

# Speakers' Contributions

## THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN PRACTICE TRAINING SEMINAR FOR LEGAL PROFESSIONALS FOCUS ON CIVIL LAW



**416DT14**    Prague, 25-26 April 2016



This series of seminars is organised with the financial support of the specific programme 'Fundamental Rights and Citizenship' JUST-2013-FRAC-AG of the European Commission.

# The Charter of Fundamental Rights of the EU in Practice

## Training seminar for legal professionals / Focus on civil law

Prague, 25-26 April 2016

### Speakers' contributions 416DT14

#### Tobias Lock

- Protecting Fundamental Rights in Europe: an overview
- The Charter of Fundamental Rights and the European Convention on Human Rights: complementing or competing systems?

#### Pavel Šturma

- The relationship between the EU Charter of Fundamental Rights and national constitutions

#### Sionaidh Douglas-Scott

- The scope of application and interpretation of the EU Charter of Fundamental Rights
- Workshop on the application of the EU Charter of Fundamental Rights: determining its scope in different scenarios

#### Ladislav Vyhnánek

- The use of one's name under EU law: relevant case law and Charter provisions

#### Giangiuseppe Sanna

- Unfair terms in consumer contracts and the right to an effective remedy and to a fair trial

#### Ladislav Vyhnánek & Giangiuseppe Sanna

- Workshop on the application of selected substantive provisions of the EU Charter with relevance for civil law



This publication has been produced with the financial support of the specific programme 'Fundamental Rights and Citizenship' JUST-2013-FRAC-AG of the European Commission. The contents of this publication are the sole responsibility of ERA and can in no way be taken to reflect the views of the European Commission.



# Protecting Fundamental Rights in Europe: an overview

Dr Tobias Lock, ERA, Prague 25 April 2016



[www.law.ed.ac.uk](http://www.law.ed.ac.uk)

# Overview

1. General principles of EU law
2. The EU Charter and its legal value
3. Other regional and national legal instruments



# History: General principles

- Until the Lisbon Treaty: no written fundamental rights in EU law
  - Why? Not considered necessary by the drafters.
- But challenges of EU measures in (highest) national courts
  - CJEU ‘invented’ fundamental rights as general principles: Case 29/69 *Stauder*
  - Mainly driven by German Federal Constitutional Court (*Solange* threat)



# General principles of EU law

- Where to find those general principles?
  - Common constitutional traditions of the Member States
  - European Convention on Human Rights (ECHR)
- Treaty of Maastricht (1992) introduced (what is now) Article 6 (3) TEU:

“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”



# Charter of Fundamental Rights

- History:
  - Drafted in 1999/2000 and ‘solemnly proclaimed’ at the Nice summit
  - Entry into force with the Lisbon Treaty on 1 December 2009
- Legal status: Article 6 (1) TEU

“[It] shall have the same legal value as the Treaties.”

  - Means that above EU legislation (secondary law)!



# Charter of Fundamental Rights

What is protected?

- Chapter I: Dignity
- Chapter II: Freedoms
- Chapter III: Equality
- Chapter IV: Solidarity
- Chapter V: Citizens' rights
- Chapter VI: Justice



# Charter of Fundamental Rights

## What is protected?

- **Chapter I: Dignity**
  - Chapter II: Freedoms
  - Chapter III: Equality
  - Chapter IV: Solidarity
  - Chapter V: Citizens' rights
  - Chapter VI: Justice
- Human dignity
  - Right to life
  - Right to the integrity of the person
  - Prohibition of torture and inhuman and degrading treatment
  - Prohibition of slavery and forced labour



# Charter of Fundamental Rights

## What is protected?

- Chapter I: Dignity
  - **Chapter II: Freedoms**
  - Chapter III: Equality
  - Chapter IV: Solidarity
  - Chapter V: Citizens' rights
  - Chapter VI: Justice
- Right to liberty and security
  - Respect for private and family life
  - Protection of personal data
  - Right to marry and to found a family
  - Freedom of thought conscience and religion
  - Freedom of expression and information
  - Freedom of assembly and of association
  - Freedom of the arts and sciences
  - Right to education
  - Freedom to choose an occupation and to engage in work
  - Freedom to conduct a business
  - Right to property
  - Right to asylum
  - Protection in the event of removal, expulsion or extradition



# Charter of Fundamental Rights

## What is protected?

- Chapter I: Dignity
  - Chapter II: Freedoms
  - **Chapter III: Equality**
  - Chapter IV: Solidarity
  - Chapter V: Citizens' rights
  - Chapter VI: Justice
- Equality before the law
  - Non-discrimination
  - Cultural, religious and linguistic diversity
  - Equality between men and women
  - The rights of the child
  - The rights of the elderly
  - Integration of persons with disabilities



# Charter of Fundamental Rights

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- Chapter I: Dignity
  - Chapter II: Freedoms
  - Chapter III: Equality
  - **Chapter IV: Solidarity**
  - Chapter V: Citizens' rights
  - Chapter VI: Justice
- Workers' right to information and consultation within the undertaking
  - Right of collective bargaining and action
  - Right of access to placement services
  - Protection in the event of unjustified dismissal
  - Fair and just working conditions
  - Prohibition of child labour and protecting young people at work
  - Family and professional life
  - Social security and social assistance
  - Health care
  - Access to services of general economic interest
  - Environmental protection
  - Consumer protection



# Charter of Fundamental Rights

## What is protected?

- Chapter I: Dignity
  - Chapter II: Freedoms
  - Chapter III: Equality
  - Chapter IV: Solidarity
  - **Chapter V: Citizens' rights**
  - Chapter VI: Justice
- Right to vote and stand in EP elections
  - Right to vote and stand in municipal elections
  - Right to good administration
  - Right of access to documents
  - Ombudsman
  - Right to petition
  - Freedom of movement and residence
  - Diplomatic and consular protection



# Charter of Fundamental Rights

## What is protected?

- Chapter I: Dignity
  - Chapter II: Freedoms
  - Chapter III: Equality
  - Chapter IV: Solidarity
  - Chapter V: Citizens' rights
  - Chapter VI: Justice
- Right to an effective remedy and to a fair trial
  - Presumption of innocence and right to defence
  - Principles of legality and proportionality of criminal offences and penalties
  - Right not to be tried or punished twice in criminal proceedings for the same offence



# Charter of Fundamental Rights

## Limiting those rights: Article 52 (1)

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.



# Charter of Fundamental Rights

## Rights v Principles

- Not all articles of the Charter contain rights; some merely contain principles

- Article 52 (5):

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

- Which are which?

- We don't know for sure – see Charter explanations for hints.



# Charter of Fundamental Rights

- Who is bound by the Charter?
  - The European Union and its institutions
    - Always
  - The Member States
    - Only “when they are implementing Union law”
      - [more this afternoon]
- This means that all acts of the EU institutions must be compliant with fundamental rights.
- **NB: Charter explanations**



# Examples from the case law

## Invalidity of EU measures, e.g.:

- *Digital Rights Ireland C-293/12 and 594/12*

EU Data Retention Directive incompatible with the right to private and family life contained in Article 7 and with the right to data protection in Article 8.

- *Test Achats C-236/09*

Exception in Equal Treatment Directive allowing insurers to take into account sex as a factor in the determination of insurance premiums incompatible with Art. 21 and 23 of the Charter (prohibition of discrimination).



# Examples from the case law

## Interpretation in light of the Charter

- *N.S. Joined Cases C-411/10 and 493/10*

Article 3 (2) of Dublin II Regulation read in light of Article 4 Charter (inhuman and degrading treatment) meant that duty of MS to process asylum applications even if asylum seeker first entered through Greece.

## Development of new rights

- *Google Spain Case C-131/12*

“Right to be forgotten”.



# Other regional and national legal instruments

- European Convention on Human Rights (more next session)
- European Social Charter
- National constitutions
- How do they relate to EU law - EU Charter?
  - Article 53 Charter:  
Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union 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.**
- General rule however: primacy of EU law (reinforced in *Melloni* – more later).



# Time for ....

## Discussion





# **The Charter and the ECHR: complementing or competing?**

Dr Tobias Lock, ERA, Prague 25 April 2016



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# Overview

1. The ECHR: an overview
2. Judicial remedies before the CJEU and the ECtHR
3. Relationship EU-ECHR
  - a) Corresponding rights Article 52 (3) CFR
  - b) Principle of equivalent protection
  - c) The CJEU's opinion on EU accession to the ECHR



# The ECHR - overview

- 47 parties from across Europe
  - All 28 EU Member States are parties to it
- Human rights protected in the 'original' ECHR:
  - Right to life
  - Prohibition of torture
  - Prohibition of slavery and forced labour
  - Right to liberty and security
  - Right to a fair trial
  - No punishment without law
  - Right to respect for private and family life
  - Freedom of thought, conscience and religion
  - Freedom of expression
  - Freedom of assembly and association
  - Right to marry
  - Right to an effective remedy
  - Prohibition of discrimination
- Plus (optional) Protocols



# Judicial Remedies: CJEU v ECtHR

- European Court of Human Rights
  - Individual complaint
  - After exhaustion of domestic remedies
  - Respondent: a state
  - Declaratory judgment
  - Possibility to award 'just satisfaction'
- Court of Justice of the EU (for individuals)
  - Either preliminary reference (Art 267 TFEU) against EU or MS measure
  - Or direct action (Art 263 (4) TFEU) against EU measure



# Judicial Remedies: CJEU v ECtHR

- Direct action (Art 263 (4) TFEU) against EU measure (e.g. Regulation)
  - Very much restricted: must show **direct and individual concern** – almost impossible to do, see Case 25/62 *Plaumann*; Case C-583/11 P *Inuit Tapiriit Kanatami and Others*
- Preliminary reference (Art 267 TFEU) against EU or MS measure
  - Reference originates in the national court
    - Must ask CJEU questions concerning the validity of an EU measure
    - Can ask CJEU for an interpretation of Charter rights where national measure is at stake (duty to ask only for highest courts)

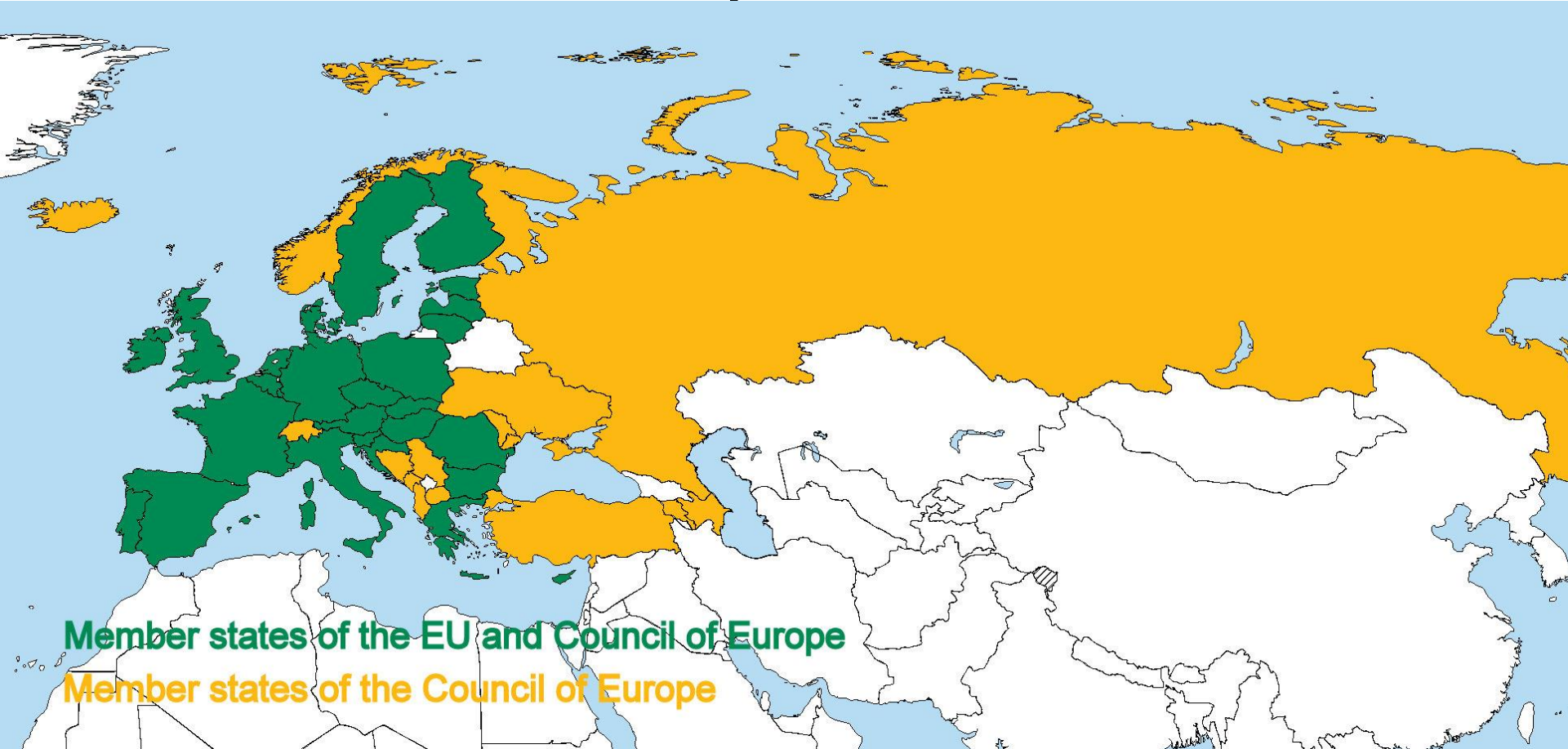


# Judicial Remedies: CJEU v ECtHR

- Effect of CJEU decisions (whether preliminary reference or direct action)
  - Has power to declare invalid EU measures
  - By contrast: ECtHR – declaratory judgment only
- Where MS measures are concerned
  - National courts under a duty to disapply them in so far as they contradict the Charter OR to interpret them in conformity with the Charter



# Relationship EU and ECHR



Member states of the EU and Council of Europe

Member states of the Council of Europe

Source: <http://blog.justis.com/the-european-union-and-the-european-court-of-human-rights-dispelling-the-myths-from-the-facts>



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# Relationship EU and ECHR

- All EU MS are parties to the ECHR
  - But EU is not (yet) a party – accession was negotiated, but agreement was dismissed by CJEU
- Nonetheless: Charter makes reference to ECHR in Article 52 (3)
- And: ECtHR holds MS responsible for (some) violations of the Convention originating in EU law



# Corresponding rights

- **Article 52 (3) of the Charter:**  
In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
- Includes case law of the ECtHR (see explanations)
- But: not strictly binding; autonomous interpretation of Charter rights remains possible, see e.g. *J.N.* C-601/15 PPU, para 47



# ECHR responsibility of the MS

- *Matthews v United Kingdom* (EU primary law)

ECtHR: MS responsibility under the ECHR for EU acts.

The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’.

Member States’ responsibility therefore continues even after such a transfer.



# ECHR responsibility of the MS

- *Bosphorus v Ireland* (EU secondary law)
  - ECtHR reaffirmed general responsibility of MS under *Matthews*
  - But introduced new rebuttable presumption:
    - EU offers protection of human rights which is equivalent to the ECHR;
    - If the MS had no discretion, the MS is presumed not to have violated the ECHR if it does nothing more than implement its obligations;
    - Presumption can be rebutted if in a particular case the protection was 'manifestly deficient'.



# ECHR responsibility of the MS

- Mind the gap: *Connolly v 15 Member States of the EU*
  - Difference to *Matthews* and *Bosphorus*: no Member State had got involved
  - Purely EU-internal dispute
- Complaint was deemed inadmissible since act not attributable to MS for lack of involvement
- Thus there is a **gap in the protection** at present where no Member State was involved



# EU Accession to the ECHR

- What would happen if the EU signed up to the ECHR?
  - Closure of the *Connolly* gap;
  - (possible) end to *Bosphorus* presumption;
  - Better accountability as the EU could be held directly responsible instead of the MS in its place.
- Main problem:
  - EU accession would have to be compatible with the EU legal order as understood (and policed) by the CJEU.



# EU Accession to the ECHR

- ECHR Accession Agreement
  - Drawn up between 2010 and 2013
  - Key features:
    - MS to remain parties to the ECHR; EU to join as well;
    - How to divide up responsibility between EU and MS (*Bosphorus*-type scenario)?
      - Co-respondent mechanism – joint responsibility;
    - How to ensure CJEU involvement?
      - Prior involvement mechanism.



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      - Prior involvement mechanism.
- Agreement was sent to CJEU: Opinion 2/13



# Opinion 2/13 – key issue

- The autonomy of the EU legal order
  - *Van Gend en Loos*: EU is a ‘new legal order of international law’
  - This (also) means that EU cannot conclude international agreements that would undermine this legal order, in particular:
    - No other court but the CJEU may have jurisdiction to interpret EU law in a binding manner;
    - And no court may decide on the distribution of competences between the EU and the MS.



# Opinion 2/13 – 7 key hurdles

- Co-respondent mechanism
- Prior involvement of the ECJ
- Article 344 TFEU and inter-party cases
- Coordination between Articles 53 CFR and 53 ECHR
- Protocol No 16
- Exclusion mutual trust/recognition cases
- Exclusion of jurisdiction over CFSP measures



# Opinion 2/13 – how to overcome these hurdles?

- Safe option: changes to the accession agreement
  - Might not be possible as regards CFSP – only solution may be Treaty change to give CJEU jurisdiction;
  - And will need agreement by non-EU MS in the Council of Europe.



# Was Opinion 2/13 a turning point in the EU/ECHR relationship?

- On EU side: new trend to pay less regard to ECHR?
  - Earlier Charter cases: *McB*: strong commitment to ECHR
  - But now:
    - e.g. *Delvigne* on prisoner voting: no mention of it.
    - *J.N.* case: clear that EU not bound by ECHR so that only Charter rights offer protection...
    - AG Bot in *Aranyosi*: strong defence of the immunity of mutual recognition to human rights; but CJEU decided that exceptions to mutual recognition are possible if real risk of inhuman or degrading treatment (Article 4 breach)



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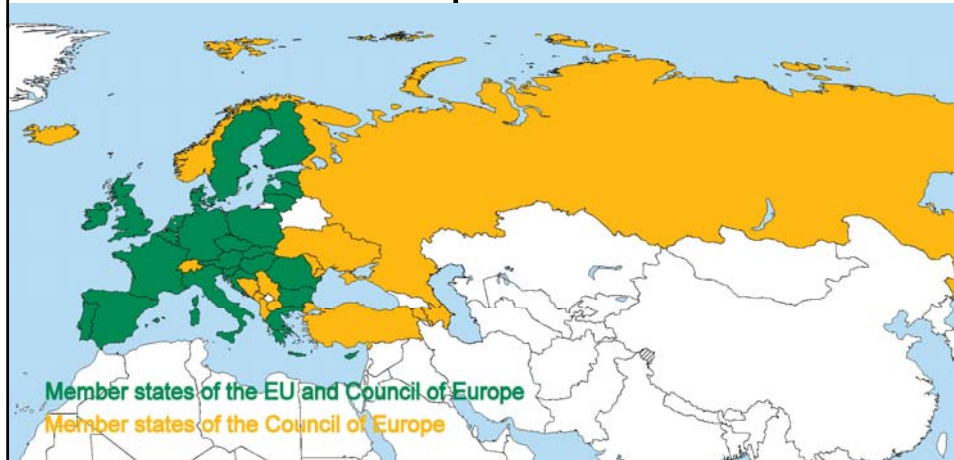
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Time for discussion.



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# The EU Charter of Fundamental Rights and national constitutions



PROF. JUDR. PAVEL ŠTURMA, DRSC.  
CHARLES UNIVERSITY IN PRAGUE  
FACULTY OF LAW

## Outline



- Introduction
- The EU Charter of Fundamental Rights and its horizontal provisions
- Relationship between the CFR and national constitutions
- Limits to Art. 53 of the CFR in the case law of the CJEU
- Position of the EU Member States' Constitutional Courts
- Conclusions

## The EU Charter of Fundamental Rights

- **Most comprehensive document (54 articles) but not easy to interpret**
  - CFR was first drafted and adopted in 2000, legally binding instrument since Dec. 2009
- **Rights, freedoms and principles**
  - I. Dignity
  - II. Freedoms
  - III. Equality
  - IV. Solidarity
  - V. Citizens' rights
  - VI. Justice
- **Horizontal provisions (VII) on the interpretation and application of the Charter**
  - Clarify the scope of application, the scope and interpretation of rights and principles, the level of protection and the prohibition of abuse of rights

## The EU Charter of Fundamental Rights(2)

- **Art. 51 (Scope of application)**
  - To the institutions and bodies of the Union
  - Principle of subsidiarity
  - To the MS only when they are implementing EU law
- **Art. 52 (Extent and interpretation of rights)**
  - Conditions of any limitation on the exercise of rights
  - Reference to the rights regulated in the Treaties
  - The same meaning and scope of the rights corresponding to the rights guaranteed by the ECHR
  - Reference to the rights that result from the constitutional traditions common to the MS
  - Principles – no direct effect

## The EU Charter of Fundamental Rights(3)

- **Article 53 (Level of protection)**

- *Noting 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.*
- A stand-still clause aims at protecting the existing level of protection guaranteed by EU law, national constitutions and international conventions, in particular the ECHR
- The reference to the national constitutions somewhat unclear, in particular whether Art. 53 would amend the status quo according to which in relation to EU legislation the only fundamental rights standard which is relevant is that set by the EU legal order
- Interpretation by the Court of Justice of the EU and constitutional courts of EU Member States

## Limits to Art. 53 in the case law of the CJEU

- **That means:**

- MSs can still go beyond what is settled by EU law, but only to the extent that the subject-matter has not been completely regulated by the Union
- In conformity with the CJEU rulings in Case C-36/02, Omega (2004) and Case C-208/09, Sayn-Wittgenstein (2010)
- MSs should have the opportunity to determine the level of protection of fundamental rights which they considered to be consistent with their national constitution, as far as the essential interests of the EU are not adversely affected by national measures implementing EU law
- EU fundamental rights does not directly exclude the application of rights recognised by the domestic courts
- The MSs have a margin of appreciation in situations when EU fundamental rights are applied in their national legal system in order to accept the differences between the MSs regarding the level of protection of fundamental rights

## Limits to Art. 53 in the case law of the CJEU (2)

- **Case C-399/11, *Melloni*, Judgment of 26.2.2013**
  - Issue of whether a Member State may refuse to execute a European arrest warrant on the grounds of infringement of the fundamental rights of the person guaranteed by the national constitution?
  - Art. 4a(1) of the Council Framework Decision on the European arrest warrant must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a EAW issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing MS.
  - Article 4a(1) of the Framework Decision is compatible with the requirements under Articles 47 and 48(2) of the Charter of Fundamental Rights of the EU.

## Limits to Art. 53 in the case law of the CJEU (3)

- Art. 53 of the CFR must be interpreted as not allowing a MS to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing MS, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.
- It is settled case law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order..., rules of constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (§§ 59 – 60)
- That means:
  - = national courts are prevented from imposing their own constitutional standards in those cases in which to do so would affect the uniform application of EU law, that is when EU law leaves no discretion to MSs
  - = and when the EU law leaves space for the exercise of discretion by national authorities, the Charter only provides MSs with a floor of rights leaving national authorities and courts the freedom to apply their own (higher or differing) constitutional standards

## Limits to Art. 53 in the case law of the CJEU (4)

- **Case C-617/10, Åkerberg Fransson, Judgment of 26.2.2013**
  - The request for a preliminary ruling concerns the interpretation of the *ne bis in idem* principle in EU law.
  - The *ne bis in idem* principle laid down in Art. 50 of the CFR does not preclude a MS from imposing successively, for the same acts of non-compliance with declaration obligations, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature.
  - EU law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law.
  - EU law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the CFR conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the CJEU, whether that provision is compatible with the Charter.

## Position of the Constitutional Courts

- **Czech Constitutional Court**
  - Decision Pl. ÚS 50/04, 8.3.2006, on Sugar Quotas III
  - First opportunity that the Czech CC had to express its views on the relationship between the EU law and the national law
  - CC recognised the transfer of competences to the EU and in this ambit also supremacy of EU law
  - But: it said that this transfer is only conditional as the primary holder of the Czech sovereignty and of the competences stemming from it is still the Czech Republic
  - The transfer of competences can only last till they would be exercised
    - ✦ In a manner that is not against the basis of state sovereignty of the CR, and
    - ✦ In a manner that does not endanger the substance of a material State of law (Rule of law)

## Position of the Constitutional Courts (2)

- Czech Constitutional Court: decision Pl.US 19/08, of 26 November 2008 (No. 446/2008 Coll.), on the Lisbon Treaty
  - The Lisbon Treaty and the EU Charter of Fundamental Rights are not in conflict with the constitutional order.
  - The Charter does not extend the scope of application of EU law
  - The EU and national (constitutional) standards of human rights stem from the same value framework
  - Principle in Art. 53 of the CFR is key, as far the limitation of scope of EU law is concerned
  - The CC reminds its case law that the protection of fundamental rights and freedoms belongs to the s.-c. material core of the Constitution. If the EU standard of protection were insufficient, the Czech authorities would have to take back the transferred powers...
  - The CC will be the *ultima ratio* in examining whether an act of the EU body has or has not swerve from the competences that the CR has transferred to it.

## Position of the Constitutional Courts (3)

- The content of human rights expressed in the EU Charter is fully comparable with that of the Czech Republic, both under the national Charter of fundamental rights and freedoms and the ECHR
- Most human rights and freedoms are open to mutual balancing on the basis of analysis of proportionality of interference with one guaranteed rights for the benefit of another right.
- Reference to the equivalent protection (ECtHR, Bosphorus case, 2005)
- The EU institutional protection of human rights standard can be considered compatible with that of the Czech Republic
- Potential future conflicts about interpretation are possible but not essential. The key is the overall aim based on values that of the same or similar nature – on national, European and international levels.
- In case of conflict of sources, Const.Court takes a pragmatic approach: what recognises a higher standard of protection.

## Position of the Constitutional Courts (4)

- **Czech Constitutional Court: decision Pl.US 66/04, 3.5.2009, on the European Arrest Warrant**
  - Case about the Czech implementation of the Framework Decision on the EAW
  - Argument of a group of MPs that it is not in conformity with Art. 14(4) of the Czech (constitutional) Charter of Fundamental Rights and Freedoms, forbidding the coercion of a Czech citizen to leave the country: rejected by the CC
  - The CC stated that the primacy of EU law and its priority application is limited by the material focus (core) of the Czech Constitution
- **Czech Constitutional Court: decision Landtová v. Czech Social Security Administration (s.-c. Slovak pensions)**
  - Preliminary question to the ECJ asked by the Supreme Administrative Court
  - CJEU, Case C-399/09, 2011: discriminatory on the grounds of nationality
  - The rejection by the Const. Court:
    - ✦ It is the CC that is to be the supreme protector of constitutionality in the Czech Rep., it can protect it also against possible excesses of the EU institutions
    - ✦ The applicable EU regulation that coordinates the pension systems between the MSs does not consider the specific situation of the separation of Czechoslovakia and therefore it cannot be applicable to this situation.

## Position of the Constitutional Courts (5)

- **Polish Constitutional Tribunal**
  - Accession Treaty Judgment (2005): it accepted primacy of EU law but the Constitution was still seen as above the EU law
- **German Constitutional Court**
  - *Judgment Solange I* (1974): the EC is not always acting as democratic legislator, therefore there can be cases when the level of HRs protection in Germany will be higher than the EC law and then the German Constitution prevails
  - *Judgment Solange II* (1986): the level of HRs protection in EU has already reached the level of the German one
  - As far as (solange) the situation will continue, there is no need for the GCC to review the compatibility of the EU law with the German Constitution (BVG) and limit its application in Germany
  - However, if the level of HRs protection will decrease, then the doctrine of Solange will be applicable again and the Constitution will prevail.
  - Germany accepts supremacy of EU law based on German Constitution but with reservation regarding the non-changeable part of the BVG (rule of law, democracy, human rights)
  - The principle kompetenz-kompetenz: the GCC has the ultimate control of competence of the EU

## Position of the Constitutional Courts (6)

- **German Constitutional Court, Order of 15 December 2015, 2 2735/14**
  - Response to the *Melloni* case
  - Case concerned the application of European Arrest Warrant with regard to ruling *in absentia* in Italy
  - This time, the Italian judgment was not lawful, as it did not inform the accused of the trial, nor the accused had his lawyer to represent him
  - The GCC stated: In individual cases, protection of fundamental rights by the Federal Constitutional Court may include review of sovereign acts determined by EU law if this is indispensable to protect the constitutional identity guaranteed by Art. 79 sec. 3 of the Basic Law
  - Under the principle of individual guilt, any criminal sanction presupposes that the offence and the offender's guilt are proven in a procedure that complies with the applicable procedural rules. The principle of individual guilt is rooted in the guarantee of human dignity enshrined in Art. 1 sec. 1 GG.
  - It therefore also has to be guaranteed in the context of extraditions pursuant to the Framework Decision on the European arrest warrant if they are meant to ensure the execution of sentences that have been rendered in the absence of the requested person.
  - The identity review conducted by the Federal Constitutional Court safeguards the constitutional identity. As with *ultra vires* reviews, [identity] reviews may ultimately result in Union law having to be declared inapplicable in exceptional cases.
  - This does not entail a substantial risk for the uniform application of Union law, as the powers of review reserved for the Federal Constitutional Court have to be exercised with restraint and in a manner open to European integration.

## Conclusions

- **More questions than answers**
  - Is the order of 15 December 2015 a final word?
  - Art. 53 seems to be clear provision but its interpretation is not
  - The problem about „*in their respective fields of application*“ = problem of the division of competences
  - Never-ending story – struggle between the CJEU and national courts, in particular constitutional, about the delimitation of the fields of EU law, national law and international law
  - Who should interpret fundamental rights from the point of view of Art. 53 of the CFR?
  - The Lisbon Treaty increased the likely extent of the case law of the CJEU on fundamental rights
  - In deciding HRs claims, the CJEU is decreasing to put references to the ECHR or to international and comparative law
  - Did the CJEU go too far in its solipsism (autism) in protecting the autonomy of EU legal order?
  - Towards an autonomous system of human rights protection based on the CFR?
  - The right resistance from national constitutional courts?



- Questions and comments ?
- Thank you for your attention !

○ [sturma@prf.cuni.cz](mailto:sturma@prf.cuni.cz)

**Relying on the Charter in a national court: the scope of application and interpretation of the Charter in domestic legal proceedings**



**PROFESSOR SIONAIDH DOUGLAS-SCOTT**  
**ANNIVERSARY CHAIR IN LAW, UNIVERSITY OF LONDON**  
**RESEARCH FELLOW, UNIVERSITY OF OXFORD**

## **THE EU CHARTER OF FUNDAMENTAL RIGHTS IN PRACTICE**

**The scope of application and interpretation of the EU Charter of Fundamental Rights:**

- **Personal and material scope**
- **The meaning of “implementation of EU law” (Art. 51)**
- **The issue of direct effect of Charter provisions**

## INTRODUCTION: RELYING ON THE CHARTER IN NATIONAL COURTS

- “The same legal value” as the Treaties (Art 6.1 TEU)
- 
- So this means it can be used as:
- a) ***Interpretative tool*** for EU law or national law within the scope of EU law (including using Charter to justify member state actions that might otherwise infringe EU law (eg *Omega*))
- AND
- b) ***Ground of invalidity*** of all EU actions and all MS actions within scope of EU law
- Whether MS is interpreting / applying EU law
- Or even restricting EU rights (eg *Carpenter*, *Ruiz Zambrano*)

- **Who is bound by it?**
- All national courts and tribunals
- Any public authority applying EU law
- In certain cases: private parties (“horizontal” direct effect issue)
- *If matter falls within scope of EU law*

- **Scope of application of the Charter**
- Article 51(1) Charter:
- What is the meaning of “implementing” Union law?
- National authorities acting as agents of EU or implementing
- e.g. Directive (see, e.g., Wachauf, NS)...
- AND National authorities derogating from right granted by EU law, e.g., free movement right (see, e.g., ERT, Carpenter, Schmidberger, Omega, Ruiz-Zambrano...)
- NOT if matter has no connection with EU law or fall outside material scope of EU law
- eg C-299/95 *Kremzow* [1997] ECR I-2629
- or Eg if agreement is made outside of EU Treaties – *Pringle*, November 2012

- **NB Charter does not extend EU competences:**
- Art. 51(2) EU Charter:
- The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties
- **Art 52(7) Status of Explanations**
- The 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.
- Explanations: not “status of law”, “valuable tool of interpretation intended to clarify”
- Inspiration and origin, not scope – backward looking

## A. Scope/Field of application of Charter

- *Article 51*
- **Field of application**
- 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
- 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

## Implementation of EU law?

Important: when the Charter applies to State measures, it can prevail over them and cause their disapplication (by virtue of the primacy of EU law, since *Costa v Enel*).

When is the MS “implementing” EU law? Same doctrines used for the application of general principles (*ERT*, *Wachauf*): when the State measures falls “within the scope” of EU law, by way of *application* or *derogation*.

## Case C-617/1 *Åkerberg Fransson*



### *Fransson* (2013)

Swedish law provides for the applicability of (both) fiscal and criminal sanctions to tax crimes.

This duplication might breach the principle of *ne bis in idem* (Article 50 of the Charter).

The question is: **are the Swedish measures implementing EU law?**  
Otherwise, the Charter cannot apply.

### **Fransson: Advocate General's Opinion**

- Advocate General Cruz Villalón:
- - the controlling consideration should be whether the EU had a 'specific interest' in centralizing human rights review of the measures.
- - '[t]he mere fact that such an exercise of public authority has its ultimate origin in Union law is not of itself sufficient for a finding that there is a situation involving the implementation of Union law'
- - the link between the EU legislation and the Swedish measures too tenuous.

### **But ECJ Grand Chamber:**

#### **Case C-617/11 Åkerberg Fransson 26/2/2013**

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

## (continued)

24 ... tax penalties and criminal proceedings ... are connected in part to breaches of ... obligations to declare VAT

26 ... Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the EU [NB: VAT finances the EU's budget]

27 ... It follows that tax penalties and criminal proceedings for tax evasion ... **constitute implementation ... of EU law**, for the purposes of Article 51(1) of the Charter

### CONTEXT OF THE CJEU RULING IN ÅKERBERG FRANSSON

- **1. Criticism by the German Constitutional Court** in a 2013 judgment (24. April 2013 1 BvR 1215/07) concerning a counter-terrorism database.
- **2. C-60/00 Carpenter [2002] ECR I-6279**
- **3. Case 34/09 Ruiz-Zambrano [2011] ECR I-1177.**
- **4. Gitlow v. New York, 268 U.S. 652 (1925) US federal comparison**
- **5. The EU is not the US**

## Contrast

- **N.S. , Joined Cases C-411/10 and C-483/10 N.S. and others**
- **Case C-333/13, *Dano*: economically inactive Union citizen falls within the scope of EU law only insofar as she meets the black letter requirements of economic self-sufficiency and comprehensive health insurance**

## Caselaw subsequent to *Fransson*

- **Case C-206/13 *Siragusa***
- ***Para 24*: However, while EU environmental law and the Italian landscape law pursued the similar but not the same objectives, the concept of 'implementing Union law', as referred to in Article 51 of the Charter, **requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other****



- **Relevant questions regarding scope of application of EU law:**
  - 1) the nature of national legislation and whether it intends to implement EU law;
  - 2) the objectives pursued by national law and to what extent they overlap with those covered by EU law;
  - 3) linked to this criterion the negative criterion whether national legislation merely indirectly affects EU law; it is not enough that EU law had an 'indirect impact' or was 'closely related' to a dispute
  - 4) the existence of “specific” rules of EU law on the matter, which includes EU rules “capable of affecting” a situation.

Another interesting case  
Case C-300/11, **ZZ v Secretary of State for the Home Department**

36 In that regard, the Court’s settled case-law should be recalled according to which, in proceedings under **Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice**, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law.

Consequently, **where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling** (Case C-553/11 *Rintisch* [2012] ECR, paragraph 15 and the case-law cited).



- 37 The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27 and the case-law cited).
- 38 That is not the case here. **First, the question referred relates to the interpretation of Article 30(2) of Directive 2004/38, read in the light, in particular, of Article 47 of the Charter. Second, that question arises in the context of a genuine dispute** relating to the legality of a decision refusing entry taken, pursuant to the directive, by the Secretary of State against ZZ. Furthermore, although it is for Member States to take the appropriate measures to ensure their internal and external security, **the mere fact that a decision concerns State security cannot result in European Union law being inapplicable** (see, to this effect, Case C-387/05 *Commission v Italy* [2009] ECR I-11831, paragraph 45).
- 39 Accordingly, the request for a preliminary ruling is admissible.

## ***Delvigne* – Opinion 4 June 2015**

French law provides that conviction for certain crimes entails the loss of the right to vote. This causes a restriction on convicted people's right to vote at European elections.

Does this mean that the French measures fall within the scope of EU law, under Art. 51(1) of the Charter?

## AG Cruz Villalon's Opinion

91. The situation of the loss of the right to vote in elections to the European Parliament ... as a result of the French law which, as we shall see, pursuant to EU law, governs elections to the European Parliament — by reference to the national general electoral law ..., which refers in turn to the relevant criminal law ... — is the consequence of a law adopted **in order to implement EU law**.

## Which EU law?

Art. 223(1) TFEU - The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States. [**not acted upon**]

Doesn't matter: French law implements EU law even if the matter is not 'entirely determined by EU law' [**stretching Melloni**]

## Interim conclusions

- Conclusions on Art 51 CFEU: has the ECJ interpreted it too widely or too narrowly?

## General limitations clause

- *Article 52*
- **Scope and interpretation of rights and principles**
- 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

## Article 52(3) and 53 CFR

Express link to the case law of the ECtHR. However, increasingly the CJEU is relying on its own case law rather than going back to the interpretation of the Convention.

Issue with Art. 53: the level of protection is not capped, in theory, but see *Melloni* (normally it is less likely that the ECtHR advocates a higher standard, but it has occurred, e.g. right to strike)

## Direct effect?

The question of direct effect goes back to ***Van Gend en Loos***: not just a matter of source, but also of content of the norm.

Hence, Treaty norms and general principles have been considered to have direct effect, insofar as they are clear and bestow unequivocally a right on the individual without need for implementing measures (*Mangold, Defrenne*)

## Are Charter rights directly effective?

Source of primary law. The test of direct effect should apply normally.

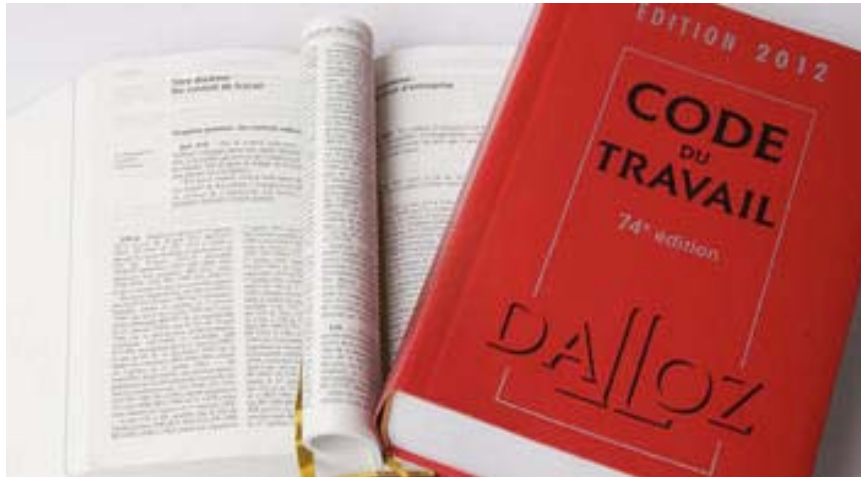
BUT, remember Art. 52(5) CFR: **no direct effect for principles.** **Controversial distinction**

“[principles] do not...give rise to direct claims for positive action by the Union's institutions or Member States authorities.”

## Can the Charter have Horizontal Effect?

- *Article 51(1)* limits the legal effect of Charter rights to EU institutions and bodies, and to member states only when implementing Union law
- - *On the other hand, some Charter Articles strongly suggest horizontal effect.* For example, Article 23 concerns ensuring equality between men and women ‘in *all* areas’ and Article 24(2) covers actions relating to children ‘whether taken by public authorities or *private institutions*’.
- Case C-144/04 *Mangold v Helm*
- Case C-176/12 *Association de Médiation Sociale* [2014] ECR I-0000.
- Case C-555/07 *Küküdeveci v Swedex*
- *Benkharbouche v Embassy of the Republic of Sudan, Libya* [2015] EWCA Civ 33.

**Case C-176/12 *Association de Mediation Sociale* [2014] ECR I-000**



**Case C-176/12 *Association de Mediation Sociale* [2014] ECR I-000**

- CJEU indicated that those Charter rights which require implementation by way of national or EU legislation are not capable of having horizontal direct effect, as they lack the requisite clarity, precision and unconditionally to ground standalone claims.

## **AMS**

...Art. 27 of the Charter...provides that workers must...be guaranteed information and consultation in the cases and under the conditions provided for by EU law and national laws and practices.

...for this article to be fully effective, it must be given more specific expression in EU or national law.

...the facts of the case may be distinguished from those which gave rise to *Kücükdeveci* in so far as the principle of non-discrimination on grounds of age ... is sufficient in itself to confer on individuals an individual right which they may invoke as such.

... Art. 27 CFR cannot, as such, be invoked in a dispute ... in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.

...since [Art. 27] by itself **does not suffice to confer on individuals a right which they may invoke as such**, it could not be otherwise if it is considered in conjunction with that directive.

### ***Benkharbouche & Janah V Embassies Of The Republic Of Sudan & Libya & Others, UK Court of Appeal (Civil Division) 5 February 2015***



### C. LITIGATION

- **1. When does the Charter come into play at national level: and how may it be litigated: some background?**
- **2. Preliminary references**
  - an example: *Association Belge des Consommateurs Tests-Achats*, 2011
- **3. National case law quoting the Charter**
  - European Commission: 'European Case Law Identifier'
  - 'European Judicial Cooperation in Fundamental Rights Practice of National Courts'

- **Article 267 TFEU**
- *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
  - *(a) the interpretation of the Treaties;*
  - *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
- *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*
- *Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*
- *If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.*

END OF PRESENTATION

THANK YOU!

# CASE STUDIES ON THE APPLICATION OF THE EU CHARTER IN NATIONAL LAW

**PROFESSOR SIONAIDH DOUGLAS-  
SCOTT  
UNIVERSITY OF OXFORD**

## **1. Garden Centres**

- *Sunshine Garden Centre*, a Belgian garden centre operator, objected to its competitors' (*Happy Plants Garden Centre*) refusal to comply with national legislation requiring retailers to observe one day of closure per week. They brought legal proceedings in the Belgian courts requesting that they be ordered to cease the practice and comply with the requirement to observe one day of rest per week. *Happy Plants Garden Centre* argued in their defence that the Belgian obligation was contrary to EU law. They persuaded the Belgian Constitutional Court to make a preliminary reference to the Court of Justice on that point.
- **a)** First, the CJEU was requested to determine whether the contested Belgian legislation was contrary to the principles of equality and non-discrimination set out in Articles 20 and 21 of the Charter, read in the light of Articles 15 and 16 of the Charter.
- **b)** Secondly, the CJEU was asked to consider the Belgian measure's compatibility with the Treaty provisions on the free movement of goods and services (Articles 34, 35 and 56 TFEU).
- 
- *Please advise whether the Charter may apply in this case.*
- *Further questions:*
  1. How do we know if the Charter applies? What is the field of its application?
  2. What relevant caselaw would you cite here?
  3. What might be the consequences in this case if the Court were to find that the Charter were applicable?

### **Case C-483/12 Pelckmans Turnhout NV v Walter Van Gastel Balen NV,**

#### **Judgment Of The Court (First Chamber) 8 May 2014**

- 20 It follows that, where a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to that effect . . . *Åkerberg Fransson* EU:C:2013:105, paragraph 22).
- 21 These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties . . .
- 22 There is nothing specific in the order for reference demonstrating that the legal situation at issue in the main proceedings comes within the scope of EU law. . .
- 24 In any event, as regards the application of Articles 34 TFEU to 36 TFEU governing the free movement of goods, referred to by that court, it must be borne in mind, as this Court has observed on a number of occasions, that those provisions do not apply to national rules concerning the closure of shops that are enforceable against all economic operators pursuing activities within the national territory and that affect, in the same way, in law and in fact, the sale of domestic products and of products from other Member States (see, *inter alia*, Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV* EU:C:1994:226, paragraph 15, and Joined Cases C-418/93 etc. *Semeraro Casa Uno and Others* EU:C:1996:242, paragraph 28)...
- 26 It follows from all the foregoing that it has not been established that the Court has jurisdiction to interpret the provisions of the Charter referred to by the referring court.
- 27 In those circumstances, the Court has no jurisdiction to answer the question referred by the Grondwettelijk Hof.

## **2. Fingerprint retention**

- Council Regulation No 2252/2004/EC requires EU member states to collect and store biometric data, including fingerprints, in the storage medium of passports and other travel documents, and requires that such data be used for verifying the authenticity of the document or the identity of the holder.
- The Netherlands introduced such measures. However, Netherlands law also provides that such data obtained through these measures can be kept in a central register, and used for other purposes (such as national security, prevention of crime and identification of disaster victims).
- The applicants made passport applications, but refused to provide the fingerprint data. They argued, *inter alia*, that the storage and further use of those data breached their fundamental rights under Article 7 and 8 of the Charter of Fundamental Rights of the EU.
- The national court referred (*inter alia*) this question for a preliminary ruling:  
*Does Article 4(3) of the Regulation 2252/2004/EC, read with Articles 7 and 8 Charter, require Member States to guarantee that the biometric data collected and stored pursuant to that Regulation will not be collected, processed and used for purposes other than the issue of passports or other travel documents?*
- [The ECJ had already held (in *C-291/12 Schwarz*) that the collection of data for the purposes stipulated in the regulation (to verify the authenticity of the passport or the identity of the holder) was compatible with the Charter. The question was whether further processing of those data by Member States would similarly be compatible.]
- *Please advise whether you think that further use by the Netherlands of this data breaches Arts 7 and 8 Charter.*

## JOINED CASES C-446/12 – 449/12 WILLEMS

### Judgment Of The Court (Fourth Chamber) 16 April 2015

- 46 The Court has already held, in its judgment in *Schwarz* (C-291/12, ), that the use and storage of biometric data for the purposes specified in Article 4(3) of that regulation are compatible with the requirements of Articles 7 and 8 of the Charter.
- 47 As regards all other uses and storage of that data, it is clear from Article 4(3) of Regulation No 2252/2004, which deals with the use of such data '[f]or the purpose of this Regulation', . . . that the use and storage of that data are not governed by the latter regulation. . . . Regulation No 2252/2004 is without prejudice to any other use or storage of these data in accordance with national legislation of Member States and . . . does not provide a legal base for setting up or maintaining databases for storage of those data in Member States, that matter being within the exclusive competence of the Member States.
- 48 It follows, in particular, that Regulation No 2252/2004 does not require a Member State to guarantee in its legislation that biometric data will not be used or stored by that State for purposes other than those mentioned in Article 4(3) of that regulation . . .
- 49 Next, as regards Articles 7 and 8 of the Charter, it is clear from the case-law of the Court that the fundamental rights guaranteed by the Charter must be respected where national legislation falls within the scope of EU law. In other words, the applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter (judgments in *Åkerberg Fransson*, C-617/10, paragraphs 20 and 22 . . .)
- 50 Given that, in the present case, Regulation No 2252/2004 is not applicable, there is no need to determine whether the storage and use of biometric data for purposes other than those referred to in Article 4(3) thereof are compatible with those articles of the Charter . . .
- 53 Therefore, the answer to the questions referred is that Article 4(3) of Regulation No 2252/2004 must be interpreted as meaning that it does not require the Member States to guarantee, in their legislation, that biometric data collected and stored in accordance with that regulation will not be collected, processed and used for purposes other than the issue of the passport or travel document, since that is not a matter which falls within the scope of that regulation.

### 3. Sacked Embassy employees

- Ms B and Ms J are both Moroccan nationals. They were employed as members of the domestic staff respectively at the Sudanese and Libyan Embassies in London. They were both dismissed and brought claims against the respective Embassies for unfair dismissal, failure to pay the national minimum wage and breach of the Working Time Regulations 1998. Ms J also claims arrears of pay, racial discrimination and harassment.
- Two of their claims specific derive from EU law: namely, the Working Time Regulations (1998) implement the European Working Time Directive 2003/88/EC into UK law, and the EU Directive 2000/43/EC (The Race Directive) is implemented in the UK by The Race Relations Act 1976 (Amendment) Regulations 2003, SI No 1626 amending the Race Relations Act of 1976.
- 
- The Embassies claimed state immunity in reliance on sections 16(1)(a) and 4(2)(b) of the UK State Immunity Act 1961 which transposes a Council of Europe Convention on that issue. The effect of section 16(1)(a) is that states enjoy a blanket immunity from UK courts' jurisdiction in respect of proceedings concerning employment of the members of an Embassy. Ms J's claim is also barred by section 4(2)(b) because she was not habitually resident in the UK at the time her contract of employment was made.
- 
- **Main Issues:**
- 1. Did invoking state immunity for these employment claims amount to a breach of human rights law, given that Article 6 ECHR (the right to a fair trial) guarantees access to the courts, according to the case law of the European Court of Human Rights (ECtHR).
- 
- 2. Is the EU Charter also applicable given that Article 47 EU Charter of Fundamental Rights also guarantees the right to a fair trial.
- 
- 3. If the EU Charter is applicable, may it be applied *horizontally*, given that Foreign Embassies are not treated as emanations of the state, but as private parties in employment disputes such as these.

## ***Benkharbouche v Embassy of the Republic of Sudan, Libya* [2015] EWCA Civ 33**

- The appellants cannot of course claim a remedy under the EU Charter unless they can also show that they are entitled to rely on a violation of it to seek a remedy in proceedings before a national court. For this there must be claims which fall “within the scope of” EU law. As to this, Article 51 EU Charter confirms that the EU Charter is addressed to the EU institutions and like bodies and that it does not extend the field of application of the EU Treaties. Article 52(5) of the EU Charter states that the EU Charter only applies to these entities when they are implementing Union law, in the exercise of their respective powers. The EU Charter does not, therefore, apply to claims based on national law.
- In fact, it is common ground that both claimants have claims that fall within the scope of EU law. As the judge explained, Ms. Benkharbouche’s claims under the Working Time Regulations and Ms. Janah’s claims under the Working Time Regulations and for racial discrimination and harassment are derived from EU measures. They have other claims which they accept are not within EU law, such as claims for unfair dismissal. The question of what falls within the scope of EU law is controversial in some contexts but no one has taken issue with the point that in part Ms. Benkharbouche’s claims and Ms. Janah’s claims are within the scope of EU law . . .

## **BENKHARBOUCHE: HORIZONTAL EFFECT**

- *Horizontal Direct Effect*
- In our judgment, for the reasons given below, an EU Charter right can be relied on “horizontally” in certain circumstances.
- The CJEU gave general principles of EU law horizontal direct effect before the EU Charter came into effect. In Case C-144/04 *Mangold v Helm* [2005] ECR I-9981, there was a dispute between a private employer and an employee who claimed that a provision of his employment contract discriminated against him on the grounds of age. He argued that national law was incompatible with Directive 2000/78 but that Directive had not been transposed into national law and the time for doing so had not expired. The conventional route for enforcing non-implemented Directive rights is through the EU law doctrine of direct effect, but that is not applicable where the time for transposition has not expired. The CJEU agreed that the national law was contrary to Directive 2000/78. It went on to hold that the provisions of the Directive were applicable even though it had not been transposed into national law and the time for transposition had not expired. Its reasoning was that the Directive implemented the principle of non-discrimination, and that was a general principle of EU law which had to be applied anyway. National law had to be set aside in order to give effect to the general principle.
- It is therefore perhaps not surprising to find that the CJEU has applied *Mangold* to the equivalent Charter provision after the Lisbon Treaty came into effect. Case C-555/07 *Kucukdeveci v Swedex* [2010] IRLR 346 was another dispute between private parties about age discrimination where again national law had not properly transposed Directive 2000/78. (The time for transposition had in this case just expired). The CJEU again held that there was a general principle of non-discrimination in EU law which had to be given effect. It noted that Article 21 EU Charter now contained the principle of non-discrimination. The CJEU also stated, without apparent qualification or elaboration, that the Lisbon Treaty (specifically Article 6, TFEU) provided that the EU Charter had the same status as the Treaties. This was significant because, as Lord Kerr pointed out in *Rugby Football Union v Consolidated Information Services Ltd* [2012] 1 WLR 3333 at [26]:
- “[I]n its initial incarnation the Charter had persuasive value: the CJEU referred to and was guided by it: see, for instance, the *Promusicae* case [2008] All ER (EC) 809.”

## BENKHARBOUCHE: HORIZONTAL EFFECT

- A question which remained after *Kucukdeveci* was whether the CJEU's statement about the status of the EU Charter means that the Lisbon Treaty had elevated all the rights, freedoms and principles in the EU Charter to a level equivalent to *Mangold* general principles. The CJEU to an extent addressed this question in Case C-176/12 *Association de Mediation Sociale (AMS)* [2014] ECR I-000 ("*AMS*") which was decided after Langstaff J. gave his judgment. In this case, a trade union representative sought to rely on Article 27 of the EU Charter (workers' right to information and consultation) against a private employer. The relevant directive had again not been duly implemented by national law and it did not have direct effect. The CJEU held that Article 27 could not be invoked horizontally because it required specific expression in Union or national law, but expressly distinguished *Kucukdeveci*. The same objection does not apply to Article 47, which does not depend on its definition in national legislation to take effect.
- The CJEU did not, however, go on to make it clear which rights and principles contained in the EU Charter might be capable of having horizontal direct effect, and which would not. In our judgement, however, Article 47 must fall into the category of Charter provisions that can be the subject of horizontal direct effect. It follows from the approach in *Kucukdeveci* and *AMS* that EU Charter provisions which reflect general principles of EU law will do so. The Explanations prepared under the authority of the Praesidium of the Convention which drafted the EU Charter, which Article 52(7) EU Charter requires the court to take into account when interpreting the EU Charter, state that the CJEU has "enshrined" the right to an effective remedy "as a general principle of Union law". The Explanations cite Case 222/84 *Johnston* [1986] ECR 1651; Case 222/86 *Heylens* [1987] ECR 4097 and Case C-97/91 *Borelli* [1992] ECR I-6313. In *Borelli*, for instance, the CJEU held:
  - "14. As the Court observed in particular in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and in Case 222/86 *UNETEF v Heylens* [1987] ECR 4097, paragraph 14, the requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."
- We therefore conclude that the right to an effective remedy guaranteed by Article 47 EU Charter is a general principle of EU law so that Article 47 accordingly has horizontal direct effect. It remains, of course, subject to the exceptions to be found in the jurisprudence of the Strasbourg court (subject to any contrary provision in EU law). Our conclusion accords with the analysis of the case law made by Mr. Eicke, which Mr. Landau adopted and on which Mr. Otty relied.

## 4. WEARING A RED STAR

- Lazlo was the vice-president of the left-wing Workers' Party in Hungary. He has been convicted - under a criminal law prohibiting the displaying of totalitarian symbols in public - for wearing a red star, 5 cm in diameter, as a symbol of the international workers' movement, on his jacket during a demonstration. Under that provision - Art. 269/B, paragraph 1(b) of the Hungarian Criminal Code, a person who makes public use of the swastika, the SS insignia, the "arrow cross", the hammer and sickle, the five-pointed red star, or any other sign representing one of these symbols has committed a minor offence punishable by a fine. [Hungary's Constitutional Court stated in 2000 that the law prohibiting the displaying of totalitarian symbols in public is in compliance with the Constitution, referring also Hungary's historical experience.]
- Lazlo appealed to the Budapest Regional Court. That court decided to stay the proceedings and to refer the case to the CJEU for a preliminary ruling under Article 267 TFEU.
- In its order for reference, the Budapest Court observed that in several EU member States, such as the Italian Republic, the symbol of left-wing parties is the red star or the hammer and sickle. Therefore, the question arose whether a provision in one EU member State prohibiting the use of the symbols of the international labour movement on pain of criminal prosecution was discriminatory, when such a display in another member State did not give rise to any sanction.
- By the reference the national court asks whether the principle of non-discrimination, Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, p. 22) or Articles 10, 11 and 12 of the Charter preclude a national provision, such as Article 269/B of the Hungarian Criminal Code, which imposes sanctions on the use in public of the symbol in question in the main proceedings.
- 
- 1. Will Lazlo be successful in his claim that the EU Charter and general principles of law apply?
- 2. Would your answer be any different had a worker from one of those other Member States been penalized for wearing the star symbol in Hungary?

**Case C-328/04: Criminal proceedings against Attila Vajnai**  
**[Order of the Court (Fourth Chamber), ECR I 8577]**

- On 6 October 2005 the CJEU declared that it had no jurisdiction to answer the question referred by the Regional Court. The relevant part of the reasoning reads as follows:
- “11. By its question, the national court asks, essentially, whether the principle of non-discrimination, Article 6 EU, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, p. 22) or Articles 10, 11 and 12 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ C 364, p. 1), preclude a national provision, such as Article 269/B of the Hungarian Criminal Code, which imposes sanctions on the use in public of the symbol in question in the main proceedings.
- ...
- 13. By contrast, the Court has no such jurisdiction with regard to national provisions outside the scope of Community law and when the subject matter of the dispute is not connected in any way with any of the situations contemplated by the treaties (see *Kremzow*, paragraphs 15 and 16).
- 14. It is clear that Mr Vajnai’s situation is not connected in any way with any of the situations contemplated by the provisions of the treaties and the Hungarian provisions applied in the main proceedings are outside the scope of Community law.
- 15. In those circumstances, it must be held, on the basis of Article 92 § 1 of the Rules of Procedure, that the Court clearly has no jurisdiction to answer the question referred by the *Fővárosi Bíróság*.”

# The Use of One's Name under EU Law: *Relevant Case Law and Charter Provisions*

ERA Seminar 26 April 2016

Ladislav Vyhnánek

# The Use of One's Name as a Fundamental Right?

- **Conceptually, the right to use one's name is usually not a fundamental right *per se* [cf. Art. 24 (2) ICCPR , though], but it can be protected under the following established fundamental rights**
  - **Human dignity .**
  - **The right to private and family life (cf. ECHR's case law).**
  - **Freedom of expression.**
  - **Non-discrimination on the grounds of ethnic origin.**

# **The Use of One's Name under EU Law: Relevant Concepts**

- **Regulation of names: not an EU competence.**
- **CJEU's case law (especially early case law, of course) seems to downplay the fundamental rights dimension and emphasize other concepts of EU law. Still, the right to one's name can be protected under following concepts:**
  - **Internal market freedoms**
  - **Common constitutional traditions**
  - **EU citizenship**
  - **Fundamental rights under EU Charter (Art. 7, 20 and 21)**
- **On the other hand, the concept of constitutional identity is very relevant.**

# Relevant Case Law of the CJEU:

## Early Case Law

- ***Konstantinidis* case (freedom of movement)**
- ***García Avello* case (EU citizenship)**
- ***Grunkin and Paul* case (equality)**

# Relevant Case Law of the CJEU:

## *Sayn-Wittgenstein case*

- Use of titles and privileges in Austria (the element of *Fürstin von ...*).
- (Fürstin von) Sayn-Wittgenstein was adopted in Germany.
- Austrian authorities intended to remove the title from the birth register (after 15 years of accepting it).
- CJEU found a breach of the free movement provisions, but at the same time found that the measure could be justifiable under the public policy derogation.

# Relevant Case Law of the CJEU:

## *Runevič-Vardyn (Runiewicz-Wardyn?)*

- **Case concerning Polish-Lithuanian Relations**
- **A Lithuanian of Polish origin living in Belgium requested that her name in her (Lithuanian) marriage certificate should be spelt in a Polish way.**
- **Problem with Art. 14 of the Lithuanian Constitution.**
- **Is it a wholly internal situation (unlike in the case of her husband – a Polish national)?**
- **Still, CJEU found a breach of the free movement provisions.**
- **A need to strike a balance between protection of linguistic tradition and the right to use one's name.**
- **Proportionality test left to be conducted by national courts.**

# *Runevič-Vardyn:*

## National courts aftermath

- National courts applied the proportionality test.
- No violation of EU law was found, as the inconveniences suffered by the applicants were „regular“ not „serious“.
- On the other hand national rules were attributed high importance.
- Legislative reform in Lithuania

# What does the future hold?

- **More emphasis on EU Charter? So far, the right to use one's name is seen through the „internal market“ and „EU citizenship“ lenses and the fundamental right to private and family life (cf. ECHR) is not emphasized (although it is mentioned in the judgements and opinions of AG's).**
- **What are the reasons of this approach (pragmatic, doctrinal etc.)?**
- **Developments in CJEU's case law (*Bogendorff von Wolffersdorff* case, opinion of AG distinguishing from *Sayn-Wittgenstein*, awaiting the CJEU's decision).**



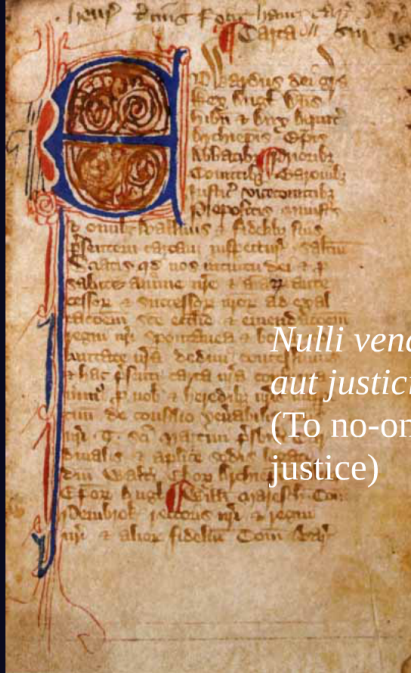
By Prof. **Giangiuseppe SANNA**  
Partner of Studio Legale Sutti in Milan



By Prof. **Giangiuseppe SANNA**  
Partner of Studio Legale Sutti in Milan

The right to an effective judicial protection and to a fair trial dates back to the disputes between an English king and his barons on the fields outside Windsor some of 800 years ago.

Magna Charta Libertatum 1215  
Chapter 40  
*Item, nulli negabimus, nec differemus iustitiam  
legis: we will not sell, to no-one deny or delay right of*



## Magna Charta Libertarum 1215

### Chapter 40

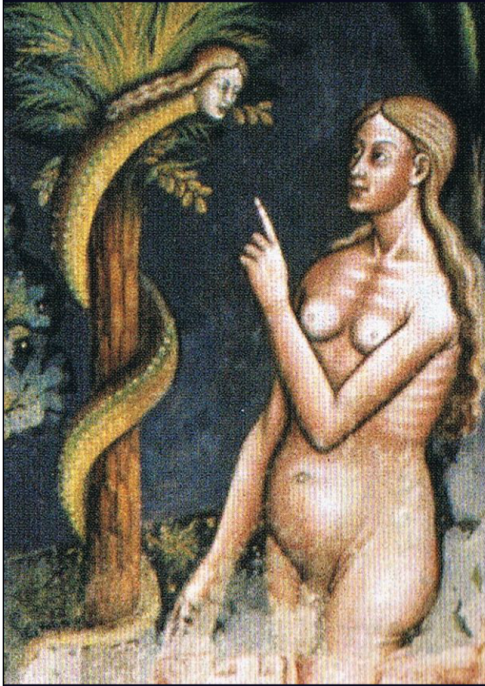
*Nulli vendemus, nulli negabimus, aut differemus rectum aut justiciam*

(To no-one will we sell, to no-one deny or delay right of justice)

**The need for  
consumer  
protection is  
even older, dating  
back to...**



The first consumer contract was concluded between Eve and the snake, who sold an apple on a basis of misleading advertising, since the product did not meet the quality standard by the seller. Hence, unfair terms excluded any liability of the snake for any damage resulting from the defective product.



The first consumer contract was concluded between Eve and the snake who sold an apple on a basis of misleading advertising, since the product did not have the qualities announced by the seller.

Worst, unfair terms excluded any liability of the snake for any damage resulting from the defective product.

**Those old  
concepts  
obtained a new  
shiny vest under**



The EU legal order, addressed both to Member States and their national, is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaties.

Case *Les Verts*  
(1986)

The EU legal order, addressed both to Member States and their national, is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaties.

Case *Les Verts*  
[1986]

The EU legal order enjoys one of the most protective systems on consumers, since secondary and primary EU rules have been established to ensure the highest level of consumer protection.

**Art. 38 of the Charter**  
Consumer Protection  
These policies shall ensure a high level of consumer protection.  
It is a principle of interpretation, not a right per se.  
**Art. 12 and 168 of TFEU**  
Consumer Protection  
It is also a general objective of EU to be taken into account in specific legislation, even in other areas of EU policies.  
**Primary EU Law**

**Council Directive 93/13/EEC**  
Against unfair EU law in consumer law, it is still regarded the principal instrument on unfair terms in consumer contracts.  
This directive harmonizes of consumer protection against unfair terms in national laws and the practice of unfair competition in the internal market.  
**Secondary EU Law**

EUROPEAN COMMISSION  
Directorate-General for Economic and Financial Affairs  
Unit B-1  
1049 Luxembourg  
Tel: +352 4303 3441  
Fax: +352 4303 3446  
E-mail: ec.europa.ec@ec.europa.eu  
Web: ec.europa.eu

EUROPEAN COMMISSION  
Directorate-General for Economic and Financial Affairs  
Unit B-1  
1049 Luxembourg  
Tel: +352 4303 3441  
Fax: +352 4303 3446  
E-mail: ec.europa.ec@ec.europa.eu  
Web: ec.europa.eu



Art. 38 of the Charter  
*Consumer Protection*  
*Union policies shall ensure a high level of consumer protection.*  
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Arts 12 and 169 of TFEU  
*Consumer Protection*  
It is also a general objective of EU, to be taken into account in specific legislation, even in other areas of EU policies.

***Primary EU Law***



**Council Directive  
93/13/EEC**

Amongst several EU acts on consumer law, it is still nowadays the principal instrument on unfair terms in consumer contracts

*Aim: complete harmonisation of consumer protection against unfair terms at national level within the purpose of full establishment of the internal market*

***Secondary EU Law***

Art. 3: a contractual term which has not been individually negotiated shall be regarded as unfair, if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Art. 5: the terms shall be written in plain and intelligible language. The interpretation most favorable to the consumer shall prevail.

Art. 6: terms that are assessed and found unfair under the Directive are not binding for consumers.

Art. 7: Member States shall ensure that, in the interests of consumers and of competitors, adequate and **effective means** exist to prevent the continued use of unfair terms in consumers contracts.

Who is the EU Consumer under the Directive?

- a natural person who is acting outside the scope of an economic activity (trade, business, craft, liberal profession);
- the weaker bargaining party in the transaction involved.

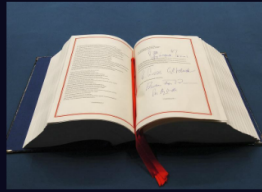
Different consumer notions shall be the "responsible consumer" or the "confident consumer", who both shall be construed as the goal for the EU internal market.



*Hominum causa ius constitum est*

Ultimately, the EU Consumer is... a human being, sometimes a EU citizen, who enjoys granted fundamental rights and freedoms.

Indeed, the Charter shall play a critical role in the European consumer protection landscape, specifically against unfair contractual terms, seemingly displacing an effective right to judicial protection.



In the EU legal order the right to an effective remedy and to a fair trial is an essential element of the rule of law and is now a fundamental human right enshrined in Art. 47 of the Charter (CFR) which reads

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.  
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.  
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

*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.*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*

Such fundamental rights find their origin in the traditional "right to a judge" and in the due process of law. The Charter merely reaffirms and consolidates fundamental rights which the ECJ already respected.

It is well known that the ECJ established the duty to respect fundamental rights in the late 1960s, despite the fact that this obligation had not been enunciated in the founding treaties.

More precisely, the principle of effective judicial protection was proclaimed in the 1986 *Johnston* case as a general principle stemming from the constitutional traditions common to the Member States and to international agreements on the protection of human rights, namely to the European Convention on Human Rights and Fundamental Freedoms (ECHR).

Indeed, Art. 47 of CFR issues directly from Arts 6 (Right to a fair trial) and 13 (Right to an effective remedy) ECHR but presents some distinctive features.

For instance, the protection offered by Art. 47 is more extensive than that offered by Art. 13 ECHR since it guarantees the right to an effective remedy before a "tribunal" instead of a "national body". Moreover, contrary to Art. 6(1) ECHR, which limits the right to a fair trial to civil and criminal law cases, Art. 47(2) CFR applies to all contentious matters.

Regardless of these specific differences, it should be recalled that pursuant to Art. 53 CFR the level of protection guaranteed by Art. 47 may never be lower than the one guaranteed by ECHR.

Lastly, since the binding force attributed by the Lisbon Treaty to the Charter, Art. 47 shall be recognised with direct effect and will thus be invoked by citizens before national authorities.

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

*Case Akerberg Fransson [2013]*

**At its core, the complex challenge is to ensure the effectiveness of consumers protection against unfair terms when implementing Directive 93/13/EC**

*What is then the principle of effectiveness? Does it encompass the effective judicial protection?*

Paragraph 35 of the judgment states that the principle of effectiveness is a general principle of EU law which requires that national law must not make it impossible or excessively difficult to exercise the rights conferred by EU law.

Effective judicial protection

In the order in the case, the Court states that the principle of effectiveness is a general principle of EU law which requires that national law must not make it impossible or excessively difficult to exercise the rights conferred by EU law.

Actually, the differences which have been national before, between effectiveness, effective judicial protection and right to life, that may appear to be in the domain of the law, are often later in the case-law of the European Court of Justice.



Inherent to the doctrine of direct effect and to the decentralized EU order, Article 19 TEU has established the Member States' duty to provide for remedies sufficient to ensure effective legal protection in the fields covered by Union Law.

However, those rules must not be less favorable than those governing similar domestic actions (**principle of equivalence or non-discrimination**) and may not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law (**principle of effectiveness or practical possibility**).

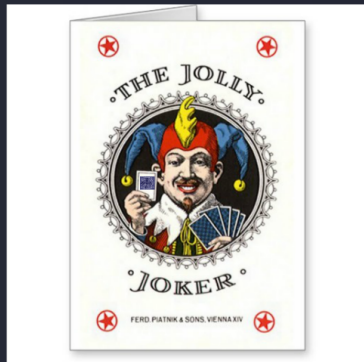


The well-known principle of effort rule is also play a role in the wild card in consumer protection game.

Regarding the ideological and doctrinal interpretation of EU law, the effort rule is that average normal possible interpretation that will prevail which best guarantees practical effect of EU rules, indeed the effectiveness.

At the same time, Art. 47, as well as the other provisions of CFR, will apply whenever the implementation of EU law (both at supranational and domestic level) is a stake, granting the effectiveness of the protection of the rights of the individual and limiting national procedural autonomy far beyond the common limits of the equivalence and effectiveness test. This infuses the national legal orders with the EU standard of effective judicial protection as enshrined in Art. 47.

While the material object could be the same (conformity to EU law of national procedural rules) the scope diverges in the effectiveness test and the test through the lens of art. 47 CFR: the former is intended to avoid obstacles to the correct enforcement of EU law and the rights and obligations derived from its provisions; the latter is rather intended to ensure respect of a general rule of law, reflecting a fundamental right of the individual.



The well-known principle of *effet utile* might also play a role as the wild card in the consumer protection game.

Regarding the teleological and dynamic interpretation of EU law, the *effet utile* means that amongst several possible interpretations the one will prevail which best guarantees the practical effect of EU rules, indeed their... effectiveness.

This hermeneutic principle is deemed to have wide structural effects on EU legal space, being also a facade for ECJ law-making initiative and new judge-made principles.

Actually the differences which have been outlined before between effectiveness, effective judicial protection and *effet utile*, that may appear so sharp in the abstract terms, are often faint in the case-law of the European Court of Justice.



...as a result, the approach of the Court of Justice varies on the role and consistency of EU effectiveness and effective judicial protection, being the test used, on some occasions, very similarly to that of procedural authority, while following, on other cases, the different path of a human rights-based angle, with different impacts on individuals and domestic rules.

Let's have a look now on a selected EU case-law which illustrate such approach dealing with the effective protection of consumers against unfair terms...

## Case **Banif Plus Bank** [2013]

*It proves clearly how the right to the effective judicial protection under art. 47 might show its teeth in the fields.*

Addressing the question referred for a preliminary ruling from Budapest Municipal Court, whether Directive 93/13 shall be interpreted as precluding a national court to allow the parties to submit a statement on the assessment on unfair terms at its own motion, the ECJ held that the principle of *audi alteram partem* stemming from Art. 47 CFR requires the national court which has dutifully found of its own motion that a contractual term is unfair to inform the parties to the dispute and to invite each of them to set out their views, with the opportunity to challenge the views of the counter-party.

The ECJ seems to underline the autonomous purpose of protection of Art. 47 CFR, whose scope is contrasting with the one of timing and practical consumer protection means. Thus the rights under Art. 47 could also be decoupled from the effectiveness principle.

As a matter of fact, effective judicial protection thus limited, without compromising, the full effectiveness of the protection provided for by Directive 93/13/EEC on unfair terms in consumer contract.

Addressing the question referred for a preliminary ruling from Budapest Municipal Court, whether Directive 93/13 shall be interpreted as precluding a national court to allow the parties to submit a statement on the assessment on unfair terms at its own motion, the ECJ held that the principle of *audi alteram partem* stemming from Art. 47 CFR requires the national court which has dutifully found of its own motion that a contractual term is unfair to inform the parties to the dispute and to invite each of them to set out their views, with the opportunity to challenge the views of the counter-party.

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## Case **AZIZ** [2013]

*On the contrary, here the ECJ confined all legal reasoning to the equivalence and effectiveness test. No reference has been made to Art. 47.*

The case concerned the assessment of unfair terms (e.g. use of "acceleration clauses" for legal charges) in a loan agreement entered with a bank in the context of mortgage foreclosure proceedings. Under Spanish procedural rules, in mortgage enforcement proceedings a limited space was granted for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based; moreover, it did not allow the court before which declaratory proceedings to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision. The referring court found it doubtful in those circumstances to ensure effective protection of the consumer as prescribed by Directive 93/13 and asked for clarification on the meaning of EU concept of 'unfair term' in article 3.

The ECJ making reference to 2007 *Unibet* case and the equivalence and effectiveness test alone, closely scrutinized the Spanish procedures and rules on enforcement and, therefore, considered such rules to infringe the Directive, since they make the application of protection which the Directive seeks to confer impossible or excessively difficult.

The effectiveness test is not used in order to protect a fundamental right of the individual/consumer, but rather to ensure the *effet utile* of EU law, to grant a minimum standard of protection under which national procedural rules should not preclude any reasonable opportunity for the individuals to claim the direct effects of EU law at domestic level.

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## Case **Pohotovost'** [2014]

*It does offer a clear illustration of the process of constitutionalisation of EU consumer law: the ECJ treated both tests harmoniously, both following a restriction/justification/proportionality type of assessment, yet moving from a fundamental right perspective.*

The case concerns a Slovak credit supplier, Pohotovost', who entered a consumer credit contract with a consumer. Having obtained a final arbitration award for the payment, execution proceedings followed. At this stage, consumer organisation HOOS asked to be added to the proceedings, in particular in order to challenge the impartiality of the bailiff involved in the case, who earlier had been employed by Pohotovost'.

Slovak procedural law prevents the consumer organisation from joining the proceedings. The referring court was in doubt as to the validity of this national rule of procedure in light of the consumer protection offered by EU Directive 93/13 read in the light of Arts 38 and 47 of the Charter.

The ECJ stated that the Directive, read in conjunction with such Arts of CFR, must be interpreted as not precluding national legislation which does not allow a consumer protection association to intervene in support of a consumer in proceedings for enforcement, against the latter, of a final arbitration award since:

-The Directive does not cover the issue of consumer organisations' participation in enforcement proceedings and that, therefore, it is up to national legal systems to provide rules on this, taking into account the principles of equivalence and effectiveness;

-The principle of equivalence is not infringed upon, as Slovak law does neither allow a consumer organisation to join in enforcement proceedings that are governed by national law nor those involving EU law;

- The principle of effectiveness, moreover, is not breached, since the Slovak law does not make the application of EU law impossible or excessively difficult by excluding consumer organisations from enforcement proceedings;

- Arts 38 and 47 of the Charter do not lead to a different conclusion, since they do not support an interpretation of the Directive in the sense that it would lay down a right for consumer organisations to join in individual enforcement proceedings.

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## Case **Sanchez Morcillo I** [2014] and **Sanchez Morcillo II** [2015]

*The ECJ moves maturely from a fundamental rights perspective, being committed to grant effectiveness of the fundamental right under Art. 47 rather than linking the reasoning to the effectiveness of EU law.*

The case concerned (again!) the compliance of Spanish law on mortgage enforcement with EU consumer law, after the amendments on the same law made after the *Aziz* decision. Specifically, this legislative change has given rise to another issue, inasmuch it was introduced a difference of treatment between consumers (debtor owner of the house) and suppliers (enforcing creditor): appeals may only be brought against a judicial order staying the proceedings or displaying an unfair contract term. This effectively offers the bank a possibility to immediately appeal against the sustenance of a home owners objection to enforcement, whereas the party against whom enforcement is sought may not appeal if his or her objection is dismissed.

The ECJ came to the conclusion that such Spanish rules do not live up to the standards of the Directive, but this time, on invitation of the referring judge and against the Opinion of AG Wahl, it grounded entirely its assessment on Art. 47 CFR in accordance with the principle of equality of arms. In that context: "the obligation for the Member States to ensure the effectiveness of the rights that the parties derive from Directive 93/13 against the use of unfair clauses implies a requirement of judicial protection, also guaranteed by Article 47 of the Charter, that is binding on the national court. That protection must be assured both as regards the designation of courts having jurisdiction to hear and determine actions based on EU law and as regards the definition of detailed procedural rules relating to such actions" (para 34). The principle of effectiveness in light of Art. 47 CFR functions as leverage for 'upgrading' national laws to EU standards.



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*"In those circumstances, it must be held that a national procedure for mortgage enforcement, such as that at issue in the main proceedings, is **liable to jeopardise the effectiveness of consumer protection intended by Directive 93/13, read in conjunction with Article 47 of the Charter, in that the procedural system reinforces the inequality of arms** between sellers or suppliers, as creditors in mortgage enforcement proceedings, on the one hand, and consumers, as debtors subject to mortgage enforcement proceedings, on the other hand, in the exercise of legal claims based on the rights that the latter derive from Directive 93/13, all the more so because the detailed procedural rules giving effect to such claims are incomplete and inadequate for preventing the continued application of an unfair clause contained in the instrument establishing the mortgage on the basis of which the seller or supplier brings enforcement proceedings against the property pledged as security" (para. 50)*

After that judgment *Sanchez Morcillo I* was delivered, the Spanish legislature has been amended accordingly another time. Nonetheless, the same national court before which the appeal proceedings were brought reported that such amendment allows consumers to bring an appeal against the order dismissing the objection to enforcement only when the court of first instance did not uphold a ground of objection based on the unfairness of a contractual term upon which the enforcement is based, while it allows sellers or suppliers to appeal against any decision terminating proceedings regardless of the ground of objection. Consequently, the referring court was still in doubts regarding the compatibility of such a national provision with the Directive read in light of the Charter.

The ECJ decided to rule in *Sanchez Morcillo II* by a reasoned order, since in its view the answers and test have been already and clearly settled and displayed in *Sanchez Morcillo I*.

The ECJ summarized the settled-case law, confirmed and applied the effective judicial protection test but this time found that, since the scope of Directive 93/13 is limited to the protection of consumers against unfair terms, issues arising from the fact that, under the national legislation at issue, consumers do not have the right to bring an appeal against a decision rejecting their objection based on grounds other than the unfairness of the contractual term which forms the basis of the enforcement order does not fall into the scope of that directive, and is therefore not liable to jeopardise the effectiveness of consumer protection which by the directive seeks to provide, also read in light of Arts 47 and 7 CFR.

## Case **Finanmadrid** [2016]

*A missed opportunity? The ECJ here deals entirely and exclusively in the framework of effectiveness of Directive 93/13 without any reference to Art. 47.*

Finanmadrid obtained an order for payment by a *secretario judicial* (court's secretary), who (at the time) was not obliged pursuant to Spanish law to *ex officio* test for unfairness of a penalty clause in a credit contract. Since the consumer did not raise the issue of unfairness, only when the order for payment became final, in the execution proceedings, the court raised a question whether they should not be able to test for unfairness of the contractual provision, on which the order for payment is based. Pursuant to Spanish law this was not possible and the referring court questioned if this was compatible with Directive 93/13 read in light of art. 47 CFR.

The ECJ based its decision on the equivalence and effectiveness test alone in order to state that the effective consumer protection precludes national legislation, such as that at issue in the main proceedings, which does not permit on the enforcement of an order for payment the assessment on unfair terms. Even Spanish rules on *res judicata* run counter to the EU effectiveness principle.

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In the opinion rendered in the case *Finanmadrid*, AG Szpunar remarked that it is yet unclear whether Art. 47 CFR offers additional protection or whether it replaces the principle of effectiveness.

However, it could be predictable that the role the effective judicial protection has to play in this context and the relation with the effectiveness test will remain yet to be seen (and possibly better explained) shortly in other pending cases before the ECJ.

Let's try now to put all these findings in the case-law in perspective...

Despite some uncertainties and apparent *revirement de jurisprudence*, a certain evolution of the judicial trend of the ECJ towards a more defined human rights-based approach could be surely inferred from the recent decisions which have been presented in the matter of consumer protection against unfair terms.

In this context, the Charter plays the same role as the bill of rights contained in the national constitutions, making possible an assimilation of the ECJ to the highest domestic courts.

The effective judicial protection becomes more than a general principle informing the consumer protection fields, to be observed by both Member States and EU institutions, turning into a peculiar source of self-standing rights which need to be protected and granted effectiveness by the ECJ itself and by domestic courts within the field of application of EU law.

The test of effectiveness on consumer protection shall be linked then to a fundamental right and must imply a balance between competing interests, both at national and a supranational level, avoiding restrictions which could never be found from a classic standpoint of the principle of effectiveness and autonomy.

At the end of the day, this human-right scrutiny of national and EU rules might assure the real... *effet utile* of the EU rules on consumer protection against unfair terms, art. 47 CFR being the major yardstick in the matter at hand.

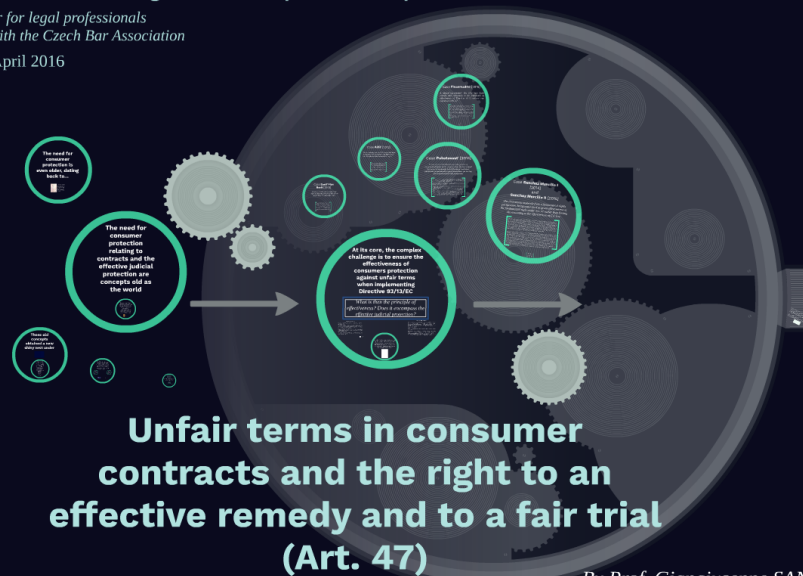
Finally, taking into account the more and more frequent express reference on Art. 47 CFR in the questions submitted for a preliminary ruling, it should be stressed the raising awareness on the potential impact of the Charter for law practitioners, dealing with their daily practice in consumer protection and unfair terms.

It is up to **YOU** to become key actors in delivering the right of effective judicial protection as guaranteed by the Charter and ensuring that individuals obtain full redress in case of violations.



#### The Charter of Fundamental Rights of the European Union in practice

Training Seminar for legal professionals  
In cooperation with the Czech Bar Association  
Prague, 25-26 April 2016



By Prof. Giangiuseppe SANNA  
Partner of Studio Legale Sutti in Milan





*Thank you for the attention!*

## **Group Work on EU Privacy and Data Protection.**

### ***"Big Brother is watching you!"***

**By Giangiuseppe Sanna**

#### **1. Preliminary Remarks**

On a daily basis within our continent, we all transfer and share automatically, without even thinking about it carefully, vast amounts of personal data, via electronic tools, often done invisibly.

Yet Greek philosopher Aristotle remarked that man is a *social animal* but nowadays this natural human sociality and the related need to communicate are magnified in the digital environment with computerized means of recording and storage, for long periods of time (virtually forever). Whenever we open a bank account, write an email, join a social networking website or simply book a flight or buy a good on-line, we leave behind us electronic traces and meta-data. In other words, we all hand over vital personal information such as names, address, credit card number, passwords and IDs, habits of everyday life, permanent or temporary places of domicile, daily or other movements, the activities carried out, even the social relationships and environments frequented...

What happens to those data? Could it fall into the wrong hands? What rights and legal framework exist regarding personal information, their disclosure and control?

Provocatively, I quoted Orwell's masterpiece *1984* as a clear cautionary tale, even a prophecy, of a systematic abuse of control taken to the end of the line. The totalitarian State of Oceania, its sinister Big Brother, always watching, the history-erasing Ministry of Truth and the menacing Thought Police, with their omnipresent telescreens: all this may seem to be the endgame of indiscriminate data mining and mass surveillance and duplicitous government control. But when in 2013 the media worldwide began to publish the well-known Snowden revelations, it brought to light the existence of a real extensive global and mass surveillance programme, launched by actual intelligence services after the terrorist attacks of 9/11. Until the Snowden's revelations, the risks involved in such sharing information have been mostly confined in the cyber-crime, the phishing frauds or the commercial manipulation/profiling.

Now surveillance non longer merely targets state or business secrets but - potentially - allows for the interception of all communications on a large scale, thus affecting the privacy and data protection of natural persons.

#### **2. European Union framework on privacy/data protection. The EU Charter.**

The European Union legal order, which is addressed to Member States and their nationals, and is based on the rule of law (case C-294/83, *Les Verts*, [1986] ECR 1339), enjoys one of the most protective systems on privacy and data processing tools, since secondary and primary EU rules have been established to ensure that personal data enjoy a high standard of protection everywhere in the EU, allowing the opportunity to consciously choose the privacy setting that individuals may prefer.

As far as secondary EU law is concerned, the principal instrument on data protection is still Directive 95/46 ("Data Protection Directive" or "DPD", OJ 1995 L 281) on the protection of individuals with regard to processing of personal data and on the free movement of such data. The aim of adopting the Data Protection Directive was a complete harmonisation of data protection law

at the national level within the purpose of full realisation of the EU internal market. At the same time, the DPD is intended, according to the terms of Article 1(1), to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data.

Interestingly, an independent advisory board, the Article 29 Working Party, composed of representatives from all EU Data Protection Authorities, the EDPS and the European Commission, was set up under the Directive 95/46/EC.

Additionally, for sake of completion, it is appropriate here to shortly refer to the more detailed data protection provisions settled for Member States by Directive on privacy and electronic communications 2002/58/EC (OJ 2002 L 201), as amended by Directive 2009/136/EC, as well as those settled for institutions and bodies of EU by Regulation (EC) no. 45/2001 (OJ 2001 L 8).

Although on 2012 the European Commission proposed to update and modernise the principles enshrined in the DPD, political discussions on EU reform package are still ongoing. While the Commission's objectives are two legislative proposals: a Regulation setting out a general EU framework for data protection and a Directive on protecting personal data processed for the purposes of prevention, detection, investigation or prosecution of criminal offences and related judicial activities, the European Parliament launched instead a plan in 2014 in order to create a truly *European Digital Habeas Corpus*.

EU primary law contains a general EU competence to legislate on data protection matters, under Art. 16 of TFEU. But it is the EU Charter of Fundamental Rights alone ("Charter or CFR, OJ C 303/17) which plays a critical role in the European personal data protection legal landscape, seemingly displacing an effective right to privacy.

Indeed, at its core, privacy and data protection are now fundamental human rights enshrined in Arts 7 and 8 of CFR<sup>1</sup>. It is important already to underline that the Charter explicitly raised the level of data protection as autonomous fundamental right yet closely related but separate to the right to the privacy. This separation facilitate the legal un-coupling of the two notions on case-by-case approach but, at the same time, allows the reading of the two articles as indistinguishable. The European Court of Justice ("ECJ") sometimes sustains a distinction and sometimes disregards it.

Now, as regards the specific contents of such provisions, Art. 7, under the heading "Respect for private and family", simply reads:

*Everyone has the right to respect for his or her family life, home and communications*

It focuses on individual autonomy and his/her right to privacy<sup>2</sup>; The EU legal concept of privacy shall be construed, therefore, as the ability of an individual or group to seclude themselves or information about themselves and thereby express themselves selectively (*ius excludendi alios*). It should be noted that - as others rights in the CFR - Art. 7 issues directly from Art. 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) but presents some distinctive features. For instance, to take account of developments in technology above mentioned, the word "correspondence" has been replaced by "communications".

Pursuant to Art. 52(3), the meaning and scope of this right are the same as those of the

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1 See González Fuster, *The Emergence of Personal Data Protection as Fundamental Right on the EU*, Springer. 2014.

2 Back on December 15, 1890 Samuel Warren and Louis Brandeis were the first to publish in USA an article of the law called "*The right to privacy*" in which they argued for the "*right to be let alone*", using that phrase as a definition of privacy.

corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR<sup>3</sup>.

Art. 7 covers a particularly wide range of issues. Generally, the rich case-law of the Strasbourg Court of Human Rights on Art. 8 ECHR may serve as example to illustrate the scope and field of application, embracing various spheres of life such personal identity and integrity, health, examination of the body, sexual privacy and sexual preferences and gender, confidential and personal data, family name, respect for residence and business premises, written and telephone and digital communications, family reunification in immigration<sup>4</sup>.

As anticipated, the compilers of the Charter devoted a specific rule to the protection of personal data, before considered under the umbrella of the general term privacy.

Under the heading "Protection of personal data", Art. 8 stipulates:

- *Everyone has the right to the protection of personal data concerning him or her.*
- *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
- *Compliance with these rules shall be subject to control by an independent authority.*

Formulated several years after the Data Protection Directive, Art. 8 of CFR must be understood as embodying the pre-existing EU data protection instruments as well as the jargon concerned (i.e. purpose limitation principle, concept of personal data, consent to data processing, data controller, the transfer of data, right to erasure, blocking, complain and obtain redress of data if misused). In this respect, for details see a practical brief lexicon attached hereto.

As a fundamental right, however, the right to data protection "*is not an absolute right, must be considered in relation to its function in society*" (joined cases C-92/09 and C-93/09, *Volker and Markus Schecke*, [2010] ECR I-11063, para. 48).

Art. 51(1) of CFR thus accepts that limitations may be imposed on the exercise of rights such as those set forth in Arts 7 and 8 CFR, as long as these limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedom of others.

Recent terrorist attacks sadly reminded us of the need of a balancing exercise with other rights: thus the EU privacy/data protection framework shall include rules to ensure a common level of data protection in this area which will also facilitate exchanges of data to prevent and investigate cross-border crime, increasing citizens' security hand-in-hand with a guarantee that the protection of their personal data is safeguarded.

Other rights likely to come into conflict with the rights under scrutiny are the right to freedom of expression and press information, protected by Art. 11 CFR, the freedom of the arts and sciences, protected by Art. 13 CFR, and the right to property, namely under the aspect of IP protection, mentioned in Art. 17 CFR.

It is up to the ECJ to operate that balance and some examples in the recent case-law here-in-below will illustrate how this balance might be reached and, actually, what kind of *Digital Habeas Corpus* might be envisaged applying Arts. 7 and 8 CFR.

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<sup>3</sup>"By law and when is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

<sup>4</sup> See <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis>.

### 3. A selected anthology of the recent EU Case-law on privacy/data protection

As it is well known, the ECJ in Luxembourg has jurisdiction to determine whether a Member State has fulfilled its EU obligation (i.e. under the Data Protection Directive) and to give preliminary rulings concerning the validity and interpretation of secondary EU legal instruments in the matter at hand, in order to ensure the effective and uniform application of the EU law in all the Member States.

Even if, theoretically, victims of unlawful processing of their data might appeal directly to ECJ, seeking the annulment if directly and individually affected by the EU legal provision, the vast majority of case law in the subject-matter originates from preliminary rulings according to Art. 267 TFUE.

Indeed, data subjects and EU nationals may, in the course of genuine disputes in domestic proceedings, ask the national court to request clarification from the European Court of Justice on the interpretation of the EU Treaties and on the interpretation an validity of acts of the institutions, bodies, offices or agencies of the EU (so called reference for a preliminary ruling). The final decision remains with the referring court to be decided after it received the preliminary ruling. Albeit is not a direct remedy for the complainant, it enables national courts to apply the correct interpretation of EU law in a judicial dialogue with the ECJ.

The scope of the protection of personal data and privacy remained relatively unexplored in the EU case-law until 2003, when the ECJ dealt for the very first time on the Data Protection Directive, showing how protection of personal data under Art. 8 ECHR may also be relevant in the sphere of relations between individuals (case C-101/01, *Lindqvist*, [2003] ECR 12971). No direct reference was made to the CFR.

After the binding force attributed to the CFR by Lisbon Treaty, the very starting point of the EU case-law in the matter at hand could be considered the case *ASNEF-FECMD/Spain* (joined case C-468/10 and C-469/10, [2011] ECR 12181) which is a first specimen of the wise utilisation of CFR in balancing the rights and interests in data processing.

Under scrutiny was art. 7(f) of the DPD which, in the absent of the data subject's consent, provides that data may be processed if (a) necessary for the purposes of the legitimate interests pursued by the controller or by the third party(ies) to whom the data are disclosed and (b) such interests must not be overridden by the fundamental rights and freedoms of the data subject. The two Spanish associations claimed that the Spanish laws of implementation of the DPD added a further condition (c) that the data should appear in public sources, restricting the scope of Art. 7(f) of DPD. The requesting Court considered *prima facie* that restriction as an obstacle and referred a preliminary ruling to the ECJ but without make reference to CFR.

Albeit some arguments used by ECJ were still based on the classical harmonisation and establishment and functioning of the internal market, the ECJ knowingly and directly relied upon the Arts 7 and 8 CFR to find out that the DPD implementation in Spain was defective in that it applied only to information kept in specified public data bank rather than more generally to public and private databases, on the basis that “*unlike the processing of data appearing in public sources, the processing of data appearing in non-public sources necessarily implies that information relating to the data subject’s private life will thereafter be known by the data controller and, as the case may be, by the third party or parties to whom the data are disclosed. This more serious infringement of the data subject’s rights enshrined in Articles 7 and 8 of the Charter must be properly taken into account by being balanced against the legitimate interest pursued by the data controller or by the third party or parties to whom the data are disclosed*”(para 45).

For the purposes of the present analysis, is the year 2014 which should be considered as the real year zero for the EU jurisprudence on Arts 7 and 8 CFR in the privacy/data protection fields. Indeed, ECJ issued at least three important and far-reaching rulings:

- a)** on 08/04/2014 ECJ issued the judgement on case *DIGITAL RIGHTS IRELAND and others* (joined cases C-293/12 and C-594/12 [2014] ECR 238) on the validity of Directive 2006/24/EC ("Data Retention Directive" or "DRD"), OJ 2006 L105);
- b)** on 13/04/2014, published the judgement on case *GOOGLE SPAIN/AEPD-COSTEJA*, (case C-131/12 [2014] ECR 317) on the so-called right to be forgotten and, finally,
- c)** on 11/12/2014, ruled on case *RYNEŠ* (case C-212/13 [2014] ECR 2428) on the CCTV operations and the so-called household exemption in DPD, namely the processing of personal data by private individuals for merely personal or household purposes.

As the proposed case-law analysis tried to illustrate, the ECJ – or sometimes its Advocates General – interpreted the Data Protection Directive in light of the Arts 7 and 8, as parameter of its validity and as tool of interpretation so as to extend and/or support a massive protection for the data subject, reaching the *effet utile* of the legal provisions of EU law.

**a)** The case *DIGITAL RIGHTS IRELAND and others* originated from two joined preliminary references, one from the Irish High Court (which referred questions from a case taken by Digital Rights Ireland, an organisation dedicated to defending civil, human and legal rights in a digital context) and the other from Austrian Constitutional Court (which referred questions from a claim of around 12.000 citizens), both on the validity of the Data Retention Directive.

Such a highly controversial directive compelled all ISPs and telecommunications service providers operating in Europe to collect and retain a subscriber's incoming and outgoing phone numbers, IP addresses, location data, and other key telecom and Internet traffic data for a period of six months to two years. Since its passage, the DRD has faced intense criticism, taking into account the lack of safeguards that limit government collection and access to individuals' data. It also omitted controls over what the data can be used for. Government-mandated data retention impacted millions of ordinary users by compromising on-line anonymity which is crucial for whistle-blowers, investigators, journalists, and those engaging in political speech.

The ECJ has ruled that the DRD is invalid. The basis of invalidity was the exceeding of the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of CFR (see para 69).

The ruling is a significant step in the development of the ECJ's jurisprudence with regard to the protection of fundamental rights. This is the first time that the ECJ has declared not just individual provisions but an entire legal instrument invalid for violations of the CFR rights. Despite suggestions from the Advocate General, Mr Villalón, that the legislature be given an opportunity to amend the law, the invalidity was absolute and immediate. A closer inspection of the court's reasoning also provides fresh insights into the court's interpretation of the right to privacy and to data protection under Arts 7, 8 CFR, and scope for further development on the relationship between surveillance and freedom of expression under Art. 11 CRF.

Having established the relevance and engagement of the rights, the ECJ went on to hold that the interference with the rights in Articles 7 and 8 was not justified. Initially, though, the ECJ declined to find that the essence of either right was adversely affected. Its basis for this finding was the non application of the Directive to the content of electronic communications (in respect of Article 7) and requirements for data protection and data security (in respect of Article 8). The ECJ made it clear that it considered the DRD to constitute a particularly serious interference with those rights, highlighting in particular the important role played by the protection of personal data in the light of

the fundamental right to respect for private life and the likely impact on individuals' perception of surveillance. In a particularly evocative formulation, the court explained the issue as follows: "*the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance*" (para. 37).

The ECJ, therefore, entails an interference with the fundamental rights of practically the entire European population (para 56). Then, exploiting the test of proportionality, the ECJ stated that the EU legislature's discretion is reduced, with the result that review of that discretion should be strict.

The ECJ accepted that the provisions included in the DRD were suitable to achieve the material objective (crime prevention instead of the formal objective of market harmonisation). However, it ruled that while the fight against serious crime for public security, in particular against organised crime and terrorism, is an object of general interest, it does not, in itself, justify a retention measure such as that established in the DRD.

In particular, the ECJ criticised (para. 54-59) the adoption of a measure that:

- i) Covers, in a generalised manner, all persons and all means of electronic communication, without any differentiation, limitation or exception being made in the light of its crime fighting objective;
- ii) Affects, in a comprehensive manner, all persons using electronic communications services, but without the persons whose data are retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions;
- iii) Applies even to persons whose communications are subject to the obligation of professional secrecy;
- iv) Does not require any relationship between the data to be retained and a threat to public security and which, in particular, is not subject to a temporal or geographic restriction or a restriction to persons who could, for other reasons, contribute to the prevention, detection or prosecution of serious offences.

The ECJ concluded that the DRD failed the proportionality test as it does not lay down clear any precise rules governing the extent of the interference with the fundamental rights enshrined in Arts 7 and 8 of the Charter.

**b) The case *GOOGLE SPAIN/AEPD-COSTEJA*** started when Mr Mario Costeja, a Spanish national, asked Google, the well known web search engine, to remove certain search links to newspaper announcements of 1998 regarding the forced sale of properties arising from social security debts which contained his name. As Google did not act on Mr Costeja's request, the Spanish data protection authority became involved and when it ordered Google to honour the request, Google challenged that order in court. Given the legal complexity of the arguments presented by the parties, the National High Court of Spain referred the matter to the ECJ.

The latter addressed the questions raised whether Google should be classified as a data controller (a requirement for being subject to the DPD) and whether Google, as a non-European Union company, was subject to the Directive's territorial reach. If the court answered both questions affirmatively, it was asked to then determine the scope of Google's legal responsibility as a data controller and whether a citizen had the right to have Google erase his data — in other words, the scope of the right to be forgotten.

In examining whether Google was a data controller subject to the DPD, the ECJ determined that a search engine's activities constitute data processing because a search engine "collects" such data which it subsequently 'retrieves' 'records', 'organises' 'stores' on its servers, and [...] 'discloses' and 'make available organises'" and because the data clearly include personal data (see para. 27-28). Given that a search engine operator "*determines the purposes and means*" of the data

processing, a search engine operator should also be regarded as a data controller. The ECJ stated that given the significant role search engines play in modern life, finding otherwise would be contrary not only to the "clear wording" of the directive at stage, but also to its objective of ensuring effective and complete protection of data subjects. On the other hand the Advocate General, Mr Jääskinen, recommended that a search engine not be deemed a controller, for the massive compliance under DPD.

The ECJ noted the important role played by internet and search engines in modern society which magnified the interference with an individual's rights to privacy and personal data protection by providing a structured overview of vast amounts of personal information that otherwise could not have been interconnected (para. 80).

As data controller, a search engine operator must comply with the DPD.

The court then determined that Google Inc.'s presence in Spain was sufficient to subject it to the DPD. Though all of Google Inc.'s data processing occurred outside Spain, Google Spain sold advertising space within the country; since advertising is Google Inc.'s main source of revenue, the court held that the two entities were "closely linked".

Having resolved the threshold issues, the ECJ turned to the next inquiry: what were search engine operators' legal obligations under the Directive? There is a right to erase and an obligation to remove the results from the list search?

First of all, the court noted that the DPD itself requires a balancing: while personal data processing was permitted, without data users' consent, when it is necessary to serve the controller's or third parties' legitimate interests, it is not permitted where such interests are overridden by the interests or fundamental rights and freedoms of the data subject.

The ECJ, according to the settled case-law, recalls that the DPR must be interpreted in the light of Arts 7 and 8 of the Charter (para 68-69) whose observance the ECJ ensures. Now, given the seriousness of the interference with a data subject's rights, an operator's economic interests were never sufficient to justify interference with privacy. The ECJ went on to say that the data protection and privacy rights of the individual override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name.

This presumption could be overcome only by the preponderant interest of the general public in having access to the information. Furthermore, the ECJ understood the data subject's privacy interest to be so important that the subject could successfully object, even if the data were in no way prejudicial. Instead, a data subject may legitimately object if information is inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing and in the light of the time that has elapsed. If that is the case, then a search engine operator must remove the links.

In other words, the ECJ took the view that when an individual rightfully objects, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages published by third parties and containing information relating to that person. According to the EJC, this should be the case even where that name or information is not erased beforehand or simultaneously from those web pages and when its publication on those pages is true and lawful!

Some criticism may challenge the court's ambiguous balancing test, as summarised in para 81 of the ruling, which prioritizes the privacy rights over nearly all other rights. One could argue that by creating a presumption towards data erasure, the court created a sort of "super-right" under Arts 7 and 8 CFR even though there is no hierarchical relationship between the conflicting human rights. By focusing so much on the right to privacy, the ECJ appears to forget that other rights were also

applicable, including freedom of information and press.

On the other hand, a prioritization stems directly from the art. 1 of DPD itself which describes the scope as "protecting the fundamental rights and freedoms of natural persons and *in particular their right to privacy*". From this standpoint, the ECJ's text-based interpretation appears quite reasonable.

c) The case **RYNEŠ** arose from the fact that Mr Ryněš installed a CCTV fixed camera on the corner of his family house in Czech Republic which overlooked not only his front door, but also the public footpath and the opposite house. His aim was to protect his family and his property, as there had been some previous vandalism to his property. Shortly after the installation of the CCTV system, the windows of the house were broken once again. The CCTV footage was used to identify two individuals, one of whom complained whether the use of the CCTV system was permissible under the Czech data protection law (implementing DPD) and the local data protection authority found that Mr Ryněš actually had infringed such Czech law while Mr Ryněš argued that the 'household exception' in Article 3(2) of the DPR applied. Following a decision and subsequent appeal in the local courts, the matter was referred to the ECJ for a preliminary ruling.

The ECJ decided that the household exemption could not apply to this activity because:

- the scope of the Directive is to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data. In this connection, and according to the settled case-law in *Google Spain* and *Digital Right Ireland and others*), the protection of the fundamental right to private life guaranteed under Article 7 of the CFR requires that derogation and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary (para. 28).
- Since the provisions of the Directive, in so far as they govern the processing of personal data liable to infringe the right to privacy, must necessarily be interpreted in the light of the fundamental rights set out in the Charter (and as discussed in the *Google Spain* decision) the household exception must be narrowly construed (para 29).

Nonetheless, in para. 34 the ECJ apparently offer an indication to the referring national court as far as a possible balance between the privacy and the protection of the property, health and life of the family, as legitimate interests pursued by the data controller under the DPD.

Eventually, on the 06/10/2015 the ECJ issued what we could defined so far as the land-mark decision in the matter at hand: case **SCHREMS/DATA PROTECTION COMMISSIONER** (*Case C-362/14, [2015] ECR nyp*) .

The preliminary ruling originated from Mr Schrems, an Austrian blogger/activist against Facebook policies, who filed a complaint in light of the revelations made in 2013 by Edward Snowden against Facebook Ireland Ltd with the Irish Data Protection Commissioner (DPC), Ireland being the country where Facebook has its European headquarters. The DPC rejected the complaint, saying there was no case to answer. Mr Schrems then filed an application for judicial review within the Irish High Court and this was granted. At the first hearing, the judges stay the case pending a reference to the ECJ. In their view, Irish law on privacy had effectively been pre-empted by European law and that the core issue was whether the relevant DPD should be re-evaluated in light of the subsequent entry into force of the Charter.

In accordance with the DPD (art. 25), by its decision 2000/250/EC, the European Commission considered the so-called "Safe Harbour Privacy Principles", implemented in accordance with the guidance provided by the so-called "Frequently Asked Questions" issued by the U.S. Department of Commerce able to ensure an adequate level of protection for personal data transferred from the EU to organisations established in the United States. At the same time, back on 2013, the Commission,

based on new evidence gathered, formulated 13 recommendations for a review of the Safe Harbour scheme, focusing inter alia on strengthening the substantive privacy principles, increasing the transparency of U.S. self-certified companies' privacy policies, better supervision and monitoring and enforcement by the U.S. authorities of compliance with those principles.

The ECJ, wearing now a truly constitutional vest, not only condensed all the findings on the EU principles of privacy/data protection according to the settled case-law (para. 90-94) , but also even overreached the scope of DPD on adequacy of protection when it comes to the transfer of personal data abroad EU. Indeed, the Court, by virtue of DPD read in the light of Arts 7, 8 and 47 of CFR, requested a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order (see para. 71, 73, 74 and 96). Even though the means to which that third country has recourse, in this connection, may differ from the ones employed within the Union, those means must nevertheless prove, in practice, effective.

Interestingly, the national supervisory authorities have been considered as independent guardians of the fundamental rights enshrined in Arts 7 and 8 CFR put at stake by data processing operations; as a consequence, as the ECJ reasoned, it does not follow that an adequacy decision of the Commission would by any means preclude a data subject's right to lodge a complaint or a DPA's competence to hear that complaint. The ECJ added that because a DPA cannot on its own declare a Commission's decision invalid, does not mean their investigation is meaningless.

Moreover, ECJ declared the Commission Decision 520/2000/EC invalid. Without examining the content of the Safe Harbour Privacy Principles, it considered that the Commission had not stated in that decision that the United States in fact 'ensured' an adequate level of protection. The ECJ criticised the lack of sufficient findings in Decision 2000/520/EC regarding the existence, in the United States, of rules adopted by the State intended to limit any interference with the fundamental rights of the persons whose data is transferred from the EU to the US, interference which the State entities of that country would be authorised to engage in when they pursue legitimate objectives, such as national security, and the existence of effective legal protection against interference of that kind.

The case can be considered to be expansive of expression as it provides greater protection for the private data and information of the citizens of the EU by taking a more restrictive approach to data transfer and handling of European data when an informed consent from data subjects lacks.

There are massive practical implications of the ECJ's decision: the data protection authorities are very likely to see a significant increase in their work load. Moreover, the ruling provides indirectly new guidelines for the EU regime for cross-border data flows. Indeed, at the end of February 2016, the EU Commission made public a draft "adequacy decision" as well as the texts that will constitute the new EU-US Privacy Shields replacing the Safe Harbour declared by the *Schrems* ruling... not so safe!

#### **4. Conclusions**

It is possible to draw now some brief conclusions on the approach of the Court of Justice in the specific privacy/data protection fields encompassed in the EU decentralised yet complex EU general system of legal remedies.

Despite some uncertainties and conundrums, based on the complementary (or conflicting?) cooperation of the same ECJ and the national judges/authorities, a certain evolution of the judicial trend of the ECJ towards a more defined human rights-based approach could be surely inferred from the recent decisions which have been commented. In this context, the Charter plays the same role as the catalogues of fundamental rights contained in the national constitutions, making possible

an assimilation of the ECJ to the highest domestic courts.

Most certainly, the binding force attributed to the Charter plus the Snowden's revelations made the question of fundamental rights gain a momentum in the matter, but it shall nonetheless remarked that, as general principle of EU law, the respect of fundamental rights was ensured by the Court since the '60. In any case, it is true that Arts 7 and a 8 of the Charter became now a major practical yardstick in this matter, exploited not only for the interpretation (narrow or extensive) of domestic and EU instruments but also for a scrutiny on the validity of EU legal instruments. This means that all EU legislative, judicial and executive acts on privacy/data protection (as well as the domestic executive one) shall be consistent with the Charter which - interpreted case-by-case by the ECJ - could impose an obligation on the Union not just to avoid breaching the rights therein, but also to take positive action in order to promote them.

Moreover, especially in the light of the *Google* and *Schrems* cases and of the questions referred for a preliminary ruling, it should be stressed the raising awareness about the potential impact of the Charter for law practitioners (even NGos), dealing with their daily legal practice in privacy and digital data flows and transfers. It is up to them to become key actors in delivering the rights and freedoms guaranteed by the Charter and ensuring the individuals obtain full redress in case of violations.

Finally, although the issue has been scarcely addressed by the case-law (with the tiny exception of case C-34/13, *Kušionová*, [2014] ECR 2189, where ECJ considered the vulnerability of consumers also under Art. 7 of CFR about unfair terms in consumer contracts) it is important to underline that clear similarities can be identified between the relationship between data users and providers of on-line services, specifically for social media, and consumers and businesses.

Indeed, in both cases the parties clearly possess unequal bargaining power when entering into a contractual relationship which need to be addressed, mostly in light of the Charter, as suggested lately by the approach of ECJ. In this context, the restriction of the user's contractual freedom could be accepted in the interest of enforcing a fairer balance between the perceived commercial interests of both parties, preserving the right to privacy.

Having in mind that global society characterised by rapid and threatening technological changes as depicted at the beginning, it seems fair to conclude pointing out that the selected EU case-law on the right to privacy and highest level of data protection strongly remind to all us that *Hominum causa ius constitutum est*.