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HUMAN RIGHTS IN THE EU

1 CENTRAL ISSUES

i. The status of human rights within the EU legal order has changed dramatically since its foundation in the early 1950s. While the draft European Political Community Treaty in 1953 would have made the European Convention on Human Rights part of the law of the new Communities, this Treaty was never adopted due to France's rejection of the closely-linked Defence Community Treaty in 1954. Consequently, the EEC and Euratom Treaties in 1957 omitted any reference to human rights. Over sixty years later, however, human rights occupy a central position within the EU legal order. The EU Charter of Fundamental Rights and the general principles of EU law now rank alongside Treaty provisions as primary norms of EU law,[1] and there is a growing EU case law dealing with human rights issues.

ii. There are three formal sources for EU human rights law listed in Article 6 TEU. The first and most important is the EU Charter of Fundamental Rights which gained binding legal force in 2009. The second is the ECHR, which for decades was treated by the ECJ as a 'special source of inspiration' for EU human rights principles. The third is the 'general principles of EU law', a body of legal principles, including human rights, which were developed by the ECJ over the years before the Charter of Rights was drafted. General principles are said by the ECJ to be derived from national constitutional traditions, from the ECHR, and from other international treaties signed by the Member States. These three sources overlap, creating some legal confusion, and other sources of international human rights law have occasionally been invoked by the ECJ.

iii. The CJEU has made it clear in recent years that the Charter is now the principal basis on which the EU Courts will ensure that human rights are observed, and the proportion of cases in which the CJEU has drawn on ECHR case law has declined since the coming into force of the Charter.

iv. Article 6(2) TEU declares that the EU shall accede to the ECHR. This was intended to introduce a degree of external accountability by ensuring that EU action could be challenged before a non-EU court for compatibility with ECHR provisions. However, the CJEU dealt a surprising blow to the prospects for EU accession when it ruled in 2014 that the long-negotiated draft Agreement on Accession of the EU to the ECHR was incompatible with the EU Treaties and with the autonomy of the EU legal order in several fundamental ways.

[1] Art 6(1) and (3) TEU, and Cases C–402 and 415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission (Kadi I)* [2008] ECR I–6351, [308].

v. EU human rights standards, including the provisions of the Charter and general principles of law, are binding on the EU and its institutions and bodies in all of their activities, and on the Member States when they act within the scope of EU law, the latter being an issue that features frequently in the case law.

vi. The EU has gradually integrated, or 'mainstreamed', human rights concerns into many of its policies. The most important internally-oriented policy of this kind is EU anti-discrimination law[2] and a second is the field of data protection and privacy. In EU external relations, human rights have featured prominently, if inconsistently.[3] The EU actively promotes its 'human rights and democratization' policy in many countries around the world, and uses human rights clauses in its international trade and development policies. It has imposed a human rights-based 'political conditionality' on candidate Member States, and claims to integrate human rights concerns throughout its Common Foreign and Security Policy. The EU in 2009 concluded its first major international human rights treaty, the UN Convention on the Rights of Persons with Disabilities, with both internal and external policy implications.

vii. There have been other significant institutional initiatives in the human rights field, including the establishment in 1999 of a sanction mechanism for serious and persistent breaches of human rights in Article 7 TEU, and the creation of an EU Fundamental Rights Agency in 2007. However, despite much debate and critique, most recently in relation to the adoption of repressive and anti-democratic measures by the Hungarian Government in recent years, the Article 7 mechanism has proven problematic.

viii. Notwithstanding these extensive developments in the human rights field, the EU's status as a significant human rights actor or organization has been questioned.[4] Critics have suggested that EU attention to human rights often constitutes little more than rhetoric or self-serving instrumentalism.[5] In the fields of immigration and asylum, the EU has been sharply criticized for neglecting and undermining human rights concerns.[6] With thousands of asylum-seekers and refugees dying at Europe's borders and on the seas, the EU Ombudsman opened an investigation into compliance with human rights standards by the EU's border agency, Frontex.[7] Even within the EU, the austerity measures mandated by the EU in response to the Euro crisis have been reported to have had a sharply negative impact on the economic and social rights of the most vulnerable populations.[8]

[2] Ch 25.

[3] See http://eeas.europa.eu/human_rights/index_en.htm.

[4] P Alston, J Heenan, and M Bustelo (eds), *The EU and Human Rights* (Oxford University Press, 1999), in particular ch 1; A von Bogdandy, 'The European Union as a Human Rights Organization: Human Rights and the Core of the European Union' (2000) 37 CMLRev 1307; A Rosas, 'Is the EU a Human Rights Organization?', CLEER Working Paper 2011/1.

[5] A Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press, 2004). For criticisms of the EU from a human rights perspective see, Amnesty International, *The EU and Human Rights: Making the Impact on People Count* (2009); K Roth, 'Filling the Leadership Void: Where is the European Union?' (Human Rights Watch World Report, 2007).

[6] See, eg, Amnesty International, *The Human Cost of Fortress Europe*, 9 July 2014.

[7] Own Initiative Inquiry concerning the means through which FRONTEX ensures respect for human rights in Joint Return Operations, OI/9/2014/MHZ, opened in October 2014.

[8] *The European Crisis and its Human Cost* (Caritas Europa, 2014); C Kilpatrick and B de Witte (eds), 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges', EUI Law Department Working Paper 2014/15; M Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21 ELJ 421; A Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?' (2017) 54 CMLRev 991.

2 INTRODUCTION

The constitutional framework of the EU today boasts an impressive array of human rights provisions. The Treaties declare that the EU is founded on respect for human rights, they give binding effect to the Charter of Fundamental Rights and Freedoms, and they mandate EU accession to the ECHR. The Treaties require all candidate Member States to adhere to these values, and they include a sanction mechanism for existing Member States which seriously and persistently violate such rights. Article 19 TFEU provides a legal basis for a strong EU anti-discrimination regime. The centrepiece of the EU's human rights framework is Article 6 TEU which provides:

> 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
>
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
>
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

These developments are, however, relatively recent. For many years the European Economic Community was primarily focused on the creation of a common market, even if efforts to broaden the integration project were never entirely off the agenda.[9] It was not until the 1970s that human rights concerns regained formal institutional recognition by the European Community, including by the ECJ and the Member States. The most significant developments came throughout the 1990s with the adoption of the Maastricht and Amsterdam Treaties and the drafting of the EU Charter of Fundamental Rights, followed by the enactment of the Lisbon Treaty.[10] Yet the legacy of the EEC's roots in the common market project retains its significance since, despite the EU's constantly changing nature and the recognition of human rights as part of its law and policy, the EU's dominant focus today remains economic.

[9] For discussion of the early years of the Communities with regard to human rights, see M Dauses, 'The Protection of Fundamental Rights in the Community Legal Order' (1985) 10 ELRev 398, 399; P Pescatore, 'The Context and Significance of Fundamental Rights in the Law of the European Communities' (1981) 2 HRLJ 295.

[10] For a post-Lisbon overview, see S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) HRLR 1.

3 'GENERAL PRINCIPLES OF EU LAW': ECJ INITIATIVE

The concept of 'general principles of Community law' dates back to the founding of the ECSC, although the ECJ equivocated as to the meaning of the concept, and as to what it should include.[11] It resisted attempts to treat fundamental rights as part of general principles of law,[12] but its approach in this respect changed in 1969 in the *Stauder* case.[13]

For some years beforehand, anxious discussions had taken place within the European Commission and Parliament about the implications of the doctrine of supremacy of EU law which the Court had pronounced in *Costa v ENEL*,[14] and specifically about the perceived risk that human rights protected under domestic constitutions might be undermined by this doctrine.[15] The Commission President argued that fundamental human rights were part of the 'general principles' of EU law which, although autonomous in source from national constitutions, nevertheless took into account the common legal conceptions of the Member States.[16] Taking its cue from these discussions, the ECJ in *Stauder* responded positively to an argument based on the fundamental right to human dignity, which the applicant alleged was violated by the domestic implementation of an EU provision concerning a subsidized butter scheme for welfare recipients.[17] Having construed the EU measure in a manner consistent with protection for human dignity, the ECJ declared that it 'contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court'.[18] In *Stauder* the ECJ thus for the first time affirmed a category of 'general principles of EU law', which included protection for fundamental human rights. Notably, the impetus for this development was the fear of a threat to the supremacy of EU law, a concern which, as we shall see below, continues to animate the Court's development of EU human rights law.[19]

The famous *Internationale Handelsgesellschaft* case followed shortly afterwards, in which the German Federal Constitutional Court was asked to set aside an EU measure concerning forfeiture of an export-licence deposit which allegedly violated German constitutional rights and principles such as economic liberty and proportionality.

[11] P Craig, 'General Principles of Law: Treaty, Historical and Normative Foundations' in K Ziegler, P Neuvonen, and V Moreno-Lax (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar, forthcoming).

[12] Case 1/58 *Stork v High Authority* [1959] ECR 17; Cases 36, 37, 38 and 40/59 *Geitling v High Authority* [1960] ECR 423; Case 40/64 *Sgarlata and others v Commission* [1965] ECR 215.

[13] Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.

[14] Case 6/64 *Costa v ENEL* [1964] ECR 585.

[15] See the report by Fernand Dehousse, a Belgian member of the European Parliament, Report on the Supremacy of EC Law over National Law of the Member States, Eur Parl Doc 43 (1965–66) [1965] JO (2923) 14.

[16] Remarks of Walter Hallstein, Eur Parl Deb (79) 218–222 (French Edition) (17 June 1965), discussing the Dehousse Report.

[17] Case 29/69 *Stauder* (n 13). For a similar case more recently see Cases C–92–93/09 *Volker und Markus Schecke GbR v Land Hessen* [2010] ECR I–11063.

[18] Case 29/69 *Stauder* (n 13) [7].

[19] See (nn 111–114) and (n 202) and text. Compare G Delledonne and F Fabbrini, 'The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence' (2019) 44 ELRev 178.

Case 11/70 **Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel**
[1970] ECR 1125

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3. Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

4. However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member states, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.

The ECJ upheld the EU measure, ruling that the restriction on the freedom to trade was not disproportionate to the general interest advanced by the deposit system. When the case returned to the German court, however, the national court concluded that the principle of proportionality in German constitutional law had indeed been violated by the EU deposit system. The effect of this and of subsequent cases on the constitutional relationship between EU law and German law is discussed in Chapter 10, but the case provides an interesting illustration of the difficulty facing the ECJ in seeking to integrate 'common constitutional principles' from the Member States into the EU legal order.

4 GENERAL PRINCIPLES OF EU LAW: ECJ DEVELOPMENT

The ECJ henceforth emphasized the autonomy of EU general principles of law, and their origin in the legal cultures of the Member States. In *Nold*, concerning the drastic impact on the applicant's right to a livelihood of the EU's regulation of the market in coal, the Court identified international human rights agreements and common national constitutional traditions as the two primary sources of 'inspiration' for the general principles of EU law.

Case 4/73 **Nold v Commission**
[1974] ECR 491

13. As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

Article 6(3) TEU today, which otherwise codifies the ECJ's case law on the general principles of law, mentions only the ECHR and national constitutional traditions as sources of inspiration, and omits express reference to other international human rights instruments. However, the ECJ has continued from time to time to cite international human rights treaties other than the ECHR,[20] and Article 6(3) can certainly be read as an affirmation of the ECJ's 'general principles' case law.[21]

(A) THE ECHR AND GENERAL PRINCIPLES OF EU LAW

Prior to the enactment of the Charter of Fundamental Rights, the main international instrument for the protection of human rights drawn upon by the ECJ as a 'special source of inspiration' was the European Convention on Human Rights. From early on the ECJ declared that EU legislation such as that restricting the powers of Member State authorities to limit free movement and residence,[22] as well as legislation on the right to judicial review, protection against sex discrimination, data protection, and privacy rights, were specific EU law manifestations of general principles enshrined in the ECHR.[23] However, the ECJ notably never ruled that the ECHR was formally binding upon the EU, or that its provisions were formally incorporated into EU law,[24] but Article 6 TEU has, since 1992, referred expressly to the ECHR. More practically, the ECJ and the CFI[25] routinely cited the 'special significance' of the ECHR, and the rulings of the Court of Human Rights, as a key source of inspiration for the general principles of EU law.[26] This allowed the ECJ to continue to assert the autonomy and supremacy of EU law, which, as we shall see below, remains a key concern of the Court.

Further, by treating the ECHR as a source of inspiration rather than a formally binding or fully incorporated bill of rights, the ECJ retained the freedom for EU law to 'go beyond' or diverge from the Convention in certain ways. This is exemplified by the right to lawyer–client confidentiality in *AM & S*[27] and *AKZO*,[28] refugee rights,[29] and data protection.[30] The idea of the ECHR as a 'floor' rather than

[20] See Case C-540/03 *European Parliament v Council* [2006] ECR I-5769, [57] citing the UN Convention on the Rights of the Child, and Case C-354/13 *FOA v Kommunernes Landsforening (Kaltoft)* EU:C:2014:2463, [53] on the UN Convention on the Rights of Persons with Disabilities.

[21] See, eg, H Hofmann and C Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9 EuConst 73.

[22] Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219.

[23] Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651, [18]; Case C-424/99 *Commission v Austria* [2001] ECR I-9285, [45]–[47] on access to judicial protection; Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143, [18]; Case C-185/97 *Coote v Granada Hospitality* [1998] ECR I-5199, [21]–[23] on discrimination; Cases C-465/00, 138 and 139/01 *Rechnungshof v Österreichischer Rundfunk* [2003] ECR I-12489, on privacy and data protection.

[24] The Court on the contrary has drawn attention to the fact that the ECHR is not formally incorporated into EU law: eg Case C-501/11 P *Schindler v Commission* EU:C:2013:522, [32] and Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, [44].

[25] See, however, Case T-347/94 *Mayr-Melnhof Kartongesellschaft mbH v Commission* [1998] ECR II-1751, [311]; Case T-112/98 *Mannesmannröhren-Werke v Commission* [2001] ECR II-729, [59], in which the General Court ruled that it had no jurisdiction to 'apply' the ECHR and that it was not part of EU law.

[26] See, eg, Case C-260/89 *ERT v DEP and Sotirios Kouvelas* [1991] ECR I-2925 [41]; *Opinion 2/94 on Accession by the Community to the ECHR* [1996] ECR I-1759, [33]; Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629, [14].

[27] Case 155/79 *AM & S Europe Ltd v Commission* [1982] ECR 1575.

[28] Case C-550/07 P *Akzo Nobel Chemicals v Commission* [2010] ECR I-8301.

[29] Case C-465/07 *ElgafajivStaatssecretaris van Justitie* [2009] ECR I-921. Compare Case C-542/13 *M'Bodj v Belgium* EU:C:2014:2452.

[30] Case C-28/08 *Commission v Bavarian Lager* [2010] ECR I-6055.

a 'ceiling' for EU human rights law was maintained by Article 52(3) of the Charter of Fundamental Rights, which specifies that the meaning and scope of those Charter rights that correspond to rights guaranteed by the ECHR is to be the same as those laid down by the ECHR,[31] but that 'this provision shall not prevent Union law providing more extensive protection'.

(B) INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Apart from the ECHR, the ECJ has rarely drawn on other regional and international instruments, and this neglect has attracted criticism.[32] In *Defrennev Sabena III*,[33] the ECJ, deeming the elimination of sex discrimination to be a fundamental EU right, drew on the European Social Charter and one of the International Labour Organization Conventions,[34] and it has cited ILO Conventions in various labour law cases. In a challenge brought to the Family Reunification Directive by the European Parliament, the ECJ, while upholding the Directive, drew on the International Covenant on Civil and Political Rights (ICCPR) and on the International Convention on the Rights of the Child, and referred to three other Council of Europe human rights instruments mentioned in the Directive.[35] The UN Convention on Refugees (the Geneva Convention) has regularly been cited in cases dealing with the EU's Directives on minimum standards and reception conditions for asylum-seekers, since the legislation expressly draws on the Geneva Convention.[36] Both the International Covenant on Economic, Social and Cultural Rights (ICESCR)[37] and the ICCPR[38] have been cited by the ECJ in a handful of cases, although the Court was dismissive of an opinion given by the ICCPR's Human Rights Committee,[39] and rejected reliance on the Oviedo Convention on Human Rights and Biomedicine when interpreting an EU directive on the basis that not all Member States had ratified the Convention.[40]

In the famous *Kadi I* case, in which the ECJ annulled the EU's implementation of UN Security Council anti-terrorist asset-freezing resolutions for violating fundamental rights, the CFI cited customary international law and '*ius cogens* rules of international law', as well as principles referred to in

[31] The CJEU has looked to relevant ECtHR case law for guidance on the interpretation of Charter Articles in specific cases, eg Case C-400/10 PPU *JMcB v LE* [2010] ECR I-8965; Case C-279/09 *DEB v Bundesrepublik Deutschland* [2010] ECR I-13849, [35]-[52]; Case C-510/11 P *Kone v Commission* EU:C:2013:696, [20]-[22] on effective judicial protection; Case C-168/13 PPU *Jeremy F* EU:C:2013:358 [43]-[44] on an effective remedy; Cases C-71 and 99/11 *Bundesrepublik Deutschland v Y and C* EU:C:2013:518 on religious freedom; Case C-334/12 RX-II *Arango Jaramillo v EIB* EU:C:2012:733, [42]-[43] on the right to a Court; Case C-562/13 *Abida* EU:C:2014:2453, [47]-[53] on refugee rights; Case C-291/12 *Schwartz v Stadt Bochum* EU:C:2013:670, [27] on data protection; Case C-34/13 *Kušionová* EU:C:2014:2189, [64] on the right to a home/accommodation; Case C-398/12 *M* EU:C:2014:1057, [38]-[40] on *ne bis in idem*.

[32] O de Schutter and I Butler, 'Binding the EU to International Human Rights Law' (2008) 27 YBEL 277; T Ahmed and I de Jesús Butler, 'The EU and Human Rights: An International Law Perspective' (2006) 17 EJIL 771; G Gaja, 'The Charter of Fundamental Rights in the Context of International Instruments for the Protection of Human Rights' (2016) 1 EP 791.

[33] Case 149/77 *Defrenne v Sabena* [1978] ECR 1365.

[34] [1978] ECR 1365, [26]. See also Case 6/75 *Horst v Bundesknappschaft* [1975] ECR 823, 836, where AG Reischl drew on an 'internationally recognized principle of social security as set out in Art 22(2) of International Labour Convention No. 48 on the Maintenance of Migrants' Pension Rights of 1935'.

[35] Case C-540/03 *European Parliament v Council* (n 20) [37]-[39], [57], [107]. The three Council of Europe instruments were the European Social Charter 1961, the Revised European Social Charter, and the European Convention on the Legal Status of Migrant Workers 1977.

[36] See, eg, Cases C-175-179/08 *Aydin Salahadin Abdulla v Germany* [2010] ECR I-364; Cases C-57 and 101/09 *Bundesrepublik Deutschland v B* [2009] ECR I-285; Case C-31/09 *Bolbol* EU:C:2010:351; Case C-364/11 *Abed El Karem El Kott* EU:C:2012:826; Case C-79/13 *Saciri* EU:C:2014:103.

[37] Case C-73/08 *Bressol v Gouvernement de la Communauté française* [2010] ECR I-181 in the context of access of students to higher education.

[38] Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505.

[39] Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-621, [44]-[47].

[40] Case C-237/09 *Belgium v De Fruytier* [2010] ECR I-316.

the UN Charter,[41] whereas the ECJ cited none of these sources. While the ECJ repeated its statement from *Nold* to the effect that it would look to 'the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories',[42] in *Kadi I* and *Kadi II* it cited only the EU Charter and the ECHR as sources for the human rights norms applicable in the case.[43]

Moreover, while many provisions of the EU Charter are based on international human rights instruments,[44] as the explanatory notes to the Charter indicate,[45] those international instruments have not, apart from the ECHR, been treated as influential or persuasive authority in the interpretation by the ECJ of Charter provisions.[46]

It has been argued that EU fundamental rights standards should be 'indexed' to international human rights standards, not least so as to avoid requiring Member States to choose between their loyalty to EU law and their other international commitments.[47] More generally, the CJEU's emphasis on the EU's constitutional autonomy and its relative disconnection from the wider international human rights system, including through devices such as disconnection clauses[48] and presumptions of mutual trust,[49] has given rise to critical comment. The emphasis by the CJEU on the autonomy of the EU legal order in its recent rejection of the draft Agreement on Accession of the EU to the ECHR has sharpened those critiques.[50]

(C) NATIONAL CONSTITUTIONAL TRADITIONS

The judgments of the Court have drawn relatively infrequently on national constitutional provisions, despite the symbolic prominence given both by the Court and the EU Treaties to the 'common constitutional traditions' of the states.[51] While occasionally the Advocate General has conducted a survey of national constitutional provisions, the Court has much more rarely cited any specific constitutional provision.[52]

[41] Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, [228]-[231].

[42] Cases C-402 and 415/05 P *Kadi I* (n 1) [283].

[43] Ibid [333]-[376]. For the subsequent rulings of the General Court and the CJEU on appeal, following the re-listing of *Kadi* by the Commission, see Case T-85/09 *Kadi v Commission and Council (Kadi II)* [2010] ECR II-5177 and Case C-584/10 P *Commission v Kadi (Kadi II)* EU:C:2013:518.

[44] Examples are the ICCPR, the ICESCR, the Council of Europe Convention on Human Rights and Biomedicine, the Rome Statute of the International Criminal Court, the UN Convention on the Rights of the Child, the Geneva Convention on Refugees, and the various Social Charters of the EU and the Council of Europe.

[45] The Explanations to the Charter are given interpretative significance by Art 6(1) TEU and Art 52(7) of the Charter. The text of the explanations is available in the Official Journal at [2007] OJ C303/17.

[46] For reliance by the CJEU on interpretations of the ECHR by the Strasbourg Court in cases invoking the Charter of Rights, see the cases at (n 31) above.

[47] See the Network of Independent Experts' Report of the Situation of Fundamental Rights in the EU and its Member States 2002, http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_2002_report_en.pdf, 21-24.

[48] Disconnection clauses are sometimes used by the EU when signing regional or international treaties, including human rights treaties. Such clauses provide that the EU and its Member States, in relations between themselves, will apply the rules of EU law rather than the provisions of the relevant treaty. Critics have cautioned that this could lead to the lowering of standards below the 'floor' set by the international instrument. See, eg, Art 40(3) of the Council of Europe Convention on Action against Trafficking in Human Persons 2005 (CETS no 197).

[49] In *Opinion 2/13 on EU Accession to the ECHR* EU:C:2014:2454, [192], the CJEU pointed out that—as in the *Melloni* case (n 111)—EU law may require Member States not just to presume that other Member States are observing human rights, but also to refrain in most cases from checking whether other Member States have done so.

[50] *Opinion 2/13*, ibid.

[51] For a case in which the General Court agreed that national parliamentary traditions could potentially form a source of inspiration for the general principles of EU law, see Cases T-222, 327 and 329/99 *Martinez, Gaulle, Front national and Bonino v European Parliament* [2001] ECR II-2823, [240].

[52] See, eg, Case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063, [17].

The reasons are not difficult to divine: it is more difficult for the ECJ to assert a 'common' approach where a particular right does not appear in every national constitution, whereas an instrument like the ECHR is intended to reflect the collectively shared commitments of all Member States. Further, the fear of compromising the doctrinal supremacy of EU law by appearing to defer to a particular national constitutional provision has animated the ECJ's case law ever since *Costa*.[53] This was evident in *Hauer*, where the referring national court declared that an EU agricultural regulation that was incompatible with German fundamental constitutional rights would not be applied. The ECJ in response grounded its decision both in the 'common constitutional traditions' of the states and in the collective commitments of the ECHR.

Case 44/79 **Hauer v Land Rheinland-Pfalz** [1979] ECR 3727

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14. As the Court declared in its judgment of 17 December 1970, *Internationale Handelsgesellschaft* [1970] ECR 1125, the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community.

15. The Court also emphasized in the judgment cited, and later in the judgment of 14 May 1974, *Nold* [1974] ECR 491, that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the Constitutions of those States are unacceptable in the Community, and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law. That conception was later recognized by the joint declaration of the European Parliament, the Council and the Commission of 5 April 1977, which, after recalling the case law of the Court, refers on the one hand to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

. . .

17. The right to property is guaranteed in the Community legal order in accordance with the ideas common to the Constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights . . .

20. [I]t is necessary to consider also the indications provided by the constitutional rules and practices of the nine member states. One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, article 14 (2), first sentence), to its social function (Italian Constitution, article 42 (2)), to the subordination of its use to the requirements of the common good (German Grundgesetz, article 14 (2), second sentence, and the Irish Constitution, article 43.2.2*), or of social justice (Irish Constitution, article 43.2.1*) . . .

[53] Case 6/64 *Costa v ENEL* [1964] ECR 585.

A further question arising when the 'common constitutional traditions' are cited as a source for EU human rights is whether the ECJ should recognize only those rights shared by all, or most, states, or whether recognition as a fundamental right by even one Member State should suffice, the so-called 'maximum standard' approach, to be part of the general principles of EU law.[54] In *Mannesmannröhren-Werke*, concerning the right to remain silent in the context of competition proceedings, the General Court was dismissive of the 'maximum standard' approach and rejected the argument that a general principle against self-incrimination could be derived from the legal systems of the Member States, even if there was such a principle in German law.[55]

In the case of *AM & S*, not all Member States were happy with the Court's derivation of a principle of lawyer–client confidentiality from a comparative survey of the laws of the Member States, and the French Government in particular argued that the case represented 'an attempt to foist on the EU what was no more than a domestic rule of English law'.[56] However, the Advocate General took the view that a general principle could be distilled from among the various states even if the 'conceptual origin' of the principle and 'the scope of its application in detail' differed as between Member States.[57] In *AKZO*, however, the ECJ refused to extend the EU's general principle of legal professional privilege beyond the context of independent lawyers, despite the fact that a number of Member States extended the privilege to in-house lawyers, since the Court took the view that there was no 'developing trend' or 'uniform tendency' in this direction across the Member States such as to justify widening the EU's general principle.[58]

In *Omega Spielhallen*, the ECJ abstracted from the *particular conception* of human dignity within German law to a more *general concept* of human dignity shared by all Member States, in order to permit Germany to derogate from EU free movement rules.[59] However, even where there may be general consensus amongst the states that a particular abstract right exists, it seems inevitable that there will be disagreement as to how that right should be interpreted and 'translated' into a general principle of EU law. Thus, although the idea of 'common constitutional traditions' as a foundation for the general principles of EU law is attractive in principle, the differences between specific national conceptions of particular human rights are often very significant.

For example, while all Member States recognize the right to life, a handful of the twenty-seven states continue to maintain extremely restrictive national abortion laws. A further example is the strong protection given by Germany's Grundgesetz to economic rights and to the freedom to pursue a trade or profession, while the constitutions of other states reflect different social priorities. In *Grant* and *D v Council*, the ECJ relied in part on different national legal conceptions of marriage to deny that there had been any breach of the applicants' rights under the general principles of EU law.[60]

[54] L Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 CMLRev 629; J Weiler, 'Fundamental Rights and Fundamental Boundaries' in his *The Constitution of Europe* (Cambridge University Press, 1999) ch 3.

[55] Case T-112/98 *Mannesmannröhren-Werke* (n 25) [84].

[56] See AG Warner in Case 155/79 *AM & S* (n 27) 1575, 1631.

[57] Ibid.

[58] Case C-550/07 P *Akzo Nobel* (n 28) [69]–[76].

[59] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, [34]–[38]; Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659; Case C-244/06 *Dynamic Medien Vertriebs* (n 38) [44]–[51].

[60] Case C-249/96 *Grant* (n 39); Cases C-122 and 125/99 P *D v Council* [2001] ECR I-4319. Compare, however, the Court's changing attitude towards sexual orientation discrimination in the later cases of Case C-267/06 *Maruko* [2008] ECR I-1757; Case T-58/08 *Commission v Roodhuijzen* [2009] ECR II-3797; Case C-267/12 *Hay* EU:C:2013:823.

5 HUMAN RIGHTS: INSTITUTIONAL AND POLICY DEVELOPMENTS

(A) HUMAN RIGHTS INCLUDED IN THE TREATY FRAMEWORK

There was, as we saw, no mention of human rights in the ECSC, Euratom, or EEC Treaty in the 1950s, and the Court was initially reluctant to entertain rights-based challenges to EU law. When the Court changed its stance, however, the move to recognize 'general principles of EU law' rapidly gained political approval. It did so initially through a joint declaration of the Parliament, Council, and Commission in 1977,[61] and later through a series of non-binding declarations, charters, and resolutions. Human rights eventually found their way back into the EU Treaties with the amendments introduced by the Maastricht, Amsterdam, Nice, and Lisbon Treaties.

First, Article 6 TEU, which is set out above, lists the various sources of human rights within EU law: the Charter, which has the same status as the Treaties, the ECHR, and common national constitutional traditions which inspire the general principles of EU law. The ECHR is thus relevant to EU law in three ways at present: (i) those provisions of the Charter which are based on provisions of the ECHR are to have the 'same' meaning as the ECHR provisions; (ii) the ECHR is one of the main sources of inspiration for the general principles of EU law; and (iii) the provisions of the ECHR will become formally binding on the EU if the EU eventually accedes to the ECHR. By comparison, the provisions of the Charter of Fundamental Rights and the general principles of EU law are already fully binding provisions of EU law, enjoying the same status as provisions of the EU Treaties.

Secondly, following the Amsterdam Treaty, respect for the values on which the EU is founded was made a condition of application for membership of the EU by Article 49 TEU. After the Lisbon Treaty, Article 2 TEU now expresses and expands on the values on which the EU is said to be founded:

> 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.

Article 3 TEU, in setting out the EU's objectives, adds further to these by declaring that it 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'. In its external relations Article 3(5) declares that the EU shall, amongst other things, 'contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child'.

Thirdly, Article 7 TEU, which was also introduced by the Amsterdam Treaty, empowers the Council to suspend some of the voting and other rights of a Member State that is found by the European Council to be responsible for a serious and persistent breach of the principles in Article 2.[62] However, despite the symbolism of Article 7 TEU, its lack of practical use has drawn criticism.[63] The failure to

[61] [1977] OJ C103/1.

[62] For an account of the 'Haider controversy' which led to the enactment of the Nice amendments, M Merlingen, C Muddle, and U Sedelmeier, 'The Right and the Righteous?: European Norms, Domestic Politics and the Sanctions against Austria' (2001) 39 JCMS 59.

[63] A Williams, 'The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's Invasion of Iraq' (2006) 31 ELRev 3; W Sadurski, 'Adding a Bite to a Bark: A Story of Article 7, the EU Enlargement and Jörg Haider' (2010) 16 CJEL 385.

instigate the Article 7 procedure in relation to a series of repressive and anti-democratic measures taken by the Hungarian Government generated a slew of proposals,[64] as well as a communication from the Commission setting out a kind of early warning system to supplement Article 7.[65]

(B) THE FUNDAMENTAL RIGHTS AGENCY

In 2007 an EU Fundamental Rights Agency (FRA) was established, to replace the previous EU Monitoring Centre for Racism and Xenophobia.[66] There was a debate preceding the establishment of the Agency over whether its powers should include monitoring Member States for the purposes of Article 7 TEU,[67] but the Member States refused to include this within the mandate of the new FRA. It is clear that the FRA could make a contribution in this respect, although there are also limits to what it can achieve, given the nature of its powers.[68] The FRA's current remit mainly covers the collection of information, formulating opinions, highlighting good practices, networking with civil society, and publishing thematic reports. The FRA has been active since its establishment and has published influential reports on issues including racism, access to justice, disability, homophobia, the Roma, security and human rights, poverty, migration, data protection, child rights, and violence against women.[69]

(C) EU HUMAN RIGHTS POWERS AND POLICIES

EU Treaty changes since 1997 significantly strengthened the status and role of human rights within the EU legal order, as the provisions of Articles 2, 3, 6, and 7 TEU indicate. Respect for human rights is a condition for the legality of EU measures, and EU laws must be interpreted and construed with a view to respecting human rights. What is less clear, however, is exactly what kind of legal competence the EU possesses to enact laws in the field of human rights protection.

In its first opinion rejecting the compatibility of EU accession to the ECHR in 1996, the ECJ ruled that no specific Treaty provision 'confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field', and that the residual powers clause in Article 235 (now Article 352 TFEU) was subject to certain constitutional limits.[70] The situation has changed since then, in particular as regards external EU competence and the power to

[64] See, Ch 2; K Scheppele, 'What Can the European Commission do when Member States violate Basic Principles of the European Union?', https://europe.princeton.edu/events/what-can-european-commission-do-when-member-states-violate-basic-principles-european-union; JW Müller 'Safeguarding Democracy Inside the EU: Brussels and the Future of Liberal Order', Transatlantic Academic Paper 3/2012–13; the Taveres Report of the European Parliament, 'The situation of fundamental rights: standards and practices in Hungary', A7-0229/2013; A von Bogdandy et al, 'Reverse *Solange*: Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 CMLRev 489; B Bugarič 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge', LSE 'Europe in Question' Paper no 79/2014.

[65] A New EU Framework to Strengthen the Rule of Law, COM(2014) 158.

[66] Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1.

[67] The previous 'network of experts on fundamental rights' had informally begun to monitor the Member States' compliance with the Charter for these purposes, but it was replaced by a differently functioning network, FRALEX, within the context of the FRA, which has not been given this power.

[68] G Toggenburg and J Grimheden, 'Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?' (2016) 54 JCMS 1093. See also A Hinarejos, 'A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis' (2016) 22 ELJ 61.

[69] See http://fra.europa.eu/en/publications-and-resources/publications. For an interesting report by the FRA on the use of the EU Charter by national courts, see http://fra.europa.eu/sites/default/files/annual-report-2013-charter_en.pdf.

[70] *Opinion 2/94* [1996] ECR I–1795.

conclude international agreements. A striking example of this is the EU's negotiation and conclusion of the UN Convention on the Rights of Persons with Disabilities, the first major international human rights treaty which the EU has concluded.[71]

It is, nonetheless, not clear exactly how much the situation has changed in relation to competence to promote human rights *within* the EU is concerned. Thus, notwithstanding the declaration in Article 2 that the EU is founded, inter alia, on the value of respect for human rights, and the stipulation in Article 3 that the EU's aim is to promote its values, the EU still requires specific competence under another provision of the Treaties if it is to take concrete action. The Treaties therefore do not provide the EU with any 'general power to enact rules on human rights'.

The EU does, however, have a powerful human rights tool in the specific field of non-discrimination, since Article 19 TFEU confers competence on the EU to adopt measures combating discrimination on a range of specified grounds, which is considered in detail in Chapter 25. Data protection is another significant rights-based field of EU policy since the enactment of Directive 95/46. Further, the 'residual powers' provision of Article 352 TFEU can be used, alone or in conjunction with another Treaty provision, as a legal basis for some human rights-related measures, as it was for the enactment of the regulation establishing the EU's external human rights and democratization programme,[72] and for the establishment of the FRA.[73]

Respect for human rights is also now a value of the EU, and even a goal which is 'mainstreamed' throughout the external relations of the EU. Following the Lisbon Treaty, Article 3(5) TEU provides that the EU shall contribute 'to the protection of human rights' in its relations with the wider world, and Article 21(1) TEU provides that the EU's action on the international scene shall be guided by the principles of 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity' amongst others. This gives a Treaty basis to the EU's policy over the past decade to integrate human rights protection into its external relations. The EU's regular practice since 1995 has been to include human rights clauses in external agreements dealing with trade, development, and association relationships,[74] and it has occasionally imposed sanctions or withdrawn trade concessions for human rights violations, as in the cases of Myanmar and Sri Lanka. It has used human rights-based conditionality in the accession process for new Member States,[75] and runs an extensive international human rights and democratization programme known as the EIDHR.[76] These and other EU activities in the field of human rights are outlined each year in the EU's Annual Report on Human Rights.[77]

There is no express Treaty commitment to the protection and promotion of human rights across the EU's *internal* policies, as there is for external policy. There are, however, four 'mainstreaming' clauses in Articles 8, 9, 10, and 11 TFEU, which require all EU policies and activities to take account of gender equality, a range of social policy concerns, other grounds of discrimination, and environmental protection

71 G de Búrca, 'The EU in the Negotiation of the UN Disability Convention' (2010) 35 ELRev 174; L Waddington, 'A New Era in Human Rights Protection in the European Community: The Implications the United Nations' Convention on the Rights of Persons With Disabilities for the European Community', University of Maastricht Faculty of Law Working Paper Series 2007, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026581.

72 Regs 975/1999 and 976/1999 [1999] OJ L120/1 and 8.

73 Reg 168/2007 [2007] OJ L53/1.

74 L Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press, 2005); U Khaliq, *Ethical Dimensions of the Foreign Policy of the EU: A Legal Analysis* (Cambridge University Press, 2009); V Depaigne, 'Protecting Fundamental Rights in Trade Agreements between the EU and Third Countries' (2017) 42 ELRev 562.

75 B de Witte and G Toggenburg, 'Human Rights and Membership of the European Union' in S Peers and A Ward (eds), *The EU Charter of Fundamental Rights* (Hart, 2004) 59–82.

76 For the European Initiative for Democracy and Human Rights, see www.welcomeurope.com/european-funds/eidhr-european-instrument-democracy-human-rights-830+730.html#tab=onglet_details.

77 http://eeas.europa.eu/human_rights/docs/index_en.htm.

respectively, but no general requirement to mainstream human rights. This difference between the emphasis on human rights in external and internal policies has led to criticisms of a double standard in the EU's approach to human rights,[78] which has been acknowledged by the Council of Ministers.[79] Nevertheless, it continues to be a theme in critiques of the EU's human rights policies.[80] On the other hand, the Commission has sought to develop a Charter 'impact assessment' for EU policies, which should help over time to address the double-standard critique.[81] Further, even if the EU lacks any general law-making powers in the field of human rights, many of its specific pieces of legislation set human rights standards in particular areas, such as criminal law, family reunification, refugee law, and data privacy.[82]

The approach of Member States to developing the EU's legal powers in the field of human rights has been equivocal. Thus, although important EU institutions and norms for the protection of human rights have been adopted in recent decades, such as the Charter of Fundamental Rights, Article 19 TFEU on combating discrimination, and the FRA, Member State governments have simultaneously sought to restrict these powers and institutions. Thus, Article 51 of the Charter declares that no new task or power has been created by its adoption; there has been heated debate over the scope of the Charter's application to Member States; and the FRA was deliberately not given power to monitor Member States for the purposes of Article 7 TEU. The political opposition to EU intervention even when serious human rights abuses may be taking place within a Member State, for example at the time of France's collective expulsion of Roma people in 2010,[83] or Hungary's restrictions on the media and interference with judicial independence,[84] suggests that there is continued resistance on the part of Member States to the EU's development of such a role.

6 HUMAN RIGHTS: THE EU CHARTER OF FUNDAMENTAL RIGHTS[85]

(A) INTRODUCTION

The Charter of Fundamental Rights was first drawn up in 1999–2000, following an initiative of the European Council to 'showcase' the achievements of the EU in this field. The novel Convention process by which the Charter was adopted, which became a model for the Treaty-revision procedure now

78 P Alston and J Weiler, 'A Human Rights Agenda for the Year 2000' in Alston, Heenan, and Bustelo (n 4); Williams (n 5).

79 See, eg, the Annual Report on Human Rights for 2006, [4.19] in particular.

80 Williams (n 5).

81 See, eg, COM(2010) 573; and SEC(2011) 567, Operational Guidance in taking account of Fundamental Rights in Commission Impact Assessment.

82 E Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51 CMLRev 219.

83 K Severance, *France's Expulsion of Roma Migrants: A Test Case for Europe* (Migration Policy Institute, 2010), www.migrationinformation.org/.

84 See (n 64) on developments in Hungary, and Ch 2.

85 There is a vast literature on the Charter. On its origins, see eg (2001) 8(1) MJ and E Eriksen, J Fossum, and A Menéndez (eds), *The Chartering of Europe* (Arena Report No 8/2001). For commentaries see K Feus (ed), *An EU Charter of Fundamental Rights: Text and Commentaries* (Federal Trust, 2000); EU Network of Independent Experts on Fundamental Rights, *Commentary on the Charter* (June 2006); S de Vries, U Bernitz, and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart, 2015); S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar, 2017); M Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press, 2017); S Peers, T Hervey, J Kenner, and A Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2nd edn, 2020). The European Commission also publishes an annual report on the application of the Charter: see https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en.

contained in Article 48 TEU, produced a draft Charter in less than a year.[86] The Charter was then solemnly proclaimed by the Commission, Parliament, and Council and politically approved by the Member States at a European Council summit in December 2000,[87] but its legal status was deliberately left undetermined at the time, pending the outcome of the series of constitutional processes on which the EU had embarked.[88] The horizontal clauses at the end of the Charter were amended slightly during the constitution-drafting process which took place in 2003–2004, but following the failure of the Constitutional Treaty, the legal status of the Charter was not finally resolved until the adoption of the Lisbon Treaty. Article 6 TEU now unequivocally grants it the same legal status as the Treaties themselves.[89]

The UK and Poland (with the Czech Republic later to join[90]) negotiated a Protocol that purported to limit the impact of the Charter in those states.[91] The Protocol contains two Articles.

Article 1

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

Whatever the intention of the three signatory states, there was debate as to whether the Protocol had anything more than declaratory effect.[92] Article 1 declares that it 'does not extend' the ability of

[86] G de Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2000) 25 ELRev 331; J Schönlau, 'Drafting Europe's Value Foundation: Deliberation and Arm-Twisting in Formulating the Preamble to the EU Charter of Fundamental Rights' in Eriksen, Fossum, and Menéndez (n 85).

[87] [2000] OJ C364/1.

[88] B de Witte, 'The Legal Status of the Charter: Vital Question or Non-Issue?' (2001) 8 MJ 81; L Betten, 'The EU Charter of Fundamental Rights: A Trojan Horse or a Mouse?' [2001] International Jnl of Comparative Labour Law and Industrial Relations 151.

[89] L Rossi, 'Same Legal Value as the Treaties? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights' (2017) 18 German LJ 771.

[90] The European Council on 29–30 Oct 2009 agreed on the text of a new protocol which would apply the provisions of Protocol 30 of the Lisbon Treaty to the Czech Republic. See the Annex to the Presidency Conclusions. See B Dufkova, 'The Legal Status of the Charter of Fundamental Rights within the Member States: The Short Story of the Czech Objection to the Charter', Charles University in Prague Faculty of Law Research Paper No 2015/I/1.

[91] Protocol No 30 to the Lisbon Treaty. See also Declarations 51, 62, and 63 annexed to the Lisbon Treaty, made by the Czech Republic and Poland respectively.

[92] House of Lords Select Committee on the European Union, 10th Report of 2008, [5.84]–[5.111]; V Belling, 'Supranational Fundamental Rights or Primacy of Sovereignty? Legal Effects of the So-Called Opt-Out from the EU Charter of Fundamental Rights' (2012) 18 ELJ 251.

the CJEU to review national measures for compatibility with fundamental rights, but the CJEU had for decades previously exercised jurisdiction to review acts of the Member States within the scope of EU law for compliance with the general principles of EU law. The Protocol does not overturn this earlier case law of the ECJ, and since the contents of the Charter are largely based on the instruments which the ECJ had cited as the inspiration for EU general principles, Article 1(1) appears primarily declaratory. Article 1(2) is designed to support or supplement Article 52(7) of the Charter by deeming Title IV of the Charter on solidarity rights not to have created any new justiciable rights in Poland or the UK, but again it can be argued that since the Charter is largely declaratory of what the ECJ had been doing for years under the language of the 'general principles of law', Title IV simply gave the general principles an explicit legal footing.[93]

While some initially referred to the protocol as an 'opt-out', the CJEU confirmed the view of the majority of commentators that this was not so. In *NS and ME*, a case concerning the application of EU asylum law in the UK, the CJEU held that Protocol No 30 did not call into question the applicability of the Charter in the UK or Poland, as made clear by the recitals in the preamble to the Protocol. The Protocol did not, therefore, exempt the UK or Poland from the obligation to comply with the Charter.[94]

(B) CONTENT

The mandate given by the European Council to the Charter-drafting body was to consolidate and render visible the EU's existing 'obligation to respect fundamental rights' rather than to create anything new.[95] Yet the Charter contains several innovative provisions, such as a prohibition on reproductive human cloning, and there are also notable omissions, such as protection for the rights of minorities. The Charter could perhaps best be described as a creative distillation of the rights contained in the various European and international agreements and national constitutions on which the CJEU had for some years already drawn.[96]

Following its lofty Preamble in the name of the 'peoples of Europe', the Charter is divided into seven chapters. The various rights are grouped into six distinct chapters, and the final chapter contains the 'horizontal clauses' or general provisions. The first six chapters are headed: I Dignity, II Freedoms, III Equality, IV Solidarity, V Citizens' Rights, and VI Justice.

The first chapter contains foundational rights such as the right to life, freedom from torture, slavery, and execution. While these might once have appeared anomalous in a Charter addressed primarily to the institutions of an economic union, the EU's current body of policing, criminal, migration, refugee, and anti-terrorism policies suggests that this is no longer so.

[93] I Pernice, 'The Treaty of Lisbon and Fundamental Rights' and C Barnard, 'The "Opt-Out" for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in S Griller and J Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008); S Peers, 'The "Opt-Out" that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights' (2012) 12 HRLR 375.

[94] Cases C-411 and 493/10 *NS and ME v Minister for Justice* EU:C:2011:865, [119]–[120]; R Clayton and C Murphy, 'The Emergence of the EU Charter of Fundamental Rights in UK Law' [2014] EHRLR 469.

[95] The European Council specified the sources on which the new Charter should draw, namely the ECHR; the common constitutional traditions of the Member States; and provisions of the European Social Charter and the Community Charter of Fundamental Social Rights of Workers, 'which go beyond mere objectives': Conclusions of the Cologne European Council, June 1999.

[96] See TP Marguery, 'The Protection of Fundamental Rights in European Criminal Law after Lisbon: What Role for the Charter of Fundamental Rights?' (2012) 37 ELRev 444 as to whether the Charter can be interpreted 'autonomously' from these other sources (eg in the field of criminal law).

The second chapter on freedoms also concentrates on the basic civil and political liberties to be found in the ECHR, such as liberty, association, expression, property, and private and family life,[97] but also contains certain fundamental social rights such as the right to education, the right to engage in work, and the right to asylum, as well as a number of provisions which are prominent in the EU context, such as the right to protection of data and freedom to conduct a business.

Chapter III on equality contains a basic equality-before-the-law guarantee, as well as a provision similar, though not identical, to that in Article 19 TFEU, a reference to positive action provisions in the field of gender equality, protection for children's rights, and some weaker provisions guaranteeing 'respect' for cultural diversity, for the rights of the elderly, and for persons with disabilities.

Chapter IV on solidarity contains certain labour rights and reflects some of the provisions of the European Social Charter that have already been integrated into EU law.[98] This chapter contains a mixture of fundamental provisions such as the prohibition on child labour and the right to fair and just working conditions, as well as others that were criticized as insufficiently fundamental to have a place in this Charter, such as the right to a free placement service. This chapter of the Charter was particularly criticized for the weak formulation of many of the rights (including some, such as environmental and consumer protection, which are not formulated as rights or freedoms at all), and because of the phrase 'in accordance with Community law and national laws and practices' which follows them and which seems to undermine the content of the guarantee.

Chapter V contains 'citizens' rights', many of which, unlike the other provisions of the Charter, are not universal but are guaranteed only to EU citizens. These include the rights of EU citizenship in Articles 20–25 TFEU, while the more broadly applicable rights include the right of access to documents and the right to good administration.

Chapter VI, entitled Justice, includes several of the rights of the defence, such as the right to a fair trial, the presumption of innocence, the principle of legality and proportionality of penalties, and the familiar EU right to an effective remedy.

(c) THE 'HORIZONTAL' CLAUSES

The final Chapter, VII, contains the general clauses that relate to the scope and applicability of the Charter, its addressees, its relationship to other legal instruments, and the 'standard' of protection.

Article 51(1) indicates that the Charter is addressed to the various institutions and agencies of the EU, but to the Member States only when they are 'implementing' Union law. The exact meaning and scope of this phrase generated considerable debate.[99] The principle of subsidiarity is mentioned in Article 51(1), although its import in this context is unclear. Article 51 goes on to specify that the EU and the Member States 'respect the rights, observe the principles and promote the application thereof in accordance with their respective powers' and respecting the limits of the EU's powers under the Treaties. There is a tension between the obligation to 'promote' the rights in the Charter and the repeated emphasis on the limits of the EU's powers, which appears also in Article 51(2).

Article 51(2) asserts that the Charter does not create any new power or task for the EU nor modify any existing task.[100] Despite the insistence that the Charter is simply a codified or slightly supplemented

[97] C McGlynn, 'Families and the EU Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?' (2001) 26 ELRev 582.

[98] M Gijzen, 'The Charter: A Milestone for Social Protection in Europe?' (2001) 8 MJ 33.

[99] See below (nn 198–208) and text.

[100] The relevant explanatory note to Art 51 reads '[p]aragraph 2 confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.'

form of what existed already under prior ECJ jurisprudence, a set of standards against which EU and Member State action within the scope of existing EU policies and powers is to be judged, and not a source of or basis for positive action, the obligation to 'promote' the rights suggests something more proactive. Certainly the proposition in Article 51 that none of the EU's tasks has been 'modified' by the adoption of the Charter seems almost oxymoronic.

Article 52(1), which draws on the jurisprudence of both the ECHR and the ECJ, contains a general 'derogation' clause, indicating the nature of the restrictions on Charter rights that will be acceptable.[101] Any limitation on the exercise of rights and freedoms contained in the Charter must be 'provided for by law', and must respect the essence of those rights and freedoms.[102] Limitations must meet the requirements of proportionality and must be 'necessary and genuinely meet objectives of general interest recognized by the Union,[103] or the need to protect the rights and freedoms of others'.

Article 52(2) addresses the question of overlap between existing provisions of EU law and the provisions of the Charter, providing that rights recognized by the Charter 'for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'. This seems intended to avoid any potential differences in the interpretation of similarly worded provisions of the Charter and of the EU Treaties, most notably the citizenship provisions.

The tricky relationship between the ECHR, other international human rights instruments, national constitutional provisions, and the Charter is addressed in Articles 52(3) and 53.[104] It seems that during the drafting process a heated debate on the proper relationship of the Charter to the Convention was held, as well as on the question whether a right contained in the Charter should necessarily be interpreted in the same way as a similar or identical right contained in the ECHR, and on the proper relationship between the CJEU and the European Court of Human Rights.[105] Article 52(3) relates specifically to the ECHR and aims to promote harmony between the provisions of the ECHR and those of the Charter, while not preventing the EU from developing more extensive protection than is provided for under the Convention:

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

This provision does not address the question of the relationship between the two European Courts, the ECtHR and the CJEU, although it seems to have been intended to promote deference, or at least

[101] D Triantafyllou, 'The European Charter of Fundamental Rights and the "Rule of Law": Restricting Fundamental Rights by Reference' (2002) 39 CMLRev 53.

[102] M Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core' (2018) 14 EuConst 332.

[103] This formulation has been criticized by some who see it as permitting the economic objectives of the EU to be introduced as grounds for limiting the scope of fundamental rights, something which would not be possible under most provisions of the ECHR.

[104] See, eg, G Harpaz, 'The European Court of Justice and its Relationship with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy' (2009) 46 CMLRev 105; J Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony' [2009] EHRLR 768; P Lemmens, 'The Relationship between the Charter of Fundamental Rights of the EU and the ECHR: Substantive Aspects' (2001) 8 MJ 49; K Lenaerts and E de Smijter, 'The Charter and the Role of the European Courts' (2001) 8 MJ 49; S Parmar, 'International Human Rights Law and the EU Charter' (2001) 8 MJ 351.

[105] P Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 CMLRev 1201.

close attention, by the CJEU to the case law of the ECtHR. The CJEU has, as seen above, drawn on ECHR jurisprudence in a range of cases,[106] although it has not done so in others.[107]

The Lisbon Treaty added four further paragraphs to Article 52 of the Charter. Article 52(4) stipulates that the provisions of the Charter derived from national constitutional traditions should be interpreted in harmony with those traditions. Paragraph (6) complements this by stipulating that 'full account' should be taken of national laws and practices as specified in the Charter. Article 52(7), together with Article 6(1) TEU, gives interpretative weight to the explanatory memorandum to the Charter, which was drafted by the secretariat to the Charter-drafting Convention.[108]

The most contentious amendment made by the Lisbon Treaty to the Charter as originally adopted in 2000 is contained in Article 52(5), which seeks to distinguish provisions of the Charter containing 'principles', and stipulates that provisions containing 'principles' will be 'judicially cognisable' only when they have been implemented by legislative or executive acts of the EU or the Member States, and only in relation to interpretation or rulings on the legality of such acts.[109] This amendment seems to have been intended to introduce into the Charter some version of the traditional, and oft-criticized, distinction between negatively-oriented civil and political rights and positively-oriented economic and social rights, with a view to rendering the latter largely non-justiciable.

Article 53 of the Charter contains a kind of non-regression clause similar to that contained in Article 53 of the ECHR, which refers not only to the ECHR, but also to national constitutions and international agreements:

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

The presence of this clause and the absence of a 'supremacy' clause in the Charter guaranteeing the primacy of EU law prompted some to ask whether the long-established supremacy doctrine was being called into question.[110] In *Melloni*, the CJEU dismissed such an interpretation of Article 53, and categorically reaffirmed the primacy of EU law.[111]

106 See (n 31).

107 G de Búrca, 'After the EU Charter of Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 MJ 168; Report of the European Parliament DG for Internal Policies: Citizens Rights and Constitutional Affairs, 'Main Trends in the Recent Case Law of the EU Court of Justice and the European Court of Human Rights in the Fields of Fundamental Rights' (2012), www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462446/IPOL-LIBE_ET%282012%29462446_EN.pdf.

108 JP Jacqué, 'The Charter of Fundamental Rights and the CJEU: A First Assessment of the Interpretation of the Charter's Horizontal Provisions' in LS Rossi and F Casolari (eds), *The EU After Lisbon* (Springer, 2014).

109 J Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11 EuConst 321; D Gudmundsdóttir, 'A Renewed Emphasis on the Charter's Distinction between Rights and Principles: is a Doctrine of Judicial Restraint more Appropriate?' (2015) 52 CMLRev 1201.

110 J Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38 CMLRev 1171.

111 Case C–399/11 *Melloni v Ministerio Fiscal* EU:C:2013:107; N de Boer, 'Addressing Rights Divergences Under the Charter: *Melloni*' (2013) 50 CMLRev 1083; M de Visser, 'Dealing with Divergences in Fundamental Rights Standards' (2013) 12 MJ 576; D Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 CMLRev 1267; L Besselink, 'The Parameters of Constitutional Conflict after "*Melloni*"' (2014) 39 ELRev 531; A Pliakos and G Anagnostaras, 'Fundamental Rights and the New Battle over Legal and Judicial Supremacy: Lessons from *Melloni*' (2015) 34 YBEL 97.

Case C–399/11 **Melloni v Ministerio Fiscal**
EU:C:2013:107

The Spanish Constitutional Court asked the CJEU whether Article 53 of the Charter permits a Member State which surrenders an individual pursuant to the EU Arrest Warrant to subject the surrender of a person convicted *in absentia* to an additional condition, in order to avoid undermining a national constitutional right to a fair trial and rights of the defence.

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56. The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of Framework Decision 2002/584.

57. Such an interpretation of Article 53 of the Charter cannot be accepted.

58. That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.

59. It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see *Opinion 1/91* [1991] ECR I–6079, paragraph 21, and *Opinion 1/09* [2011] ECR I–1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State . . .

The CJEU concluded that although Article 53 left national courts free to apply national standards of protection for fundamental rights, this was subject to the condition that the primacy, unity, and effectiveness of EU law would not be affected. The Framework Decision establishing the arrest warrant was, in the Court's view, precisely intended to reflect a consensus reached by Member States and a 'harmonization' of the procedural rights of a person who had been tried *in absentia*.

If Spain were allowed to plead its own specific constitutional version of the rights of the defence in order to impose an additional condition on surrender it would 'cast doubt on the uniformity of the standard of protection of fundamental rights defined in that framework decision', as well as undermining the principle of mutual trust and recognition between Member States.[112] This interpretation of Article 53 of the Charter as an unequivocal reassertion of the primacy of EU law over national constitutional rights in the event of conflict, rather than a more pluralist vision of coexisting human rights systems, has drawn critical comment,[113] but the CJEU in *Opinion 2/13 on EU accession to the ECHR* clearly confirmed its *Melloni* ruling in this respect.[114]

112 Case C–399/11 (n 111) [63].

113 Besselink (n 111).

114 *Opinion 2/13 on EU Accession to the ECHR* EU:C:2014:2454, [188]; Case C–617/10 *Åkerberg Fransson* EU:C:2013:105, [29].

Finally, Article 54 contains a clause modelled on Article 17 of the ECHR, which provides that no provision of the Charter shall imply the right to engage in any activity aimed at the destruction or excessive limitation of any of the rights contained therein.

7 HUMAN RIGHTS-BASED JUDICIAL REVIEW: EU ACTION

Since the coming into force of the Charter, the number of cases in which the CJEU has entertained challenges to EU legislation on grounds of human rights violations has grown substantially.[115] Even before the Charter became legally binding, the Court had begun to take fundamental rights claims seriously and to engage with the case law of the European Court of Human Rights in evaluating the validity of EU laws. While litigants enjoyed some success in challenging individual administrative acts of the Commission and other EU actors for violation of rights, the Court for many years was deferential to the EU legislator and slow to annul EU legislation, even in the face of strong fundamental rights challenges.[116] In recent years, however, this has begun to change, particularly in the field of sanctions,[117] and more generally since the coming into force of the Charter.[118]

(A) CHALLENGES TO EU LEGISLATION

The Court in the early case of *Nold* had already declared that 'general principles of law' would take precedence, in the event of conflict, over specific Community measures, but the ECJ ruled that the rights to property and to a trade or profession were far from absolute, and that limitations in this case were justified by the EU's overall objectives.[119] This approach characterized many cases concerning property and economic rights,[120] as well as intellectual property.[121]

Since the drafting of the Charter of Fundamental Rights, many other kinds of human rights challenges have been mounted to EU legislation. Cases have been brought to challenge a wide range of EU legislative measures, including the Biotechnology Directive,[122] the Family Reunification

115 EU judicial processes have also been challenged for their compatibility with fundamental procedural rights: see, eg, Case C-17/98 *Emesa Sugar v Aruba* [2000] ECR I-665; Case C-308/07 P *Gorostiaga Atxalandabaso v Parliament* [2009] ECR I-1059, [39]-[50]; Case C-89/08 P *Commission v Ireland* [2009] ECR I-11245, [50]-[62]; Case F-45/07 *Mandt v European Parliament* EU:F:2010:72.

116 A Clapham, 'A Human Rights Policy for the European Community' (1990) 10 YBEL 309, 331; J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 CMLRev 669.

117 C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2010).

118 G Toggenburg, 'The EU Charter: Moving from a European Fundamental Rights Ornament to a European Fundamental Rights Order' in G Palmisano (ed), *Making the Charter of Fundamental Rights a Living Instrument* (Brill Nijhoff, 2015) 10.

119 Case 4/73 *Noldv Commission* [1974] ECR 491.

120 See, eg, Cases C-20 and 64/00 *Booker Aquacultur Ltd and Hydro Seafood GSP v The Scottish Ministers* [2003] ECR I-7411; Cases C-37 and 38/02 *Di Lenardo Adriano Srl v Ministero del Commercio con l'Estero* [2004] ECR I-6911; Cases C-453/03, 11, 12 and 194/04 *The Queen, ex p ABNA Ltd v Secretary of State for Health and Food Standards Agency* [2005] ECR I-10423; Case C-295/03 P *Alessandrini v Commission* [2005] ECR I-5673; Case C-347/03 *ERSAv Ministero delle Politiche Agricole e Forestali* [2005] ECR I-3785; Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* EU:C:2013:28; Case C-360/10 *SABAM v Netlog* EU:C:2012:85.

121 See, eg, Case C-360/10 (n 120); J Griffith and L McDonough, 'Fundamental Rights and European IP Law—The Case of Article 17(2) of the EU Charter' in C Geiger (ed), *Constructing European Intellectual Property* (Edward Elgar, 2013).

122 Case C-377/98 *Netherlands v Council and Parliament* [2001] ECR I-7079, challenging the Biotechnology Dir for violation of human dignity.

Directive,[123] the Framework Decision on an Arrest Warrant,[124] the Money-Laundering Directive,[125] the Audiovisual Media Services Directive,[126] the Biometric Passports Regulation,[127] the Directive on Driving Licences,[128] the Regulation on compensation of passengers for air travel delays,[129] and the Schengen Implementing Convention.[130]

In each of these cases, however, the Court, having considered whether the alleged restriction was disproportionate, upheld the EU legislation. There have, however, been some notable cases in which the CJEU annulled EU legislation for violation of fundamental rights. In *Digital Rights Ireland*, the Data Retention Directive was annulled on the ground that it disproportionately restricted the privacy and data protection guarantees of the Charter of Fundamental Rights.[131]

It is in the field of anti-terrorism in the post-9/11 era, however, that the Court's willingness to strike down EU laws for disproportionately violating individual rights has been most vividly evident.[132] In a series of important judgments handed down since 2009, most dramatically in *Kadi I*[133]and *Kadi II*,[134] the CJEU and the General Court have struck down a range of EU laws imposing sanctions, including both 'autonomous' EU measures as well as UN-mandated measures, for violating a range of rights, most notably due process (rights of defence) and the right to property.[135] The *Kadi* cases raised many interesting questions about the relationship of EU law to the international legal order,[136] and became

123 Case C-540/03 *European Parliament v Council* (n 20) challenging the Family Reunification Dir for violation of the right to respect for family life.

124 Case C-399/11 *Melloni* (n 111) challenging the Framework Decision establishing an Arrest Warrant for violation of the right to an effective judicial remedy and a fair trial; Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633.

125 Case C-305/05 *Ordre des barreaux francophones et germanophones et al v Council* [2007] ECR I-5305, challenging the Money Laundering Dir for violation of the right to a fair trial and the professional secrecy of lawyers.

126 Case C-283/11 *Sky Österreich* (n 120) challenging the Audiovisual Media Services Dir for violation of the right to intellectual property and freedom to conduct a business.

127 Case C-291/12 *Michael Schwarz v Stadt Bochum* EU:C:2013:670 challenging the Biometric Passports Reg for violation of the right to private life.

128 Case C-356/12 *Glatzel* EU:C:2014:350 challenging the Driving Licences Dir for violation of the right to non-discrimination.

129 Case C-12/11 *McDonough v Ryanair* EU:C:2013:43 challenging the EU Reg on compensation for air passengers in the event of delay and cancellation for violation of the right to conduct a business.

130 Case C-129/14 PPU *Zoran Spasic* EU:C:2014: challenging the Schengen Implementing Convention for violation of the principle of *ne bis in idem*.

131 Case C-293/12 *Digital Rights Ireland v Minister for Communications* EU:C:2014:238.

132 Compare the more limited approach in Case C-84/95 *Bosphorus v Minister for Transport* [1996] ECR I-3953.

133 Cases C-402 and 415/05 P *Kadi* (n 1) [308]; D Halberstam and E Stein, 'The United Nations, the European Union, and the King of Sweden' (2009) 46 CMLRev 13; A Gattini, Note (2009) 46 CMLRev 191; C Eckes, 'Judicial Review of European Anti-Terrorism Measures—The *Yusuf* and *Kadi* Judgments of the Court of First Instance' (2008) 14 ELJ 74; J Godhino, 'When Worlds Collide: Enforcing United Nations Security Council Asset Freezes in the EU Legal Order' (2010) 16 ELJ 67; T Isiksel, 'Fundamental Rights in the EU after *Kadi* and *Al Barakaat*' (2010) 16 ELJ 551; S Poli and M Tzanou, 'The *Kadi* Rulings: A Survey of the Literature' (2009) 28 YBEL 533; M Cremona, F Francioni, and S Poli (eds), 'Challenging the EU Counter-Terrorism Measures through the Courts', EUI Working Paper 2009/10; J Kokott and C Sobotta 'The *Kadi* Case: Core Constitutional Values and International Law: Finding the Balance' (2012) 23 EJIL 1015.

134 Case T-85/09 *Kadi v Commission and Council (Kadi II)* [2010] ECR II-5177; Case C-584/10 P *Commission v Kadi (Kadi II)* EU:C:2013:518; T Tridimas, 'Terrorism and the CJEU: Empowerment and Democracy in the EC Legal Order' (2009) 34 ELRev 103.

135 See, eg, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council* [2006] ECR II-4665; Case T-256/07 *People's Mojahedin Organization of Iran v Council (PMOI)* [2008] ECR II-3019; Case C-27/09 P *France v PMOI* EU:C:2011:853; Case T-318/01 *Othman v Council and Commission* EU:T:2009:187; Case T-253/04 *KONGRA-GEL v Council* [2008] ECR II-46; Cases C-399 and 403/06 P *Hassan and Ayadi v Council and Commission* [2009] ECR I-11393; Case C-376/10 *Tay Za v Council* EU:C:2012:138; Case T-565/12 *National Iranian Tanker Company v Council* EU:T:2014:608; Case T-400/10 *Hamas v Council* EU:T:2014:1095; Case T-485/15 *Bashir Saleh Bashir Alsharghawi v Council of the European Union* EU:T:2016:520; Case C-225/17 P *Islamic Republic of Iran Shipping Lines v Council of the European Union* EU:C:2019:82.

136 For discussion of the international law aspects see Ch 11.

an inspiration for the European Court of Human Rights in its own subsequent case law involving UN-related economic sanctions. For the purposes of this chapter, however, the most significant parts of the judgment are those which deal with the ECJ's treatment of fundamental rights.

Cases C–402 and 415/05 P **Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission**
[2008] ECR I–6351

[Note Lisbon Treaty renumbering: Art 6 EU is Art 6 TEU; Art 220 EC is Art 19 TEU; Art 297 EC is Art 347 TFEU; Art 300(7) EC is Art 216(2) TFEU; Art 307 EC is Art 351 TFEU]

The EU adopted a set of legislative measures including regulations designed to implement a series of UN Security Council Resolutions, beginning with Resolution 1267 (1999). These UN Resolutions were adopted in the wake of the 11 September 2001 attacks on the United States, and required all states to freeze the funds and other financial resources of any persons or entities controlled directly or indirectly by the Taliban, or associated with Osama bin Laden or the Al-Qaeda network, and established a Sanctions Committee to ensure their implementation. In 2001 Kadi, together with Yusuf and the Al Barakaat Foundation, who were named on the UN and the EU lists, brought proceedings before the General Court (then CFI) to challenge the EU implementing measures. They argued that the contested EU regulations disproportionately infringed their fundamental rights, in particular their right to the use of their property and the right to a fair hearing. The General Court ruled that it had no jurisdiction to question Resolutions of the UN Security Council, even indirectly, other than for violation of *jus cogens*; and that in this instance there was no violation of *jus cogens*. On appeal, the ECJ took a different approach.

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281. In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23).

282. It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community.

283. In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance.

284. It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (*Opinion 2/94*, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C–112/00 *Schmidberger* [2003] ECR I–5659, paragraph 73 and case-law cited).

285. It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

286. In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.

. . .

304. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.

305. Nor can an immunity from jurisdiction for the contested regulation with regard to the review of its compatibility with fundamental rights, arising from the alleged absolute primacy of the resolutions of the Security Council to which that measure is designed to give effect, find any basis in the place that obligations under the Charter of the United Nations would occupy in the hierarchy of norms within the Community legal order if those obligations were to be classified in that hierarchy.

306. Article 300(7) EC provides that agreements concluded under the conditions set out in that article are to be binding on the institutions of the Community and on Member States.

307. Thus, by virtue of that provision, supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary Community law . . .

308. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

. . .

[*The ECJ went on to rule that the procedure for re-examining the listing of individuals before the UN Sanctions Committee was essentially diplomatic and intergovernmental, and did not offer guarantees of judicial protection. There was no right of representation, no obligation to give reasons or evidence, and no opportunity for judicial review. To grant immunity from jurisdiction to the listing measures within the EU legal order would constitute 'a significant derogation from the scheme of judicial protection of fundamental rights' laid down by the EU Treaties.*]

326. It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

. . .

334. In this regard, in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.

335. According to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1). . . .

352. It must, therefore, be held that the contested regulation, in so far as it concerns the appellants, was adopted without any guarantee being given as to the communication of the inculpatory evidence against them or as to their being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the appellants' rights of defence were not observed,

which has had the further consequence that the principle of effective judicial protection has been infringed.

353. It follows from all the foregoing considerations that the pleas in law raised by Mr Kadi and Al Barakaat in support of their actions for annulment of the contested regulation and alleging breach of their rights of defence, especially the right to be heard, and of the principle of effective judicial protection, are well founded . . .

357. Next, it falls to be examined whether the freezing measure provided by the contested regulation amounts to disproportionate and intolerable interference impairing the very substance of the fundamental right to respect for the property of persons who, like Mr Kadi, are mentioned in the list set out in Annex I to that regulation . . .

369. The contested regulation, in so far as it concerns Mr Kadi, was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him.

370. It must therefore be held that, in the circumstances of the case, the imposition of the restrictive measures laid down by the contested regulation in respect of Mr Kadi, by including him in the list contained in Annex I to that regulation, constitutes an unjustified restriction of his right to property . . .

372. It follows from all the foregoing that the contested regulation, so far as it concerns the appellants, must be annulled.

The ECJ, however, maintained the relevant Regulation in effect for three months, to allow the EU institutions time to cure the procedural breach and to re-list the applicants. Following the publication and communication to the applicants of summary reasons provided by the UN Sanctions Committee, the Commission adopted a new regulation maintaining the sanctions against Kadi, who promptly brought a further action for annulment.[137] Both the General Court, and the CJEU on appeal, ruled that the evidence offered to justify the sanctions was inadequate, and annulled the Regulation once again.[138]

The *Kadi* cases and many of those which followed are important and raise complex legal issues for the EU and the Member States, and they have generated international controversy, as well as possibly helping to trigger reform of the UN sanctions system, given the global relevance of many of the sanctions.[139] But what is most striking, for the purposes of the present chapter, is that the CJEU and the General Court were less deferential to the EU institutions, and even to international institutions such as the UN Security Council, when considering challenges based on fundamental rights in several of the sanctions cases. Nevertheless, it has also been pointed out that some of the judicial victories, including that of Kadi, whose eventual removal from the UN sanctions list came about due to the intervention of the UN Ombudsperson rather than the EU Courts, have been pyrrhic.

Nevertheless, the stream of high-profile and politically salient anti-terrorist sanctions cases in recent years has shown both the General Court and the ECJ displaying greater willingness to review and to strike down EU legislation for violation of basic rights, and to assert the priority of fundamental rights in EU law over secondary EU legislation, and even over the most important norms of international law.

137 Commission Regulation 1190/2008, amending the earlier Regulation 881/2002 to maintain Kadi's name in the relevant Annex [2008] OJ L322/25.

138 Case T-85/09 *Kadi v Commission and Council*; Case C-584/10 P *Commission v Kadi (Kadi II)* (n 134).

139 M Avbelj, F Fontanelli, and G Martinico (eds), *Kadi on Trial* (Routledge, 2014); P Margulies, 'Aftermath of an Unwise Decision: The UN Terrorist Sanctions Regime after *Kadi II*' (2014) 6 Amsterdam Law Forum 51.

(B) CHALLENGES TO EU ADMINISTRATIVE ACTION

Rights-based challenges to EU administrative action have also regularly been made. Two particular contexts in which such claims have often been successfully made are those of staff disputes concerning EU bodies and institutions, and competition law proceedings involving the Commission.

(i) *Staff Cases*

In a range of staff and recruitment cases the EU Courts have entertained arguments based on pleas including the violation of freedom of expression,[140] freedom of religion,[141] private and family life,[142] and non-discrimination,[143] and required the EU institutions to amend several of their practices. Administrative proceedings affecting EU staff are subject to the rights of the defence. The EU Civil Service Tribunal (CST) ruled that the EU staff regulations and conditions of employment must be read in the light of the provisions of the Charter of Fundamental Rights.[144]

(ii) *Competition Proceedings*

The Commission's enforcement powers in competition proceedings have been a fertile source of litigation, in which general principles of law and fundamental rights have been invoked, including:[145] the rights of the defence,[146] the right to a fair hearing,[147] effective judicial review,[148] non-retroactivity of penal liability,[149] data protection and privacy,[150] and *nullum crimen, nulla poena sine lege*.[151]

The Commission's powers in competition proceedings are very wide, including the authority to investigate and make searches, as well as to impose severe financial penalties, and affected parties have repeatedly called upon the Court to limit and control their exercise by reference to fundamental legal principles.[152] Thus, for example, the ECJ in *Hüls* emphasized the significance of the ECHR and

140 Case 100/88 *Oyowe and Traore v Commission* [1989] ECR 4285.

141 Case 130/75 *Prais v Council* [1976] ECR 1589.

142 Case T-58/08 *Commission v Roodhuijzen* [2009] ECR II-3797.

143 Case C-404/92 P *X v Commission* [1994] ECR I-4737; Cases C-122 and 125/99 P *D* (n 60); Case C-191/98 P *Tzoanos v Commission* [1999] ECR I-8223; Case C-252/97 *N v Commission* [1998] ECR I-4871.

144 Case F-51/07 *Bui Van v Commission* EU:F:2008:112.

145 See, eg, H Andersson, 'Dawn Raids under Challenge' (2014) 35 ECLR 135; W Wils, 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System when the Commission Acts as Both Investigator and as First-Instance Decision Maker' (2014) 37 World Competition 5; K Lenaerts, 'Due Process in Competition Cases' (2013) 1 Neue Zeitschrift für Kartellrecht 175.

146 See, eg, Case C-397/03 P *Archer Daniels Midland v Commission* [2006] ECR I-4429; Case T-210/01 *GEC v Commission* [2005] ECR II-5575; Cases C-204-219/00 P *Aalborg Portland A/S et al v Commission* [2004] ECR I-123; Case C-407/08 P *Knauf Gips KG v European Commission* [2010] ECR I-6375, [90]-[92].

147 Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417.

148 Case C-386/10 P *Chalkor AE Epexergasias Metallon v Commission* EU:C:2011:815; Case C-389/10 P *KME Germany and others v Commission* EU:C:2011:816.

149 Cases C-189-213/02 P *Dansk Rørindustri et al v Commission* [2005] ECR I-5425.

150 Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission* [2007] ECR II-4225.

151 Case T-99/04 *AC-Treuhand AG v Commission* [2008] ECR II-1501; Case T-446/05 *Amann & Söhne GmbH v Commission* [2010] ECR II-1255.

152 See, eg, Cases 209-215/78 *Van Landewyck v Commission* [1980] ECR 3125; Case 136/79 *National Panasonic v Commission* [1980] ECR 2033; Cases 100-103/80 *Musique Diffusion Française v Commission* [1983] ECR 1825; Case 322/81 *Michelin v Commission* [1983] ECR 3461; Case 5/85 *AKZO Chemie v Commission* [1986] ECR 2585; Case 374/87 *Orkem v Commission* [1989] ECR 3283; Case C-185/95 P *Baustahlgewebe* (n 147); Case C-328/05 P *SGL Carbon AG v Commission* [2007] ECR I-3921; Case C-199/11 *Europese Gemeenschap v Otis NV* EU:C:2012:684.

the case law of the ECtHR and ruled that the presumption of innocence applies to competition proceedings which may result in fines.[153]

(C) CONSTRUING EU LEGISLATION IN CONFORMITY WITH FUNDAMENTAL RIGHTS

The EU judiciary has also taken increasing account of fundamental rights by interpreting EU measures in conformity with such rights. This technique has the effect both of insulating EU legislation against challenge and of imposing human rights obligations, as a matter of EU law, on national authorities.[154] In the famous case of *Google Spain*, for example, the CJEU interpreted the EU Data Processing Directive in the light of Articles 7 and 8 of the Charter in such a way that a 'right to be forgotten' (the right to have data concerning oneself deleted from search engines, in certain circumstances), had to be protected by the operator of a search engine.[155]

(D) SUMMARY

i. From the time of the ECJ's acceptance in the early 1970s that fundamental human rights were part of the general principles of EU law until the Charter of Fundamental Rights acquired binding force in 2009, the two main sources of inspiration for those rights have been the ECHR and national constitutional traditions. The Charter now dominates as the most important source of fundamental human rights in EU law.

ii. Despite the clear Treaty basis for the various sources of human rights within EU law in Article 6 TEU, their application by the ECJ to specific cases has been more contested. The Court has adopted neither a 'universal standard' based on the highest level of protection given by any single Member State, nor a 'lowest common denominator' approach which would recognize only the common level of protection accorded by all states, but instead a pragmatic case-by-case approach to identify the scope and content of particular rights which are pleaded.

iii. With the enactment of the Charter of Fundamental Rights, the CJEU has increasingly drawn on this instrument, and less on the ECHR or the common constitutional principles of Member States, as the EU's autonomous source of human rights law. In *Melloni* the Court made clear that Article 53 of the Charter does not change its long-standing ruling that fundamental rights under national constitutions cannot call into question the primacy of EU law, which should prevail in the event of conflict.[156]

iv. Until such time as the EU follows the mandate in Article 6(2) TEU and accedes to the ECHR, the Convention is not formally binding on the EU.[157] However, even though the Charter has replaced the ECHR as the favoured source of human rights principles in EU law, the CJEU and the General Court continue to cite provisions of the ECHR and sometimes make reference to the case law of the European Court of Human Rights, particularly in cases governed by Article 52(3) of the Charter.

v. The CJEU was formerly reluctant to engage in robust rights-based review of EU policy and legislation. However, with the enactment of the Charter, and the expansion of EU policy activities into the fields of internal and external security, human rights-based challenges against EU action have more recently met with greater success before the CJEU. This is particularly notable in cases challenging economic and financial sanctions imposed by the EU.

vi. The General Court has also entertained many rights-based challenges to administrative action, particularly in the context of EU competition proceedings and staff disputes.

vii. The EU's policy competence in the field of human rights has gradually broadened since the Court first acknowledged the general principles of law. While the EU's legislative competence to enact internal rules on human rights is largely sector-specific, or requires recourse to the residual treaty basis of Art 352 TFEU, human rights feature prominently in EU external relations. Supporting institutions such as the Fundamental Rights Agency have also been created, and debate continues over how to operationalize the sanction mechanism in Article 7 TEU.

153 Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, [149]-[150]; Case C-57/02 P *Acerinox v Commission* [2005] ECR I-6689, [87]-[89]; Cases T-458/09 and 171/10 *Slovak Telekom v Commission* [2012] ECR II-145, [67]-[68]; Case T-348/08 *Aragonesas Industrias y Energía v Commission* EU:T:2011:621, [94]. Compare the earlier, narrower ruling in Case 374/87 *Orkem* (n 152).

154 See, eg, Case C-578/08 *Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-1839, [44], [62]-[63]; Case C-275/06 *Promusicae v Telefónica de España SAU* [2009] ECR I-271, [65]-[69]; Case C-400/10 PPU *JMcB* (n 31) [60]; Case C-300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363, [50]-[52]; Case C-396/11 *Radu* EU:C:2013:39; Case C-277/10 *Martin Luksan v Petrus van der Let* EU:C:2012:65; Case C-104/10 *Kelly v NUI* EU:C:2011:506.

155 Case C-131/12 *Google Spain v AEPD* EU:C:2014:317.

156 Case C-399/11 *Melloni* (n 111).

157 For a contrary argument that the EU is already bound, as a matter of EU law, by the provisions of the ECHR, see B de Witte, 'Human Rights' in P Koutrakos (ed), *Beyond the Established Orders: Policy Interconnections Between the EU and the Rest of the World* (Hart, 2011).

8 HUMAN RIGHTS-BASED CHALLENGES: MEMBER STATE ACTION

Thus far, we have mainly examined the role of human rights as standards for assessing the legality of EU action and as constraints on the acts of the EU institutions. However, the ECJ also ruled some decades ago that fundamental rights were binding not only on the EU institutions, but also on the Member States when they acted within the scope of EU law. When the Charter of Fundamental Rights was enacted, its provisions were made binding not just on the EU institutions, but also on the Member States when 'implementing Union law'. However, the application of EU fundamental rights review to Member State action nonetheless remains contentious, in part because it is not always clear whether states are acting within the scope of application of EU law, and in part because some Member States remain resistant to the very idea of the CJEU determining standards of human rights protection to be applied to them.[158] The law as regards the circumstances in which Member State action may be reviewed by the CJEU for compliance with EU fundamental rights review, whether the general principles of EU law or the Charter, is outlined below, followed by the question whether the Charter can be directly applied to the conduct of private actors.

158 K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 EuConst 375; A Rosas, 'When is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19 Jurisprudence 1271; C Vadja, The Application of the EU Charter of Fundamental Rights: Neither Reckless nor Timid?', University of Edinburgh Law School Research Paper Series 2014/47; F Fontanelli, 'The Implementation of European Union Law by Member States under Article 51 of the Charter of Fundamental Rights' (2014) 20 CJEL 193; M Dougan, 'Judicial Review of Member State Action under the General Principles of the Charter: Defining the "Scope of Union Law"' (2015) 52 CMLRev 1201; J Snell, 'Fundamental Rights Review of National Measures: Nothing New under the Charter' (2015) 21 EPL 285; B Schima, 'EU Fundamental Rights and Member State Action after Lisbon: Putting the ECJ's Case Law in Its Context' (2015) 38 Fordham Int LJ 1097; P Craig, *EU Administrative Law* (Oxford University Press, 3rd edn, 2018) ch 16; B Pirker, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology' (2018) 3 EP 133.

(A) MEMBER STATES AS AGENTS OF THE EU WHEN IMPLEMENTING AND APPLYING EU MEASURES

The ECJ first indicated in *Rutili* in 1975 that when Member States are applying provisions of EU legislation which are based on protection for human rights, they are bound by the general principles of EU law.[159] *Rutili* concerned Directive 64/221, which contained limitations on the restrictions Member States could impose on the free movement of workers. These were treated as specific expressions of the general principles enshrined in the ECHR. Similarly in *Johnston*, the requirement of judicial control in the 1976 Equal Treatment Directive was described by the Court as reflecting a general principle of EU law, which meant it should be interpreted as providing the right to an effective remedy.[160] More recent examples can be seen in relation to the EU Data Protection Directive 95/46 and Regulation 45/2001, which have been held to reflect rights of privacy protected under the ECHR and the Charter, and to require interpretation and application by national authorities in that light.[161]

Further such rulings have been given in relation to EU Directive 2004/83 on minimum standards for refugees, which is based on the UN Geneva Convention and is said by the CJEU to reflect other provisions of the EU Charter including respect for human dignity and the right to asylum.[162] Similarly, if more contestedly, the EU's 'Dublin' Regulations 2003/343 and now 604/2013, concerning the determination of the Member State responsible for asylum applications, have been said to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter, and to prevent violations of the prohibition on degrading treatment under Article 4 of the Charter.[163] These Regulations have, however, been the subject of extensive ECHR case law, in which the operation of the EU asylum system has been challenged, and sometimes condemned, for violation of Article 3 ECHR concerning inhuman and degrading treatment.[164]

The consequence of the CJEU rulings is that when Member States are implementing or applying EU measures that are based on, or reflect, fundamental rights, their action can be scrutinized by the CJEU to ensure they have done everything necessary to avoid violating rights guaranteed under EU law. Thus, for example, they must not return asylum-seekers to a Member State encountering systemic deficiencies and in which they are likely to face inhuman or degrading treatment;[165] they must not require asylum-seekers to undergo 'tests' to prove their sexual orientation;[166] they must ensure protection of rights during the appeal process;[167] and in determining who qualifies as a refugee they must ensure protection for family life, freedom of religion, and other rights.[168] Further, when applying EU laws based on fundamental rights, national authorities must ensure a fair balance between these and other rights protected as part of EU law.[169]

Long before the Charter was enacted, however, the ECJ had already gone beyond the kinds of cases described above, in which EU measures themselves embody a particular right,[170] and had required Member States to ensure that EU fundamental rights are protected *whenever states are implementing an EU measure*, even one that has little to do with rights.[171] Thus in *Wachauf*, a case concerning the regulation of milk production, the ECJ ruled that Member States are bound, when implementing EU law, by all the general principles and fundamental rights that bind the EU in its action.[172] This application of fundamental rights can be explained by viewing Member States as agents of the EU when they implement or enforce EU measures, and thus are bound by the rights protected as part of EU law. This is a kind of judicial 'human rights mainstreaming' technique, in accordance with which EU legislation is strengthened by the imposition on Member States of an obligation to protect all the rights guaranteed by the Charter, and the general principles of EU law, when implementing such measures.

This is exemplified by case law prior to the Charter, such as *Ordre des barreaux francophones et germanophones* concerning the right to a fair trial in the implementation of the Money Laundering Directive;[173] *Spector Photo Group* concerning the presumption of innocence in the implementation of the EU Insider Dealing Directive 2003/6;[174] *Varec* on the rights of the defence under the review procedures to implement the EU Public Procurement Directives;[175] *Chakroun* on the right to family life in the implementation of the EU Family Reunification Directive 2003/86;[176] *Kabel Deutschland Vertrieb* concerning protection for freedom of expression and media pluralism in the context of the implementation of the Universal Service Directive;[177] *Damgaard* concerning protection for freedom of expression in the context of the prohibition of advertising of medical products under EU Directive 2001/83;[178] *Promusicae* concerning reconciliation of the rights to property, data protection, and private life in the domestic transposition of EU directives on electronic commerce, intellectual property, and electronic communications;[179] and *Aguirre Zarraga* on the rights of the child in considering a custody dispute under EU Regulation 2201/2003.[180]

159 Case 36/75 *Rutili* (n 22). See AG Trabucchi in Case 118/75 *Watson and Belmann* [1976] ECR 1185, 1207–1208, for comment on this aspect of the case.

160 Case 222/84 *Johnston* (n 23). See also Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097; Case C–185/97 *Coote* (n 23); Case C–432/05 *Unibet* [2007] ECR I–2271, [37]; Case T–111/96 *ITT Promedia NV v Commission* [1998] ECR II–2937; Case C–279/09 *DEB v Bundesrepublik Deutschland* [2010] ECR I–13849.

161 Cases C–465/00, 138 and 139/01 *Österreichischer Rundfunk* (n 23) [70]–[72]; Case C–131/12 *Google Spain* (n 155); Case C–73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy* [2008] ECR I–9831.

162 Case C–465/07 *Elgafaji* (n 29); Case C–148/13 *A, B & C v Staatssecretaris van Veiligheid en Justitie* EU:C:2014:2406, [45]–[46], [53]–[54]; Case C–101/09 *Bundesrepublik Deutschland v B* EU:C:2009:285; Cases C–71 and 99/11 *Bundesrepublik Deutschland v Y and C* EU:C:2012:518; Case C–175–179/08 *Salahadin Abdulla and Others* [2010] ECR I–1493, [53]–[54]; Case C–31/09 *Bolbol* [2010] ECR I–5539, [38].

163 Cases C–411 and 493/10 *NS* (n 94) [75]–[86]; Case C–4/11 *Bundesrepublik Deutschland v Puid* EU:C:2013:740, [30]; Case C–394/12 *Shamso Abdullahi v Bundesasylamt* EU:C:2013:813; Case C–19/08 *Migrationsverket v Petrosian* [2009] ECR I–495, [4]; G Mellon, 'The Charter of Fundamental Rights and the Dublin Convention: An Analysis of *N.S. v. Home Secretary*' (2012) 18 EPL 655.

164 See, eg, App No 30696/09 *MSS v Belgium and Greece*, Grand Chamber judgment of 21 Jan 2011 and App No 29217/12 *Tarakhel v Switzerland*, Grand Chamber judgment of 4 Nov 2014.

165 Cases C–411 and 493/10 *NS* (n 94) [75]–[86]; Case C–4/11 *Puid* (n 163) [30]; Case C–163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* EU:C:2019:218.

166 Case C–148/13 *A, B & C* (n 162).

167 Case C–181/16 *Gnandi v État belge* EU:C:2018:465.

168 Cases C–71 and 99/11 *Y and C* (n 162).

169 Cases C–468–469/10 *ASNEF and FECEMD v Administración del Estado* EU:C:2011:777, [43]; Case C–275/06 *Promusicae* (n 154); Case C–314/12 *UPC Telekabel Wien* EU:C:2014:192; Case C–360/10 *SABAM v Netlog NV* EU:C:2012:85, [42]–[44]; Case C–201/13 *Deckmyn and Vrijhejdsfonds* EU:C:2014:2132, [26], [30]; Cases C–297 and 298/10 *Henning and Mai* [2011] ECR I–7965, [66].

170 See, eg, Case C–219/91 *Criminal Proceedings against Ter Voort* [1992] ECR I–5495, [33]–[38], on compliance by a Member State with Art 10 ECHR when giving effect to Dir 65/65/EC on the categorization of medicinal products.

171 See, eg, Case 63/83 *R v Kent Kirk* [1984] ECR 2689, [21]–[23]; Cases C–74 and 129/95 *X* [1996] ECR I–6609; Case C–60/02 *X* [2004] ECR I–651; Case C–387/02 *Berlusconi et al* [2005] ECR I–3565.

172 Case 5/88 *Wachauf v Germany* [1989] ECR 2609, [17]–[19]; Case C–292/97 *Karlsson* [2000] ECR I–2737.

173 Case C–305/05 *Ordre des barreaux francophones* (n 125); M Luchtmann and R van der Hoeven, Note (2009) 46 CMLRev 301.

174 Case C–45/08 *Specter Photo Group NV v CBFA* [2009] ECR I–12073.

175 Case C–450/06 *Varec v Belgium* [2008] ECR I–581.

176 Case 578/08 *Chakroun* (n 154).

177 Case C–336/07 *Kabel Deutschland Vertrieb v Niedersächsische Landesmedienanstalt für privaten Rundfunk* [2008] ECR I–10889.

178 Case C–421/07 *Damgaard* [2009] ECR I–2629.

179 Case C–275/06 *Promusicae* (n 154).

180 Case C–491/10 PPU *Aguirre Zarraga* [2010] ECR I–14247, [60]–[66].

The post-Charter case law has remained unaltered in this respect, and Member States must comply with Charter rights when implementing EU law. This is exemplified by case law concerning implementation of the EU Arrest Warrant,[181] the Data Protection Directive,[182] EU intellectual property law,[183] child custody,[184] the rights of long-term residence third-country nationals,[185] anti-discrimination law,[186] recognition and enforcement of judgments,[187] economic sanctions,[188] and free movement measures.[189]

(B) MEMBER STATES DEROGATING FROM EU RULES OR RESTRICTING EU RIGHTS

Thus far, we have considered situations in which Member States were *implementing* EU measures. However, Member States are also sometimes permitted by the Treaty, or by analogous principles developed by the ECJ, to *derogate* from, or restrict, EU rules on public policy or other grounds. The ECJ in *ERT*, after initial uncertainty,[190] declared that it had a duty to ensure that Member States adequately respected EU fundamental rights when they adopted measures derogating from EU law.

Case C–260/89 **Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas**
[1991] ECR I–2925

[Note Lisbon Treaty renumbering: Arts 56 and 66 EC are now Arts 52 and 62 TFEU respectively]

The case concerned the compatibility with EU law of exclusive rights granted by Greek legislation to ERT, which had the effect of restricting the free movement of services and establishment. The defendant argued that the effect of the legislation on its freedom of expression should also be taken into account by the Court.

THE ECJ

42. As the Court has held (see Cases C–60 & 61/84 *Cinéthèque*, paragraph 25 and Case C–12/*86 Demirel v. Stadt Schwäbisch Gmünd*, paragraph 28), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.

181 Case C–396/11 *Radu* EU:C:2013:39; Case C–168/13 PPU *Jeremy F* EU:C:2013:358; Case C–399/11 *Melloni* (n 111); Case C–220/18 PPU *ML* EU:C:2018:589.

182 Case C–131/12 *Google Spain* (n 155).

183 Case C–277/10 *Martin Luksan v Petrus van der Let* EU:C:2012:65; Case C–469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* EU:C:2019:623.

184 Case C–400/10 PPU *JMcB* (n 31).

185 Case C–571/10 *Servet Kamberaj v IPES* EU:C:2012:233, [79]–[80].

186 Case C–104/10 *Kelly v NUI* EU:C:2011:506; Case C–396/17 *Leitner v Landespolizeidirektion Tirol* EU:C:2019:375.

187 Case C–112/13 *A v B* EU:C:2014:2195.

188 Case C–314/13 *Užsienio reikalų ministerija v Pevtiev* EU:C:2014:1645, [24]–[26].

189 Case C–300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363.

190 Cases 60 and 61/84 *Cinéthèque v Fédération Nationale des Cinémas Français* [1985] ECR 2605, [25]–[26]; Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, [28].

43. In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Article 56 and 66 only if they are compatible with the fundamental rights, the observance of which is ensured by the Court.

44. It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.

45. The reply to the national court must therefore be that the limitations imposed on the power of the Member States to apply the provisions referred to in Articles 66 and 56 of the Treaty on grounds of public policy, public security and public health must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights.

This ruling extended the Court's jurisdiction to review Member State compliance with EU fundamental rights, in situations in which they arguably seek to escape the remit of EU law.[191] Notwithstanding arguments made, even by members of the Court itself, to reduce the scope of these rulings,[192] they have been confirmed many times since.[193] The application of the *ERT* reasoning is exemplified by case law in the field of immigration, where there have been many rulings concerning the right to family life or due process where states have relied on the public policy, or public interest, derogation to expel a migrant covered by EU law, or to refuse some other family benefit. The Court has emphasized the requirement on states to take adequate account of the impact of their proposed actions on the right to family life as well as other Charter rights.[194]

It is moreover clear from *Schmidberger* that the protection of human rights *in itself* constitutes a legitimate interest that will justify a restriction on EU free movement rules.[195] Austria had relied on protection for freedom of expression and assembly as a public policy justification for the closure of roads between Austria and Italy to facilitate environmental protests. The ECJ held that since both the EU and the Member States are required to respect fundamental rights, 'the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by [EU] law, even under a fundamental freedom guaranteed by the Treaty such as the free movement

191 Cases C–250/06 *United Pan-Europe Communications Belgium v Belgium* [2007] ECR I–11135; Case C–336/07 *Kabel Deutschland* (n 177).

192 F Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice' (2001) 26 ELRev 331, 337–339. Compare his expansive earlier argument for human rights review of national measures by the ECJ in his opinion as AG in Case C–168/91 *Konstantinidis v Stadt Altensteig* [1993] ECR I–1191, 1211–1212.

193 See, eg, Case C–368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I–3689; Case C–370/05 *Festersen* [2007] ECR I–1129; Case C–470/03 *AGM-COS.MET Srl v Suomen valtio and Tarmo Lehtinen* [2007] ECR I–2749, [72]–[73]; Case C–201/15 *AGET Iraklis v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* EU:C:2016:972, [63].

194 See, eg, Cases C–482 and 493/01 *Orfanopoulos and Oliveri v Land Baden-Württemberg* [2004] ECR I–5257, [97]–[100]; Case C–459/99 *MRAX v Belgium* [2002] ECR I–6591, [53], [61], [62]; Case C–413/99 *Baumbast and R v Home Secretary* [2002] ECR I–7091, [72]–[73]; Case C–60/00 *Carpenter v Home Secretary* [2002] ECR I–6279; Case C–145/09 *Land Baden-Württemberg v Tsakouridis* [2010] ECR I–11979; Case C–300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363.

195 Case C–112/00 *Schmidberger v Austria* [2003] ECR I–5659; Case C–208/09 *Sayn-Wittgenstein* [2010] ECR I–13693, [84]–[89].

of goods.'[196] Similarly in *Omega Spielhallen*, Germany successfully pleaded the protection of human dignity as a ground for restricting the marketing in Germany of laser games which simulated the killing of human beings.[197]

(c) MEMBER STATE ACTION 'WITHIN THE SCOPE OF EU LAW'

Doubts arose, following adoption of the Charter, as to whether the drafters had intended to reverse or confine the *ERT/Familiapress* line of jurisprudence, by using narrower language when describing the scope of application of the Charter to Member States. Article 51 of the Charter declares that:

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

However, whatever the intentions of the drafters,[198] the ECJ chose not to read this provision of the Charter narrowly, but instead so as to confirm its prior approach.[199] In *Åkerberg Fransson*, the Court drew support from the Explanations to the Charter, which were given interpretive effect by Article 6(1) TEU and Article 52(7) of the Charter, and which use the wider term 'binding on the Member States when they act within the scope of EU law'. The Member State action in *Fransson* amounted neither to an 'implementation of EU law' nor to a 'derogation' from EU law, which raised the issue as to whether it could still be covered by the Charter.

Case C–617/10 Åklagaren v Åkerberg Fransson
EU:C:2013:105

The applicant claimed that his prosecution under Swedish law for a tax offence, having been already subject to tax penalties for the same matter, was a violation of the principle of *ne bis in idem* in breach of EU law. The Swedish Government, together with the Commission and four intervening governments, argued that the situation fell outside the scope of EU law for the purposes of Article 51 of the Charter, since neither the tax penalty, nor the criminal prosecution arose from the implementation of EU law. The CJEU began by indicating that Article 51 confirmed its previous case law on the scope of application of fundamental rights review.

196 Case C–112/00 *Schmidberger* (n 195) [74].

197 Case C–36/02 *Omega Spielhallen* (n 59). See also Case C–208/09 *Sayn-Wittgenstein* (n 195) [87]; Case C–244/06 *Dynamic Medien* (n 38); Case C–341/05 *Laval un Partneri Svenska Byggnadsarbetareförbundet* [2007] ECR I–11767, [101]–[111]; Case C–438/05 *International Transport Workers' Federation v Viking* [2007] ECR I–10779, [74]–[90].

198 For a comment on this aspect of the original drafting of the Charter in 1999–2000, see G de Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2000) 25 ELRev 331. Note, however, that the Charter was subsequently revised during the 2003–2004 Convention and IGC on the Constitutional Treaty, and that it has been proclaimed and adopted by a range of different actors. Discerning the intention of the multiple drafters would be a difficult task.

199 Case C–617/10 *Åklagarenv Åkerberg Fransson* EU:C:2013:105 ; Case C–390/12 *Pfleger* EU:C:2014:281, [35]–[36]; Case C–145/09 *Tsakouridis* (n 194) [52]; Cases C–217 and 350/15 *Criminal proceedings against Massimo Orsi and Luciano Baldetti* EU:C:2017:264, [16]–[20].

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17. It is to be recalled in respect of those submissions that the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.

18. That article of the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.

19. The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see inter alia, to this effect, Case C–260/89 *ERT* [1991] I–2925, paragraph 42; . . .).

20. That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C–279/09 *DEB* [2010] ECR I–13849, paragraph 32). According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.

21. Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

22. Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C–466/11 *Currà and Others* [2012] ECR I–0000, paragraph 26).

23. These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see *Dereci and Others*, paragraph 71).

The Court insists that the Charter does not *extend* the scope of application of EU law, but rather *follows* its scope of application. The key sentence in the judgment is that 'the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter'. The Court states that if EU law is genuinely applicable to the case, then the Charter will also be applicable, and the CJEU will review compliance with its provisions, but that still leaves questions about when exactly EU law is genuinely applicable to the facts of the case.

In *Fransson* itself, the CJEU declined to follow the Opinion of the Advocate General, who had advised that the link between the Swedish penalties and EU tax law was insufficient to bring the

case within the terms of Article 51 of the Charter.[200] Instead, the CJEU ruled that even though the national laws on the basis of which the tax penalties and criminal proceedings had been brought had not been adopted specifically to implement an EU tax Directive, they were nonetheless designed in part to penalize infringements of the Directive, as well as of national law, in relation to the EU obligation to declare and collect VAT, and this brought them within the scope of application of EU law for the purposes of the Charter.[201] The CJEU, however, also held that the national court was free to apply domestic standards of fundamental rights, since the national law in question was not entirely determined by EU law, so long as this did not compromise the level of protection under the Charter of the unity and consistency of EU law.

In subsequent rulings, the CJEU has given further guidance on the scope of Article 51 of the Charter, but still at a level of considerable generality and abstraction. In the *Cruciano Siragusa* and *Julian Hernández* cases, the Court declared that the reason for requiring fundamental rights review of Member State action falling within the scope of EU law is the same as the original reason for requiring fundamental rights review of *EU action* in the early *Handelsgesellschaft* case: namely to ensure the supremacy of EU law. In the Court's words, the scope of Article 51 is intended '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.'[202]

In subsequent rulings as to whether national action constitutes 'implementation' within the meaning of Article 51 of the Charter the Court has stated that relevant factors include '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.'[203] The Court insisted, moreover, that the concept of implementing EU law in Article 51 'presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other'.[204] The fact that a national measure comes within an area in which the EU has powers is insufficient by itself to bring it within the scope of application of EU law, and to render the Charter applicable.[205]

Thus, the fact that national measures may 'indirectly affect' EU law will not be enough to bring the situation within Article 51, while the fact that EU law imposes an *obligation* on the state with regard to the subject matter of the case probably will suffice to bring the situation within the scope of application of EU law.[206] In *NS and ME*, the Court indicated that the fact that a Member State exercises

[200] Case C-617/10 (n 199) [63]-[64].

[201] Ibid [24]-[28]; Case C-218/15 *Paoletti v Procura della Repubblica* EU:C:2016:748, [18]; Cases C-217 and 350/15 *Orsi and Baldetti* (n 199) [16]-[20]; Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* EU:C:2017:373, [40]-[41]; Case C-235/17 *European Commission v Hungary* EU:C:2019:432, [63]; Case C-516/17 *Spiegel Online GmbH v Volker Beck* EU:C:2019:625, [21].

[202] Case C-206/13 *Cruciano Siragusa v Regione Sicilia* EU:C:2014:126, [32]; Case C-198/13 *Julian Hernández* EU:C:2014:2055, [47].

[203] Cases C-206/13 *Cruciano Siragusa* (n 202) [25]; Case C-40/11 *Iida* EU:C:2012:691, [79]; Case C-87/12 *Ymeraga* EU:C:2013:291, [41].

[204] Cases C-198/13 *Julian Hernández* (n 202) [34]; Case C-206/13 *Cruciano Siragusa* (n 202) [24]; Case C-218/15 *Paoletti* (n 201) [14]; Case C-50/16 *Grodecka v Konieckza* EU:C:2016:406.

[205] See Cases C-198/13 *Julian Hernández* (n 202) [34]; Cases C-483/09 and 1/10 *Gueye and Salmerón Sánchez* EU:C:2011:583, [69]-[70]; Case C-370/12 *Pringle* EU:C:2012:756, [104]-[105], [180]-[181].

[206] See, eg, Case C-617/10 *Åkerberg Fransson* (n 199). Compare Case C-144/95 *Maurin* [1996] ECR I-2909, [11]-[12]; Case C-206/13 *Cruciano Siragusa* (n 202) [26]; K Lenaerts, 'Exploring the Limits of the Charter of Fundamental Rights' (2012) 8 EuConst 375.

discretion to determine whether or not to avail of an option under asylum legislation does not mean that the situation falls outside the scope of EU law: the UK's decision to examine a claim for asylum which was not its responsibility under the criteria set out in EU Regulation 343/2003 fell within the scope of Article 51 of the Charter, since that option was an integral part of the EU asylum system.[207]

It can only be hoped that further case law will lead to better and sharper criteria to determine the contours of this still elusive category of Member State action falling 'within the scope of application of EU law' which amounts neither to a straightforward implementation of EU law nor to a derogation from it.[208]

(D) SITUATIONS FALLING OUTSIDE THE SCOPE OF EU LAW

The Court in *Fransson* made clear that its pre-Charter case law on situations falling *outside* the scope of EU law also remains relevant. It follows from Article 51 that the Court has no jurisdiction to review Member State compliance with the Charter in situations which lie beyond the scope of EU law.[209] It can, nonetheless, be difficult to predict which situations will be deemed to lie 'outside', and which 'inside', the field of application of EU law for the purposes of human rights review.

The Court deemed a number of pre-Charter cases to be outside EC law and thus not caught by general principles of law.[210] The CJEU has, in similar manner, held that many cases fall outside the scope of EU law, and hence outside its jurisdiction to review state action for compatibility with the Charter.[211] Some cases are relatively straightforward in this respect, others are more complex. The latter include situations such as national legislation adopted in the exercise of an exclusive national competence, which grants workers in certain circumstances more extensive protection than that provided under related EU employment law;[212] a Member State's refusal to grant a residence permit to a family member of an EU national who does not satisfy the conditions of residence set by EU legislation;[213] a state's refusal of legal aid to an individual under provisions of national law even where the main proceedings for which legal aid was sought concerned EU law;[214] and a Member State's definition of what constitutes a 'special non-contributory cash benefit' for the purposes of EU rules on coordination of social security, since the EU rules do not purport to define the national scope of such benefits.[215]

[207] Cases C-411 and 493/10 *NS* (n 94) [65]-[68]; Case C-258/14 *Florescu v Casa Județeană de Pensii Sibiu* EU:C:2017:448, [48].

[208] See (n 158) for a selection of the secondary literature.

[209] Case 12/86 *Demirel* (n 190).

[210] Compare, eg, Case C-144/95 *Maurin* [1996] ECR I-2909; Case C-276/01 *Steffensen* [2003] ECR I-3735, [69]-[78]. For pre-Charter cases deemed to lie outside the scope of ECJ review for compliance with general principles, see Case C-299/95 *Kremzow* (n 26); Case C-291/96 *Grado and Bashir* [1997] ECR I-5531; Case C-309/96 *Annibaldi v Sindaco del Commune di Guidoma* [1997] ECR I-7493; Case C-333/09 *Noël v SCP Brouard Daude* [2009] ECR I-205; Case C-535/08 *Pignataro* [2009] ECR I-50; T Marguery, 'EU Fundamental Rights and Member States Action in EU Criminal Law' (2013) 20 MJ 282.

[211] See, eg, Case C-27/11 *Vinkov* EU:C:2012:326, [57]-[59]; Case C-370/12 *Pringle* EU:C:2012:756, [178]-[180]; Case C-339/10 *Asparuhov Estov* EU:C:2010:680, [12]-[14]; Cases C-483/09 and C-1/10 *Gueye* (n 205) [69]; Cases C-267 and 68/10 *Rossius* EU:C:2011:332, [16]-[20]; Case C-87/12 *Ymeraga* (n 203) [41]-[43]; Case C-457/09 *Chartry* EU:C:2011:101, [25]; Case C-314/10 *Pagnoul* EU:C:2011:609, [24]; Case C-161/11 *Vino* EU:C:2011:420, [22]-[40]; Case C-198/13 *Julian Hernández* (n 202) [45]-[48]; Case C-265/13 *Torralbo Marcos v Korota SA* EU:C:2014:187; Case C-333/13 *Dano v Leipzig* EU:C:2014:2358, [87]-[91]; Case C-14/13 *Cholakova* EU:C:2013:374; Case C-40/11 *Yoshikazu Iida v Stadt Ulm* EU:C:2012:691, [78]-[82]; Case C-206/13 *Siragusa* (n 202) [20]-[33]; Cases C-532 and 538/15 *Eurosaneamientos SL and Others v ArcelorMittal Zaragoza SA* EU:C:2016:932, [52]-[55].

[212] Case C-198/13 *Julian Hernández* (n 202) [45].

[213] Case C-40/11 *Iida* (n 211) [78]-[82].

[214] Case C-265-13 *Torralbo Marcos v Korota SA* (n 211).

[215] Case C-333/13 *Dano* (n 211).

However, it is notable that even where a particular issue has been deemed to lie outside the scope of application of EU law, and therefore to be unreviewable by the CJEU for compliance with EU fundamental rights, the CJEU nevertheless often draws the Member State's attention to its 'international' obligations under the ECHR.[216]

(E) HORIZONTAL APPLICATION OF THE CHARTER

Article 51 of the Charter provides that the provisions of the Charter are binding on the EU institutions and the Member States, but makes no reference to their effect on individuals. However, since the ECJ had previously declared that Treaty provisions addressed to Member States could also impose obligations on individuals,[217] and had also ruled that general principles of law could in certain circumstances have horizontal direct effect,[218] the question whether the provisions of the Charter might also impose legal obligations on individuals soon arose. [219]

The issue came directly before the Court in the *AMS* case.[220] The question was whether Article 27 of the Charter concerning the rights of workers to be consulted could be invoked by an employee against a private employer. While the Court on the facts of the case ruled that Article 27 was insufficiently specific to be able to create an obligation on an employer to include certain categories of worker for the purposes of calculating staff numbers, it left open the larger question of whether a sufficiently precise provision of the Charter could be binding on an individual.

The CJEU has, however, now made clear that certain Charter provisions can have horizontal effect. It is clear, moreover, from *Egenberger* that the CJEU is willing to accord horizontal effect to Charter rights even where the relevant Charter right is considerably less detailed than a directive that covers the same terrain. The decisions extracted below have been reinforced by other CJEU rulings.[221]

Case C–414/16 **Egenberger v Evangelisches Werk für Diakonie und Entwicklung** EU:C:2018:257

Egenberger alleged that she had been discriminated against in relation to employment by the Protestant Church in breach of Directive 2000/78, and that this was so notwithstanding the fact that Article 4 of the Directive made provision, inter alia, for religion to be regarded as a valid criteria for certain types of occupational position. The CJEU held that application of Article 3 of the Directive could not be left

216 See, eg, Case C–127/08 *Metock* [2008] ECR I–6241, [74]–[79]; Case C–87/12 *Ymeraga* (n 203) [44].

217 See, eg, Case 43/75 *Defrenne v Sabena* [1976] ECR 455; Case C–281/93 *Angonese v Cassa di Risparmio di Bologna* [2000] ECR I–4134. See more generally, Ch 8.

218 Case C–144/04 *Mangold* [2005] ECR I–9981; Case C–555/07 *Kücükdeveci* EU:C:2010:365.

219 D Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 ELRev 479; N Lazzerini, '(Some of) the Fundamental Rights Granted by the Charter May Be a Source of Obligations for Private Parties: *AMS*' (2014) 51 CMLRev 907; E Frantziou, 'Case C–176/12 *AMS*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) 10 EuConst 332; C Murphy, 'Using the EU Charter of Fundamental Rights against Private Parties after *AMS*' [2014] EHRLR 170; E Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 ELJ 657; E Frantziou, '(Most of) the Charter of Fundamental Rights is Horizontally Applicable: ECJ 6 November 2018, joined cases C-569/16 4 and C-570/16, *Bauer et al.*' (2019) 15(2) EuConst 1.

220 Case C–176/12 *Association de médiation sociale (AMS) v Union locale des syndicats CGT, Laboubi* EU:C:2014:2, [44]–[49].

221 Case C–68/17 *IR v JQ* EU:C:2018:696; Case C–684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu* EU:C:2018:874; Case C–193/17 *Cresco Holdings Ltd v Achatzi* EU:C:2019:43. See also Case C–396/19 *Leitner v Landespolizeidirektion Tirol* EU:C:2019:375.

entirely to the relevant religious organization, and that there had to be effective judicial review of such a determination by a national court. The CJEU then considered how this interpretation of Article 4 could be enforced in an action between private parties, assuming that the relevant national law could not be read so as to be in accord with the Directive thus interpreted.

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75. In the event that it is impossible to interpret the national provision at issue in the main proceedings in conformity with EU law, it must be pointed out, first, that Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation, which originates in various international instruments and the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds, including religion and belief, as may be seen from its title and from Article 1 (see, to that effect, judgment of 10 May 2011, *Römer*, C-147/08, EU:C:2011:286, paragraph 59 and the case-law cited).

76. The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (see, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 47).

77. As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals (see, by analogy, judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, paragraph 39; of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296, paragraphs 33 to 36; of 3 October 2000, *Ferlini*, C-411/98, EU:C:2000:530, paragraph 50; and of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraphs 57 to 61).

78. Secondly, it must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.

79. Consequently, in the situation mentioned in paragraph 75 above, the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

80. That conclusion is not called into question by the fact that a court may, in a dispute between individuals, be called on to balance competing fundamental rights which the parties to the dispute derive from the provisions of the FEU Treaty or the Charter, and may even be obliged, in the review that it must carry out, to make sure that the principle of proportionality is complied with. Such an obligation to strike a balance between the various interests involved has no effect on the possibility of relying on the rights in question in such a dispute . . .

81. Further, where the national court is called on to ensure that Articles 21 and 47 of the Charter are observed, while possibly balancing the various interests involved, such as respect for the status of churches as laid down in Article 17 TFEU, it will have to take into consideration the balance struck between those interests by the EU legislature in Directive 2000/78, in order to determine the obligations deriving from the Charter in circumstances such as those at issue in the main proceedings (see, by analogy, judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, paragraph 76, and order of 23 April 2015, *Commission v Vanbreda Risk & Benefits*, C-35/15 P(R), EU:C:2015:275, paragraph 31).

The willingness of the CJEU to accord horizontality to Charter rights is apparent in other cases, such as *Bauer and Broßonn*, where the relevant right concerned Article 31 of the Charter, which deals with rights to pay and annual leave.

Cases C–569–570/16 **Stadt Wuppertal v Maria Elisabeth Bauer; Volker Willmeroth v Martina Broßonn** EU:C:2018:871

The two cases concerned whether Stadt Wuppertal and Mr Willmeroth, respectively, in their capacity as former employers of the late husbands of Mrs Bauer and Mrs Broßonn, had an obligation to pay the respective widows an allowance in lieu of the paid annual leave not taken by their spouses before their death. The right to paid annual leave for employees was enshrined in Article 7 of Directive 2003/88, and also included in Article 31(2) of the Charter. The second action involved two private parties, and thus the Directive, would not itself have horizontal direct effect. The German courts held that the national law implementing the Directive could not be interpreted so as to accord this benefit to spouses of employees who had not taken the benefit before their husbands died. The CJEU held that the Directive should be interpreted so as to accord such benefits, and that Article 7 thereof was sufficiently precise and certain to satisfy the conditions for direct effect, but that it could, nonetheless, not have horizontal direct effect. It held, however, that Mrs Broßonn could secure such benefits from the Charter right, which had horizontal effect.

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85. The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76).

86. Article 31(2) of the Charter therefore entails, in particular, as regards the situations falling within the scope thereof, first, that the national court must disapply national legislation such as that at issue in the main proceedings pursuant to which the death of a worker retroactively deprives him of his entitlement to paid annual leave acquired before his death, and, accordingly, his legal heirs of the entitlement to the allowance in lieu thereof by way of the financial settlement of those rights, and, second, that employers cannot rely on that national legislation in order to avoid payment of the allowance in lieu which they are required to pay pursuant to the fundamental right guaranteed by that provision.

87. With respect to the effect of Article 31(2) of the Charter on an employer who is a private individual, it should be noted that, although Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.

88. First of all, as noted by the Advocate General in point 78 of his Opinion, the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 77).

89. Next, the Court has, in particular, already held that the prohibition laid down in Article 21(1) of the Charter is sufficient in itself to confer on individuals a right which they may rely on as such in a dispute with another individual (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76), without, therefore, Article 51(1) of the Charter preventing it.

90. Finally, as regards, more specifically, Article 31(2) of the Charter, it must be noted that the right of every worker to paid annual leave entails, by its very nature, a corresponding obligation on the employer, which is to grant such periods of paid leave.

91. In the event that the referring court is unable to interpret the national legislation at issue in a manner ensuring its compliance with Article 31(2) of the Charter, it will therefore be required, in a situation such as that in the particular legal context of Case C-570/16, to ensure, within its jurisdiction, the judicial protection for individuals flowing from that provision and to guarantee the full effectiveness thereof by disapplying if need be that national legislation (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 79).

The *foundational principle* underlying the preceding cases is that the directive is merely reflective of a right in the Charter, which may also be found in the constitutional traditions of the Member States and international instruments. The Charter right can apply horizontally between private parties, as well as vertically in relation to the state. The provisions of the relevant directive may shape the contours and duration of the right, but the right nonetheless emanates from the Charter. The number of Charter rights that are invested with horizontality pursuant to this reasoning remains to be seen. It is, however, potentially far-reaching in this respect, since many directives will be capable of being linked to a Charter right that covers the same terrain as the particular directive. The implications of this for horizontal direct effect of directives have been considered in an earlier chapter, to which reference should be made.[222]

The *remedial consequence* of this case law is equally significant, insofar as it bypasses the remedial limits on the horizontal direct effect of directives. Thus, if the national court cannot interpret the national legislation to be in accord with the directive, a private party can nonetheless have recourse to the background Charter right in an action against another private party, and the national court will be obliged to set aside/disapply the offending national legislation and any contrary provision of national law. The benefits that have been denied the claimant then flow from the Charter right, read in conjunction with the more detailed provisions of the directive, which may, as noted above, shape the contours and duration of the right.

The following extract by Lucia Rossi, the Italian judge on the CJEU, reflects on the significance of the case law.

L Rossi, The *Kücükdeveci* Ambiguity: 'Derivative' Horizontal Direct Effects for Directives?[223]

According to Article 6(1) TEU, the Charter of Fundamental Rights of the European Union (hereinafter, the 'Charter' or 'CFR') has the same legal value as the Treaty. After the entry into force of the Treaty of Lisbon, the question therefore arises as to whether the ECJ case law on the direct effects of EU

[222] See above, Ch 8.

[223] EU Law Analysis (25 Feb 2019), https://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html.

primary law provisions, dating back to Van Gen den Loos may be extended also to the rights contained in the Charter.

[*The author reviews the case law including* AMS, Egenberger, Bauer, *and* Cresco *and then continues as follows.*]

These judgments appear to have developed a general test to be applied to all the rights protected by the Charter, a test similar—albeit with a different wordings—to that initially set out by the same Court for determining the direct effects of the provision of the Treaty (*van Gend en Loos*, 26/62, p. 13) and then of directives (*van Duyn*, 41/74, paras 1213). This test is based on a twofold condition, according to which the provisions of the Charter are liable to have—not only vertical, but also horizontal–direct effects where they are both (i) unconditional in nature, and (ii) mandatory.

The first condition requires the provisions of the Charter to be 'self-sufficient' (cf. AG Bot in *Bauer*, point 80 and Lenaerts), in that they must not need 'to be given concrete expression by the provisions of EU or national law'. The Court has nonetheless stated that the secondary law may specify certain characteristics of the right concerned, such as its duration, and lay down 'certain conditions for the exercise of that right' (see *MaxPlanck*, para 74 and *Bauer*, para 85).

It follows that the numerous provisions of the Charter which refer to rights 'as provided for in national laws and practice' are, in principle, deprived of such horizontal direct effect, as the Court has made it clear in *AMS* (paras 44–45) and confirmed in *MaxPlanck* (para 73) and *Bauer* (para 84). . . .

. . .

Secondly, the Court has acknowledged in *MaxPlanck* that, although Article 51(1) CFR does not 'systematically preclude' that private individuals may be directly required to comply with certain provisions of the Charter, this is without prejudice to the precondition for invoking such a horizontal direct effect, that is, that the legal situation shall fall within the scope of the Charter. According to the same Article 51 CFR as interpreted by the settled ECJ case law, this is the case when the relevant legal situations are governed by EU law and the national legislation falls within the scope of Union law (see *Fransson* C-617/10, . . .), which cannot be extended by the Charter itself.

9 AN EVOLVING RELATIONSHIP: THE EU AND THE ECHR

(A) ACCESSION BY THE EU TO THE ECHR

The possible accession of the EU to the ECHR has been a regular part of the EU integration debate at least since the 1970s. The revival of proposals for accession at that time followed from the earlier abandonment of the 1950s federalist blueprint for an EU that was fully integrated with the ECHR system.[224] However, the fact the EU now has its own Charter of Fundamental Rights, which is partly modelled on the ECHR, and a fairly extensive 'domestic' human rights system of its own, raises the question why accession is still considered to be desirable today. There are several possible answers.

First, the EU continues to encounter criticism of its human rights role, and scepticism as to whether its commitment to promoting human rights is genuine. The ECJ has been accused of using human rights discourse in an attempt to extend the influence of EU law over areas that should remain the primary concern of the Member States, and using the rhetorical force of the language of fundamental human rights to promote the integration or internal market goals of the EU.[225] Accession to the ECHR could therefore help to signal the credibility of the EU as far as human rights commitments are concerned.

224 G de Búrca 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 AJIL 649.
225 See Coppel and O'Neill (n 116).

A related concern for some is that the CJEU should not act as a parallel European Human Rights Court, but should leave this task to the ECtHR, a court which was specifically entrusted by the Member States of the Council of Europe with monitoring compliance with the ECHR.

A further concern has been that the CJEU's extension of its jurisdiction to review national laws for compliance with fundamental rights raises the possibility of conflict between the pronouncements of the two European Courts on similar issues.[226] While some see any conflict of interpretation between the two Courts as unlikely,[227] others view it as a clear risk.

Finally, the desirability of being able to challenge acts of the EU directly before the ECtHR is perhaps the strongest argument in favour of accession. Accession would mean that the CJEU will no longer be the final official arbiter of the compliance of EU action with human rights. If accession occurs, the EU will have its own judge on the ECtHR, alongside each Council of Europe Member State judge. For the European Commission, accession will help develop a common culture of fundamental rights in the EU, reinforce the credibility of the EU's human rights system and external policy, place the EU's weight behind the Strasbourg system, and ensure the harmonious development of the case law of the two Courts.[228]

In a first serious political move in this direction, the Court of Justice was asked by the Council in 1994 for its opinion under what is now Article 218(11) TFEU on the compatibility of accession with the EU Treaties. The Court responded that the EU lacked competence under the Treaties, and that an amendment would be necessary.[229] Thirteen years later, Article 6(2) TEU was introduced by the Lisbon Treaty, providing not only competence but a legal obligation ('the EU shall accede') for the EU to accede to the ECHR. However, while *Opinion 2/94* indicated that the Court had concerns about the 'fundamental institutional implications' and 'constitutional significance' of accession, it did not explain these concerns in any detail.[230] Most observers nonetheless assumed that the Lisbon Treaty's amendment to Article 6(2) TEU had removed any obstacle to accession from the side of the EU.[231] From the side of the Council of Europe, delays caused by Russia were also overcome to allow enactment of Protocol 14 ECHR, which amended the statute of the Council of Europe to allow the EU to accede.

It seemed that everything was in place for the EU to accede. The Draft Agreement on Accession (DAA) took three years to complete, but by mid-2013 it seemed that most of the sticking points had been overcome.[232] The DAA had to be: concluded by the Committee of Ministers of the Council of Europe; accepted unanimously by the Council of Ministers of the EU; gain the assent of the European Parliament; and be ratified by all forty-seven Council of Europe states. There were key DAA provisions to address concerns about the specificity of EU law,[233] including: (i) a mechanism for prior involvement of the CJEU to ensure the ECtHR would not rule on the compatibility of an EU act with the Convention until such time as the CJEU had first ruled on the matter; (ii) a co-respondent

226 R Lawson, 'Confusion and Conflict? Diverging Interpretations of the ECHR in Strasbourg and Luxembourg' in R Lawson and M de Bloijs (eds), *The Dynamics of the Protection of Human Rights in Europe* (Kluwer, 1994); D Spielman, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Inconsistencies and Complementarities' in Alston, Heenan, and Bustelo (n 4).
227 P van Dijk and G van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer, 3rd edn, 1998) 21; A Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1 EJLS 1.
228 Commission Press Release IP/10/291 of March 2010.
229 *Opinion 2/94* [1996] ECR I–1795.
230 Ibid [34]–[35].
231 JP Jacqué, 'The Accession by the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 CMLRev 995; F Korenica, *The EU Accession to the ECHR* (Springer, 2015).
232 P Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 Fordham Int LJ 1115.
233 See, eg, Discussion document of the ECJ on certain aspects of the accession of the EU to the ECHR, Luxembourg, 5 May 2010.

mechanism to allow the EU to become party to ECHR proceedings against a Member State, where the compatibility of EU law with the ECHR might be at issue; and (iii) a provision to prevent Article 55 ECHR, which prohibits ECHR Member States from bringing disputes arising from the interpretation of the Convention before other dispute-settlement systems, from being interpreted to apply to proceedings before the CJEU, or otherwise lead to a violation of Article 344 TFEU.

These provisions, however, proved insufficient to address the concerns of the CJEU, and in its *Opinion 2/13* on the DAA in December 2014 the Court declared that the DAA was incompatible with Article 6(2) TEU.[234] The Court was not satisfied with the preceding mechanisms in the DAA,[235] as well as with a range of other features of the agreement, including the failure to clarify the relationship between Article 53 of the Charter and Article 53 of the ECHR;[236] the risk of undermining the principle of mutual trust between Member States within the field of Justice and Home Affairs;[237] the fact that the Strasbourg Court would gain jurisdiction to review EU Common Foreign and Security Policy measures while the CJEU is largely excluded by the TEU from doing so;[238] and the risk that Protocol 16 to the ECHR would enable Member State courts to request interpretive rulings from the ECtHR on matters relating to EU law before the CJEU would have a chance to consider them.[239] The overriding theme of the Court's objections to the various 'problematic' provisions of the DAA is the need to preserve the specificity and the autonomy of the EU legal order, as well as the exclusivity of its own jurisdiction.

The Opinion is lengthy, complex, and requires careful reading. While the Advocate General's Opinion was not so different from that of the Court, her advice was ultimately expressed in terms that confirmed the compatibility of the DAA with the Treaties, so long as several conditions were ensured as a matter of binding international law. The Court, however, while sharing much of the substance of her Opinion, ruled that the DAA was incompatible with the Treaties, thereby throwing the future of the DAA into doubt, and rendering the future accession of the EU to the ECHR a difficult political task once more.

The general reaction to the judgment has been critical.[240] While it seems unlikely, given the mandatory nature of Article 6(2) TEU, that plans for accession will be shelved, it is difficult to predict at present what the path forward in this respect will be. This issue is considered in a number of academic articles. The options in this respect are complex and cannot be considered in detail here, but the following extract provides a good sense of the scale of the task.

234 *Opinion 2/13 onEU Accession to the ECHR* EU:C:2014:2454.

235 On the mechanism for prior involvement of the CJEU see *Opinion 2/13* (n 234) [236]–[248]; on the co-respondent mechanism, [215]–[235]; on preventing Art 55 ECHR from undermining Art 344 TFEU, [201]–[214].

236 Ibid [185]–[190].

237 Ibid [191]–[195].

238 Ibid [249]–[257].

239 Ibid [196]–[199].

240 See, eg, B de Witte and S Imamovic, '*Opinion 2/13* on the Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 ELRev 683; E Spaventa, 'A Very Fearful Court?: The Protection of Fundamental Rights in the EU after *Opinion 2/13*' (2015) 22 MJ 35; B Pirker and S Reitemeyer, 'Between Discursive and Exclusive Autonomy—*Opinion 2/13*, the Protection of Fundamental Rights and the Autonomy of EU Law' (2015) 17 CYELS 168; 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) 11 EuConst 239; L Besselink, M Claes, and J-H Reestan, 'A Constitutional Moment: Acceding to the ECHR (or not)' (2015) 11 EuConst 2; S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16 German LJ 213; A Lazowski and R Wessel, 'When Caveats Turn into Locks: *Opinion 2/13* on Accession of the European Union to the ECHR' (2015) 16 German LJ 179; C Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After *Opinion 2/13*' (2015) 16 German LJ 147; P Eeckhout, '*Opinion 2/13* on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38 Fordham Int LJ 955; L Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection—On *Opinion 2/13* on EU Accession to the ECHR' (2015) 15 HRLR 485; J Snell, 'Is *Opinion 2/13* Obsolescent?' (2017) 42 ELRev 449. Compare, however, D Halberstam, 'It's the Autonomy, Stupid: A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR' (2015) 16 German LJ 105.

B de Witte and S Imamovic, *Opinion 2/13 on the accession to the ECHR*: Defending the EU Legal Order Against a Foreign Human Rights Court[241]

> Some of the Court's minor objections are indeed legitimate and could be dealt with by amending the draft Accession Agreement . . . , or even more simply by adding some clarifying language to the Explanatory Report. Other objections, however, may prove to be very difficult to remedy or even be non-starters. This is particularly so, it seems, for the objections relating to the mutual trust principle and to CFSP. In both cases, . . . the CJEU effectively claims an exemption for the EU from the normal Convention standards. This cannot be included in an Accession Agreement, except by means of reservations lodged by the Union upon its accession. Such reservations, since they would not relate to specific Convention rights but have a 'horizontal' scope, would be inadmissible under the Convention regime of reservations. This leads to the conclusion that a renegotiation of the Accession Agreement along the lines of the Court's Opinion is simply impossible. In the absence of accession, the EU will, of course, remain bound by the ECHR *as a matter of EU law*, on the basis of art.6(3) TEU and art.52(3) EU Charter.
>
> It is difficult to conclude otherwise than that the Court of Justice has done everything in its power to make accession exceedingly difficult, if not impossible.
>
> The Member States, when amending the European Treaties at Lisbon, clearly determined that the EU should accede to the Convention. By adding Protocol 8, they formulated some conditions to be respected in negotiating this accession, but they certainly cannot be suspected of having added Protocol 8 in order to undermine the clear accession mandate of art.6(2) TEU. And yet, this is what the CJEU did in its Opinion 2/13: it used the language of Protocol 8 in order to conclude that the bona fide attempt of the negotiators to implement the mandate of art.6(2) was ill advised and, in fact, doomed from the start—since some of the objections made by the Court in Opinion 2/13 could not possibly have been met by the negotiators of the Accession Agreement. In this way, the CJEU has interpreted the text of the Treaties *contra legem* and one might even argue that the true threat to the integrity of the EU legal order lies in the adventurous interpretations offered by the Court rather than in the cautious attitude displayed by the drafters of the Accession Agreement. In essence, the CJEU treats the ECtHR as a *foreign* court that threatens the authority which the CJEU has acquired in the course of time . . . In its Opinion 2/13, it showed great concern for its own prerogatives, and rather less concern for the protection of fundamental rights.

(B) INDIRECT REVIEW OF EU ACTS BY THE ECTHR PRIOR TO ACCESSION

In the absence of EU accession to the ECHR, while complaints cannot be brought directly against the EU before the Strasbourg Court, the ECtHR has been prepared in a range of circumstances to accept *indirect* complaints against EU acts when they are brought against one or all Member States.[242]

In 1999, the ECtHR ruled in *Matthews* that while the Convention did not preclude the transfer by a state of national competences to an international organization such as the EU, the responsibility

241 (2015) 40 ELRev 683, 703–704.

242 See, eg, App No 13258/87 *Melcher (M) v Germany*, decision of 9 Feb 1990; App No 21090/92 *Heinz v Contracting States and Parties to the European Patent Convention*, decision of 10 Jan 1994; App No 21072/92 *Gestra v Italy*, decision of 16 Jan 1995; App No 13645/05 *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA v the Netherlands*, decision of 20 Jan 2009.

of states for violations of the ECHR would continue even after such a transfer.[243] Many subsequent cases were brought before the Strasbourg Court involving various forms of EU action, and the ECtHR seemed willing to entertain such indirect challenges, although in most cases it dismissed the challenge for other reasons, such as the lack of a victim or the non-applicability of the substantive right.[244] The key ECtHR ruling concerning its jurisdiction over EU acts is the *Bosphorus* case.[245]

Application No 45036/98 **Bosphorus v Ireland** Judgment of 30 June 2005

This case was brought by a Turkish company against Ireland for impounding, without compensation, an aircraft which the applicant company had leased from the national airline of the former Yugoslavia. The Irish authorities impounded the aircraft in reliance on an EU regulation, following an ECJ decision on that regulation,[246] which implemented the UN sanctions regime against the former Yugoslavia during the civil war in the early 1990s. The ECtHR took the view that the alleged violation was committed by Ireland due to the state's compliance with a binding and non-discretionary EU law obligation: in other words, the EU regulation was the real source of the alleged violation. The ECtHR set out its approach to such complaints.

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1. The question is therefore whether, and if so to what extent, that important general interest of compliance with EC obligations can justify the impugned interference by the State with the applicant's property rights.
2. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity (the *M. & Co.* decision, at p. 144 and *Matthews* at § 32, both cited above). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party . . .
3. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations . . .
4. In reconciling both these positions and thereby establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (*M. & Co.* at p. 145 and *Waite and Kennedy*, at § 67). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention . . .
5. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see the above-cited *M. & Co.* decision, at p. 145, an approach with which the parties and the European Commission agreed). By 'equivalent' the Court means 'comparable': any requirement that the organisation's protection be 'identical' could run counter to the interest of international co-operation pursued (paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.
6. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

   However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights . . .
7. It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. The numerous Convention cases cited by the applicant at paragraph 117 above confirm this. Each case (in particular, the *Cantoni* judgment, at § 26) concerned a review by this Court of the exercise of State discretion for which EC law provided . . . The *Matthews* case can also be distinguished: the acts for which the United Kingdom was found responsible were 'international instruments which were freely entered into' by it (§ 33 of that judgment) . . .
8. Since the impugned act constituted solely compliance by Ireland with its legal obligations flowing from membership of the EC (paragraph 148 above), the Court will now examine whether a presumption arises that Ireland complied with its Convention requirements in fulfilling such obligations and whether any such presumption has been rebutted in the circumstances of the present case.

[243] App No 24833/94 *Matthews v United Kingdom*, judgment of 18 Feb 1999, esp [34]–[35]; R Harmsen, 'National Responsibility for EC Acts under the ECHR: Recasting the Accession Debate' (2001) 7 EPL 625.

[244] See, eg, App No 51717/99 *Guérin Automobiles v les 15 Etats de l'UE*, decision of 4 July 2000; App No 56672/00 *DSR-Senator Lines GmbH v the 15 Member States of the EU*, decision of 10 Mar 2004; App Nos 6422/02 and 9916/02 *SEGI v the 15 Member States of the EU*, decision of 23 May 2002; App No 62023/00 *Emesa Sugar v Netherlands*, decision of 13 Jan 2005.

[245] App No 45036/98 *Bosphorus v Ireland*, Grand Chamber judgment of 30 June 2005; S Douglas Scott, Note (2006) 43 CMLRev 243; A Hinarejos Parga, Note (2006) 31 ELRev 251.

[246] Case C–84/95 *Bosphorus v Minister for Transport* [1996] ECR I–3953.

The ECtHR surveyed the EU's system of fundamental rights, and found that the presumption that Ireland complied with its ECHR obligations did indeed arise, on the basis that the EU provided human rights protection 'equivalent' to that of the ECHR system, and there was no dysfunction in the EU's control system such as to rebut that presumption in the case at hand.[247]

There were, however, two separate concurring opinions signed by seven judges, who expressed reservations about the majority approach. They expressed concern about the replacement of a case-by-case review of compliance, with a largely abstract review of the EU's general system of 'equivalent protection' for human rights. They also drew attention to the deficiencies in the EU's system of judicial protection due to the limited *locus standi* for private parties before the ECJ, and raised the question whether this amounted to a violation of Article 6(1) ECHR.

The Court in *Michaud* elaborated further on the underlying reason for adopting a 'presumption of equivalence' approach in relation to organizations such as the EU, emphasizing that it was 'only where the rights and safeguards it protects are given protection comparable to that afforded by the Court

[247] K Kuhnert, '*Bosphorus*—Double Standards in European Human Rights Protection?' (2006) 2 Utrecht Law Review 177; C Costello, 'The *Bosphorus* Ruling of the ECtHR: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 HRLR 87.

itself' that the Court would reduce the intensity of its supervision of state action taken to comply with the obligations flowing from membership of such organizations.[248]

Since the *Bosphorus* case, the Strasbourg Court has indirectly reviewed EU action for compatibility with the ECHR on numerous occasions, and has shown itself quite willing to conclude that the presumption of equivalence is inapplicable, and to apply its normal standard of review. In cases in which it has condemned the operation of the EU asylum system, the ECtHR held that since the states in question had discretion to decide whether to deal with an asylum application, even if it was not their responsibility under the EU regulation, the action was not *strictly* required by EU law and hence the presumption of equivalence would not apply.[249] The ECtHR has also been willing to engage with an applicant's argument that the presumption of equivalence had been rebutted by the circumstances of the case.[250]

There was speculation as to whether the ECtHR might lessen its degree of deference towards EU action in view of the CJEU's negative ruling in *Opinion 2/13* on EU accession to the ECHR, more especially given that the President of the Strasbourg Court expressed disappointment at *Opinion2/13*.[251] However, in *Avotiņš* the ECtHR held that the *Bosphorous* presumption of equivalence remained notwithstanding *Opinion 2/13*.[252] The *Avotiņš* judgment was, however, nuanced, since while preserving the presumption of equivalence, the Strasbourg Court nonetheless considered very carefully whether the presumption should be rebutted in the instant case, thereby signalling a willingness to engage in close scrutiny in this regard.[253]

(c) MUTUAL INFLUENCE OF THE CJEU AND THE ECTHR PRIOR TO ACCESSION

We have seen above how the CJEU cites ECtHR rulings, particularly in cases where similar rights under the EU Charter are invoked, since Article 52(3) of the Charter stipulates that the meaning and scope of Charter rights which correspond to ECHR rights are to be the same as those laid down by the ECHR.[254]

The potential for differences in interpretation between the two Courts on the same issue was evident in early case law. Compare, for example, the judgment of the ECtHR in *Open Door Counselling*[255] with the Advocate General's opinion in *Grogan*;[256] the ECJ's approach in *ERT*[257] with that of the ECtHR in *Lentia v Austria*;[258] the ECJ's decision in *Hoechst*[259] with that of the ECtHR in *Niemietz*;[260] and the ECJ's approach in *Orkem*[261] with that of the ECtHR in *Funke*.[262]

248 App No 12323/11 *Michaud v France*, judgment of 6 Dec 2012, [104].

249 See, eg, App No 30696/09 *MSS v Belgium and Greece*, Grand Chamber judgment of 21 Jan 2011; App No 29217/12 *Tarakhel v Switzerland*, Grand Chamber judgment of 4 Nov 2014.

250 App 3890/11 *Povse v Austria*, judgment of 18 June 2013, [84]–[87].

251 www.echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf.

252 Case No 17502/07, *Avotiņšv Latvia*, 23 May 2016.

253 P Gragl, 'An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of *Bosphorus* and Reaction to *Opinion 2/13* in the *Avotins* Case' (2017) 13 EuConst 551; L Glas and J Krommendijk, 'From *Opinion 2/13* to *Avotins*: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts' (2017) 17 HRLR 1.

254 G de Búrca 'After the EU Charter of Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 MJ 168.

255 App Nos 14234/88 and 14235/88 *Open Door Counselling Ltd and Dublin Well Woman Centre v Ireland*, judgment of 29 Oct 1992.

256 Case C–159/90 *SPUC v Grogan* EU:C:1991:249.

257 Case C–260/89 *ERT* (n 26).

258 App Nos 13914/88 etc *Informationsverein Lentia v Austria*, judgment of 24 Nov 1993.

259 Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859.

260 App No 13710/88 *Niemietz v Germany* [1992] 16 EHRR 97.

261 Case 374/87 (n 152).

262 App No 10828/84 *Funke v France* [1993] 16 EHRR 297.

Despite the potential for conflict, there has, however, been a desire by both Courts to avoid conflict in their respective case law, and to demonstrate a degree of deference towards one another on similar questions arising before them.[263] This is the approach encapsulated in Article 52(3) of the Charter, and the Strasbourg Court has also made many references to, and actively accommodated, EU law and the CJEU.[264] The Charter has been cited in many Strasbourg judgments,[265] and it has even followed the lead of the Luxembourg Court in a number of instances.[266] Further, the ECtHR has acted as enforcer of EU law in cases concerning the failure of a national court to make a preliminary reference to the CJEU, finding this under certain circumstances to constitute a violation of Article 6(2) ECHR.[267] The two Courts also hold regular meetings 'to discuss general questions of common interest'.[268]

Nevertheless, as the European Parliament put it in a study of the fundamental rights case law of the two Courts, the CJEU sometimes 'manifestly expressed the preference for the Charter over the Convention, without entering into conflict with the ECHR'.[269] This tendency towards increasing reliance on the Charter as the source of EU human rights law, and towards more autonomous interpretation of the Charter without reference to the ECHR,[270] echoes the wariness of the CJEU in *Opinion 2/13* as regards any arrangement that would tie EU human rights norms too closely, as a matter of law, to the ECHR and particularly to the rulings of the ECtHR.

Thus, the standard formulation in recent CJEU case law is that Article 52(3) of the Charter, while enshrining the need for consistency between EU law and that of the ECHR, should not thereby undermine the autonomy of EU law or that of the CJEU;[271] that notwithstanding Article 52(3), as long as the EU has not acceded to the ECHR, it does not constitute a legal instrument that has been formally incorporated into EU law;[272] and that therefore the primary resource in rights-based cases should be the rights guaranteed by the Charter.[273]

10 CONCLUSIONS

i. Human rights occupy an increasingly significant place within EU law and policy today. The Charter of Fundamental Rights has binding legal force. Compliance with human rights standards is a condition for the admission of new Member States, and serious non-compliance forms the basis for the symbolic sanction mechanism in Article 7 TEU. However, there is increasing concern that the Article 7 tool is unusable in practice, and that a more effective mechanism is required.

263 ML Pâris-Dobozy. 'Paving the Way: Adjustments of Systems and Mutual Influences between the European Court of Human Rights and European Union Law Before Accession' (2014) 51 Irish Jurist 59.

264 See C Dautricourt, 'A Strasbourg Perspective on the Autonomous Development of Fundamental Rights in EU Law: Trends and Implications', NYU Jean Monnet Working Paper 10/2010.

265 See, eg, App No 28957/95 *Goodwin v United Kingdom*, judgment of 11 July 2002, [100]; App No 34503/97 *Demir and Baykara v Turkey*, judgment of 12 Nov 2008, [47], [150]; App No 10249/03 *Scoppola v Italy*, judgment of 17 Sept 2009; App No 25965/04 *Rantseva v Russia and Cyprus*, judgment of 7 Jan 2010.

266 See, eg, anti-terrorism sanctions cases, see App No 10593/08 *Nada v Switzerland*, judgment of 12 Sept 2012.

267 See App No 17120/09 *Dhabi v Italy*, judgment of 8 July 2014, [31]–[34].

268 L Scheeck, 'Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks', Garnet Working Paper 23/07 (2007).

269 N (107).

270 De Búrca (n 107).

271 See, eg, Case C–180/17 *X and Y v Staatssecretaris van Veiligheid en Justitie* EU:C:2018:775, [31]; Case C–492/18 PPU *TC* EU:C:2019:108, [57].

272 See, eg, Case C–617/10 *Åkerberg Fransson* (n 199) [44]; Case C–426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen v Vlaams Gewest* EU:C:2018:335, [40]; Case C–524/15 *Criminal proceedings against Luca Menci* EU:C:2018:197, [22]–[24].

273 See, eg, Case C–524/15 *Criminal proceedings against Luca Menci* (n 272) [24].

ii. The case law of the CJEU and the General Court dealing with human rights matters continues to grow exponentially, and covers a wide spectrum of different human rights issues. Since the adoption of the Charter, the CJEU has shown itself willing to strike down EU laws for violation of its provisions.

iii. While national governments remain ambivalent about the EU's role in relation to human rights matters within the EU, the CJEU has taken a broad view of what falls within the scope of EU law for the purposes of Article 51 of the Charter. It has unequivocally asserted the primacy of EU law and of the Charter over national constitutional law in the event of conflict. It has also now clarified that the Charter can impose obligations on private parties.

iv. While both the Strasbourg and the Luxembourg Courts have sought to avoid conflict between their respective bodies of case law, with Article 52(3) of the Charter promoting deference by the CJEU to the ECtHR, and the ECtHR increasingly accommodating and citing EU law, the CJEU clearly remains very concerned to protect the autonomy of the EU legal order and the exclusivity of its own jurisdiction. This concern demonstrated itself most dramatically in *Opinion 2/13*, in which the CJEU found the draft Agreement on Accession of the EU to the ECHR to be incompatible with the EU Treaties.

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ENFORCEMENT ACTIONS AGAINST MEMBER STATES

1 CENTRAL ISSUES

i. Article 17(1) TEU entrusts the Commission with the task of ensuring and overseeing the application of EU law 'under the control of the Court of Justice'. A crucial component of the Commission's task is to monitor Member State compliance and to respond to non-compliance.

ii. The TFEU provides for various enforcement mechanisms[1] involving judicial proceedings against the Member States, which are brought either by the Commission or much less frequently by a Member State. Article 258 TFEU establishes the general enforcement procedure, giving the Commission broad power to bring infringement proceedings against Member States, which it considers to be in breach of their obligations under EU law.[2]

iii. The enforcement procedure performs several functions. It is in part an elite channel for the amicable resolution of disputes involving Member States without recourse to litigation, in part a channel for individuals to complain to the Commission about breaches of EU law, and in part an 'objective' law enforcement tool in the hands of the Commission and Court.[3] It has also been described as a forum for enhancing the accountability of the different institutional actors involved, in particular the Member States and the Commission,[4] involving also the Parliament

[1] See, eg, Art 7 TEU for Member States which seriously and persistently breach the values on which the EU is based; Art 108(2) TFEU on state aid; Art 114(9) TFEU on internal market measures; Art 271 confers enforcement powers on the Board of the European Investment Bank and the Governing Council of the European Central Bank similar to those of the Commission under Art 258 TFEU; Art 348 TFEU provides for a specialized enforcement procedure where Member States have relied on Art 347 TFEU to derogate from fundamental EU rules, Case C–120/94 R *Commission v Greece* [1994] ECR I–3037; Art 126 TFEU provides for a specialized enforcement procedure for the 'excessive deficit procedure' within EU monetary policy.

[2] The original infringement procedure under Art 88 of the Coal and Steel Treaty (which expired at the end of 2002) gave considerably more power to the Commission (then called the High Authority), which was empowered to record the failure of a state to fulfil its obligations, without first bringing the case before the ECJ. However, the state itself could then bring the matter before the Court. A proposal for conferring a similar power on the Commission today was discussed during the negotiations on the Lisbon Treaty and its predecessor Constitutional Treaty, but was dropped. Following the enactment of the Lisbon Treaty, Arts 258–260 TFEU now also govern the Euratom Treaty.

[3] R Rawlings, 'Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement' (2000) 6 ELJ 4.

[4] C Harlow and R Rawlings, 'Accountability and Law Enforcement: The Centralized EU Infringement Procedure' (2006) 31 ELRev 447; M Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge, 2010) 15–18, who identifies five different functions of the general infringement procedure.