

# The Protection of Fundamental Rights in the Jurisprudence of the CJEU and the Charter – Twelve Years On

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*While national governments remain ambivalent about the EU's role in relation to human rights matters within the EU, the CJEU has taken a broad view of what falls within the scope of EU law for the purposes of Article 51 (field of application) of the Charter of Fundamental Rights of the EU. Mainly, in the event of conflict, it has asserted the primacy of EU law and of the Charter over national constitutional law. The Article therefore studies the development of human rights protection and the role of the Charter, Member State law, and international organizations in the matter of fundamental rights and freedoms. The paper considers the future of the CJEU's protection policy and provides a conclusion of the analysed issues at hand.*

*Keywords: fundamental rights, Charter, criminal proceedings, field of application, primacy, CJEU, ECtHR*

## 1. Introduction

The aim of this Article is to summarise and analyse the status of human rights and their protection in the field of EU law, while examining the engagement by the Court of Justice of the European Union (CJEU), mostly over the period since the Charter of Fundamental Rights (Charter) was made formally binding by the Lisbon Treaty in 2009. The case law available shows that the Court has engaged in several issues concerning human rights, the paper therefore explains the CJEU's protection policy towards these matters, while clarifying the definition and system of human rights and giving a short history of the fundamental rights protection before the Charter.

As stated in the abstract above, even though national governments remain ambivalent about the EU's role in relation to human rights matters within the EU, the CJEU has taken a broad view of what falls within the scope of EU law for the purposes of Article 51<sup>1</sup> (field of application) of the Charter. Mainly, in the event of conflict, it has declared the primacy of EU law and of the Charter over national constitutional law. However, it has not yet clarified whether the Charter can impose obligations on private parties or not. The most important case law is selected in order to understand

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<sup>1</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, (hereinafter: Charter) Article 51. 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."

the CJEU's logic through landmark decisions. The relationship between Luxembourg and the European Court of Human Rights (ECtHR)<sup>2</sup>, and the EU's accession to the European Convention of Human Rights is also discussed in the given context. The Article considers the extent to which the European Court of Justice has provided adequate protection for human rights within the European Union legal order, and also how national courts (explicitly the Spanish and German constitutional tribunals) reacted to this matter.

The Lisbon Treaty, by adopting the Charter did not aim at promoting the harmonisation of the systems of protection of fundamental rights of Member States, but it rather aimed at eliminating the possibility that Member States in implementing Union law would apply different standards of protection of fundamental rights. As part of the body of EU constitutional rules and principles, the Charter is binding upon the EU institutions when adopting new measures as well as on the Member States when implementing them. EU law is shaping up to be a complete legal order based on a solid construction of fundamentals or principles, and even if it is founded on the principle of conferral from the Member States, it has developed as a "supranational legal order." The Article consequently also explores whether this legal order, the primacy, unity and effectiveness of EU law should mean placing these above national constitutions and also considers the future of the CJEU's protection policy.

## **2. The development of protection - the road to the Charter of Fundamental Rights**

Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion or any other status. Everyone is entitled to these rights, without discrimination, because they are all interrelated, interdependent and indivisible. Deciding which norms should be counted as human rights is a matter of considerable difficulty, even more so that there is a continuing pressure to expand lists of human rights to include new areas.<sup>3</sup> Many political movements would like to see their main concerns categorized as matters of human rights, since this would publicize, promote, and legitimize their concerns at an international level.<sup>4</sup> Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. Furthermore international human rights law lays down obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

After the Second World War has ended, when the promise of an integrated Europe emerged, the rebuilding of Europe, devastated both economically and physically by the War, was the primary concern. The immediate focus was on economic integration and the creation of a common market that would result in a higher standard of living for all.<sup>5</sup> So, when the Treaty of Paris<sup>6</sup>, and the treaty

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<sup>2</sup> The European Court of Human Rights (based in Strasbourg) is an international court set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.

<sup>3</sup> See J. Nickel, *Human Rights*, in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition) <https://plato.stanford.edu/archives/spr2017/entries/rights-human/> (1 December 2021).

<sup>4</sup> O. P. Dhiman, *Understanding human rights, an overview*. Kalpaz Publication, Delhi 2011, p. 56. See also: M. W. Cranston, *What are Human Rights?* The Bodley Head, London 1973.

<sup>5</sup> E. F. Defeis, *Human Rights and the European Court of Justice: An appraisal*. *Fordham International Law Journal* Vol. 31, No 5, 2007, pp. 1104-1106.

<sup>6</sup> The Treaty establishing the European Coal and Steel Community by „The Six” (Belgium, Luxembourg, France, Italy, Netherlands, West Germany) signed on April 18, 1951. See 1951 Treaty between the Federal Republic of Germany, the

of Rome (EEC Treaty)<sup>7</sup> were adopted, the protection of human rights was given very little attention. Fortunately, other forums like the United Nations declared as one of its purpose the encouragement and promotion of human rights and fundamental freedoms protection.

The principle of universality of human rights is the cornerstone of international human rights law. One of the first resolutions adopted by the General Assembly of the UN was the Universal Declaration of Human Rights in 1948.<sup>8</sup> This declaration is a milestone document, drafted by representatives with different legal and cultural backgrounds from all regions of the world, to show a common standard of achievements for all peoples and all nations. In addition the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 1950 and was subsequently ratified – among others – by each of the original members of the EEC.<sup>9</sup>

Although the EEC Treaty contained a Social Chapter which gave limited mention to human rights and the protection of workers' rights, neither it, nor the Treaty of Paris could have been considered a bill of rights. The EEC Treaty protected freedom of movement and gender equality with respect to equal pay for male and female workers,<sup>10</sup> but beyond the mention of these principles, the EEC Treaty offered little protection in other areas of human rights, further it did not contain any specific provisions to enforce these rights.<sup>11</sup> At the time, human rights were to be protected by individual Member States through their national constitutions and laws.<sup>12</sup> In addition, since each Member State was also party to the European Convention of Human Rights<sup>13</sup>, the guarantees of the Strasbourg process were available to its citizens.

The status of human rights within the EU legal order has changed dramatically since its foundation in the early 1950s. An explicit reference to fundamental rights at Treaty level appeared only with the entry into force of the Maastricht Treaty.<sup>14</sup> According to Article F of the Treaty on European Union, the EU was obliged to “respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States as general principles of Community law.”<sup>15</sup>

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Kingdom of Belgium, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands instituting the European Coal and Steel Community, 261 UNTS 140.

<sup>7</sup> The Treaty establishing the European Economic Community signed by the upper mentioned „Six” on March 25, 1957. See 1957 Treaty establishing the European Economic Community, 294-298 UNTS 3-2-2-3. (hereinafter: EEC Treaty)

<sup>8</sup> GA Res. 217 (III), 10 December 1948.

<sup>9</sup> Defeis 2007, p. 1105.

<sup>10</sup> EEC Treaty Article 48: providing that freedom of movement for workers shall be secured within the Community. EEC Treaty Article 119: providing that each Member State shall ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

<sup>11</sup> Defeis 2007, p. 1106.

<sup>12</sup> See J. H. H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights Within the Legal Order of the European Communities*, Washington Law Review Vol. 61, No. 3, 1986, p. 1103.

<sup>13</sup> Formally the Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty signed on 4 Nov. 1950 to protect human rights and fundamental freedoms in Europe. It was drafted by the then newly formed Council of Europe. The Convention also established the European Court of Human Rights. See 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221.

<sup>14</sup> The Maastricht Treaty (signed on 7 February 1992) created the 3 pillars structure of the European Union and led to the creation of the single European currency, the euro. The Maastricht Treaty and all pre-existing treaties has subsequently been further amended by the treaties of Amsterdam (1997), Nice (2001) and Lisbon (2009).

<sup>15</sup> 1992 Treaty on European Union, 1755-1759 UNTS, Article F

Since the entry into force of the Amsterdam Treaty<sup>16</sup> and more likely of the Lisbon Treaty<sup>17</sup>, protecting fundamental rights is a founding element of the European Union and an essential component of the development of the supranational European Area of Freedom, Security and Justice.<sup>18</sup>

### 3. Scope and structure of the Charter

The Charter was originally drawn up in 1999-2000, and was solemnly proclaimed by the Commission, Parliament and Council and also politically approved by the Member States at a European Council summit in December 2000, but its legal status was left undetermined at the time.<sup>19</sup> The original idea near the millennium was to ratify the so-called Constitutional Treaty, which would have replaced all the existing EU Treaties with a single text, and would have given legal force to the Charter. The Treaty establishing a Constitution for Europe however remained an unratified international treaty and the Treaty of Lisbon formulated as amendments to the existing Treaties.

Formally, then, the Charter is recognized as primary law, and it has even been suggested that it could gain constitutional status, on the reasoning the Charter enshrines the Union's fundamental principles and some general legal principles - such as *ne bis in idem*.<sup>20</sup> Following the failure of the Constitutional Treaty, the legal status of the Charter was not resolved until the adoption of the Lisbon Treaty. Instead of incorporating the Charter into the Treaties -the strategy used for the Constitutional Treaty- it was decided that the Treaty of Lisbon should simply refer to the Charter as a source that would be external to the Treaty itself but internal to the EU system. Therefore - currently - under Article 6 of the Treaty on European Union (TEU), the Charter "shall have the same legal value as the Treaties." In reality the Charter's force as a primary source is reduced from within, notwithstanding that the EU Charter of Fundamental Rights may formally have equal rank with the EU Treaty and may in the abstract be subject to the same structural principles as the latter: the principles of conferral, primacy, and direct effect. Written into the Charter itself are a series of provisions limiting its own effects, with extra caution taken where interference may arise with the Member States' legal systems.<sup>21</sup> This, after all, seems to be in keeping with the function originally entrusted to the Charter by its drafting convention as a tool designed not to bring new rights into being but to firm up existing ones.

The rights of every individual in the EU were established at different times, in different ways and

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<sup>16</sup> 1997 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2700 UNTS.

<sup>17</sup> The Treaty of Lisbon (initially known as the Reform Treaty) is an international agreement, which amends the two treaties which form the constitutional basis of the European Union. The Treaty of Lisbon was signed by the EU Member States on 13 December 2007, and entered into force on 1 December 2009. It amends the Maastricht Treaty (1993) (Treaty on European Union (2007)), and the Treaty of Rome (1957), (Treaty on the Functioning of the European Union (2007)). It also amends the attached treaty protocols as well as the Treaty establishing the European Atomic Energy Community (EURATOM). See 2007 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2702 UNTS.

<sup>18</sup> F. Ferraro, J. Carmona, *Fundamental Rights in the European Union – The role of the Charter after the Lisbon Treaty*, European Parliamentary Research Service, March 2015, (PE 554.168) [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS\\_IDA\(2015\)554168\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf) (1 December 2021).

<sup>19</sup> P. Craig & G. de Búrca, *EU Law – Text, Cases and Materials*, Oxford University Press, Oxford 2015, p. 394.

<sup>20</sup> See T. Tridimas, *General Principles of EU law*, 2<sup>nd</sup> edn., Oxford European Union Law Library, Oxford 2006 and also M. Wimmer, *The Dinghy's Rudder: General Principles of European Union Law through the Lens of Proportionality*, European Public Law Vol. 20, No. 2, 2014 pp. 331-353.

<sup>21</sup> L. S. Rossi, "Same Legal Value as the Treaties"? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights, German Law Journal Vol. 18, No. 04, p. 795.

in different forms. For this reason, the EU decided to include them all in a single document, which has been updated in the light of changes in society, social progress and scientific and technological developments. The Charter brings together all the personal, civic, political, economic and social rights enjoyed by people within the EU in a single text.

Consequently, the Charter plays a special part in the European Union's *Acquis Communautaire*, as the Charter and the general principles of EU law now rank alongside Treaty provisions as primary norms of EU law, and there is a growing EU case law dealing with human rights issues. The Charter is binding upon the EU institutions when enacting new measures, as well as for the Member States whenever they act within the scope of EU law.<sup>22</sup> The field of application of the Charter is limited in a significant way: the Charter only applies when EU law is at stake. When national courts and authorities in the EU Member States are confronted with problems of purely national law, they are not obliged to apply the Charter, but should instead rely on the national constitutional bill of rights as well as the international human rights instruments which are binding on the Member State in question.<sup>23</sup>

The Charter is worded taking into account all previous CJEU case law, but it enjoys a higher degree of legitimacy, thanks to its ratification by all the Member States on behalf of their citizens. An important aspect of the EU Charter, indicated explicitly in its preamble, is that it places the individual at the heart of EU activities (people's Europe). The Charter draws on the European Convention on Human Rights (ECHR), the European Social Charter and other human-rights conventions, as well as the constitutional traditions common to the EU Member States. It also recognises new kinds of rights protecting individuals from new forms of abuses by public or private entities (like the right to the protection of personal data and to good administration).<sup>24</sup> Overall, the Charter could best be described as a creative distillation of the rights contained in the various European and international agreements and national constitutions on which the CJEU had for some years already drawn.<sup>25</sup>

Via the Lisbon Treaty, the so-called 'principle of conferral' has been further codified by the TEU, notably in Article 5, according to which under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein, and the competences not conferred upon the Union in the Treaties remain with the Member States. It is, then, the scope of EU law which determines EU jurisdiction on fundamental rights and not the reverse.<sup>26</sup> The same applies to the content of EU fundamental rights. In fact, according to Article 52(2) of the Charter: "Rights recognised by [the] Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties." In the light of this specification, in several areas where the same subject matter is regulated both by an Article of the Treaty and by an Article of the Charter (see the

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<sup>22</sup> See Case C-617/10 *Åkerberg Fransson*, [EU:C:2013:105]. European Union law does not govern the relations between the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, 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. European Union 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 Charter of Fundamental Rights of the European Union 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 Court of Justice of the European Union, whether that provision is compatible with the Charter.

<sup>23</sup> A. Rosas, *When is the EU Charter of Fundamental Rights applicable at national level?* *Jurisprudence*, Vol. 19, No. 4, 2012, pp. 1269-1288.

<sup>24</sup> Ferraro & Carmona 2015, p. 5.

<sup>25</sup> Craig & de Búrca 2015, p. 396.

<sup>26</sup> Ferraro & Carmona 2015, p. 11.

case of data protection covered by Articles 16 TFEU and 8 of the Charter, or the case of access to documents covered by Article 15 TFEU and Article 42 of the Charter), the legislature has to take both as a reference; indeed very often they complement each other.<sup>27</sup>

The Charter is the reference not only for the CJEU but also for EU institutions, in particular the Commission, when launching new proposals which give ‘specific expression to fundamental rights.’<sup>28</sup> This is the case with EU policies dealing with anti-discrimination, asylum, data protection, transparency, good administration, and procedural rights in civil and criminal proceedings. Nevertheless, fundamental rights (and the Charter) come into play in EU legislation in any other domain of EU competence, such as transport, competition, customs and border control. As these policies can also have an impact on the rights of citizens and other individuals, such as human dignity, privacy, the right to be heard and freedom of movement, EU and Member State law should take the Charter into account when regulating these spheres.<sup>29</sup>

#### **4. The European Court of Justice’s role in the protection of human rights**

Traditionally, the term ‘fundamental rights’ is used in a constitutional setting whereas the term ‘human rights’ is used mainly in international law. The two terms refer to similar substance as can be seen when comparing the content in the Charter of the European Union with that of the European Convention on Human Rights and the European Social Charter. Initially the term human rights appeared rarely in the case law of the CJEU. The term was mainly used when referring to the international treaties, rather, the CJEU referred to the ‘fundamental rights’ as general principles of EU law that must be protected by the Court.<sup>30</sup> These general principles of EU law are interpreted by the Court more broadly than the rights contained in international human rights conventions and include not only those rights but also rights recognised in the constitutional law of Member States. The term ‘fundamental rights’ is used in the European Union to express the concept of ‘human rights’ within a specific EU internal context.

It is important to note that there needs to be a balance between three systems of protection of fundamental rights in the EU. The Court of Justice of the European Union, the European Court of Human Rights and the national courts. According to the Treaties, the CJEU has three main sources of inspiration as regards the protection of fundamental rights within the Union legal order: the Charter, the Convention and the constitutional traditions common to the Member States. Article 6 of the TEU<sup>31</sup>

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<sup>27</sup> Ferraro & Carmona 2015, pp. 11-12.

<sup>28</sup> See Case 555/47 *Seda Küçükdeveci v Swedex GmbH & Co. KG*. [EU:C:2010:21] para. 21. The Court underlined for the first time the new legal status of the Charter, stating that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties. See also: E. Muir, *The Fundamental rights implications of EU legislation: some constitutional challenges*, *Common Market Law Review*, Vol. 51, No. 1, 2014, pp 223-226.

<sup>29</sup> Ferraro & Carmona 2015, p. 4.

<sup>30</sup> Defeis 2007, p. 1111.

<sup>31</sup> “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamen-

gives the CJEU all the elements to be considered in interpreting the provisions of the Charter. It provides that the interpretation of the Charter requires the Court to take into consideration several parameters; such as the constitutional traditions common to the member States and the national laws and practices as specified in the Charter, the Convention for the Protection of Human Rights and Fundamental Freedoms, the case-law of the Court of Strasbourg as well as the Explanations relating to the Charter.<sup>32</sup>

The case law of the CJEU and the General Court dealing with human rights matters continues to grow exponentially, and covers a wide spectrum of different human rights issues. Since the adoption of the Charter, the CJEU has shown itself willing to strike down EU laws for violation of its provisions. Throughout its history, the CJEU has decided on many cases which deal with fundamental rights such as non-discrimination, freedom of religion, association, and expression. Facing today's problems and with the widening and the deepening of the Union, it is safe to say that the Court will be faced with new controversies involving human rights. Issues such as the legality of anti-terrorist measures, standards to be applied to expanded equality provisions, and restrictions on the movement of persons and goods are certain to come before the Court.<sup>33</sup>

## 5. Some landmark decisions

Back in 1969, the CJEU already referred to fundamental rights as being part of the general principles of Community law and underlined that they are protected by the Court.<sup>34</sup> The CJEU's willingness to protect fundamental rights appeared in the context of the doctrine of supremacy of Community law as proclaimed in *Van Gend en Loos*<sup>35</sup> and *Costa v Enel*.<sup>36</sup> However, national constitutional courts showed reluctance - especially in Germany<sup>37</sup> - to recognise this supremacy without proper guarantees for fundamental rights at the Community level.<sup>38</sup> While in the first *Solange* decision the German Constitutional Court (BVerfG) expressed the view that Community law did not ensure a standard of fundamental rights corresponding to that of German Basic Law, only some years later in the second *Solange* judgement finally conceded that the protection of fundamental rights ensured by the CJEU could be presumed to be equivalent to the protection by the German Constitutional Court. However, the BVerfG also indicated that this presumption could not be considered absolute.

In the *Stauder* case the CJEU for the first time affirmed a category of 'general principles of EU law', which included protection for fundamental human rights. Highly relevant furthermore is the

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tal Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." See Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012. Article 6.

<sup>32</sup> A. Arnulf, *The European Court of Justice after Lisbon*, in M. Trybus & L. Rubini (Eds.), *The Treaty of Lisbon and the Future of European law and Policy*, Edward Elgar Publishing, Cheltenham, Northampton 2012, pp. 49-50.

<sup>33</sup> Craig & de Búrca 2015, p. 427.

<sup>34</sup> Case 29/69 *Erich Stauder v City of Ulm* [EU:C:1969:57]

<sup>35</sup> Case 26/62 *Van Gen den Loos* [EU:C:1963:1]

<sup>36</sup> Case 6/64, *Costa v. Enel* [EU:C:1964:66]

<sup>37</sup> See Case 11-70 *Internationale Handelsgesellschaft*, [EU:C:1970:114.] and also the *Solange* saga (*Solange I*: Federal Constitutional Court of Germany, judgment no. 37, 271 of 29 May 1974, *Solange II*: Federal Constitutional Court of Germany, judgment no. 73, 339 of 22 October 1986), where the German Constitutional Court expressed the view that the Community law did not in all circumstances ensure a standard of fundamental rights corresponding to that of German Basic Law, however later decided that it would no longer examine the compatibility of Community legislation with German fundamental rights as long as the European Court continues to protect fundamental rights adequately.

<sup>38</sup> Ferraro & Carmona 2015, p. 4.

*Internationale Handelsgesellschaft* case, in which the German Federal Constitutional Court was asked to set aside an EU measure concerning forfeiture of an export-licence deposit which allegedly violated German constitutional rights and principles such as economic liberty and proportionality.<sup>39</sup> The CJEU upheld the EU measure, ruling that the restriction on the freedom to trade was not disproportionate to the general interest advanced by the deposit system. In 1974 in the *Nold* decision<sup>40</sup> the Court declared that general principles of law would take precedence, in event of conflict, over specific Community measures, it ruled that the rights to property and to trade or profession were far from absolute, and that limitations in this case were justified by the EU's overall objectives.<sup>41</sup> The Court also added that, apart from national constitutional traditions, Community fundamental rights can be based on international agreements to which the Member States are contracting parties, explicitly pointing to the ECHR the following year in the *Rutili* case.<sup>42</sup>

One of the most analysed CJEU judgments dealing with the scope of application of EU law in the fundamental rights context is *Åkerberg Fransson*,<sup>43</sup> where the Court, referring to its established case law on the scope of fundamental rights in the EU and to the explanations relating to Article 51 of the Charter considered that the fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of European Union law. The Court also stated in - further discussed - *Melloni*<sup>44</sup> judgement that only in a situation where an action of a Member State is not entirely determined by EU law, do national courts and authorities remain free to apply national standards of protection of fundamental rights. However, even in these cases, the level of protection provided by the Charter as interpreted by the Court, and the primacy, unity and effectiveness of EU law must not thereby be compromised.<sup>45</sup>

Indeed, in the *Åkerberg Fransson* case, the Court interpreted the *ne bis in idem* principle laid down in Article 50 of the Charter<sup>46</sup>. The Court observed that the principle of preventing a person from being punished twice for the same offence does not preclude a Member State from imposing, for the same acts, a combination of tax penalties and criminal penalties, as long as the tax penalty is not criminal in nature. It then defined the three criteria to be followed by the national judge to assess if a sanction is criminal in nature, for example, the legal classification of the offence under national law, the very nature of the offence, and the nature and degree of severity of the penalty that the person concerned is liable to incur.<sup>47</sup> According to the Court: ‘since the fundamental rights

<sup>39</sup> Craig & de Búrca 2015, p. 383.

<sup>40</sup> Case 4/73 *Nold v Commission*, [EU:C:1974:51]

<sup>41</sup> Craig & de Búrca 2015, p. 401.

<sup>42</sup> Case 36/75 *Roland Rutili v Ministre de l'intérieur* [EU:C:1975:137]

<sup>43</sup> See B. de Witte & A. Ott, E. Vos (Eds.), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law*, Edward Elgar Publishing, Cheltenham, Northampton 2017. p. 186.

<sup>44</sup> Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, [EU:C:2013:107] A preliminary ruling by the Spanish Constitutional Court was based on a situation where two different regimes of judgment *in absentia* competed at national and European level. The CJEU's answer was in favour of the application of the principle of EU law, as described by the Framework Decision on the European Arrest Warrant, because: “allowing a Member State to avail itself of Article 53 of the Charter of Fundamental Rights to make the surrender of a person conditional on a requirement not provided for in the EU framework decision on the European Arrest warrant would, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that decision, undermine the principles of mutual trust and recognition which that decision purports to uphold and would therefore compromise its efficacy.” *Ibid.* para. 63.

<sup>45</sup> C-399/11 *Melloni* [EU:C:2013:107] para. 60. See also: A. Von Bogdandy & M. Kottmann & C. Antpöhlee & J. Dickschen & S. Hentrei & M. Smrkolj, *Reverse Solange – Protecting the essence of fundamental rights against EU Member States*, *Common Market Law Review*, Vol. 49, No. 2, 2012, pp. 489–519.

<sup>46</sup> Charter Article 50 “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.”

<sup>47</sup> Ferraro & Carmona 2015, p. 12.

guaranteed by the Charter must 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.<sup>48</sup>

## 6. Fundamental rights in criminal proceedings

When dealing with fundamental rights issues, which concern international (European Convention on Human Rights and its protocols), EU (Charter of Fundamental Rights, Framework Decision) and national law (including the State's constitutions), we often have to face the complexity and difficulty of applying different binding texts sometimes simultaneously, using different standards, structures and terminology, while the aim is to find a solution that harmonizes the fields of application.<sup>49</sup> In the event of conflict, the principle of supremacy of EU law states that Member States should not apply conflicting national rules. National courts accept that obligation to a large extent, although when it comes to their constitutions they - understandingly - tend to stand their grounds.

The CJEU therefore developed various techniques to deal with such constitutional matters.<sup>50</sup> The controversial issue may be brought outside the scope of EU law (see *e.g. Grogan*<sup>51</sup>), EU law may be recognised to protect the same constitutional right to the same far-reaching extent (*e.g. case Omega Spielhallen*<sup>52</sup>), or the principle of respect for national identity, as currently laid down by Article 4(2) of the Treaty on the European Union<sup>53</sup>, may be used to allow national norms to remain applicable even when they undermine effectiveness of an EU norm.<sup>54</sup>

In the landmark *Melloni* judgement, the Grand Chamber of the CJEU decided not to use any of these techniques, instead the EU Framework Decision was held to prevail over the Spanish Constitution. It is also important to mention, that *Melloni* seems to hold its relevance as time passes by, since there has been many follow-up cases in the CJEU's practice, concerning similar matters—but

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<sup>48</sup> C-617/10 Åkerberg Fransson, [EU:C:2013:105] para. 21.

<sup>49</sup> See J. Polakiewicz, *Fundamental Rights in Europe: a Matter for Two Courts*, Oxford Brookes University, Strasbourg, 2014, Concluding remarks: present challenges and future directions, [https://www.coe.int/en/web/dlapil/speeches-of-the-director/-/asset\\_publisher/ja71RsfCQTP7/content/-fundamental-rights-in-europe-a-matter-for-two-courts-?inheritRedirect=false#\\_ftn1](https://www.coe.int/en/web/dlapil/speeches-of-the-director/-/asset_publisher/ja71RsfCQTP7/content/-fundamental-rights-in-europe-a-matter-for-two-courts-?inheritRedirect=false#_ftn1) (1 December 2021).

<sup>50</sup> E. Cloots, *National Identity in EU Law*, Oxford University Press, Oxford 2015, pp. 263-265.

<sup>51</sup> Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. [EU:C:1991:378]. The issue was an Irish constitutional prohibition on the distribution of information on abortions carried out abroad. It appears from the Court's reasoning (para. 24.) that the Irish prohibition fell outside the scope of the freedom to provide services, not because it gave effect to a national constitutional right, but because it did not, in fact, hinder the UK abortion clinics in the provision of their services.

<sup>52</sup> Case C-36/02 *Omega Spielhallen* [EU:C:2004:614] involved the marketing in Germany of a violent laser-game, which had been lawfully produced and sold in the United Kingdom. The marketing of the game was forbidden by the German authorities on the basis that the game 'constituted an affront to human dignity' as protected by the German constitution (paras. 11-12.).

<sup>53</sup> 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

<sup>54</sup> D. Lecykiewicz, *Melloni and the future of constitutional conflict in the EU*, U.K. Constitutional Law Association Blog, 22 May 2013 <https://ukconstitutionallaw.org/2013/05/22/dorota-lecykiewicz-melloni-and-the-future-of-constitutional-conflict-in-the-eu/> (1 December 2021).

in different approach and reasoning—like *Taricco I-II*<sup>55</sup>, *Jeremy F*<sup>56</sup> or *Aranyosi/Căldăraru*,<sup>57</sup> which cases will be explained below.

Apart from the previously mentioned general case law leading up to the *Melloni* judgement, particularly when thinking about criminal proceedings, and the issuing of a European Arrest Warrant (EAW), the national judiciaries also have to think about the problem of double jeopardy, with which the CJEU also dealt with in the *Mantello*<sup>58</sup> case. According to the CJEU's judgement, whether a person has been 'finally' judged is determined by the law of the Member State in which the judgment was delivered. Consequently, if a Member State does not definitively bar further prosecution at national level in respect of certain acts, then there is no procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts in another Member State of the European Union.<sup>59</sup> Meaning also, that the executing judicial authority cannot as a general rule refuse to execute EAW in such cases.

In 2013, the same year of the *Melloni* judgement, the Court dealt with a similar problem in the *Radu*<sup>60</sup> case. Several governments intervened in the proceedings highlighting that in their view, the execution of an EAW could exceptionally be refused if there are serious reasons to believe that the execution would lead to infringements of the requested person's fundamental rights.<sup>61</sup> The Court however only focused on the same outcome as in *Melloni*, that the Framework Decision must be interpreted as the executing judicial authorities cannot refuse to execute EAWs issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard (in case of *Melloni*; sentenced *in absentia* -without making appearance in court-) in the issuing Member State before that arrest warrant was issued. It held that the obligation of the suspect to be heard would 'inevitably lead to the failure of the very system of surrender provided for by the EAWFD.'<sup>62</sup>

The quasi-follow-up judgments of *Melloni*, *Taricco I*, *II*. raise even more questions than it answers on when a Member State can apply higher standards of rights in criminal proceedings. The Italian CC used the notion of constitutional identity for the first time in its Decision No. 24/2017, when it asked the ECJ to clarify whether its ruling in *Taricco* actually left national courts with the power to disapply domestic norms, even to the extent that this contrasted with a fundamental principle of the Constitution, namely, the principle of legality in Article 25. The Italian CC asserted in the judgment that the rule inferred from Article 325 TFEU is only applicable if it is compatible with the constitutional identity of the Member State, and it falls to the competent authorities of that State to carry out such an assessment.<sup>63</sup> In *Taricco I* the Court held that the Italian limitation periods for serious VAT fraud cases breached Article 325 of the TFEU (combatting fraud), and according to the Court, the primacy of EU law required the Italian court to disapply the national rules on limitation

<sup>55</sup> Case C105/14 *Taricco and Others* [EU:C:2015:555] and Case C-42/17 *M.A.S and M.B.*, [EU:C:2017:936]

<sup>56</sup> Case C168/13 *Jeremy F. v Premier ministre* [EU:C:2013:358]

<sup>57</sup> Joined Cases C404/15 and C659/15 *PPU Aranyosi and Robert Căldăraru* [EU:C:2016:198]

<sup>58</sup> Case C-261/09 *Gaetano Mantello* [EU:C:2010:683]

<sup>59</sup> Court of Justice of the European Union PRESS RELEASE No 113/10 Luxembourg, 16 November 2010.

<sup>60</sup> Case C-396/11 *Ciprian Vasile Radu* [EU:C:2013:39]

<sup>61</sup> A. Ghimis, *The European Arrest Warrant: Between mutual recognition and fundamental rights*, European Parliamentary Research Service Blog, 11 September 2013. <https://epthinktank.eu/2013/09/11/the-european-arrest-warrant-between-mutual-recognition-and-fundamental-rights/> (1 December 2021).

<sup>62</sup> Case C-396/11 *Radu* para. 40.

<sup>63</sup> T. Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A regional Approach*, German Law Journal Vol. 21, No. 2, 2020, p. 111.

periods.<sup>64</sup> It is precisely this feature of the Italian legality principle (which applies also to limitation periods) that was accepted in *Taricco II*<sup>65</sup>, though without altering the scope of Article 49 of the Charter. The Court thus permitted the Italian courts to apply the national standard of protection (the national legality principle), even if it means higher standards, and even if it comes at the detriment of the effectiveness of EU law; indeed, many criminal proceedings of VAT fraud affecting the EU's financial interests would be time-barred as a consequence.<sup>66</sup>

As we could see from the judgments analyzed above, the CJEU showed strong commitment to widen and strengthen the scope and the binding value of the Charter. Indeed, the Court is fully aware of the importance and sensitiveness of its role in the scrutiny of the criminalization choices of the EU legislator and of the relevant national criminal provisions. It tries to have an independent position from the ECtHR, even in the light of future accession to the ECHR (discussed in the upcoming chapter). However, comparing the material facts in *Melloni* (application of the European Arrest Warrant) and in *Taricco* (fight against the offences affecting the EU's financial interests), we could conclude that, when security needs are at stake, the CJEU is more likely to lower the standard of protection for fundamental rights.<sup>67</sup>

More recently on 15 October 2019, the Court published its judgement in *Dorobantu*,<sup>68</sup> a case which concerns the interpretation of Article 4 of the Charter and Council Framework Decision 2002/584/JHA of 2002 on the EAW and the surrender procedures between Member States. Interestingly, the judgment makes no mention of the general principles of EU law and does not reference its own jurisprudence regarding how the ECHR may have an indirect relevance in EU law.<sup>69</sup> Firstly, the Court ruled that Article 1(3) of the Framework Decision, read in conjunction with Article 4 of the Charter, must be interpreted as meaning that when the executing Member State has objective, reliable, specific and properly updated information showing that there are systemic or generalized deficiencies in the conditions of detention in the issuing Member State, it must take account of all relevant physical aspects of the conditions in the prison in which the person concerned is likely to be detained (e.g. the personal space available to each detainee, sanitary conditions, freedom of movement within the prison).<sup>70</sup> To that end, the Court specified, that in order to safeguard the efficacy of the EAW system, the executing Member State has to take into account the time limits set by Article 17 of Framework Decision 2002/584/JHA for the adoption of a final decision on the execution of the European Arrest Warrant. Therefore, it should be determined if there is indeed a real risk in the prisons in which the individual might be detained and not a general assessment for all the prisons of the issuing Member State. In order to achieve that in time, the executing Member State

<sup>64</sup> Another point worth highlighting is that, according to the CJEU, by disapplying the statutes of limitations periods, the referring court would not breach the principle of legality, as enshrined in Article 49 of the Charter. This is because the latter covers only substantive criminal provisions: those determining the types of crimes and sanctions, whereas the nature of statutes of limitations periods is procedural in the CJEU's view. See more on this topic: M. Krajewski, *A way out for the ECJ in Taricco II: Constitutional identity or a more careful proportionality analysis?*, European Law Blog, 23 November 2017. <https://europeanlawblog.eu/2017/11/23/a-way-out-for-the-ecj-in-taricco-ii-constitutional-identity-or-a-more-careful-proportionality-analysis/> (1 December 2021).

<sup>65</sup> Case C-42/17 M.A.S and M.B [EU:C:2017:936]

<sup>66</sup> C. Peristeridou, *A Bridge over Troubled Water – a Criminal Lawyers' Response to Taricco II*, VerfBlog' 12 December 2017, [https://intr2dok.vifa-recht.de/receive/mir\\_mods\\_00002969](https://intr2dok.vifa-recht.de/receive/mir_mods_00002969) (1 December 2021).

<sup>67</sup> See V. Scalia, *Protection of Fundamental Rights and Criminal Law The Dialogue between the EU Court of Justice and the National Courts*, Eucrium (The European Criminal Law Associations' Forum), Vol. 10, No. 3, 2015, pp. 100-111.

<sup>68</sup> Case C-128/18 Dumitru-Tudor Dorobantu [EU:C:2019:857]

<sup>69</sup> Á. Mohay, *The Dorobantu case and the applicability of the ECHR in the EU legal order*, Pécs Journal of International and European Law, Vol. 11, No. 1, 2020, p. 88.

<sup>70</sup> Council Framework Decision 2002/584/JHA of 13 June 2002, OJ L 190, 18.7.2002, paras. 58 and 62.

must request the issuing Member State to provide (as a matter of urgency) all the necessary information on the conditions in which it is actually intended that the individual will be detained.<sup>71</sup> Interestingly, the Court citing the case of *Melloni*, reminds us one more time that the person detained by virtue of a European Arrest Warrant is subject only to compliance with the minimum standards of detention conditions resulting from Article 4 of the Charter and Article 3 of the ECHR, and not with those resulting from the national law of the executing Member State, otherwise, the principles of mutual trust and recognition will be undermined.<sup>72</sup>

The right to an effective remedy does not have an independent existence. Instead, it complements other fundamental rights. According to the case-law of the ECtHR it cannot be violated in itself, but only if a state action constricting human rights cannot be challenged.<sup>73</sup> Also recently, in its *Gavanozov*<sup>74</sup> judgement the CJEU had the chance to interpret for the first time some provisions of Directive 2014/41/EU and provide some clarification on the level of safeguards that needs to be provided 'in practice.' Although it is a brief judgment that ultimately deals only with the interpretation of the form contained in an Annex to the Directive, the questions it raises touch upon broader and more fundamental issues of transnational enforcement. The CJEU was tasked with deciding is the right to an effective remedy violated by Bulgarian law not providing the right to challenge the issuance of an European Investigation Order (EIO) requesting search of business premises and home and the seizure of items?<sup>75</sup> According to the Directive the EIO is a judicial decision issued or validated by a judicial authority in order to request one or several specific investigative measures carried out in another Member State or to obtain evidence already in possession of the competent authorities of the executing Member State. In many European Investigation Orders that were transmitted through Eurojust, Section J was not filled in.<sup>76</sup> This sometimes prompted executing judicial authorities to send requests for additional information related to the available legal remedies in the issuing Member State. In addition, several national authorities struggled with questions on how to interpret the obligation to fill in this box: some insisted that the use of the present perfect in that section ('remedy ... already has been sought ...') implied that it was inherently impossible to fill in this box, as at the time of the issuance of the EIO template a legal remedy could not yet have been issued. Others believed that the sentence in brackets seemed to refer only to the availability of legal remedies in the national legislation (either used or not, in the specific case in question).<sup>77</sup> With the *Gavanozov* judgment, this issue has been clarified. The CJEU held that Article 5 (1) EIO DIR must be interpreted as meaning that the judicial authority of a Member State does not, when issuing an EIO, have to include in Section J a description of the legal remedies, if any, that are provided for in its Member State against the issuing of such an order.

To conclude, the application of the EIO with its double check by the issuing as well as by the executing State on the principle of legality, proportionality, on the grounds for refusal, risks to put in crisis the principle of mutual recognition which is based on mutual trust. According to Eurojust<sup>78</sup>, in

<sup>71</sup> Ibid. para. 67.

<sup>72</sup> Ibid. para. 79.

<sup>73</sup> European Court of Human Rights: Guide on Article 13 of the European Convention on Human Rights. 2020. p. 8.

<sup>74</sup> Case C-324/17 Ivan Gavanozov [EU:C:2019:892]

<sup>75</sup> See I. Sziujártó, *The implications of the European Investigation Order for the protection of fundamental rights in Europe and the role of the CJEU*, Pécs Journal of International and European Law Vol. 13, No. 1, 2021, p 66.

<sup>76</sup> See Eurojust and EJM, Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, Council doc. 11168/1/19 <https://www.eurojust.europa.eu/hu/joint-note-eurojust-and-ejm-practical-application-european-investigation-order> (31 October 2021).

<sup>77</sup> Report on Eurojust's casework in the field of the European Investigation Order, November 2020, [https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11\\_EIO-Casework-Report\\_CORR\\_.pdf](https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11_EIO-Casework-Report_CORR_.pdf) (1 December 2021), pp. 25-26.

<sup>78</sup> European Union Agency for Criminal Justice Cooperation (2020). Challenges and best practices from

practice, in some States, the control is more pervasive than it should be: without reinforcing mutual trust among States there is a risk that cooperation might become ineffective, with consequences on the field of the fight against organised crimes that have a transnational dimension.<sup>79</sup>

## 7. The question of final competence and constitutional conflict

As we will see, the problem of final competence remains an important question, as the CJEU and the national constitutional courts often consider themselves to be the final judge.<sup>80</sup> In Luxemburg's view, EU law (including all acts of secondary law) enjoys unconditional supremacy over national law (including constitutions), whilst national constitutional courts view the national constitution to be supreme law of the Member State. In particular, they have underlined the need to uphold the protection of fundamental rights, as granted at national level, which should not be lowered, as well as preserving national constitutional identity.

According to Article 52 of the Charter, any limitation to fundamental rights must be provided for by law, respect the essence of those rights and freedoms, and respect the principle of proportionality, failing which EU legislation is also to be held void. The CJEU has touched upon these principles in judgments through the last decades, since the entry into force of the Lisbon Treaty. In the *Schecke* case<sup>81</sup>, whilst recognising that, in a democratic society, tax-payers have the right to be kept informed of the use made of public funds, the Court considered nonetheless that it was necessary to strike a proper balance between the right to transparency, on the one hand, and the right to protection of personal data of natural persons, on the other. However, due to the absence in EU law of criteria minimising interference with personal data (such as the definition of the periods during which those persons received such aid, the frequency of such aid or the nature and amount thereof), the Court considered that the Council and the Commission exceeded the limits of proportionality.

In the *Test-Achats* cases<sup>82</sup> the CJEU partially annulled an EU measure dealing with insurance services on account of discrimination between women and men, in violation of Articles 21 and 23 of the Charter. These provisions stipulate that any discrimination based on gender is prohibited and that equality between men and women must be ensured in all areas. The issue was that Directive 2004/113 in principle promoted equal treatment, but at the same time, recognised an unlimited transitional period for the Member States in its Article 5(2). Accordingly, the Court considered there was a risk that EU law may permit a derogation from the equal treatment of men and women to persist indefinitely. Such a provision, enabling the Member States to maintain, without temporal limitation, an exemption from the rule of unisex premiums and benefits, was considered contrary to the achievement of the objective of equal treatment between men and women, and incompatible with Articles 21 and 23 of the Charter.<sup>83</sup>

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Eurojust's casework in the area of cybercrime. Overview Report. [https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11\\_Cybercrime-Report.pdf](https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11_Cybercrime-Report.pdf) (1 December 2021).

<sup>79</sup> S. Cacciatore, *European Investigation Order as Instrument for the Fight Against Organised Crime*, Vilnius University Open Series, 2021, pp. 34-38.

<sup>80</sup> G. Beck, *The Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor*, *European Law Review*, Vol. 30, No. 1, 2005, p. 42.

<sup>81</sup> Joined Cases C-92/09 and C-93/09, *Schecke* [EU:C:2010:662]: The CJEU annulled certain EU rules providing for the annual *ex-post* publication of the names of beneficiaries of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), and of the amounts received by each beneficiary under each of those Funds.

<sup>82</sup> Case C-236/09 *Test-Achat* [EU:C:2011:100]

<sup>83</sup> Ferraro & Carmona 2015, pp. 19-21.

In the *Digital Rights Ireland case*<sup>84</sup>, the CJEU annulled the Data Retention Directive on account of a violation of the principle of proportionality when limiting fundamental rights to privacy and data protection (Articles 7 and 8 of the Charter).<sup>85</sup> The Court was of the opinion that, by adopting the Data Retention Directive, the EU legislature exceeded the limits imposed by compliance with the principle of proportionality. In that context, the Court observed that, in view of the important role of protection of personal data in the light of the fundamental right to respect for private life, and the extent and seriousness of the interference with that right caused by the Directive, the discretion afforded the EU legislature is reduced, with the result that, discretion should be reviewed strictly. Although the retention of data required by the Directive may be considered appropriate to attain the objective it pursues, the wide-ranging and particularly serious interference of the Directive with the fundamental rights at issue was not sufficiently circumscribed to ensure that that interference was limited to strict necessity.<sup>86</sup>

In *Kadi I*<sup>87</sup>, and *Kadi II*<sup>88</sup> the CJEU and the General Court have struck down a range of EU laws imposing sanctions, including both 'autonomous' EU measures as well as UN-mandated measures, for violating a range of rights, most notably due process (rights of defence) and the right to property.<sup>89</sup> Cases have been brought to challenge a wide range of EU legislative measures, including the Biotechnology Directive<sup>90</sup>, the Family Reunification Directive<sup>91</sup>, the Framework Decision on an Arrest Warrant<sup>92</sup>, the Money-Laundering Directive<sup>93</sup>, the Audio-visual Media Services Directive<sup>94</sup>, and the Biometric Passport Regulation<sup>95</sup>. In each of these cases, however, the Court, having considered whether the alleged restriction was disproportionate, upheld the EU legislation.<sup>96</sup>

It is also important to add that the Treaty of Lisbon has preserved the use of general principles of

<sup>84</sup> Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* [EU:C:2014:238]

<sup>85</sup> The main objective of the Data Retention Directive was to harmonise Member States' provisions concerning the retention of certain data, generated or processed by providers of publicly available electronic communications services or of public communications networks. Its aim was to ensure that data were available where required for the prevention, investigation, detection and prosecution of serious crime, such as, in particular, organised crime and terrorism. Thus, the Directive provided that the above-mentioned providers must retain traffic and location data, as well as related data necessary to identify the subscriber or user. In contrast, it did not permit retention of the content of the communication or of information consulted. The Court took the view that, by requiring the retention of this data, and by allowing the competent national authorities to access the data, the Directive was interfering in a particularly serious manner with the fundamental rights to respect for private life and protection of personal data. Furthermore, the fact that data were retained and subsequently used without informing the subscriber or registered user, is likely to generate a feeling in the persons concerned that their private lives are the subject of constant surveillance.

<sup>86</sup> Ferraro & Carmona 2015, p. 21.

<sup>87</sup> Joined Cases C-402 and 415/05 *Kadi I* [EU:C:2008:461]

<sup>88</sup> Joined Cases C-584/10, C-593/10 and C-595/10 *Kadi II* [EU:C:2013:518]

<sup>89</sup> Craig & de Búrca 2015, p. 402.

<sup>90</sup> Case C-377/98 *Netherlands v Council and Parliament* [EU:C:2001:523] (challenging the Biotechnology Directive for violation of human dignity).

<sup>91</sup> Case C-540/03 *European Parliament v Council of the European Union* [EU:C:2006:429] (challenging the directive for violation of the right to respect for family life).

<sup>92</sup> Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [EU:C:2013:10] (violation of the right to an effective judicial remedy and a fair trial).

<sup>93</sup> Case C-305/05 *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres* [EU:C:2006:788] (violation of the right to a fair trial and the professional secrecy of lawyers).

<sup>94</sup> Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [EU:C:2013:28] (violation of the right to intellectual property and freedom to conduct a business).

<sup>95</sup> Case C-291/12 *Michael Schwarz v Stadt Bochum* [EU:C:2013:670] (violation of the right to private life).

<sup>96</sup> Craig & de Búrca 2015, p. 401.

EU law for the protection of fundamental rights, which would eventually allow the CJEU, if need be, to integrate new rights which are not written in the Charter but which would correspond to changes in society and would be established in the Member States. In other words, the Court has still the possibility to intervene in the development of fundamental rights even though these rights are set out in a legally binding document.

Another issue at hand is that the national courts can invoke their constitutional interpretations of fundamental rights and apply their higher national standards of protection, only in areas of law where the actions of the Member States are not fully dictated by EU law. This leaves them with a secondary role in the discussion for fundamental rights in the European legal order, especially if we consider that as the scope of EU law is expanding, the legal field where national courts can apply their national standards becomes narrower. This is not in line with the ideas of pluralism and judicial dialogue, and clearly shows that the main priority of the CJEU is to safeguard the primacy of EU law.<sup>97</sup>

On the same date of the *Melloni* decision, the CJEU issued the judgment in the previously mentioned *Åkerberg Fransson* case as well, containing the same doctrine: where an EU legal act harmonises the law between the Member States, national constitutions cannot provide higher levels of protection. According to disputes that followed the judgements, these decisions had the effect of shifting the power away of national constitutional courts to determine the meaning of their state constitutions in cases where the law has been fully harmonised by EU law.<sup>98</sup>

A few months after the *Melloni* decision, the French Constitutional Council ('FCC') also had to face similar issues, when looking for a balance between the efficiency of mutual recognition and the protection of human rights in the *Jeremy F* case. The FCC had to clear whether the French law of criminal procedure was, or was not, infringing the right to an effective judicial remedy and the principle of equality before the courts. It also had to take into consideration if the Framework Decision were to be followed, it would lead to give precedence to EU law (and the decision would be in accordance with the case-law of the CJEU set out in the *Melloni* judgement) and not to recognise a possible right of action resulting from the principles of constitutional rank in France.

Therefore, for the first time in its existence—just like the Spanish Constitutional Court—the FCC decided to refer a question to the Court of Justice for a preliminary ruling. The CJEU came to the conclusion that EU law does not prevent Member States from providing for an appeal suspending execution of a decision extending the effects of a European Arrest Warrant. EU law does, however, require that, in the case where the Member States choose to provide for such an appeal, the decision to extend should be taken within the time-limits provided for by EU law in cases concerning the European Arrest Warrant.<sup>99</sup>

In the joined cases of *Aranyosi/Căldăraru* the CJEU answered the question whether Article 1(3) of the Framework Decision on the European Arrest Warrant must be interpreted as meaning that when there are strong indications that detention conditions in the issuing Member State infringe Article 4 of the Charter, the executing judicial authority must refuse surrender of the person against whom the EAW is issued. The CJEU ruled that if, after a two-stage assessment, the executing judicial authority finds that there is a real risk of an Article 4 violation for the requested person once

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<sup>97</sup> C. Zachariadis, *The role of Article 53 of the Charter in the EU legal order*, Thesis paper, 2016, <https://lup.lub.lu.se/student-papers/search/publication/8879784> (1 December 2021), pp. 13-14.

<sup>98</sup> M. García, *Cautious Openness: the Spanish Constitutional Court's approach to EU law in recent national case law*, European Law Blog, June 2017, <http://europeanlawblog.eu/2017/06/07/cautious-openness-the-spanish-constitutional-courts-approach-to-eu-law-in-recent-national-case-law/> (1 December 2021).

<sup>99</sup> Court of Justice of the European Union PRESS RELEASE No.69/13 Luxembourg, 30 May 2013.

surrendered, the execution of the arrest warrant must initially be deferred and, where such a risk cannot be discounted, the executing judicial authority must decide whether or not to terminate the surrender procedure.<sup>100</sup> This conclusion shakes the system of mutual trust upon which the principle of mutual recognition is built and also questions the previous case-law the CJEU has been building up in this matters.

## **8. The Relationship between the CJEU and the ECtHR-and the EU's accession to the ECHR**

The relationship between the CJEU and the ECtHR is another important issue in EU law and human rights law which needs to be put under scope. While the CJEU rules on European Union law, the ECtHR rules on the European Convention on Human Rights, which covers the 47 Member States of the Council of Europe. The common features between the two jurisdictions can be determined as well; both courts are supranational or international and compulsory jurisdictions. Moreover, both courts have been set up to ensure respect for the law of the treaties establishing them.

Cases cannot be brought at the ECtHR against the European Union, but the Court has ruled that states cannot escape their human rights obligations by saying that they were implementing EU law. The Strasbourg Court, in accordance with Article 53 of the Convention, aims at establishing a minimum level of human rights protection throughout all 47 Member States, the Convention does not aspire to harmonise the various systems of fundamental rights developed at national level, but at securing a common basis.<sup>101</sup> Meanwhile, the EU judiciary's aim is not to ensure a minimum protection of fundamental rights in Europe but the uniformity of EU law, based on the principle of equality of Member States.

After the Charter became legally binding on the European Union with the entry into force of the Treaty of Lisbon in December 2009, another milestone that has to be mentioned is the delivery of Opinion 2/13 in December 2014 by the CJEU<sup>102</sup> which held that the accession of the EU to the ECHR on the basis of the draft agreement negotiated by the Council of Europe and the EU would be incompatible with Article 6(2) and Protocol No. 8 of the TEU.<sup>103</sup> As the Union endowed itself with its own catalogue of fundamental rights and since most of them correspond to rights also guaranteed by the ECHR, it was necessary to formally clarify the terms of interaction between the Strasbourg and the Luxembourg regime.<sup>104</sup> Serving as an interpretative bridge of the two regimes, Article 52(3) of the Charter has to be mentioned, which states that, without prejudice to a more extensive protection, the meaning and scope of those rights shall be the same as those laid down by the ECHR.

On the other hand, in the wake of the Treaty of Lisbon, a tendency of the CJEU to use the Charter as its principal point of reference can be identified in its case law. This trend was clearly made explicit

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<sup>100</sup> K. Bovens'eerdt, *The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?*, Utrecht Journal of International and European Law, Vol. 32, No. 83, 2016, <https://utrechtjournal.org/articles/10.5334/ujiel.337/> (1 December 2021).

<sup>101</sup> D. Spielmann, *The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights or how to remain good neighbours after the Opinion 2/13*, Conference Paper, Brussels, 27 March 2017, pp. 3-5.

<sup>102</sup> Opinion 2/13 of the Court of Justice of the EU [EU:C:2014:2454] (hereinafter: Opinion 2/13)

<sup>103</sup> Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, OJ C 326, 26.10.2012.

<sup>104</sup> Spielmann 2017, p. 10.

in 2010<sup>105</sup> in a case on access to legal aid referred by a German court with reference to the general principle of effective judicial protection but resolved by the Court with reference to Article 47 of the Charter. In a similar matter, in a case which concerned the right of effective judicial protection in asylum procedures, the Court did not make any reference to the ECHR or the case law of the ECtHR.<sup>106</sup> On its part, the ECtHR started to refer to the CJEU's case law more frequently when the Charter became binding. For the CJEU, it is a matter of legitimation of its status and of the autonomy of EU law towards national jurisdictions while for the ECtHR, referring to EU law offered a basis to show contemporary consensus and modernise the interpretation of the Convention. In conclusion, with the entry into force of the Charter, EU law became more relevant to the ECtHR.<sup>107</sup>

The Lisbon Treaty increased the likely extent of the CJEU's case law on fundamental rights issues in three ways: by repealing the constraints under the former Article 68 of the EC Treaty as regards the making of preliminary references by national courts in the area of freedom, security and justice, by including the acts of EU agencies such as FRONTEX and the Asylum Support Office within the scrutiny powers of the Court, and by strengthening the application of the accelerated procedure and the urgent preliminary ruling procedure for cases where a person is in custody.<sup>108</sup> The growth of the CJEU's role as a human rights adjudicator<sup>109</sup> is not just a function of the coming into force of the Charter with a binding set of EU human rights commitments for the Court to enforce, but also a consequence of the continued expansion of the scope of EU law and policy.<sup>110</sup> A significant part of the EU's legislative corpus now covers areas such as immigration and asylum, security and privacy, alongside many of the more traditional fields of EU policy including competition and market regulation.<sup>111</sup>

According to de Búrca, the combination of these various features—the binding force of the Charter, the ever-expanding scope of EU powers and competences, and the extension of the Court's jurisdiction by the Lisbon Treaty—heralds a growing role for the Court as a human rights tribunal.<sup>112</sup> By comparison with the ECtHR, which is the regional European court charged with interpreting and enforcing a European Bill of Rights, the Court of Justice has little experience of adjudicating human rights issues in any depth, despite now being tasked with applying the EU Charter of Rights across the whole range of EU powers.<sup>113</sup>

The planned accession of the European Union to the European Convention on Human Rights has gone from a theoretical opportunity to a formally drafted accession agreement, which was demolished by Opinion 2/13 of the CJEU in December 2014. As the opinion was binding on the EU, the solution which seemed to be manageable for the EU was to draw up a new accession agreement.<sup>114</sup>

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<sup>105</sup> Case C-279/09 DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, [EU:C:2010:489]

<sup>106</sup> Case C-69/10 Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration. [EU:C:2011:524]

<sup>107</sup> Spielmann 2017, pp. 11-12.

<sup>108</sup> S. Carrera & M. De Somer & B. Petkova, *The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice*, in CEPS, Justice and Home Affairs, Liberty and Security in Europe Papers, No. 49, 2012.

<sup>109</sup> G. de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a human rights adjudicator?*, Maastricht Journal of European and Comparative Law, Vol. 20, No. 2, 2013, pp. 168-184.

<sup>110</sup> Ibid. 169-170.

<sup>111</sup> P. Ferk, *Public services as fundamental rights of European citizens in the time of crises*, Acta Universitatis Wratislaviensis, No. 3744, 2016, p. 106.

<sup>112</sup> de Búrca 2013, p. 170.

<sup>113</sup> de Búrca 2013, pp. 170-171.

<sup>114</sup> See Á. Mohay, *Once more unto the breach? The resumption of negotiations on the EU's accession to the ECHR*, Pécs Journal of International and European Law, Vol. 13, No. 1, 2021, pp. 6-8.

The Commission and the Council of Europe have both restated that the intention to make the EU's accession to the ECHR possible was unchanged. Following an informal meeting in June 2020<sup>115</sup> - where the European Commission clarified that it intends to realize the accession by 'modulations' to the Accession Agreement - accession negotiations were formally resumed in September 2020. It was agreed that these modulations should preserve the EU's special characteristics while meeting the requirements set out in Opinion 2/13. This means that the Draft Accession Agreement lays the foundation for the upcoming meetings and provides the parties with a frame to work in.

The negotiation meetings kept going through November 2020, where discussions were held on the EU specific mechanisms of the procedure before the ECtHR, inter-party applications under Article 33 ECHR and references for an advisory opinion under Protocol No.16. The next meeting was scheduled for February 2021, where the issues of mutual trust and Common Foreign and Security Policy (CFSP) was examined. One of the most lamented elements of Opinion 2/13 is the issue of jurisdiction over the CFSP. As is known, the CJEU has very limited competence in CFSP matter, as it may only monitor compliance with Article 40 TEU and review the legality of certain decisions as provided for by Article 275(2) TFEU. This means that most acts adopted in the context of the CFSP fall outside the scope of judicial review by the CJEU.<sup>116</sup>

At its 92<sup>nd</sup> meeting (November 2019), the Steering Committee for Human Rights (CDDH) proposed a series of arrangements for continuation of the negotiations within an ad hoc group composed of representatives of the 47 Member States of the Council of Europe and a representative of the European Union ("47+1"). The latest (11<sup>th</sup> negotiation) meeting took place on October 2021, where the Group discussed proposals related to the EU's specific mechanism of the procedure before the ECtHR, the operation of inter-party applications (Article 33 of the Convention), the principle of mutual trust between EU member states and other provisions of the draft Accession Agreements (notably Articles 6-8).<sup>117</sup>

Ultimately it can be seen, that while the negotiations are in progress, it is already apparent that they will take time. Several of the CJEU's objections in Opinion 2/13 concern issues that are extremely delicate. From the perspective of the non-EU Member States of the Council of Europe, the negotiations are now essentially being reopened to deal with mostly internal affairs between the EU and its Member States. This is a recurrent theme in EU external relations: the externalization of issues that should be dealt with internally. Against this background, the future negotiations will likely be quite difficult. Hopefully, however, the obstacles can nevertheless be overcome without undermining the ECHR system. If not, there is only one way forward: amending EU primary law to neutralize the effects of Opinion 2/13.

## 9. The future of fundamental rights protection in the EU

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<sup>115</sup> Virtual Informal Meeting of the CDDH ad hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights – Meeting Report, 22 June 2020 [47+1(2020)rinf]

<sup>116</sup> Mohay 2021, p. 6. See also T. Verellen, *In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (Bank Refah Kargaran)*, European Papers, Vol. 6, No. 1, 2021, pp. 17-24.

<sup>117</sup> See the report of the meeting: <https://rm.coe.int/cddh-47-1-2021-r11-en/1680a42134> (1 December 2021). The Group is scheduled to hold its next meeting in December 2021.

To provide assistance and expertise relating to fundamental rights to EU institutions, bodies, offices, agencies, and also to EU countries when they implement EU law, the EU Agency for Fundamental Rights (FRA) was established in 2007. Its main task is to collect and publish relevant, objective and comparable information and data on the situation of fundamental rights throughout the Member States, within the scope of EU law. The agency covers all EU countries, potential EU countries, and it plans its research on the bases of multiannual programming documents and within the thematic areas listed in its multiannual frameworks. FRA identifies and analyses major trends in the fields of fundamental rights protection, in 2012 the EU also appointed its first ever EU Special Representative for Human Rights<sup>118</sup>, whose role is to make EU policy on human rights in non-EU countries more effective and to bring it to public attention.

Moreover, in October 2010, the Commission adopted a strategy to ensure that the Charter is effectively implemented. It developed a ‘Fundamental Rights Check List’ to reinforce the evaluation of impacts on fundamental rights of its legislative proposals. The Commission is also working with the relevant authorities at national, regional and local, as well as at EU level to better inform people about their fundamental rights and where to go for help if they feel their rights have been infringed. The Commission now provides practical information on enforcing one’s rights via the European e-Justice portal<sup>119</sup> and has set up a dialogue on handling fundamental rights complaints with ombudsmen, equality bodies and human rights institutions.

The profound human rights and democracy dimensions to the ongoing global health crisis have become increasingly evident. The COVID-19 pandemic has perpetuated and aggravated existing inequalities and vulnerabilities worldwide. In 2020, in line with its commitment to contribute to the global response to the pandemic, the EU has promoted a human rights-based approach, stressing that human rights are universal, interdependent and indivisible and must be fully respected in the response to the pandemic. All the EU’s work and achievements in the advancement of human rights through its external action are detailed in the report on human rights and democracy, which is adopted by the Council once a year.<sup>120</sup> Furthermore, in November 2020, the Foreign Affairs Council adopted the EU Action Plan on Human Rights and Democracy (2020-2024), which sets out the EU’s ambitions and priorities for action in external relations for the next five years. The EU annual report on human rights and democracy monitors the implementation of the new EU Action Plan by presenting the progress achieved to date.

In December 2020, the Council also adopted a landmark decision and a regulation<sup>121</sup> establishing the first-ever EU global human rights sanctions regime, which is a milestone achievement. For the first time, the EU is equipping itself with a framework that will allow it to target individuals, entities and bodies—including state and non-state actors—responsible for, involved in or associated with serious human rights violations and abuses worldwide, no matter where they occurred.

## 10. Summary and concluding remarks

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<sup>118</sup> Following Mr. Stavos Lambrinidis (first EUSR for Human Rights), since 1 March 2019, Mr. Eamon Gilmore holds this position. In February 2021 his mandate was extended for two years, until 28 February 2023.

<sup>119</sup> <https://e-justice.europa.eu/home.do?action=home&plang=en> (1 December 2021).

<sup>120</sup> See the annual report on human rights and democracy in the world for 2020 [https://reliefweb.int/sites/reliefweb.int/files/resources/eeas\\_annual\\_report\\_humanity\\_2021\\_web.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/eeas_annual_report_humanity_2021_web.pdf) (1 December 2021).

<sup>121</sup> Council Regulation (EU) 2020/1998 of 7 December 2020, concerning restrictive measures against serious human rights violations and abuses, OJ L 410I 7.12.2020.

The European Union, like its Member States, must comply with the principle of rule of law and respect fundamental rights when fulfilling its tasks foreseen by the Treaties. These legal obligations were framed by the case law of the CJEU. The Court filled gaps in the original Treaties, ensuring the autonomy and consistency of the EU legal order and its relationship with national constitutional orders. Since the entry into force of the Lisbon Treaty, these principles are also clearly laid down by the Treaties and by the Charter of Fundamental Rights (with the same legal value).

The Charter, as mentioned before, draws on the European Convention on Human Rights, the European Social Charter and other human rights conventions, and the constitutional traditions common to the EU Member States, and the Court's case law. Even if some of its provisions refine, or even develop, existing human-rights instruments, the Charter does not extend EU competence.<sup>122</sup> However, as part of the body of EU constitutional rules and principles, the Charter is binding upon the EU institutions when adopting new measures as well as on the Member States when implementing them.

It is also important to underline the role of the Court of Justice of the EU as the only institution which in an authoritative way can interpret the EU law and impose its respect and implementation and that it was through the jurisprudence of the Court that the supranational legal order of the Union has been consolidated. The protection of fundamental rights developed exponentially in the case-law of the Court of Justice, as it is the Court itself which introduced this notion in the EU legal order, which finally led to the adoption of the Charter. In Europe today, the question is perhaps less about whether certain fundamental rights are enforceable before a supranational court (provided of course that relevant requirements are met), and more about before which judicial the enforcement can take place. Recent cases continue to highlight the relevance of the interplay between European human rights systems and the need for a consistent interpretation and a well-defined relationship between the European standards of human rights protection.<sup>123</sup>

The Treaty of Lisbon brought two novelties in the field of fundamental rights: the incorporation of the Charter in EU primary law and a provision allowing the accession of the EU to the European Convention. The Charter became the reference text and the starting point when the CJEU deals with a matter relating to fundamental rights. The CJEU is very concerned with the consistency of its judgements with the case-law of the Strasbourg Court. The text of the Charter itself ensures the coherence between the rights it guarantees and those contained in the European Convention. This could suggest that the accession of the EU to the Convention can be seen as a 'translation' of the existing dialogue between the two Courts before and after the entry into force of the Treaty of Lisbon. As research has shown, the CJEU tends to cite the ECHR and the case law of the ECtHR less frequently since the entry into force of the Lisbon Treaty.<sup>124</sup> However it is also interesting to note that in *Opinion 2/13* the CJEU found it problematic that the EU Member States could take each other to court in Strasbourg for the infringement of the ECHR, because EU law on the other hand required them to rely amongst themselves on the principle of mutual trust.<sup>125</sup> And yet in the *Dorobantu* judgement it has relied on the ECtHR jurisprudence to underline the existence of exceptional circumstances under which Member States are required to derogate from the principle of mutual trust.<sup>126</sup> Although a great deal of discussion surrounds the relationship of the two courts, the accession of the EU to the ECHR should not be seen or realized as a form of subordination of one

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<sup>122</sup> Ferraro & Carmona 2015, p. 3.

<sup>123</sup> Mohay 2021, p. 8.

<sup>124</sup> J. Krommendijk, *The Use of ECtHR Case Law by the Court of Justice after Lisbon: The View of Luxembourg Insiders*, Maastricht Journal of European and Comparative Law, Vol. 22, No. 6, 2015, pp 812-835.

<sup>125</sup> *Opinion 2/13*, paras. 191-195.

<sup>126</sup> Mohay 2021, p. 90.

court to another: the CJEU and the ECtHR as judicial forums are crucial pillars of the European legal space which always have had - and in all probability will continue to have - regard to each other's case law following the eventual accession.<sup>127</sup>

We can agree that twelve years after it became legally binding, the EU Charter of Fundamental Rights is not used to its full potential. Research shows that people do not know enough about their Charter rights but would like more information.<sup>128</sup> In the future the Commission intends to present a strategy to improve use and awareness of the Charter in the EU so that it becomes a reality for all. All in all, the judicial activism of the CJEU, by increasing the number of cases referring to fundamental rights protection, and maintaining the final say in competence matters, while also placing the EU's primacy in the frontline, has served as a basis for establishment of EU system for human rights protection. There are certain visible benefits of the adoption of the EU Charter, but the analysis of its practical application also shows that reaching more efficient implementation of the EU Charter is one of the challenges that still remain for the European Union.

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<sup>127</sup> T. Lock, *The European Court of Justice and International Courts*, Oxford University Press, Oxford 2015. pp. 167-218. and p. 244.

<sup>128</sup> See for example: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Strategy to strengthen the application of the Charter of Fundamental Rights in the EU [2020.12.2. COM (2020) 711].