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The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures

STUDY FOR THE PETI COMMITTEE

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PETITIONS

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STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Petitions, considers the dilemma of a broad or narrow application of the Charter of Fundamental Rights (CFR) to national measures. It considers the way the Court of Justice of the EU (CJ EU) has been interpreting fundamental rights in relation to such measures before and after the Lisbon Treaty and the constitutionalisation of the Charter: currently the CJ EU applies a varied interpretation of the CFR, on the basis of a narrow approach to its applicability to Member States' measures implementing EU law. As a consequence, the Commission's strict approach in relation to a selection of petitions received by the Committee on Petitions raising issues of alleged CFR violations seems justified in the light of the existing law and CJ EU jurisprudence. The analysis, after examining the considerations that militate in favour and against a narrow interpretation of the Charter and of its Article 51, concludes that a more courageous approach should be taken at EU level when examining national implementing measures of EU law raising fundamental rights issues, notably until these are not evenly and properly guaranteed across the EU.

This study was commissioned by the Policy Department for Citizen's Rights and Constitutional Affairs at the request of the PETI Committee

AUTHOR

Professor Eleanor SPAVENTA
Eleanor.spaventa@durham.ac.uk
Durham Law School
Durham University, UK

RESPONSIBLE ADMINISTRATOR

Martina SCHONARD, Ottavio MARZOCCHI
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

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poldep-citizens@europarl.europa.eu

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CONTENTS

LIST OF ABBREVIATIONS

CFR	Charter of Fundamental Rights of the EU (also referred to as Charter)
CMLRev	Common Market Law Review
CJ EU	Court of Justice of the EU (also referred to as Court)
ECHR	European Convention on Human Rights
ELRev	European Law Review
EP	European Parliament
EurConstLawRev	European Constitutional Law Review
PETI / PETI Committee	Committee on Petitions of the European Parliament

EXECUTIVE SUMMARY

This analysis looks into the **applicability of fundamental rights** as enshrined in the EU Charter of Fundamental Rights (CFR) in the European Union legal order. It focuses on the **limits imposed to the rights and freedoms declared by the CFR by its Article 51**, which states that the Charter only applies to European Union Institutions and bodies and to the Member States only when they are implementing Union law.

The **scope of application of fundamental rights before the adoption of the Charter** was progressively established and developed by the European Court of Justice through its evolving jurisprudence. Fundamental rights were declared as general principles of Community law protected by the Court (Stauder), as common constitutional traditions among the Member States (Internationale Handelsgesellshaft) and enshrined in international treaties, such as the European Convention on Human Rights (ECHR) (Nold) and the ECtHR jurisprudence. The scope of application covered the acts of EC/EU institutions, the implementation of EU law by Member States (Wachauf), including when they act within the field of EU law by limiting free movement rights (ERT, Carpenter). **This jurisprudence has been particularly courageous in expanding the protection provided to EU citizens in relation to fundamental rights.**

The **Charter** was elaborated and adopted with the aim of codifying the Court jurisprudence and making the EU fundamental rights obligations more visible. At the same time, some Member States did not want the Charter to have effects that could potentially limit their competences by expanding in substance the field of application of EU law beyond EU powers. For this reason, a series of **limits to the applicability of the Charter** were inserted in the Charter itself, among which Article 51 CFR. **The CJ EU jurisprudence shows that the Court has been receptive to this approach, adopting a narrow interpretation of the applicability of the CFR to national measures, on the basis of its Article 51.**

The analysis of the CJ EU case law shows that there is a **varied application** of EU fundamental rights to measures adopted by Member States: when a stronger interest of the EU is at stake (internal market; EU integration), the CFR is more likely to be applied also to national measures; when the Member State acts on the basis of EU co-ordination measures, the CFR applies (if at all) only in extreme cases; in all other cases, the CFR will most likely not apply.

The examination of the **petitions** tabled by citizens to the EP shows that citizens have high expectations in relation to the CFR and its application to measures adopted by the States allegedly infringing their fundamental rights. Having said that, the application of the CJ EU jurisprudence, as reflected in the Commission opinions on the selection of petitions analysed in this study, does not leave much margin of manoeuvre. The Committee on Petitions seems to have mostly followed the Commission approach with a number of exceptions, notably on children rights, Greece austerity measures and some more recent petitions. **The overall approach taken by the Commission on the petitions at stake seems justifiable** to the author of this paper, with the exception of the petitions on the right to collective bargaining in Greece.

When looking into the interpretation of the CFR, the author believes that **the approach taken by the CJ EU is dangerously restrictive and not warranted by Article 51, for**

instance in relation to Union citizenship, the European Arrest Warrant or asylum cases. The underlying notion that Member States guarantee an equivalent level of protection of fundamental rights is fallacious, especially given that there is very little that can be done at EU level to ensure that fundamental rights are guaranteed across the Member States. **A more courageous use of the CFR should be made for national measures falling within the scope of EU law, so to ensure that those instruments cannot be used to undermine fundamental rights guarantees**. Furthermore, EU fundamental rights should never be seen as instrumental to the achieving of the effectiveness and supremacy of EU law; rather they should be seen as a tool without which integration in certain areas might become impossible and/or undesirable. Hence, the Court should not refrain from its duties and clarify that EU rules that are premised on a certain degree of mutual trust amongst Member States as to compliance with fundamental rights at national level might become inapplicable (or invalid) if this alleged common standard of fundamental rights protection does not exist in practice. This approach would be a powerful incentive for Member States to achieve a satisfactory level of fundamental rights protection and to take fundamental rights obligations more seriously. It might also encourage the EU institutions to be more vociferous in their critique of fundamental rights failures at national level. And it would also serve the primary objective of protecting individuals from fundamental rights violations committed by authorities at EU or national level.

INTRODUCTION

The PETI committee requested the EP Policy Department for Citizens' Rights and Constitutional Affairs to acquire an **expert opinion on Article 51 of the EU CFR, with a particular view to assess the applicability of the CFR to acts of national authorities in relation to petitions received by the Committee**. To achieve this aim, this research analyses the way the Court of Justice of the EU has interpreted Article 51 CFR in relation to national rules to then turn to an analysis of the petitions; it concludes by recalling arguments in favour and against a broad application of the Charter; it advocates a more courageous use of the Charter in those situations that are firmly within the scope of Union law, and in particular cases of co-ordination of national rules; and Union citizenship cases. The report is structured as follows.

Section 1, ***The scope of application of EU fundamental rights before the Charter***, provides a brief historical introduction on the situation before the adoption of the Charter. This is important since Article 51 CFR, and the Charter more generally, sought to codify the existing state of the law. This section also briefly recalls the debate surrounding EU fundamental rights and in particular the fear that the application of the latter might have a significant impact on national sovereignty and regulatory autonomy.

Section 2, ***Article 51 Charter: its significance and its interpretation by the Court of Justice***, examines the way Article 51 CFR has been interpreted in relation to acts of national authorities. It should be recalled that Article 51 CFR applies to Member States *only when they implement Union Law*. In particular it focuses on three lines of case law: *Åkerberg Fransson*, where a remote link with EU law was sufficient to trigger the Charter; *McB*, and *N.S.*, where national acts giving effect to EU co-ordinating rules are subject to a lighter touch review (or no review); and cases in which the Charter did not apply, either for lack of a connection with EU law, or because of a restrictive interpretation of the Union citizenship provisions.

The report concludes that there is a **varied application** of the Charter which depends on the area considered (stronger in internal market, weaker in other cases). Furthermore, the interest in integration is taken into account; and so is the need to ensure the effectiveness and supremacy of Union law. In cases of co-ordination of national rules the presumption of uniform compliance with a minimum standard of fundamental rights protection by all Member States is paramount; and in Treaty cases the Court has retreated from a generous interpretation of fundamental rights, leaving the Union citizen (especially, but not only, if non economically active) particularly vulnerable.

Section 3, ***The petitions to the EP and the Commission's position,*** analyses a selection of petitions received by the PETI Committee where petitioners raised concerns in relation to alleged violations of the CFR, to assess the extent to which the Charter would have been applicable in the cases at issue. It divides the petitions in three categories: those where there is no discernible link with Union law; those where there might have been a potential link; and those which raise issues in relation to the foundational principles of the EU.

Section 4, ***The dilemma of a broad or strict application of the Charter***, highlights the policy and legal reasons in favour and against a broad interpretation of the Charter. It concludes advocating a more consistent, and courageous, use of the Charter in cases of co-

ordination of national rules (Asylum, EAW) and in citizenship cases also as a means to raise the level of protection of fundamental rights in the territory of the EU.

1. THE SCOPE OF APPLICATION OF EU FUNDAMENTAL RIGHTS BEFORE THE CHARTER OF FUNDAMENTAL RIGHTS

KEY FINDINGS

- This section recalls the evolution of the case law of the Court in relation to the **scope** of EU fundamental rights. In this respect, before the Charter, the case law had established that the EU institutions were bound by fundamental rights as general principles of Union law. More controversially, the Court also established that national authorities would be bound by EU fundamental rights when implementing/giving effect to a Regulation, Decision or Directive; and when limiting one of the Treaty free movement rights.
- The **application of EU fundamental rights to the implementing acts of national authorities** is not uncontested since national authorities are already bound by domestic fundamental rights, which should afford a satisfactory level of protection. However there might be substantive (higher protection) and procedural (supremacy) advantages for claimants to rely on EU rather than domestic fundamental rights.
- The **application of EU fundamental rights to national law**, especially in fields where the Union does not have harmonising competence, is seen as constitutionally problematic in that it might result in competence 'creep' where areas reserved to Member States are reviewed according to EU fundamental rights standards through a broad interpretation of EU law.

1.1. The Evolution of EU Fundamental Rights: Fundamental Rights as General Principles of EU Law

In order to understand the discussion about the scope of application of the Charter, as provided for in Article 51 therein, it is necessary to briefly recall the evolution of EU fundamental rights as general principles of Union law since the Charter itself sought to codify the existing fundamental rights framework. A **short historical introduction** then allows us to put Article 51 Charter in its historical context.

It is well known that, because of historical circumstances, **the original Treaties did not make any reference to fundamental rights**: this omission potentially left a serious gap in the protection afforded to individuals and companies in the European territory,[1] since the Union institutions had regulatory powers which might have immediate and not mediated effects on the legal situation of individuals across the Member States.[2] **National courts, and especially the German and Italian Constitutional Courts,[3] became understandably concerned that the Union institutions could escape any fundamental rights scrutiny**: the principles of supremacy and direct effect might, if

[1] For sake of convenience we will thereinafter only refer to individuals (to mean also corporate entities) unless otherwise necessary.

[2] We will refer to EU/Union throughout even when talking about the former Communities unless it is necessary to distinguish.

[3] *Internationale Handelsgesellschaft* [1974] 2 CMLR 540 (*Solange I*); see also *Steinike und Weinling …* [1980] 2 CMLR 531; and cf also the Italian Constitutional Court rulings Sentenza 7/3/64, n.14 (in F. Sorrentino, *Profili Costituzionali dell'Integrazione Comunitaria*, 2nd ed, Giappichelli Editore 1996, p. 61 and ss) and *Societá Acciaierie San Michele v. High Authority* (27/12/65, n. 98), [1967] CMLR 160.

respected to the full,[4] render national constitutional guarantees inapplicable to Union rules; and, as the European Communities were not signatories to the European Convention of Human Rights, the residual protection provided for therein would also be inapplicable. Given the post-was historical context, it is then not surprising that those constitutional courts entered into a **constructive dialogue with the European Court of Justice** so as to ensure that fundamental rights would also be respected by the Community Institutions. As a result of this dialogue, the Court of Justice held, in the case of ***Stauder***, that **fundamental human rights were 'enshrined in the *general principles of Community law* and protected by the Court'**.[5] Fundamental rights were then considered unwritten general principles of (Union) law, binding all of the European institutions: whilst it was not until the Charter was drafted that the Union equipped itself with its own catalogue of fundamental rights, the political institutions welcomed the case law of the Court of Justice,[6] and indeed Treaty revisions gradually strengthened fundamental rights protection in the EU.[7]

As far as the identification of fundamental rights was concerned, the Court of Justice relied on a plurality of sources (which also informed the drafting of the Charter): in particular great weight was given to the **common constitutional traditions** of the Member States[8] and to **international treaties** for the protection of fundamental rights to which Member States were signatories or participants.[9] Not surprisingly, the most important Treaty in this respect was **the European Convention of Human Rights**,[10] and broadly speaking the Court of Justice has been willing to respect not only the Convention but also the guidance provided by the European Court of Human Rights.[11]

[4] It should be noted though that the views of national constitutional courts as to their obligations and powers in relation to fundamental rights is not at one with the views of the CJ EU, see recently the order of the *Bundesverfassungsgericht* of 15 December 2015, 2 BvR 2735/14, http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvq16-004.html;jsessionid=17CDEFAB320A8170E548EA4DC69DCDD8.2_cid393. This order is particularly interesting if seen in the context of the exceptionalism doctrine espoused by the CJ EU in relation to certain matters of EU law which are based on mutual trust between Member States in Opinion 2/13, EU:C:2014:2454. The latter ruling ha attracted a great deal of criticism among scholars, see e.g. B De Witte and S Imamović 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court' (2015) ELRev 683; E Spaventa 'A Very Fearful Court: The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) Maastricht J 35; T Lock 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable? (2015) Eur Const Law Rev 239.

[5] Case 29/69 *Stauder* EU:C:1969:57, para 7 emphasis added.

[6] See Joint Declaration of the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1977] OJ C 103/1.

[7] See e.g. the commitment to fundamental rights protection in what was then Art F(2) Maastricht Treaty; the introduction of a procedure to sanction serious and persistent breaches of fundamental rights by the Member States in the Amsterdam Treaty (then Art 7 TEU, then modified by the Nice Treaty); the introduction by the Amsterdam Treaty of Union competence to fight discrimination on grounds other than nationality; the Charter of Fundamental Right proclaimed in 2000; and the Lisbon Treaty which gave the Charter the same value as the Treaties, imposed a duty on the Union to accede to the ECHR, as well as introducing other significant changes from a fundamental rights protection perspective.

[8] Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:114, para. 4.

[9] Case 4/73 *Nold*, EU:C:1974:51, para. 13.

[10] E.g. Case 222/84 *Johnston v Royal Ulster Constabulary*, EU:C:1986:206; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE (ERT) v Dimotiki Etairia Pliroforissis and others*, EU:C:1991:254.

[11] See for instance Case C-94/00 *Roquette Frères Sa v Directeur général de la concurrence, de la consomation et de la répression des fraudes* [2002] ECR I-9011 which brought the CJ EU case law in line with the ECtHR ruling in *Niemietz v Germany* (1993) Series A Vol 251, 16 EHRR 97. This said the relationship between CJ EU and ECtHR has become more strained following the CJ EU ruling in Opinion 2/13.

1.2. The Scope of Application of EU Fundamental Rights before the Charter

As mentioned above, the development of EU fundamental rights can be traced to the need to impose similar limits upon the Union institutions to those applicable to national authorities. As a result, to start with, EU fundamental rights were invoked mainly in relation to **acts of the Union institutions**,[12] including as a tool to guide the Court's interpretation of the Treaty and secondary legislation.[13] However, with time it became clear that **EU fundamental rights might have a role to play also in relation to acts of national authorities**. This development was (and still is) not without its problems since Member States are equipped with their own constitutional guarantees of fundamental rights protection;[14] furthermore all Member States are parties to the European Convention on Human Rights. The application of EU fundamental rights might then have the effect of displacing the national constitutional guarantees also in those cases that have only a slight connection with Union law; furthermore, it is not always the case that EU standards of fundamental rights protection are higher or equivalent to the national ones.[15] Article 51 Charter must therefore be understood in its constitutional context: if the Union is a system of conferred powers, with limited – if ever increasing – competences, there is a real fear amongst at least some of the Member States that fundamental rights might be used to significantly extend the reach of EU law and subject to EU law matters reserved to the competences of the Member States.

In order to understand this debate we will then first look at the **scope of application of EU fundamental rights to the acts of Member States**. Before the Charter, the Court distinguished two situations in which EU Fundamental Rights would apply to national authorities (including national legislatures): **when the Member State was implementing EU law**, for instance by implementing a Directive, or giving effect to a Decision or Regulation;[16] and **when the Member State was 'acting within the field' of Union law by limiting one of the EU free movement rights**.[17] The justification for imposing EU fundamental rights standards in those cases is slightly different: in the case in which the Member State is implementing or giving effect to secondary legislation, the fundamental rights limit arises from the very existence of this secondary legislation. A Regulation, Directive or Decision cannot be interpreted in a way which violates EU fundamental rights; thus should the Member State exercise its discretion in a way inimical to those very rights it would indirectly violate that piece of secondary Union law.[18] In subsequent, and contested, case law the CJ EU went a step further by allowing for the possibility to invoke EU fundamental rights against a private party even when the matter had been attracted within the scope of Union law by virtue of a Directive, which in itself cannot be invoked against a private party.[19]

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[12] E.g. Case 4/73 *Nold v Commission*, EU:C:1974:51; but already in Case 36/75 *Rutili v Minister for the Interior*, EU:C:1975:137 the Court makes a link between national rules and fundamental rights.
[13] E.g. Case 149/77 *Defrenne v Sabena* (Defrenne III), EU:C:1978:130.
[14] Including the UK, even though it has a unique constitutional arrangement also in relation to fundamental rights. see Human Rights Act 1998.
[15] E.g. Case C-377/98 *Netherlands v Council* (biotechnology directive), EU:C:2001:523; Case C-399/11 *Melloni v Ministerio Fiscal*, EU:C:2013:107.
[16] E.g. Case 5/88 *Wachauf*, EU:C:1989:321; Case C-292/97 *Karlsson and* others, EU:C:2000:202; Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd at al V Scottish Ministers*, EU:C:2003:397; there are many interpretative conundrums in relation to the application of fundamental rights to Directives, for instance on the relationship between minimum harmonisation and fundamental rights obligations; see F De Cecco 'Rome to Move? Minimum harmonization and fundamental rights' (2006) CMLRev 9; M Bartl and C Leone 'Minimum harmonisation after Alemo-Herron: the Janus face of EU fundamental rights review' (2015) Eur Const Law Rev 140.
[17] E.g. Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (ERT)*, EU:C:1991:254.
[18] AG Jacobs in Case 5/88 *Wachauf*, EU:C:1989:321 argued that the Member State would be bound by EU fundamental rights in those cases since it acts as a 'delegated' power of the EU; however the theory of delegation only works for those fields where the Union has harmonising competence, and it is not convincing in other cases.
[19] Case C-144/04 *Mangold* [2005] ECR I-9981; Case C-555/07 *Kücüdeveci v Swedex* [2010] ECR I-365; see generally E Spaventa 'The Horizontal Application of Fundamental Rights as General Principles of EU law' and M

In relation to the Treaty free movement provisions, the rationale for imposing Union fundamental rights is that when an individual has brought her/himself within the scope of the Treaty by exercising or seeking to exercise her/his Treaty free movement rights the Member State can limit those rights only to the extent to which this is permissible under Union law. Hence, the limitation must pursue a legitimate interest and be proportionate. However, the limitation imposed by the Member State, in order to be tolerated, must also be consistent with the EU own constitutional values. Thus, for instance, if a Member State seeks to limit (lacking any secondary legislation) the right of a service provider to provide information, then it must not only pursue a public policy aim compatible with the Treaty,[20] but must also ensure that in doing so it does not infringe EU fundamental rights as constitutional principles of EU law.

1.3. Fundamental Rights and National Sovereignty

The application of EU fundamental rights upon national authorities' acts or measures has not been universally welcomed by the Member States. In very simple terms, the issue is one of **sovereignty**: why, when Member States have not transferred general fundamental rights jurisdiction to the EU, should their acts be reviewed also having regard to EU fundamental rights? It could be argued (and it has been argued) that given that all Member States have their own fundamental rights guarantees it is those that should be applicable to the acts of domestic institution. Furthermore, the application of EU fundamental rights through EU law determines a constitutional anomaly: different legal systems ensure legislative compliance with fundamental rights in different ways so as to balance different considerations: for instance legal certainty might militate in favour of a centralised scrutiny by a specialised court; or a given view of the separation of powers might curtail the extent to which rules passed through representative democracy can be annulled by the judiciary.

However, once a matter is attracted within the field of Union law, then the principle of supremacy applies: this means that if a national rule is found to fall within EU law *and* to violate fundamental rights, it will not be applicable in the case at issue (but might be applicable to a purely domestic situation). This determines a considerable procedural advantage for claimants, and an incentive to claim EU fundamental rights. Take for instance the case of *Carpenter*.[21] There, the claimant was a British citizen living in the UK and married to a third country national. Mrs Carpenter's residence permit was however not renewed as she had overstayed her residence permit; she was therefore supposed to go back to her home country and reapply for a residence permit from there. The UK argued that the case was purely internal, and therefore should be decided pursuant to British law. The claimants on the other hand argued that since Mr Carpenter was providing services also in other EU countries, he fell within the scope of EU law; deportation of his wife would, it was argued, affect his business. Even should the UK rules be justified on public policy grounds (i.e. to deter irregular migration), the application of such rules to Mr and Mrs Carpenter should respect the right to family life as (then) a general principle of Union law and should be proportionate. The Court agreed with the claimants and found that the application of the rules to Mr and Mrs Carpenter would be an undue interference with their

Dougan 'In defence of *Mangold*?' both in A Arnull, C Barnard, M Dougan, and E Spaventa *A Constitutional Order of States? Essays in EU Law in honour of Alan Dashwood* (Oxford, Hart Publishing 2011), Ch 11 and 12 respectively. The impact of the ruling in *Kücüdeveci* might be limited to the principle of non-discrimination; in any event, the Court in Case C-176/12 *Association de Médiation Sociale (AMS)*, EU:C:2014:2, held that Article 27 Charter in order to be effective must be given more specific expression in European or national law, and therefore could not be invoked between private parties in a situation that fell within the scope of a Directive.

[20] Note however that a link with Union law is always required; whilst in some cases (such as *Carpenter*) this was easily stablished, in other it has been refused, e.g. Case C-159/90 *Society for the Protection of Unborn Children v Grogan*, EU:C:1991:378; Case C-299/95 *Kremzow*, EU:C:1997:254; Case C-309/96 *Annibaldi*, EU:C:1997:631; Case C-5/12 *Betriu Montull*, EU:C:2013:571.

[21] Case C-60/00 *Carpenter*, EU:C:2002:434; the effects of the ruling in *Carpenter* have been significantly curtailed in Case C-457/12 *S and G*, EU:C:2014:136 to the extent to which the right to reside of a family member of a own national worker depends on child rearing responsibilities (sic!) and on whether the family member is the parent or otherwise of the child to be taken care of.

right to family life. Hence, the application of EU free movement rules triggered the application of EU fundamental rights so that a rule which would have otherwise fallen within the competence of the UK (visas for spouses of own citizens) became a matter to be adjudicated by the Court of Justice, with all the procedural and substantive advantages that that might entail for the claimants.

From a national sovereignty perspective then, the wide application of EU fundamental rights raises the spectre of competence creep, so that potentially no area of domestic law can be sheltered from EU scrutiny.

1.4. The Commission's powers to pursue fundamental rights claims: the hiatus in the enforcement of Union law.

The application of EU fundamental rights to national rules produces another constitutional anomaly in that **the Commission might not be able to bring infringement proceedings in relation to a rule of a Member State even when that same rule might be found, in a concrete case, to be inconsistent with EU law (including fundamental rights)**. Thus, for instance, in the *Carpenter* case recalled above, the Commission would have no powers under the existing Treaties to bring proceedings against the UK in relation to British family reunification rules. Yet, the same rules were found to be inconsistent with Union law, and more precisely with the right to family life as interpreted by the Court of Justice, when applied to a *concrete* situation involving a trans-border issue. It is very important to appreciate the existence of this constitutional hiatus between the Commission's powers and the application of EU law in national courts; in relation to the petitions analysed below, it is not clear that even should a EU trans-border element be established, the Commission have the power to bring infringement proceedings against the Member State.

2. ARTICLE 51 CHARTER: ITS SIGNIFICANCE AND ITS INTERPRETATION

KEY FINDINGS

- **Article 51 determines the scope of application of the Charter**; it provides that the Charter applies to the **acts of the EU institutions**; and to the **Member States only when they are implementing EU law**. Article 51(2) provides that the Charter does not extend the field of application of Union law beyond the powers of the Union and does not give any new powers to the Union. **The Court of Justice has been receptive to the second paragraph and it seems that the scope of application of EU fundamental rights has become more defined (if not more narrow) following the Treaty of Lisbon**.
- **The report divides the case law in three different groups**: first we examine the ruling **in *Fransson*,** where **the Court accepted that a remote connection with EU law was enough to trigger the Charter**; then we turn to the case law concerning EU law that **co-ordinates** rather than harmonises national rules; and then we analyse the **cases where the Charter was found not to apply**. The latter are further divided in those cases where the Court found the **connection with EU law to be insufficient** to justify the application of EU law; and the **citizenship cases** where the Court by redefining the personal scope of EU law has impacted on the extent to which the Charter is applicable.
- The report argues that there is a **varied application of EU fundamental rights to national rules: in cases with a stronger EU interest at stake the Charter is more likely to apply to national rules; in cases concerning co-ordination of rules, the Charter applies (if at all) only in extreme cases to national executing authorities; for the rest, the Court has adopted a narrow interpretation of the scope of application of the Charter by applying a narrow and utilitarian test, and by redefining the personal scope of the Treaty.**

2.1. Article 51 of the Charter of Fundamental Rights

Article 51(1) defines the scope of application of the Charter; whilst **Article 51(2) clarifies that the Charter does not, in any way, modify the competences and powers of the Union**. Thus, whilst Article 51(1), virtually unchanged between Nice and Lisbon, codifies the existing case law on the scope of application of fundamental rights as general principles of Union law,[22] the second paragraph of the same provision was intended to **assuage the fears of 'competence creep'** through the Charter, i.e. the idea that the Charter could be used to expand the competences of the EU. Article 51(2) was later amended, mainly at the request of the UK Government.[23] The current version of Article 51 reads as follows (changes from original Nice version in italics):

[22] Small confusion as to whether cases 'within' the scope of Union law were covered by the Charter.
[23] See Lord Godsmith's evidence to the House Of Commons European Union scrutiny Committee *The Application of the EU Charter of Fundamental Rights in the UK: a state of confusion*, 43rd Report Session 2013-14, http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/979/979.pdf

Article 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, *offices* and *agencies* of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers *and respecting the limits of the powers of the Union as conferred on it in the Treaties.*

2. 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 preoccupation with competence creep is mirrored in **Article 6(1) TEU**. There, again, it is stated that the Charter does not 'extend in any way the competences of the Union',[24] a provision clearly intended at ensuring that the Charter would not be used as a gateway to general fundamental rights competence. This is also confirmed in the explanations to the Charter[25] in relation to the new sentence in Article 51(2). Thus, it is stated that 'the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as *extending by itself* the range of Member State action considered to be 'implementation of Union law'.

On the other hand, **the limited applicability of the Charter to national measures has also been the subject of criticism**: in particular, and give the fact that **there is no effective means to enforce fundamental rights against recalcitrant Member States, the European Parliament has criticised the interpretation given to Article 51 CFR** to the extent to which this frustrates the citizens' expectation of being protected by the EU also against acts of their own Member States.[26]

This said, **scholars generally believed that Article 51 CFR just reaffirmed the existing scope of application of Union fundamental rights**:[27] hence, the Charter would be applicable always to the acts of the EU institutions (which are after all the primary target of its provisions) and to the acts of the Member States only in those cases in which there was a connection with EU law, either because the Member State is implementing EU legislation or because it is obliged to respect the constitutional principles of the EU when limiting one of the EU's free movement rights.[28] However, it should be recalled that the extent to which fundamental rights applied to national rules was not well defined even *before* the amendments to the Charter: for instance, in the *Wachauf* case the Court appeared to be limiting the national court's obligation to apply EU fundamental rights to

[24] Article 6(2) also clarifies that accession to the ECHR does not affect the Union's competences; accession has been put on hold following the CJ EU ruling in Opinion 2/13, EU:C:2014:2454.
[25] (2007) OJ C 303/17; the explanations to the Nice Charter are contained in document Charte 4473/00, Convent 49.
[26] See European Parliament resolution of 21 January 2016 on the activities of the Committee on Petitions 2014 (2014/2218(INI)); see also European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)).
[27] To start with there was some discussion as to whether the Charter was in fact narrower in its scope than the general principles because of the fact that the Charter does not refer to Member States acting within the scope of EU Law (i.e. free movement cases); however, the explanations referred to both situations and the Court soon indicated as much; see e.g. Case C-256/11 *Dereci*, EU:C:2011:734.
[28] It falls beyond the scope of this report to investigate the further complication arising from Article 52(5) Charter in relation to the distinction between rights and principles; for an account of recent case law see J Krommendijk

national rules to an interpretative obligation, which only stretched 'so far as possible'.[29] Similarly, the case law on the relationship between national rules limiting fundamental rights and free movement rights was not copious and, in most cases,[30] also fostering internal market effectiveness.

Be as it may, following the constitutionalisation of the Charter it became clear that the **Court was receptive to the amended text of Article 51(2) CFR**, even though the actual text of the Charter or its explanations gave little indication as to the boundaries of its application to national law: it is fair to state that the **Court has proceeded with extreme caution in demanding Charter compliance by national authorities**.[31]

As this report is concerned with the possibility of invoking the Charter in relation to Petitions received by the PETI Committee, we will focus on those cases that that are particularly relevant for those purposes; and we will focus our analysis to the extent to which the Charter applies to national authorities. In particular, we will recall the case of *Åkerberg Fransson*, where the Court gave a very broad interpretation of the connection required between EU and national law for the purposes of applying the Charter to act of national authorities (2.2.). We will then examine those cases in which the Court qualified existing case law, by requiring no, or a 'light touch', review in those cases covered by Regulations aimed at co-ordinating rather than harmonizing national rules (2.3.), to then turn to those cases in which the Court excluded the relevance of the Charter altogether (2.4.)

2.2. The extensive interpretation of EU law: Åkerberg Fransson

In ***Åkerberg Fransson***[32] the national proceedings at issue concerned tax fraud, which happened to include a **VAT fraud** element. Mr Åkberger Fransson was seeking the **unmediated application of the Charter, in particular Article 50 of the Charter which guarantees *ne bis in idem*; he was not relying on a specific provision of EU law**. Despite the Member States' protestations, the **Court found that the Charter applied**, since a loss of revenue arising from the failed collection of VAT also entailed a **loss of revenue for the EU budget**. For this reason, the claimant could rely directly on the Charter to invoke the *ne bis in idem* principle. It would be fair to say that the *Åkberger Fransson* ruling was received with a certain perplexity by the scholars (and with hostility by the Member States) since it was considered that the link between EU law and the case at issue was too tenuous to trigger the application of the Charter.

'Principled silence or mere silence on principles? The role of the EU Charter's principles in the case law of the Court of Justice' (2015) Eur Const Law Rev 321.

[29] Case C-5/88 *Wachauf*, EU:C:1989:321, para 19.

[30] Cases of conflict between the exercise of free movement rights and fundamental rights are few: e.g. Case C-368/95 *Familiapress*, where the Court left the assessment to the national court; Case C-36/02 *Omega,* EU:C:2004:614; more problematic the situation when the application of the Treaty free movement provisions determines a 'centralised' approach capable of displacing (potentially or in fact) national fundamental rights: e.g. Case C-112/00 *Schmidberger*, EU:C:2003:333; Case C-438/05 *International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line et al*, EU:C:2007:772; see also Case C-341/05 *Laval un Partneri*, EU:C:2007:809. On these issues see E Spaventa 'Federalisation versus Centralisation: tensions in fundamental rights discourse in the EU' in S Currie M Dougan *50 years of the European Treaties: Looking backwards Thinking Forward*, Hart publishing 2009, 343.

[31] For a general overview of EU fundamental rights protection (but pre-*Fransson* and *Melloni*) see S de Vries, U Bernitz and S Weatherill (eds) *The Protection of EU Fundamental Rights after Lisbon* (Hart Publishing 2013); on the scope of the Charter see generally M Dougan 'Judicial review of Member State action under the general principles and the Charter: defining the 'scope of Union law' (2015) CMLRev 1201.

[32] Case C-617/10 *Åkerberg Fransson*, EU:C:2013:105; and see F Fontanelli 'Implementation of EU law through domestic measures after *Fransson*: the Court of Justice buys time and 'non-preclusion' troubles loom large' (2014) ELRev 682.

Yet, it is possible that *Åkberger Fransson* is more limited in its effects than it had been initially thought: this is not only since the Court later provided a more restrictive interpretation of the connection with EU law needed to invoke the Charter,[33] but also because it might be that the expansive interpretation in *Fransson* is due to two considerations: first of all, VAT having been the subject of harmonisation is a matter falling within the scope of EU law; and penalties for infringement of VAT are closely related to VAT collection. Secondly, the strategic importance of VAT collection for the EU budget might justify, at least in the eyes of the Court, a more intrusive stance: thus for instance in ***Taricco***,[34] the Court greatly impinged on national procedural autonomy[35] when it found that Italian rules on limitation periods in relation to criminal offences relating to **VAT fraud fell within the scope of EU law**, so much so that they might have to be disregarded to avoid a situation in which actions for VAT fraud would routinely be abandoned because of the combined effect of the complexities of the proceedings and the limitation period.

2.3. The application of the Charter to executing national authorities: McB and N.S.

Possibly the most significant effect of the Charter, in relation to Member States, was to alert national courts to the potential of EU fundamental rights. In this regard, it is striking that in the forty year or so preceding the Charter, national courts made very few preliminary references to enquire as to the exact obligations imposed upon Member States when implementing Union law. If one of the main aims of the Charter was to make EU fundamental rights 'more visible', it certainly succeeded and after the Charter we see a **dramatic increase in requests for a preliminary reference on the extent to which EU fundamental rights are applicable to acts of the Member States**. And yet, it also became clear that **the intersection between EU fundamental rights and national law is incredibly complex**: in particular, in a system of conferred competences, where the EU can only act when it has been equipped to do so by the Member States, there is a risk that either fundamental rights impact on areas which the State had wanted to reserve for themselves[36], or that fundamental rights of individuals are left unprotected when Member States act on the basis of EU law.

In the case of ***McB***,[37] the first preliminary reference on the interpretation of Article 51(2) of the Charter, the potential for complexity became apparent. Here, the case related to Regulation 2201/2003 (the **Brussels II Regulation**) which, amongst other things, determines jurisdiction when a child has been wrongfully removed from one Member State to another. In the case at issue, Mr McB was an Irish national who had three children with a British national. Eventually the mother decided to flee Ireland taking the children with her. The father initiated proceedings for custody in the Irish courts and then proceedings in the UK courts to obtain an order that the children be returned to Ireland pursuant to the Brussels II Regulation. The British courts requested Mr McB to obtain a certificate declaring

[33] Case C-206/13 *Siragusa*, EU:C:2014:126, examined further below.
[34] Case C-105/14 *Taricco*, EU:C:2015:555; see also Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Garage Molenheide,* EU:C:1997:623.
[35] The principle of national procedural autonomy entails that rules of procedure, including time limits, are in principle reserved to the Member States, subject to the principles of equivalence (equal treatment with comparable non EU claims) and effectiveness (exercised of EU law derived rights is not rendered excessively difficult).
[36] This was evident also before the adoption of the Charter: take for instance Case C-60/00 *Carpenter*, EU:C:2002:434, in which the effect of the case law of the fundamental rights jurisprudence of the Court was to assess the proportionality of the denial of a residence permit to the third country national spouse of a British citizen living in the UK. Or the case of *Metock* (C-127/08, EU:C:2008:449), in relation to the fact that a third country national unlawfully present in the EU would be able to rectify her irregular migration status through marriage to a Union migrant.
[37] Case C-400/10 PPU *McB*, EU:C:2010:582.

that the removal of the children from the Irish jurisdiction had been wrongful, since the relevant provisions of the Brussels II Regulation only apply in that circumstance. The Irish Court held that the removal was not wrongful pursuant to the Brussels II Regulation since, at the time when the children had left the Irish territory, Mr McB did not have custody rights of his children. Pursuant to Irish law, when the parents are not married the natural father gains custody rights only following a court order (or in agreement with the mother).

The issue for consideration by the Court of Justice was then **whether the Irish rules on custody were incompatible with Union law interpreted in the light of Article 7 of the Charter** (right to private and family life). One of Mr McB's arguments was in fact that since the Irish Court would be applying the Brussels II Regulation, then **the matter fell within the scope of the Charter pursuant to Article 51**. In that case, on a preliminary reference, it would be for the Court of Justice to assess (indirectly) the compatibility of the Irish rules on the determination of paternity with EU fundamental rights. However, the EU does not have harmonising competence in relation to **family law**. The preliminary ruling request then uncovered a potential area of tension when the situation is attracted within the scope of EU law by a co-ordinating piece of legislation, i.e. by **rules aimed at co-ordinating the exercise of Member States competences** rather than at harmonising them, since the application of EU fundamental rights in that case might have the effect of imposing a European standard on a matter otherwise reserved to the competence of the Member States. Yet, pursuant to the orthodox understanding of the case law, EU fundamental rights would apply to acts of Member States (including their national courts) when those are implementing EU law by applying the provisions of a Regulation.

The Court relied on Article 51(2) to ensure that the effect of the Charter did not impinge on the repartition of competences between the EU and its Member States. It held:

> 51. First, according to Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not 'establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it.
>
> 52. It follows that, in the context of this case, *the* ***Charter should be taken into consideration solely for the purposes of interpreting Regulation No 2201/2003*****, and there should be** ***no assessment of national law as such***. More specifically, the question is whether the provisions of the Charter preclude the interpretation of that regulation set out in paragraph 44 of this judgment, taking into account, in particular, the reference to national law which that interpretation involves.[38]

In *McB* the Court then clarifies that, at least in certain cases where the Member State is applying EU Law, national rules remain outside the scope of the Charter. However, in the case at issue, this does not mean that the individual is hence deprived of the protection afforded by the Charter; rather this protection is mediated, in that it is the piece of EU law which refers to the substantive provisions of national law that is assessed vis-à-vis Charter rights. The end result then is similar (the Court did consider after all whether the rules denying automatic custody rights to unmarried natural fathers were compatible with EU fundamental rights), but the distinction is constitutionally very important: **in *McB* the**

[38] Case C-400/10 PPU *McB*, EU:C:2010:582, emphasis added.

Court attempts to ensure that the Charter might not be used as a tool to broaden the impact of EU law on national law. Furthermore, this is important also in relation to the role played by the Commission in these cases since, following *McB* although arguably even before, it is clear that it would not be possible for the Commission to bring infringement proceedings against a Member State in those instances: if anything, there would be a question of the compatibility of EU law (as interpreted by the Court) with the Charter.

In ***N.S.***,[39] **the Court further limited the extent to which national courts are able to directly apply the Charter (or their own fundamental rights standards) in cases in which a Regulation is designed to determine the jurisdiction over given claims**. The case related to the **Dublin II Regulation** which allocated jurisdiction for asylum claims:[40] lacking any other connecting factor, the first port of entry is responsible to process asylum claims so that the asylum seeker claiming asylum in another Member State can be returned to the first port of entry to have her claim processed there. The Dublin II Regulation also included a **reserve of sovereignty for Member States** so that the competent national authority could always decide to process the asylum claim even when it was not the first port of entry. In *N.S.* asylum seekers who had entered the territory of the EU through Greece and had then arrived in the UK faced being returned to Greece, as that was the first port of entry. They argued, however, that given the situation in Greece, where there were serious and documented problems both with the treatment of asylum seekers and with the way claims were processed, the UK could not return them there as that would put the claimants at risk of being subjected to degrading and inhuman treatment in breach of Article 4 of the Charter and 3 of the ECHR. Thus, in the claimants' opinion, the UK was under a duty to exercise its discretion and process the asylum claims.[41] The first issue for consideration was then whether a Member State is 'implementing' the Charter when it is conferred discretion whether or not to act by a Union law instrument. It was only if the Court found this to be the case that the Charter would be applicable and the asylum seekers' rights might be protected by the Union.

The Court found that when deciding whether to exercise discretion, i.e. whether to process the asylum claim, the UK was still 'implementing' EU law, so that the Charter would be applicable; however, the Court also gave considerable weight to the need to ensure the functioning of the Dublin system so that it was only in extreme circumstances that the Charter would be relevant in these cases. [42]

[39] Joined Cases C-411/10 and C-483/10 *N.S. and others,* EU:C:2011:865.

[40] Council Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States [2003] OJ L 50/1; Regulation 343/2013 has now (and after the *N.S.* case) been repealed and substituted with Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ 180/31; following the migration crisis the Commission is looking into a comprehensive reform of the system, see D Robinson *How the EU plans to overhaul 'Dublin Regulation' on asylum claims*, FT 20 January 2016, http://www.ft.com/cms/s/2/d08dc262-bed1-11e5-9fdb-87b8d15baec2.html#axzz3yv5xcQLG.

[41] In *M.S.S. v Belgium and Greece* (Appl. No. 30696/09), ECtHR Grand Chamber ruling, the European Court of Human Rights found that Member States had a duty to exercise jurisdiction, even under the Dublin system, when returning the asylum seeker to the first port of entry would entail a breach (or a risk thereof) of Article 3 ECHR; see also *Tarakhel v Switzerland*(Appl. No. 29217/12) on the Swiss authorities' obligation to seek guarantees as to the existence of adequate housing in Italy before being able to transfer the asylum seeker there.

[42] The Court held that a duty to process a claim exercising the reserve of sovereignty arose only 'where they [national authorities] cannot be unaware that *systemic* deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State [the Member State otherwise competent to process the claim, in this case Greece] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.' (Joined Cases C-411/10 and C-4983/10 *N.S. and others,* EU:C:2011:865, operative part of the ruling).

The rulings in *McB* and *N.S.* therefore somehow limit the impact of the Charter even in those cases in which the national authorities are giving effect to Union law. In fact, and with the benefit of hindsight following Opinion 2/13 on the accession of the EU to the ECHR,[43] both cases might be seen as an **example of 'exceptionalism', where the application of the Charter to national rules is limited to ensure the full effectiveness of EU rules**. Underlying this case law is the idea, dear to the Court, that further integration in fundamental rights sensitive matters (asylum, but also the functioning of the European Arrest Warrant) is **premised on mutual trust between the Member States**. Co-ordinating legislation is only effective if all the States (and crucially the European legislature) start from the **premise of adequate fundamental rights protection across the territory of the EU**. It is therefore not for the executing authority to syndicate or scrutinise whether the premise of 'adequate fundamental rights' protection is based on sound foundations since if national courts were given the power to scrutinise fundamental rights compliance in other Member States, then the effectiveness of these Regulations would be impaired. It should however be noted that national constitutional courts might be unwilling to provide the EU with such a blank cheque, and the **German Constitutional Court** has recently delivered a ruling **reasserting its jurisdiction in ensuring that the principle of mutual trust** that underlines the European Arrest Warrant **does not infringe crucial constitutional guarantees** (and in particular the identity clause) contained in the German Basic Law.[44]

2.4. Cases where the Court found that the Charter did not apply

Finally, we should consider those **cases where the Court found that the Charter of Fundamental Rights was not relevant to the situation at issue**; this it did either because of a lack of connection with EU law (2.4.1.); or because, even though there was a connection to EU law, the applicant somehow did not fall within the personal scope of EU law (2.4.2.). The two situations will be looked at separately.

2.4.1 Lack of Connection with EU Law

As said above the Charter applies to Member States *only* when they are implementing EU law, which is to say when they either give effect to an EU Regulation or Decision; when they implement a Directive; or when they limit a Treaty free movement right.[45] In this first group of cases here analysed, the Court found that there was **no connection with EU law and that therefore the Charter could not be applied**.

In ***Siragusa***, Mr Siragusa having failed to comply with Italian landscape conservation rules and having being ordered to restore the site to its former state argued that the Italian rules at issue were inconsistent with the right to property as guaranteed by the Charter, and with the general principle of proportionality as guaranteed by EU law.[46] The national court found that there might be a link with EU environmental law. The Court provided us with a **test on how to determine whether national rules are 'implementing EU law' for the purposes of Article 51 Charter, when those rules** are not themselves giving effect to a piece of EU law, but **happen to be in a field which is related to one occupied by EU**

[43] Opinion2/13, EU:C:2014:2454.
[44] 2 BvR 2535, 14.
[45] For cases declared inadmissible for lack of a connection with EU law, before the ruling in Case C-206/13 *Siragusa*, EU:C:2014:126, see e.g. Case C-2711/ *Vikov*, EU:C:2012:326; Case C-5/12 *Betriu Montull*, EU:C:2013:571.
[46] The factual circumstances are not so dissimilar to those examined in Case C-309/96 *Annibaldi*, EU:C:1997:631, which following the mention in the explanations to the Charter and the ruling in *Siragusa*, has acquired a new lease of life.

Law (such as it is undoubtedly the case in relation to national conservation rules vis-à-vis EU environmental protection rules). It therefore identified the following as relevant criteria:[47]

> (i) whether the national rule is *intended* to *implement* EU law;
>
> (ii) the nature of the rule and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law;[48]
>
> (iii) whether there are *specific* EU law rule on the matter or whether there are EU law rules that are capable of having an effect on the matter.[49]

Furthermore, the Court held that the Charter would not be applicable in those situations in which EU law in the subject area 'did not impose any obligation on the Member States with regard to the situation in issue in the main proceedings'.[50]

More worryingly, the **Court also gave a very narrow, and possibly rather parochial, view of the purpose of EU fundamental rights, at least in relation to the extent to which such rights apply to national rules by linking fundamental rights protection to the need to preserve the unity, primacy and effectiveness of EU law**.[51] In this way, **fundamental rights protection is seen as instrumental to the achievement of the EU own constitutional goals rather than aimed primarily at ensuring that a minimum standard of fundamental rights protection is always guaranteed when the Member State is acting within the EU constitutional system**.

The ruling in *Siragusa* has been **reaffirmed in subsequent case law**; specifically, in ***Hernández***,[52] the Court applied the same test to **exclude the relevance of the Charter in a situation which had a stronger connection with Union law**. Here, employees were dismissed; such dismissals were then found to be invalid; however, the relevant companies had in the meantime ceased their activities with the result that employment was terminated. The companies were instructed by the national court to pay the relevant wages, and Fogasa (the Wages Guarantee Fund) was ordered to guarantee such payment within the statutory limits. However, because the dismissals had been held by the national court to be invalid rather than unfair, the employees received a lesser compensation that they would have been entitled to had the companies not ceased their activities, or had their dismissal been qualified as unfair. The national court therefore referred a question as to the compatibility of the national rules treating unfair and invalid dismissal in a different way with Article 20 of the Charter which guarantees the principle of equality before the law.

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[47] Case C-206/13 *Siragusa*, EU:C:2014:126, para 25 'In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU Law, the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU Law; and also whether there are specific rules of EU law on the matter or capable of affecting it.' The list appears to be non-exhaustive (some of the points to be determined) and possibly cumulative in that more than one of these criteria might be relevant. At the end of the day, though, the matter is really one of proximity between national rule and EU law, however that proximity might be demonstrated. It is not clear whether Case C-617/10 *Åkerberg Fransson*, EU:C:2013:105, examined above, would have passed the *Siragusa* test.

[48] See for an example Case C-198/13 *Hernández and others*, EU:C:2014:2055, discussed below, where the Court gave great weight to the fact that the legislation at issue was pursuing an aim other than that pursued by the relevant directive (see esp para 41); see also Case C-265/13 *Torralbo Marcos*, EU:C:2014:187, also discussed below.

[49] The English version of the ruling is not all that clear, the Italian version appears to be clearer but see also the French version.

[50] Case C-206/13 *Siragusa*, EU:C:2014:126, para 26.

[51] Case C-206/13 *Siragusa*, EU:C:2014:126, para 32; see also Case C-198/13 *Hernández and others*, EU:C:2014:2055, para 41. For a more optimistic view of the link between fundamental rights and effectiveness and supremacy see M Dougan 'Judicial review of Member State action under the general principles and the Charter: defining the 'scope of Union law' (2015) CMLRev 1201.

[52] Case C-198/13 *Hernández and others*, EU:C:2014:2055.

In this case, **the field was partially 'occupied' by Union law**, in that Fogasa had been established pursuant to Directive 2008/94 as the guarantee institution for remuneration owed to employees in the event of the insolvency of the employer.[53] The Court found that Fogasa had discharged its duty under the directive; the claim for additional payment was based on national law intended to remedy (for the employer but by subrogation in insolvency cases payable to the employee) the delays in the administration of justice, and was therefore not connected with the aims of Directive 2008/94, rather being the result of the exercise of the State's exclusive competence. The Court then reaffirmed that the 'reason for pursuing the objective of protecting fundamental rights in EU law, as regards *both* action at EU level and the *implementation* of EU law by the Member States, is the need to avoid a situation in which the level of protection of fundamental rights *varies* according to the national law involved in such a way as to *undermine the unity, primacy and effectiveness of EU law*'.[54] As there was no such risk in the case at issue, there was no reason for an application of the Charter.

In ***Torralbo Marcos***,[55] the situation related again to a claim for payment of wages in relation to insolvency of the employer. In this case, however, the Charter was invoked to challenge the request for payment of court fees which, it was argued, were contrary to the right to an effective remedy guaranteed by Article 47 Charter. The fees were to be paid in relation to an appeal to obtain a legal declaration of the insolvency of the employer in order to access the competent guarantee institution (Fogasa), in accordance with Directive 2008/94. The connection with Union law in this case could then be said to be strong as the declaration was a condition to access guarantees provided by Union law. The Court found that the rules at issue concerned the administration of justice and that there were no specific EU rules regulating the matter. Whilst it was true that Mr Torralbo Marcos was seeking a declaration of insolvency so as to trigger the protection guaranteed by Directive 2008/94, the latter Directive had not yet been engaged since there was no declaration of insolvency, which was a matter for national law. As a result the situation did not (yet) fall within the scope of Union law, and the Charter could not be applied. The ruling in Torralbo Marcos is particularly interesting because **it places the claimant in a catch 22 situation**: in order to access the guarantees provided by Union law, the claimant needs a declaration of insolvency, yet he might be unable to get such a declaration if the fees applicable are too high. In this respect, **the interpretation of Article 51 CFR is here extremely narrow, and possibly inimical to the aim to ensure the effectiveness of EU law**. In this respect, it might be interesting to recall the above mentioned case of *Taricco*, where the Court had no problem in curtailing the principle of national procedural autonomy in a case in which national rules might have the effect of undermining the Union interest in recovering unpaid VAT.

In any event, it is clear that **the Court of Justice has interpreted Article 51 of the Charter to ensure only a very limited and subsidiary protection in relation to national rules; in so doing it has placed the fundamental rights ball back in the national courts' courtyard, potentially at the expenses of the protection of citizens' fundamental rights**. Fundamental rights protection in those situations which are not (very) directly connected with EU law remains the primary responsibility of the domestic legal system and its courts.[56] It remains to be seen though whether the *Siragusa* test also extends to those situations which are covered by the Treaty free movement provisions. If that were the case, the scope of the Charter would be reduced even further.

[53] Directive 2008/94 on the protection of employees in the event of the insolvency of their employer (2008) OJ L 283/36.
[54] Case C-198/13 *Hernández and others*, EU:C:2014:2055, para 47, emphasis added.
[55] Case C-265/13 *Torralbo Marcos*, EU:C:2014:187..
[56] However, and to be clear, when there is a direct connection between national rule and EU law, the Charter does apply, see e.g. Case C-56/13 *Érsekcsanádi Mezőgazdasági Zrt v Bács-Kiskun Megyei Kormányhivatal*, EU:C:2014:352.

2.4.2. Narrowing the interpretation of the Treaty: the new wave of EU citizenship cases

As mentioned above, **EU fundamental rights, and the Charter, apply not only when the Member State is giving effect to EU law by implementing it but also when the Member State is seeking to derogate or limit one of the free movement provisions**. In those instances, the Member State is acting within the scope of EU law since it can only limit or derogate from a **Treaty right** to the extent to which that is consistent with the Treaty, as interpreted by the Court of Justice. Since limits and derogations must be consistent with the Treaty, they also have to be consistent with its constitutional principles, including EU fundamental rights.

As explained above, **at a certain point in time, this interpretation entailed a pervasive reach of EU fundamental rights**; moreover, in some cases the standard of protection provided for by EU law would be higher than that provided by national law, either because of a more generous interpretation of a given fundamental right,[57] or because of procedural advantages linked to invoking EU law through the principle of supremacy and direct effect.[58]

The introduction of Union citizenship, which weakened the link between economic activity and migration in order to fall within the scope of the Treaty, **further broadened the potential impact of EU fundamental rights**: if more rules could be construed as a limitation to Treaty rights, then more rules could potentially be assessed in relation to their fundamental rights compliance, including for instance rules on surnames,[59] and rules on the residency rights of third country national family members.[60] **In the past five year or so however, the Court has considerably narrowed its interpretation of the EU citizenship provisions**: for instance in ***Alokpa***,[61] the case concerned the third country national mother of two French children residing in Luxembourg; Ms Alokpa attempted to rely on her children's Union citizenship right to reside anywhere in the EU to obtain a work permit. Without a job she was not able to support the children, who would then fail the self-sufficiency test under the Free Movement Directive 2004/38. However, had she been allowed to work, her children would have been able to establish a residence right in Luxembourg and therefore take full advantage of their EU free movement right. A purposive interpretation of the Treaty therefore clearly militated in favour of granting Ms Alokpa the right to work. Yet the Court found that since her children, as matters stood, were not self-sufficient they did not have a right to reside in Luxembourg, and therefore their mother could not invoke a derivative right to work and reside there. Furthermore, **in a situation which arguably fell squarely within the Treaty free movement provisions, since Article 21 TFEU has been triggered, the Court failed to assess whether the national rules at issue were compatible with the Charter**.

In ***Dano***[62] the CJ EU indicated that the **economically inactive Union citizen falls within the scope of EU law only insofar as she meets the black letter requirements of economic self-sufficiency and comprehensive health insurance contained in the**

[57] As it was the case in Case C-60/00 *Carpenter*, EU:C:2002:434.
[58] This said, in some instances the Court's interpretation has been to the detriment of non-economic fundamental rights, most notably in the *Viking* and *Laval* cases (Case C-438/05, EU:C:2007:772; and Case C-341/05 EU:C:2007:809).
[59] Case C-148/02 *Garcia Avello* EU:C:2003:539, Case C-208/09 *Ilonka Sayn-Wittgenstein*, EU:C:2010:806; Case C-256/11 *Dereci*, EU:C:2011:734.
[60] E.g. Case C-356/11 *O and S*, :EU:C:2012:776; Case C-256/11 *Dereci*, EU:C:2011:734.
[61] Case C-86/12 *Alokpa v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:645; see also Case C-40/11 *Iida*, EU:C:2012:691.
[62] Case C-333/13, *Dano*, EU:C:2014:2358. The restrictive approach to citizen's rights is also visible in a line of case law concerning the enhanced protection from expulsion measures which arises, pursuant to Directive 2004/38, after 5 and ten years of residence in the host state – also in those cases which fell within the scope of EU law, the Court failed to remind the national court of their EU fundamental rights obligations; see e.g. Case C-348/09, *PI*, EU:C:2012:300.

Free Movement Directive 2004/38.[63] This has far reaching repercussions since if before the migrant citizen could always rely on a minimum of EU fundamental rights protection – at least in relation to those rules that affected her migration rights – this is no longer possible. It is only when the migrant has sufficient resources and comprehensive health insurance that she might be able to also claim the protection of EU fundamental rights vis-à-vis national rules affecting her migration rights.

In any event, and more generally, **the stress on the Member States' duty to respect EU fundamental rights when limiting Union national migration rights, if existing at all, is much less prominent than it was before the Charter acquired its full legal status**.

2.5. Preliminary conclusions: EU fundamental rights and European integration

The case law analysed above shows the level of **complexity** inherent in assessing the scope of application of the Charter to national measures. To summarise:

- There is a **varied approach** to the Charter, according to type of interest and area considered. In the case of co-ordinating pieces of legislation, the obligations of national executing courts to apply the Charter is reduced.

- **EU fundamental rights** are seen (also?) **as a means** to an end: **to ensure supremacy and effectiveness of EU law**.

- The interest in integration is a relevant consideration so that some areas, and in particular those where there is a strong **EU interest**, fall more easily within the scope of EU law.

- On the other hand when the application of EU fundamental rights (e.g. asylum; European arrest warrant) would undermine the effectiveness of EU legislation, then the **presumption of compliance with fundamental rights by all Member States takes precedence** over the potential breach of fundamental rights of a given claimant.

- Similarly, **in Treaty based cases the Court has retreated from a generous application of fundamental rights** thus assuaging fears about competence creep and undue interference with the sovereignty of Member States (especially in the field of migration of third country nationals, either through the Dublin system or as a consequence of the derived rights of family members of EU citizens movers).

- In certain areas there appears to be a **hiatus** between the operation of primary or even secondary EU law at national level (as interpreted by the CJ EU in preliminary references) and the powers of the Commission to bring proceedings for infringement of EU law.

In this respect it should be considered whether the **Court's approach to the application of the Charter is not unduly restrictive** and whether it does not end up frustrating the expectations of citizens to a meaningful protection of their fundamental rights.

Furthermore, in some cases it is **the very operation of Union law (asylum, EAW) that might have the effect of weakening the protection of fundamental rights for individuals**. It is open to debate whether such results are required by the Charter: indeed

[63] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77.

the more **recent case law on Union citizenship**, pursuant to which Union citizens are only protected to the extent to which they bring themselves within the scope of Directive 2004/38 on free movement - hence negating any scope for the residual protection previously offered through the direct application of the Treaty citizenship provisions - is a **choice of interpretation, and a debatable one** at that.

Moreover, even without applying the Charter to national measures, in cases which relate to the operation of the Dublin system or the European Arrest Warrant, the EU interest in co-ordination of national rules should be subsidiary to the EU duty to respect fundamental rights. **If the operation of these instruments has the effect of weakening (at times considerably) the protection of individuals then either such instruments should be found altogether incompatible with the Charter**; **or their operation should be made conditional to the existence of adequate fundamental rights guarantees in both the executing Member State and the Member State to take responsibility for the individual**.

Lacking an effective mechanism for the EU to enforce the fundamental rights obligations of its Member States, there should be little space for an abstract presumption of minimum compliance across the territory of the EU.

3. THE PETITIONS TO THE EUROPEAN PARLIAMENT AND THE COMMISSION'S POSITION

KEY FINDINGS

- This section analyses a **selection of petitions received by the PETI committee where citizens alleged a potential infringement of the Charter**, which were dismissed by the Commission, except in one case.
- It divides the petitions in **three groups**: those were there was no discernible connection with EU law; those where a connection might have been found; and petitions relating to the infringement of foundational principles of the EU.
- It overall finds the **Commission's approach justifiable** in the view of the CJ EU jurisprudence, with the notable exception of the petitions on the right to collective bargaining in Greece.

3.1 Introduction

The brief outline provided for above is aimed at highlighting both the current state of the law and the legal and policy problems inherent in the debate about fundamental rights in the European Union. In particular it is important to recall the following:

- At least some Member States are sceptical about the application of EU fundamental rights to national laws since they consider that approach an unjustified interference with their sovereignty; and/or they believe that their national constitutional instruments are more than sufficient to guarantee fundamental rights protection in their territory;
- At least some national courts are equally sceptical believing that the Court of Justice might not necessarily guarantee the same level of protection and/or might privilege integration / economic rights to the detriment of other rights (as proven by the dicta in *Siragusa* but also by the failure of the CJ EU to engage with the national courts' perplexities in relation to the compatibility of the operation of the EAW with fundamental rights).
- Following the Treaty of Lisbon and the constitutionalisation of the Charter the CJ EU has become more careful in delimiting the scope of application of the Charter, to the point of significantly reducing its impact on national rules.

However, and the above notwithstanding, **the situation from the viewpoint of the citizen might be not particularly satisfactory**. The **plurality of sources** of fundamental rights protection (national, EU and international) and the **complexity** of their interaction might prove to be not only confusing but also have the effect to **weaken rather than strengthen fundamental rights protection**. In this respect, it should be noted how **most of the petitions included in the selection for this study and received by the European Parliament's Committee on Petitions to demand the protection of fundamental rights would not fall within the scope of the Charter having regard to the case law of the Court**. **In some cases however, there might have been space for a more proactive interpretation**. I will divide the petitions according to the following categories:

(i) petitions where there is **no discernible link with EU law**;

(ii) petitions where the Commission's assessment might seem **unduly restrictive**;

(iii) petitions that raise **macro-constitutional concerns in relation to foundational principles**.

It should be noted that twenty petitions were forwarded for the purposes of this report: of these, only one was found by the Commission to fall within the scope of EU law.[64]

3.2. Petitions where there is no discernible link with EU Law

A number of petitions contained **no discernible link with EU law, even should the latter be given a very broad interpretation** (i.e. even regardless of the *Siragusa* test mentioned above). In this category, the highest proportion related to cases concerning **custody rights in relation to children**.[65] It should be remembered that custody cases might fall within the scope of EU law only to the extent to which there (i) is a cross-border dimension; and either (ii) the Brussels II Regulation is engaged;[66] or (iii) the action of the authority limits the right to move of one of the claimants. Of the petitions examined, only in two cases there might have been an EU cross-border issue in the form of a limitation on the right to travel of the complainant;[67] however, even though such a limitation falls squarely within the scope of the free movement provisions, it would be easily justified on public policy grounds (need to protect vulnerable minors would be of paramount importance and so would the best interest of the child) and therefore any action from the Commission would be unlikely to succeed. In any event, the fundamental rights scrutiny would be confined to the rule that limits the free movement rights (the travel ban) and would not extend to the procedural and substantial issues concerning custody rights.

Other petitions grouped in this category include objections to rules on the **changes in disability pension**,[68] where there was no cross-border link and where no provision of EU law had been engaged; rules providing a **different age of consent for same sex intercourse vis-à-vis hetero-sexual intercourse**, a matter that has already been found to infringe the ECHR but which does not fall per se within the scope of EU law;[69] legislative **changes to employment law justified by the austerity program** absent any cross-border issue and given that there is no provision of EU law secondary legislation regulating the contracts at issue;[70] the refusal to provide **access to the geological assessment** carried out in relation to the construction of a school;[71] **discrimination of a disabled man** by the judiciary and the police;[72] and a request that **war crimes** perpetrated during the Spanish Civil War and Franco dictatorship be investigated.[73]

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[64] Petitions no 689/ 1998, 508/2007, 1152/2011 and 2788/2013, on language assistants in Italy (Article 45(1)).
[65] Petition 59/2013 removal from parental care; Petition 542/2013 custody rights; Petition 1234/2013 breach of children's rights; Petition 2543/2013 removal of child from parental care; Petition 344/2014 violation of custody rights.
[66] But please note that pursuant to the ruling in Case C-400/10 PPU *McB*, EU:C:2010:582, discussed above section 2.2, in those cases in which the Brussels II Regulation is engaged the Charter applies only to the interpretation of the Regulation and not to national law itself.
[67] Petition 2543/2013) removal of child from parental care; Petition 344/2014 violation of custody rights.
[68] Petition 279/2012, disability pension.
[69] Petition 1395/2012 discrimination of homosexuals.
[70] Petitions 1367/2012 1929/2012 right to employment and austerity; it is not clear whether the measures complained about where part of policies demanded by the ESM. If that were the case the same considerations discussed in section 3.3.2 apply.
[71] Petition 1448/2013 on right of access to public information.
[72] Petition 2082/2013 discrimination of the disabled by Slovenian police and judiciary.
[73] Petition 0572/2014, war crimes; **Petition 1343/2013** on the functioning of the Hungarian judicial system might be included in those where there is no link to EU law; given the situation concerning legislative reforms affecting the independence of the judiciary in Hungary, this might be also seen as a case which brings to the

3.3. Petitions with a potential connection to EU law

Only two of the petitions examined had a connection with EU law: this first one, did have trans-border credentials, albeit following more recent case law the Court might consider those not sufficient to bring the situation within the scope of Union law for the purposes of the Charter. The second one concerns the fundamental question of the obligations of the EU institutions in relation to bailouts agreements.

3.3.1. Registration of child

Petition 1430/2013 raises issues which, in the writer's opinion, fall within the scope of EU law, even though it is not obvious that the Commission would be able to bring successful infringement proceedings, given what said in section 1.5. above in relation to the constitutional hiatus between what can be achieved through a case in a national court and what can be pursued as an infringement of Union law.[74] In the case at issue the claimant was a woman (Mrs X) who renounced her Romanian nationality in favour of German nationality upon moving to Germany and marrying a German citizen. She subsequently divorced, returned to Romania and had a child through artificial insemination. When Mrs X declared the birth of her child she was informed that the child would be registered as being the daughter of her ex-husband; Mrs X then was unable to receive benefits as her daughter did not have a registration number, which in turn was conditional upon the production of a passport which she could not obtain as her daughter did not have a birth certificate. The Romanian office also required an order by the Romanian courts recognising the denial of paternity ruling delivered by the German courts. As a result of the application of these rules Mrs X was denied access to parental leave entitlements and monthly child allowances.

The **Commission found the situation to fall outside the scope of EU law and yet, from the information received, it seems that there were several factors which could have connected the situation to EU law**. Thus, the Commission held that 'the registration of children in a Member State, including the condition under which such registration could be made' is a matter reserved to the Member States. Whilst it is true that there are no EU rules regulating this matter (and that it would fall outside the competence of the EU to attempt to do so) **in *Garcia Avello* the Court found that rules concerning names under which children could be registered could fall within the scope of the Union citizenship provisions if a connection with an intra-EU dimension could be established**.[75] In that case such a connection was found to exist because of the dual nationality of the children and the potential barrier to migration the children would have encountered if they were to be registered under different names in different documents. It is clear that at least some of the inconveniences faced by Mrs X were the result of the fact that she had married and divorced outside of Romania. Furthermore, it is not clear whether she was requesting the registration documents as a Romanian or German citizen; in the latter case her intra-EU credentials would have been even stronger. But more fundamentally, the issue also raises questions about the applicability of the ***Ruiz Zambrano*** case law,[76] pursuant to which **Member States might not take decisions that would deprive Union citizens of the genuine enjoyment of the substance of the rights attaching to the status of Union citizenship**.[77] Thus, the refusal of the authorities to register the child as not being the daughter of Mrs X's ex-husband indirectly deprived the child of her EU passport and therefore of the possibility to enjoy her right (and

attention of the EP violation of basic democratic principles listed in Art 2 TEU and analysed further below in section 3.3. However, the text provided does not contain sufficient details to characterise the situation as under either of the headings.

[74] Petition 1430/2013 civil status.

[75] Case C-148/02 *Garcia Avello* EU:C:2003:539.

[76] Case C-34/09 *Ruiz Zambrano,* EU:C:2011:124.

[77] This said it should be noted that *Ruiz Zambrano* might be a one off; see for instance the artificially narrow interpretation in Case C-256/11 *Dereci*, EU:C:2011:734.

her mother's right) to move within the EU.[78] Thus, **it could be argued that it would have been possible to establish (or at least try to establish) an EU link; however, and as mentioned above, this does not mean that it would have been possible for the Commission to bring proceedings for an infringement of EU law**.

3.3.2. Right to collective bargaining in Greece

More serious concerns are raised by the Commission's analysis of Petitions 1698/2012, 1699/2012, 1700/2012, 1702/2012 in relation to the **right to collective bargaining in Greece post-bailout measures**. The complainants asked:

> 'Parliament to investigate whether it is lawful [in relation to the Charter of Fundamental Rights] to undermine in this way [replacing collective bargaining with considerably weaker measures] the right provided by Article 28' of the Charter, i.e. the right to collective bargaining and collective action.

The **Commission** held that since the Memorandum of Understanding on Specific Economic Policy Conditionality and the Memorandum of Economic and Financial Policy were adopted between Greece and the European Financial Stability Facility, then **the matter fell outside the scope of EU law**. **Thus, when giving effect or implementing these memoranda Greece was not 'implementing' EU law for the purposes of Article 51 of the Charter, and therefore the Charter did not apply**.

It falls beyond the scope of this report to enter into a detailed analysis of whether the framework underpinning the bailouts agreements can really be qualified as falling altogether outside the scope of EU law.[79] However and besides questions relating to the clear conflict of interest of the Commission and the degree of discretion realistically enjoyed by the Greek legislature, **the present writer agrees with the position expressed by the European Parliament** Committee on Economic and Monetary Affairs in its report on the role and operations of the Troika,[80] **that Commission, Council and the ECB, as EU institutions, continue to be bound by the Charter also when acting (allegedly) outside the scope of EU Law; and when acting through Memoranda of Understanding rather than through acts listed in the Treaty**. Given that **Article 51 CFR is addressed also and primarily to the EU institutions, and that it contains no qualification similar to that contained in relation to Member States, it is difficult to conceive reasons why the EU institutions would ever be exempt from the obligations imposed upon them by the Charter**.[81]

3.4. Petitions relating to the infringement of foundational principles

Some of the petitions relate to alleged breaches of the very principles that are proclaimed in Article 2 TEU to be the foundation of the EU. It might be recalled that Article 2 TEU reads:

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[78] The European Court of Human Rights found that the fact that such presumptions could not be rebutted (or not easily rebutted) might constitute a breach of Article 8 ECHR; however in both cases the natural father was involved; see Appl. 18535/91 *Kroon v Netherlands*, and Appl No 77785/01 *Znamenskaya v Russia*.

[79] For an excellent and comprehensive analysis see C Kilpatrick 'Are the bailouts immune to EU social challenge because they are not EU law' (2014) Eur Const Law Rev 393.

[80] Report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0149+0+DOC+XML+V0//EN, at point 11. The Court has not (yet) addressed the questions and has denied jurisdiction in Case C-128/12, *Sindicato dos Bancários do Norte et al. v. BPN – Banco Português de Negócios SA*, EU:C:2013:149; and Case 264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins*, EU:C:2014:2036, in relation to the Portuguese bailout agreement.

[81] On these issues see generally De Witte and K Kilpatrick (eds) *Social Rights in Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, EUI WP 2014/5.

> 'The Union 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

Despite the resonant language, **the EU has not equipped itself with an effective mechanism to enforce those values in case of breaches by its Member States**. The mechanism provided in **Article 7 TEU** has proved an eminently ineffective tool and it has never been used despite some Member States introducing changes to their internal legislation which are capable of undermining, if not altogether threatening, the principles listed in Article 2 TEU. The arguments has been made that the **foundational principles in Article 2 TEU are enforceable in that it would be open to the Commission to bring infringement proceedings for breach of the values contained in that provision**:[82] and yet, and to simplify somewhat, **it is not obvious that this would be the case**: first of all, Article 2 TEU does not say that these values bind the Member States, but it merely states that the Union is founded on those values and that those values are *common* to the Member States. Secondly, Article 51 Charter (which has the same value as the Treaty and might be construed as *lex specialis*) limits the EU fundamental rights obligations of the Member States to cases of implementation of EU law; however, if Article 2 TEU were to be enforceable it would be difficult to reconcile it with Article 51 Charter. Nor is there any reason why if Article 2 TEU were to be enforceable, its enforceability would be limited to systemic breaches. It is open to debate whether a Union supervisory power over *any* breach of the values contained in Article 2 TEU would even be desirable without appropriate and preliminary discussion and agreement on what these values exactly imply (definitions, indicators, etc), so to avoid actions based on political judgments and bias. Thirdly, and perhaps most importantly, it is Article 7 TEU that provides the path (as ineffective as this might have proved to be) for reacting to breaches of the values contained in Article 2 TEU. In any event, it appears likely, given the fact that an action has not so far been brought (nor Art 7 TEU triggered), that the Commission is of the view that such route is either not plausible or not desirable.[83]

This said, **some of the situations brought to the attention of the European Parliament might have been found to have a link with Union law**. For instance, **Petition 1040/2011** concerned draft legislation under discussion in the Italian Parliament introducing heavy penalties for journalists publishing the content of wiretapping.[84] Here, the Commission did not exclude that there might be an intra-EU dimension (not least in relation to the free movement of services and the *ERT* jurisprudence)[85] but was limited by the fact that the legislation at issue was in draft form.

Petitions 2596/2013 and 2814/2013 bring to the attention of the EP the restrictive rules introduced by the Spanish legislature to curtail the right to freedom of assembly, association and expression. These petitions, possibly more than others, highlight one of the constitutional anomalies relating to fundamental rights in the EU in that whilst, on a preliminary reference there might be the possibility to activate the Treaty and with it the protection provided by EU fundamental rights, for instance in a case in which a

[82] See Editorial comments *Safeguarding EU values in the Member States – Is something finally happening?*(2015) CMLRev 619 advocating for the possibility to enforce Article 2; see also Editorial Comments, 'Union membership in times of crisis', (2014) CML Rev.1.
[83] Hence the Communication from the Commission to the Council and the European Parliament, A new EU framework to strengthen the Rule of Law (COM(2014)158 final); this was recently used in relation to Poland; and the fact that the Commission has brought infringement proceedings against Hungary by relying on specific EU law provisions rather than Article 2 TEU; see Case C-288/12 *Commission v Hungary*, EU:C:2014:237; Case C-286/12 *Commission v Hungary*, EU:C:2012:687.
[84] Petition 1040/2011 freedom of expression and freedom of assembly.
[85] Case C-260/89 *ERT v DEP*, EU:C:1991:254.

transnational element might be (even artificially) introduced, it is not possible for the Commission to bring proceedings in those instances.

Petitions 714/2013 and 217/2014 on the treatment of minorities in Latvia and Lithuania respectively bring to the fore the problem of the dissonance between the Copenhagen criteria imposed on acceding Member States[86] and the lack of instruments available if and when the fundamental rights assessment performed in view of the negotiations has overlooked (for political or other considerations) significant fundamental rights protection issues in the countries about to join.[87] In this respect the treatment of Russian speaking minorities has raised several concerns in other fora;[88] this said, short of attempting an action based on Art 2 TEU, there seems to be little space for an intervention by the Commission.

Overall, then there is only one case (bailout) where the Commission's response appears unsatisfactory. In the other petitions, on the basis of the current CJ EU jurisprudence, the link with Union law would have not been sufficiently strong to trigger infringement proceedings.

[86] 'Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and *protection of minorities*, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.' (emphasis added), Presidency Conclusions, Copenhagen European Council, 21 and 22 June 1993.
[87] Although some fundamental rights related areas might fall under the co-operation and verification mechanism; see for instance the latest Report from the Commission on the progress in Bulgaria under the Co-operation and Verification Mechanism, COM(2016) 40 final.
[88] On these issues see generally P Van Elsuwege 'Russian-Speaking minorities in Estonia and Latvia: Problems of Integration at the threshold of the European Union' ECMI Working Paper no. 20, 2004.

4. THE DILEMMA OF A BROAD OR STRICT APPLICATION OF THE CHARTER

KEY FINDINGS

- This section recalls the **constitutional issues** which might militate in favour or against a narrow **interpretation of the Charter**.
- **It laments the lack of effective means to enforce fundamental rights compliance by Member States**.
- It argues for a **more courageous use of the Charter in citizenship cases and in co-ordination situations**, also as a means to encourage better compliance at domestic level.

As mentioned above, and perhaps counterintuitively, **the Charter has had a chilling effect on the application of EU fundamental rights to national measures**. It is therefore not surprising that the **Commission adopts a cautious, and overall realistic, approach to the petitions under consideration**. It should now be considered **whether a broader application of the Charter to national measures would be desirable**. As shown above, the Court has so far adopted a varied approach to the application of the Charter to national rules: when the internal market connection is stronger, then it is willing to assert its jurisdiction and apply Charter fundamental rights to national rules, also (but not only) as a tool to strengthen internal market rights. However, when the internal market connection is weaker, and even when there is a clear connection to EU law such as it is the case in Union citizenship cases, the Court has become more reluctant to impose EU fundamental rights standards on national rules. Furthermore, both the case law on co-ordinating legislation (Dublin II/III and European Arrest Warrant) and the case law on Article 51 CFR seem to suggest a subservience of EU fundamental rights to the interest of EU integration, at least in relation to the application of the Charter to national rules.[89] This said, it should be considered whether a broader application of the Charter is possible and desirable. In this respect **the following considerations seem relevant**.

- The primary aim of the Charter was to make rights **more visible** to the Union citizens: this was particularly important in relation to acts of the Union institutions, the application of the Charter to the acts of the Member States being a mere codification of existing case law.
- National authorities when exercising discretion in a field occupied by EU law are in any event bound by their own national guarantees. All being well, then, domestic fundamental rights should be the main source of protection for Union citizens against acts of the Member States; and the Charter should be the standard imposed on EU institutions whilst also acting as a **safety net** to ensure that national authorities respect fundamental rights when they implement EU law.

[89] Although also beyond that, see e.g the refusal of the CJ EU to take stock of the national courts' perplexities in relation to the EAW, recently see Case C-399/11 *Melloni v Ministerio Fiscal*, judgment of 26 February 2013, noted N De Boer (2013) 50 CMLRev 1083; see also Opinion 2/13, EU:C:2014:2454.

- A broad application of the Charter to national measures might entail a significant loss of national autonomy and **sovereignty**, in ways that might be difficult to justify in the context of the current Treaties, especially having regard to the principle of conferral.

- A broad application of the Charter might entail the loss of the **constitutional diversity** which is part of the national identity that the Union must respect pursuant to Article 4(1) TEU. A narrower interpretation of the Charter thus allows for some variation hence ensuring respect for the way conflicting values might be balanced at domestic level.[90]

- **The Court of Justice is not always receptive to fundamental rights discourse** and also pursues the EU interest in integration/effectiveness. Thus for instance in the case of *Viking*,[91] which concerned transnational industrial action, the combined effect of the application of the Treaty free movement rights and the substitution of the EU standard of fundamental rights for the domestic one, had the effect to weaken rather than strengthen the protection of non-economic rights in the national context.[92]

- **National courts** might be better apt at protecting fundamental rights, and more apt at solving instances of conflict of rights.

This said, there are two major considerations to be taken into account when considering a **broader application** of the Charter to national measures:

- First of all, it should be considered whether Union citizens do not have the legitimate expectation to gain from the European Union not only economic and free movement rights, but also a **common standard of protection throughout the EU**.[93]

- Secondly, the Charter might be seen as a much needed **constitutional glue** for a system that can no longer be understood as based on some sort of functionalist idea of integration; and which *should* not be understood in that way as otherwise it might be used as a proxy to weaken rather than strengthen the protection of the individuals.

In any event, **the approach currently espoused by the Court of Justice is dangerously restrictive and not warranted by the text of Article 51 Charter**, especially if the latter was aimed at codifying the existing state of the law.

In this respect, the **narrow interpretation in the Union citizenship cases** (which deprive EU citizens exercising free movement within the EU of any form of protection unless they are able to demonstrate self-sufficiency) and the **doctrine of EU exceptionalism in relation to Asylum and European Arrest Warrant are very difficult to justify**. In relation to the latter, consider that if national authorities are always bound by the Charter when implementing Union law, then the executing authorities in cases concerning asylum seekers and individuals subject to a European Arrest Warrant should be under a **duty, imposed by Article 51 CFR, to ensure that the EU fundamental rights of the individual concerned are not violated** by the receiving

[90] In this respect, see also Art 52(4) and Article 53 Charter. The significance of the latter might well be called into doubt following the ruling in Case C-399/11 *Melloni v Ministerio Fiscal*, EU:C:2013:107.
[91] Case C-438/05 *International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line et al*, EU:C:2007:772; see also Case C-341/05 *Laval un Partneri*, EU:C:2007:809 and Case C-112/00 *Schmidberger*, EU:C:2003:333.
[92] Arguably this was the case also in Case C-426/11 *Mark Alemo-Herron and Others*, EU:C:2013:521; on these issues see M Bartl and C Leone 'Minimum harmonisation after Alemo-Herron: the Janus face of EU fundamental rights review' (2015) Eur Const Law Rev 140.
[93] See AG Jacobs in Case C-168/91 *Konstantinidis*, EU:C:1992:504; although Mr Jacobs later changes his mind, see 'Human Rights in the European Union: the Role of the European Court of Justice' (2001) ELRev 331.

authority, at least insofar as there is a discretion conferred by EU law. However, this would render the quasi automatic allocation of jurisdiction provided for in these instruments almost meaningless.

The idea underlying the case law of the Court of Justice, as well as those instruments themselves, is that there is an **equivalence of protection throughout the EU**. Yet, and here lies the major problem with this mechanism, **there is no possibility for the EU institutions to enforce this alleged common (minimum) standard of protection: short of triggering the Article 7 TEU procedure, which has so far proved to be cosmetic,[94] there is very little that can be done at EU level to ensure that fundamental rights are guaranteed across its territory**.

It is in this light then that **a more courageous use of the Charter by the Court (and when possible by the Commission) should be considered**: if, for instance, the Court accepted that the operation of EU law is not an aim in itself but rests on the effectiveness of fundamental rights protection in all of the Member States, then its case law might act as a powerful tool to push for fundamental rights guarantees to be achieved, even when national courts might not be able to protect fundamental rights effectively by means of national law. After all, **legislation that rests on the assumption of a minimum level of fundamental rights protection in the EU should not be enforceable when such assumption proves to be erroneous**.

Fundamental rights might be a means to an end, but not in the way perceived by the Court: **they are the means to achieve an effective European Union where the rights of individuals are guaranteed**, with all that that entails in terms of benefits for the achievement of all the aims of the EU, including the effective functioning of the internal market.

[94] See generally D Kochenov and L Pech 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) Eur Const Law Review 512.

5. CONCLUSIONS

This report has considered the current state of the law in relation to the application of the Charter of Fundamental Rights to national rules. It has found that the **Court of Justice of the European Union has adopted a varied interpretation** of Article 51 CFR; and that it considers **fundamental rights also as a tool to ensure the supremacy and effectiveness of EU law**. In this respect, the Court is much more likely to be receptive to fundamental rights claims when it is on firmer internal market grounds; or when to do so might foster the EU interest in integration.

In the light of the case law then the **Commission's response to the petitions analysed seems all in all justifiable** but for the notable exception of its summary and superficial response in relation to the complaints about the impact of the Greece bailout agreements on the right to collective action.

In considering whether the current interpretation of Article 51 CFR is desirable several considerations should be taken into account: thus, the system of **conferral** and reserve of national **sovereignty** militate against a broad application of the Charter to national law, and so does the need to preserve **constitutional diversity** in the EU; furthermore, **national courts** (and domestic fundamental rights) might be as well, if not better, positioned to assess conflict of values, not least since the Court of Justice has not always been receptive to fundamental rights discourse.

This said, there is also the need for a **more courageous use of the Charter in those situations that fall in any event within the scope of EU law, such as citizenship cases, and those that demand thorough fundamental rights scrutiny** (especially in the case of asylum and in relation to the use of the European Arrest Warrant): here, the Court of Justice seems to have weakened the protection afforded by the Charter so as not to undermine the effectiveness of these instruments. However, the approach should be exactly the opposite: **until when Member States cannot guarantee a satisfactory level of fundamental rights protection then those instruments might not be relied upon to undermine fundamental rights guarantees**. Lacking real powers for the enforcement of fundamental rights in the EU, this approach might be a powerful incentive for Member States and Union institutions alike to take their fundamental rights obligations more seriously.

ANNEX I - TABLE OF PETITIONS EXAMINED IN THE STUDY[95]

Petition number	Title / issue	Petitioner mentions CFR Articles	Commission view (CFR applies?)	PETI decision (open / closed)
689/1998, 0508/2007, 1152/2011 and 2788/2013	Language teachers in Italy		Yes (assessment on-going)	All Open
1040/2011	Freedom of expression and freedom of assembly in Italy		No (but COM will follow the progress and assess compatibility with EU law)	Closed
279/2012	Disability pensions in Hungary		No (no EU legislation or competence on the matter)	Closed
1395/2012	Discrimination of homosexuals in Greece		No (no EU legislation on the matter)	Closed
1698/2012, 1699/2012, 1700/2012, 1702/2012	Right to collective bargaining in times of austerity and fiscal consolidation in Greece - violation of the CFR	Art 28 CFR Articles 26, 34, 35 CFR	No (falls outside of the implementation of EU law)	All Open
1367/2012, 1929/2012	Right to employment and austerity measures imposed on civil servants in Spain	Articles 20, 21, 27 and 28	No (EU law does not seem to have been violated)	Both Closed
0059/2013	Removal from parental care in Germany (Jugendamt)		No (falls outside of Commission competences)	Open
0542/2013	Infringement of		No	Open

[95] Selection of petitions raising fundamental rights issues, elaborated on the basis of the information provided by the PETI Secretariat.

	art. 8 ECHR in the Netherlands		(no EU legislation applicable or infringed)	
0714/2013	Personal problem (protection of minorities in Latvia)		No (no EU competence on acquisition of nationality)	Closed
1234/2013	Alleged breach of human rights, including children's rights, in Denmark		No (no EU law applicable, falls outside the Commission competences)	Open
1343/2013	on the judicial system in Hungary		No (unrelated to the application of EU law)	Closed
1430/2013	Birth certificate for the daughter (of a German citizen), who was born in Romania		No (unrelated to EU law)	Closed
1448/2013	Fundamental right of access to public information	Articles 41, 42	No (unrelated to EU law)	Closed
2082/2013	Justice system in Slovenia (Discrimination of the disabled by Slovenian police and judiciary)		No (no violation of EU law, unrelated to EU law)	Closed
2543/2013	Return of her child, who has been taken into care by the British authorities (Removal of child from parental care in the UK)		No (no EU competence)	Open
2596/2013	Announced reform of the Spanish criminal code (freedom of assembly in Spain)	Article 12	No (no EU competence)	Closed
2814/2013	on banning demonstrations		No	Open

	in Spain (freedom of expression and freedom of assembly in Spain)		(no EU competence)	
0217/2014	on behalf of the Electoral Action of Poles in Lithuania on the persistent violation of the rights of the ethnic minorities by the Lithuanian government (protection of minorities in Lithuania)		No (unrelated to the implementation of EU law, no authority to intervene)	Open
0344/2014	Supposed violation by the British authorities of the fundamental rights of a Bulgarian family relating to the custody rights over a minor	Various articles	No (unrelated to EU law, the Commission is not in a position to take action)	Open
0572/2014	on compensation for victims of the Spanish Civil War 1936-1939 (War crimes in Spain)		No (absence of EU competence)	Open

CAT: QA-04-16-145-EN-C (paper)
CAT: QA-04-16-145-EN-N (pdf)

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