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THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE PROTECTION OF FUNDAMENTAL RIGHTS

Abstract

The present contribution looks at the protection of fundamental rights under EU law, paying special attention to the Charter of Fundamental Rights of the European Union (the Charter) which, since the entry into force of the Treaty of Lisbon, enjoys “the same legal value as the Treaties”. First, by looking at the recent case law of the European Court of Justice, it explores the scope of application of the Charter. Second, it examines the conditions that the limitations on the exercise of the rights and freedoms recognised by the Charter must fulfil in order to be valid. Third, it looks at the interaction between, on the one hand, the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms and between, on the other hand, the Charter and the constitutional traditions common to the Member States. Finally, a brief conclusion contains some remarks as to the requirements private applicants must fulfil in order to build strategic human rights cases successfully.

INTRODUCTION

In accordance with Article 19 of the Treaty on European Union (the TEU), the Court of Justice of the European Union (the CJEU) – which includes the European Court of Justice (the ECJ), the European General Court (the EGC) and specialised courts (the Civil Service Tribunal) – “shall ensure that in the interpretation and application of the Treaties the law is observed.” Stated simply, the authors of the Treaties entrusted the CJEU with the task of upholding the rule of law.

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As the most important part of that task, the CJEU must ensure that EU law is interpreted and applied in compliance with fundamental rights. In so doing, the CJEU is bound by three different, albeit complementary, normative sources, namely the Charter of Fundamental Rights of the European Union (the Charter),¹ the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR)² and the constitutional traditions common to the Member States. In contrast to the latter two which still operate as a source of inspiration in the interpretation and discovery of general principles of EU law,³ the Charter enjoys, since the entry into force of the Treaty of Lisbon,⁴ “the same legal value as the Treaties,” i.e. it is primary EU law.⁵ Accordingly, in the EU legal order, the protection of fundamental rights is governed by a two-tiered system: the provisions of the Charter and the general principles of EU law.

Moreover, in light of Article 6(1) TEU, the protection of fundamental rights shall not extend in any way the competences of the Union as defined in the Treaties. A similar statement is also reproduced in Article 51(2) of the Charter.⁶ As the EU is bound by the principle of conferral (or enumerated powers),⁷ it follows that there must be “a link” between the violation of the fundamental right at issue and the EU legal order. That constitutional requirement is precisely what distinguishes the protection of fundamental rights under EU law from that under the ECHR or under the national constitutions of the Member States. It is only where such violations fall within the scope of EU law that private individuals may have recourse to the judicial protection afforded to them by the Treaties.

The purpose of this article is threefold. First, by looking at the recent case law of the ECJ, I would like to explore the scope of application of the Charter. Second, I shall examine the conditions that the limitations on the exercise of the rights and freedoms recognised by the Charter must fulfil in order to be valid. Last, but not least, I would like to make some brief comments on the interaction between,

¹ See, [2010] OJ C 83/02.

² It is worth noting that prior to the entry into force of the Treaty of Lisbon, the EU lacked the legal basis to accede to the ECHR. See, Opinion of the ECJ 2/94 [1996] ECR I-1759. However, this is no longer the case as such legal basis is set out in Article 6(2) TEU.

³ See, Article 6(3) TEU.

⁴ The Treaty of Lisbon entered into force on 1 December 2009.

⁵ See, Article 6(1) TEU.

⁶ Article 51(2) of the Charter reads as follows: “[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.”

⁷ See, Article 5(2) TEU.

on the one hand, the Charter and the ECHR and between, on the other hand, the Charter and the constitutional traditions common to the Member States.

1. THE SCOPE OF APPLICATION OF THE CHARTER

Since from now on the Charter is primary EU law, it fulfils a triple function.⁸ First, just as general principles of EU law, the Charter serves as an aid to interpretation, since both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter. Second, just as general principles, the Charter may also be relied upon as providing grounds for judicial review. EU legislation found to be in breach of an article of the Charter is to be held void and national law falling within the scope of EU law that contravenes the Charter must be set aside. Finally, it continues to operate as a source of authority for the “discovery” of general principles of EU law.⁹

However, from the fact that the Charter is now legally binding it does not follow that the EU has become a “human rights organisation”¹⁰ or that the ECJ has become “a second European Court on Human Rights” (the ECtHR). To this effect, the second paragraph of Article 6(1) TEU stresses that “[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.” A similar statement is also reproduced in Article 51(2) of the Charter.¹¹ It requires that, in interpreting and applying the Charter, the ECJ respects the principle of conferral as set out in Article 5(2) TEU.

The scope of application of the Charter is therefore the keystone which guarantees that the principle of conferral is complied with. To this effect, Article 51(1) of the Charter states that “the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing

⁸ K. Lenaerts, J. A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 *Common Market Law Review* 1629 (2010), pp. 1656 *et seq.*

⁹ After the entry into force of the Treaty of Lisbon, see Case C-403/09 PPU *Detiček* [2009] ECR I-12193, para. 53 (where the Charter was relied upon as an aid to interpretation of Regulation Brussels II bis, [2003] OJL 338/1). See also, Case C-555/07, *Küçükdeveci*, judgment of 19 January 2010, not yet reported, para. 22.

¹⁰ T. Tridimas, *The General Principles of EU Law*, 2nd ed., Oxford University Press, Oxford: 2006, p. 613.

¹¹ Article 51(2) of the Charter reads as follows: “[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.”

Union law.”¹² While in relation to the EU institutions, bodies, offices and agencies, Article 51(1) focuses on guaranteeing compliance with the principle of subsidiarity, this Article makes the Charter applicable to the Member States “only when they are implementing Union law.”¹³ But what does “implementing Union law” mean?

In accordance with Article 6(1) TEU, “[t]he rights, freedoms and principles in the Charter shall be interpreted [...] with due regard to the explanations [relating to it].”¹⁴ In the same way, Article 52(7) of the Charter states that “[those] explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States”. As explained below, the ECJ may not interpret the Charter in a way that conflicts with the explanations relating to it. In this regard, in order to clarify the exact meaning of the terms “implementing Union law” one must look at the explanations relating to Article 51 of the Charter, which read as follows:

As regards the Member States, it follows unambiguously from the case-law of the [ECJ] that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of [EU] law.

Next, the explanations relating to Article 51 of the Charter cite *Wachauf*, *ERT* and *Annibaldi*.¹⁵ They also quote a passage from paragraph 37 of *Karlsson*,¹⁶

¹² Note that Article 51(1) of the Charter does not refer to private parties. Thus, one could argue that, unlike general principles of EU law (see, Case C-555/07, *Küçükdeveci*, *supra* note 9), the provisions of the Charter do not apply in a private dispute. In this vein, see, J. Kokott, Ch. Sobotta, *The Charter of Fundamental Rights of the European Union after Lisbon*, EUI Working Papers, No. 2010/06, available at: <http://cadmus.eui.eu/handle/1814/15208>, p. 14 (opining that “Article 51 of the Charter [...] does not provide for a direct effect of the prohibition of age discrimination on private parties. Article 51 only refers to institutions, bodies, offices and agencies of the Union and Member States implementing Union law, but not to private parties. Moreover, the Charter repeatedly emphasizes the limits of the Union’s competencies [...]. Accordingly, the Charter should not be seen as a reason to extend the Union’s competencies”).

¹³ In German, “ausschließlich bei der Durchführung des Rechts der Union.” In French, “aux États membres uniquement lorsqu’ils mettent en oeuvre le droit de l’Union.” In Dutch, “uitsluitend wanneer zij het recht van de Unie ten uitvoer brengen.” In Spanish, “a los Estados miembros únicamente cuando apliquen el Derecho de la Unión.” In Italian, “agli Stati membri esclusivamente nell’attuazione del diritto dell’Unione.”

¹⁴ See, the explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17 (“the explanations relating to the Charter”).

¹⁵ Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR I-2925, and Case C-309/96 *Annibaldi* [1997] ECR I-7493.

¹⁶ Case C-292/97 *Karlsson* [2000] ECR I-2737, para. 37.

which reads as follows: “[i]n addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the [EU] legal order are also binding on Member States when they implement [EU] rules ...”

Finally, the explanations stress that the terms “Member States” contained in Article 51(1) of the Charter should be interpreted broadly so as to include not only the central authority, but also regional bodies, local bodies, and public organisations when they are “implementing Union law.”

In light of the explanations relating to Article 51(1) of the Charter, it appears that the expression “only when [Member States] are implementing Union law” should thus cover all situations where Member States fulfil their obligations under the Treaties as well as under secondary EU law (adopted pursuant to the Treaties), i.e. the Charter applies whenever Member States fulfil an obligation imposed by EU law.

In light of the case law of the ECJ, one may distinguish two different types of obligations that EU law imposes on the Member States, namely (1) EU obligations that require a Member State to take action (as the situations in *Wachauf* and *Karlsson* show) and (2) EU obligations that must be complied with when a Member State derogates from EU law (as the situation in *ERT* reveals). Conversely, where EU law imposes no obligation on the Member States, the Charter simply does not apply (as the example of *Annibaldi* demonstrates).

1.1. *Wachauf* as a token of positive action on the part of the Member States

As is well-known, in *Wachauf* – to which the explanations relating to Article 51(1) of the Charter refer – the ECJ held that fundamental rights, understood as general principles of EU law, were binding upon the Member States when they applied EU (then Community) rules on the common organisation of the milk market as provided for by Regulation No 1371/84.¹⁷ For the case at hand this meant that national authorities had to apply EU (then Community) rules governing the transfer of milk quotas which were exempted from an additional levy following a change of ownership or occupancy of a holding, in such a way as to ensure that a lessee was not deprived of the fruits of his labour and of his investment in the tenanted holding without compensation.¹⁸

Likewise, in *Karlsson* – another milk quota case to which the explanations relating to Article 51(1) of the Charter also refer – the ECJ examined whether

¹⁷ Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, [1984] OJ L 132/11.

¹⁸ Case 5/88 *Wachauf*, *supra* note 15, paras. 20-21.

Swedish law, which sought to implement Regulation No 3950/92 complied with the principle of equality.¹⁹ That regulation limited the production of milk in Sweden to 3.3 million tons per year. At the outset, the ECJ noted that new milk producers and producers who had increased their milk production were treated less favourably than normal producers who had not altered their average milk production from 1991 to 1993. Unlike the milk quotas allocated to normal producers, the milk quotas allocated to them were set at a level below their production capacity.²⁰ However, the ECJ held that such a difference in treatment pursued a legitimate aim recognised by the common organisation of the milk market, namely the reduction of structural surpluses and the improvement of the milk market. Notably, the ECJ observed that “the reductions applied unilaterally to new producers and producers who [had] increased their production appear[ed] to be objectively justified, having regard to the specific contribution made by such producers to exceeding the guaranteed total quantity.”²¹ As to the principle of proportionality, the milk quotas allocated to new producers and producers who had increased their production did not go beyond what was necessary for achieving the legitimate aim pursued, as their milk quotas were calculated on the basis of the risk that the total quantity of milk would be exceeded.²²

Wachauf and *Karlsson* show that, when adopting national measures which aim to apply a normative scheme put in place by the EU legislator, Member States are implementing EU law, and are thus bound by the fundamental rights contained in the Charter. This is so even if “Member States enjoy wide discretion in ensuring the implementation of [EU] rules within their territory,”²³ as the recent ruling of the ECJ in *N.S.* illustrates.²⁴

In that case, the ECJ was called upon to determine whether the Charter was applicable to a national decision adopted by a Member State on the sole basis of Article 3(2) of Regulation No 343/2003 (the Dublin Regulation).²⁵ In accordance with that provision, which is known as the “sovereign or discretionary

¹⁹ Council Regulation (EEC) No 3950/92, of 28 December 1992, establishing an additional levy in the milk and milk products sector, [1992] OJ L 405/1.

²⁰ Case C-292/97 *Karlsson*, *supra* note 16, para. 42.

²¹ *Ibidem*, para. 47.

²² *Ibidem*, para. 59.

²³ *Ibidem*, para. 35.

²⁴ Joined Cases C-411/10 and 493/10 *N.S.*, judgment of 21 December 2011, not yet reported.

²⁵ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1.

clause”, a Member State is, in principle, free to decide whether it examines a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Dublin Regulation.

In *N.S.*, the question thus boiled down to whether, having decided to make use of that provision, a Member State must comply with the Charter, in particular with Articles 1, 4, 18, 19(2) and 47 thereof. The ECJ replied in the affirmative. It noted that Article 3(2) of the Dublin Regulation “grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the [EU] legislature.”²⁶ That discretionary power, the ECJ wrote, “must be exercised in accordance with the other provisions of that regulation.”²⁷ Indeed, the ECJ pointed out that “a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of [the Dublin] Regulation [...] and must, where appropriate, inform the other Member State or Member States concerned by the asylum application.”²⁸ Accordingly, “a Member State which exercises that discretionary power must be considered as implementing [EU] law within the meaning of Article 51(1) of the Charter.”²⁹

It follows from *N.S.* that as long as a Member State enjoys a discretionary power the exercise of which must comply with other provisions of EU law, that Member State is “implementing EU law.” Accordingly, the exercise of that power must be compatible with the Charter.

As to the substance, the ECJ ruled that the concept of “Member State responsible” for examining an asylum application within the meaning of Article 3(1) of the Dublin Regulation could not be interpreted as designating a Member State with “systemic deficiencies in the asylum procedure and [whose] reception conditions of asylum seekers [...] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.”³⁰ Consequently, the Member State where the asylum seeker is present must proceed to examine the other hierarchical criteria listed in the Dublin Regulation so as to determine the “Member State responsible”, provided that such determination does not take an unreasonable length of time which could worsen the situation of the asylum seeker. If that determination is excessively time-consuming, the Member State where the asylum seeker is present must examine his or her application under Article 3(2) of

²⁶ Joined Cases C-411/10 and 493/10 *N.S.*, *supra* note 24, para. 65.

²⁷ *Ibidem*, para. 66.

²⁸ *Ibidem*, para. 67.

²⁹ *Ibidem*, para. 68.

³⁰ *Ibidem*, para. 94

the Dublin Regulation. Stated differently, if compliance with fundamental rights requires the Member State where the asylum seeker is present to examine the asylum application, that Member State has no choice but to do it.³¹

Moreover, the principle of effectiveness, which is now enshrined in Article 19(1) TEU,³² ensures that the substantive rights which EU law confers on individuals do not become “an empty promise.” By virtue of that principle, in the absence of EU measures harmonising national rules of procedure, it is for the Member States to ensure the *full effect* of EU law. In this regard, the ECJ has, time and again, stated that national remedies must afford an effective judicial protection to EU rights,³³ a fundamental right which is now enshrined in Article 47 of the Charter. The ruling of the ECJ in *DEB* illustrates this point.³⁴

In that case, the ECJ was requested to rule on the question whether EU law and, more specifically, the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that, in the context of a procedure for pursuing a claim, brought by a legal person, seeking to establish State liability under EU law, that principle precludes a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs and under which a legal person does not qualify for legal aid even though it is unable to make that advance payment. The ECJ found that that principle must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right, whether they pursue a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which the national rule seeks to achieve.³⁵ The ECJ further held that, in making that assessment, the national court must take into consideration the subject-matter of the litigation, whether the applicant has a reasonable prospect of success, the importance of what is at stake for the applicant in the proceedings,

³¹ *Ibidem*, para. 98.

³² Article 19(1) TEU states that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

³³ The explanations relating to the Charter, *supra* note 14, p. 29, refer to Case 222/84 *Johnston* [1986] ECR 1651; Case 222/86 *Heylens* [1987] ECR 4097, and Case C-97/91 *Borelli* [1992] ECR I-6313.

³⁴ Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft*, judgment of 22 December 2010, not yet reported.

³⁵ *Ibidem*, paras. 59 and 60.

the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively. In order to assess the proportionality of the national rule, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. With regard, more specifically, to legal persons, the national court may take into consideration, *inter alia*, the form of the legal person in question and whether it is profit-making or non-profit-making, the financial capacity of the partners or shareholders and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.³⁶

Referring expressly to Article 51 of the Charter,³⁷ the ECJ held that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, may be relied upon in order to determine the limits within which a Member State may exercise its procedural autonomy. This means that a national court may have recourse to the principle of effective judicial protection, as enshrined in Article 47 of the Charter, in order to set aside a national procedural rule that prevents a legal person from bringing a claim seeking to establish State liability under EU law. Stated differently, the principle of effective judicial protection, as enshrined in Article 47 of the Charter, applies in relation to national procedural rules which hinder the effectiveness of EU law in general and thus, relate to the implementation of EU law in the Member State concerned. That is sufficient to qualify these procedural rules as "implementing Union law." Hence, they fall within the scope of application of the Charter.

It follows that the Charter applies where Member States adopt measures in order to comply with the obligations imposed by a normative scheme set out by EU law. The Charter, notably Article 47 thereof, also applies in order to guarantee the *full effect* of the substantive rights EU law confers on individuals.

1.2. The derogation situation

For some scholars, the Charter should not apply when examining the validity of national measures derogating from EU requirements, i.e. in the so-called "derogation situation."³⁸ For example, contrary to the general principles of EU law, the Charter should not apply in cases such as *Familiapress*, *Schmidberger*, or *Viking Line*.³⁹

³⁶ *Ibidem*, paras. 61 and 62.

³⁷ *Ibidem*, para. 30.

³⁸ Case C-260/89 *ERT*, *supra* note 15.

³⁹ Case C-368/95 *Familiapress* [1997] ECR I-3689; Case C-112/00 *Schmidberger* [2003] ECR I-5659, and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, Viking Line*, [2007] ECR I-10779.

This narrow reading of the terms “when [the Member States] are implementing Union law” finds support in the drafting process of the Charter, which “illustrates an emergent reluctance to commit the Member States to observing the norms of the Charter other than in the cases which are most closely linked to the European Union where the Member States have little or no autonomy.”⁴⁰ Likewise, the Convention on the Future of Europe also favoured limiting the scope of application of the Charter, so as to minimise national resistance to the Charter’s legally binding status as provided for by the Treaty establishing a Constitution for Europe.⁴¹ Put simply, both the Convention in charge of drafting the Charter and the Convention on the Future of Europe sought to assure the Member States that the Charter would not upset the vertical allocation of powers.

For Lord Goldsmith, where Member States derogate from EU law, “the protection of fundamental rights for the citizen will be the existing structure of national law and constitutions and important international obligations like [the ‘ECHR’].”⁴² In his view, the Charter has to be read as an instrument which limits the powers of the EU, as opposed to “an exercise in extending [its] competences.”⁴³ Likewise, former AG Jacobs – writing extrajudicially – argued that in derogation situations, a Member State’s compliance with fundamental rights should not be subject to judicial review of the ECJ.⁴⁴ He posited that “[o]nce it has been established that a restriction is justified from the perspective of [EU] law, the restriction might still be caught as infringing fundamental rights. But that would be a matter for national law, or possibly the [ECHR], not for [EU] law.”⁴⁵ The former Advocate General referred to *Familiapress*⁴⁶ to illustrate this point. In that case, the ECJ was asked to determine whether Austrian legislation prohibiting the sale of periodicals containing prize competitions complied with Article 34 TFEU (ex Article 28 EC). Austria alleged that its legislation was justified on the ground of preserving press diversity, an important aspect of the freedom of expression. According to the former Advocate General, the ECJ should have lim-

⁴⁰ G. De Búrca, *The Drafting of the European Union Charter of Fundamental Rights*, 26 *European Law Review* 126 (2001), p. 137.

⁴¹ A. Knook, *The Court, the Charter, and the Vertical Division of Powers in the European Union*, 42 *Common Market Law Review* 367 (2005), p. 373.

⁴² Lord Q. Goldsmith, *A Charter of Rights, Freedoms and Principles*, 38 *Common Market Law Review* 1201 (2001), p. 1205.

⁴³ *Ibidem*, p. 1206.

⁴⁴ F.G. Jacobs, *Human Rights in the European Union: the Role of the Court of Justice*, 26 *European Law Review* 331 (2001).

⁴⁵ *Ibidem*, p. 336.

⁴⁶ Case C-368/95 *Familiapress*, *supra* note 39.

ited itself to examining whether the Austrian legislation at issue complied with the public policy derogations contained in the Treaty. If so, then that national measure should have been upheld as a matter of EU law. The question whether such a measure complied with the freedom of press was a separate issue, and was not for EU law to decide. However, Eeckhout argues that the problem with that view is that it would allow “the relevant Treaty provisions [to] be interpreted in a way which tolerates the violation of fundamental rights.”⁴⁷ In addition, he rightly notes that the notion of “public policy” is difficult to apprehend without considering fundamental rights. By way of example he observes that had the ECJ decided in *Grogan*⁴⁸ that the freedom to provide services was applicable to the Irish ban on the distribution of specific information about clinics in another Member State where abortions were performed, it would have been very difficult for the ECJ to decide whether such a measure complied with EU law without considering Ireland’s argument based on the right to life.⁴⁹ Most importantly, in the “derogation situations”, determining whether a Member State complies with fundamental rights vests the rulings of the ECJ with legitimacy. It reassures national courts, in particular the constitutional courts, that the Union embraces the values and principles in which national constitutions are grounded. As Tridimas says, the protection of fundamental rights guarantees “ideological continuity” between the two levels of governance.⁵⁰ Accordingly, in order to demonstrate that the Union takes fundamental rights seriously, “they should be all pervasive in EU law.”⁵¹ Even if Article 51(1) of the Charter were subject to a strict interpretation, the scope of application of general principles of EU law should not be adversely affected. General principles would take over where the scope of application of the Charter ends. However, Dougan believes that such a dual regime would not be without difficulties, as it “might prove burdensome.”⁵² He notes that, while the fundamental rights protected may be the same, a dual regime could give rise to arbitrary divergences as to the actual quality and potency of those rights.⁵³ In the same way, AG Bot observes that by

⁴⁷ P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 *Common Market Law Review* 951 (2002), p. 977.

⁴⁸ Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [2001] ECR I-4685.

⁴⁹ Eeckhout, *supra* note 47, p. 978.

⁵⁰ Tridimas, *supra* note 10, p. 302.

⁵¹ Eeckhout, *supra* note 47, p. 977.

⁵² M. Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 *Common Market Law Review* 617 (2008), pp. 664-665.

⁵³ *Ibidem*.

weakening the protection of fundamental rights at EU level, such a dual regime would run counter to Article 53 of the Charter.⁵⁴

In order to overcome the difficulties inherent in this discussion, it seems to me that the terms “implementing Union law” must be read so as to also include the derogation situation.⁵⁵ Indeed, the explanations relating to Article 51(1) of the Charter expressly refer to *ERT*.⁵⁶ In that case, the ECJ held that national rules which constitute a restriction on the freedom to provide services may be justified on the grounds laid down in Article 52(1) TFEU, in so far as those rules are “interpreted in light of [...] fundamental rights.” In order for those rules to fall within the scope of Article 52(1) TFEU, they must be “compatible with the fundamental rights the observance of which the [ECJ] ensures.”⁵⁷ It follows from *ERT* that when a Member State derogates from the substantive law of the EU, it is also “implementing EU law”, given that such derogation must always meet the conditions imposed by EU law. Not only must the national measure conflicting with the fundamental freedoms pursue a legitimate interest recognised by EU law, be free from any discrimination, and respect the principle of proportionality, but it must also comply with fundamental rights. Contrary to the views of Lord Goldsmith and former AG Jacobs, *ERT* suggests that whether the derogations put forward by a Member State comply with fundamental rights is a determination that does not fall outside the scope of application of the Treaties. Far from that, all derogations put forward by a Member State must always pass muster under EU law, of which the Charter is now part and parcel.

Moreover, this would mean that the scope of application of the Charter and that of general principles of EU law overlap. Thus, the Charter would not alter the scope of application of fundamental rights protection under EU law, respecting the constitutional allocation of powers sought by the authors of the Treaties. Does this mean, as Weiler considers,⁵⁸ that a catalogue of fundamental rights has little added value? In my view, the answer to this question should be in the negative. Since the material scope of the Charter is broader than that of general principles,⁵⁹ the Charter may contribute significantly to the “discovery” of general principles.

⁵⁴ See, Opinion of AG Bot in Case C-108/10 *Scattolon*, delivered on 5 April 2011, not yet reported, paragraph 120.

⁵⁵ Eckhout, *supra* note 47, p. 993. See Opinion of AG Bot in Case C-108/10 *Scattolon*, *supra* note 54, paras. 118 and 119. AG Bot supports the contention that “implementing Union law” should be interpreted as “acting within the framework of Union law.” In so doing, he relies on the explanations relating to the Charter.

⁵⁶ Case C-260/89 *ERT*, *supra* note 15.

⁵⁷ *Ibidem*, para. 43.

⁵⁸ J.H.H. Weiler, *Editorial: Does the European Union Truly Need a Charter of Rights?* 6 *European Law Journal* 95 (2006).

⁵⁹ Knook, *supra* note 41, at 371.

1.3. *Annibaldi* as an example of the situations where the Charter does not apply

Finally, the explanations relating to Article 51(1) of the Charter also refer to *Annibaldi*.⁶⁰ Contrary to *Wachauf* and *ERT*, it seems that the authors of the explanations relating to the Charter chose *Annibaldi* in order to illustrate the situations where EU law imposes no obligation on the Member States, i.e. cases where the compatibility of national measures with fundamental rights cannot be examined under EU law.

That case involved the refusal of Italian authorities to grant Mr Annibaldi permission to plan an orchard of 3 hectares within the perimeters of a regional park. Such refusal was adopted on the basis of Regional law No 22 of 20 June 1996, according to which the regional park was created in order to protect and enhance the value of the environment and cultural heritage of the area concerned. For his part, Mr Annibaldi, who owned an agricultural holding 33 hectares of which were located within the park, argued that the refusal at issue in the main proceedings amounted to an expropriation without compensation which was contrary to his fundamental right to property. At the outset, the ECJ recognised that the EU (then the Community) pursues objectives in the fields of the environment, culture and agriculture. However, it noted that Regional Law No 22 of 20 June 1996 was not intended to implement a provision of EU law in any of those three fields.⁶¹ Notably, that law pursued objectives other than those covered by the common agricultural policy and was general in character.⁶² Most importantly, in light of Article 345 TFEU (ex Article 222 EEC), EU (then Community) rules relating to the common organisation of the agricultural markets have no effect on systems of agricultural property ownership.⁶³ The ECJ thus ruled that it lacked jurisdiction to answer the questions referred by the Italian court.

It follows from *Annibaldi* that the compatibility of national measures which are not a means for a Member State to fulfil its obligations under EU law, with fundamental rights cannot be examined by the ECJ. Recently, the ruling of the ECJ in *Dereci* confirmed this point.⁶⁴

The question in that case was whether Mr Dereci, a third-country national, was entitled to a derivative right of residence grounded in his children's status of European citizen, in spite of the fact that the latter had never left the Member

⁶⁰ Case C-309/96 *Annibaldi*, *supra* note 15.

⁶¹ *Ibidem*, para. 21.

⁶² *Ibidem*, para. 22.

⁶³ *Ibidem*, para. 23.

⁶⁴ Case C-256/11 *Dereci*, judgment of 15 November 2011, not yet reported.

State of which they were nationals (Austria). The ECJ noted that, unlike the factual situation in *Ruiz Zambrano*,⁶⁵ a refusal to grant Mr Dereci a residence permit (the contested decision) did not deprive his children, who were minors, “of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.”⁶⁶ The contested decision did not force his children “to leave [...] the territory of the Union as a whole.”⁶⁷ Accordingly, the contested decision did not fall within the scope of the Treaty provisions on EU citizenship. This meant that, under EU law, the Member State in question, i.e. Austria, had no obligation to grant such a residence permit to Mr Dereci. Just as in *Annibaldi*, since Austria was not “implementing EU law”, the ECJ lacked jurisdiction to examine whether such refusal was compatible with Article 7 of the Charter.

The fact that the refusal to grant Mr Dereci a residence permit could adversely affect his right to a family life and that of his children was not by itself sufficient to trigger the application of the Charter. This did not mean, however, that the fundamental rights of Mr Dereci and that of his children were left unprotected. If “[the national court] takes the view that that situation is not covered by [EU] law, [the ECJ reasoned that] it must undertake that examination in the light of Article 8(1) of the ECHR.”⁶⁸

2. THE LIMITATIONS ON THE EXERCISE OF THE RIGHTS AND FREEDOMS RECOGNISED BY THE CHARTER

Unlike the TEU or TFEU, the Charter lays down binding instructions as to the way in which it must be interpreted. Article 6(1) TEU – which refers to Title VII of the Charter and to the explanations relating to it – stresses the importance of those instructions. In the following section, I would like to focus on a particular aspect of those instructions, namely Article 52(1) of the Charter which contains the conditions that the limitations on the exercise of the rights and freedoms must fulfil in order to be valid.

Under the system of the ECHR, every right whose exercise may be subject to limitations (“qualified rights”) is followed by a specific derogation clause. By contrast, the Charter contains a horizontal provision. Article 52(1) is thus a “general limitation clause”, which sets out the conditions that every limitation

⁶⁵ Case C-34/09 *Ruiz Zambrano*, judgment of 8 March 2011, not yet reported.

⁶⁶ *Ibidem*, para. 42.

⁶⁷ Case C-256/11 *Dereci*, *supra* note 64, para. 66.

⁶⁸ *Ibidem*, para. 72.

on the exercise of the rights and freedoms recognised by the Charter must fulfil in order to comply with EU law. However, it is worth noting that, just as the ECHR, no limitation may be imposed on the rights under Title I of the Charter (Articles 1 to 5), i.e. human dignity,⁶⁹ the right to life, the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour.

The wording of Article 52(1) of the Charter is largely inspired by the case law of the ECJ on the protection of fundamental rights,⁷⁰ which, in turn, draws on the case law of the ECtHR.⁷¹ Article 52(1) of the Charter states that “[a]ny limitation on the exercise of the rights and freedoms recognised by [the] Charter must be provided for by law.” In addition, any limitation must respect “the essence of those rights and freedoms” and comply with the principle of proportionality, i.e. “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.”

In light of *Knauf Gips v Commission*,⁷² the terms “provided for by law” are to be interpreted as meaning that, in the absence of a specific legal basis, an EU act of individual application may not by itself impose limitations on the exercise of the rights and freedoms recognised by the Charter. In that case, the ECJ held that the EGC had erred in considering that, in the absence of a specific legal basis, the Commission could limit the rights of an undertaking to an effective remedy and of access to an impartial tribunal, as guaranteed by Article 47 of the Charter.⁷³

⁶⁹ See, the explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17 (“the explanations relating to the Charter”), p. 17 (given that “the dignity of the human person is part of the substance of the rights laid down in this Charter [, it] must therefore be respected, even where a right is restricted”). The same applies in relation to the right to life and to the right to the integrity of the person. In this regard, see, Case C-112/00 *Schmidberger*, *supra* note 39, para. 80 (“unlike other fundamental rights enshrined in [the ECHR], such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose”).

⁷⁰ See, e.g., Case C-62/90 *Commission v Germany* [1992] ECR I-2575, para. 23; Case C-44/94 *Fishermen’s Organisations and Others* [1995] ECR I-3115, para. 55; Case C-292/97 *Karlsson*, *supra* note 16, para. 45; Joined Cases C-317/08 to C-320/08 *Alasini and Others* [2010] ECR I-2213, para. 63.

⁷¹ See, e.g., ECtHR, *Fogarty v United Kingdom*, judgment of 21 November 2001, no. 37112/97, para. 33, ECHR 2001-XI.

⁷² Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-6371.

⁷³ *Ibidem*, paras. 87 *et seq.*

The question is then under what circumstances an EU act of individual application – or, as the case may be, a national measure of individual application falling within the scope of EU law – which limits a fundamental right, has (or lacks) a sufficient legal basis. For instance, is it possible to interpret the terms “provided for by law” as only including EU acts adopted under the ordinary legislative procedure? Or, should the ECJ follow the case law of the ECtHR, according to which those terms should also include EU acts adopted under a special legislative procedure? In accordance with the case law of the ECtHR, a limitation is “provided for by law”, provided that it meets the three following cumulative conditions. First, the limitation must have some basis in domestic law. However, the ECtHR has ruled that the intervention of the parliament is not always mandatory.⁷⁴ Second, the persons concerned must be able to know those limitations in advance, by, for example, reading them in the *Official Journal* of the EU. Finally, those limitations must be foreseeable.⁷⁵ Stated differently, any limitation on the fundamental rights recognised by the Charter must be consistent with the principle of legal certainty, i.e. it must be clear and precise.⁷⁶

In *Volker und Markus Schecke*,⁷⁷ the ECJ rejected a restrictive interpretation of the terms “provided for by law.” In that case, the referring court asked, in essence, whether Council Regulation No 1290/2005⁷⁸ and Commission Regulation No 259/2008⁷⁹ were compatible with Articles 7 (right to respect for his or her private and family life, home and communications) and 8 (right to the protection of personal data) of the Charter. Article 44a of Council Regulation No 1290/2005, on the financing of the common agricultural policy, provided that Member States had to ensure annual *ex-post* publication of the beneficiaries of the EAGF and the EAFRD and the amounts received per beneficiary under each of these Funds. That information had to be the subject of “general publication.” For its part,

⁷⁴ ECtHR, *Sunday Times v United Kingdom*, judgment of 26 April 1979, Series A no. 30. See also *Müller v Switzerland*, judgment of 5 November 2002, no. 41202/98 (Sect. 2) (Eng).

⁷⁵ ECtHR, *Kruslin v France*, judgment of 24 April 1990, Series A No 176-A, § 27.

⁷⁶ See to this effect, Opinion of AG Cruz Villalón in Case C-70/10 *Scarlet Extended SA* (pending), delivered on 14 April 2011.

⁷⁷ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, judgment of 9 November 2010, not yet reported.

⁷⁸ [2005] OJ L 209/1, as amended by Council Regulation (EC) No 1437/2007 of 26 November 2007, [2007] OJ L 322/1 (“Regulation No 1290/2005”).

⁷⁹ Commission Regulation (EC) No. 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation No. 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), [2008] OJ L 76/28 (Regulation No 259/2008).

Commission Regulation No 259/2008 set out the content of the publication, adding that “the municipality where the beneficiary resides or is registered and, where available, the postal code or the part thereof identifying the municipality” also had to be published. Article 2 of that regulation prescribed that the information was to be made available on a single website per Member State so that it could be consulted by means of a search tool.

In relation to the existence of an interference with the rights recognised by Articles 7 and 8 of the Charter, the ECJ held that the “publication on a website of data naming those beneficiaries and indicating the precise amounts received by them thus constitutes an interference with their private life within the meaning of Article 7 of the Charter.”⁸⁰ In addition, the ECJ ruled that the publication required by Article 44a of Regulation No 1290/2005 and Regulation No 259/2008 constitutes the processing of personal data falling under Article 8(2) of the Charter.⁸¹

As to the justification of the interference with the rights recognised by Articles 7 and 8 of the Charter, the ECJ ruled that “it is common ground that the interference arising from the publication on a website of data by name relating to the beneficiaries concerned must be regarded as ‘provided for by law’ within the meaning of Article 52(1) of the Charter. Articles 1(1) and 2 of Regulation No 259/2008 expressly provide for such publication.”⁸² Stated differently, limitations on the fundamental rights recognised by the Charter, which are grounded in a Council Regulation, must be considered as “provided for by law.” It follows that Article 52(1) of the Charter does not require limitations on fundamental rights to be grounded in an EU measure whose adoption is conditioned upon the European Parliament’s co-decision.

In providing that any limitation must “respect the essence of [the rights and freedoms recognised by the Charter],” the latter guarantees that no limitation will deprive those rights and freedoms of their substance. The term “essence” of a right or freedom draws on the constitutional traditions common to the Member States,⁸³ as well as on the case law of the ECtHR.⁸⁴ In the same way, the ECJ has consistently held that any limitation on fundamental rights may only be justified, “provided that those restrictions in fact correspond to objectives of general interest

⁸⁰ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, *supra* note 77, para. 58.

⁸¹ *Ibidem*, para. 60.

⁸² *Ibidem*, para. 66.

⁸³ *See, e.g.*, Article 19(2) of the German Basic Law, which provides that “[i]n no case may the essence of a basic right be affected.”

⁸⁴ *See, e.g.*, ECtHR, *Sporrong and Lönnroth v Sweden*, judgment of 23 September 1982, Series A No. 52.

pursued by the European Union and do not constitute disproportionate and intolerable interference, impairing *the very substance of the rights guaranteed*.”⁸⁵

Article 52(1) of the Charter sets out two different types of legitimate objectives. On the one hand, there are “objectives of general interest recognised by the Union.” On the other hand, there are also objectives which aim “to protect the rights and freedoms of others.”

As to the former type of objectives, they are set out not only in Article 3 TEU but also in specific Treaty provisions.⁸⁶ The case law of the ECJ clearly shows that the latter has followed a rather broad approach when qualifying an objective as being “of general interest recognised by the Union.” For example, the following objectives have been recognised as falling within that category: the establishment of a common organisation of the market,⁸⁷ the protection of public health and public security,⁸⁸ and the requirements of international security.⁸⁹

Moreover, limitations on the fundamental rights of the Charter may have both a vertical and horizontal dimension. This means that, when asserting a fundamental right, one must comply with “the need to protect the rights and freedoms of others.”⁹⁰ The terms “rights and freedoms of others” refer not only to the fundamental rights of third parties, but also to all rights bestowed upon them by EU law,⁹¹ notably the rights that stem from the Treaty provisions on free movement and Union citizenship.⁹² In relation to conflicts between fundamental rights, or between fundamental rights and fundamental freedoms, it is worth

⁸⁵ In relation to the right to property, see Case 44/79 *Hauer* [1979] ECR 3727, para. 23; Case 265/87 *Schröder HS Krafftutter* [1989] ECR 2237, para. 15; Case C-293/97 *Standley and Others* [1999] ECR I-2603, para. 54; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 355; and Joined Cases C-379/08 and C-380/08 *ERG* [2010] ECR I-2007, para. 80 (emphasis added).

⁸⁶ See, e.g., Articles 36, 45 (3), and 52 TFEU.

⁸⁷ Case 44/79 *Hauer*, *supra* note 85.

⁸⁸ Case C-293/97 *Standley and Others* [1999] ECR I-2603.

⁸⁹ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, *supra* note 85.

⁹⁰ In relation to a conflict between the right to private life and the freedom of expression, see, e.g., Case C-101/01 *Lindqvist* [2003] ECR I-12971, para. 86 and Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, paras. 53 to 56.

⁹¹ See, e.g., ECtHR, *Barthold v Germany*, judgment of 23 March 1985, no. 8734/79, Series A, no. 90, para. 58.

⁹² See, e.g., Case C-112/00 *Schmidberger*, *supra* note 39; Case C-36/02 *Omega* [2004] ECR I-9609; Case C-438/05 *Viking Lines*, *supra* note 39; Case C-250/06 *UnitedPan-Europe Communications Belgium and Others* [2007] ECR I-11135; Case C-244/06 *Dynamic Medien* [2008] ECR I-505.

noting that there is no hierarchy of qualified rights under the Charter.⁹³ Given that all qualified rights stand on an equal footing, conflicts between them must be solved by striking the right balance.

In that regard, Article 52(1) of the Charter states that any limitation on the rights thereof must comply with the principle of proportionality. It is thus for the EU institutions and, as the case may be, for the national authorities participating in the implementation of EU law to verify that any limitation on fundamental rights is suitable to meet the “objectives of general interest recognised by the Union” and “the need to protect the rights and freedoms of others”; and that it does not go beyond what is necessary for achieving the legitimate aim pursued. For example, in *Volker und Markus Schecke*, the ECJ found that the publication on a website of the names of the beneficiaries of aid from the EAGF and the EAFRD and of the amounts which they receive from those Funds was liable to increase transparency with respect to the use of the agricultural aid concerned. The ECJ reasoned that such display of information reinforced public control of the use to which that money is put and contributes to the best use of public funds.⁹⁴ However, regarding the necessity of the publication in question, the ECJ held that it went beyond what was necessary for achieving the legitimate aims pursued, given that neither the Council nor the Commission had “sought to strike [the right] balance between the European Union’s interest in guaranteeing the transparency of its acts and ensuring the best use of public funds, on the one hand, and the fundamental rights enshrined in Articles 7 and 8 of the Charter, on the other.”⁹⁵ Indeed, derogations and limitations in relation to the protection of personal data must apply only in so far as it is strictly necessary.⁹⁶ Thus, the Council and the Commission should have examined whether the legitimate objective pursued by the contested regulations could not be achieved by measures which interfere less with the right of the beneficiaries concerned to respect for their private life in general and the protection of their personal data in particular.⁹⁷ Accordingly, the ECJ ruled that Article 44a of Regulation No 1290/2005 and Regulation No 259/2008 were invalid.

⁹³ Needless to say, we are not referring here to the fundamental rights under Title I of the Charter.

⁹⁴ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, *supra* note 77, para. 75.

⁹⁵ *Ibidem*, para. 80.

⁹⁶ Case C-73/07 *Satakunnan Markkinapörssi and Satamedia*, *supra* note 90, para. 56.

⁹⁷ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, *supra* note 77, paragraph 78, and paragraphs 81 to 86 (where the ECJ referred, as an example, to measures “limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid, or the frequency or nature and amount of aid received”).

3. THE INTERACTION BETWEEN THE CHARTER, THE ECHR AND THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES

3.1. The Charter and the ECHR

In light of the explanations relating to Article 52(3) of the Charter,⁹⁸ the latter “is intended to ensure the necessary consistency between the Charter and the ECHR,” “without thereby adversely affecting the autonomy of [EU] law and of that of the [ECJ].” However, the autonomy of EU law may only be grounded in the principle “of the more extensive protection,” i.e. the level of protection guaranteed under EU law may never be lower than that guaranteed by the ECHR (as interpreted by the ECtHR).

A combined reading of Article 52(3) and Article 53 of the Charter demonstrates that if the ECtHR raises the level of protection of a fundamental right (or decides to expand its scope of application) so as to overtake the level of protection guaranteed by EU law, then the autonomy of EU law may no longer exist.⁹⁹ With a view to attaining the level of protection guaranteed by the ECHR, the ECJ will be obliged to reinterpret the Charter. Conversely, if the ECtHR ever decides to lower the level of protection below that guaranteed by EU law, by virtue of Article 53 of the Charter, the ECJ will be precluded from interpreting the provisions of the Charter in a regressive fashion. Stated differently, interpreted as a “stand-still clause”, Article 53 of the Charter preserves the constitutional autonomy of EU law.¹⁰⁰

As to the rights recognised by the Charter which correspond to the rights guaranteed by the ECHR, Article 52(3) of the Charter states that, without prejudice to a more extensive protection, “the meaning and scope of those rights shall

⁹⁸ Article 52(3) of the Charter states that “[i]n so far as [the] 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.”

⁹⁹ Article 53 of the Charter reads as follows: “[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”

¹⁰⁰ See the explanations relating to the Charter, *supra* note 14, p. 35, which provide that “[t]his provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law.” The adverb “currently” refers to the moment when the Charter, as primary EU law, entered into force, i.e. 1 December 2009.

be the same as those laid down by [ECHR].”¹⁰¹ The explanations relating to the Charter provide a list enumerating those rights.¹⁰² It does not come as a surprise that the approach encapsulated in Article 52(3) of the Charter is no less that the codification of the case law of the ECJ, according to which the ECHR, as interpreted by the ECtHR, has “special significance” in the protection of fundamental rights within the EU legal order.¹⁰³ In addition, the explanations relating to Article 52(3) of the Charter provide a list with “the Articles [whose] meaning is the same as the corresponding Articles of the ECHR, but [whose] scope is wider.”¹⁰⁴ However, one must point out that the previous sentence is not entirely accurate, as

¹⁰¹ Regarding Article 7 of the Charter and Article 8 of the ECHR, the ECJ has held that they both have the same meaning and scope. *See*, Case C-400/10 PPU *McB.*, judgment of 5 November 2010, not yet reported, paragraph 53. Likewise, the ECJ has also ruled that “the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR.” *See* Case C-279/09 *DEB*, *supra* note 34, para. 32.

¹⁰² *See* the explanations relating to the Charter, *supra* note 14, at 33 and 34. Those rights are the following: “- Article 2 corresponds to Article 2 of the ECHR, - Article 4 corresponds to Article 3 of the ECHR, - Article 5(1) and (2) corresponds to Article 4 of the ECHR, - Article 6 corresponds to Article 5 of the ECHR, - Article 7 corresponds to Article 8 of the ECHR, - Article 10(1) corresponds to Article 9 of the ECHR, - Article 11 corresponds to Article 10 of the ECHR without prejudice to any restrictions which Union law may impose on Member States’ right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR, - Article 17 corresponds to Article 1 of the Protocol to the ECHR, - Article 19(1) corresponds to Article 4 of Protocol No 4, - Article 19(2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights, - Article 48 corresponds to Article 6(2) and (3) of the ECHR, - Article 49(1) (with the exception of the last sentence) and (2) correspond to Article 7 of the ECHR.”

¹⁰³ *See*, e.g., Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, p. 2859; and Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, para. 37.

¹⁰⁴ *See* the explanations relating to the Charter, *supra* note 14, p. 34. Those rights are the following: “- Article 9 covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation, - Article 12(1) corresponds to Article 11 of the ECHR, but its scope is extended to European Union level, - Article 14(1) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training, - Article 14(3) corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents, - Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation, - Article 50 corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States, - Finally, citizens of the European Union may not be considered as aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context.”

that list also includes Articles of the Charter whose “meaning is wider”,¹⁰⁵ as well as Articles of the Charter “whose meaning *and* scope” are wider,¹⁰⁶ than those of the corresponding Articles of the ECHR.

Moreover, the interpretation of Article 50 of the Charter (the *ne bis in idem* principle) appears to be particularly complex, since its scope and meaning fluctuate according to the context in which that provision is invoked. In this regard, the explanations relating to Article 50 of the Charter state that, if the *ne bis in idem* principle is relied upon in a cross-border situation, then that principle must be interpreted in compliance with the EU *acquis*, i.e. in light of the case law of the ECJ under the Convention implementing the Schengen agreement.¹⁰⁷ By contrast, where the *ne bis in idem* principle is relied upon in a purely internal situation, then that principle has the same meaning and the same scope as the corresponding right in the ECHR. Such a dual regime may be problematic, notably in cases where it is difficult to ascertain whether a situation is purely internal. However, one must point out that in *Sergey Zolotukhin v Russia*,¹⁰⁸ the ECtHR has recently decided to interpret the concept “*idem*” in light of the case law of the ECJ, so that in interpreting the principle of *ne bis in idem*, the approach of both courts converges.¹⁰⁹

¹⁰⁵ See, Article 9 of the Charter (whose wording allows gay marriage, in contrast to the wording of Article 12 of the ECHR which provides that “[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”).

¹⁰⁶ See, Article 47 of the Charter (which applies to both EU institutions and national authorities “implementing EU law.” In addition, the protection offered by that provision is more extensive since it guarantees the right to an effective remedy before a court. Hence, in contrast to Article 6(1) of the ECHR, Article 47 is not limited to proceedings relating to “the determination of his civil rights and obligations or of any criminal charge against him”).

¹⁰⁷ Joined Cases C-187/01 and C-385/01 *Gözütok and Brügger* [2003] ECR I-1345.

¹⁰⁸ ECtHR, *Sergey Zolotukhin v Russia*, judgment of 10 February 2009, [GC], no. 14939/03, ECHR 2009.

¹⁰⁹ In that case, the ECtHR reconsidered its approach in relation to the concept of the “same offence.” In placing the emphasis on the identity of the facts instead of their legal classification, the ECtHR held that the terms “same offence” must be interpreted as meaning “identity of the material acts.” In so doing, the ECtHR noted that “[t]he difference between the terms ‘same acts’ or ‘same cause’ (*mêmes faits*) on the one hand and the term ‘[same] offence’ (*[même] infraction*) on the other was held by the [ECJ] to be an important element in favour of adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant. In so finding, [the ECJ] emphasised that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his sentence or had been acquitted, he need not fear further prosecution for the same act.” The ECtHR referred to Case C-367/05 *Kraaijenbrink* [2007] ECR I-6619. See, ECtHR, *Sergey Zolotukhin v Russia*, *supra* note 108, paras. 37 and 79.

Sergey Zolotukhin v Russia shows how important it is for the ECJ and the ECtHR to engage in a constructive dialogue, notably in relation to the provisions of the Charter that refer to the ECHR. Such a dialogue provides an excellent means of avoiding divergences between the EU *acquis* in realm of fundamental rights and the case law of ECtHR.

In the same way, the rulings of the ECtHR in *Menarini*¹¹⁰ and of the ECJ in *KME v Commission*¹¹¹ also reveal a degree of convergence regarding Article 6 of the ECHR and Article 47 of the Charter. Before commenting those two rulings, it is worth recalling that Article 47(2) and (3) of the Charter corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards EU law and its implementation. This means for example, that “[i]n Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations.”¹¹² However, aside from the fact that the material scope of Article 47 of the Charter is wider than that of Article 6 of the ECHR, “the guarantees afforded by the ECHR apply in a similar way to the Union.”

In *Menarini*, the ECtHR was asked to determine the level of judicial scrutiny required by Article 6 of the ECHR where an administrative authority, which is not “an independent and impartial tribunal” for the purposes of the ECHR, fines an undertaking on the ground that the latter had breached competition law. In this regard, the ECtHR reasoned that such an administrative authority is not precluded from fining undertakings, provided that an *ex post* full review of its decisions is undertaken by “an independent and impartial tribunal.” Accordingly, when testing the validity of an administrative decision imposing a fine, the “impartial and independent tribunal” must not limit itself to reviewing the legality of that decision but must also look into the facts. Stated simply, the “impartial and independent tribunal” must be empowered to set aside any determination, be that in law or in fact, made by the administrative authority.¹¹³ Notably, it must be empowered to modify the amount of the fine. A few weeks later, the ECJ reached a similar conclusion in *KME v Commission*. In that case, the appellants, three undertakings producing semi-finished products in copper and copper alloys, brought an appeal against the judgment of the EGC which upheld a Commission decision imposing on them a fine of several millions Euros for having participated in a cartel.

¹¹⁰ See, ECtHR, *A. Menarini Diagnostics S.r.l. v. Italy*, judgment of 27 September 2011, no. 43509/08 (Sect. 2) (fr).

¹¹¹ Case C-389/10P *KME Germany AG v Commission*, judgment of 8 December 2011, not yet reported.

¹¹² See the explanations relating to the Charter, *supra* note 14, p. 30.

¹¹³ See, ECtHR, *A. Menarini Diagnostics S.r.l. v. Italy*, *supra* note 110, para. 59.

The appellants argued that the EGC had committed a violation of their fundamental right to an effective judicial remedy by deferring excessively to the Commission's discretion. For the appellants, the EGC's judicial deference to the Commission's margin of appreciation was in breach of Article 47 of the Charter. Whilst the ECJ ruled out that the EGC had excessively deferred to the Commission's discretion, it did provide some interesting guidance as to the way in which the Commission's margin of appreciation in the realm of competition law must be interpreted in light of the principle of effective judicial protection. First, the ECJ recalled that the judicial review of a Commission decision imposing a fine includes not only the review of its legality, but also, by virtue of Article 261 TFEU and Article 31 of Regulation No 1/2003,¹¹⁴ unlimited jurisdiction in regard to the penalties laid down by EU Regulations.¹¹⁵ As to the review of legality, the ECJ recognised that in matters giving rise to complex economic assessment, the Commission enjoys a margin of appreciation. However, from such a margin it does not follow that EU Courts may "rubber-stamp" the Commission's interpretation of the information of an economic nature. On the contrary, "[n]ot only must [EU] Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."¹¹⁶ With regard to the amount of a fine for infringements of competition law, the ECJ first recalled the factors that must be taken into account by the Commission when fixing the fine.¹¹⁷ Next, the ECJ stressed that EU Courts must "carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward." "In carrying out such a review", the ECJ ruled, "[EU] Courts cannot use the Commission's margin of discretion [...] as a basis for dispensing with the conduct of an in-depth review of the law and of the facts."¹¹⁸ Moreover, notwithstanding the fact that proceedings

¹¹⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

¹¹⁵ See, *KME Germany AG v Commission*, *supra* note 111, para. 120.

¹¹⁶ *Ibidem*, para. 121.

¹¹⁷ *Ibidem*, paras. 123-124. In order to determine the amount of the fine, EU Courts should look at the duration of the infringement, the gravity of the infringement, the role played by each undertaking participating in the cartel, the profit obtained by each undertaking, the size of the undertaking concerned, the value of the goods concerned, the threat that that infringement may pose to the Union. They must also examine the content and duration of the anticompetitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order.

¹¹⁸ *Ibidem*, para. 129.

before EU Courts are *inter partes*, in accordance with Article 261 TFEU, those courts are empowered, “in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission’s and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.”¹¹⁹ Hence, the ECJ ruled that “[t]he review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter.”¹²⁰

Finally, the Charter also incorporates rights that cannot be found in the ECHR.¹²¹ As a result, it is for the ECJ itself to interpret and develop those rights. Needless to say, the ECJ will still take into account the other sources of inspiration set out in Article 52 of the Charter, such as international agreements ratified by the EU or all its Member States, or the constitutional traditions common to the Member States. For example, the Charter aims to provide an answer to the challenges brought about by the new technologies, in particular, by bioethics. In this regard, Article 3(2)(d) thereof provides that the reproductive cloning of human beings is prohibited. In *Brüstle*,¹²² the ECJ was confronted with a difficult question which was particularly sensitive to the public morality of the Member States: it was asked to interpret the concept of “human embryo” within the meaning of and for the purposes of the application of Article 6(2)(c) of Directive 98/44,¹²³ which provides that the uses of human embryos for industrial or commercial purposes are unpatentable. That question arose in proceedings brought by Greenpeace e.V. seeking the annulment of the German patent held by Mr Brüstle, which related to neural precursor cells and the processes for their production from embryonic stem cells and their use for therapeutic purposes. At the outset, the ECJ noted that Directive 98/44 did not contain a definition of the concept of “human embryo”. Nor did it make a reference to the laws of the Member States to that end. The ECJ thus reasoned that the terms “human embryo” convey an autonomous concept that had to be defined in accordance with the context in which those terms operate and the purposes pursued by Directive 98/44. Referring to the preamble of that Directive, the ECJ observed that “patent law must be applied so as to

¹¹⁹ *Ibidem*, para. 130.

¹²⁰ *Ibidem*, para. 133.

¹²¹ *See, e.g.*, the economic and social rights under Title IV of the Charter, such as the right of collective bargaining and action, including the right to strike. *See* also the right to good administration (Article 41 of the Charter).

¹²² Case C-34/10 *Brüstle*, judgment of 18 October 2011, not yet reported.

¹²³ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, [1998] OJ L 213/13.

respect the fundamental principles safeguarding the dignity and integrity of the person,”¹²⁴ which are enshrined in Articles 1 and 3 of the Charter. In this regard, the ECJ found that the EU legislature sought to exclude any possibility of patentability where respect for human dignity could thereby be affected. Accordingly, “the concept of ‘human embryo’ within the meaning of Article 6(2)(c) of the Directive must be understood in a wide sense.”¹²⁵ This meant that the prohibition contained in Article 6(2)(c) applied not only to any fertilised human ovum, but also to any non-fertilised human ovum which, through scientific techniques, is capable of commencing the process of development of a human being.

3.2. The Charter and constitutional traditions common to the Member States

In accordance with Article 52(4) of the Charter, “[i]n so far as [the latter] 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.” By referring to the constitutional traditions common to the Member States, the Charter does not seek to define the fundamental rights recognised thereby in accordance with the “smallest common denominator” of the Member States’ constitutions, but to interpret the fundamental rights enshrined therein in a way that offers a high level of protection; that is adapted to the nature of EU law; and that is in harmony with the national constitutional traditions.

Moreover, Article 53 of the Charter states that “[n]othing 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 the Member States’ constitutions.” The question is then whether Article 53 of the Charter must be interpreted as a codification of the Solange approach,¹²⁶ according

¹²⁴ *Brüstle*, *supra* note 122, para. 32.

¹²⁵ *Ibidem*, paras. 34-37. This meant that “any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a ‘human embryo’ within the meaning of Article 6(2)(c) of [...] Directive [98/44].” By contrast, the ECJ left to the national court to decide whether “in the light of scientific developments, whether a stem cell obtained from a human embryo at the blastocyst stage constitutes a ‘human embryo’ within the meaning of Article 6(2)(c) of [...] Directive [98/44].”

¹²⁶ See the judgments of the German *Bundesverfassungsgericht* of 29 May 1974, known as *Solange I* (2 BvL 52/71) and of 22 October 1986, known as *Solange II* (2 BvR 197/83); the judgment of the Italian *Corte Costituzionale* of 21 April 1989 (No 232, *Fragd*, in *Foro it.*, 1990, I, 1855); the declaration of the Spanish *Tribunal Constitucional* of 13 December 2004 (DTC 1/2004). See also, ECtHR, *Bosphorus Hava Yolları Turizm v Ireland ve Ticaret Anonim Şirketi*, judgment of 30 June 2005, ECHR 2005-VI.

to which the primacy of EU law is conditioned upon that law offering a level of fundamental right protection, at least, equivalent to that guaranteed by the legal orders of the Member States.

In my view, one should not read Article 53 of the Charter as a rule of conflict, but as a rule which seeks to strengthen the primacy of EU law by demanding from the ECJ that it states the reasons why it decided to follow (or depart from) the level of fundamental right protection provided for by the Member States' constitutions. Article 53 of the Charter thus mandates the ECJ to engage in a dialogue with the national constitutional courts or, as the case may be, with the national supreme courts. In accordance with such a reading, Article 53 of the Charter would be an expression of constitutional pluralism. Article 53 of the Charter would not endorse the primacy of an EU law measure which does not pay due homage to the constitutional traditions common to the Member States; nor would that provision of the Charter deprive EU law of its primacy because of a national constitution which, though offering a higher level of protection than that guaranteed under EU law, does not take into account the essential elements of that law. Accordingly, Article 53 of the Charter is not to be interpreted in accordance with the Solange approach, but in light of the rulings of the ECJ in *Omega*¹²⁷ and *Sayn-Wittgenstein*.¹²⁸ In those cases, the ECJ ruled that "it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State."¹²⁹ This means that, in so far as the essential interests of the EU are not adversely affected by national measures implementing EU law, the ECJ defers to the Member States the question of determining the level of protection of fundamental rights they consider consistent with their national constitution.

¹²⁷ Case C-36/02 *Omega*, *supra* note 92.

¹²⁸ Case C-208/09 *Sayn-Wittgenstein*, judgment of 22 December 2010, not yet reported.

¹²⁹ *Ibidem*, para. 91 (referring to Case C-36/02 *Omega*, *supra* note 92, paras. 37 and 38).

CONCLUSION

I would like to conclude this article with some brief remarks as to the requirements private applicants must fulfil in order to build a case successfully.

First of all, they must make sure that the measure causing a violation of the fundamental right at issue falls within the scope of EU law. This is easy to demonstrate if NGO lawyers call into question the validity of an EU measure, either by bringing an annulment action before the ECJ under Article 263 TFEU or by inviting the national court to make a preliminary reference to the ECJ. However, if they challenge a national measure, then they must show, in accordance with Article 51(1) of the Charter, that the measure “implements EU law”. As results from *DEB* and *N.S.*, a Member State is “implementing EU law” when it is called upon to fulfil an obligation imposed by that law.

Second, as the ECJ made clear in *Volker und Markus Schecke*, NGO lawyers must prove that there is a restriction to the fundamental right at issue which is brought about by the challenged measure. Next, they must demonstrate that such a restriction fails to comply with the requirements set out in Article 52(1) of the Charter, i.e. that the restriction is provided for by law; that it respects the essence of the rights and freedoms adversely affected; and that it complies with the principle of proportionality.

Third, NGO lawyers may base their arguments on the existing case law of the ECtHR, in particular in relation to the fundamental rights contained in the Charter which correspond to those guaranteed by the ECHR. Indeed, as *Sergey Zolotukhin v Russia* and *Menarini* reveal, the ECtHR both influences and is influenced by the case law of the ECJ.

Last, but not least, if NGO lawyers wish to set aside a national measure implementing EU law which, at the same time, embodies a national interest which is vital to the identity (or the general interest) of a Member State, then they must show that such a national measure is also in breach of an interest vital to the EU (e.g. the principle of non-discrimination on grounds of nationality). Otherwise, in light of *Omega* and *Sayn-Wittgenstein*, the ECJ will defer to the standard of human rights protection guaranteed by the constitution of that Member State. Stated simply, in the absence of any interest of fundamental importance to the EU, the ECJ will favour “value diversity”.