failure of domestic courts to refer a preliminary ruling to the CJEU can constitute a violation of Article 6.1 ECHR.

6. Invocability of the Charter before EU and National Courts

What You will Learn



This section provides a practical guide to invoking the Charter in legal proceedings before both EU and national courts. It explains how to determine the Charter's applicability, integrate it into legal arguments, and navigate procedural mechanisms such as the preliminary reference procedure.

Key themes :

1. **Assessing Applicability:** Understand the steps to determine whether the Charter applies in a specific case, including the need for a clear link to EU law and the relevance of key articles.
2. **Leveraging the Preliminary Reference Procedure:** Gain insight into the process of referring questions of EU law to the CJEU under **Article 267 TFEU**, including when and how to use this mechanism strategically.
3. **Building Effective Legal Arguments:** Learn to frame arguments grounded in the Charter, supported by relevant CJEU case law and aligned with national legal contexts.
4. **Role of Lawyers in Safeguarding Rights:** Explore the lawyer's role in ensuring the effective application of the Charter, from identifying breaches of EU law to challenging non-compliance through innovative strategies.

National courts must determine whether the Charter applies to a given case, which requires:

1. Understanding the specific articles within the Charter and the level of protection they afford.
2. Consulting the CJEU case law to interpret and align the Charter's provisions with national law.

Respect for and correct application of the Charter within the EU is essentially ensured through the CJEU's jurisprudential control. While there is no specific or direct mechanism for protecting the rights and freedoms recognised in the Charter, the CJEU, within its framework of actions, is competent to interpret and control its proper application by both the Member States and all the Union's institutions and bodies. Furthermore, under the principle of primacy, national courts are obliged to ensure the effective application of European Union Law.



The role of Lawyers in Safeguarding Fundamental Rights:

In matters that affect fundamental rights, lawyers have an essential role in their protection. Since a case may fall within both the EU and the Council of Europe's jurisdiction, lawyers must:

- Evaluate the scope and limitations of the ECHR and the EChFR and assess the interactions between these two systems.
- Utilise the unique feature of EU law that allows for a direct reference to the CJEU for a preliminary ruling without exhausting national remedies, unlike the ECHR.

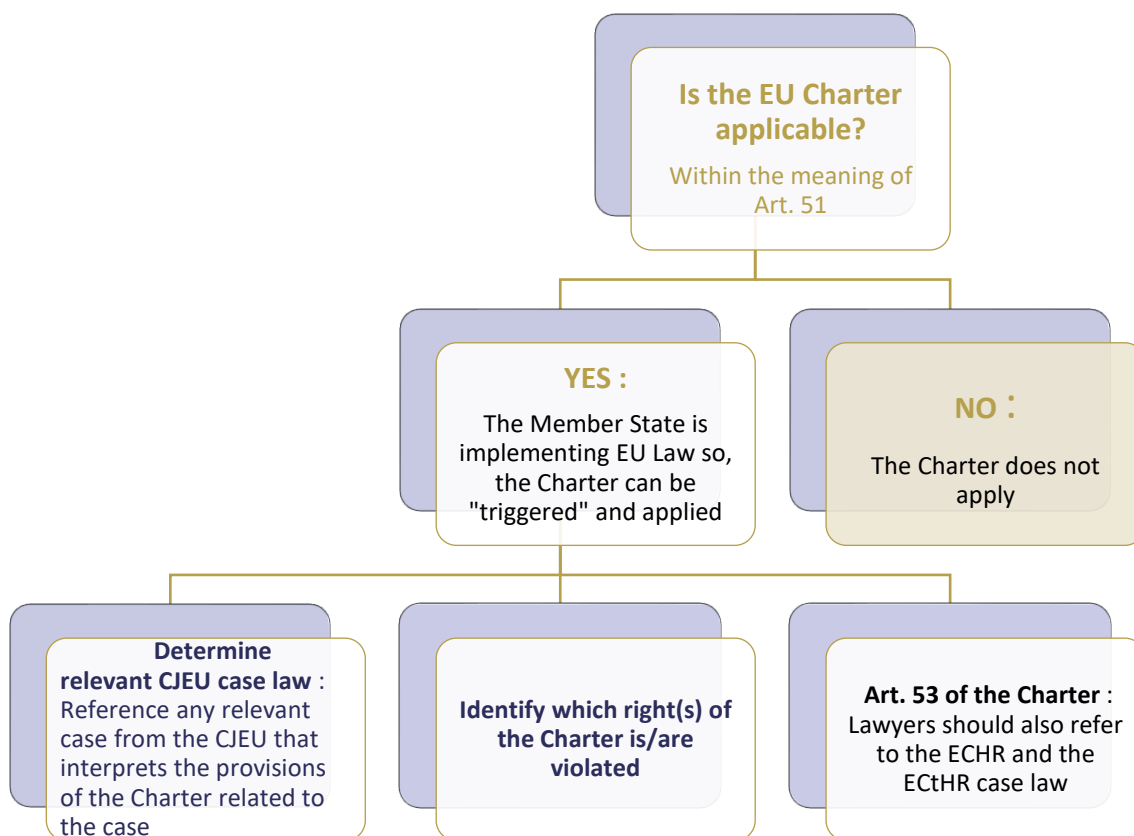


Strategy tip : *Whenever possible, a detailed analysis must be presented to the national judge in order to determine the scope, meaning and level of protection of the fundamental rights in question*

Triggering the Charter in Proceedings:

Faced with the possibility of applying the Charter, lawyers should provide the Court with strong arguments and as such, should:


- Highlight the specific European provisions that apply, thereby “triggering” the Charter
- Reference relevant CJEU case law to clarify how the Charter should be read and applied in the specific case context.



Regarding the protection of fundamental rights under the Charter, it should be noted that the *ex officio* application of EU law by the national judge is twofold.

As noted, the Charter does not apply directly to the facts of national proceedings or to domestic law in general: Its application depends on whether other rules of substantive EU laws are applicable. Consequently, the party wishing to invoke the guarantees of EU law may:

1. Point out the rules of EU law applicable in the main proceedings and, in addition,
2. Demonstrate the applicability of the concrete guarantees of fundamental rights.




In the case of only presenting allegations regarding the substantive rules of EU law, it should be remembered that compliance with fundamental rights is a condition for the validity of EU rules, and therefore national judges can always raise its relevance *ex officio*. In other words, it is very important that the lawyer endeavours to introduce EU law into the proceedings in accordance with the national procedural regime, as the application of fundamental rights is not required to be specifically included in the reasons of the parties.



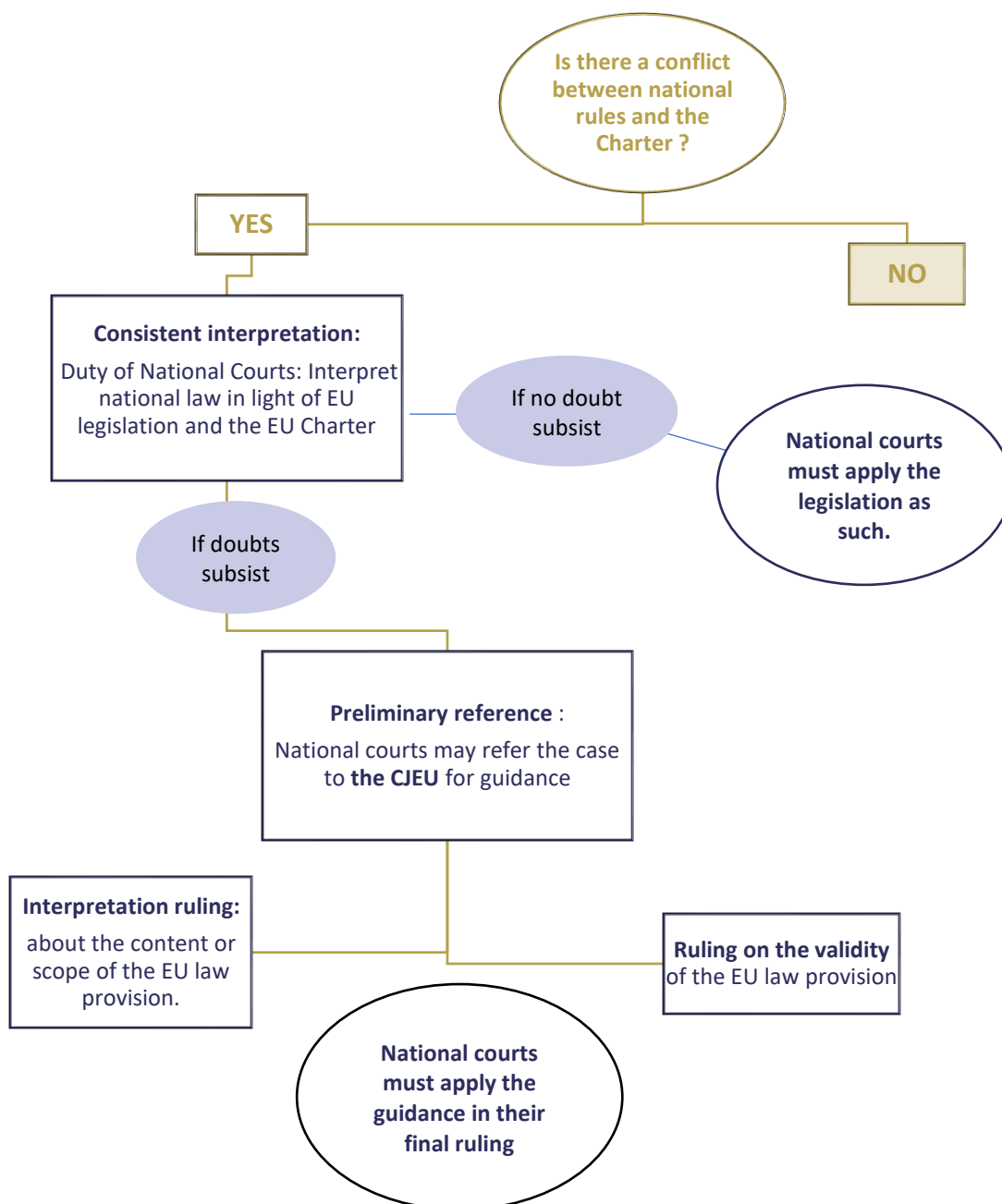
Strategy Tip : *Integrate applicable EU provisions from the start of proceedings, as the court can raise fundamental rights issues independently if EU law is invoked.*

However, in the event that a compliant interpretation is unlikely, or it may raise difficulties, the lawyer can also contribute to the elaboration of the necessary analysis in order to convince the national judge to request a preliminary ruling or, even, the non-application of the national rule introducing the Charter compliance as a good argument.



If interpreting the Charter raises complexities, lawyers can :

- Advocate for a **preliminary ruling from the CJEU** to resolve interpretation challenges
- Argue for non-application of conflicting national laws if they cannot be interpreted consistently with the Charter



Consistent Interpretation:

In order to decide which is the best strategy, lawyers must analyse if there is a conflict of rules between a national rule and what is established by the Charter. From the outset the national courts have the duty to make an interpretation considering the wording and the objective of the applicable EU legislation and the Charter. In other words, **EU acts must be interpreted in light of EU fundamental rights and, if EU acts are open to differing meanings, the interpretation that is most in line with EU fundamental rights must be preferred.**

Consistent interpretation allows national law to be interpreted in accordance with EU law, even if the national legislature has not yet transposed the relevant secondary law rule. Sometimes consistent interpretation does not allow to achieve the result of aligning a national legal provision with what is established in the EU Charter.



Consistent interpretation

Anticipates and resolves direct conflicts between:
(1) legal rules of national origin and EU/ECHR,
(2) EU and ECHR rules,
and (3) divergent rulings of national law in the light of EU/ECHR law.

Preliminary Reference:

In any case, national courts may opt for a preliminary reference to the CJEU if there are doubts about the consistent interpretation.

Preliminary rulings, as outlined in Art. 267 TFEU, aim to promote judicial cooperation between the CJEU and national courts, ensuring the uniform application and interpretation of EU law. The purpose is for the CJEU to guide national courts in the resolution of legal cases. References are made when a provision of the EU's legal system is applicable to a case brought before a court in a Member State. Ultimately, preliminary rulings serve as a procedural incident within the main proceeding carried out in the Member State.



Preliminary rulings (Art. 267 TFEU)

Facilitate judicial cooperation between national courts and the CJEU, ensuring uniform EU law application and interpretation. They are given when a Member State needs guidance on a case involving EU law.

The CJEU can provide **two types of preliminary rulings**:

- First, **a ruling regarding the interpretation** of the meaning or scope of application of an EU law provision.
- And second, **a ruling on the validity** of an EU regulatory act to be applied by a national court.



As a mechanism for cooperation between the national courts and the CJEU, **the only bodies empowered to submit a request for preliminary ruling are the national courts**. Differences between jurisdictional systems of the Member States have led the CJEU to establish the characteristics to be met by a court to be able to refer a question. From this perspective, the CJEU has adopted a broad legal concept for determining eligibility. Accordingly, any organ that meets the following characteristics may be considered capable of submitting a preliminary question: legal origin; permanence; compulsory jurisdiction; *inter partes* proceedings; rulings based law; and independence.



CJEU, 6 october 2015, *Consorti Sanitari del Maresme v. Corporació de Salut de Maresme i la Selva*, C-203/14, ECLI:EU:C:2015:664

Facts: This case arose from a request for a preliminary ruling made by the Catalan Public Sector Contracts Board (Spain), a specialised administrative body responsible for reviewing special appeals related to public procurement. In the course of the proceedings, doubts arose concerning the CJEU's jurisdiction given the unique nature of this body, which is not considered a court *stricto sensu* under Spanish law even though its decisions are final in so far as administrative remedies are concerned. Moreover, bringing an appeal before that body is optional, which raised the question of whether it could be regarded as a "court or tribunal of a Member State" within the meaning of Article 267 TFEU and whether it met the CJEU's established criteria for compulsory jurisdiction, independence and other requirements necessary to make a request for a preliminary ruling.

Ruling: The CJEU ruled that the Catalan Public Sector Contracts Board could indeed qualify as a "court or tribunal of a Member State" under Article 267 TFEU, provided that it meets the specific criteria of legal origin, permanency, inter partes proceedings and rulings based on law.

- **Independence:** "19. So far as (ii) the criterion of independence is concerned, [...] acts as a third party in relation to the authority which adopted the decision challenged in the main proceedings (see judgments in *Corbiau*, C-24/92, EU:C:1993:118, paragraph 15, and *Wilson*, C-506/04, EU:C:2006:587, paragraph 49). **In that regard, it would appear that the Tribunal carries out its functions in a wholly independent manner, not occupying a hierarchical or subordinate position in relation to any other body and not taking orders or instructions from any source whatsoever** (see judgment in *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 22); it is thus protected against external intervention or pressure liable to jeopardise the independent judgment of its members (judgments in *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and *TDC*, C-222/13, EU:2014:2265, paragraph 30)."
- **Permanency:** "20. [...] when performing its duties, with the requirement for objectivity and impartiality vis-à-vis the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. Furthermore, [...] **the members of the Tribunal are appointed on a permanent basis and cease to hold office only in the circumstances expressly set out in Article 8** (see judgments in *Wilson*, C-506/04, EU:C:2006:587, paragraphs 52 and 53, and *TDC*, C-222/13, EU:2014:2265, paragraphs 31 and 32).
- **Inter partes proceedings:** "23. In this regard, it must nevertheless be observed that the decisions of the referring body, whose jurisdiction does not depend on the parties' agreement, are binding on the parties (see order in *Merck Canada*, C-555/13, EU:C:2014:92, paragraph 18 and the case-law cited; and judgment in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, EU:C:2014:1754, paragraph 28).
- **Rulings based on law:** "24. [...] in practice, tenderers in public procurement procedures do not generally avail themselves of the possibility of directly initiating an administrative-law action, without having first brought a special appeal of the kind in the main proceedings before the *Tribunal Català de Contractes del Sector Públic*. [...] primary responsibility for ensuring that EU public procurement law is observed lies with the referring body."



As a mechanism of judicial cooperation and aid on the part of the CJEU, any national court can request a preliminary ruling. However, to guarantee the uniform application of EU law, a request becomes mandatory if no judicial remedy exists under national law (Art. 267(3) TFEU). According to CJEU case law, courts are exempt from this requirement in the following circumstances:

- When the matter to be raised is not relevant to the solution of the Member State's legal case;
- When the national judge has no reasonable doubts with regard to how to apply EU law (known as the *acte clair doctrine*, as established in Srl CILFIT v. Ministry of Health); or
- When the CJEU has clarified the matter in previous rulings.

When a national court chooses not to make a preliminary referral to the CJEU despite being required to do so, lawyers have different options and should assess them:

- First, if the conditions are met, this refusal can be seen as a violation of Art. 47 ECHR, concerning the **right to a fair trial**. At the same time, if there is a violation of the right to a fair trial, the ECtHR has ruled that an unjustified refusal to send a preliminary question amounts to a **breach of Article 6 ECHR**, as established in *Dhabi v. Italy* (ECHR, 8 April, 2014, *Dhabi v. Italy*).
- In addition, the Member State may incur **liability for damages to the affected party**, leading to the corresponding procedural actions.
- Furthermore, it is possible that the omission of a preliminary referral could affect the validity of the national court's judgment. Therefore, it is possible to try to reopen a case if, after the decision of the national court, it is clear that this court made an error in terms of EU law.
- Lastly, the information can be forwarded to the European Commission to evaluate the possibility of opening an infringement procedure of EU law.

Strategy tip : *If a national court unjustifiably refuses to refer a preliminary question to the CJEU,*

- *Consider arguing a violation of Art 47 of the Charter and Article 6 of the ECHR.*
- *Assess State liability for damages to the affected party,*
- *Explore reopening the case due to an EU law error and notify the European Commission for potential infringement*





Regarding the proceeding, it is ultimately up to the national court to decide whether to request the preliminary ruling, either *ex officio* or at the request of a party. If the court decides to request it, the main proceeding is suspended until the CJEU issues a ruling. Issuing a decision before the CJEU's response would be contrary to the **principle of loyal cooperation** enshrined in Art. 4 TUE and would undermine the *effet utile* of art. 267 TFEU.

Upon receiving a preliminary reference, the CJEU must admit the request and generally, does not assess the question's relevance. However, the CJEU may decline to rule if the question falls outside the scope of an actual legal case, is not directly related to the main legal case; is not related to EU law; or lacks sufficient reasoning. The CJEU has the discretionary power to amend the order of the questions, group them, declare them inapplicable, formulate them in another manner, and answer questions that have not been asked or take into consideration provisions of EU law not raised in the request.

Preliminary rulings are binding for the court that submitted the request, that is, the decision answering the questions raised in the request binds the court for the ruling of the main legal case.

Interpretative preliminary rulings have general applicability and thus bind all national judges in similar cases.

Preliminary rulings on validity also have a general scope: if the CJEU declares the act of EU law invalid, the national court must not apply it, though, the act formally remains within the EU legal system (it is not repealed). Sometimes, the CJEU states that the alleged grounds for invalidity are not well-founded, although the validity of the act can subsequently be questioned for other reasons. In any case, an EU act that does not comply with EU fundamental rights and cannot be interpreted in conformity with them can be declared invalid by a preliminary ruling of the Court of Justice (if the rule has not been annulled through an annulment action).



Step-by-Step: Verifying the Charter's Applicability and Using Preliminary Reference

A national environmental regulation imposes significant fines on companies that exceed emissions thresholds. A company challenges the fines, arguing they are disproportionate and violate the principle of proportionality under **Article 52(1)** of the Charter. The national law was adopted to comply with an EU regulation on industrial emissions (**Regulation 2010/75/EU**). The national court is uncertain whether the Charter applies and whether the fines are compatible with EU law.

Instructions:

You are the lawyer representing the company. Using the knowledge from this section, answer the following questions step by step to verify your understanding of how to approach a preliminary ruling request.

Step 1: Applicability of the Charter

Question 1: Does the Charter apply in this case?

- Identify the link between the national law and EU law.
- Explain how Article 51 of the Charter is satisfied.

Hint: Remember that the Charter applies only when Member States are implementing EU law. What evidence do you need to prove this link?

Step 2: Examining the Provisions in Question

Question 2: Which Charter provisions are relevant?

- Identify and explain the relevance of **Article 52(1)** and the proportionality principle.
- How does the regulation on industrial emissions tie into this analysis

Step 3: Building the Argument

Question 3: What arguments would you present to the national court to demonstrate a potential violation of EU law?

- How would you use the proportionality principle to assess the fines?
- What examples of **CJEU case law** could strengthen your argument?



Hint: Consider cases where proportionality and Charter rights were assessed, such as *Åkerberg Fransson (C-617/10)* or other similar rulings

Step 4: Determining the Need for a Preliminary Ruling

Question 4: Should the national court refer a question to the CJEU?

- What uncertainties or ambiguities might justify a referral?
- Draft a sample question that could be sent to the CJEU for interpretation.

Hint: Think about whether the national court can resolve the issue independently or if a clarification of EU law is essential.

Step 5: Strategic Considerations

Question 5: How would you persuade the national court to make a referral?

- Highlight the importance of uniform interpretation of EU law.
- Argue why the proportionality principle requires clarification in this context.

Answer Key (to provide later or during discussion):

1. The Charter applies because the fines are linked to the implementation of **Regulation 2010/75/EU**, an EU instrument.
2. Relevant provisions include **Article 52(1)** (proportionality) and any specific articles of the Charter linked to environmental or economic rights.
3. The argument must demonstrate that the fines undermine the proportionality principle, referencing **CJEU precedents** on disproportionate penalties.
4. A sample preliminary question: "Does Article 52(1) of the Charter, in conjunction with Regulation 2010/75/EU, preclude national legislation imposing fines that are disproportionately high compared to the emissions thresholds violated?"
5. Persuasion should focus on ensuring **legal certainty** and the consistent application of EU law across Member States.

7. Appendices: national perspectives on the Charter

The following appendices provide an in-depth examination of the European Charter of Fundamental Rights (EChFR) and its role within the legal systems of selected Member States of the European Union. Each appendix focuses on a specific country, offering insights into how the Charter has been integrated into national legal frameworks, its application in judicial contexts, and its interaction with domestic constitutional and legislative provisions.

For each country, readers will find:

- **An overview** of the legal status of the Charter and its relationship to the national constitution and laws.
- **Case studies** illustrating how the Charter has been invoked and interpreted by national courts.
- **Key challenges and trends** in the implementation and enforcement of the Charter at the national level.

The appendices are designed to serve as practical reference points for lawyers, trainees, and legal practitioners, demonstrating the Charter's relevance in addressing contemporary legal issues and enhancing fundamental rights protection across the EU.

APPENDIX 1: CZECH REPUBLIC

1.1 Scope and Application of EChFR rights in Czech Republic

As already mentioned, one of the main merits of the EChFR lies in the fact that it articulates explicitly and transparently the rights protected within the European Union. At the same time, it is essential to bear in mind that the rights protected by the EChFR are applicable only when "implementation of European law" is involved (Article 51 EChFR). Consequently, the EChFR and the rights outlined within it are binding on all Member States and EU institutions.

While the EChFR also enshrines rights not yet explicitly articulated in other human rights instruments and extends the scope of application of certain rights to areas that have remained "uncovered" by existing human rights instruments, national institutions often forget to incorporate the EChFR in their deliberations.

This tendency is also seen in Central and Eastern European Member States, which were part of the 'big bang' enlargement of the European Union over 20 years ago. The Czech Republic is a vivid example of this: it has been a Member State since 2004 and has significant experience in aligning its legislation with EU law. This alignment extends to the application and interpretation of EU law by administrative and other courts of the Czech Republic which have considerable experience applying EU law. Moreover, under Articles 10 and 10a of the Czech Constitution, EU law takes precedence over Czech national legislation.

1.2 Case Study 1: Temporary Protection in the Czech Republic

However, the EChFR continues to be overlooked in many cases. A notable instance that highlights the EChFR's potential relevance is the ongoing court proceedings concerning the **granting of temporary protection** for Ukrainian citizens fleeing and seeking refuge in EU Member States after February 24, 2022, to escape Russian aggression in their homeland.

Temporary protection is an exceptional protection status and *sui generis* group-protection proceedings, regulated in EU law by the 2001 **Temporary Protection Directive (Directive 2001/55/EC)**. When granting temporary protection, the Member States implement EU law, which renders EChFR applicable.

Article 51 EChFR :
Specifies that the EChFR applies only in cases involving **the implementation of EU law**, making its rights binding on EU institutions and Member States






At the core of the ongoing dispute before the Czech courts is the legal assessment of a specific aspect of Czech legislation: the provision that prohibits unsuccessful seekers of temporary protection from challenging negative decisions in court. Specifically, individuals who have applied for or received temporary protection in another EU Member State and are unsuccessful in the Czech Republic cannot contest the rejection of their application. Instead, under Czech law, such applications are considered inadmissible, and the applicants are only provided with oral reasons for the refusal.

The Czech temporary protection regime continues to raise several legal concerns on this point and considerably impacts the applications of many Ukrainian citizens who have been denied temporary protection. Article 29 of the Temporary Protection Directive mandates that individuals excluded from temporary protection should have the right to legally challenge such a decision. The Czech legislation, however, appears to conflict directly with this part of the Directive.

Not surprisingly, the Czech Supreme Administrative Court promptly examined the legal conformity of this exclusion of judicial review. In its inaugural ruling on the issue of temporary protection, the Supreme Administrative Court concluded that **Czech legislation aligns with the Czech Charter of Fundamental Rights and Freedoms**. Nonetheless, the judgment failed to persuade not only practicing lawyers but also other courts as it did not address the EU dimension, particularly the EChFR. While the Supreme Administrative Court rulings are generally respected and followed by lower administrative courts, this particular ruling faced resistance.

In a marked departure, **lower courts openly criticised the Supreme Administrative Court's decision, pointing to its lack of consideration for the EChFR**. These lower courts have also highlighted the importance of the EChFR and its Article 47, which provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before an impartial tribunal. The lower administrative courts also referenced the CJEU's ruling in *Soufiane El Hassani v Minister Spraw Zagranicznych (C-403/16)*, in which the CJEU, referring to Article 47 EChFR, established the obligation of the Member States to allow access to judicial remedy to applicants for short-stay visas.

Following this case, Czech administrative courts began to examine the case in the context of the EChFR and its Article 47. This article served as the legal foundation for the courts' conclusions that **the Czech implementation of the Temporary Protection Directive violates EU law and therefore also breaches the Czech Republic's obligations**.



Eventually, the case returned to the Supreme Administrative Court, which revisited its earlier conclusions, based on the rights protected by the EChFR.

The case is set to be adjudicated by the CJEU following a request for a preliminary ruling by the Czech Supreme Administrative Court. Due to the novel or unresolved nature of this issue in CJEU case law, the Czech Court exercised its duty under Article 267 TFEU to refer the case for interpretation.

Even if the CJEU were to find the Czech temporary protection legislation compatible with the EChFR, the example outlined above serves an important purpose: it highlights that the EChFR can offer a solution in areas where other instruments or national constitutional legislation fail to provide a clear and positive answer to the issue at hand. Simultaneously, the example underscores that the EChFR is often unjustly overlooked, even by Member States with more than 20 years of EU membership.

Furthermore, preliminary rulings under Article 267 TFEU also played a crucial role in this case. **National courts of last instance are obligated to refer a request for a preliminary ruling to the CJEU if the interpretation of EU law needs clarification or if a similar case has not yet been addressed in the CJEU's case law.** This important obligation should be utilised more frequently by Czech courts.



Preliminary Rulings under Art 267 TFEU : An underutilised tool

Art 267 TFEU mandates that national courts of last instances must refer to the CJEU :

- If clarification on how to interpret EU law is required or
- If a similar case has not been yet addressed by the CJEU

1.3 Case study – application of the EChFR in Czech national law: *The Torubarov case:*

Beyond temporary protection, Czech courts have consistently recognised the value of the EChFR in national judicial context. A key example of the EChFR's application at the national level is the application of the CJEU's judgment in the *Torubarov* case (C-556/17), which, although arising from another Member State, holds significant relevance for the Czech Republic. This case illustrates the EChFR's potential to shape core national legal principles.



CJEU, 30 April 2019, *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal*, C-556/17, ECLI:EU:C:2019:339

Facts : The case of *Torubarov* before CJEU involved Mr. Torubarov, an applicant for international protection in Hungary. His application was repeatedly rejected by Hungarian administrative authorities. While this situation might typically fall within the expected parameters of asylum procedures, Mr. Torubarov's case was marked by a significant conflict between judicial and administrative decisions. Mr Torubarov contested these refusals on several occasions through legal action before courts. Nevertheless, his efforts and the subsequent court decisions have had a limited impact. Under Hungarian national law , the courts were only entitled to annul the administrative authorities' decisions rather than to substitute them with their own decision granting international protection. This limitation, known as the cassation principle, means that a court can either dismiss an action or uphold it and remit the matter to the administrative authority for further proceedings. This procedural limitation led to a cycle of repeated annulments and remittals in Mr. Torubarov's case. Courts annulled administrative rejections and referred the matter back to the authorities for re-examination. However, administrative authorities persisted in rejecting his application without providing adequate reasoning for their contradictory decisions. This dynamic resulted in an "administrative ping-pong" or a vicious circle of unresolved decisions.

Ruling :

The *Torubarov* case was ultimately referred to the CJEU.

The CJEU examined the matter under the framework of EU asylum law and the **right to an effective remedy**, as enshrined in **Article 47 EChFR**.

In its judgment, the CJEU held that:

- To ensure an effective remedy under EU asylum law, national courts must, in **exceptional cases**, have the power to substitute their decision for that of the administrative authority.
- Even where national legislation prohibits such substitution, this prohibition cannot be upheld if it undermines the right to an effective remedy.

Following the *Torubarov* judgment, Czech courts quickly integrated these conclusions into their own case law. They faced the same original problem of not being able to replace administrative authorities' decisions with their own decisions directly. For applicants for international protection, this represented a significant step, reinforcing their rights to an effective remedy. While Czech law, like Hungarian law, traditionally prevents administrative courts from substituting their own decisions for those of administrative authorities, the *Torubarov* decision changed this. Czech Courts have since recognised this "new power" derived not from Czech law but directly from Article 47 EChFR.



A growing body of national case law demonstrates that Czech courts are prepared to use this power, particularly where asylum authorities repeatedly ignore the courts' conclusions and continue to reject applications for international protection without any new substantial grounds. **This assertive application of the Torubarov precedent underscores the strengthened role of Czech courts in upholding applicants' right to an effective remedy, as established under EU law.**

APPENDIX 2: FRANCE

Pursuant to Article 55 of the French Constitution, the Charter of Fundamental Rights has supra-legislative value, equivalent to a treaty. With the entry into force of the Treaty of Lisbon in 2009, the Charter was given binding legal effect alongside the EU Treaties. It must therefore be applied directly by national courts within the Charter's defined limits.

2.1 The *Conseil Constitutionnel* and its role in European Union Law

The Constitutional Council does not assess national law in light of international commitments. It has authority to address EU law only in connection with Article 88-1 of the Constitution which establishes *"The Republic participates in the European Union made up of States which have freely chosen to exercise jointly some of their competences under the Treaty on European Union and the Treaty on the Functioning of the European Union, as they result from the Treaty signed in Lisbon on 13 December 2007"*.

Notably, when transposing an EU directive or adapting national law to an EU regulation, the Council ensures that such actions do not contradict principles inherent to the French constitutional identity unless specifically permitted by the French constitution. In the absence of any challenge to such a rule or principle, the Constitutional Council is not competent to assess the constitutionality of legislative provisions that are merely implementing the clear and unconditional terms of a EU directive or regulation. In that case, it is solely for the Courts of the European Union, through preliminary rulings when requested by national courts, to assess the conformity of such EU measures with fundamental rights guaranteed by Article 6 of the TEU.



Constitutional Council, Decision No. 2021-940 QPC, 15 October 2021, Société Air France

Facts :

This case concerned the obligation for air carriers to reroute foreigners who are refused entry into France.

It arose from the application of article L. 213-4 of the Code on Entry and Stay of Foreigners and Asylum Law (CESEDA) which stipulates that air or sea carriers who have transported a person who has been refused access to French territory on the grounds that his or her *"presence would constitute a threat to public order"*, or who is the subject of either a territorial ban or a deportation order, are thus *"required, at the request of the authorities responsible for controlling persons at the border, to return the foreigner without delay to the point where he or she began using the company's means of transport, or, if this is not possible, to the State which issued the travel document with which he or she travelled, or to any other place where he or she may be admitted"*. The purpose of article L. 213-4 of the CESEDA was to draw the consequences, in domestic law, of the convention implementing the Schengen Agreement, signed on June 19, 1990. The Minister of the Interior had imposed two fines on Air France for failing to meet its obligation to reroute two passengers who had been refused access to French territory.

Air France challenged the constitutionality of article L 213-4.

Ruling :

The Constitutional Council held that for infringements arising from EU acts – such as the Schengen Convention implementation underlying Article L.213-4 – only the EU legal system has jurisdiction to assess compliance with rights. However, if rules and principles inherent to France's constitutional identity are at stake, The Constitutional Council has to ensure that they are respected.

In 2013, the *Jeremy F.* decision marked the first instance in which the Constitutional Council referred a question to the CJEU. This referral specifically concerned the implementation of the European Arrest Warrant and was made under Article 88-2 of the French Constitution, which mandates that the legislature shall establish rules relating to the European Arrest Warrant *"in application of the acts adopted by the institutions of the European Union"*. In decision No. 2013-314 P QPC, dated 4, April 2013, the Constitutional Council formally requested a preliminary ruling referred a question to the CJEU for the first time in its history.



2.2 The Charter before national courts: scope, invocation and the role of judges

National courts must first determine whether the dispute falls within the scope of EU law, referencing CJEU case law for guidance. Lawyers must invoke EU law before national court in order for it to be applied.

Parties are responsible for asserting claims of infringement of fundamental rights guaranteed by the Constitution, the ECHR and the EChFR. The question of whether a national provision is consistent with the EChFR is not a matter of public policy that judges are obligated to raise on their own initiative. However, it is noteworthy that French court occasionally do raise such claims on their own motion based on EU law or the ECHR.

In the absence of a direct recourse to the CJEU equivalent to the right of individual petition (Art. 34 ECHR), the Charter's effectiveness depends on national judges and on the preliminary ruling process, an instrument fostering dialogue between judges.

For instance, regarding the right of detainees to receive food in line with their religious beliefs, the *Conseil d'État* clarified that a claim based on Article 10 of the Charter is ineffective, as EU law is not applicable in this area (CE, 10 Feb. 2016, M.B., No. 385929). By contrast, the Court of Cassation has issued multiple judgments concerning the wearing of religious symbols in the workplace, addressing discrimination in connection with Council Directive 2000/78/EC of 27 November 2000, which establishes a general framework for equal treatment in employment and occupation.

Although the Court of Cassation has occasionally rendered decisions on the basis of the Charter, such instances are exceptional.

Notable examples may be found in **labour law**:



Cass. Soc. Ch. soc., Jan 31, 2012, No 10-19.807

Facts :

In this case, an employee requested overtime pay, challenging the legality a fixed-term employment contract ("*convention de forfait jours*").

Ruling :

Invoking EU law, Article 31 of the EChFR, as well as the general principles of worker health and safety protection, the French Supreme Court upheld the employee's claim.



Cass. Soc. 13/09/2023, n°22.17340, 22-17341 and 22-17342

Facts :

In this case, an employee sought vacation pay for the period spent on sick leave, despite French law at the time containing no provision for such an entitlement.

Ruling :

The Court of Cassation ruled that workers on sick leave retain the right to paid annual leave, referencing Directive 2003/88/EC and Article 31(2) EChFR. It held that national legislation conflicting with these provisions must be disapplied.

"8. The right to paid annual leave is an essential principle of EU social law (CJEU 6 November 2018, *Stadt Wuppertal v. Bauer*, C-569/16 and *Willmeroth v. Broßonn*, C-570/16, paragraph 80). 9. It follows from the case-law of the Court of Justice of the European Union that Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time makes no distinction between workers who are absent from work on sick leave during the reference period, and those who actually worked during that period. It follows that, in the case of workers on duly prescribed sick leave, the right to paid annual leave conferred by that directive on all workers cannot be made by a Member State subject to the obligation to have actually worked during the reference period established by that State (CJEU *Schultz-Hoff*, 20 January 2009, C-350/06, paragraph 41; CJEU 24 January 2012, *Dominguez*, C-282/10, para. 20).

[...]

11. By judgment of 6 November 2018 (C-569/16 *Stadt Wuppertal v. Bauer*, and C-570/16 *Willmeroth v. Broßonn*), the Court of Justice of the European Union held that, where it is impossible to interpret national legislation in such a way as to ensure compliance with Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter of Fundamental Rights, The national court must disapply that national legislation. The Court of Justice of the European Union clarifies that this obligation is imposed on the national court under Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter of Fundamental Rights where the dispute is between a beneficiary of the right to leave and an employer having the status of a public authority and under the latter of those provisions where the dispute is between the beneficiary and an employer who has the status of a private individual.»

[...]

15. **It is therefore necessary to disapply in part the application of the provisions of Article L. 3141-3 of the Labour Code** in so far as they make the acquisition of rights to paid leave by an employee whose employment contract is suspended as a result of a stoppage of work due to a non-occupational disease to be ruled in part, and to hold that the employee may claim his or her rights to paid leave in respect of that period in application of the provisions of Articles L. 3141-3 and L. 3141-9 of the Labour Code".



Another recent and significant example involves the interpretation of the French Labour Code with respect to paid sick leave, as viewed through the lens of EU law and the EChFR.

2.3 Case studies: Application of the Charter by national courts

Although French courts have increasingly incorporated the ECHR into their jurisprudence, the EChFR remains underutilised, resulting in limited influence on national judicial decisions and a corresponding scarcity of case law. While progress has been made, French judges do not consistently align with EU law. This is sometimes due to a reluctance to refer cases to the CJEU when a preliminary ruling is warranted, or to a resistance to the CJEU's interpretations.

Very often, the *Conseil d'État*, when presented with legal arguments invoking both the ECHR and the EChFR, will address the matter solely by applying the ECHR, affirming that this approach yields the same outcome under the EChFR.

Highlighted below are **noteworthy cases** in which French courts have applied – or resisted applying – the EChFR:

i. **Matters of asylum :**



Conseil d'Etat, 2ème – 7ème chambres réunies, 30/01/2017, No. 394686

Facts :

The Code de l'Entrée et du Séjour des Etrangers et du Droit d'Asile (Code on the Entry and Residence of Foreigners and the Right of Asylum) provided for the possibility of taking fingerprints, in accordance with Regulation (EU) no. 603/2013 of June 26, 2013 "on the Eurodac system for the comparison of the fingerprints of applicants for asylum for the purpose of determining the Member State responsible for examining an application for international protection lodged in one of the Member States". Associations for the defense of migrants challenged the legality of the decree under the Charter of Fundamental Rights.

Ruling :

The *Conseil d'Etat* upheld the Eurodac provisions, noting that they were proportionate, necessary and served objectives of general EU interest, such as combating serious crime and terrorism, thereby finding no infringement of Charter Articles 8 and 18.

"Whereas, in accordance with Article 52(1) of the Charter of Fundamental Rights of the European Union, any limitation on the exercise of the rights and freedoms enshrined in the Charter must be provided for by law, respect their essence and, subject to the principle of proportionality, limitations may be made on those rights only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the European Union, need to protect the rights and freedoms of others; whereas it is clear from the case-law of the Court of Justice of the European Union that the fight against international terrorism with a view to maintaining international peace and security and the fight against serious crime in order to guarantee public security constitutes an objective of general interest of the Union; whereas, without there being any need to refer a question to the Court of Justice of the European Union for a preliminary ruling, taking into account the criteria allowing access to the data contained in the Eurodac system by the competent authorities and the safeguards provided for the use of those data in the light of the objective pursued, it is clear from the contested provisions of Regulation (EU) No 603/2013 that consultation of the Eurodac system for law enforcement purposes does not infringe the Articles 8 and 18 of the Charter of Fundamental Rights of the European Union."

ii. Data Protection



CE, Ass. 21 Apr. 2021, French Data Network, No. 393099

Facts :

A requirement imposed on electronic communication operators to retain data for criminal investigations was challenged as violating Articles 7 and 8 of the EChFR, protecting private life and data protection.

Ruling :

The Conseil d'Etat has significantly reduced the protection of fundamental rights to data protection and respect for private life, as enshrined in Articles 7 and 8 of the EChFR, in the name of the constitutional objective of safeguarding the Nation's fundamental interest, preventing public order violations, identifying perpetrators of criminal offenses and combating terrorism.

iii. Exchange of information in the field of taxation



C.E, 25 June 2021, No. 448486.

Facts :

This case concerns the transposition of Council Directive 2018/822 of May 25, 2018 which mandates the automatic and compulsory exchange of information in tax matters for reportable cross-border arrangements. This Directive introduced a requirement for entities to report to the tax authorities legal arrangements likely to result in a loss of tax matter involving several European Union member states or a member state and a third country.

The *Conseil National des Barreaux* (National Council of Bars) and various lawyers' organizations contested this transposition law, arguing that its reporting obligations compromised lawyer-client confidentiality. They claimed that this requirement violated fundamental rights under both EU and international law - specifically, Articles 7 and 47 EChFR, which protects private life and the right to a fair trial, as well as Articles 8 and 6 of the ECHR.

Ruling :

The Conseil d'Etat recognised the validity of the applicants' concerns regarding fundamental rights. It acknowledged that the rights guaranteed by the EChFR were critically implicated in this case. Furthermore, the court indicated that it may grant relief sought by the parties, which included the option to make a preliminary reference to the CJEU to clarify the compatibility of the reporting obligations with EU law.

iv. Social protections



Cour d'Appel de Lyon, March 31, 2015, No. 14/05509

Facts :

This case involved the review of a legislative provision that condition the granting of the solidarity allowance for the elderly on a residence requirement. The applicant questioned the conformity of Article L816-1 of the French Social Security Code. The applicant questioned the conformity of Article L816-1 of the French Social Security Code with international standards, arguing that it deprived him of the minimum means of subsistence, as required by international texts of higher value under Article 55 of the French Constitution.

Ruling :

The Lyon Court of Appeal determined that, while the residence condition aimed to ensure that assistance was granted to individuals residing permanently in France – a legitimate objective – the provision's application in this case deprived the applicant of necessary subsistence means before the age of 75. This deprivation was found to contravene the rights to dignity and independence required the EChFR, prompting the court to deem the provision inconsistent with the EChFR.

v. Right of the Social and Economic Committee (CSE) to take legal action



Cour de Cassation, Chambre Sociale, March 2, 2022, No. 20-077

Facts :

This dispute involved a company's social and economic committee (CSE), which initiated a consultation process on social policy within the company and appointed an expert to assist. The employer objected, citing an agreement with trade unions stipulating that consultations on economic, social and strategic policies were to take place solely at the central CSE level.

Ruling :

The *Cour de Cassation* upheld the CSE's right to an effective judicial remedy, citing Article 47 of the EChFR, Article 16 of the 1789 Declaration and Directive 2002/14/EC on employee consultation. The Court ruled that the CSE could contest the legality of the collective agreement clauses that infringed its legally granted prerogatives, affirming the right of the CSE to pursue its claims without time limit.

"Having regard to the right to an effective judicial remedy guaranteed both by Article 16 of the 1789 Declaration and by Article 47 of the Charter of Fundamental Rights of the European Union, applicable in the present case by virtue of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a social and economic committee is entitled to invoke by way of exception, without any time limit, the illegality of a clause of a collective agreement on the grounds that the clause violates its own rights resulting from the prerogatives conferred on it by law".

vi. Employer's duty to inform employees about working hours



Cour de Cassation, Chambre Sociale, July 5, 2023, No 21-24122

Facts :

This case centered on the CSE's claim that the employer had failed to comply with its duty to ensure employee safety and prevent occupational risks and monitor working hours. The CSE requested that the employer implement tracking systems for employees' working hours and unusual work travel, and to ensure monthly monitoring of the volume of hours recording in the accounts.

Ruling :

The *Cour de Cassation* upheld the CSE's claim, referencing Article 31(2) of the EChFR, Directive 2003/88/EC concerning working time and Directive 99/391/EEC regarding worker health and safety. The court affirmed that the employer was responsible for tracking working hours to safeguard employee health and safety.

vii. Right of access to individual information on discrimination and data protection



Cour de Cassation, Chambre Sociale, June 1, 2023, No. 22-13238

Facts :

The case concerned employees who, alleging discrimination due to their trade union activities, sought to obtain information about other employees' career progress and salaries to substantiate their claims. The employer objected citing data protection concerns under the General Data Protection Regulation (GDPR).

Ruling :

The Court held that providing names and pay information of other employees was necessary and proportionate to substantiate claims of discrimination, and did not disproportionately infringe privacy. Citing the GDPR and the EChFR, the court clarified that data protection is not absolute but must be balanced against other fundamental rights, such as the right to a fair trial. The court emphasised that protecting individuals' right to evidence in discrimination cases justified the limited data disclosure.

APPENDIX 3: SPAIN

3.1 Integration of the EChFR into Spanish constitutional framework

The integration of the EChFR into the Spanish legal system has been a controversial issue, especially due to the doctrinal changes adopted by the Constitutional Court. The Spanish Constitution includes two relevant provisions in this regard:

- **Article 93** of the Spanish Constitution mandates that judges ensure the direct effectiveness and primacy of the EChFR when EU law is applied, stemming from Spain's ratification of the EU Treaties and adoption of the Community standards.
- However, **Article 10.2** of the Spanish Constitution establishes that it is also possible to defend a hermeneutic value to the EChFR to the extent that Article refers to *"the rules relating to fundamental rights and freedoms recognized by the Constitution"*.

Initially, the Constitutional Court was very cautious when declaring itself competent regarding violations of rights in the field of European law. Prior to the EChFR's adoption, the Court repeatedly affirmed that *"it is not up to the Constitutional Court to monitor the adequacy of the activity of the national public powers to European Community law. This control is the responsibility of the organs of ordinary jurisdiction, as they are enforcers of the Community order and, in their case, the Court of Justice of the European Communities through the infringement procedure"* (see Constitutional Court Judgement 372/1993, of December 13, FJ 2; or 265/1996, of September 19, FJ 5). In practice, this means that the Court has rarely admitted claims for violations of effective judicial protection linked to the referral of preliminary questions or to issues around the correct interpretation of the CJEU jurisprudence. When it did so, the Constitutional Court limited its role strictly to determining the distribution of jurisdiction (see, Constitutional Court Judgement 145/2012, of July 2, known as *Iberdrola case*).

The Constitutional Court subsequently developed a controversial doctrine to address potential conflicts between guarantees: namely, between internal regulation and the EChFR. In Declaration 1/2004, of December 13, the Constitutional Court affirmed that in the event of a "hypothetical" conflict *"the application by the national judge, as a European judge, of the fundamental rights of the Charter will have to assume, almost without exception, the simultaneous application of the correlative fundamental national right"*. This approach was based on the Constitutional Court's interpretation of the EChFR and the relevant considerations for national authorities when applying it. Accordingly, the Constitutional Court affirmed that *"it is clearly stated that the Charter is conceived, in any case, as a guarantee of minimums, on which the content of each right and freedom can be developed until the density of content ensured in each case by the internal law"*.



Additionally, the Court noted that, in the face of any conflict involving international obligations, national authorities “*remain public authorities that are subject to the Constitution*” (see Constitutional Court Judgement 64/1991, of March 22, *APESCO*, par. 8).

3.2 Case study: the *Melloni* case and its impact

Years later, the Constitutional Court presented its first preliminary reference, which effectively challenged the established doctrine. This case involved Mr. Meloni, an Italian citizen, against the Public Prosecutor, regarding the execution of a European Arrest Warrant issued by Italian authorities for a criminal conviction (CJEU Judgement, *Melloni*, C-399/11, ECLI:EU:C:2013:107). The Constitutional Court questioned the compatibility of the EAW for enforcing a sentence handed down *in absentia* with Article 47 of the EChFR. At the time, the Spanish Court also sought clarification from the CJEU on the scope of Article 53 of the EChFR, particularly whether the transfer of Mr. Melloni could be conditioned upon the possibility of reviewing the conviction in the requesting State to ensure a higher level of protection than provided by EU law—thereby safeguarding fundamental rights as recognised in the executing Member State’s constitution.

The CJEU’s response was conclusive indicating that “60. *It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised. [...] 63. [...] allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia [...] in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights [...] would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision*”.

In response to this CJEU ruling, the Constitutional Court has opted for the mere interpretative value of the EChFR based on Article 10(2) of the Spanish Constitution, thus de-emphasising the principle of primacy in accordance with Article 93 of the Spanish Constitution. Consequently, the Constitutional Court appears exempt from the direct effectiveness and primacy of the EChFR when applying some parts of EU law.



In ordinary Spanish jurisdiction, the application of the EChFR is largely confined to the direct effect and transposition of Directives. In fact, it is common for Spanish judges to consider the EChFR as an **interpretive tool** rather than recognising its legal value as equivalent to primary law.

The CJEU has defined quite precisely the scope of Article 51 EChFR regarding the Charter's applicability in relation to EU Directives. Specifically, the transposition of a Directive is linked to the Charter in two main situations:

- Firstly, when the Directive's application to a specific case leaves no margin of appreciation, thereby imposing a specific obligation on Member States.
- And secondly, when implementing the Directive requires an assessment that may undermine the effectiveness of EU Law.

Guided by the doctrine of the Constitutional Court, the majority of ordinary Spanish courts resist the direct application of European Directives, instead determining their own margins of appreciation under the Charter. This approach has led to a substantial number of preliminary references regarding the application of the Charter in the case of the Directives. For example, notable cases include the *ASNEF* case on personal data processing ([C-468/10 and C-469/10, ECLI:EU:C:2011:777](#)); the *Aziz* ([C-415/11, ECLI:EU:C:2013:164](#)) and *Sánchez Morcillo* cases ([C-169/14, ECLI:EU:C:2014:2099](#)) on consumers and abusive clauses in mortgage loans; the *Vital Pérez* case ([C-416/13, ECLI:EU:C:2014:2371](#)) on discrimination on grounds of age in a public call; and the *Nisttahuz* case ([C-117/14, ECLI:EU:C:2015:60](#)) on employment contracts and trial periods.



APPENDIX 4: IRELAND

The Irish constitution makes reference to the primacy of European Union (EU) law in Article 29 but does not specifically mention the Charter. Against this background it is noteworthy that an amendment was necessary to enable the State to join the EU and prevent conflicts between constitutional provisions and EU law. This was achieved with the Third Amendment of the Constitution Act, 1972.

In December 2009, there was a substantial shift in the EU's framework for protecting fundamental rights. Since then, Ireland is bound by the Charter, which has the same legal standing as the EU Treaties among member states. It is crucial to remember that the Charter only comes into play when a dispute involving EU law emerges. The EU Charter is applicable, for instance, when national laws incorporating EU law are adopted or implemented by EU member states, or when EU law is directly applied by their authorities. Nonetheless, the Charter will not be applicable if a new Irish law is passed that has nothing to do with EU law. When the Charter is applicable, Irish courts will immediately apply it, and in the event of a dispute, it will supersede domestic law. This implies that judges in Irish courts must use the Charter and that it may serve as the foundation for a claim. In the following, it will be clearer enunciated how this applies in judicial practice.

4.1. Bringing fundamental rights home - how Irish Courts and the CJEU domesticate the Charter in Ireland

The CJEU has long had a limited involvement in the area of European fundamental rights. Although the number of cases involving substantive human rights claims remained low in the early decades, the Court achieved significant results over the years by recognising fundamental rights as general principles of EU law and evaluating the compatibility of national and European measures against those principles. The Court was also frequently criticised for not being "fundamental rights minded" to support EU law supremacy.

The breadth of EU policy and law has kept growing, and today the legislative body of the EU addresses a wide range of topics, including security, privacy, and immigration and asylum. Stated differently, the EU is a constantly expanding and omnipresent legislative body that can affect human rights, welfare, and national sovereignty in a variety of ways. As a result, requests for decisions on matters pertaining to human rights as well as the interpretation and implementation of the Charter of Rights comes in constant interaction between Irish Courts and CJEU.



In the following, two examples of these interactions are highlighted which led to a greater domestication of the Charter in the State.

i. Respect for private and family life and Protection of personal data

It is mandatory to interpret all sub-primary provisions of EU law in accordance with the Charter. To that end, secondary law that violates the Charter should be disregarded where appropriate interpretation is not available. In the event of a direct action for annulment as stipulated in Article 263 Treaty on the Functioning of the European Union (TFEU) or a reference for a preliminary determination (Article 267 TFEU), the CJEU is the sole authority with the authority to declare provisions of EU legislation illegal. The CJEU issued a range of judgments which declared certain invalid provisions of EU legislation or an entire EU secondary act due to being in conflict with the Charter, having effect on cases which related to the Republic of Ireland (such as C-293/12).



CJEU, 8 April 2014, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, Joined Cases C-293/12 and C-594/12., ECLI:EU:C:2014:238

Facts :

This particular case dealt with Directive 2006/24/EC (Directive), which governed Internet service providers' storage of telecommunications data and which might be utilised to combat serious crime in the EU. It was adopted by the European Parliament and Council in 2006. The purpose of the Directive was to unify the various national laws in the EU regulating the preservation of data about the origin, destination, and timing of communications occurring within the EU.

Regarding the legality of the actions based upon the Directive, parallel cases were brought up in Austria and Ireland. Digital Rights Ireland, a civil rights organisation in the State, said that the Directive was being used as a foundation for regulations pertaining to mass surveillance that infringed against fundamental human rights. The Austrian Constitutional Court and the High Court of Ireland contended that they were unable to appraise such actions until the legitimacy of the Directive was determined. Following that, the questions from each court were referred to the CJEU.

Ruling :

After assessing the Directive's compliance with Articles 7 and 8 of the Charter, the European Court of Justice (ECJ) ruled that it was unconstitutional. The CJEU claimed that the Directive infringed against both the right to the protection of personal data under Article 8 and the right to respect for one's private life under Article 7. Limitations on these rights are only permissible under Article 52(1) of the Charter if they are mandated by law, respectful of the fundamental rights guaranteed by the Charter, and commensurate with the legitimate goal being sought.

The CJEU concluded that the Directive's application might, for a period of time that was not stated but could range from six to twenty-four months, significantly interfere with the fundamental rights of every citizen of the EU. Regarding the terms of data storage and the responsibilities of Internet service providers and security agencies that access the data, the Directive ought to have been more explicit. Because the Directive did not provide any assurances on the storage, management, or accessibility of telecommunications data, the CJEU held that the Directive was incompatible with the Charter.

ii. Human dignity, prohibition of torture and inhuman or degrading treatment or punishment et al.

The case C-411-10 and C-493-10, joined cases of *N.S. v United Kingdom* and *M.E. v Ireland* is a case which dealt with a variety of rights enshrined in the Charter, as it encapsulates an area of law which has triggered the human rights infrastructure of the State: namely, asylum law.



CJEU, 21 December 2011, N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, C-411/10 and C-493/10, ECLI:EU:C:2011:865

Facts :

The primary proceedings involved a dispute involving several nationals of other countries who had previously transited through Greece and sought asylum in the UK or Ireland. They protested being sent to Greece, the EU member state typically in charge of evaluating their asylum applications using Regulation No. 343/2003 12 (also known as the "Dublin II Regulation"). They contended that the procedures and conditions for asylum seekers in Greece are insufficient, or that such a transfer would violate their fundamental rights, and that the Member State whose territory they were on at the time was obligated to exercise its authority under Article 3(2) of the Dublin II Regulation to accept responsibility for reviewing and determining their asylum claims. In particular, that case raised two concerns about the scope of the Charter's application.

Key Issues examined by the CJEU :

- **Application of the Charter to Member States under EU Law:**

The Court considered whether a Member State's decision to accept or reject an asylum claim under Article 3(2) of the Dublin II Regulation constituted an implementation of EU law under Article 51(1) of the Charter.

The CJEU noted that Article 3(2) provides Member States with a discretionary power essential to the EU's Common European Asylum System. This discretion, however, must be exercised in compliance with EU law, including the Charter. Therefore, a Member State deciding to review an asylum application under Article 3(2) was deemed to be implementing EU law and bound by the Charter (paragraphs 55, 65–69).

- **Impact of Protocol No. 30 :**

The Court addressed whether Protocol No. 30, which applies to the UK and Poland, limited the applicability of the Charter. The Court clarified that the Protocol did not exempt these Member States from their obligation to comply with the Charter when implementing EU law. Instead, the Court determined that Article 1(1) of Protocol No. 30 clarifies the scope of Article 51 of the Charter and does not aim to absolve the Republic of Poland or the United Kingdom of their duty to abide by its provisions, nor to prohibit a court of one of those Member States from enforcing compliance with those provisions (paragraphs 116, 119, 120, 122 and paragraph 4 of the operative part).

Prohibition Against Transfer to Greece:

The CJEU emphasized that under Article 4 of the Charter, which prohibits torture and inhuman or degrading treatment, Member States are not allowed to transfer asylum seekers to a Member State where they face a real risk of such treatment. The Court held that systemic deficiencies in Greece's asylum procedures and reception conditions exposed asylum seekers to inhuman and degrading treatment, thereby making their transfer under the Dublin II Regulation unlawful.

Ruling :

The Court held that:

- a Member State exercising discretion under Article 3(2) of the *Dublin II Regulation* is implementing EU law and is therefore bound by the Charter.
- The Protocol did not absolve the UK or Poland of their obligation to ensure compliance with the Charter. It is necessary to read Article 4 of the European Union's Charter of Fundamental Rights to mean that national courts and Member States are not permitted to send asylum seekers to the Member State that is holding them accountable.



4.2. Reflection on the Charter's impact of fundamental rights jurisprudence in Ireland.

A greater reflection is needed under this section how the interaction with the Court and Charter has shaped the fundamental rights jurisprudence in Ireland. It is in particular in the area of asylum law which may have begun as a field of domestic and/or international law, but as EU legislation in the areas of justice and home affairs has grown over time, the amount of EU law occupying the field has increased dramatically.

For this reason, the Irish courts have given the scope of application of the Charter particular consideration in cases involving immigration and asylum. Numerous rulings have underlined the ongoing character of some powers, such as the authority to deport, as sovereign to the State (meaning that some provisions of the Charter, such as the Article 7 right to respect for private and family life, are not applicable). In a rather recent case, the High Court held that the State's refusal to give lodging, food, and basic hygienic facilities to a 17-year-old who had just arrived from Afghanistan was declared illegal and a violation of his Charter right to dignity by the High Court. Upon requesting international protection in Ireland, the applicant was informed that lodging was not feasible and was instead given a €25.00 Dunnes coupon. He spent three weeks on the streets as a result of this ([S.Y. \(A Minor Suing by his Next Friend Aoife Dare\) v The Minister for Children and Others.](#))

In addition, a case involving an application for an injunction to prevent the execution of a deportation order, *AO v. Minister for Justice, Equality and Law Reform* (No. 3), may include one of the closest analysis of the breadth of applicability of the Charter in Irish courts in the last years. Hogan J. pointed out that the interpretation of Article 51 of the Charter was still being worked out by the EU courts ([A.O. v Minister for Justice ,Equality and Law Reform \(No. 3\) \[2012\] IEHC 104.](#))

Less straightforward cases present more difficulty. It may well be that where, for example, the State exercises a discretionary power pursuant to the European Arrest Warrant Act 2003 that the Charter will apply, although this matter is not at all free from difficulty, as Edwards J. acknowledged in *Minister for Justice and Equality v. D.L.* [2011] IEHC 248. Other difficult questions may possibly arise regarding the scope of application of the Charter where this is said to be triggered by the presence of possibly accidental factors of nationality and free movement in circumstances which might otherwise suggest the happening of events purely internal to this Member State.



In another notable case, the Charter played a role in the Irish judicial review of decisions made by the Minister of Justice and Equality (*K.I. and Others v Minister for Justice and Equality and Others* [2014] IEHC 83.). In this case, the applicant, a Nigerian national who had applied for asylum but was turned down, was also the second applicant's partner. The applicant claimed that because his deportation violated Article 8 ECHR by not respecting his family life, it qualified for redress under the Court of Justice's *Zambrano* ruling. In this ruling McDermott J. held that the applicants had not proven there was a fundamental error in the respondent's decision. Even if they weren't his biological offspring, the applicant's rights had been duly taken into account, and the children's welfare and best interests had been duly evaluated. The applicants' attempt to prove that the decision to refuse to cancel deportation was invalid due to the arguments put forward did not satisfy the court. He had continued to lie about when he had arrived in the State. Throughout, the applicant disregarded immigration and asylum laws while continuing to lead a family life while being aware of his dangerous situation.

Finally, it is also noteworthy that the Court and national courts find themselves in conflict, such as in *Graham Dwyer v. Data Commissioner*. In this case a jury found Mr. Graham Dwyer guilty on March 27, 2015, of killing Ms. Elaine O'Hara. On April 25, 2015, he was sentenced to life in prison. The investigation leading to the trial used the mobile telephony data generated by the phone provided by the plaintiff's employer to the plaintiff. The 2011 Act allowed for the retention and access of this data. According to Dwyer, information obtained from his phone under the 2011 Communications (Retention of Data) Act was improperly used during his Central Criminal Court trial in 2015. Dwyer's work phone produced the data that positioned the phone in a given location at a given time. The prosecution claims that Dwyer utilised that data to connect him to another cell phone that he obtained and utilised to get in touch with Ms. O'Hara.

According to Mr. Dwyer, Section 3(1) of the 2011 Act violates Article 15(1) of the 2002 Directive because it allows the wide and indiscriminate retention of telephone data in violation of Articles 7, 8, 11, and 52 of the Charter and Articles 8 and 10 of the ECHR.

In particular, the High Court held that "the requirements of the Charter to the Constitution" is ill founded because "the Irish Superior Courts have exclusive jurisdiction to define the scope and limits of the rights protected under the Constitution which have been guaranteed over many decades long before the Charter was proclaimed or given legal effect".



Further, the logic that informed the ECJ analysis does not necessarily apply in precisely the same way to constitutional analysis” ([Dwyer v Commissioner of an Garda Síochána, 351/2015, 6 December 2018](#))

The State had maintained that legislation granting access to and use of stored data by the authorities are critical for the identification, prosecution, and deterrence of major crimes, including as cybercrime, organised crime, gangs, homicide, and terrorism. The European Convention on Human Rights and EU legislation are violated by Irish law regarding the keeping of telecommunications data, according to the by the Irish High Court.

The Court stated that this decision does not imply that Dwyer's murder conviction would be overturned because of phone data that was obtained and kept in violation of EU legislation and utilised by the prosecution during Dwyer's trial. It concluded that certain provisions of Ireland's retention regulations violate EU law and rulings from the European Court of Human Rights, highlighting the supremacy of European law.

The State successfully appealed to the Supreme Court following a victorious High Court hearing in 2018, but the Supreme Court then forwarded the case to Luxembourg on the grounds that it pertained to European data retention rules. In consequence, the CJEU held that that the widespread and indiscriminate keeping of location and electronic traffic data for the purpose of fighting serious crime is prohibited by EU law. A national legislation that permits such retention may not be declared unlawful by a national court, nor may it have its effects limited in time.

Therefore, the evidence collectively demonstrates that the significance of the Charter in Irish jurisprudence is already noteworthy in areas like data protection, family law, asylum/immigration law, European Arrest Warrant law, and social/employment law. However, the significance of the Charter has also been felt in the area of companies' rights, for example. It is certain that the effect of the Charter will continue to rise as the reach of EU law broadens to encompass areas that are currently thought. To this end it is true that Irish lawyers are using the Charter more often to support their positions in matters involving EU law as they become more conscious of its ability to support their positions and have an impact on the legal process. If this pattern persists, perhaps the courts will also progressively acquaint themselves with the European Convention on Human Rights, as they eventually did with the Charter, in order to gain additional knowledge about the Charter's applicability, contexts in which it can be used, and the significance of the various rights for resolving disputes in Irish law.



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