

Magdalena Ličková, Legal Secretary, Court of Justice of the EU

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

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### Outline

- When does the Charter apply?
  - Is there a relevant link with EU law?
  - Not all situations are clear-cut
- What role can the Charter play and with which legal consequences?
  - Yardstick for validity of EU law
  - Yardstick for applicability of the given rule of national law
  - Tool of conform interpretation
  - Direct effect of (some of) its provisions
- What is its relationship vis-à-vis other instruments of fundamental rights protection?
  - Particular relevance of the ECHR within the EU system of protection of fundamental rights
  - National standards of protection

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## The Charter and EU law

### Article 6 (ex Article 6 TEU)

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

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

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

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

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## Article 51 of the Charter

- '1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and **to the Member States only when they are implementing Union law**. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
- 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'
- → The conditions for the applicability of the Charter, as a matter of EU law, not to be confused with its use outside of its scope. For the description of the practice before the national courts see the respective national reports in Bobek M., Adams-Prassl J., *The EU Charter of Fundamental Rights in the Member States* (2020) Hart Publishing, 632 p.

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Åkerberg Fransson  
C-617/10 (2013)

- Article 51(1) of the Charter confirms the preexisting situation [18]
- 'Since the fundamental rights guaranteed by the Charter must [...] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.' [21]
- 'Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction' [22]
  - The idea of the fundamental rights being the shadow of EU law. → Lenaerts, K., and Gutiérrez-Fons, J.A., 'The Place of the Charter in the EU Constitutional Edifice', in Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights: A Commentary*, C.H. Beck, Hart, Nomos, 2014, p. 1560-1593, at 1568.

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[Procedural parenthesis: the Charter and proceedings based on Article 267 TFEU]

- Limits imposed on the applicability of the Charter are reflected at the level of the jurisdiction of the Court to give a preliminary ruling → an element to be kept in mind when making a preliminary reference
- '[...] it must be noted that, under Article 51(1) of the Charter, the provisions of the Charter are addressed to the Member States only when they are implementing EU law. While the circumstances of such implementation can vary, 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 Courts of the European Union have 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 of *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings – version of 2024*)

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## When does the Charter apply?

- 'The concept of 'implementation of Union law', within the meaning of Article 51(1) of the Charter, presupposes a degree of connection between an act of EU law and the national measure at issue above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'. Judgment of 29 July 2024 (GC) *protectus* (C-185/23 [42]).
- The so called 'lida test': 'in order to determine whether a national measure involves 'implementing Union law' within the meaning of Article 51(1) of the Charter, it is necessary to determine, inter alia, whether that national legislation is intended to implement a provision of EU law; the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it'. Judgment of 8 November 2012, *lida* (C-40/11, EU:C:2012:691, [79], referring to *Annibaldi* EU:C:1997:631, [21 to 23]; recalled e.g. in judgments of 8 May 2013, *Vmeraga* (C-87/12, EU:C:2013:291 [41]); of 6 March 2014, *Syracusa* (C-206/13, EU:C:2014:126 [25]); of 10 July 2014, *Julian Hernández* (C-198/13, EU:C:2014:2055, [37] and the most recently in judgment of 29 July 2024 (GC) *protectus* (C-185/23 [43]).
- However, 'neither cumulative nor exhaustive', AG Bobek in *Ispas* C-298/16, [47].
- **The classical scenarios:**
  - Direct application of a rule of EU law (typically a regulation)
  - Application of a national rule that implements EU law (typically a national law transposing a directive)
  - Derogation scenario – national law making use of the derogations provided for by EU law

The underlying difficulty: the scope of the harmonized standard; some situations may seem remote with no immediately visible 'rule of EU but a rule of EU law still affected.

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## Scale of links (exemples)

- Judgment of 1st August 2022 [GC], *Staatssecretaris van Justitie en Veiligheid (Refusal to take charge of an Egyptian unaccompanied minor)* (C-19/21, EU:C:2022:605)
  - Direct application of harmonised procedural rules, a possible gap identified by the national court.
  - Article 27(1) Dublin III Regulation provides for the applicants' right to an effective remedy against a transfer decision. Does it provide also for a remedy against a refusal to take charge of an unaccompanied minor?
- Judgment of 4 October 2024 [GC], *Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky* (C-406/22, EU:C:2024:841)
  - Harmonized standard of judicial review?
  - Does the national court have to raise, ex officio, the possible incompatibility of the designation as safe country of origin with Directive 2013/32? [related to another issue of the case – designation, under Italian law, as safe country of origin - two pending references in *Ogüta* C-388/24, and *Daloo* C-389/24].
  - See also judgment of 29 July 2019 [GC], *Torubarov* (C-556/17, EU:C:2019:626): Does EU law empower a national judge to modify a decision of an administrative authority disregarding its previous judgment, although – under national law – the judge can only annul and remit?
- Judgment of 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle ne bis in idem)* (C-365/21 EU:C:2023:236).
  - Limits to the derogation from the principle ne bis in idem, guaranteed under Article 54 CSA and 50 of the Charter under Article 55(1)(b) of the CISÄ.
- Judgment of 13 June 2019, *Moro* (C-646/17, EU:C:2019:489)
  - Right to be informed of the accusation, compare the position of the Court with the AG as to whether the situation is covered by EU law.

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## Role(s) of the Charter

- Typically a tool for determination of concepts of secondary law or of the national law implementing that 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.’ E.g. judgment of 30 January 2024 [GC], *Landeshauptmann von Wien (Family reunification with a minor refugee)* (C-560/20, EU:C:2024:96 [48] or judgment of 21 December 2011 [GC], *N. S.* (C-411/10, EU:C:2011:865 [77])
- But also determination of implications of concepts of EU primary law:
  - see e.g. pending case *Kubera* (C-144/23), Opinion of AG Emiliou of 18 June 2024, judgment [GC] to be delivered on 15 October 2024
  - Does a decision refusing a party’s application for leave to bring an appeal before a court of last instance constitute a judicial decision which must state the reasons why the party’s request that a reference for a preliminary ruling be made was not be granted?
  - Or judgment of 4 October 2024 [GC], *Mirin* (C-4/23), concerns Articles 20 and 21(1) TFEU + Articles 7 and 45 of the Charter

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## Role(s) of the Charter

- Interpretation of harmonized standards, see e.g. judgments in cases C-19/21, C-406/22 or C-556/17 referred to above.
- Limit to their operation, see esp. judgment of 5 April 2016 [GC], *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198) and further case-law summarized in the Opinion of AG Emiliou in *Staatsanwaltschaft Aachen*, C-819/21 [30-34] or judgments of 22 November 2022 [GC], *Staatssecretaris van Justitie en Veiligheid (Removal – Medical Cannabis)* (C-69/21, EU:C:2022:913) and judgment of 21 December 2023 [GC], *GN (Ground for refusal based on the best interests of the child)* (C-261/22, EU:C:2023:1017).
- Limits to the action of the Member States’ within the permissible derogation (see, e.g. judgment of 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle ne bis in idem)* (C-365/21 EU:C:2023:236).
- Role of the procedural provisions of the Charter in connection with substantive provisions of EU secondary law, even in the absence of specific procedural provisions (see judgment of 20 February 2024 [GC], *X (Lack of reasons for termination)* (C-715/20, EU:C:2024:139).

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## Role(s) of the Charter

- Validity of EU secondary law:
  - See, e.g., judgment of 8 April 2014 [GC], *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238); compare with judgment of 21 March 2024 [GC], *Landeshauptstadt Wiesbaden* (C-61/22, EU:C:2024:251).
- Yardstick for applicability of the given rule of national law:
  - However, direct effect of some of its provisions only: see e.g. on **Article 47 of the Charter**, judgments of 17 April 2018 [GC], *Egenberger*, C-414/16, EU:C:2018:257 [78]; 29 July 2019 [GC] *Torubarov* (C-556/17, EU:C:2019:626), of 20 February 2024 [GC], *X (Lack of reasons for termination)* (C-715/20, EU:C:2024:139); on **Article 50 of the Charter** judgments of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193 [68]; of 24 October 2018 [GC], *XC and Others*, C-234/17, EU:C:2018:853 [38]; or of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and ne bis in idem)* (C-435/22 PPU [109]); on the prohibition of discrimination on grounds of religion or belief and on the grounds of age, under **Article 21** of the Charter, judgments of 15 January 2014 [GC], *Association de médiation sociale* (C-176/12, EU:C:2014:2 [47] and of 11 September 2018 [GC], *IR* (C-68/17 EU:C:2018:696, [69]) or of 22 January 2019, *Cresco Investigation* [GC] (C-193/17, EU:C:2019:43); on the right to paid annual leave Article 31(2) of the Charter judgment of 6 November 2018 [GC] *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16 EU:C:2018:874, [79-80]). However, e.g., judgment of the Court of 11 July 2024, *Plamaro*, (C-196/23) EU:C:2024:596 on Articles 27 and 30 of the Charter.

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## Other instruments of FR protection

### ECHR: Art 52(3) of the Charter

- In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'
- The level of protection guaranteed under the Charter cannot be lower than the level of protection under the ECHR.

### Article 53 of the Charter

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

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### Art 52(3) of the Charter

- For a recent example, see judgment of 10 September 2024 [GC], *Neves 77 Solutions* (C-351/22, EU:C:2024:723 [80], ... 'it follows that, for the purposes of interpreting Article 17 of the Charter, it is necessary to take into account the case-law of the European Court of Human Rights relating to Article 1 of Protocol No 1, which establishes the protection of the right to property, as the minimum threshold of protection.'
- Examples of judicial dialogue re aspects of the principle of ne bis in idem: judgments of 20 March 2018 [GC] *Menci* C-524/15; *Garlsson Real Estate and Others* C-537/16; and *Di Puma and Zecca* C-596/16 and C-597/16 (and later in *bpost* C-117/20 and *Nordzucker* C-151/20 [GC]), compare with ECtHR, 15 November 2016, *A and B v. Norway*; see also judgment of 29 June 2016 [GC] in *Kossowski* (C-486/14, EU:C:2016:483 [53]), ECtHR judgment of 8 July 2019, *Mihalache v. Romania* (CE:ECHR:2019:0708JUD005401210 [§§ 97 and 98] and Opinion of Advocate General Emiliou in *Központi Nyomozó Főügyészség* (C-147/22, EU:C:2023:549, [34]).

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### Article 53 of the Charter

- National standards of protection: judgment of 26 February 2013 [GC], *Melloni* (C-399/11, EU:C:2013:107):
- [59] ... by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State.
- [60] It is true that Article 53 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.
- [61] However, ... Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.
- See also order of 20 September 2024, *Anacco* (C-504/24 PPU EU:C:2024:779), a request for a preliminary ruling from the Corte d'appello di Roma.

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## Further reading ...

- Peers, S.; Hervey, T.; Kenner, J.; Ward, A.; Peers, *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing, second edition (2021).
- Lenaerts, K., and Gutiérrez-Fons, J.A., 'The Place of the Charter in the EU Constitutional Edifice', in Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights: A Commentary*, C.H. Beck, Hart, Nomos, 2014, pp. 1560-1593.
- Casarosa, F.; Moraru, M., *The practice of judicial interaction in the field of fundamental rights: the added value of the Charter of Fundamental Rights of the EU* (2022) Elgar, xxvii-410 p.
- Bobek M., Adams-Prassl J., *The EU Charter of Fundamental Rights in the Member States* (2020) Hart Publishing, 632 p.
- Dougan, M., 'Judicial Review of Member State Action Under the General Principle and the Charter: Defining the "Scope of Union Law"', *Common Market Law Review*, Vol. 52, 2015, pp. 1201 to 1245.
- Fontanelli, F., 'The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights', *Columbia Journal of European Law*, Vol. 20, 2014, pp. 193 to 247.
- Sarmiento, D., 'Who's Afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe', *Common Market Law Review*, Vol. 50, 2013, pp. 1267 to 1304.
- Opinion of Advocate General Pitruzella of 30 March 2023 in *K.L.* (C-715/20).
- Opinion of Advocate General Emiliou of 7 April 2022, *Staatssecretaris van Justitie en Veiligheid (Refusal to take charge of an Egyptian unaccompanied minor)* (C-19/21).
- Opinion of Advocate General Bobek of 5 February 2019 in *Moro* (C-646/17).
- Opinion of Advocate General Saugmandsgaard Øe of 29 November 2018 in *Commission v Hungary (Usufruct Over Agricultural Land)* (C-235/17).
- Opinion of Advocate General Bobek of 7 September 2017 in *Ispas* (C-298/16).