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The Scope of Application of the Charter of Fundamental Rights of the European Union – Quo Vadimus?

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Abstract

The Lisbon Treaty has brought about fundamental changes to the structure of the EU. One of the most important changes is the conversion of the Charter into a legally binding "bill of rights" for the EU. Since the Charter has become legally binding, discussion has arisen concerning the Charter's scope of application. In 2013, the European Court of Justice gave its ruling in case C-617/10 Åkerberg Fransson, which concerned the clarification of Article 51(1) of the Charter. The standpoint of the CJEU was that the article must be interpreted as meaning that the Charter is addressed to the Member States when they are acting "within the scope of European Union law". In dealing with Åkerberg in a coordinated way, the CJEU took a conscious first step towards developing a general theory on how to apply the Charter. Through its recent preliminary rulings, the CJEU has attempted to close the gap by interpreting the notion of "implementing Union law" broadly, thereby clarifying the mixture of different wordings, making it possible to more easily predict the Charter's scope of application in a particular case. The Charter may be a powerful tool when integrating fundamental rights into new EU legislation. However, whether it can be considered to have been successful in practice leaves some room for doubt.

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Full Article

> *"As you can see, at EU level, the Charter has evolved into a powerful tool. Evidently, not all is perfect yet. Even the best fundamental rights assessment may come to incorrect conclusions. However, it can certainly no longer be said that the EU institutions do not take fundamental rights seriously. The Charter and a very active approach from the Commission to promote its application have made sure that today fundamental rights play a key role in the development of new EU policies and proposals."*
>
> Viviane Reading
> Vice-President, European Commission
> Commissioner of Justice, Fundamental Rights and Citizenship[2]

1 Introduction

1.1 The Purpose of this Article

The application of EU law according to Article 4(3) TEU is a principle that the national courts have accepted, but which also poses difficulties when applied by national courts and administrative bodies. This article focuses on the implementation and application of the Charter on Fundamental Rights of the European Union[3], in other words what Article 51 regulating the scope of application of the Charter signifies in practice, and the role of the CJEU.

This article includes an examination of the background of the Charter, in particular Article 51 (Chapter 2), followed by a presentation of important case law of the CJEU, and finally an analysis of theoretical problems concerning e.g. terminology when interpreting the Charter and the role of the CJEU (Chapter 3). The article finishes with brief conclusions (Chapter 4).

1.2 A Description of the Question at Issue

The Lisbon Treaty has brought about fundamental changes to the structure of the EU. One of the most important changes is the conversion of the Charter into a legally binding bill of rights for the EU[4], and the official

2 Speech delivered in Tallinn, 31 May 2012.
3 The Charter of Fundamental Rights of the European Union, 2010/C 83/02 ("the Charter").
4 Article 6(1) TEU.

mandate for the EU to accede to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[5]. It is thus affirmed that fundamental rights constitute general principles of EU law as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States. These advances have given the Union a strengthened fundamental rights mandate that has provided the basis for the emergence of a new "fundamental rights architecture"[6], and contributes to the visibility and better protection of fundamental rights within the EU.[7]

Although the Charter has become part of primary EU law, the scope of application of the Charter is limited in a significant way, viz. the Charter becomes applicable on a national level only when EU law is in question. Given the importance of being able to run Charter arguments, the most important issue will be determining whether the Charter applies in certain situations on national level.[8] In other words, the question arises on whether an EU norm is applicable in a particular case or not.

The scope of application is regulated in Article 51(1) of the Charter. According to the article the Charter applies to the institutions, bodies, offices and agencies of the Union and to Member States, but it applies to Member States "*only* where they are *implementing* European Union law" (author's emphasis). This means that only when Member States are acting pursuant to directives or regulations they must act in accordance with the Charter. However, the borderline between EU law and national law is not always easy to establish in a case *in concreto*. According to the recent case Åkerberg *Fransson*[9], the notion of the implementation of EU law seems to correspond with the scope of application of EU law. Another recent case, *Melloni*[10], has also brought about some further precisions. When Åkerberg *Fransson* ap-

5 Article 6(3) TEU.
6 Carrera *et al.*, p. 2.
7 Skouris, p. 7.
8 The Commission does not have the power to intervene as guardian of the Treaties, and it is left to the Member States to apply their own systems to protect and ensure compliance with fundamental rights through their national court systems (COM (2010) 573 final).
9 Judgment of 26 February 2013 Åklagaren *vs* Åkerberg *Fransson*, case C-617/10 (2013).
10 Judgment of 26 February 2013, *Stefano Melloni vs Ministerio Fiscal* (*Melloni*), case C-399/11.

pears to confirm a fairly broad but still limited conception of the Charter's scope of application on national level, case *Melloni* brought some interesting clarifications concerning the coexistence of European and national standards on the protection of fundamental rights and the scope of application of the Charter. These two decisions shed some light on the notion of application on a national level, as well as clarify the mixed wordings in the Article 51 of the Charter and the explanations behind them.[11]

The upholding of fundamental rights by Member States when they implement EU law is in the common interest of all the Member States because it is essential to the mutual trust necessary for the smooth operation of the EU. This principle is particularly important in view of the expansion of the EU *acquis* in areas where fundamental rights are especially relevant, such as the area of freedom, security and justice, non-discrimination, EU citizenship, the information society and the environment.[12] The CJEU has been placed at the heart of the new architecture on fundamental rights, and can be regarded as one of its key guarantors.

The adoption of the draft Charter was a major achievement as neither agreeing on the scope of *ratione materiae* of the instrument, nor reaching a compromise on the most central horizontal questions, was easy.[13] The issue now lies in the definition of to what extent the Charter should bind the Member States. This task was a politically challenging exercise. Among other issues, the relation between the Charter and other sources of fundamental rights (including the ECHR[14] and the Member States' Constitutions), the level of protection to be ensured, as well as the possibility of providing for limitations to the rights to be codified by the instrument, were extensively de-

11 Platon, p.1.
12 COM (2010) 573 final, p. 9.
13 The draft Charter was adopted in less than one year, in October 2000. See Kaila, p. 294.
14 On the structure and background of the ECHR, see e.g. Mowbray, A. Cases, Materials, and Commentary on the European Convention on Human Rights (3rd ed. 2011). The book, however, does not touch on the subject of the relationship between the Charter and the ECHR.

bated. The provisions of the Charter governing its scope of application are thus the result of a delicate compromise. The formulation of Article 51(1) has resulted in different interpretations, and the academic opinions are undoubtedly divided.[15]

2 The Scope of Application of the EU Charter

2.1 An EU Bill of Rights?

The question on whether the Charter constitutes a kind of bill of rights for the European Union has been thrown around with the background in a federalist association. This would essentially signify that the Charter constitutes a roof of fundamental rights over all Member States, and would make national fundamental rights legislation superfluous. This line of thought has been criticized, since the Charter, as pointed out many a time in legal literature, is not meant to replace national fundamental rights. The Charter in the sense of a true bill of rights in the EU would also mean an extensive workload for the Commission, acting as the central authority for fundamental rights cases for all Member States. After all, the EU of today is not a European federal state.[16]

However, to reach the European citizens on a national level it may be a positive thing to 'market' the Charter and its complementing purpose in a way that is historically relatable, and to strengthen a collective European identity. The CJEU's role as a "constitutional court" has been secured as the authoritative interpreter of the Charter rights. As a result, the Court will occupy (and has already occupied) a very strong place within the rights-based constitutionalism in Europe.[17] In any case, the term has been used in legal literature describing the Charter, and seems to be rather accepted among commentators in the sense that it symbolizes the change from the Charter as a non-binding document to a legally binding bill of rights.[18]

15 Kaila, p. 293. On the debate regarding the EU as a centre for human rights and the role of the CJEU prior to the adoption of the Charter, see e.g. von Bogdandy, pp. 1307–1338.
16 Vivane Reading for one has criticised the comparison of the Charter with a U.S style federal bill of rights.
17 Sweet, p. 153.
18 See e.g. Skouris, p. 7.

2.1.1 The Background of the Charter

The position of the fundamental and human rights was in the beginning open and unclear in the European integration process. In the 1957 TEC there was not even a wind of wording of any fundamental or human rights, not to mention inclusion in any register in the national constitutions. This omission can best be attributed to the drafters' vision of the nature of the institution being created, one of limited competence and economic purposes.[19] Human rights were to be protected by the Member States' national constitutions and laws. However, some of the regulations in the Treaty had some obvious connecting links with the fundamental rights, e.g. the articles on the prohibition against discrimination based on nationality and the right to equal wages for men and women.[20]

In the end of the 1950s and in the beginning of the 1960s, the CJEU ruled in a few cases that projected an exceedingly restrictive attitude towards fundamental rights, which in turn led to a discussion concerning the role of fundamental rights in the European integration.[21] The priority of EC law in situations of conflict however caused some anxiety especially in Germany[22] and Italy, concerning e.g. the effect this would have on the constitutional fundamental rights in the Member States.[23] The 1970s witnessed a focus on the ECHR, which was referred to by the CJEU for the very first time in 1975.[24]

The introduction of a fundamental rights regime into EU law is essentially a story of judge-made law, and has been characterized as an exercise of bold

19 Defeis, p. 1107.
20 Ojanen, p. 82.
21 The breakthrough came with the case *Costa vs Enel* in 1964, when the ECJ for the first time laid down the priority of EC law in situations of conflict.
22 The German doubt concerned the lack of a written register of fundamental rights that was characteristic for the Member States' constitutions. Thus the German constitutional court initiated the discussion concerning the question whether a separate catalogue of fundamental rights should be incorporated into the EC Treaties.
23 Ojanen, p. 82.
24 Ojanen, p. 83. Noteworthy is also that the ECJ did not refer to the case law of the ECtHR until the end of the 1990s, although the content of the ECHR often does not become clear until examining the case law of ECtHR.

judicial activism.[25] This largely means that the recognition of fundamental rights has become binding EU law through judgments given by the CJEU. The fundamental and human rights clauses have gradually been incorporated in the TEU and the TEC, and consequently, development has shown a gradual conjunction between EU law and the ECHR.[26] Some commentators have suggested that the fundamental rights doctrine of the CJEU was primarily motivated by the court's desire to protect the supremacy doctrine expressed by the court from being rejected at the national level.[27]

The developments in case law as well as Treaty law initiated a need to codify the main fundamental rights that stem from the constitutional traditions and international conventions common to the EU. The codification was aspired in order to ensure effectiveness and provide a true bill of rights for the authorities and citizens instead of having to search through thousands of pages of court decisions and a variety of legal and political texts.[28] With the Charter, the EU has equipped itself with quite a wide range of fundamental rights on different levels, updated in accordance with changes in society, and scientific and technological developments.

2.1.2 Scope of Application of the Implementation Stipulation

The Charter applies primarily to the institutions and bodies of the EU. It therefore concerns in particular the legislative and decision-making work of the Commission, Parliament and the Council. The legal acts of these institutions and bodies must be in full conformity with the Charter. The scope of application of the Charter is stipulated in Article 51(1), which reads as follows:

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

25 Weiler, p. 1005. For criticism on the CJEU's judicial activism, see *e.g.* de Waele, Henri: 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment', *Hanse Law Review,* 6(1) (2010), pp. 18–22.
26 Rosas (2012), p. 1271.
27 Weiler, p. 1137.
28 *Ibid*.

> 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

The scope (or field) of application has been deliberately limited. According to the article, the first and primary addressees of the Charter are the Union institutions themselves, as national fundamental rights law does not bind them. The Charter applies to the Member States *only* when they are implementing EU law. This wording is very restrictive. In other words, it does not apply in situations where there is no link to EU law.[29] It should, however, be noted that the earlier case law of the CJEU as well as the Explanations[30] relating to the Charter refer to both "implementing" EU law and acting within "the scope of" EU law.[31] As Article 51(1) of the Charter refers to a situation of "implementing" Union law, there has been much discussion on whether this expression is more restrictive than the "scope" or "field of application" of EU law.[32] Noteworthy is also the dissimilarity in the different language versions of the Charter and the use of the verb "implement"; e.g. in Swedish "*tillämpa*", in Finnish "*soveltaa*" in comparison with "implement" in English and *"mise en oeuvre*" in French.

If a certain question does not fall under the scope of application of EU law, the EU fundamental rights are not binding for the authorities and courts of a Member State, and these are expected to follow both the fundamental rights in the constitution, and the international fundamental rights regulations. In these cases the CJEU is not competent to examine the question whether a Member State's constitutional law is consistent with the fundamental rights of the EU or not, if the case does not fall under the scope of application of EU law.

29 Rosas 2012, p. 1277.
30 OJ [2007] C 303/17.
31 In the Explanations relating to the Charter, reference is made both to the case law of the ECJ stating that the requirement to respect fundamental rights is binding on the Member States "when they act in the scope of Union law" and to cases using the notion of "implementation". In any event, the reference to implementation was not meant to exclude situations where Member States apply Union legal norms directly, including situations where they invoke derogations from such norms, in other words including situation where there is no separate national implementing act (COM (2010) 543 final).
32 Rosas 2012, p. 1276.

Article 51(2) of the Charter states that it does not extend the field of application of EU law beyond the powers of the EU or establish any new power or task for the EU, or modify powers and tasks as defined in the Treaties. Before the Charter, implementing EU law referred to an "agency situation"[33]: the EU confers a power onto a Member State to introduce EU secondary legislation into national law. Implementing was the giving of "hands and feet" to EU law in order for it to become effective.[34] The classic reasoning in the field of protection of fundamental rights has therefore changed[35], and from now on, the CJEU uses a starting point in the Charter itself, no longer the common constitutional traditions, and the ECHR.[36]

Direct effect refers to whether individuals can rely on the EU law in domestic courts.[37] The doctrine of direct effect applies in principle to all binding EU law including the Treaties, secondary legislation, and international agreements.[38] The meaning of direct effect remains contested. In a broad sense it means that provisions of binding EU law which are sufficiently clear, precise, and unconditional to be considered justiciable can be invoked and relied on by individuals before national courts. There is also a narrower concept of direct effect, which is defined in terms of the capacity of a provision of EU law to confer rights on individuals.[39] The notion of direct effect should be kept apart from the notion of direct applicability, which explains whether an EU law needs a national parliament to enact legislation to make it law in a Member State. Treaties and regulations are vertically and horizontally directly effective. Either a Treaty or a Regulation can be used as a piece of law in a Member State court against the state or another individual.

Thus, the Treaty of Lisbon has introduced some major procedural reforms, the most important of which is said to be an easing of the conditions for the admissibility of actions brought by individuals against regulatory acts of

33 See e.g. Groussot *et al.*, pp. 3–5.
34 Besselink (2001), p. 77.
35 The ECHR constituted until the entry into force of the Lisbon Treaty the primary source of reference. See e.g. the EUI working paper of Kokott-Sobotta.
36 Compare e.g. Case C-555/07 *Kücükdeveci* (2010) ECR I-365 (para. 22) and Case C-144/04 *Mangold* (2005) ECR I-9981 (para. 74).
37 Vertical direct effect means that you can use EU legislation against a Member State. Horizontal direct effect means that you can use EU legislation against another individual.
38 Craig - de Burca, p. 180.
39 *Ibid.*

the institutions, bodies, offices and agencies of the EU, as natural or legal persons can bring proceedings against a regulatory act if they are *directly* affected by it and if it does not entail implementing measures.[40] National courts are bound to ensure respect for Charter rights and must accordingly review national legislation in the light thereof, thereby setting it aside in case of conflict, even in horizontal settings. This negates the fact that in practice such an "indirect horizontal effect" of fundamental rights contained in the Charter effectively amounts to making them binding on private individuals.[41] The competences of the EU are very wide and they allow for legislation that interferes deeply into horizontal relationships.[42]

2.1.3 Clarifying Case Law

When a Member State fails to fulfill the fundamental rights expressed in the Charter when implementing EU law, the Commission, as guardian of the Treaties, has powers of its own to try to put an end to the infringement and may, if necessary, take the matter to the CJEU. The Commission may only intervene if the situation in question relates to EU law.[43] The factor connecting it with EU law will depend on an evaluation *in casu*.[44] For example, a connecting factor exists when national legislation implements an EU directive in a way contrary to fundamental rights, when a public authority applies EU law in a manner contrary to fundamental rights or when a final decision of a national court applies or interprets EU law in a way contrary to the fundamental rights.[45]

Regarding the application of the Charter, the CJEU has issued several judgments clarifying the Charter's purpose and objectives. For example, it was established in the 1980s, in the landmark case of *Wachauf,* that Member States – when implementing EU law – are bound to respect EU fundamen-

40 Skouris, p. 10. See also Art. 263(4) TFEU.
41 Claes, Monica. *The European Union, its Member States and their Citizens* in Leczykiewicz & Weatherhill, p. 50.
42 *Ibid*, p. 51.
43 See Article 51(1) of the Charter.
44 COM (2010) 573 final, p. 10.
45 Those infringement proceedings which raise issues of principle or which have particularly far-reaching negative impact for citizens will be given priority. See COM (2010) 573 final, p. 10.

tal rights.[46] The CJEU continued to stake out the path and later held that Member States were also to respect EU fundamental rights when derogating from EU law[47] and potentially when acting 'within the scope of EU law.'[48] In the *ERT* case[49], the court went further by holding that it could also review a national rule which may restrict a fundamental freedom on grounds of public order, public security or public health, adding that such a rule must be interpreted in the light of the general principles of law and in particular of fundamental rights whose efficacy is ensured by the CJEU.

A few years after the entry into force of the Lisbon Treaty, in 26 February 2013, the CJEU issued two important decisions, Åkerberg *Fransson* and *Melloni*[50] that brought some interesting and expected (but also criticized) precisions on the application of the Charter on a national level, especially concerning the terminology and the consequences of the notion of implementing EU law in the sense of Article 51(1) of the Charter.

2.2 Pre-Lisbon Case Law

In the pre-Lisbon case law two main situations can be distinguished: when implementing or applying EU law through national measures and when derogating from EU law through national measures.[51] Two central cases that represent these lines are *Wachauf*[52] and *ERT*[53]. Conversely, where EU law imposes no obligation on the Member States, the Charter simply does not apply, as the example of *Annibaldi*[54] demonstrates. In other words, there

46 5/88 *Wachauf* [1989] ECR 2609 at para. 19.
47 C-368/95 *Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 C-260/89 *Elliniki Radiophonia Tileorassi* [1993] ECR I-2925.
48 C-309/96 *Annibaldi* [1997] ECR I-7493.
49 Judgment of 18 June 1991, *Elliniki Radiophonia Tileorassi ('ERT')*, case C-260/89, ECR I-2925.
50 Judgment of 26 February 2013, *Stefano Melloni vs Ministerio Fiscal* (*Melloni*), case C-399/11.
51 See Groussot *et al.*: "The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication". The article has equated the scope of application of EU fundamental rights with the scope of application of EU law.
52 Judgment of 13 July 1989, Wachauf, case C-5/88, ECR 2609.
53 Case C-260/89 *Elliniki Radiophonia Tileorassi*.
54 See *supra* note 44.

can be said to exist two different types of obligations that EU law imposes on the Member States; EU obligations that require a Member State to take action (*Wachauf*), and EU obligations that must be complied with when a Member State derogates from EU law (*ERT*).[55]

2.2.1 Case Wachauf

The CJEU's case law reflects the reality that the Charter has to be observed also by the Member States. Such an obligation is crucial as implementation and application of EU law relies essentially upon national legal orders. The central question in the landmark case *Wachauf* was the issue of the implementation of EU secondary legislation, and that Member States when implementing EU law are bound to respect EU fundamental rights as far as possible. In other words, the Charter applies to the Member States when they are acting as part of the decentralized administration of the Union and applying or implementing a regulation, transposing a directive or executing a decision of the Union or a judgment of the CJEU.[56]

It was observed in the decision that EC rules would be incompatible with the requirements of the protection of fundamental rights in the EC legal order. Since those requirements are also binding on the Member States when they implement EU rules, the Member States must apply those rules in accordance with those requirements.[57]

2.2.2 Case ERT

In 1991, in the wake of *Wachauf,* the CJEU finally clarified in *ERT* that it had the jurisdiction to review any national measure that negatively affects any of the individual rights guaranteed by EU law, in particular the EU citizen's free movement rights.[58] In the case, the test was formulated as a requirement that the national measures 'fall within the scope of Community law'.

55 See Arestis, pp. 6–9.
56 See Arestis, p. 6.
57 C-5/88, ECR 2609, para. 19.
58 Groussot *et al.*, p. 7.

In the *ERT* judgment, the CJEU accepted to follow what Advocate-General Slynn stated in case *Cinétèque*.[59] Advocate-General Slynn held that the Court had indeed jurisdiction to review a national measure derogating from a fundamental freedom in the case in question, the freedom to provide services for compliance with EU fundamental rights:

> In particular, where a Member State relies on the combined provisions of Articles 56 and 66 [now 52 and 62 TFEU] 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 Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.[60]

Before reaching this conclusion, the Court, citing *Wachauf,* recalled that the Union obviously cannot accept national measures that are not compatible with EU fundamental rights, provided that these measures do not fall outside the scope of EU law, as provided in *Cinétèque*.[61] However, where the CJEU holds that the national rules at issue do fall within the scope of EU law and reference is made to the Court for a preliminary ruling, it provides all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the efficacy of which the Court safeguards and which derive in particular from the ECHR.[62] This meant in the *ERT* case that the Greek Government needed to prove that the national legislation at issue was not in breach of the general principle of freedom of expression in order to be able to rely on the Treaty provisions that allow each Member State to justify national measures 'providing for special treatment for foreign nationals on grounds of public policy, public security or public health'.[63]

According to *Wachauf*, the requirements for the protection of fundamental rights are binding on the Member States when they implement Community rules. The CJEU widened the scope of this obligation in *ERT*, ruling that fundamental rights have to be respected when a Member State derogates

59 Cases 60/84 and 61/84 [1985] ECR 2605.
60 Case C-260/89 *Elliniki Radiophonia Tileorassi*, para. 43.
61 *Ibid*, para. 41.
62 *Ibid*, para 42.
63 Groussot *et al.*, p. 9–10.

from a fundamental economic freedom guaranteed by the Treaties.[64] In its subsequent jurisdiction, the CJEU has required Member States to respect fundamental rights as general principles of EU law also in some other situations having a *sufficient* connection to EU law. However, the exact scope of this obligation is subject to controversy. This case law takes EU fundamental law protection into the sphere of each Member State where it coexists with the standards of fundamental rights protection enshrined in national law or in the ECHR.

The Explanations[65] relating to Article 51(1) of the Charter recalled that the obligation to respect fundamental rights defined in the framework of the EU is only binding on Member States "when acting in the scope of Union law". Instead of limiting itself to *Wachauf*, the document also refers to *ERT* corresponding to the "Derogation situation" and to *Annibaldi* where the formulation "within the scope of Community law" is used.[66] According to Rosas, for example, the CJEU did not unveil any radical new principles in cases *Wachauf* and *ERT*, but simply stated the obvious.[67]

2.3 Post-Lisbon Case Law

Since the Charter has become legally binding, discussion has arisen concerning the Charter's potential "federalizing effect" and the horizontal application of the Charter.[68] Article 51(1) of the Charter would, however, appear to prohibit such power for the CJEU outside the application of EU law, and an "American evolution" through judicial activism is said to be more or less impossible.[69]

64 E.g. Kaila refers to the 'Agency situation' and the 'Derogation situation', see Kaila p. 293.
65 Explanations Relating to the Charter of Fundamental Rights OJ [2007] C 303/17. See also commentary on Article 51(1) of the Charter in Mock – Demuro, pp. 315–322.
66 Kaila, p. 297.
67 Rosas (2012), p. 1274.
68 Groussot et al. p. 16. See also Mock-Demuro, p. 320–321.
69 *Ibid*, p. 18.

2.3.1 Case Melloni

In *Melloni*[70], the Court touched on the important issue of the relationship between national fundamental rights and EU fundamental rights. The *Melloni* case is important for the interpretation of Article 53 of the Charter. Article 53 reads as follows:

> 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 [European] Union or all the Member States are party, including the [ECHR] and by the Member States' constitutions.

The CJEU rejected the interpretation according to which Article 53 authorizes Member States to apply their standard of protection of fundamental rights guaranteed in the constitution when that standard is higher than the one based on the Charter, and thus giving priority to it over the application of EU law.[71] The CJEU reaffirmed that EU law is superior to national law, including national constitutions. Consequently, based on Article 53, the question is whether a Member State could invoke its constitution and constitutional protection of fundamental rights and refuse to apply a provision of EU law. Here the issue is not merely about the scope of Article 53 but, interestingly, it turns into an issue of the relation between national constitutional law and EU law, more specifically the nature and limits of the principle of primacy of EU law.

The approach taken by the CJEU is hardly surprising, with regard to the principle of primacy: the unconditional primacy of EU law over national

70 *Melloni* case C-399/11.

71 The Court stated that "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". It then went on by saying that "by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order... rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State." See paras. 55–57.

law is confirmed. Moreover, Member States may apply their standard of protection of fundamental rights when implementing EU law, with the condition that primacy of EU law is secured and the level of protection of the Charter is not compromised.[72]

The significance of the *Melloni* judgment should not be underestimated. While its immediate effects could be restricted to the particular EU legislative act in question, the judgment sends a worrying message about the way in which the CJEU sees its role as a "constitutional review court".[73] The starting assumption of the Court is not only that the EU legislator has respected fundamental rights but also that the scope of protection of fundamental rights, including those recognized in the Charter, should be determined on the basis of an act of secondary law. If this method was applied more broadly, an EU act could never be found invalid for breaching fundamental rights. The judgment in *Melloni* is also a step towards the centralization of standards of fundamental rights protection in the EU, at least in areas where Member States' authorities are implementing EU acts.

2.3.2 Case Åkerberg Fransson

In case Åkerberg *Fransson*[74] we get to the core of this article. Behind the case, which *prima facie* appears to be simple, lie two extremely complicated problems. The first problem concerns whether the CJEU can try a question of interpretation whatsoever when the case concerns a situation on a national level. The other problem regards the application of the principle of *ne bis in idem* in Article 50 of the Charter.[75]

One of the elements of this case was the CJEU's attempt to clarify Article 51(1), and how the sentence according to which the Charter is addressed

72 See para. 60.
73 See D. Leczykiewicz: *Melloni* and the future of constitutional conflict in the EU U.K. Const. L. Blog (22nd May 2013) (available at http://ukconstitutionallaw.org).
74 Judgment of 26 February 2013 Åkerberg *Fransson*, case C-617/10 (2013).
75 According to General-Advocate Cruz Villalón the confusion in this case arises in connection to the district court's first question of interpretation, where the problem in itself is perceived to be easier than the previous. The question has to do with the dimension of the principle of primacy in relation to a demand that has been stated by the Swedish Supreme Court. The confusion is caused by the fact that the sufficient link (see also para. 33) to EU law is stated in the case law of the ECtHR, which makes the question about the dimension of *ne bis in idem* in EU law even more complicated.

"to the Member States only when they are implementing Union law" is to be interpreted. The Court addressed the question of implementation to establish its jurisdiction, not because the referring court put it forward as a preliminary question itself. This caused some alarm in the Advocate-General's office.[76] The most important element of this case concerns the clarification that Article 51(1) is to be interpreted as meaning that the Charter is addressed to the Member States when they are acting "within the scope of European Union law". The Charter can be invoked not only in situations when Member States are transposing an EU directive or executing a Regulation, but more broadly when the situation at issue falls "within the scope of EU law", which also covers for example situations when Member States are derogating from the free movement provisions of the internal market.[77]

The reference to the Explanations[78] via Article 52(7) the Charter and Article 6(1) TEU, allow the conclusion that the wording "when implementing EU law" in Article 51(1) is to be equated with the phrasing "within the scope of EU law", which is used in the Explanations.

The CJEU takes a uniform approach to the question in which case fundamental rights are guaranteed in the EU legal order. Fundamental rights guaranteed as general principles of EU law apply "within the scope of EU law" and so do fundamental rights as enshrined in the Charter. A different scope of application of the two sources of EU fundamental rights would lead to considerable confusion and inconsistencies, given that they exist next to each other, and given that many of the fundamental rights contained in the Charter had already been recognized as constituting general principles of EU law before the Charter became legally binding.

The CJEU allows the applicability of the national fundamental rights standard "in a situation where action of the Member States is not entire deter-

76 See para 56.
77 As far as the issue of admissibility is concerned Advocate-General Cruz Villalón proposed that the Court of Justice should find that it lacks jurisdiction, since the Member State concerned is not implementing Union law within the meaning of Article 51(1) of the Charter. The Advocate-General believed that a careful examination of the circumstances of the case militates in favour of reaching that conclusion. See para. 5.
78 OJ [2007] C 303/17.

mined by European Union law", yet the fact that there is a connection with EU law means that the Charter level of protection applies as a minimum guarantee. It also means that the national standard can only apply if it does not compromise the primacy, unity and effectiveness of EU law.

In dealing with *Åkerberg* and *Melloni* in a coordinated way, the CJEU took a conscious first step towards developing a general theory on how to apply the Charter. First, it engaged with a long running debate about the Charter's scope of application with regard to Member States' actions, interpreting the article 51(1) wording of "only when implementing Union law". Second, it interpreted article 53, which states, "Nothing in the Charter shall be interpreted as restricting or adversely affecting human rights … as recognized by the ECHR and by the Member States' constitutions".

2.4 To Apply, or Not to Apply: That is the Question

The pre-Lisbon case law does not pose any greater problems at first glance, but the essential question that needs a clear answer is whether the relevant national measure in a case falls within or outside the scope of EU law. Article 51(1) of the Charter is clear, but the application test is easy to criticize. EU law is a constantly evolving set of rules, which makes it virtually impossible to create a predictable test or a clear definition for when the Charter becomes applicable, that is to say, when EU law is at hand. And as already mentioned, there is no clear line drawn between national rules that fall within the scope of EU law, and national measures that fall outside the scope. As we have seen in the recent case law presented, there have been clear disagreements between Advocates-General and the CJEU on the in-

terpretation of Article 51(1).[79] In practice, the key question is the level of connection to EU law, and whether one is able to identify any cross-border elements that would link the case in question with an EU norm in a *sufficient* extent.[80]

Of course, the CJEU insists in its case law on the fundamental principle of the primacy of EU law over national law. The primacy is absolute and unconditional, and EU law overrides even national constitutional law.[81] However, in practice, the CJEU does not really have the power to enforce this principle because of the fact that it is not hierarchically superior to national courts. This means that, in reality, the enforcement of EU law in and by Member States essentially depends on the readiness of national courts to give full effect to the principle of primacy, and not on coercion. In practice, most national courts appear to have no difficulty in accepting the primacy of EU law.

However, national courts function within a specific constitutional context, which must be taken into account. EU law might sometimes require them to step outside of that context. This is a huge request especially for constitutional courts the primary responsibility of which is to protect and uphold the constitution. A constitutional court could consider that too much. The dilemma the constitutional court faces, if following the principle of primacy would force it to derogate from what it regards as core principles of the Constitution, more particularly where national fundamental rights are concerned.[82] E.g. Timmermans finds it fascinating how the national supreme courts and the CJEU have handled this dilemma. According to Timmermans they have mostly succeeded in neutralising it over the past 50

79 See e.g. Opinion of Advocate-General Cruz Villalón in case C-617/10 Åkerberg *Fransson*.

80 The Explanations for Article 51(1) has also caused some puzzlement among commentators; the view of Groussot-Pech-Petursson accentuates a need for clarification: "One swift look at the so-called explanations seems to suggest that the drafting deficiency thesis is accurate but also suggests that those who drafted Article 51(1) did not fully understand the arguably opaque case law of the Court as regards its jurisdiction to review national acts for their conformity with EU fundamental rights". Besselink (2001) refers to a "concoction of formulation" because of the mixed wordings in the case law of the Court.

81 See e.g. case C-11/70 *Internationale Handelsgesellschaft* (1970) ECR 1125 and case C-409/06 *Winner Wetten* (2010) ECR I-8015.

82 Timmermans, p. 16.

years thanks to the co-operation that has developed between them through the European judicial dialogue.[83] However, after the cases Åkerberg *Fransson* and *Melloni*, critical voices have been raised. Åkerberg in particular has been criticised for being based on a "too far-fetched understanding of the CJEU's competences"[84]. The CJEU has not only been criticised by academic commentators, but now also by the German *Bundesverfassungsgericht*. This negative feedback has been interpreted as a warning for the CJEU.[85] One can think of this situation as two sides of a coin: the danger of a too broad and "intrusive" scope and the incredibility of an ineffective Charter of fundamental rights.

3 Reflections on the Application of the Charter and the Role of the CJEU

Before the Lisbon treaty, which entered into force on 1 December 2009, the Charter did not have legal effect (although it has been around in a somewhat different form since December 2000). The EU's accession to the ECHR was made obligatory by Article 6(2) TEU, as amended by the Lisbon Treaty, and thereby complements the system to protect fundamental rights by making the ECtHR competent to review EU acts. The guarantees enshrined in the ECHR are a minimum standard. While signatory parties must not afford a level of human rights protection lower than that required by the Convention, they are free to exceed it. If the level of protection within a member state is higher than the protection provided by the ECHR, the Convention must not be construed as limiting any of the rights entrenched in the domestic legal framework of a member state.[86] In January 2010, in the *Kücükdeveci case*, the Court underlined for the first time the new legal status of the Charter, simply stating "the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties".[87]

83 For more on formal and informal judicial dialogue, see e.g. Timmermans, pp. 16–19.
84 See opinion of Leijten, Ingrid. The Applicability of the EU Fundamental Rights Charter: A Matter of Who Has the Last Word? Leiden Law Blog. Posted on 21 May 2013 in Public Law.
85 *Ibid.* See also para. 2 in the press release no. 31/2013 of 24 April 2013. Available at http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-031en.html (last visited 2.3.2014).
86 Article 53 ECHR.
87 *Kücükdeveci* case C-555/07, ECR I-365 (para. 22).

3.1 What is the Problem?

Speaking of the application of the Charter, EU Justice Commissioner Reading raises the problem of the "knocking on the wrong door" effect. It is stated that every day, the Commission receives hundreds of letters from citizens who want to enforce their fundamental rights *vis-à-vis* this or that Member State. This has convinced the Commission that informing citizens about when the Charter applies and where to go to when their rights are violated requires further effort.[88] However, when looking at recent case law by the CJEU, it seems that the problem of the scope of application is more complex than the mere lack of information flow to Member State citizens. In fact, there seems to be more than one perception of what the problem of "the application of the Charter on a national level" really means. When reading the Commission's official reports and statements, the problem addressed is the problem of citizens' misinterpretation of the Charter's scope of application, rather than the Member States' criticism of the *extent* of the Charter's scope of application. The main problem that needs to be solved for the smooth function of the Charter is the relationship between the defense of fundamental rights and the limitation of the EU's powers.[89]

In line with the principle of subsidiarity, Article 51(1) of the Charter states that its provisions are firstly addressed to the institutions, bodies, offices and agencies of the Union, which are required to respect the provisions of the Charter when performing their tasks and whose authority is limited accordingly. A judgment of the Court of 19 July 2012, *Parliament v. Council*, in which the European Parliament asked the Court to annul a Council Regulation referred to this duty imposed on *all* the institutions to respect fundamental rights.[90]

Drafting Article 51(1) of the Charter was indeed a difficult task. While there was no doubt that, according to Article 6 TEU and to the case law of the CJEU, the Member States have to respect fundamental rights as general principles of EU law, the fact remains the relation between those principles

88 COM (2012) 169 final, p. 8.
89 Mock-Demuro, p. 315.
90 Judgment of 19 July 2012, *Parliament v. Council*, case C-130/10, not yet published, (para. 83).

and the fundamental rights and principles reaffirmed by the Charter is not clear-cut. On the one hand, it could be argued that fundamental rights are a subset of general principles of EU law. On the other, the Charter comprises rights, which might not necessarily qualify as such principles.[91] Furthermore, the general principles of law are often unwritten, rather vague and have to be adapted through case law, whereas the Charter establishes a written, sharply defined framework for the protection of fundamental rights. Therefore, a simple parallelization between the fields of application of these two systems of fundamental rights protection did not seem to be a realistic option.[92]

The Charter can be subjected to quite vast criticism, for instance the distinction between rights and principles, which is likely to create new uncertainties and lead to the relegation of the social and economic rights as mere inspirational principles lacking capacity to be enforced. According to Doğan, if the Charter is to serve well the objective of the promotion and protection of human rights, especially by empowering the CJEU to provide coherent, adequate and effective safeguarding for the rights in question, it is crucial that the aforementioned distinction is removed and the provision restricting the jurisdiction of the Court be amended.[93]

The problematic situation of when to apply the Charter may also perhaps be due to the fact that there is no specific test in order to assess with predictability whether national law falls within the scope of application of the Charter. Whether it is possible to create an instrument for the Member States to test with security whether a certain case falls in the scope of the Charter is however rather unlikely, since the area of law in question constantly lives and changes along with the social and economic structures of the Union.

3.2 A New EU Fundamental Rights Architecture: the Role of the CJEU

Among the changes that the Lisbon Treaty brought about, the most significant one has been the conversion of the Charter into a legally binding docu-

91 For more information on general principles of EU law, see e.g. Raitio (2003), pp. 101–123.
92 Kaila, p. 295.
93 Doğan, p. 79.

ment for the EU. The challenge consists, among other things, of turning what is merely an architectural design into an effective institutional, policy and legal apparatus that ensures the *practical* delivery of fundamental rights to individuals. The role of the CJEU is essential in this regard, especially when it comes to guaranteeing access to justice for every person whose fundamental rights have been allegedly violated as envisaged in Article 47 of the EU Charter[94], and to ensure future transparency.

Whether we choose a broader or a narrower interpretation of Article 51 of the Charter, this does not change the fact that it does not replace national constitutions, but merely complements them. Citizens thus have to get used to the fact that they are faced with a multi-layered system of fundamental rights protection: the CJEU, the ECtHR and the national courts. According to the Treaty, the Court has three main sources of inspiration as regards the protection of fundamental rights within the EU legal order: the Charter, the Convention and the Constitutional traditions common to the Member States. Unavoidably, this reach of jurisdiction, the clash of interests in a complex modern society, and the need for a central final judge of fundamental issues has over time led to the CJEU becoming a constitutional federal court capable of handling fundamental rights issues, much like the United States' Supreme Court, and it has done so in the absence of a unifying document granting it that authority or embodying the fundamental rights principles.[95] One of the Charter's *raisons d'être* is to provide this unifying document and the foundational authority for the CJEU.

The CJEU has through recent case law attempted to close the gap by interpreting the notion of "implementing Union law" broadly, thereby clarifying the mixture of different wordings, making it possible to more easily predict the Charter's scope of application in a particular case. The Court had the choice to maintain its existing fundamental rights case law as a relatively autonomous body, which might have allowed for more flexibility and legitimacy when dealing with references from the national courts that concern sensitive Member State measures falling "within the scope of EU law". The

94 Article 47 of the Charter states that "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article".

95 See the forewords to Mock – Demuro for an overview of the development.

Court is now in possession of a key role regarding the future of the Charter. Future actions of the CJEU in "developing" the scope of the Charter is quite crucial for the Court in order to maintain certain Member States' trust (Germany for one is known for its skepticism). The CJEU may have to prove through future case law that the Charter is not a failure, but in fact, a diamond in the rough.

3.3 Quo Vadimus?

The question regarding the scope of application of Article 51 of the Charter and what the scope of application means in practice on a national level are nuanced issues. Rosas debates a need to "de-dramatize the question [of the field of application of the Charter] and also show that the real problem is not so much the applicability of the Charter as such but rather the applicability of *another* norm of Union law"[96].

The CJEU's terminology also causes difficulties. For instance, regarding the wordings "the capacity to invoke" or "to rely on" a provision of EU law, is not entirely satisfactory, because the wordings are rather vague. Therefore, direct effect really boils down, as far as courts are concerned, to a test of justifiability; is the norm "sufficiently operational in itself to be applied by a court" in a given case.[97] The existence of direct effect is a matter of interpretation of EU law to be settled by the CJEU, rather than by the national courts separately, and national courts still regularly ask the CJEU to decide on the direct effect of a norm of EU law in terms of "whether or not".[98] In the EU context, administrative authorities are put under a duty to enforce directly effective norms of EU law, and to set aside conflicting national legislation, even though they cannot use the mechanism of Article 177 EC Treaty to ask the CJEU for guidance on whether the EU norm has direct effect and on whether there is a conflict with national law. Therefore, those authorities are liable to apply EU law in the wrong way.[99]

96 Rosas (2012), p. 1270.
97 *Ibid.*
98 In Case 103/88 *Costanzo* (1989) ECR 1839, 30–32 the Court of Justice stated that 'when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration including decentralized authorities such as municipalities, are obliged to apply those provisions.
99 De Witte (2011), p. 333.

The disappearance of EC law through the Lisbon Treaty and its absorption within the new and broader regime of EU law creates new questions about the scope of the principle of primacy. The crucial element for the effective application of the principles of primacy and direct effect indicated by the CJEU is the *attitude* of national courts and authorities.[100] The competences of the EU are very wide and they allow for legislation that interferes deeply into horizontal relationships. Whether this is considered legitimate and desirable ultimately depends on whether we accept that the EU is more than an internal market and includes a community of values. The CJEU finds itself in the middle of an inter-judicial structure – the triangle of national courts, the ECtHR and the CJEU. The CJEU will find itself under increasing pressure from below (the national courts) and above (the ECtHR), and these pressures will require it to intrude ever more deeply into EU-level policy-making. More judicialisation will most likely be the result of this course of action.[101]

4 Conclusion

The Charter may be a powerful tool when integrating fundamental rights into new EU legislation. However, whether it can be considered to have been successful in practice leaves some room for doubt. The application of the Charter lacks transparency, although lawyers and judges may be more comfortable using the Charter as the codified tool it was aimed to be in their work, rather than unwritten general principles scattered around in case law.

The development in case law has witnessed an expansionist streak in the CJEU's approach in the case *Åkerberg Fransson*, to equate "implementing Union law" to "acting within its scope". For EU insiders and human rights practitioners the situation may appear in different lights regarding the question on when the now binding Charter and its sometimes higher human rights standards apply, and the CJEU may have done little more than reformulate the dilemma. In case *Melloni*, in an effort to protect the Court's understanding of EU law, the CJEU turned the wording of article 53 of the Charter completely on its head, practically positioning the Charter as

100 Kaila, pp. 346–347.
101 Sweet, pp. 152–153.

a maximum rather than a minimum standard of human rights protection. Both cases seem to leave room for interpretation, however, allowing details of the general theory to modified in future cases. At this moment, one could say that the Charter indeed has strengthened the legal certainty when it comes to effective fundamental rights, but the question of transparency in the process leaves room for improvement.

If the CJEU does no more than create new case law through references to earlier case law, it can be difficult to derive clear guiding principles for the interpretation of the Charter. When looking at recent case law it also seems that the Court may deliberately create new competence to attempt to clarify the rationale behind a particular norm, as it appears to have happened in Åkerberg *Fransson*. This question is, however, debatable. It would perhaps be better to solve a question of interpretation by defining clear guiding principles as a result of case law that are in accordance with the wordings and Explanations of the Charter. One of the *raisons d'être* of the Charter was, as we have seen when looking at the background, the codification of the fundamental rights of the EU to facilitate the process and increase transparency on a national level, and to create a stronger protection for the effectiveness of fundamental rights. Then on the other hand, fundamental rights constitute a dynamic body of rights, and an exhaustive codification probably would not remain up to date for very long. However, the main question for the future to come is whether the CJEU is much more than "*la bouche de la loi*", and whether it has gone too far in carving out the way for the Charter.

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List of Abbreviations

CJEU	Court of Justice of the European Union (European Court of Justice)
EC	European Community
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
OJ	Official Journal of the European Union
TEC	Treaty Establishing the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union