1. The scope of the Charter: temporal issues

There is no provision in the Charter specifying its scope ratione temporis. Certain rules can be inferred from the case-law of the Court of Justice. With respect to violations of fundamental rights deriving from acts adopted by the European Union, the Charter can be used as a benchmark even if the act at issue was adopted before the entry into force of the Treaty of Lisbon (see, for instance, Case C-92/09 Volker und Markus Schecke, Case C-236/09 ASBL Test-Achats, Case C-293/12 Digital Rights Ireland, and Case C-362/14 Schrems).

The position is different with regard to national measures which fall within the scope of application of the Charter (see Part II, section 3 and Part III, section 2), but against which the direct effects of the Charter cannot be invoked (see on this point section 7) if the facts underlying the case occurred prior to the entry into force of the Lisbon Treaty (1 December 2009). This is demonstrated by Case C-316/13 Fenoll. However, it is important to note that even before the entry into force of the Lisbon Treaty, the Court of Justice had ensured the protection of certain fundamental rights by way of the general principles of EU law (see section 2.3). Therefore, it might be worth establishing whether the provision in question in the Charter protects a fundamental right that was previously protected as a general principle (and then, using the test laid down for the Charter – see section 7 – whether it satisfies the criteria for direct effect).

2. A classification of national acts to which the Charter applies

As explained in Part II, section 2, Article 51(1) of the Charter offers protection against violations deriving from national measures that implement EU law. This means that the protection offered by the Charter cannot be activated simply by claiming that the case in question concerns the violation of a fundamental right.

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

The connection must be sufficient, since it is not enough for the EU and national provisions to concern the same issue: the EU law provision must lay down a rule that acts as the reference norm at the national level in the field concerned.

Consequently, in addition to the provisions of the Charter itself, there are other rules of EU law which cannot activate the protection of the Charter. This is true of Treaty provisions that confer on the EU legislative bodies the power to adopt measures in a particular field. In contrast, provisions of EU law (i.e. EU directives or regulations) adopted by the EU legislative instances in the exercise of that power can prompt application of the Charter with respect to national measures implementing them.

For instance, Article 19 TFEU provides that 'the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Relying on this provision (or more accurately, on its predecessor, Article 13 EC), the EU legislative instances adopted some important pieces of legislation, notably: Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; and Directive 2000 /43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The Charter can be invoked against a national provision which falls within the scope of these directives. In contrast, the Charter's protection cannot be put into effect by simply claiming that the European Union has the competence to combat certain types of discrimination if the national provision at issue concerns a field not covered by the directives referred to above.

A list of situations in which national measures can be regarded as implementing EU law is provided below. In the situations described, there exists sufficient a connection between the national measure or provision allegedly breaching the Charter and EU law for the protection offered by the Charter to be activated. By clicking on each category, a short explanation and a practical example will appear.

Please note that this list cannot be exhaustive: it is based on the case-law of the Court of Justice, which may evolve over time.

2.1 National provisions adopted in order to give effect to EU law

The Charter applies to national measures adopted with a view to fulfilling obligations deriving from EU law, such as EU directives or regulations (see, respectively, **examples 1** and **2** below).

Directives are binding upon the Member States to which they are addressed only as regards the result to be achieved, but leave the choice to national authorities as to the forms and methods to achieve it. Accordingly, a directive requires the adoption, by the deadline laid down in it, of national implementing legislation, unless the existing national rules can ensure the achievement of the prescribed aim.

The obligations laid down by EU directives can be very specific, but they can also be broadly formulated. This is the case, for instance, for national measures that give effect to the obligation to provide for effective, proportionate and dissuasive sanctions or penalties for the infringement of the national rules implementing a directive (see **point 4** of this classification).

However, the degree of discretion left to the Member States does not affect the duty to respect EU fundamental rights when adopting implementing measures. Member States have a duty to give effect to the relevant EU law obligation in a way that both achieves the purpose targeted by the directive and is consistent with EU fundamental rights. In contrast, where no discretion is left to the Member States and the EU law provision appears, in and of itself, to be incompatible with EU fundamental rights, a national court should submit a preliminary request to the Court of Justice asking it to check the validity of the provision.

Unlike directives, regulations generally have immediate effect in the national legal systems without national authorities having to adopt implementing measures. Nevertheless, certain provisions in regulations can require national implementing measures. Those measures must not hamper the direct applicability of the regulation or mask the nature of the regulation. In addition, the implementing measures for an EU regulation must be compatible with the rules protecting EU fundamental rights.

Provisions of EU primary law can also give rise to obligations for Member States, and their implementation may require the adoption of implementing measures that are in line with the Charter (see **example 3**).

Examples

(1) *The following example, concerning national provisions adopted to transpose an EU directive, is based on: the Court of Justice's judgment of 15 January 2014, in Case C-176/12 Association de médiation sociale.*

Mr Loboudi was appointed as the worker's representative within his undertaking. His employer sought to annul this appointment, arguing that the number of employees did not amount to the minimum level that gave rise to the obligation to appoint a representative under the law. He emphasised the fact that most of the workers were employed under a type of contract that, according to domestic legislation, did not enter into consideration when calculating the abovementioned minimum number of employees.

Since the national court doubted the compatibility of the domestic legislation concerned with Article 27 of the Charter on the right of workers to information and consultation within the undertaking, it decided to refer the issue to the Court of Justice for a preliminary ruling.

The Court of Justice held that the Charter was applicable to the case because the domestic legislation at issue was adopted in order to give effect to Directive 2002/14/EC establishing a general framework for informing and consulting employees.

***(2)** The following example, concerning national provisions implementing an EU regulation, is based on: the Court of Justice's judgment of 15 May 2014, in Case C-135/13 Szatmàri Malom Kft.*

The owner of a mill made a request for financial support under Regulation (EC) No 1698/2005 on support for rural development. His intention was to use the support to replace the mill with a new one, without increasing its capacity. The competent national authority refused the request on the ground that, according to the national legislation implementing the Regulation, support could be granted only for the modernisation of existing mills, not for the construction of a new mill. The mill owner challenged this refusal and the national court asked the Court of Justice to rule on the compatibility of the national legislation with the Regulation.

The Court of Justice pointed out that it was the task of Member States to lay down specific rules on the admissibility of requests for financial support. Those rules, however, had to comply with the special condition set by the Regulation, namely that the support granted had to improve the overall performance of the sector. Member States could introduce additional admissibility requirements provided that they did not exceed the discretion granted to them. The aim of the national legislation was to avoid encouraging, by granting support, the emergence of additional processing capacity in the milling sector against a backdrop of underutilisation of the existing mills. The Court of Justice held that this was a reasonable objective. Nevertheless, it considered that, in a case such as that of the applicant, the national legislation infringed the fundamental right to equal treatment enshrined in Article 20 of the Charter, as the creation of the new facility would have resulted in the closure of the old one, and would, thus, not have to led to any increase in the pre-existing capacity.

***Note that** the European Commission published '**Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds ("ESI Funds")'.** It includes a list of the national measures which constitute implementation of EU law within the meaning of Article 51(1) of the Charter.*

***(3)** The following example, concerning national measures implementing EU primary law provisions, is based on the Court of Justice's judgment of 6 October 2015, in **Case C-650/13 Delvigne**. In a case regarding the loss of civic rights of an EU citizen, a French court raised doubts about the compatibility with Article 39(1) of the Charter of a national provision on the automatic deprivation of the right to vote in the event of a criminal conviction in connection with a criminal conviction by a final judgment handed down before 1 March 1994 (the date when the country's new Criminal Code entered into force). It therefore decided to submit a request for a preliminary ruling to the Court of Justice.*

The Court of Justice held that, by virtue of Article 8 of the 1976 Act concerning the election of members of the European Parliament (which has the status of EU primary law), 'subject to the provisions of that act, the electoral procedure is to be governed in each Member State by its national provisions' (paragraph 29).

It went on to argue that 'the Member States are bound, when exercising that competence, by the obligation set out in Article 1(3) of the 1976 Act, read in conjunction with Article 14(3) TEU, to ensure that the election of Members of the European Parliament is by direct universal suffrage and free and secret'. Consequently, it must be considered that a Member State which 'in implementing its obligation under Article 14(3) TEU and Article 1(3) of the 1976 Act, makes provision in its national legislation for those entitled to vote in elections to the European Parliament to exclude Union citizens who... were convicted of a criminal offence and whose conviction became final before 1 March 1994, must be considered to be implementing EU law within the meaning of Article 51 (1) of the Charter' (paragraphs 32 and 33).

2.2 National provisions that give effect to EU law, though not adopted for that purpose

A Member State does not necessarily have to adopt new legislation in order to fulfil the obligations deriving from EU law: this is not necessary where existing national provisions already make it possible to ensure the compliance of the national legal system with such obligations. Whether the national measure was adopted in order to put into effect an EU obligation, was already used to for the implementation of such an obligation or was adopted on the basis of a purely national initiative is of no significance.

This means that national measures that were adopted before the implemented EU law obligation came into existence can fall within the scope of the Charter. This situation is exemplified under (3) and (4), although it may also concern national provisions other than those laying down procedural rules or penalties.

2.3 National provisions of procedural law governing the exercise before national courts of (ordinary) rights conferred on individuals by EU law

According to the settled case-law of the Court of Justice, 'in the absence of [EU law] rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU law]' (see, for instance, *Case C-276/01 Steffensen*, paragraph 60).

The Lisbon Treaty has codified this case-law. The second sentence of Article 19(1) TEU states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

Accordingly, the Charter, in particular, Article 47 on effective judicial protection, applies to national procedural provisions that govern the exercise before the domestic courts of (ordinary) rights conferred on individuals by EU law, irrespective of whether they were adopted for that specific purpose. Such rights may derive from directives or regulations, or from EU primary law provisions other than the provisions of the Charter itself.

Example

The following example, which concerns procedural provisions governing the exercise of a right conferred by EU law, is based on the Court of Justice's judgment of 22 December 2010 in Case C-279/09 DEB

A German company operating in the natural gas market claimed to have suffered damages as a consequence of delays in the transposition of two EU directives on the supply of natural gas. Consequently, it wanted to bring an action for liability against Germany for breach of EU law in line with the precedent of Case C-6/90 Francovich. However, lacking both cash and assets, the company could not afford the advanced payment of litigation costs required by the relevant domestic legislation. Similarly, it could not pay for a lawyer, who, under the German law for that type of action, must counsel the party bringing the claim. Since Germany's Constitutional Court had interpreted the domestic provisions on legal aid as being addressed solely to individuals, the company's application was refused.

The company appealed the decision and the national court submitted a reference for a preliminary ruling to the Court of Justice concerning the compatibility of the relevant domestic rules of civil procedure with the EU law principle of effective judicial protection. The Court of Justice found that it had jurisdiction to review the domestic provisions (and notably their interpretation as provided by Germany's Constitutional Court) with reference to Article 47 of the Charter since, in the case in question, those provisions affected the exercise in court of a right conferred by EU law (the right to obtain compensation for damages

caused by a Member State's failure to implement its obligations under EU law). Therefore, national procedural provisions that impact the exercise of rights granted by EU law fall within the scope of the Charter, regardless of whether they were adopted for that specific purpose or not.

2.4 National provisions on penalties applying to failure to perform EU law obligations

Increasingly, EU law measures require Member States to lay down effective, proportionate and dissuasive penalties for the infringement of the specific obligations laid down by those measures, or by the implementing legislation.

Member States can comply with this obligation by adopting specific penalties, which must meet the requirements for safeguarding the fundamental rights enshrined in the Charter. Nonetheless, Member States may also decide to rely on penalties already provided for in their domestic legislation for (comparable) breaches at national level. In this case, the Charter can be invoked only when the penalties are applied to the infringement of an obligation deriving from EU law.

Example

The following example is taken from the Court of Justice's ruling of 26 February 2013 in Case C-617/10 Åkerberg Fransson

A Swedish fisherman gave false information on the payment of tax in his annual income tax declaration, with the resulting risk of a loss of revenue for the national exchequer in terms of income tax and value added tax (VAT) collected. Under the national legislation, a tax offence of this nature can give rise to both administrative and criminal proceedings, which can result in a tax surcharge and a criminal penalty being handed down for the same acts. After the administrative proceedings against him, the man was summoned to appear before a criminal court. However, the court raised doubts as to the compatibility of the national legislation with the ne bis in idem principle enshrined in Article 50 of the Charter (namely, the prohibition on punishing someone twice for the same offence).

The Court of Justice held that it had jurisdiction to review the national legislation in the light of Article 50 of the Charter since Member States are under an obligation to take all legislative and administrative measures appropriate to ensure collection of all the VAT due on their territory and for preventing evasion. This obligation is laid down, inter alia, in Articles 2, 250(1) and 273 of Directive 2006/112/EC on the common system of valued added tax.

The Court of Justice did not view the fact that the national legislation was not adopted in order to transpose the Directive (it dated back to before Sweden's accession to the EU) as an obstacle to application of the Charter. It emphasised that the national provisions in question, irrespective of the objective attributed to them originally by the legislative instances, had the effect of implementing the obligation under EU law to impose effective penalties for conduct prejudicial to the financial interests of the European Union.

In addition, the fact that the national legislation did not only concern VAT-related offences did not preclude the application of the Charter. The Court of Justice pointed out that Article 325 TFEU obliges Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests.

2.5 Application by a national authority of EU law provisions or of national provisions implementing them

The obligation of Member States to implement EU law in a manner consistent with EU fundamental rights does not concern legislative instances alone, it also applies to the national authorities entrusted with enforcing the law within Member States. Therefore, national courts and administrative authorities must apply (or interpret) rules of EU law in a manner consistent with EU fundamental rights.

This has been established in the settled case-law of the Court of Justice, according to which 'it is for the authorities and courts of the Member States... to make sure they do not rely on an interpretation [of EU law, or of the national provisions implementing it] which would be in conflict with the fundamental rights protected by the Community legal order' (Case C-101/01 Lindqvist paragraph 87).

Example

This example is based on the Court of Justice's order of 8 May 2014 in Case C-329/13 Stefan

Mr Stefan's properties were seriously damaged following flooding of the river Drava. He therefore sent a request to the competent Austrian authority seeking information relating to management of the river's water levels. The request was rejected on the ground that disclosure of the information sought could adversely affect pending criminal proceedings against the keeper of the river's locks and compromise the prospect of a fair trial for that person.

According to Article 4(2)(c) of Directive 2003/4/EC on public access to environmental information, Member States are allowed to provide for the refusal of a request for disclosure of environmental information, where such disclosure would adversely affect the course of justice or the ability of any person to receive a fair trial.

Mr Stefan appealed against the refusal. The national court found that his request could not be refused, since Austria's legislative instances had made no provision for the optional derogation referred to above in the domestic legislation implementing the Directive.

In this respect, the national court raised doubts as to the compatibility of the legislation with the right to a fair trial as guaranteed by Article 47(2) of the Charter and decided to submit a reference for a preliminary ruling to the Court of Justice. The Court of Justice pointed out that all authorities of the Member States, including the administrative and judicial bodies, must ensure respect for the rules of EU law, including EU fundamental rights, within their respective spheres of competence. Accordingly, since the domestic legislative instances did not provide for the exception referred to in Article 4(2)(c) of the Directive when transposing it into domestic law, the authorities responsible for implementing the domestic rules are required to avail themselves of the discretion conferred on them by the provision in a manner consistent with Article 47(2) of the Charter.

2.6 National provisions specifying notions contained in EU measures

European Union acts sometimes include a section that provides definitions of certain notions and terms used with the legislative act itself. Where such definitions are provided, these notions and terms have an autonomous and standardised meaning under EU law; in case of doubt, the Court of Justice has the power to interpret them.

In contrast, other EU acts refer to definitions endorsed by each Member State. This means that the EU legislative instances wish to respect the differences between Member States over the meaning and exact scope of the concepts in question. Nonetheless, the Court has made it clear that the lack of a separate definition in EU law does not mean that Member States can adversely affect the effective pursuit of the objectives laid down by the EU act in question, in such a way as to fail to fulfil their obligation to put the act into effect in a manner consistent with EU fundamental rights. Consequently, domestic provisions providing definitions of notions or terms contained in an EU act implement EU law within the meaning of Article 51(1) of the Charter.

Example

This example is based on the Court of Justice's judgment of 24 April 2012 in Case C-571/10 Kamberaj

The rules in one Italian province governing the granting of housing benefit provided for different treatment of long-term, legally resident, third-country nationals compared to EU citizens (whether Italian or not) residing in the province concerned. The attribution of funds was based on a weighted average of the number of people in and the requirements of the two groups (determining the available funds). However, whereas the multiplier used for these parameters with respect to Italian and EU citizens was 1, the number of people used in the weighted average for third-country nationals was subject to a multiplier of 5 (leading to a significantly lower level of funds to be attributed to that category).

Mr Kamberaj, a third-country national who had lived in the province for a long time, challenged a decision to refuse his request for housing benefit. The national court expressed doubts about the compatibility of the provincial law in question with Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents. After finding that the mechanism for allocating the funds led to a difference in treatment between the two categories, the Court of Justice looked into whether it fell within the scope of Article 11(1)(d), which provides for equal treatment between EU citizens and third-country nationals who are long-term residents with respect to 'social security, social assistance and social protection as defined by national law'.

The Court of Justice acknowledged that the reference to national law definitions suggested that the EU legislative instances wished to respect the differences between Member States concerning the meaning and exact scope of the concepts in question. Nonetheless, it also pointed out that Member States cannot undermine the effectiveness of the principle of equal treatment as laid down in the Directive. The Court of Justice further held that Article 11(1)(d) must be read in the light of Article 34(3) of the Charter, on the basis of which the European Union 'recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices'. It consequently concluded that the national court should verify whether the housing benefit in question corresponded to the objective laid down in Article 34(3) of the Charter. If that was the case, the housing benefit should be regarded as falling within the scope of application of the principle of equal treatment laid down in the Directive.

2.7 National provisions based on a derogation granted by EU law

In some instances, EU law allows Member States to derogate from the obligations contained within its provisions. One of the most relevant examples concerns the law on free movement. In this field, the EU Treaties and the EU legislation implementing the Treaties set out the grounds that may justify national provisions restricting the fundamental freedom concerning the movement of goods, capital and services and the free movement of EU citizens. For example, the free movement of EU citizens can be restricted on the grounds of public health, public order or public security under Directive 2004/38/EC (the EU Citizenship Directive). A restrictive national measure that is based on one of those grounds can only be justified if it is consistent with EU fundamental rights.

Example

The following example is based on the Court of Justice's ruling of 23 November 2010 in Case C-145/09 Tsakouridis

Directive 2004/38/EC lays down the conditions on and limits to the right of EU citizens and their family members to move and reside freely within the territory of Member States. As far as the right of EU citizens is concerned, the Directive puts into effect Article 21(1) TFEU, which confers on any EU citizen the right to reside freely 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

According to Article 27 of the Directive, the freedom of movement and residence of an EU citizen residing in another Member State can be restricted only on the grounds of public policy, public security or public health. Article 28 goes on to state that, if the EU citizen has acquired a right of permanent residence in the territory of another Member State (i.e. after legally residing in that State for a continuous period of five years), a measure of expulsion can only be adopted on 'serious grounds' of public policy or public security. 'Imperative grounds' are necessary in order to expel a Union citizen who has resided in the host Member State for the previous ten years.

In the Tsakouridis case, a German court asked the Court of Justice for guidance on interpreting such grounds in order to assess whether and to what extent criminal offences in connection with dealing in narcotics as part of an organised group could justify an expulsion measure against an EU citizen. The Court of Justice stated that, in principle, offences of that nature can come within the scope of public security.

However, it also pointed out that the national court needed to assess whether, in the specific case, the consequences of the expulsion would be proportionate to the legitimate object sought by that measure.

According to the Court of Justice, reasons of public interest could be relied upon to justify a national measure that limits the exercise of the freedom of movement of EU citizens only if that measure was compatible with the fundamental rights under the Charter, and in particular the right to respect for private and family life under Article 7. The national court should therefore take into account the solidity of the social, cultural and family ties of the EU citizen concerned with the host Member State.

2.8 National provisions that directly affect areas governed by EU law

In two cases decided shortly after the entry into force of the Lisbon Treaty (the rulings handed down on the references for preliminary rulings – Case C-555/07 *Kücükdeveci* and Case C-441/14 *Dansk Industri*), the Court of Justice applied the Charter to national provisions aimed at regulating an area governed by an EU Directive, even though these provisions had not been adopted with the purpose of implementing the Directive in question (as they predated the Directive) nor did they give it actual effect (indeed, they ran counter to the Directive). When the actions underlying the cases took place, the deadline for transposition of the Directive had expired and the cases entered into the scope of application of the Directive ratione personae and ratione materiae, so there were grounds for applying the Charter.

Example

This example is drawn from the Court of Justice's ruling of 19 January 2010 in C-555/07 Kücükdeveci

Ms Kücükdeveci, an employee, complained of the contradiction between Directive 2000/78/EC and Article 622(2) of Germany's Civil Code. Under the national provision, periods of work performed by employees before their 25th birthdays did not have to be taken into consideration when calculating the notice period that applied in the event of their dismissal. Consequently, her notice period was calculated as if she had worked for the company for only three years, when she had worked there for ten.

The national provision had not been adopted to implement the Directive (it predated the EU measure) and it could not be regarded as a measure of which the actual effect was to bring the Directive into force (on the contrary, it was a direct obstacle to it). Having noted that the alleged discriminatory behaviour took place after the deadline for transposition of the Directive, the Court stated that, 'On that date, the Directive had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by the Directive, in this case the conditions of dismissal'.

This type of connection is of particular practical significance when the dispute involves only private parties (i.e. is horizontal) and centres on differences between a domestic law provision and one contained in an EU Directive laying down an EU fundamental right. If the appropriate provision of the Charter meets the conditions in order to have direct effect (see Part II, section 2 and Part III, section 7), the national court can rely on the Charter in order to disapply national provisions contrary to it, thereby remedying the lack of horizontal effect of the Directive.

3. The role of national sources of protection in applying the Charter

When a case concerns a national act which implements EU law (see Part II, section 2), the Charter may apply. However, this does not mean that domestic sources of protection, in particular, constitutions, have no role to play.

Article 53 of the Charter states: '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 Member States' constitutions'.

Clearly, where the specific level of protection is provided by the Charter, it overrides the national constitutional provisions of Member States (see Case C-399/11 *Melloni*). In contrast, if the Charter is silent on the specific level of protection, then domestic standards can apply, provided that two conditions are met.

First, the application of domestic standards must not compromise the level of protection provided by the Charter. Second, the 'primacy, unity and effectiveness' of EU law must be ensured. See, for instance the rulings handed down in the references for preliminary rulings in Case C-168/13 PPU Jeremy F and C-617/10 Åkerberg Fransson.

If there is any doubt as to whether these two conditions are satisfied, a national court can issue a reference for a preliminary ruling, asking the Court of Justice to provide interpretation of the EU law provisions concerned.

4. The distinction between 'rights' and 'principles'

As mentioned in Part I, section 3, the fundamental rights of the EU act as **parameters for interpretation** and **of the validity** of the acts adopted by the institutions, bodies and agencies of the EU. In addition, they constitute parameters of compatibility for national acts with the law of the EU within its scope of application.

Article 52(5) of the Charter states: 'The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in ruling on their legality'.

In order words, Article 52(2) outlines a scheme of limited judicial review for the provisions of the Charter which contain 'principles' as opposed to 'rights'. This is apparent from the corresponding explanation: 'Paragraph 5 clarifies the distinction between 'rights' and 'principles' set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by Member States only when they implement Union law); accordingly, they become significant for the courts only when such acts are interpreted or reviewed. They do not, however, give rise to direct claims for positive action by the Union's institutions or Member States' authorities'.

Nevertheless, the precise extent of the scope of application and the effects of Article 52(5) of the Charter are unclear.

In terms of ***scope***, there is no list enumerating the Charter's principles. The explanation for Article 52(5) provides only a few examples. In addition, it points out that some of the provisions of the Charter may contain both elements of a 'right' and of a 'principle'. 'For illustration, examples for principles recognised in the Carter include e.g. Articles 25 [the rights of the elderly], 26 [Integration of persons with disabilities] and 37 [environmental protection]. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23 [equality between women and men], 33 [family and professional life] and 34 [social security and social assistance]'.

In terms of ***legal effects***, the 'principles' cannot be invoked directly by individuals to prevent the implementation of contrary national provisions (see Part II, section 1 and section 7).

It is not clear whether 'principles' can act as parameters of interpretation and validity for *any* provisions of the European Union or national act falling within the scope of the Charter or whether they can only aid in the interpretation of EU and national legal provisions aimed at directly implementing 'principles'. To date, the Court of Justice has referred to Article 52(5) in only one case: Case C-356/12 *Glatzel*, concerning Article 26 of the Charter on the 'Integration of persons with disabilities'. In that case, however, no definitive answer was given to the problematic elements referred to above.

Doubts on the legal effect of the Charter's principles can be addressed by submitting a reference for a preliminary ruling to the Court of Justice.

5. The interpretation of the fundamental rights granted by the Charter: the Explanations

In order to determine the protection afforded by the fundamental rights in the Charter, it is helpful to consult the official Explanations to the Charter. According to Article 52(7) of the Charter, the Explanations were 'drawn up as a way of providing guidance in the interpretation of this Charter' and 'shall be given due regard by the courts of the Union and of the Member States'.

In particular, the Explanations indicate the source(s) of inspiration for each of the Charter's fundamental rights: for instance, the ECHR, the European Social Charter, the constitutional traditions of the Member States, etc.

This indication is of particular importance since Title VII of the Charter lays down specific rules of interpretation, depending on the source of inspiration of the fundamental right concerned. In particular, there are different rules on the interpretation of the Charter's provisions that correspond to fundamental rights enshrined in the ECHR and of the Charter's provisions acknowledging fundamental rights deriving from the constitutional traditions of Member States (see Article 52(3) and 52(4) and the corresponding Explanations).

5.1 Rights in the Charter corresponding to rights guaranteed by the ECHR

Article 52(3) of the Charter states that: 'in so far as this Charter contains rights which correspond to rights guaranteed by [the ECHR], 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'.

In other word, the ECHR represents a minimum *standard* of protection insofar as 'corresponding rights' are concerned. Accordingly, all EU acts, as well as national legal provisions that implement EU law must provide a level of protection to corresponding rights consistent with the ECHR. In the event of a doubt, there are grounds for submitting a reference for a preliminary ruling (on the validity or interpretation of the EU law provisions concerned depending on the circumstances).

The official explanation of Article 52(3) provides some help in identifying the corresponding rights. It contains two lists, one enumerating the Articles of the Charter with 'the [same] meaning and scope... as the corresponding Articles of the ECHR' and one with 'the same [meaning] as the corresponding Articles of the ECHR, but... wider (scope)'.

The two lists are not exhaustive: they reflect the current state of evolution of the law and remain open to 'developments in the law, legislation and Treaties'. Indeed, some additional corresponding rights can be identified.

For instance, the explanation of Article 49(1) of the Charter states that this provision corresponds to Article 7(1) ECHR, with the exception of the principle of retroactivity of the subsequent law providing for a lighter criminal penalty, which can be found in the last part of the Charter's provision. In its 2009 ruling in the case of Scoppola v. Italy (No 2), the ECtHR, quoting Article 49(1) of the Charter, interpreted Article 7(1) ECHR as also encompassing the principle of the retroactivity of national law that provides for a lighter criminal penalty.

The explanation concerning Article 52(3) of the Charter provides some additional useful indications:

the scope and meaning of the corresponding rights must be determined by taking into consideration the text of the ECHR and of its Protocols, as interpreted by the ECtHR;

where corresponding rights in the ECHR encompass limitations, they must also be respected in interpreting the Charter;

similarly, where there are no limitations on ECHR rights, there can be no limitations on those rights under the Charter either.

5.2 The role of common constitutional traditions

Article 52(4) of the Charter states:

'In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions'.

The corresponding explanation points out that 'The rule of interpretation contained in paragraph 4 has been based on the wording of Article 6(3) of the Treaty on European Union and takes due account of the approach to common constitutional traditions followed by the Court of Justice (e.g. Judgment of

13 December 1979 in Case 44/79 *Hauer* [1979] ECR 3727; Judgment of 18 May 1982 in Case 155/79 *AM&S* [1982] ECR 1575). Under that rule, rather than following a rigid approach of a "lowest common denominator", the Charter rights concerned should be interpreted in a way offering a high standard of protection, which is adequate for the law of the Union and in harmony with the common constitutional traditions'.

Unlike the one for Article 52(3), the explanation for Article 52(4) does not provide a list of the fundamental rights in the Charter which derive from the constitutional traditions of the Member States. Some indication in this respect is provided by the explanations of the Charter's substantive provisions. The explanation of Article 20 on 'Equality before the law', for example, reads as follows: 'This Article corresponds to a general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law (judgment of 13 November 1984, Case 283/83 *Racke* [1984] ECR 3791, judgment of 17 April 1997, Case C-15/95 *EARL* [1997] I-1961 and judgment of 13 April 2000, Case C-292/97 *Karlsson* [2000] ECR 2737)'.

It might be argued that the scope of Article 52(4) of the Charter encompasses more provisions than those which, according to their explanations, reflect the Member States' constitutional traditions. It is particularly helpful to look at the case-law on the general principles of EU law (see Part I, section 2.3), since the Court of Justice took inspiration from the Member States' constitutional provisions to identify and construct those principles.

The effects of the rule of interpretation laid down by Article 52(4) of the Charter are not particularly clear. To date, the Court of Justice has not handed down any judgments that clarify them. What is clear, however, is that there is no rule of maximum protection: there is no indication that the scope of the Charter's protection automatically corresponds to that of the Member State constitution offering the most extensive protection. Instead, it is understood that 'the interpretation of those fundamental rights [should] be ensured within the framework of the structure and objectives of the EU' (Opinion 2/13, paragraph 170). That structure includes respect for the constitutional traditions of the Member States.

6. When the Charter's fundamental rights can be limited

Article 52(1) of the Charter sets out the conditions governing the admissibility of limitations to the Charter's fundamental rights. 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

Although it is not mentioned in Article 52(1) of the Charter, there can be no limitations on certain fundamental rights. Since the ECHR acts as a minimum standard of protection, by virtue of Article 52(3) of the Charter (see section 5.1), fundamental rights that are characterised as absolute rights under the ECHR (such as the right to life, or the prohibition of torture, inhuman and degrading treatment) cannot be limited under the Charter either.

To test the admissibility of a limitation to one of the fundamental rights set out in the Charter, the following questions must be asked:

can the fundamental right at issue be limited?

If yes, does the limitation respect the essence of the fundamental right?

If yes, does it genuinely meet the objectives of general interest recognised by the European Union? In the alternative, does it serve the purpose of protecting the rights or freedoms of others?

If yes, is the limitation proportionate? (This means that the limitation must be appropriate to the objective pursued)

If yes, is the limitation necessary? (This means that the limitation must achieve the objective pursued without causing more interference than needed with the fundamental right concerned).

Some useful guidance on the way that this assessment should be conducted is provided by Annex IV to the EU Council's '*Guidelines on methodological steps to be taken to check fundamental rights' compatibility at the Council preparatory bodies*', drawn up by the Council of the European Union in 2014.

As regards the Court of Justice's case-law, *Case C-92/09 Volker und Markus Schecke* provides a clear illustration of the *test* set out in Article 52(1) in action.

7. More on the Charter's effects at national level

When a national measure is in conflict with the Charter, the national court should, as a first step, check whether the national measure at issue can be interpreted in accordance with the Charter (I). If this does not prove possible, the national court should then consider whether the provision of the EU Charter concerned satisfies the requirements to have direct effect (II). Ultimately, the person claiming the breach of a fundamental right can sue the Member State concerned for damages (III). A good illustration of the specific conditions and limits of the three ways of providing protection listed above, as well as the logical order in which they should be invoked, is provided in the judgement in Case C-441/14 Dansk Industri (DI).

I - Interpretation of national law in accordance with EU law

In order to solve conflicts, national courts should take into consideration the whole body of rules under national law and apply the methods of interpretation recognised by those rules. Where possible, they should interpret the **national provision concerned in the light of** the wording and purpose of the EU provisions that are relevant to the case.

For instance, in Case C-149/10 Chatzi, a Greek court asked the Court of Justice to clarify the meaning of Article 2(2) of the Framework Agreement on Parental Leave (set out in Directive 96/34/EC) in the light of Article 24 of the Charter (the rights of the child). The referring court doubted the compatibility of the national legislation implementing the Agreement with the Charter, insofar as it granted mothers of twins a single period of parental leave.

The Court of Justice held that the national measure **was not in conflict** with Article 24 of the Charter. However, it stated that, in order to ensure respect for **the principle of equality before the law**, granted by Article 20 of the Charter, the Member States must take the necessary measures to take into account the specific situation of parents of twins. Indeed, their situation differs from that of parents of single children and that of parents of children with only a small gap in age between them (who can therefore benefit from two distinct periods of parental leave).

Accordingly, the Court of Justice answered the question raised by the Greek court as follows: '[The Framework Agreement], read in the light of the principle of equal treatment... obliges the national legislature to establish a parental leave regime which, according to the situation obtaining in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs. It is incumbent upon national courts to determine whether the national rules meet that requirement and, if necessary, to interpret those national rules, so far as possible, in conformity with European Union law'.

II – Direct effect of the Charter's fundamental rights and disapplication of the conflicting national law provisions

According to the settled case-law of the Court of Justice, where the provisions of EU law are clear, precise and not subject to conditions, they can be relied on by legal and natural persons before their national courts to obtain the disapplication of conflicting national provisions. This is known as the direct effect of EU law. The direct effect can be vertical or horizontal depending on whether it is relied upon in the context of proceedings between a natural or legal person and a Member State (vertical direct effect), or in disputes between private parties (horizontal direct effect).

It is worth noting that, for the purposes of vertical direct effect, the Court of Justice has endorsed a broad notion of 'State', which encompasses the legislature, the executive and the judiciary, and any central and local public authorities. It also includes 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals' (see, for instance, Case C-282/10 Dominguez).

In *Case C-176/12 Association de médiation sociale* (*AMS*), the Court of Justice stated that the Charter could have horizontal direct effect in certain circumstances. It held that the principle of non-discrimination on the grounds of age enshrined in Article 21(1) of the Charter had horizontal direct effect and could be relied on directly to disapply a conflicting national provision, because it is 'sufficient in itself to confer on individuals an individual right which they may invoke as such'.

The following indications may be inferred from the judgment in the *AMS* case:

a conflict between national law and the Charter leads to the disapplication of national law where the Charter's provision at issue is sufficient in itself to confer an individual right which can be invoked as such (that is without the need for implementing measures at either EU or national levels);

in such circumstances, the direct effect of the Charter's provision can be invoked not only in vertical but also in horizontal proceedings (as was the case in the *AMS* case);

Article 21(1) of the Charter satisfies the requirements for direct effect, at least as regards non-discrimination on grounds of age. Arguably the same is true of other grounds of non-discrimination referred to in the provision;

Article 27 of the Charter on the rights of workers to information and consultation within the undertaking has no direct effect: the Court excluded it in the *AMS* case;

If the case at issue involves a different provision of the Charter, it might be worthwhile asking the Court of Justice to establish whether it satisfies the *AMS test* (although national courts which hand down judgments that are not final are under no obligation to submit references for preliminary rulings).

III – Action for damages against a Member State for breach of EU law

When it proves impossible to interpret a national law in accordance with the Charter and there is no direct effect, the victim of a violation of an EU fundamental right may bring an action for damages against the Member State concerned for breach of EU law.

Although the action for damages must be brought before the competent national court based on the national rules of procedure applying to similar actions, the conditions which must be met have been laid down in a uniform manner by EU law; moreover, national procedural rules must comply with the right to effective judicial protection as enshrined in Article 47 of the Charter, as well as the principles of equivalence and of effectiveness as devised by the Court of Justice. In the event of doubt as to the compatibility of the national rules with the parameters of EU law referred to above, the national court could suggest reference to the Court of Justice for a preliminary ruling (see, in this respect, the preliminary ruling in Case C-279/09 DEB).

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