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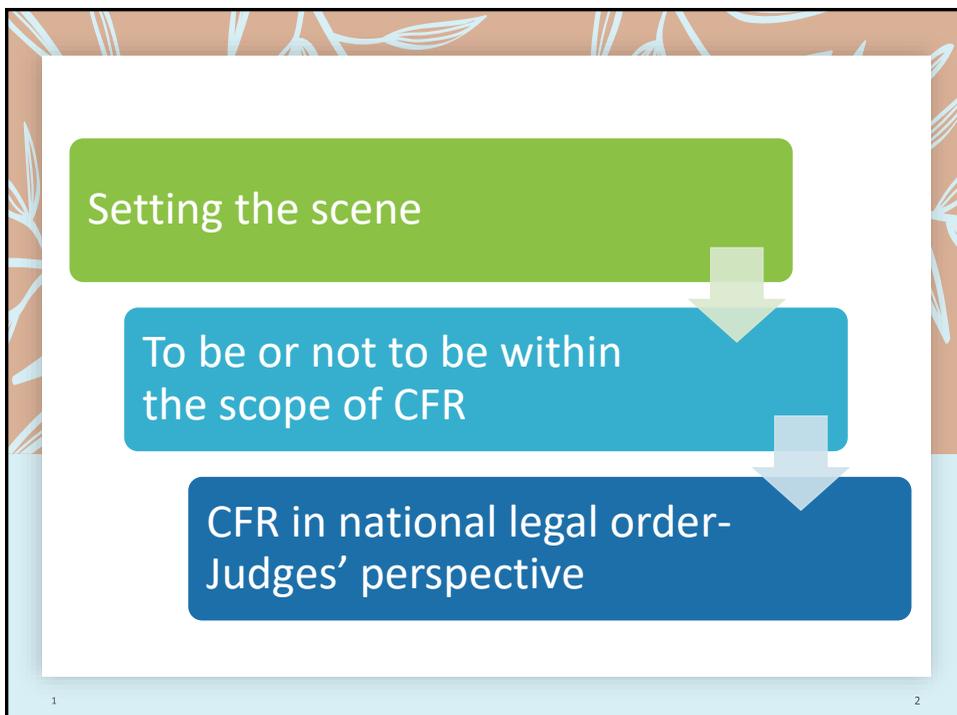


The scope of application of the EU Charter in national legal orders

Judge Beatrice Ramascanu
24 May 2024, Budapest

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Article 51 (1) CFR+ Explanations

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union [...] and to the Member States **only when they are implementing Union law.**

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Lost in translations

Opinion of Advocate General Sharpston, 14 November 2013 Case C-390/12, Robert Pflieger

- I note that (predictably) **there is a degree of linguistic variation** in the texts of the Charter in different equally authentic languages. Thus, whilst the English text speaks of 'implementing', the German has 'bei der Durchführung des Rechts der Union' and the French '**lorsqu'ils mettent en oeuvre le droit de l'Union**'. The Spanish and Portuguese (for example) are broader ('cuando apliquen el Derecho de la Unión' and 'quando apliquem o direito da União', respectively). Against that background, one turns naturally to the **explanations relating to the Charter**, which must, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter itself, be taken into consideration for the interpretation of the Charter.



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Explanations of CFR

- (...) it follows *unambiguously* from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States **when they act in the scope of Union law** (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, ERT [1991] ECR I-2925); judgment of 18 December 1997 (C-309/96 Annibaldi [1997] ECR I-7493).



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To be or not to be within the scope of EU law?

'implementing EU law'



'acting within the scope of EU law'



When does a situation brought before the national authorities fall within the scope of EU law?

BUT

?Same as **"fields covered by Union law"**?

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Key points

- EU fundamental rights must be complied with where national legislation **falls within the scope of EU law**: situations cannot exist which are covered by EU law but where EU fundamental rights are not applicable.
- The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.” (C-617/10, Åklagaren v. Hans Åkerberg Fransson [GC], 26 February 2013, para. 21)

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“shadow of EU law”

“Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter.”



K. Lenaerts/J.A. Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in: Steve Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014), 1559, 1567.

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3 scenarios

“
TO BE, OR NOT TO BE:
THAT IS THE QUESTION.
WILLIAM SHAKESPEARE
”

direct application

indirect application

derogation

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...and other taxonomies

- National measures giving effect to obligations imposed by EU law - primarily addressed to the domestic legislature
- National procedural provisions allowing legal protection of the rights conferred on individuals by EU law – domestic courts
- Application of EU law rules, or of the national provisions giving them effect, by a national court or a national administrative authority



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Many othertaxonomies

- National measures derogating from EU law rules, based on the grounds for derogation explicitly provided by EU primary or secondary law, or based on the CJEU's case law on mandatory requirements
- National provisions that clarify notions contained in EU law measures

(e-Booklet on the Use of the Charter of Fundamental Rights of the EU in the framework of the project "E-LEARNING NATIONAL ACTIVE CHARTER TRAINING (E-NACT)")

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-
- Transposition into national law of EU acts
 - National acts adopted on the basis of powers conferred by EU law (+discretionary powers)
 - National acts involving remedies, sanctioning or enforcement that can be deployed in connection with a Union legal act or Treaty provision according to the duty of sincere cooperation laid down in Article 4(3) of the TEU (+procedural autonomy)
 - National acts involving legal concepts that are mentioned in a Union legal act
 - (see also FRA -*Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level*)

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Implementing EU

C-396/11, Radu, C-168/13
 PPU Jeremy (EAW)
 C-131/12, Google Spain
 (data protection)
 C-400/10, PPU JMcb
 (custody rights
 Reg.2201/2003),
 C-411/10 and C-493/10,
 N.S. and Others (Dublin
 Reg)
 C-682/15, Berlioz
 Investment Fund
 (exchange tax information)
 684/16, Max-Planck-
 Gesellschaft zur Förderung
 der Wissenschaften
 (annual leave)

When MS are implementing EU law they act as agents of EU

MS are obliged to respect HR as EU itself

Important judicial techniques of integrating the protection of HR additionally to EU level but this time at national level

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Factors - national measures 'implementing EU law'

- EU law places one or several specific obligations on the Member States, or the national situation is covered by a specific rule of EU law
- C-206/13, Siragusa (Judgment of 6 March 2014)
 - EU law, Aarhus Convention, Directives 2003/4 and 2011/92 – no obligations to protect the landscape
 - The objectives pursued by EU legislation are not the same as those pursued by national legislation

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Criteria

- *whether the national legislation at issue is intended to implement a provision of European Union law,*
- *what the character of that legislation is,*
- *and whether it pursues objectives other than those covered by European Union law,*
- *even if it is capable of indirectly affecting that law,*
- *and also whether there are specific rules of European Union law on the matter or capable of affecting it.*

(see from C-309/96 *Annibaldi* [1997] ECR I-7493, para. 21 to 23 to C-206/13, *Siragusa* EU:C:2014:126, para. 25)

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Objective/subjective

a certain
degree of
connection

- a mere 'thematic' connection with an instrument or a provision of EU law, or with an area of EU competences does not form a sufficient connection with EU law.
- The applicability of EU fundamental rights requires a more solid degree of connection, which goes 'above and beyond the matters covered being closely related'.
 - (C-218/15, *Paoletti and Others*, 6 October 2016, EU:C:2016:748, para. 14)

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MS not acting within the scope of EU law

- acting in a field in which the EU holds a competence but has not yet legislated on (Case C-198/13 Hernández and others, EU:C:2014:2055)
- acting in the scope of transposing legislation that goes beyond the requirements laid down in EU legislation (higher national standards, 'goldplating')
- No specific obligation for MS imposed by EU (C-609/17 and C-610/17), TSN and AKT)
- Pure internal situation (Order of 30 April 2020, Marvik Pastrogor and Rodes - 08 (C-818/19 and C-878/19)

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Compare – Practical case no. 1

- Case C-298/16, Teodor Ispas, 7 September 2017

(See also, Opinion of Advocate general Bobek)

- Joined Cases C-469/18 and C-470/18, IN and JM v Belgische Staat, Judgment of 24 October 2019



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Derogation “implementing EU law”?

Where a MS enacts a measure that **derogates** from a fundamental freedom guaranteed by the TFEU, *that measure falls within the scope of Union law.* (see, eg, ERT)

The power to derogate from the fundamental freedom guaranteed by EU law in certain circumstances is a power that Member States retain and that EU law recognises; **but the exercise of that power is circumscribed by EU law.**

When a court reviews whether national legislation restricting the exercise of such a fundamental freedom falls within the Treaty derogation (and is thus permissible) **that process of review is carried out by reference to, and under criteria derived from, EU law,** not national law.

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Derogation “implementing EU law”?

C-78/18, Judgment of 18 June 2020 (Grand Chamber), Commission v Hungary (Transparency of associations), EU:C:2020:476)

- Hungarian legislation aiming to ensure the transparency of civil organisations receiving donations from abroad

When a national measure which restricts a fundamental freedom guaranteed by the FEU Treaty is justified on the basis of that Treaty or by an overriding reason in the public interest recognised by EU law, such a measure must be regarded as implementing Union law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental rights enshrined in the Charter.

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Practical case no. 2

**JUDGMENT, 22 February
2024**

Case C-491/21, WA

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Pure internal situation + *renvoi* to EU law

Domestic law makes a *renvoi* to the content of EU provisions as it seeks to adopt the same solutions as those adopted in EU law in order, for example, to avoid discrimination against foreign nationals or any distortion of competition or to provide for a single procedure in comparable situations.

BUT only when the EU provisions have been made applicable by national law **directly and unconditionally** in order to ensure that internal situations and situations governed by EU law **are treated in the same way** and concepts taken from EU law are to be should be interpreted uniformly, irrespective of the circumstances in which they are to apply.

(*Agafitei and Others*, para. 39, C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio*, para. 22, C-280/06 *ETI and Others* [2007] ECR I-10893, para 25).

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Specific situations / No other EU “trigger”

- Article 19 TEU (judicial independence)
- Article 20 TFEU (EU citizenship rights)
- The prohibition of discrimination on the basis of nationality
- Equal pay for equal work or work of equal value for men and women

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Article 19 (1) TEU

- Member States shall provide remedies sufficient to ensure effective legal protection **in the fields covered by Union law.**

The second subparagraph of Article 19(1) TEU applies **to the fields covered by EU law, irrespective of whether** the Member States are implementing EU law within the meaning of Article 51(1) of the Charter.

(C-64/16, Associação Sindical dos Juizes Portugueses, 27 February 2018, EU:C:2018:117, para. 29)

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Article 19 (1) TEU and Article 47 CFR

The second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure *effective legal protection*, **within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law** (judgment in *A. K. and Others*, paragraph 168 and the case-law cited), meaning that the latter provision **must be duly taken into consideration for the purposes of interpreting** the second subparagraph of Article 19(1) TEU (Order of 6 October 2020, Prokuratura Rejonowa w Słubicach, [C-623/18](#), not published, [EU:C:2020:800](#), paragraph [28](#))

C-824/18, A.B, 2 March 2021, ECLI:EU:C:2021:153, par. 143

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Article 19 (1) TEU and CFR. A “penumbra”?

C-64/16 ASIP, para. 30- 37

Article 19(1)(2) TEU creates an obligation of judicial independence for every national court *which is abstractly empowered to apply EU law*.

If the Charter and Article 47 CFR “follow” the scope of Article 19(1)(2) TEU, is Article 47 (and the Charter as a whole) applicable in virtually *every* procedure before a Member State court?

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C-585/18, C-624/18 and C-625/18, , A.K. and Others

- Polish judges of the Supreme Administrative Court and the Supreme Court complained about their early retirement under new national legislation
- before the Labour and Social Insurance Chamber of Supreme Court, they argued that such early retirement infringed Article 19(1), second subparagraph, TEU and Article 47 of the Charter as well as Directive 2000/78

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Scope of CFR

- prohibition of age discrimination in employment provided for in Directive 2000/78 - Article 9 of which reaffirms the right to an effective remedy.
- situation governed by EU law
- ?does the national body normally competent to hear and determine a dispute in which an individual relies on a right **which he derives from EU law** satisfy the requirements of the right to an effective judicial remedy, as guaranteed by Article 47 of the Charter and Article 9(1) of Directive 2000/78

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JUDGMENT of 20 April 2021

- Case C-896/19, **Repubblika**, Appointments procedure of the members of the judiciary – Power of the Prime Minister and Involvement of a judicial appointments committee
- Applicability of Article 51, 47 of the Charter

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Not quite....unless

- As a preliminary point, in so far as the first question concerns the interpretation of Article 47 of the Charter, it must be pointed out that the recognition of the right to an effective remedy, in a given case, **presupposes that the person invoking that right is relying on rights or freedoms guaranteed by EU law** (see, to that effect, judgments of 6 October 2020, *Etat luxembourgeois* (Right to bring an action against a request for information in tax matters), [C-245/19 and C-246/19](#), [EU:C:2020:795](#), paragraph 55, and of 20 April 2021, *Repubblika*, [C-896/19](#), [EU:C:2021:311](#), paragraph 41) **or that that person is the subject of proceedings constituting an implementation of EU law, within the meaning of Article 51(1) of the Charter** (see, to that effect, judgment of 21 December 2021, *Euro Box Promotion and Others*, [C-357/19](#), [C-379/19](#), [C-547/19](#), [C-811/19](#) and [C-840/19](#), [EU:C:2021:1034](#), paragraph 204).

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Practical case no. 3

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CFR in national legal order

- ✓ Duty to respect, observe and *promote* the Charter when applying EU law
- ✓ Using the Charter in the legislative process (Romanian Law no. 24/2000 on the legislative process- draft piece of legislation in accordance with international treaties)



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National judges

- Applying CFR based on the principles of direct effect and supremacy
- to interpret national measures in conformity with the Charter (within the scope of EU law)
- disapplication of national measures (within the scope of EU law) if they are contrary to CFR



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National judges

- Applying the standard of protection of EU fundamental rights instead of their higher constitutional standard (Melloni)
- Affording direct effect when CFR provisions are sufficiently precise and unconditional



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National judges

- State liability for damages caused to individuals as a result of breaches of the Charter
- Submit Preliminary ruling request seeking interpretation on EU law in the light of the CFR's provisions



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Some specific aspects for national judges. *Judicial activism?*

To put into place effective judicial remedy against decisions on applications for international protection **even if no national provisions are available**

See C - 556/17, Torubarov, 29 July 2019, ECLI:EU:C:2019:626, para. 73 – 74

*Therefore, in order to guarantee that an applicant for international protection has an effective judicial remedy within the meaning of Article 47 of the Charter, and in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, a national court or tribunal seised of an appeal **is required to vary a decision of the administrative or quasi-judicial body**, in the present case the Immigration Office, that does not comply with its previous judgment and **to substitute its own decision** on the application by the person concerned for international protection by disapplying, if necessary, the national law that prohibits it from proceeding in that way (see, by analogy, judgment of 5 June 2014, Mahdi, C-146/14 PPU, EU:C:2014:1320, paragraph 62).*

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Specific aspects for national judges based on CFR

C-560/20, CR and Others v Landeshauptmann von Wien, 30 January 2024, para. 48

*Thus, in accordance with settled case-law, the Member States, in particular their courts, must not only interpret their national law in a manner consistent with EU law **but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the legal order of the European Union** (judgment of 16 July 2020, *État belge (Family reunification – Minor child)*, C-133/19, C-136/19 and C-137/19, EU:C:2020:577, paragraph 33 and the case-law cited).*

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CFR and the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings

- With regard to references for a preliminary ruling concerning the interpretation of the Charter..., it must nevertheless be clearly and unequivocally apparent from the request for a preliminary ruling **that a rule of EU law other than the** Charter is applicable to the case in the main proceedings.
- Since the **Court has no jurisdiction** to give a preliminary ruling where a legal situation **does not come within the scope of EU law**, any provisions of the Charter that may be relied upon by the referring court or tribunal cannot, of themselves, form the basis for such jurisdiction.

(pt. 10)

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Content of the referral order

- National court must define the factual and legal contest of the question it is asking or, at the very least, explain the assumptions of fact on which those questions are based
- *there is nothing to suggest that the dispute in the main proceedings concerns the interpretation or application of a rule of Union law other than that laid down in the Charter. Thus, according to that decision, the dispute in the main proceedings relates to the temporal applicability of the decisions of the Constitutional Court and in no way concerns national legislation implementing European Union law within the meaning of Article 51(1) of the Charter.*

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....fill in the blanks...



- the Court may find it necessary to consider _____ provisions of EU law to which the national court has not referred in its questions. The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law **does not prevent the Court from providing the national court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions.**
- In that regard, it is for the Court **to extract from all the information provided by the national court**, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 5 December 2023, *Nordic Info*, C-128/22, EU:C:2023:951, para. 99)

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Refuse to refer
as the national
judge deems
that CFR is not
applicable.

Any procedural
obligations?

- Article 6 § 1 ECHR requires the domestic courts **to give reasons** for any decision refusing to refer a question for a preliminary ruling, especially where the applicable law allowed for such a refusal only on an exceptional basis *CILFIT doctrine*

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- Article 6 requires that national courts whose decisions were not open to appeal under domestic law **give reasons**, based on the applicable law and **the exceptions** laid down in CJEU case-law for their refusal to refer a preliminary question on the interpretation of EU law.
- **They should set out their reasons for considering CILFIT doctrine**
 - that the *question was not relevant*,
 - that the provision had already been interpreted by the CJEU, *acte claire*
 - or that the correct application of EU law was so obvious as to leave no scope for reasonable doubt, *acte éclairé*

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Violation of Article 6 ECHR

- **Dhahbi v. Italy**, 8 April 2014
- **Baltic Master Ltd. v. Lithuania**, 16 April 2019
- **Sanofi Pasteur v. France**, 13 February 2020
- **Bio Farmland Betriebs S.R.L. v. Romania**, 13 July 2021
- **Rutar and Rutar Marketing d.o.o. v. Slovenia**, 15 December 2022
- **Georgiou v. Greece**, 14 March 2023

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Obligation to give reasons

- **C-561/19 - Consorzio Italian Management, Catania Multiservizi SpA**

Article 267 TFEU read in the light of Art. 47 par. 2 of the Charter

Duty to give reason according to *CILFIT* 2



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Tools for national judges

Factsheets - https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/fiche_thematique_-_charte_-_en.pdf

FRA, *Charterpedia*

FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level – Guidance*

Michal Bobek, eremias Adams-Prassl (eds.), *The Charter of Fundamental Rights in the Member States*, Hart/Bloomsbury, 2020

Steve Peers, Tamara Hervey, Angela Ward, *The EU Charter of Fundamental Rights. A Commentary*, Hart, 2021)

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Tools for national judges

FRA, *The EU Charter of Fundamental Rights - Use and added value in EU Member States*

European University Institute, *ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter - Module 1 General Rules on the Scope and Application of the EU Charter of Fundamental Rights* (2019), available at <https://cjc.eui.eu/wp-content/uploads/2019/03/D1.1.a-Module-1.pdf>

e-Booklet on the Use of the Charter of Fundamental Rights of the EU
IN THE FRAMEWORK OF THE PROJECT “E-LEARNING NATIONAL ACTIVE CHARTER TRAINING (E-NACT)”

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Thank you for your attention!

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