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FIDE 2012 – Session on "Protection of Fundamental Rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions"

- Institutional Report -

Introduction

This report is written from the double perspective of an EU official who was involved in the long genesis of the Charter of Fundamental Rights ("Charter")[1] and of Article 6 TEU, during two Conventions[2] and the 2007 Intergovernmental Conference ("IGC"), and who participates in the Commission's practical application of these norms. It attempts to provide replies to the 14 questions in the Questionnaire prepared by the General Rapporteur, to the extent this double perspective may offer pertinent contributions. One focus is on the Commission's practice, in particular in the area of EU legislation and of dealing with fundamental rights situations in Member States brought to its attention. But we also address those general or "horizontal" issues of interpreting the Charter, which are prominently raised in the Questionnaire and which are gradually being clarified in the case law of the Court of Justice ("the Court", in this report), a process to which the Commission contributes as *amicus curiae*. The report largely follows the order of questions in the Questionnaire, with one exception: Its section 3 assembles an analysis of key aspects of the relationship between EU fundamental rights and the Member States legal systems. It may be useful to offer this analysis first, before turning, in section 4, to the questions of direct effect, horizontal effect and colliding rights, which can arise, *in casu*, only to the extent EU fundamental rights bind Member States in the first place. Section 5, on the EU's accession to the European Convention of Human Rights ("ECHR"), makes for a relatively short part of this report. This must not be understood as minimising the importance of this historic step for the EU's overall system of fundamental rights protection. It is rather due to the circumstance that the negotiations on accession are not yet completed; it therefore appears appropriate to concentrate on the mechanisms, specifically addressed in Question 9, that are key to the challenge of smoothly inserting the EU with its specificities into the ECHR's judicial control system.

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[1] Articles without reference to a legal text refer to the Charter.

[2] The Convention of the year 2000 (referred to as "the first Convention" in this report) which drafted the original version of the Charter solemnly proclaimed on 7 December 2000 by the European Parliament, the Council and the Commission; and the European Convention of 2002-03 (referred to as "the second Convention") which, in its draft Treaty establishing a Constitution for Europe, secured consensus on the elements subsequently included in Article 6 TEU of the Lisbon Treaty, in particular on an amended Charter becoming part of EU primary law and on the EU's accession to the ECHR.

1. The new corpus of EU fundamental rights under the Treaty of Lisbon: structure and level of protection

This section provides replies to questions 1, 2 and 7 of the Questionnaire.

Under the Lisbon Treaty, the corpus of fundamental rights of the Union's legal order contains three layers, set out in the three paragraphs of Article 6 TEU: the Charter, the ECHR as such once the Union will have acceded to it, and fundamental rights as general principles of law. These will be briefly addressed hereafter.

1.1. The Charter (Article 6 (1) TEU)

The 50 substantive articles of the Charter now form the centrepiece of the new corpus. Rapidly after the Lisbon Treaty has come into force, the Court has started applying the Charter directly rather than as a mere source of inspiration. In the years following the first proclamation of the Charter in 2000, there had been a debate on whether these 50 articles were a mere restatement of the fundamental rights that already existed before in the Union legal order or whether they contained true innovations[3]. In our view, there were good reasons to argue for the latter:

1.1.1. The Charter's innovative character comes out clearest from some "third generation rights" for which one finds scarce equivalence in national constitutions and in those international conventions widely subscribed to by the Member States. To name but the two most topical examples: The bioethical provisions in Article 3 (2) encapsulate essential elements of the Council of Europe's Oviedo Convention, which has to date still not been ratified by many Member States; the lack of full consensus on those elements became visible during the negotiations on the directive on human tissues and cells.[4] And the fundamental right to good administration, as laid down in Article 41, can be found expressly only in a few more recent constitutions and in no international convention.

1.1.2. In the field of the so-called economic and social rights, the Charter also marks a considerable achievement, secured after tough negotiations: the first Convention managed to find consensus on an elaborate set of provisions, despite enormous initial divergencies of political views of its members and, more importantly, of the constitutional traditions in which they were rooted. The second Convention reached consensus on making the package binding. As a result, the Charter is the first binding legal instrument at international level which combines these rights with the classic civil and political rights in a single catalogue and submits them to the same system of judicial enforcement.[5] Its structure of seven Titles and its

[3] See, e.g., the Commission's communication assessing the Charter, COM (2000) 644, point 2; Lord Goldsmith, 38 CMLR (2001), p. 1204; and the various contributions in: J.Y. Carlier / O. De Schutter (eds.), La Charte des droits fondamentaux de l'Union européenne, 2002.

[4] See Article 12 (1) of Directive 2004/23, which provides that Member States shall (only) "*endeavour* to ensure voluntary and unpaid donations of tissues and cells". Compare with Article 13 (1) of Directive 2010/45 on standards of quality and safety of human organs intended for transplantation (adopted after the Charter has become binding): "Member States *shall* ensure that donations of organs from deceased and living donors are voluntary and unpaid." (emphasis added).

[5] G. Braibant, La Charte des droits fondamentaux, Témoignage et commentaires, 2001, p. 46.

general provisions defy any dichotomy between "economic and social rights" and its other provisions. Two of the key elements that made this consensus possible will be discussed further in this report[6]: the distinction between rights and principles (Article 52 (5) – see section 4.1. below) and the references to national laws and practices as made in ten Charter provisions and symbolically underlined in Article 52 (6) see section 3.4.2. below).

1.1.3. As regards civil and political rights, where the Charter often reproduces the guarantees of the ECHR and in so far has the same meaning pursuant to Article 52 (3)[7], here and there it has also brought about at least significant clarifications if not innovations.[8] The prime example is Article 47, guaranteeing effective *judicial* protection for all subjective rights derived from Union law, thus leaving behind the distinction in the ECHR between "civil rights" (Article 6) and other rights for which administrative remedies may suffice under Article 13. Although this step of the Charter may appear self-evident today, in 2000 it took some initial discussion on a rather thin case law basis[9] to agree that this was a correct reflection of the state of Community law. More boldly still, Article 50 creates a *ne bis in idem* guarantee applying across borders within the Union, not only within the jurisdiction of one State as in Article 4 of Procol n° 7 ECHR. The main basis for this was Articles 54 to 58 of the Schengen Implementing Convention which do not bind all Member States.[10] Finally, there is Article 21 (1), a very broad clause prohibiting 17 grounds of discrimination. The list is based on a merger of the grounds already listed in Article 14 ECHR and 19 TFEU, to which only the ground of "genetic features" was added. The protests against the Court's finding of a general principle prohibiting non-discrimination on account of age in the *Mangold* judgment suggest that the article did go beyond merely codifying what had been universally recognised before.[11]

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[6] For more details on this consensus-building, including the third key element – a deliberate modesty in drafting –, see C. Ladenburger, in: G. Amato / H. Bribosia / B. De Witte (eds.), Genesis and Destiny of the European Constitution, 2006, p. 311, points 45 et seq.

[7] This report does not analyse in any detail Article 52 (3), and in particular not its difficult second sentence ("This provision shall not prevent Union law providing more extensive protection"). That sentence was deemed necessary by certain Convention members to preserve, even as regards rights literally corresponding in both instruments, the Court's freedom to provide higher protection than that offered by any future Strasbourg case law that might appear too weak. The practical likelihood of that scenario might be questioned. In contrast, the sentence is not needed to cater for those Charter rights which, already on the face of their wording, were meant to go beyond the ECHR guarantees such as Articles 47 and 50: Those provisions simply do not fully "correspond". Significantly, the sentence is not mentioned in the joint communication by the two Presidents of the European Courts of 17 January 2010 that recommends a "parallel" interpretation, http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf (last visited on 24 February 2012, as all websites referred to in this report).

[8] See also the list of 7 instances in the Praesidium's Explanations (OJ C 303 of 14 December 2007, hereinafter: "the Explanations") on Article 52, "where the meaning is the same as the corresponding articles of the ECHR, but where the scope is wider".

[9] Cases 222/84, Johnston, [1986] ECR 1651, point 18; 22/86, Heylens, [1987] ECR 4097, point 14; C-97/91, Borelli, [1992] ECR I-6313, point 14. Only once had an AG stated explicitly that this goes beyond the ECHR, see AG Colomer, in: C-65/95 and C-111/95, [1997] ECR I-3343, 3363. See also Ladenburger, in: J.Y. Carlier / O. De Schutter (eds.), La Charte des droits fondamentaux (footnote 3 above) p. 105, 107.

[10] See the Explanations, which also refer to two sectoral 3rd pillar conventions that were unratified at the time.

[11] For a summary of the controversies on *Mangold*, see only M. Dougan, in: A. Arnull and others (eds.), A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood, 2011, p. 219. On the modernity of Article 21 (1), see also AG Cruz Villalón, in: C-447/09, Prigge, [nyr], point 32. Nonetheless, there is an undeniable logic behind the "merger" operated in Article 21 (1): If the Treaty allows, in Article 19 TFEU,

1.1.4. Notwithstanding the above-mentioned examples, the debate on the innovative vs. purely reaffirmatory character of the Charter has arguably now been mooted by the Masters of the Treaties themselves. According to Recital 6 of Protocol n° 30, *"the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles."* The Masters of the Treaties thus seem to recognise that, whatever the Charter provides in its 50 articles, was at least dormantly already part of the Union's fundamental rights in force before 1 December 2009 as general principles of law. Taken seriously, this recital can be qualified as an authoritative postulation, ex post factum, of absolute legal continuity. If so, that could have consequences, to be discussed further below.[12]

1.2. Fundamental rights as general principles of Union law (Article 6 (3) TEU)

In the second Convention there had been a debate on whether it was appropriate still to keep, after full incorporation of the Charter into primary law, an express provision referring to fundamental rights as general principles of law. The view prevailed that such an article would indeed be useful to clarify that the Court remains free to identify further fundamental rights not enshrined in the Charter but that may emerge over time from the common constitutional traditions and from international conventions on which the Member States have collaborated or of which they are signatories. True, national constitutions usually do not need such an article to prevent a rigid, *e contrario* interpretation of their rights catalogues. And yet, in the special context of the Union the argument for Article 6 (3) TEU carries greater weight. Given the complex procedure that would have to be followed, we are not likely to see anytime soon an updating of the Charter text in the light of societal developments. Moreover, the co-existence of the Charter and a provision referring to additional rights inspired by the Member States' traditions and the main European instrument of human rights protection arguably matches well with the constitutional structure of the Union, which derives a double legitimacy from its citizens and its Member States and their constitutional traditions[13].

Article 6 (3) TEU should have the same legal meaning as ex-Article 6 (2) TEU. In particular, the article cannot be understood as an exhaustive definition of the sources of inspiration the Court may use in finding general principles of law in the field of fundamental rights; the case law referring to other international conventions on which the Member States have collaborated or of which they are signatories can be continued.[14] The rank of fundamental rights thus distilled by the Court should be the same as those of the Charter itself. The question arises whether fundamental rights derived from general principles under Article 6 (3) TEU should be governed by the same horizontal rules as those laid down in Articles 51 to

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the Union to legislate to combat certain forms of discrimination even though they are not explicitly mentioned in Article 14 ECHR, then surely the Union's institutions could not practise those very forms of discrimination in their own action.

[12] On possible consequences of this recital, see section 3.5. below. See also J.-P. Jacqué, L'Europe des libertés, Revue d'actualité juridique, n° 26, p. 2, 4 (http://leuropedeslibertes.u-strasbg.fr/IMG/EdL_26_doctrine.pdf).

[13] Weiss, 7 EuConst (2011), p. 64, 66, 68; see also Editorial by LB and JHR, 4 EuConst (2008), p. 199.

[14] On this case law, see A. Rosas, in: Law in the changing Europe, Liber Amicorum Pranas Kuris, 2008, p.363.

54.[15] Those who find Article 51 (1) too restrictive, as regards the application of the Charter to Member State action or the question of direct horizontal effect, might be tempted to invite the Court to develop different lines for fundamental rights as general principles pursuant to Article 6 (3) TEU. In our view, that would however be neither necessary nor appropriate. As will be argued in section 3.1. below, Article 51 (1) is not to be understood as a deliberate correction of a given case law, but rather as a codification, albeit with a certain emphasis placed by its authors. It would belittle that codificatory achievement and undermine the overall coherence of the Union's legal system if one attempted to develop, under the realm of Article 6 (3) TEU, a separate set of horizontal rules differing from those of the Charter.[16]

As to its function and practical importance, Article 6 (3) TEU is now the basis of a *residual* category of fundamental rights, to which the Court is likely to resort only in case of a gap in the 50 articles of the Charter that cannot be closed even by creative interpretation.[17] Two examples may serve to illustrate that this is not hypothetical: The first Convention was unable to achieve consensus on an article guaranteeing the rights of persons belonging to ethnic, religious or linguistic minorities, similar to Article 27 of the International Covenant on Civil and Political Rights. Only the laconic statement of principle in Article 22 was acceptable to all 15 Member States of the time. Already in the IGC of 2004 this was deemed unsatisfactory; the Charter itself having become untouchable, upon pressure of certain new Member States the rights of persons belonging to minorities as part of human rights were inserted in the provision on values that became Article 2 TEU of the Lisbon Treaty.[18] If respect of a fundamental right is explicitly deemed to be part of the Union's values, then *a fortiori* that right must be part of the Union's fundamental rights corpus. Article 6 (3) TEU needs to serve as *sedes materiae* for that right, since values as in Article 2 are not the same as fundamental rights[19]. The second example concerns good administration: Article 41 was deliberately drafted so as to mention the Union institutions, bodies, offices and agencies as its sole addressees, in derogation to Article 51 (1). This was due to reluctance of a Praesidium member to upset national administrative law. Nonetheless, several elements of good administration mentioned in Article 41 (2) have already been recognised by the Court as a general principle of law binding also Member States when implementing Union law.[20]

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[15] Cf. AG Trstenjak, in: C-282/10, Dominguez, [nyr], points 89-131; S. Prechal, 3 Review of European Administrative Law (2010), p. 5, 21.

[16] Likewise, AG Trstenjak, loc. cit.

[17] On this shift towards applying wherever possible the Charter instead of general principles, AG Cruz Villalón, in: C-447/09, Prigge, [nyr], point 26. A strong expression of this approach can now be found in the judgments of 8 December 2011 in the KME (C-272/09 P and C-389/10 P, [nyr]) and Chalkor (C-386/10 P, [nyr]) cases. See in particular point 51 of C-386/10 P.

[18] See also J.-Cl. Piris, The Lisbon Treaty, 2010, p. 149.

[19] The legal difference between human rights as values (Article 2) and fundamental rights (Article 6) is fundamental: The latter are fully-fledged norms of primary Union law, enforceable through the infringement procedure, but binding Member States only when they implement Union law. The former require some basic degree of respect by Member States across the board of their action, regardless whether Union law is implemented or not, but only a serious and persistent breach can be sanctioned by the political ultima ratio procedure of Article 7 TEU. A Discussion of Articles 2 and 7 TEU lies outside this report; see in that regard the Commission's communication on Article 7 (COM (2003) 606).

[20] See the case law cited in the Explanations on Article 41, and AG Kokott, in: C-392/08, Commission v. Spain, [2010] ECR I-2537, point 16. On the limited scope of Article 41, see C-482/10, Cicala [nyr], point 28.

Finally, depending on the interpretation of Protocol n° 30, Article 6 (3) TEU may acquire an even more important function: if Article 1 (2) and Article 2 of this Protocol are to be understood as constitutive limitations of the Charter, then the Court can rely on Article 6 (3) TEU to apply fundamental rights to Poland and the United Kingdom notwithstanding said limitations (see section 3.5. below).

1.3. The ECHR as such, after the Union's accession to it (Article 6 (2) TEU)

Once the Union will have acceded to the ECHR, that convention will as such be a directly binding part of Union law and form the third layer of the EU's fundamental rights corpus. In accordance with Article 216 (2) TFEU, the ECHR's rank will be superior to secondary but inferior to primary law.

The – enormous – legal significance of the Union's accession to the ECHR lies primarily if not exclusively in the submission of the Union's own acts to the external control mechanism set up under the Convention. That dimension will be examined in section 5 below. In contrast, when looking merely at the substantive content of the Union's fundamental rights corpus, it will not significantly change with accession. Already before 1 December 2009, the Court did integrally and faithfully apply the ECHR in its interpretation of the European Court of Human Rights (hereafter: "the Strasbourg Court"), as confirmed by eminent members.[21] This is now reinforced by the principle laid down in Article 52 (3) and the "parallel interpretation" envisaged by the Presidents of the two European Courts[22]. The material content of the ECHR has thus been incorporated into primary Union law with the Lisbon Treaty at the latest. What is more, the already achieved material incorporation of the ECHR reaches further, in two respects, than the formal incorporation to come: The Court already applies, as general principles, even provisions of additional protocols to the ECHR that have not been ratified by all Member States[23], whereas the draft accession agreement foresees the EU's accession only to the two Protocols that have been ratified by all 27 Member States[24]. Moreover, the accession agreement as such will make the ECHR guarantees only binding for the Union institutions, bodies, offices and agencies, not for the acts of Member States which remain governed by their own international law commitments under the ECHR.[25] In contrast, the same ECHR guarantees, materially incorporated into Union law through Article 6 (3) TEU and Article 52 (3), bind also Member States when implementing Union law.

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[21] J.-C. Puissochet, in: P. Mahoney and others (eds.), mélanges Ryssdal, 2000, p. 1139, 1140 ("tout se passe comme si la Cour appliquait purement et simplement la CEDH"); voir aussi A. Tizzano, RDUE 2006, p. 9, 11; F. Jacobs, The Sovereignty of the Law, 2007, p. 54; A. Rosas / L. Armati, EU Constitutional Law, 2010, p.153.

[22] See their joint communication cited in footnote 7 above. For practical examples, see J. Callewaert, [2009] EHRLR, p. 768.

[23] E.g., Ne bis in idem as in Article 4 of Protocol 7, cited in joined cases C-238/99 P, Limburgse Vinyl Maatschappij NV (LVM) and Others, [2002] ECR I-8375.

[24] See Article 1(1) of the latest draft accession agreement (Document CDDH (2011) 16 of 19 July 2011, http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_documents/CDDH-UE_2011_16_final_en.pdf). On this point, the Council did not follow the Commission's proposed negotiation directives.

[25] See Article 1 (2) of the latest draft accession agreement, reflecting an uncontroversial acquis of the negotiations.

2. Effects of the new corpus of EU fundamental rights on the EU institutions

This section provides further replies to question 7 of the Questionnaire[26].

The entry into force of this new corpus of fundamental rights and notably of a legally binding Charter has reinforced and accelerated a development which had been gradually building up ever since the first proclamation of the Charter in 2000. Its *Leitmotiv* is, put briefly, an ever stronger awareness within the EU institutions for fundamental rights aspects of EU law and policies, and for the need to take those rights seriously in one's own action. Three dimensions of this effect will be reported in the following sections.

2.1. The place of fundamental rights in the Court's case law

The case law of the Court is marked by a steep rise, over the last years and particularly since 1 December 2009, of preliminary references submitting questions of interpretation of the Charter. Since that date, the Court has delivered more than 60 decisions referring to the Charter.[27] In 2011 alone, 27 new preliminary references made by national courts referred to the Charter (whereas there were 18 in 2010). National courts, acting as judges of EU law, are thus rapidly taking ownership of the Charter and giving the Court manifold opportunities to explore fundamental rights aspects of EU law. This concerns both the substance of various individual rights[28] and horizontal questions, to name only legal persons as fundamental rights beneficiaries, the need for restrictions to be provided for "by law" or the correspondence in meaning and scope of Charter rights with ECHR rights[29]. If really the Charter has created no new rights, then at least the rapidly growing body of case law impressively illustrates the practical difference a written catalogue makes : it stimulates litigants, national judges and the Court to invoke fundamental rights and test arguments which in theory could have been raised already before, as part of general principles of law, but had simply come much less to mind. The two most frequent categories of preliminary questions are those concerning a fundamental rights-compatible interpretation of EU secondary law[30] and concerning the compatibility of national action with EU fundamental rights as such[31]; but there are also more and more references on the validity of EU acts in regard of the Charter – a trend bound to increase after the Union's accession to the ECHR.[32]

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[26] Particularly, since the Annotated Questionnaire states that "it would be interesting to know in which manner courts and legislatures (and other public entities) have used the Charter before and after it has acquired status as primary law".

[27] Cf. excellent overviews by A. Rosas / H. Kaila, Il Diritto dell'Unione Europea 2011, p. 1; and Th. v. Danwitz / K. Paraschas, A fresh start for the Charter, Fundamental questions on the application of the European Charter of Fundamental Rights (to be published in Fordham International Law Journal 2012 – here cited as manuscript), counting 53 decisions as of 1 November 2011.

[28] E.g., the overview in A. Rosas / H. Kaila, Il Diritto dell'Unione Europea 2011, footnotes 60-69.

[29] C-279/09, DEB, [nyr]; C-400/10 PPU, McB, [nyr]; C-407-08 P, Knauf, [nyr], point 91. We cite these three examples for general issues here, since these are areas which are not analysed further in the present report.

[30] See references in footnote 86 below, for the Court's focus on fundamental rights-compatible interpretation. See also AG Cruz Villalón, in: C-306/09, I.B., [nyr], point 44, who specifically underlines that the entry into force of the Charter has made it more imperative to interpret secondary law in the light of fundamental rights.

[31] See references given in section 3.1. below.

[32] See point 5.3.3. below *in fine*.

Significantly, it was also after 1 December 2009 and based on the Charter that the Court has, for the first time, struck down truly legislative acts of the EU as violating fundamental rights. The two judgments *Schecke*[33] and *Test Achats*[34] may be taken as evidence that the Court feels further encouraged, by a binding Charter and by the prospect of accession to the ECHR, to exercise stringently its function as the EU's own constitutional court. Both judgments have sent strong messages to the EU legislator. *Test Achats* incites the legislator to ensure higher standards of legislative drafting: at least where a fundamental right is implemented, the Court will show less tolerance towards clumsy political compromises expressed in self-contradictory legislative rules. And *Schecke* stands for the need to buttress effective respect of proportionality by an assessment of less intrusive policy alternatives and by internal processes guaranteeing that such an assessment is in fact carried out and documented. The *Schecke* judgment in particular has since played a major role in other legislative files, influencing discussions both within the Commission and during the legislative procedure in the Council and the Parliament. This leads us to the next aspect.

2.2. Ensuring effective respect of fundamental rights in the action of the political institutions, in particular in EU legislation

The Charter has incited the EU's political institutions to step up their efforts to ensure respect of fundamental rights in their own acts, in particular in EU legislation. As regards the Commission, this process began in 2001, when it started including "fundamental rights recitals" in its proposals. It then systematised its efforts and made them public in a first communication in 2005 setting out a "methodology of fundamental rights scrutiny"[35]. The culmination point has been the Commission's 2010 *"Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union"*[36], adopted on initiative of the first Commissioner specifically responsible for justice, fundamental rights and citizenship, Vice-President Viviane Reding. Its political *Leitmotiv* is that the Union should be exemplary in its own respect of fundamental rights; therefore the Commission pledges to strengthen a fundamental rights culture within the own institution, to be developed at all stages of the internal process. That end is being served, as a centrepiece of the 2010 communication[37], by a further reinforcement of the methodology of fundamental rights scrutiny of legislative proposals already devised in 2005. Briefly summarised[38], its components are:

[33] Joined cases C-92/09 and C-93/09, Volker und Markus Schecke and Eifert, [nyr].
[34] C-236/09, Association Belge des Consommateurs Test-Achats and Others, [nyr].
[35] Commission communication "Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring", COM (2005) 172; see also the report on the practical operation of the methodology, COM (2009) 205.
[36] COM (2010) 573.
[37] The communication of 2010 sets out several further initiatives that cannot be presented in more detail here, including an annual report on the application of the Charter (see COM (2011) 160 and SEC (2011) 396 for the report for 2010), the rewording of the Commissioners' solemn undertaking upon taking up office, and communication action by the Commission to inform citizens on rights, remedies and the (limited) EU competences.
[38] See in more detail communication COM (2005) 172, and section 1.1. of communication COM (2010) 573. Both communications stress that fundamental rights scrutiny is also performed for all non-legislative acts of the Commission, except that an impact assessment is not normally conducted on them. A good recent example are

- raising the "fundamental rights reflex" of all Commission departments drafting legislative initiatives,
- flagging fundamental rights aspects in preparatory public consultations and sollicitating comments thereon,
- a prominent role of fundamental rights in the Commission's elaborate system of impact assessment[39],
- then the final examination of fundamental rights compatibility by the Legal Service in the interservice consultation, to which DG Justice must also be associated,
- and finally an obligation to explain in a recital and the explanatory memorandum why, after scrutiny, the Commission's proposal respects those fundamental rights that may be affected by it.

On this last point, the two communications announce a change of practice responding to criticism *inter alia* from the UK House of Lords[40], which is more consistently implemented since 2010[41]: the "fundamental rights recital" should not be included on a standard basis, but only for those initiatives presenting a particular link with fundamental rights, i.e. which either provide for limitations of a right or serve to promote one. But where the recital is put, it should be more elaborate, i.e. identify the particular fundamental right(s) affected and, where appropriate, even the solutions found to respect it. Moreover, any proposal containing such a recital must be accompanied by a specific section in the Explanatory Memorandum explaining how fundamental rights obligations have been met; for the most rights-sensitive proposals this needs to include a summary of all the fundamental rights aspects contained in the impact assessment and the proposal.[42]

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the two Commission regulations on security scanners at airports, 1141/2011 and 1147/2011. - See also the European Parliament's reply to the Commission's communication of 2005, in its resolution of 15 March 2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals, and the report of the UK House of Lords Select Committee on "Human rights proofing EU legislation" of 2006 (http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/67/6702.htm).

[39] See the Commisison's impact assessment guidelines, revised to that effect in 2009, at http://ec.europa.eu/governance/impact/index_en.htm., and the Operational Guidance on taking account of fundamental rights in Commission Impact Assessments, SEC (2011) 567. The communications of 2005 and 2010 both point out that the impact assessment does not itself serve to perform the legal fundamental rights scrutiny of a draft act (this is done at the later stage of interservice consultation); instead, its role is to prepare the ground for a fully informed, solid scrutiny, by identifying fundamental rights liable to be affected, measuring degrees of interference with the right in question, and addressing the necessity and proportionality of the interference in terms of policy options and objectives.

[40] See footnote 38 above.

[41] For recent examples, see the recitals mentioning the Charter in the proposals for the new General Data Protection Regulation (COM (2012) 11); for a directive on consular protection (COM (2011) 881); and for a regulation and a directive on alternative dispute resolution (COM (2011) 793 and 794). See also the proposals for a Market Abuse Regulation and the EU-PNR directive cited in footnotes 49 and 51 below. For recently adopted texts, see, e.g., Regulation (EU) 1168/2011 amending the mandate of the FRONTEX Agency; Regulation (EU) 513/2011 on credit rating agencies; the two Commission Regulations 1141/2011 and 1147/2011 on security scanners; Directive 2011/92 on combating the sexual abuse and sexual exploitation of children and child pornography; Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

[42] These communications and the "methodology" have sometimes been criticized for focusing too much on "passive respect", i.e. on avoiding violations of fundamental rights, rather than on active EU policies to promote fundamental rights or to ensure "fundamental rights mainstreaming". Such criticism is based on unrealistic

The Commission's Strategy of 2010 and its first Annual Report have meanwhile been echoed by Council conclusions[43] and by guidelines on methodological steps for a fundamental rights scrutiny within the Council's preparatory bodies[44] which *inter alia* stress the role of the Council Legal Service and of the Council's new permanent working party on fundamental rights. The European Parliament, for its part, has included a specific rule in its rules of procedure [45] under which the Committee responsible for interpreting the Charter (currently the LIBE committee) can be seized to give an opinion on the compliance of a legislative proposal with the Charter, by the competent committee, a political group or at least 40 Members[46]. Furthermore, the Fundamental Rights Agency can produce an opinion on pending legislative files, but only upon request from the European Parliament, the Council or the Commission.[47]

To which extent has a binding Charter, have the above-mentioned methodological efforts of the institutions made a real difference, i.e. led to stronger protection of rights in concrete legislative files? Is there more than rhetoric and a diffuse perception that the fundamental rights awareness of political actors has been strengthened? It is by definition difficult to specify and document an impact of the Charter on EU lawmaking which members of the three legal services may experience as very real but which often occurs in non-public negotiations within the Commission and then in and between Council and Parliament. And yet, some recent files can indeed be cited as evidence for political processes where fundamental rights concerns played a major role and were more readily accepted by the political level, faced with the argument that one should not take undue risks of censure by the Court or, after accession to the ECHR, the Strasbourg Court. One well-documented example, prior to the Treaty of Lisbon, is the asylum package as proposed by the Commission in December 2008, explained in detail in the Commission's report of 2009 on the operation of the methodology[48]. Since the entry into force of the Charter, there have been files where fundamental rights concerns have prompted the institutions to revisit rules that had been enacted in previous years without much ado. Thus, much care has been exercised in the recent Commission proposal of a Market Abuse Regulation to circumscribe the powers of

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expectations of what a horizontal method of legal fundamental rights scrutiny within the Commission can achieve: It necessarily needs to focus on scrutinising the legislative acts that are prepared by the various Commissioners and departments. It cannot monitor whether these Commissioners and departments are sufficiently active in exercising their political judgment to propose new legislation promoting certain rights. This report cannot give an overview on stimuli flowing from the Charter regarding the active promotion of fundamental rights by various Commissioners and departments; the rapporteur's experience is on legal fundamental rights scrutiny of proposed EU legislation.

[43] Council conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union, 25 February 2011: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/119464.pdf; and
Conclusions on the Council's actions and initiatives for the implementation of the Charter, 23 May 2011, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/122181.pdf.

[44] Endorsed by Coreper on 18 May 2011, http://register.consilium.europa.eu/pdf/en/11/st10/st10140.en11.pdf.

[45] Rule 36 of the Parliament's Rules of Procedure.

[46] See point 25 of its resolution of 15 December 2010 on fundamental rights in the EU (2009), suggesting to enlarge the possibilities currently foreseen in Rule 25 and to ask opinions from the Parliament's Legal Service.

[47] Article 4 (2) of its founding Regulation 168/2007. See, e.g., its opinions of 2011 on the proposals for the PNR directive and for a directive regarding the European investigation order in criminal matters, both requested by the EP (available at: http://fra.europa.eu/fraWebsite/research/opinions/opinions_en.htm).

[48] COM (2009) 205, point 2.2.

national authorities to access private premises, seize documents and access telephone or data traffic records in order to investigate suspicions on insider dealing or market manipulation.[49] Another exemplary field that has caught much media attention concerns rules on access to flight Passenger Name Records ("PNR"). In this field, there have been, on the one hand, several international negotiations between the EU and third countries, most prominently the US which in light of its terrorist threats has, since 2001, requested far-reaching rights of access to such data from European air carriers. The Commission has recently presented a new PNR agreement with the US to replace the agreement signed in 2007. The Council has politically agreed to this new agreement, acknowledging that it ensures a far higher standard of protection, which the Commission obtained in prolonged negotiations after invoking the imperative of compliance with its new Charter and the toughened standard of scrutiny by the Court.[50] On the other hand, the ongoing legislative procedure on EU-internal PNR rules should be noted: Although the Commission's proposed directive already went far above the level of protection that characterised its earlier proposal on a third pillar framework decision[51], it is still giving rise to much more intense debate on fundamental rights in the legislative process[52] than when its previous framework decision had been discussed in the old times of the third pillar.

2.3. The attention given by the political institutions to fundamental rights problems arising in Member States

The Union's political institutions have been led to consider possible fundamental rights problems arising in Member States far more often since the Charter was first proclaimed and still increasingly so under the realm of the Lisbon Treaty.

Since the beginning of the last decade, the Commission has been receiving an ever increasing amount of citizens' complaints and petitions alleging violations of their fundamental rights. In 2010 alone, there were some 4000 such letters. The vast majority of them have concerned situations unrelated to Union law and therefore clearly outside Article 51 (1) and the Commission's competence.[53] This shows that the Charter has often been misunderstood as a

[49] See Article 17 (2) (e) and (f) and recitals 35 and 39 of the Commission's proposal in COM (2011) 651 final; and compare with Article 12 of Directive 2003/6, which could be read as allowing access to telephone and data traffic records independently of a concrete suspicion.

[50] See the agreement of 2007 in OJ L 204/18 of 4.8.2007, which replaced an earlier EC agreement and adequacy decision which the Court, on application by the EP, had struck down as erroneously based on first pillar legal bases (C-317/04, EP v. Council and 318/04, EP v. Commission, [2005] ECR I-2457). - As reported in the media in spring 2011 an interim result of negotiations informally discussed within the Commission as well as with the Parliament and the Council met with fundamental rights concerns, which led the Commission to request and obtain further important data protection improvements in the last negotiation stage. – At the time of writing, the European Parliament has not yet given its consent to the new agreement.

[51] COM (2011) 32; see page 8 of the explanatory memorandum and recitals 14 and 31. Cf. with the proposal of a framework decision: COM (2007) 654.

[52] See, e.g., the opinion of the European Data Protection Supervisor of 25 March 2011, http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-03-25_PNR_EN.pdf, and that of the Fundamental Rights Agency of 15 June 2011 (footnote 47 above).

[53] According to the Commission's annual report of 2010, this concerned ¾ of more than 4000 letters (see COM (2011) 160, p. 3. The percentage of those complaints levelled against Member States that lie outside Article 51 is presumably even higher, since the overall figure of letters received also include those raising general considerations or issues of EU policy but no specific fundamental rights violation by a Member State authority.

sort of second ECHR and that it is not easy to explain its limited scope of application to citizens. Consequently, an important part of the Commission's fundamental rights strategy lies in communication efforts dispelling such misunderstandings, explaining the rationale of the Charter and informing citizens to which autorities they can turn to seek protection of their rights.

The Commission has also been seized with high numbers of parliamentary questions and similar requests from members of the European Parliament. These are often targeted to draw the Commission into most sensitive political debates ongoing within a Member State. To present merely a short-list of significant examples, the Commission was interrogated on the prohibition of the Islamic headscarf in French public schools[54] or of the Burka in the public of several States[55], on compulsory HIV screening in Italy[56], on the regimes of some new Member States for restitution of property confiscated under communist regimes[57], on Spanish laws regulating construction in coastal areas[58], on the media landscape in Italy[59] and more recently the media law in Hungary, on a collective agreement in Italy limiting the right to strike[60] and even on a planned concordat of Slovakia with the Holy See on the freedom of conscience of doctors, a controversy that led to the downfall of a national government[61]. In most of these and other cases, the Commission, practising a prudent interpretation of Article 51 (1) (see section 3.1. below), declared its lack of competence to look into the substance. However, to the extent the matter clearly did concern implementation of Union law and serious substantive concerns existed, the Commission has pursued it with the Member State concerned. Recent examples for this were the measures of expulsion of EU citizens of Roma-origin from France[62], the Hungarian media law[63], the deficiencies in the Greek asylum system, and a Lithuanian law for the protection of minors, banning public circulation of information promoting homosexual relations[64]. At a closer look, the thrust of the Commission's legal challenges often related to more classic infringements of an EU Treaty or secondary law norm whereas the Charter issues were only additional or even secondary.

[54] Question E-301/05 (MEP Ribeiro e Castro).
[55] Questions E-587/07 (MEP Vanhecke), E-7918/2010 (MEP Patriciello), E-1688/2010 (MEP Belet).
[56] Question E-8061/2010 (MEP Vergiat).
[57] Document SEC (2011) 396 accompanying the Commission's 2010 annual report, p. 20.
[58] Document SEC (2011) 396, p. 20 and question E-6662/2010 (MEP Andreasen).
[59] Numerous questions over several years, e.g., from 2009: P-5086/09 (MEP Turnes), P-3258/09 (MEP Chiesa), E-3251/09 (5 MEPs), E-3222/09 (MEPs Frassoni, Mussaccio), E-4576/09 (MEP de Magistris).
[60] Document SEC (2011) 396, p. 36.
[61] See http://www.secularism.org.uk/vaticanconcordatrowcausesgovernm.html, http://www.iheu.org/node/2276. In that case, while the Commission itself never took a position, the political controversy was fuelled by a critical opinion of the former EU Network of Independent Experts, produced upon request of the EP's LIBE committee.
[62] See the Commission's 2010 report on the application of the Charter, COM (2011) 160, p. 8, and SEC (2011) 396, p. 28.
[63] In January 2011, Commissioner N. Kroes sent a letter to the Hungarian authorities requesting modifications to the new Hungarian Media law on four issues falling within the scope of EU law, amongst which the obligations of "balanced coverage" and of registration with the media authority, imposed on all media, which were challenged as infringing the Charter. On 7 March 2011, the law was amended in accordance with the Commission's requests. See also reply to question E-1014/2011 (MEP Badia i Cutchet), explaining the Commission's fact-finding enquiry with 16 other Member States following its intervention on the Hungarian media law.
[64] Question E-5090/09 (MEP Messerschmidt). The Commission replied that the law fell partially within the scope of Union law, and the law was amended in December 2009.

Indeed, to our knowledge the Commission has so far never opened a formal infringement procedure solely on the grounds of a fundamental rights violation; even those procedures where fundamental rights were invoked, as one head of infringement alongside other more classic ones, have so far been scarce.[65] One may however expect more fundamental rights infringement procedures to be launched in the future, given the Commission's stated determination to give highest priority to treating problems when they come under its competence.[66] The limits of the Commission's competence to review fundamental rights issues are not always well understood or accepted in political discourse.[67]

The European Parliament as such – i.e. beyond questions asked by its individual members – was also prompted by the first proclamation of the Charter to look at fundamental rights issues in Member States. However, a significant change to its approach occurred during the last decade. Up to 2003 the Parliament adopted annual resolutions on the situation of fundamental rights in the Union which, going through the Charter Title by Title, included quite outspoken criticism of fundamental rights problems in individual Member States.[68] This approach was always very controversial within the House; it was abandoned in 2004 after the draft resolution on the year 2003 failed to reach any majority in the plenary. That event having shown, according to an eminent commentator[69], the risk of politicization of such a country-specific approach, there were no more resolutions in five years. The Parliament resumed its practice in 2009, but the two resolutions adopted ever since are of a totally different character: they avoid taking up any specific situation in a Member State and instead focus on key messages for the EU's fundamental rights policy[70]. In contrast, the annual reports published by the Fundamental Rights Agency[71] do – within the thematic areas covered – provide information on the fundamental rights situation on the ground in various

[65] Two recent examples may be cited: C-441/02, Commission v. Italy, [2006] ECR I-3449, points 103 et seq. (expulsions of Italians from Germany and protection of family life); the pending infringement procedure concerning deficiencies in the Greek asylum system, launched by letters of formal notice of 3 November 2009 and 24 June 2010 (as mentioned by AG Trstenjak, in: C-411/10, N.S. and Others, [nyr], point 104).

[66] COM (2010) 573, p. 10.

[67] Regarding the Hungarian Media law: See the reaction by Mr. Hammarberg, the Council of Europe's Commissioner for Human Rights, complaining that "we were outmaneuvred by the European Commission who accepted a few changes to the law and Budapest proclamed that the issue had been settled. But there are still freedom-of-the-press problems with that law"; public statement following a hearing at the EP's LIBE committee on 10 November 2011 (http://iplextra.indiatimes.com/quote/00UG7736497VP?q=Hungary). Such further issues lay however outside the scope of Directive 2010/13; they led to a partial annulment of the law by the Hungarian constitutional court in December 2011. The distinction between EU law infringements and other issues coming under the Council of Europe's remit is clearly made in President Barroso's speech in the European Parliament of 18 Jan 2012 (SPEECH/12/16, available at http://ec.europa.eu/commission_2010-2014/president/index_en.htm).

[68] See resolution of 5 July 2001 on the situation as regards fundamental rights in the European Union (2000), and subsequent resolutions of 15 January 2003 (on 2001) and of 4 September 2003 (on 2002).

[69] O. De Schutter, Journal de droit européen, 2009, p. 115.

[70] See resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, which contains calls for policy actions in selected fields, addressed to the other EU institutions and to Member States generally, and resolution of 15 December 2010 on fundamental rights in the EU (2009) which centers around the new post-Lisbon fundamental rights architecture and adds a list of the "most pressing challenges of the new era".

[71] E.g., the last report "Fundamental rights: challenges and achievements in 2010". See also F. Benoît-Rohmer, 47 RTD eur. (2011), p. 145, 153 et seq.

Member States; however, they stop short of formally finding fundamental rights violations, in line with the limits of the Agency's mandate[72].

3. The relationship between EU fundamental rights and the Member States' legal systems

This section provides replies to questions 11, 12 and the first part of question 13 of the Questionnaire.

3.1. The field of application of the Charter with regard to Member States: Article 51 (1)

According to its Article 51 (1), the Charter binds the Member States *"only when they are implementing Union law"*. This provision is central to the relation between EU fundamental rights and the Member States' legal systems. We will briefly look at its genesis, then its application by the Court and the Commission, before submitting a general approach and looking at its consequences for open questions.

3.1.1. Article 51 (1) was the fruit of intense discussion in the first Convention and became the object of renewed debate in the second Convention and once again in the negotiations of 2007 that led to the Lisbon Treaty.[73] While there was consensus in the first Convention that the main thrust of the future catalogue of rights should be to bind EU institutions and bodies, a majority followed the Praesidium's line that the Court's case law, subjecting Member States action to Community fundamental rights in certain instances, needed also to be reflected. However, the Convention rejected a Praesidium drafting proposal foreseeing to bind Member States "when acting within the scope of Union law", a formula perceived as too far-reaching and potentially open-ended. A widespread demand was for finding a wording that would contain the Charter's scope to well-defined sectors of Member State action. Consensus could only be reached when the Praesidium proposed to stick to the wording that was used in the latest judgment in point that the Court had just handed down in April 2000[74]. That judgment was also referred to by the Praesidium as timely evidence that the Court's case law would be continued at all, despite the insertion of (ex-)Article 46 d) TEU[75] by the Treaty of Amsterdam. The Explanations on Article 51 were part of the consensus found: In their original version of 2000, they referred to the two existing lines of case law submitting

[72] See, in particular, Article 4 (2) of the founding Regulation 168/2007, according to which the Agency's conclusions, opinions and reports shall not deal "…with the question of whether a Member State has failed to fulfill an obligation under the Treaty within the meaning of Article 226…".

[73] See also G. Braibant (footnote 5), p. 251; M. Borowski, in: J. Meyer (ed.), Charta der Grundrechte, 3nd ed., 2011, Art. 51, points 2 et seq.; Th. v. Danwitz / K. Paraschas (footnote 27), p. 4; C. Ladenburger, in: P.J. Tettinger and K. Stern (eds.), Kölner Gemeinschaftskommentar zur Grundrechte-Charta, 2006, Art. 51, point 22.

[74] See the Explanations on Article 51, citing the wording of the judgment C-292/97, Karlsson, [2000] ECR I-2737.

[75] Under that provision of the former TEU, the powers of the Court of Justice applied "only to the following provisions of this Treaty: (…)Article 6 (2) *with regard to action of the institutions*, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty." (emphasis added).

Member States to respect of Community fundamental rights: *Wachauf* and *ERT*[76]. But, significantly, the Praesidium of the second Convention added a reference to the *Annibaldi* case[77] as an example where the Court denied the applicability of those fundamental rights, on the basis of a rather precise analysis showing that the national law at issue did not present sufficient links with Community law.

3.1.2. In the meantime, the Court has had many occasions to judge whether fundamental rights as general principles of Community law, or since 1 December 2009 the Charter, should apply to a given Member State action. At least until the entry into force of the Charter, it has unequivocally maintained and developed the two well-known lines of cases: the *Wachauf* line, concerning Member States when implementing Union law *stricto sensu,* and the *ERT* line, as regards Member States derogating from fundamental freedoms.

And yet, several questions remain open at this point: Should Article 51 (1), given its more restrictive wording, be understood as reversing the *ERT* case law? If *ERT* remains good law, as is the preponderant view and as some judgments suggest[78], should there be scope for further categories of Member State action coming under Article 51, or even a residual third category encompassing all Member State acts presenting some sort of link with EU law?[79] And how narrowly or expansively should the two existing lines of case law be construed in practice?[80]

In the Court's judgments and orders of the last decade, one finds examples both for narrow and for expansive tendencies. In several instances, the Court appears to have a close look, declaring itself incompetent to rule on a fundamental right in absence of a specific link between the national act and a concrete EU norm governing that act. Thus, the mere fact that the Member State acts within a policy area covered by EU competences is not sufficient.[81]

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[76] Case 5/88, Wachauf, [1989] ECR 2609; C-260/89, ERT, [1991] ECR I-2925. The original Explanations can be found as document CHARTE 4473/00 CONVENT 49 of 11 October 2000, http://www.europarl.europa.eu/charter/pdf/04473_en.pdf. On the genesis and legal significance of the Explanations generally, see C. Ladenburger, in: Kölner Gemeinschaftskommentar (footnote 73), Art. 52, points 112 et seq.

[77] C-309/96, Annibaldi, [1997] ECR I-7493.

[78] AG Bot, in: C-108/10, Scattolon, [nyr], points 117-120; J. Kokott / Chr. Sobotta, EuGRZ 2010, p. 265, 267 et seq.; P. Craig, The Lisbon Treaty, 2011, p. 211; Commentary on the Charter by the EU Network of Independent Experts on Fundamental Rights, 2006, (http://cridho.cpdr.ucl.ac.be/documents/Download.Rep/NetworkCommentaryFinal.pdf), p. 392; A. Rosas / L. Armati (footnote 21), p. 150; for the opposite view: P.M. Huber, EuR 2008, p. 190; M. Borowski (footnote 73), Art. 51, points 29 et seq. The judgment *Dereci* (cited in footnote 85 below) should be understood as a confirmation of this point.

[79] AG Sharpston, in: C-427/06 Bartsch, [2008] ECR I-7245, point 69; K. Lenaerts / J. Gutierrez-Fons, 47 CMLR (2010), p. 1629, 1639; S. Prechal (footnote 15), p. 9 et seq.

[80] Where a broad interpretation of Article 51 (1) is suggested, it is not always clear whether this means that the *ERT* line of cases should be considered good law, or whether the intention is to go beyond; see AG Sharpston, in: C-34/09, Zambrano, [nyr], points 163 et.s.; AG Bot, in: C-108/10, Scattolon, [nyr], points 118-110; A. Rosas / L. Armati (footnote 21), p. 147 et seq. At the opposite end of the spectrum: P.M. Huber, EuR 2008, p. 190; similarly Th. Kingreen, in: Chr. Calliess / M. Ruffert, EUV-AEUV-Kommentar, 4th ed. 2011, Art. 51 GRCh, points 11, 12, 16; for a prudent, intermediate line: Th. v. Danwitz, in: Festschrift für Roman Herzog, 2009, p. 19; Th. v. Danwitz / K. Paraschas (footnote 27), p. 2 et seq.

[81] C-361/07, Polier, [2008] ECR I-6, points 13-15, and already C-309/96*,* Annibaldi, [1997] ECR, I-7493. For a contrary view (but proposed not *de lege lata* prior to 1 December 2009 and leaving open whether *de constitutione ferenda* or "*de Charta lata")* AG Sharpston, in: C-34/09, Zambrano, [nyr], points 163 et.s.

Where EU secondary legislation exists, the Court examines carefully whether it really covers the relevant aspect of the national act complained of.[82] On the other hand, in the two judgments *Carpenter* and *Karner* concerning fundamental freedoms, the Court has been quite generous in assuming a connection to EU law allowing it to scrutinise a fundamental right[83]. That said, its more recent *Zambrano* approach, of protecting citizens against the deprivation of genuine enjoyment of the substance of their rights is rooted exclusively in EU citizenship without any recourse to the Charter[84]; this is confirmed in its judgment *Dereci* which arguably diverges from the *Carpenter* approach.[85] An interesting recent tendency becomes apparent in several judgments where the Court avoids squarely applying EU fundamental rights (or now the Charter) to the national acts at issue, but instead stresses the need to take those rights into account in interpreting the applicable secondary EU law.[86] This approach, while appearing less intrusive towards national law, opens national courts an important perspective of proposing to the Court, in preliminary references, fundamental rights-inspired interpretations of EU law.

3.1.3. The European Commission is constantly called upon to apply Article 51 (1), in its replies to an ever increasing amount of parliamentary questions, petitions and complaints on fundamental rights issues arising in Member States. It has followed a cautious line, replying in most instances that, in absence of an apparent link to EU law, it is not competent to deal with the case. Only in a limited number of cases since the Charter's entry into force did the Commission find a sufficient nexus allowing it to examine the situation submitted from a fundamental rights angle[87].

3.1.4. This report agrees with the prudent interpretation of Article 51 (1) that characterises the Commission's practice and at least in part the Court's recent case law. Indeed, the EU institutions should not strive to extend the scope of the Charter as largely as ever possible, by accepting any theoretically construable nexus of the situation submitted to EU law. Instead, the guiding question should be whether there really is a convincing justification for adding, as regards the category of Member State action at hand, a layer of fundamental rights protection at EU level, on top of the two existing levels of the ECHR and the national constitutions. This underlying question should inform both the Court's and the Commission's and other institutions' analysis of whether there is a *sufficiently specific link* between the national act at issue and a *concrete* norm of EU law applied.

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[82] E.g., already C-144/95, Maurin, [1996] ECR I-2909, points 11-12; more recently C-483/09 and C-1/10, Gueye, [nyr], point 69; C-20/10; Vino I, [nyr], points 52-66 and C-161/11, Vino II, [nyr], points 22-40.

[83] C-60/00, Carpenter, [2002] ECR I-6279; C-71/02, Karner, [2004] ECR I-3025; critical on these judgments: M. Ruffert, EuR 2004, p. 165, 170; D.H. Scheuing, EuR 2005, p. 163. See also Th. v. Danwitz / K. Paraschas (footnote 27), p. 8.

[84] Judgment of 8 March 2011, C-34/09, Zambrano, [nyr]; contrary to AG Sharpston's approach in that case.

[85] Judgment of 15 November 2011, C-256/11, Dereci, [nyr]. Unlike in C-60/00, Carpenter, [2002] ECR I-6279, the scope of citizenship rights is not construed expansively in order to bring a problem of family life, i.e. a fundamental rights problem, within the scope of Union law; to the contrary, the Court finds that such a problem does not suffice to claim citizenship protection under the Zambrano criterion (C-34/09, [nyr], point 68), and that the Charter is only applicable once the situation is governed by Union law (which is for the national court to judge, point 72).

[86] C-275/06, Promusicae, 2008 [ECR] I-271; C-400/10 PPU, McB, [nyr], points 51-52; joined cases C-411/10 and C-493/10, N.S. and Others, [nyr], point 77.

[87] See the references in footnotes 62 through 64 above.

Several good reasons plead in favour of this prudent approach to Article 51 (1). The first is derived from its strikingly restrictrive wording ("only when they are implementing" – "uniquement lorsqu'ils mettent en oeuvre" – "ausschließlich bei der Durchführung") and the intentions of the authors, as referred to above, to contain the field of application of the Charter to limited sectors of Member State action. A prudent approach is also in line with the principle of non-expansion of EU competences through the Charter, as expressed in Article 51 (2) and repeated in Article 6 (1) TEU. More fundamentally, it takes into account the broader implications for Europe's multi-level system of human rights protection: It cannot be in the interest of the EU's institutions to vindicate a power – and a corresponding responsibility – of human rights scrutiny for vast areas of Member State action, and thus to duplicate the general system of human rights protection established by the ECHR and to undermine latter's authority. An all-encompassing scope of the Charter would risk to exceed the absorption capacities of the Commission and the Court, or in case of selective follow-up of alleged infringements, undermine the credibility of EU law enforcement. The Commission's cautious reaction to complaints and parliamentary questions shows that it is mindful of the potential danger to the EU's very legitimacy if its institutions ended up being drawn into various highly sensitive national debates, commenting from a human rights angle even though there is no particular aspect of EU policy or law at stake, and the high threshold of a serious breach to the Union's values is not reached (Article 7 TEU). Even under a prudent approach to Article 51 (1), human rights problems lying at the heart of EU policies will occur more and more frequently in Member States as these policies are expanded; dealing with those problems firmly and consistently is delicate and resource-intensive enough for the Commission. Recent examples are the expulsions of Roma from France, certain aspects of the Hungarian Media law, or deficiencies of the Greek asylum system. Finally, the combined application of several fundamental rights layers to a single case does not necessarily result in gains of protection, particularly in cases of colliding rights; it may instead make the identification and interpretation of applicable rights more difficult and uncertain, and their balancing more complex (see sections 3.3. and 4.4. below).[88]

3.1.5. What follows from such an approach in practice? For the classic *Wachauf* line of cases, the need for ensuring fundamental rights protection at EU level is obvious and universally recognised: Member States act as "agents" on behalf of and in the interest of the EU, when they transpose a directive or take administrative action to apply EU law. Both the uniform implementation of EU law and the EU's credibility vis-à-vis the citizens concerned requires that such implementation acts obey to uniform EU-wide fundamental rights standards and that the EU institutions ultimately guarantee their respect. Most commentators – rightly in our view – also accept the *ERT* case line as justified[89]: Admittedly, here the Member State acts not as an EU agent but in its own interest and on the basis of its own law. However, when scrutinising whether a restriction to a fundamental freedom is proportionate and thus,

[88] Th. v. Danwitz / K. Paraschas (footnote 27), p. 15-16.

[89] J. Kokott / Chr. Sobotta (footnote 78), p. 269. A. Rosas / L. Armati (footnote 21), p. 150; Th. v. Danwitz / K. Paraschas (footnote 27), p. 7; S. Fries, Die Grundrechtsbindung der Mitgliedstaaten nach dem Gemeinschaftsrecht, 2002, p. 34 et seq. - For the contrary view: e.g., F. Jacobs, 26 E.L.R. (2001), 331, 336 et seq.; P.M. Huber, EuR 2008, p. 190; Th. Kingreen, in: Chr. Calliess / M. Ruffert (footnote 80), Art. 51 GRCh, points 16-17.

justified under the Treaty it is simply impossible to leave aside fundamental rights impacts from the comprehensive assessment required under the proportionality principle.[90] Since *ERT* is also cited in the Praesidium's Explanations and since a Member State relying on the Treaty clauses or principles allowing restrictions to fundamental freedoms can be said to "implement" EU law, the *ERT* case line should indeed stand as good law under Article 51 (1).[91]

3.1.6. The general approach set out above can provide guidance when addressing various concrete situations not yet fully clarified in the case law. As regards the transposition of directives, Article 51 should apply not only where the transposing legislator has no margin, but also where it uses options or derogations foreseen in the directive, but not where, merely at the occasion of transposing, it adds national provisions not induced by the directive.[92] Where a directive, or indeed the Treaty (as in Article 193 TFEU) requires national measures to be "compatible with the Treaties", that is not enough to make the Charter applicable, since such a clause does not determine which part of Treaty law is applicable in the first place[93]. Where an EU provision aiming to implement a specific equality right applies to a given national act, that has been accepted as a sufficient link to also apply the corresponding fundamental equality right in *Kücükdeveci*[94]; but it should not necessarily follow that the same act would be covered by Union law comprehensively, i.e. for other equality aspects or other rights of the Charter.[95] Regarding fundamental freedoms, judgments such as *Carpenter* and *Karner* are much more difficult to square with a prudent approach to Article 51 than the recent judgment *Dereci*. In any event, the Court has never explicitly espoused a "*civis europaeus sum*" doctrine, under which an EU citizen, by the mere fact of staying in another Member State, could claim comprehensive respect of EU fundamental rights from the

[90] This is true for both constellations covered by this line of cases: where the restriction of a fundamental freedom also affects fundamental rights of the same person (as, e.g., in C-260/89, ERT, [1991] ECR I-2925 or C-368/95*,* Familiapress, [1997] ECR I-3689), and where the need to protect a fundamental right is invoked as justifying the restriction (as , e.g., in C-112/00, Schmidberger, [2003] ECR I-5659 or C-36/02, Omega, [2004] ECR I-9609).

[91] See also references in footnote 78 above.

[92] C-540/03, Parliament v. Council, [2006] ECR I-05769, point 104; See also joined cases C-411/10 and C-493/10, N.S. and Others, [nyr], points 64-69, confirming that where a regulation grants Member States a discretionary power, the exercise of that power may still be an "implementation of Union law" where the power is merely an element of a comprehensive Union regime (here: the Common European Asylum System).

[93] C-6/03, Eiterköpfe, [2005] ECR I-2753, points 59-64, for the proportionality principle. See also the structural funds example mentioned further below.

[94] C-555/07, Kücükdeveci, [2010] ECR I-365.

[95] To give an example, it should not follow from Kücükdeveci (C-555/07, [2010] ECR I-365) that national labour legislation, falling within the scope of Directive 2000/78, could also be censored for any linguistic discrimination or restrictions of freedom of religion it might contain, since Union law has not occupied the field for such aspects. This approach is followed by the Court in C-20/10, Vino I, [nyr], points 52-66 and C-161/11, Vino II, [nyr], points 22-40; but see, for a different view, AG Kokott's opinion in pending case C-393/10, O'Brien, [nyr], points 66-70; and the Commission's reply to Question E-587/07 (Vanhecke). – Here, we do not deal with the controversial question whether the Court followed a circular logic in considering the national legislation at issue in Kücükdeveci an "implementation of Union law", although it did not transpose any Union law at all (as the legislation in the Mangold case did), but merely came within the scope of the non-discrimination Directive 2000/78 which the Court considered in turn as a "concretisation" of the fundamental right of Article 21 (1).

authorities of the host state[96]. Nor should, e.g., a detention or imprisonment of an EU citizen in another Member State be scrutinised under EU fundamental rights, simply because he or she cannot exercise his right to free movement as a consequence of the detention[97]. The case law on the Court's competence to give a preliminary ruling where national law refers to Union law or uses the same definitions should be applied with caution in this context: the simple fact that national law contains a fundamental right worded analogously or similarly to the Charter should not suffice for the Court to interpret it, in the absence of a specific reference made to the Charter.[98] An unexplored area concerns national action co-funded by the EU: Should it be submitted to respect of EU fundamental rights because it is made possible by EU money? The legislator expressly opted for that approach as regards the EU's research policy[99]; the matter is less clear with regard to cohesion policy, where the Commission once, in reply to a petition and in line with the cautious approach advocated here, declined entering into a fundamental rights scrutiny of a co-funded project[100]. Similarly, the mere fact that a national measure constitutes State aid and hence is bound by the discipline of Articles 107 and 108 TFEU, should not be a sufficient reason to submit it also to respect of EU fundamental rights.[101] But of course, the Commission's funding or state aid action as such is bound by the Charter. The circumstance alone that some EU law becomes relevant in national civil proceedings, or that it may make civil judgments enforceable throughout the Union, should not mean that the Charter becomes applicable to such proceedings or to the civil laws applied therein.[102] It may thus not be sufficient for Article 51 (1) that a national act, largely governed by national law, also may have to respect some applicable norm of EU law, since that circumstance would potentially be true for a vast class of national acts allowing no prior definition.[103] It is admittedly difficult to formulate a single positive test on *the extent to which* a national act must be determined by Union rather than by national provisions, in order for it to become "implementation" within the meaning of Article 51 (1).[104]

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[96] A. Rosas / L. Armati (footnote 21), p. 150; But see AG Sharpston, in: C-34/09, Zambrano, [nyr], points 83-84.

[97] On this basis, Commissioner A. Vitorino abstained from acting against the UK's Anti-Terrorism, Crime and Security Act 2001, which was later censured by the House of Lords.

[98] See now C-482/10, Cicala, [nyr], points 21-30.

[99] See recital n° 30 and Art. 6 of Decision 1982/2006 concerning the 7th Framework Programme.

[100] This position is not in contradiction with Article 9 (5) of Regulation 1083/2006 (the general regulation on structural funds) requiring conformity of projects with EU law. That provision does not answer the question whether the Charter, given its Article 51, should be considered part of the EU law applicable to the project.

[101] Th. v. Danwitz / K. Paraschas (footnote 27), p. 9.

[102] Cf. C-400/10 PPU, McB, [nyr], points 51-52.

[103] On this point see Th. v. Danwitz (footnote 80), p. 19, 25. Similarly, C-309/96, Annibaldi, [1997] ECR I-7493, point 22, treating as irrelevant the fact that the national law may indirectly affect the operation of a common argicultural market organization.

[104] The difficulty to define a single general test is also evidenced by joined cases C-411/10 and C-493/10, N.S. and Others, [nyr], points 64-69, where the Court recognised that exercising the – significant – discretion left to Member States by the Dublin II Regulation, to transfer an asylum seeker pursuant to that regulation or treat the application itself, is still part of the Common European Asylum System and hence, an implementation of Union law. Th. von Danwitz (footnote 80), p. 19, 28 proposes the test that there must be a "Rechtsverhältnis, das sich ausschließlich oder jedenfalls hauptsächlich aus dem Gemeinschaftsrecht ergibt". A possible test – fitting for the "Wachauf" situation but not for the "ERT" situation - might also be to require that through the national act in

3.1.7. This leads back to the more general question whether there are or should be further categories, or possibly a third "residual" category, of national acts coming under the scope of Union law, besides the *Wachauf* and the *ERT* situations. The concrete formulations used in certain Court orders concluding on a manifest lack of its own competence are not conclusive and should not be over-interpreted.[105] We fail to see a single judgment to date applying fundamental rights which would squarely fall outside either the *Wachauf* or the *ERT* case law.[106] In our view, while future extensions beyond these two lines of cases might not be altogether excluded, any such extension should, if at all, only be contemplated if really there was a convincing justification for adding fundamental rights protection at EU level and if a concrete, manageable definition of the acts covered could be found; for the time being, we fail to discern any compelling case for such an extension. In any event, making the claim that there is a third *residual* category, comprising any act for which a link to EU law can somehow be intellectually construed, would not bring further dogmatic clarity and not help the task of the EU institutions; instead, it would only create legal uncertainty.

3.1.8. It should be clear from the foregoing that the scope of Member State action falling under Article 51 (1) is not the same as, but indeed much narrower than, the area of Member State action coming "within the scope of application of the Treaties" within the meaning of Article 18 TFEU, a concept the Court has construed very expansively.[107] That difference in approach is logical: any discrimination of EU citizens on account of nationality is an attack on the very idea of EU citizenship, a core value specific to the EU whose defence is a central mission of the EU institutions that cannot be left to national constitutional law and to the ECHR, unlike the general mission of upholding, say, freedom of religion or expression. Probably, the wording "within the scope of Union law" in Article 16 TFEU will also need to be distinguished from Article 51, as it appears unlikely that the Court will reverse its expansive case law on the scope of the EC's data protection Directive 95/46.[108]

3.1.9. Finally, it should not be overlooked that the field of application of some Charter articles differs from the principle set out in Article 51 (1) or at least requires a special analysis. This is true for those Articles which merely repeat preexisting Treaty guarantees and hence conserve their same meaning as in the Treaty (Article 52 (2)): They also have their special scope of application, which in the case of fundamental freedoms (repeated in Articles 15 (2) and 45 (1)) is wider than the normal rule of Article 51 (1). On the other hand, Article 41, on good administration, is expressly confined to the action of Union institutions, bodies, offices and agencies. For Article 47 to apply, it suffices that a litigant can convincingly claim, in a national court, to have a subjective right under Union law (other than the Charter) that might be violated by a national act. Then that court is required to perform its role as Union court under Article 19 TEU by granting judicial protection, and its action is covered by

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question the Member State discharges a duty it has by virtue of Union law, see M. Dougan (footnote 11 above), p. 229.

[105] E.g., raising whether there are "d'autres éléments de rattachement" au droit de l'Union, C-339/10, Estov and Others, [nyr], point 14; C-457/09, Chartry, [nyr], point 25.

[106] Likewise, Th. v. Danwitz / K. Paraschas (footnote 27), p. 7.

[107] Th. v. Danwitz / K. Paraschas (footnote 27), p. 8.

[108] C-465/00, Rechnungshof, [2003] ECR I-4989, points 39 et seq.; C-524/06, Huber, [2008] ECR I-9705, points 44-45.

Article 47, regardless of any connection between the national act challenged and Union law and whether the subjective right eventually proves to exist.

3.2. No extension of competences through the Charter: Article 51 (2)

Article 51 (2) provides that *"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 the powers and tasks as defined in the Treaties."*

In cases requiring a delimitation of the sphere of Member State action bound by the Charter, the Court has repeatedly cited this provision together with that in Article 51 (1) which was examined in the preceding section.[109] However, while the paragraphs are closely related, in the intention of the two Conventions paragraph 2 went beyond repeating or reinforcing paragraph 1, and was also to send a message to the EU legislator. The following two subsections explain this intention, and analyse the current extent of competences in the area of fundamental rights.

3.2.1. The *raison d'être* of Article 51 (2) as conceived by the two Conventions is linked to the Charter's conception as a *thematically comprehensive* catalogue of fundamental rights, comprising also guarantees that cover areas of life which the EU has little or no legislative competence to regulate. Prime examples for this include the right to take collective action including strike, the right to conscientious objection, the right to marry and to found a family and the bioethical principles of Article 3 (2). After some debate, the first Convention decided to draft such a comprehensive catalogue instead of attempting to mirror the EU's system of competences. That decision was justified: Not only would such an incomplete Charter quickly prove out of date in case of future Treaty changes entailing further transfer of competences to the Union. More profoundly, no fundamental right is per se specifically linked to a given policy area, in which the Union may have full, limited or no legislative competences. Rather is the Union's action in any policy area liable to at least indirectly affect any fundamental right, and one can cite numerous examples for this.[110] There is no correlation between the extent of the Union's legislative competence and its capacity of affecting fundamental rights.

That said, enshrining the principle of non-extension of competences and tasks in Article 51 (2) became, for the first Convention, an immediate consequence of its decision in favour of a thematically comprehensive catalogue; it appeared all the more necessary since the Charter recognises that fundamental rights must not only be respected but may also need to be *promoted,* i.e. may entail positive action. Article 51 (2) thus aims, concretely, to prevent the institutions from resorting to Charter articles when identifying the legal basis for EU legislation – a message well understood by the Commission from the outset.[111] This includes

[109] E.g., C-400/10 PPU, McB, [nyr], point 51.
[110] Working Document 3 submitted by Chairman Vitorino to Working Group II of the second Convention, http://european-convention.eu.int/docs/wd2/1656.pdf.; J.-P. Jacqué (footnote 12), p. 2, 4.
[111] See intervention of M. Petite, then Director-General of the Commission's Legal Service in Working Group II of the Second Convention, WD 13 of Working Group II (http://european-convention.eu.int/docs/wd2/1821.pdf), page 39.

legislation based on Article 352 TFEU: the reference to "tasks" in Article 51 (2) should be read as meaning that Charter articles create no new Union *objectives* beyond those found in other parts of EU primary law and in particular in Article 3 (2) to (5) TEU.[112] On the other hand, Article 51 (2) cannot exclude that, in the light of the Charter, a need arises to take positive action to promote a Charter right, where such action lies within EU competences and is in line with the principle of subsidiarity.

The subsequent insertion, by the second Convention, of the words "[the Charter] does not extend the field of application of Union law beyond the powers of the Union" pursued a further, specific objective, which becomes clear from the last sentence of the Explanations on Article 51. The reference to the Charter in Article 6 (1) TEU, making the Charter a formal part of "Union law", cannot by itself extend the range of Member State action coming under Article 51 (1). The intention was to expressly rule out a circular reasoning which had preoccupied the "Charter-sceptic" delegations: it should be excluded to argue that Member State action constitutes an "implementation of Union law" simply because it promotes a right or principle which figures also in the Charter. For instance, a national law designed to reconcile family and professional life, does not become an act of "implementation of Union law" merely because there is an Article 33 in the Charter and the Charter is part of Union law; instead such a law would only be covered by Article 51 if it served to implement a Union provision outside the Charter. In short, the concept of Union law in Article 51 (1) must be read as meaning "Union law other than the Charter itself"[113].

3.2.2. Finally, even if the Charter itself does not extend the Union's competences, the question remains *what is*, at the present stage of development of Union law, the extent of existing Union competences in the area of fundamental rights. An answer in four steps may be given on this point[114]:

Firstly, the constant practice of the institutions is still marked by the axiom, derived from the Court's famous opinion 2/94 on accession to the ECHR, that the Union has *no general competence in the area of fundamental rights*, not even under Article 352 TFEU. This practice comes out clearly from Regulation 168/2007 establishing the fundamental rights agency and also from Decision 2007/252 on the EU's fundamental rights and citizenship programme for 2007 – 2013[115], the scope of both instruments, although based on ex-Article 308 TEC, remaining restricted to areas covered by other Union law and policies. It has however been questioned whether the Court's passage in Opinion 2/94 really meant to establish such a sweeping axiom, beyond the particular context of accession to the ECHR.[116]

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[112] For a different nuance, see the Independent Experts' Commentary (footnote 78), p. 395.

[113] Note in contrast that, in Article 52 (3), the reference to "Union law" is mostly read as including the Charter itself.

[114] On the following, see J. Weiler / S. Fries, in: Alston, The EU and Human Rights, 1999, p. 147; P. Eeckhout, 39 CMLR (2002), p. 945, 979 et seq.; C. Ladenburger, in: Kölner Gemeinschaftskommentar (footnote 73), Art. 51, points 54 et seq.

[115] It is interesting to note that the successor instrument proposed by the Commission for the period 2014-2020 is no longer conceived to fund activities on fundamental rights generally, but activities on specific rights for which the Treaty confers express competences on the Union (COM (2011) 758). This avoids the politically unwelcome recourse to Article 352 TFEU.

[116] P. Eeckhout, 39 CMLR (2002), p. 945, 982; J. Weiler / S. Fries (footnote 114).

Be that as it may, we consider that the axiom is fundamentally justified, and that the institutions do well to observe it. This is simply because invoking “fundamental rights” as a general competence entitlement, given their present stage of development as reflected in the 50 Articles of the Charter, would allow the holder of such competence to touch upon virtually any sensitive legal, political, economic and cultural issue of modern society. Applied to the Union that would have the effect of thwarting the principle of conferral (Article 5 (2) TEU) and blurring the delimitations of Union versus Member State competences laid down in the Treaties.

Secondly, at the latest under the Lisbon Treaty it is now clear that this axiom applies only to the Union *internally*. In external relations, things are very different. Generalising language previously found in the EC's chapter on development cooperation, Articles 3 (5) and 21 (2) (b) TEU now recognise the protection, consolidation and support of human rights as a general objective to be pursued throughout the different areas of the Union's external action, be it the Common Foreign and Security Policy ("CFSP") or the Union's development policy or its economic, financial and technical cooperation with non-developing countries. Given the thematic breadth of the provisions on CFSP, development policy and technical cooperation, coupled with the practice of including human rights clauses in its international agreements, the Union has ample possibilities to raise fundamental rights problems in a third country (including a candidate country). This contrast between a wide external and a limited internal human rights competence is not as paradoxical as it may seem at first glance: in its relations with third countries, the Union's means of action are essentially limited to steering financial aid, exercising diplomatic pressure or suspending benefits agreed in bilateral Treaties, which is qualitatively different from the powers to enforce EU law binding in Member States; and there is no problem of undermining the delimitation of competence between the EU and its own Member States as it exists with regard to EU-internal legislation.

Thirdly, the Treaties have over time conferred to the Union various *specific internal competences* in the area of fundamental rights. Major examples include Article 16 TFEU, which the Lisbon Treaty inserted to create a self-standing legal basis for data protection, Article 82 (2) (b) TFEU, included by the same Treaty to provide for legislation on the rights of individuals in criminal procedure, the competence for a common European Asylum System created by the Treaty of Amsterdam and expanded by the Lisbon Treaty, and perhaps most importantly Article 19 TFEU, introduced by the Treaty of Amsderdam, on non-discrimination on account of eight factors. Regarding equality of sexes in the area of employment and occupation, a competence was already conferred in the Treaty of Rome (Article 157 TFEU).

Fourthly, the Union has "functional" or "accessory" powers to enact fundamental rights provisions where these are a necessary part of legislative competences conferred on it. It goes without saying that its procedural rules in many fields, such as competition, anti-dumping, customs or anti-fraud must necessarily include rules on rights to defence. More substantially, the Union's exercise of its competences in the entire Area of Freedom, Security and Justice raises many fundamental rights issues which are addressed by appropriate provisions securing those rights.

3.3. Co-existence in a multilevel system of fundamental rights protection: Article 53

Most commentators accept the possibility of applying the fundamental rights of the Charter and those of the acting Member State cumulatively to national acts implementing Union law[117]. Others voice scepticism about such a cumulative application, advancing excessive complexity for legal practice of such a model and potential jeopardy to uniform application of Union law.[118] The Court's case law gives no clear guidance yet on this point.[119]

3.3.1. This report considers that *a priori* a cumulative application of several layers of fundamental rights protection binding Member State acts should be admitted (principle of co-existence). To be sure, where a national authority or court implements a Union act, national fundamental rights may never be invoked to indirectly question the validity of the Union act itself. But where Union law leaves several ways of implementation without its effectiveness being undermined, then it is hard to see why the national authority should not be authorised to select only such modes of implementation that respect its own constitution. Neither primacy nor uniform application of Union law would impede this. The real challenge, in *Wachauf* situations, is to interpret the Union law that is being implemented in order to ascertain the margin of appreciation or discretion it really leaves.[120] In *ERT* situations, it would be paradoxical if Union law deprived an EU citizen, who challenges a national measure restricting his or her fundamental freedoms, of a national fundamental rights argument; rather that argument should co-exist with the Charter rights which that citizen can invoke. The principle of co-existence is also conducive to respect for Member States' national identities, including their fundamental constitutional structures (Article 4 (2) TEU)[121]. Finally, a strong argument is now provided by the basic architecture of the EU's forthcoming accession to the ECHR: Under the Accession Treaty, the Union as such will assume international responsibility pursuant to the ECHR only with regard to the acts of its own institutions and bodies, while Member States will fully retain their responsibility for all their acts, including those implementing Union law and subject only to a procedural co-respondent mechanism[122]. There will thus in any event be a cumulative application of the Charter and the ECHR as incorporated in national law.

3.3.2. This principle of co-existence should now be considered enshrined in Article 53 of the Charter itself, which the Court has a first opportunity to interpret in the pending *Melloni* case[123]. While neither the legislative history nor the Explanations provide conclusive

[117] E.g., J. Kokott / Chr. Sobotta (footnote 78), EuGRZ 2010, p. 270; S. Fries, Die Grundrechtsbindung der Mitgliedstaaten nach dem Gemeinschaftsrecht, 2002, p. 113 et seq. This view also underlies the decision of the Spanish Constitutional Court of 13 December 2004 (DTC 1/204).

[118] Th.v. Danwitz (footnote 80), p. 19, 27 et s.; Th. Kingreen, in: Chr. Calliess / M. Ruffert (footnote 80), Art. 53 GRCh, point 5.

[119] The judgment in C-135/08, Rottmann, [2010] ECR I-1449, point 55, admits a double scrutiny of proportionality under EU and national law (though this concerns a citizenship case).

[120] E.g., for such an interpretation, joined cases C-383/06 to C-385/06, Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening, [2008] ECR I-1561, points 53-59 (in relation to the principle of legitimate expectations).

[121] On that principle, see L. Besselink, 6 Utrecht Law Review (2010), p. 36, 42.

[122] See footnote 25 above, and on the co-respondent mechanism section 5.2. below.

[123] C-399/11, Melloni. Extensively on Article 53: L. Besselink, in: S. Prechal et al. (eds.), The Emerging Constitution of Europe, OUP 2005, p. 1, 11 et seq.

evidence as to the intent pursued by Article 53, this principle of co-existence was widely accepted amongst the members of the first Convention. Conversely, there are two further possible readings which were controversial already in the Convention and which, for systemic reasons, should not be followed:

One reading is that proposed by the Spanish Constitutional Court in *Melloni*: to construe Article 53 as an exception to the principle of primacy of Union law. A Member State would be allowed by Article 53 to refrain from acting as it would otherwise be required to do under Union law, on the ground that a fundamental right of its Constitution precludes such action (*in casu*, to execute a criminal sentence pronounced by another Member State following a trial *in absentia*). Yet, an exception from that most fundamental principle of Union law should only be recognised if it came out explicitly from the wording of a primary law provision. That is not the case here. Moreover, Article 53 refers to Member States' constitutions (as well as to Union law, international law and international agreements) only *within their respective fields of application*. Those words were chosen by the first Convention precisely to leave primacy of Union law unaffected[124]: Where a national constitutional norm is in conflict with a norm of Union law, primacy means that it simply does not apply to the case. Practical experience so far suggests that such a situation (which is however at stake in *Melloni*) should not arise often; in any event, where it does, the Union norm requiring primacy will hardly ever be the Charter itself, but rather some norm of secondary Union law, notably instruments of full harmonisation and / or mutual recognition. Genuine conflicts between the *Charter itself* and national fundamental rights should remain extremely rare, all the more under a prudent application of Article 51 (1) and given the Court's readiness to leave margins to national authorities and courts as regards the balancing of colliding rights (see section 4.4.2. below).

A second reading of Article 53 should also be discarded: that of a requirement to interpret the Charter in a way ensuring at least the same level of protection as provided in all other fundamental rights instruments cited in Article 53. Such a rule is laid down elsewhere in the Charter, namely in Article 52 (3), for the sole instrument of the ECHR.[125] For national constitutions, there is the *lex specialis* of Article 52 (4), requiring the interpretation "in harmony" (see section 3.4.1. below). In any event, expecting the Court to perform, whenever it interprets a Charter provision, a check of all national constitutions to pinpoint particularly high standards of protection, would be illusory in practice and defeat the very purpose of a codification at Union level – quite apart from the notorious problem of ascertaining *which is* the highest level of protection in cases of colliding rights.

Admittedly, the principle of co-existence of several layers of fundamental rights protection as arguably enshrined in Article 53 has a price: complexity. Particularly in situations of

[124] M. Borowski (footnote 73), Art. 53, point 5; Th. von Danwitz, in: Kölner Gemeinschaftskommentar (footnote 73) zur Grundrechte-Charta, 2006, Art. 53, point 3. Sceptic about neat separations of fields of applications: L. Besselink, loc. cit.

[125] Accordingly, the Praesidium of the second Convention changed the Explanations by deleting a sentence suggesting such a rule from the Explanations on Article 53 and moving it to those on Article 52. Same view as here, e.g., M. Borowski (footnote 73), Art. 53, point 9; H. D. Jarass, Charta der Grundrechte, 2010, Art. 53, point 3.

colliding rights, it can become a daunting task for a national administrator or judge to assess which margin, if any, a norm of Union law may leave for applying rights other than those of the Charter, and then to identify the various applicable fundamental rights and their meaning pursuant to the case law of the Strasbourg, Luxembourg and the national constitutional court. But in our view, this complexity cannot be avoided by imposing a stern antagonism between applying either the Charter or national fundamental rights. It is rather one more factor commending a prudent determination of the field of application of Article 51 (1) (see section 3.1. above).

3.4. Taking into account Member States' laws in the interpretation of the Charter: Article 52 (4) and (6)

Two horizontal provisions of the Charter specifically suggest that Member States' laws should be taken into account in the interpretation of Charter provisions: paragraphs 4 and 6 of Article 52.

3.4.1. Article 52 (4) – a provision not yet interpreted by the Court – has its origin, just as paragraphs 5 and 6 of the same article, in the consensus-building achieved by Working Group II of the second Convention, as part of the package that enabled the sceptics to accept a legally binding Charter.[126] It is a remnant of a more global request, made by one Member State, for a closed system of horizontal clauses that should "tie back" the interpretation of all Charter rights to the pre-existing legal situation: Charter rights should either stem from the Treaties or the ECHR and then have the same meaning as in those instruments, or they should be derived from the Member States' common constitutional traditions and then be interpreted in accordance with those traditions; all remaining Charter articles should be qualified as non-justiciable "principles". That request was denied and Article 52 contains no such closed system. The Working Group was however prepared to add an interpretive rule referring to common constitutional traditions, provided it would not jeopardise the pre-existing methodological approach of "evaluative comparison" followed by the Court when referring to common constitutional traditions.[127] The language "in so far as this Charter recognises fundamental rights as they result…" and "…interpreted in harmony…" appeared an acceptable compromise. The result is a clause whose concrete legal substance is difficult to grasp, both as regards its field of application and its effects. It allows Member States to make the argument that a given Charter interpretation would conflict with their own constitutional tradition, but it also leaves the Court sufficient leeway to discard that argument.

3.4.2. By adding paragraph 6 to Article 52, the second Convention responded to a request to emphasise, in the horizontal provisions, the importance of references to national laws and

[126] For more details on the following: C. Ladenburger, in: Kölner Gemeinschaftskommentar (footnote 73), Art. 52, points 75 et seq.

[127] See (then) judge Skouris' intervention explaining that approach, under which the Court "is not bound by the common constitutional traditions as such" and does not "mechanically transpose their lowest common denominator into the Community legal order", but "merely draws inspiration from them in order to determine the level of protection appropriate within the Community legal order", WD 19 of Working Group II, p. 8. This is also reflected in the Explanations on Article 52 (4). For a recent confirmation of the Court's methodology of evaluative comparison, see AG Kokott, in: C-550/07 P, Akzo, [nyr], points 93 et seq.

practices that are made in ten substantive provisions of the Charter.[128] The Court has occasionally mentioned such references, but without attaching apparent legal consequences to them.[129]

In the deliberations of the first Convention[130], such references to national laws and practices had first been proposed for the right to marry and to found a family and the right to collective action, two draft provisions that were heavily contested for covering areas where the Union lacked legislative competence and where Member States' approaches diverged even more than elsewhere. Reference to national laws and practices, taken over from Article 12 ECHR and Articles 21 and 22 of the European Social Charter (revised) ("ESC"), appeared as a handy response. Unfortunately, that original logic was lost (and no other followed), when in further negotiations similar references were spread out across the Charter. Thus, one cannot explain why, amongst Charter guarantees akin in nature, some refer to national laws while others do not.[131]

Making concrete legal sense of these references is not an easy task[132], given that absence of logic but also a doctrinal problem insufficiently considered in the Convention: In the framework of the ECHR and ESC[133], such references to national laws and practices can be squared with the nature of international conventions that offer their contracting parties possibilities of "géométrie variable", i.e. of modulating the concrete international law obligations assumed. But it is difficult to import that approach into primary Union law whose characteristics are autonomy and uniform application. The very scope of protection ("Schutzbereich") of a Charter guarantee can hardly depend on which Member State has implemented Union law in a given case; it requires an autonomous and uniform interpretation. For example, despite the radical divergencies of national systems the Court may in due course need to rule, for all addressees of the Charter alike, whether or not Article 9 includes same-sex partnerships at all in its scope[134], or whether Article 28 protects, in principle, not only strike but also lock-out. At most Article 52 (6) may suggest that, when approaching such tough questions, the Court should duly take into account the state of national laws and practices on the controversial question; but that is nothing else than the method of "evaluative comparison" which is not only warranted for the ten provisions of the Charter referring to national law. The Court can also take national laws and practices into account by affording margins of appreciation to Member States restricting a Charter right and balancing it with other rights, in the situations of *ERT* or *Schmidberger*. But in such cases

[128] Namely, in its Articles 9, 10 (2), 14 (3), 16, 27, 28, 30, 34 (1) and (3), 35.
[129] E.g., C-271/08, Commission v. Germany, [nyr], point 38.
[130] For more details, see C. Ladenburger, in: Kölner Gemeinschaftskommentar (footnote 73), points 11 et seq.; same author (footnote 6), point 52, with further references.
[131] Compare, e.g., Articles 15 (1) and 16, or Articles 30 and 31 (1).
[132] Cf. C. Ladenburger, in: Kölner Gemeinschaftskommentar (footnote 73), Art. 52, points 103 et seq.
[133] It should however be noted that Article 12 ECHR, unlike Articles 21 and 22 ESC, may be nothing more than a special limitation clause, equal in nature to paragraphs 2 of Articles 8 to 11 ECHR, see Chr. Grabenwarter, EMRK, 3rd ed., 2008, § 22, point 64; as such its reproduction in Article 9 Charter was unwarranted, given Article 52 (1).
[134] Article 2 (2) of Directive 2004/38 suggests that, at this stage, there is no broad consensus in Europe on the matter, a circumstance which should be taken into account by the Court if ever it had to interpret Article 9 in this respect.

margins of appreciation should exist no matter which Charter right is concerned.[135] Finally, there are two legal paths on which the references made in ten Charter provisions should in our view *not* lead the Court: They should not be understood as implying that legislative implementation of these provisions is indispensable and that they are hence per se "principles" as defined in Article 52 (5) and / or cannot have any direct effect.[136] Nor should the term "practices" be read as a relaxation of the requirement in Article 52 (1) that limitations must be provided for "by law".[137]

3.4.3. In conclusion, it is difficult to distill a concrete legal sense from these two horizontal clauses. Nonetheless, when drafted they played an important role in securing consensus. They may thus be understood as conveying a more general message: the step of incorporating a written catalogue into primary law should not lead to construing Union fundamental rights in complete abstraction from the Member States' constitutional traditions and laws. Without diminishing the autonomous value of the Charter, its codificatory achievements and its substantive choices, the Court is encouraged to maintain its method of evaluative comparison when deciding hard cases.[138]

3.5. Protocol n° 30 on the application of the Charter to Poland and to the United Kingdom, and possible future Protocols

First, a brief account of the genesis of Protocol n° 30 might be useful.[139] The idea for it emerged during the bilateral consultations which the German Presidency had in the weeks preceding the European Council of June 2007, where the extremely prescriptive mandate for the next IGC – in reality, virtually the entire substance of the later Lisbon Treaty – was politically agreed. The UK signalled, as one of its main requests for a Treaty sufficiently different from the EU Constitution so as to allow avoiding a referendum, that the Charter should not be binding on the Member States, mainly because of resistance against social rights in British public opinion. While several Member States would have accomodated this point by accepting to refer, in the new Treaty, to the Charter as binding only the EU institutions, others and the Commission rejected that solution, wary that such a move by the Masters of the Treaty might endanger the subsistence of the Court's case law on Member States being bound by EU fundamental rights. A special Protocol on the Charter, accomodating the UK's concerns, appeared to them preferable over that scenario. The draft text of Protocol n° 30 was negotiated during the European Council itself. Poland confirmed a few days later that it wished to join in; its substantive concerns vis-à-vis the Charter were not linked to social rights but rather concerned questions of morality.[140] At the European Council

[135] Th. v. Danwitz and C. Ladenburger, in: Kölner Gemeinschaftskommentar (footnote 73), respectively on Art. 51, point 41 and on Art. 52, point 108.
[136] AG Trstenjak could be read as excluding direct effect for such Charter articles in C-282/10, Dominguez, [nyr], point 77.
[137] Cf. on this point D. Triantafyllou, 39 CMLR (2002), p. 53, 61 et s.; H.-W. Rengeling / P. Szcekalla, Grundrechte in der EU, 2004, point 1045; C. Ladenburger, in: Kölner Gemeinschaftskommentar (footnote 73), Art. 52, point 111.
[138] See also J. Kokott / Chr. Sobotta (footnote 78), p. 267.
[139] See also J.-C. Piris, The Lisbon Treaty, 2010, p. 160; M. Dougan, 45 CMLR (2008), p. 617, 665 et seq.; B. Schima, in: W. Hummer / W. Obwexer (eds.), Der Vertrag von Lissabon, 2009, p. 334 et seq.
[140] See Poland's unilateral declaration to the Lisbon Final Act (n° 62).

of October 2009 Member States politically agreed on a future protocol which would accord the Czech Republic the same position as Poland and the UK under Protocol n° 30; that Member State's request was linked to its President's fear that a binding Charter might spur restitution claims of EU citizens for real estate in areas formerly inhabited by the Sudetes. That concession cleared the way for ratification of the Treaty of Lisbon by the Czech Republic.[141]

The Court has interpreted Protocol n° 30 in its judgment *"N.S. and Others"* concerning the Dublin II regulation.[142] However, that case concerned only Article 1 (1), providing that the Charter does not extend the ability of the Court or of national courts of the two Member States to find national action of those States inconsistent with fundamental rights reaffirmed by the Charter. The judgment treats this provision as a declaratory explanation of the normative content of Article 51, thus clarifying a point with which the UK itself has agreed: The Protocol does not create a simple "opt-out" of the two Member States from the Charter.[143]

The more difficult part of the Protocol lies in Article 1 (2) and Article 2, two provisions which concern only selected parts of the Charter, i.e. its Title IV "solidarity" (containing most of the "social" rights and principles of the Charter) and those ten Charter provisions referring to national laws (discussed at point 3.4.2. above). When approaching interpretation of these two provisions, the Court will have to make an essential choice: Should they also be understood as declaratory, i.e. as statements which anyway reflect accurately the normative content of Title IV and the said ten Charter provisions with regard to any Member State? Or must they be taken as constitutive, i.e. as reducing, vis-à-vis Poland and the UK alone, the legal effects which the concerned parts of the Charter may have in other Member States?[144]

This report does not wish to take a final position on this difficult question. But we wish to flag a downside of the widespread scholarly tendency to construe Article 1 (2) and Article 2 as purely declaratory. There is a risk that generalising the statements made therein would weaken the Charter provisions concerned beyond any proper, autonomous construction. As regards Article 2, the argument made at point 3.4.2. above should be recalled: The references to national laws, e.g., in Article 28 (right to collective bargaining and action including strike), cannot mean that the sheer existence of any protection under this Charter right ("Schutzbereich") hinges on whether a Member State implementing Union law recognises that right at all and if so, to what extent. Regarding Article 1 (2), any attempt to construe it as merely declaratory could certainly not end in qualifying all articles of Title IV as "principles", since the nature of a subjective right is incontestable at the very least for Article

[141] The Council submitted a draft protocol to this effect to the European Council on 11 October 2011, on which consultation of the European Parliament and the Commission pursuant to Article 48 (3) TEU are ongoing.
[142] Joined cases C-411/10 and C-493/10, N.S. and Others, [nyr], points 116-122.
[143] The Commission had argued the same in that case, but it has not yet taken any position on the remainder of the Protocol.
[144] Most commentators lean towards a reading as declaratory, or at least minimising the importance: M. Dougan, 45 CMLR (2008), p. 617, 665 et seq.; J.-P. Jacqué (footnote 12), p. 2, 6; J. Kokott / Chr. Sobotta (footnote 78), p. 270 et seq.; I. Pernice, in: S. Griller / J. Ziller (eds.), The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?, 2008, p. 235, 244; J.-C. Piris, The Lisbon Treaty, 2010, p. 160 et seq.; B. Schima, in: W. Hummer / W. Obwexer (eds.), Der Vertrag von Lissabon, 2009, p. 334 et seq.

28, as recognised by the Court in *Viking* and *Laval*.[145] Article 1 (2) could thus only be deemed declaratory if the expression "*justiciable* [rights]" referred to something else than the possibility to seek judicial protection for a subjective right in a court.

That said, if Articles 1 (2) and Article 2 were recognised to have constitutive legal effects, such effects may rarely become tangible in practice, since the Charter rights concerned should normally apply in national law only where EU legislation concretising them is implemented, and that legislation of course applies to Poland and the United Kingdom as to any other Member State.[146] What is more, the two Member States remain fully bound by fundamental rights as general principles of Union law under Article 6 (3) TEU, as is made clear by the 12th recital of that protocol (*"by Union law generally"*). The Court could thus mitigate the practical effects of the Protocol by deriving its replies to national courts from those Member States from general principles of law. This "detour" may in practice lead to at least *similar* results as the direct application of the Charter in relation to other Member States. Some appear to go even a step further: taking the postulation of legal continuity in Recital 6 of Protocol n° 30 to mean that whatever the Charter provides in its 50 articles was already part of the Union's general principles of law in force before 1 December 2009, one could conclude that, even if Protocol n° 30 limited the application of the Charter as such, *identical* rights apply by virtue of Article 6 (3) TEU and without the restrictions of the Protocol.[147] A safe expectation is that the Court will avoid sweeping statements on this matter in the foreseeable future.

Finally, a further protocol that might soon become primary law will take over the provisions of the decision of the Heads of State or Government of 19 June 2009 on the concerns of the Irish people on the Treaty of Lisbon[148]. Article 1 of that decision states in the relevant part that nothing in the Treaty of Lisbon attributing legal status to the Charter affects in any way the scope and applicability of the protection of the right to life, the protection of the family and the protection of the rights in respect of education in certain quoted provisions of the Constitution of Ireland. This article can more easily be understood as purely declaratory in nature – an understanding that would also correspond to the declared intention of its authors:[149] as seen above, Union fundamental rights apply to national acts in principle cumulatively with national fundamental rights and will anyway hardly ever cause such national rights to be set aside by virtue of primacy. Should such an extremely rare case arise

[145] See also A. Rosas / L. Armati (footnote 21), p. 160.
[146] See Jacqué and Kokott / Sobotta, loc. cit.
[147] J.-P. Jacqué (footnote 12), , p. 2, 6; I. Pernice, in: S. Griller / J. Ziller (eds.), The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?, 2008, p. 235, 244.
[148] The decision figures in Annex I to the conclusions of the European Council of June 2009. The Council submitted a draft protocol, taking over the provisions of this decision, to the European Council on 11 October 2011, on which consultation of the European Parliament and the Commission pursuant to Article 48 (3) TEU are ongoing. We do not go into the discussion on the current legal value of the decision, which follows the precedent of the decision of 1992 that paved the way to Denmark's ratification of the Treaty of Maastricht.
[149] See point 5 (v) of the conclusions of the European Council of June 2009: "The Protocol will in no way alter the relationship between the EU and its Member States. The sole purpose of the Protocol will be to give full Treaty status to the clarifications set out in the decision to meet the concerns of the Irish people. Its status will be no different from similar clarifications in Protocols obtained by other Member States. The Protocol will clarify but not change either the content or the application of the Treaty of Lisbon."

in practice, the Charter would not create a *new* situation as compared to Community fundamental rights before 1 December 2009, since the Charter only makes visible rights that existed before.

4. The questions of direct effect and horizontal effect of the Charter and of collisions of rights

This section provides replies to questions 3 through 6 and question 8 of the Questionnaire.

4.1. Rights versus principles: Article 52 (5)

It appears useful to start this chapter with a brief discussion of the distinction between "rights" and "principles", because that distinction pre-conditions the further questions of this chapter. When we analyse to which extent the classic concept of direct effect (vertical or horizontal) – understood as the possibility for an individual to invoke a norm of Union law as the only source of a right which would not exist under national law[150] – can apply to Charter norms, it seems that this very question presupposes that a Charter norm lays down a subjective right, not a "mere" principle.[151]

The distinction between rights and principles[152] in Article 52 (5) has not yet been explicitly addressed by the Court.[153] Several authors have underlined the difficulty, or even questioned the very possibility, of drawing such a distinction for each Charter article in abstract.[154] On the other hand, in the Charter's genesis the distinction was the most important element of compromise that made a consensus possible on the Charter's comprehensive set of provisions on economic and social matters.[155] The distinction was already developed by the first Convention in Article 51 (1), which drew inspiration especially from the French concept of "justiciabilité normative" and from Article 53 (3) of the Spanish Constitution. The second Convention agreed to insert Article 52 (5), a key element of the compromise with the Charter-sceptic camp crafted in its Working Group II, in order to clarify the legal effects of the distinction, and its Praesidium accepted to expressly designate some Charter articles as principles rather than rights. The Commission, and following it the Union legislator, has also

[150] See A. Rosas / L. Armati (footnote 21), p. 63.
[151] K. Lenaerts, 82 Rev. trim. dr. h. (2010), p. 217, 224; M. Safjan / P. Miklaszewicz, 3 European Review of Private Law (2010), p. 475, 480; A. Rosas / L. Armati (footnote 21), p. 159; similarly (no direct effect for the "Leistungsbereich"), H. Sagmeister, Die Grundsatznormen in der Europäischen Grundrechtecharta, 2010, p. 291.
[152] Obviously, the concept of "principles" in Article 52 (5) must not be confused with that of general principles of Union law.
[153] In case C-282/10, Dominguez, [nyr], AG Trstenjak qualifed Article 31 (2) on paid annual leave as a right rather than a principle. The Court did not rule on the matter.
[154] S. Prechal, in: Liber Amicorum A. Kellermann, 2004, p. 177; A. Rosas / L. Armati (footnote 21), p. 160; M. Safjan / P. Miklaszewicz, 3 European Review of Private Law (2010), p. 475, 480.
[155] On the genesis and sources of inspiration in national systems, see Braibant, (footnote 5), p. 44; Independent Experts' Commentary (footnote 78), p. 405 et seq.; Th. v. Danwitz / K. Paraschas (footnote 27), p. 9 et seq.; H. Sagmeister (footnote 151), p. 35, 77 et seq.; J. Schmidt, Die Grundsätze im Sinne der EU-Grundrechtecharta, 2010, p. 124, 134 et seq.; C. Ladenburger, in: Kölner Gemeinschaftskommentar (footnote 73), Art. 52, points 6 et seq.; same author (footnote 6), points 45 et seq.

acknowlegded the distinction in its model "Charter recital". All this strongly suggests that the Court should take the distinction seriously, despite the incontestable difficulties of interpreting that Article 52 (5) on which we can only offer a few remarks in this report.

The task of identifying which Charter provisions are "mere principles" rather than rights is one the two Conventions deliberately chose to leave to the Court because they could not have reached consensus on a list. There is a pragmatic and a more systematic way of tackling the challenge: Pragmatically, one can base oneself, first and foremost, on the express qualification by the Praesidium of articles as principles, in its Explanations on Article 52 but also on individual substantive Charter provisions[156]. This leads to qualifying as principles Articles 25, 26, 34 (1) and (3), 35 through 38. But the guidance given by the Explanations is not without ambiguity, since they state that *"in some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g., Articles 23, 33, 34."* May this sentence, which came about in a difficult negotiation with some Convention members[157], be understood as relativising again the whole distinction and leaving the door open to derive a core subjective right from *any* of the Charter provisions? For our part, we prefer to understand it as pointing only to articles which include separate norms.[158]

While the Court might, in a first phase at least, choose for the pragmatic approach and avoid qualifying other Charter provisions as principles, academia should develop the necessary systematic arguments and dogmatic paradigms apt to solve the hardest cases of doubt in the Charter, such as Articles 18, 22, 23, 27 and 32 (2). During the Convention debates, two paradigms appeared to influence the actors: the antagonism between *subjective* rights and principles as purely *objective* norms addressed to the State, and the paradigm of principles as being norms needing legislative implementation. Both paradigms provide useful indications but also have their limits: some articles qualified as principles, such as Articles 36 through 38 and 33 (1) are drafted as objective norms avoiding even the word "right" or any reference to the individual. But that should not mean that other articles avoiding the word "right" cannot create rights; rather one needs to look also at the other classic techniques of interpretation to figure out whether a subjective right of any kind is conferred. The paradigm of principles as needing legislative implementation, which is echoed in Article 52 (5) itself, is no doubt important; and yet one should not forget that most fundamental rights provisions, including classic rights, are drafted vaguely and often call for some positive action by the legislator. In

[156] The Praesidium of the second Convention not only added Explanations on Article 52 (5), but also cleansed the whole text of the first version of the Explanations of any "non-technical" use of the word "principle". The aim was to ensure that wherever the Explanations speak of a "principle" (not of "general principles of law"!), this refers to the distinction made in Article 52 (5). Unfortunately, very few isolated cases of doubt remain (see the Explanations to Article 3 and to Article 14), and the same exercise of "terminological cleansing" could not be done for the text of the Charter itself: See the title of Article 49 mentioning "principles" although the article clearly guarantees rights that largely correspond to those of the ECHR. Nor does the "principle of equality" in Article 23 necessarily refer to Article 52 (5).

[157] For details see C. Ladenburger, in: Kölner Gemeinschaftskommentar (footnote 73), Art. 52, point 101 and footnote 282.

[158] I.e.: Article 23 is a right to equal treatment in the areas of employment, work and pay, derived from Article 157 TFEU and Directive 76/207; outside those areas it is a principle similar in nature to Article 3 TEU and Article 8 TFEU. Article 33 contains a principle in its paragraph 1, and a right in paragraph 2. Article 34 (2) is a right, paragaphs 1 and 3 are principles.

any event, in absence of guidance by the Explanations, one will have to resort to all classic methods of interpretation taken together – the wording of the Charter norm concerned, its systematic place, its genesis in the first Convention, its purpose and its nature including the degree of legislative concretisation it calls for.[159]

It is no less delicate to determine the precise legal effects of the distinction. Only one point is clear: Article 52 (5) 2nd sentence does not exclude any justiciability of principles, but confirms that they should be applied by courts not only as interpretive tools but even as standards of legality of legislative and executive acts. Here, the second Convention did not follow the model of Article 45 of the Irish constitution, excluding any justiciablity, but stayed more closely to the Spanish model. But what, then, is the "minus" in justiciability of principles as compared to rights? More precisely, the question has been raised whether the formula "such acts" should be read as referring *only* to those acts *specifically adopted* in order to implement a Charter principle. That would mean that, e.g., social principles in the Charter could not be applied by the courts when interpreting or judging a Commission decision on State aids or a Council act of "economic governance" (under Articles 121, 126 or 136 TFEU), or that the principles of environmental or consumer protection would be irrelevant in litigation on an act of the common agricultural policy. These examples show that such a literal reading would produce absurd results and go against the intent of the initiators of the concept in the first Convention[160]. Instead, the word "such [acts]" should be read merely as a generic referral to the *categories* of legislative or executive acts in the first sentence of the paragraph.[161] The "minus" in justiciability should be construed as implying that principles, contrary to subjective rights, cannot serve to establish standing in Union or national courts nor give rise to damage claims under Article 340 (2) TFEU, are not the object of the guarantee of judicial protection in Article 47 and cannot as such be invoked with direct effect before a national judge to found any claim that would not exist under national law. Nor can they be relied upon to claim in court that positive action should have been taken by the Charter's addressees. But where a litigant has standing under a different ground to challenge a legislative or executive act, then Article 52 (5) leaves open the possibility for the judge to resort to a principle in order to strike down that act.

4.2. Vertical direct effect of Charter rights

It is crucial to distinguish between "vertical" and "horizontal" direct effect. The latter is more problematic than the former and will be discussed further below.

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[159] For details, see H. Sagmeister (footnote 151), p. 350 et seq.; J. Schmidt (footnote 155), p. 212 et seq.; see also K. Lenaerts, 82 Rev. trim. dr. h. (2010), p. 217, 225 et seq.; C. Ladenburger, in: Kölner Gemeinschaftskommentar (footnote 73), Art. 52, points 96-101.

[160] Braibant, (footnote 5), 2001, p. 46; J.-P. Jacqué (footnote 12), p. 2, 6.

[161] This seems to be the approach of the Court in Joined Cases C-175/08, C-176/08, C-178/08, C-179/08, Abdulla and Others, [2010] ECR I-1493, point 54. It is supported by most commentators, see e.g., S. Prechal (footnote 154), p. 177; K. Lenaerts / P. Van Nuffel, EU Law, 3rd ed., 2011, point 22-28; Independent Experts' Commentary (footnote 78), p. 407; P. Craig, The Lisbon Treaty, 2011, p. 220. For detailed analyses on the question of legal effects and justiciability of principles: H. Sagmeister (footnote 151), p. 181 et seq.; J. Schmidt (footnote 155), p. 198 et seq.

At first sight, it appears almost inherent in the concept of fundamental rights "addressed to Member States" (Article 51) that they should be capable of having direct vertical effect, i.e. being invoked against national authorities in litigation before national judges. However, the first question must always be whether there is at all some Union law, other than the Charter itself, to be implemented. The figure of direct vertical effect of a Charter right may not be used to circumvent that threshold requirement of Article 51 (1).

At a closer look, one needs to distinguish carefully according to the basic functions of fundamental rights. All Charter rights should by definition have direct vertical effect to the extent that they are invoked with their "status negativus", i.e. as protection against a Member State act (implementing Union law) intruding into the invididual's sphere of rights. Likewise, the equality rights of the Charter may be invoked against a Member State act that implements Union law in a discriminatory fashion. Things are less obvious where positive obligations might be at stake. Here, it appears impossible to generalise. At first sight, the preliminary requirement of a Member State implementing act in Article 51 (1) suggests that the various social rights of the Charter cannot be invoked against the State as a basis for freestanding social benefit claims. This does diminish their value – they can be highly relevant, e.g., when it comes to interpreting, in a Charter compatible manner, social legislation of the Union and their transposition and application at national level. But one should not rule out categorically any possibility of invoking a Charter right as requiring a particular positive action. For example, under Article 47 (3) a litigant might be able to claim legal aid, even in absence of national rules granting such aid, where necessary for him to enforce a right he derives from Union law.[162] In some instances, it might not be easy to distinguish between acts and omissions in implementing Union law and hence, between positive and negative effects of the Charter; for instance, where an authority, which implements the European Asylum system vis-à-vis asylum seekers, fails to ensure satisfactory sanitary conditions, to admit minors to schooling or to provide any places for worship, etc. That said, such cases can often also be solved by an interpretation of the applicable Union legislation in conformity with the Charter.

4.3. Horizontal direct effect of Charter rights

The question whether its rights can be invoked with direct effect in a legal relationship between two private parties is amongst the most debated general questions of the Charter.[163] Not only is the question already highly controversial in general fundamental rights doctrine at national level, where constitutional traditions vary greatly. At Union level, the classic problems of separation of powers and of distinction between the State and private sphere of freedom, known from the national debate, mingle with issues of division of competences between the Union and the Member States, in particular as regards social policy, and of the limited scope of the Charter. If Article 51 (1) limits the legal effects of Charter rights to the Union institutions and bodies, and to Member States only when implementing Union law, without mentioning private individuals, this begs the question whether granting horizontal direct effect to Charter rights would be at odds with a conscious decision of the Masters of

[162] Cf. the judgment in case C-279/09, DEB, [nyr], which did not have to rule expressly on direct effect.
[163] See in particular A. Rosas / L. Armati (footnote 21), p. 160 et seq.; Th. v. Danwitz (footnote 80), p. 19, 29 et seq.; P. Craig, The Lisbon Treaty, 2011, p. 206 et seq.

the Treaties. Advocate General Trstenjak has indeed recently reached this conclusion in her opinion in the case *Dominguez*.[164]

The problem can be appropriately studied by referring to four emblematic cases: *Mangold*, *Kücükdeveci, Viking* and most recently *Dominguez*[165]. Many authors refer to horizontal direct effect of the Charter to characterise any situation in which a Charter norm is invoked in litigation between two private parties. When looking more closely at those cases, it becomes clear that different settings need to be carefully distinguished:

4.3.1. Direct horizontal effect *stricto sensu* is at issue where the litigation concerns only the private law relations between two individuals and there is no act of the State whose fundamental rights-conformity could be at issue. Imagine, first, an easy case: a labour law dispute where the employee, invoking directly Article 31, requests his employer to ensure a particular working condition for which there is no basis in national labour law and there was no EU directive requiring such a condition to be created. Here, direct horizontal effect *stricto sensu* should indeed be excluded. It would be in conflict with Article 51 (1). To be sure, the wording of Article 51 (1), and the discussion in the first Convention leading to it, may not necessarily be taken as a conscious decision to exclude any horizontal direct effect; the mood of the Convention was rather to leave this well-known but controversial doctrinal question to future case law and academic discourse. But Article 51 (1) would simply be circumvented if each national civil judge could directly apply Charter norms to a case having no nexus to *other* Union law being implemented and thus, belonging entirely to the sphere of competence of the Member State. Thus, in reality it suffices to conclude that the Charter is inapplicable, even before the question of direct effect arises.

4.3.2. The case becomes more difficult if there is a directive requiring the working condition to be enshrined in national law but this has not been done and there was complete inaction on the part of the legislator. Here, two positions could be defended: a more restrictive one would be to exclude again *a priori* any possibility of direct effect, on the ground that there was no implementing act by the Member State bound by the Charter pursuant to Article 51 (1) and hence, no authority for the judge to apply the Charter since he may not add the private employer as a third category of addressees not mentioned in Article 51. Or one could defend that there is always *some* residual national law applicable to the litigation, coming under Article 51 (1) because of the directive, and that the judge needs to interpret that law in the light of the Charter right invoked, if necessary by applying general notions of civil law such as *boni mores*. If that line was followed, the next question still to be asked would be whether the concrete Charter norm is unconditional and sufficiently precise to have direct effect (see point 4.3.5. below, for Article 31).

4.3.3. The next setting is that of the *Viking* case, in which the Court held a trade union bound to respect the freedom of establishment of a private shipping company, and at the same time recognised the union's right to strike as needing to be balanced with the fundamental freedom of the company. Has the Court thereby not admitted horizontal direct effect of the right to

[164] See also Th. v. Danwitz / K. Paraschas (footnote 27), p. 18 et seq.
[165] C-282/10, Dominguez, judgment of 24 January 2012, [nyr].

strike, as now guaranteed by Article 28[166]? It has, but in a specific situation and merely as the flip-side of granting direct horizontal effect to a fundamental freedom of the Treaty against trade unions. That was the bold step of *Viking*; once it was taken, it was only natural that the union's colliding right to strike was also taken into account in order to determine what the fundamental freedom required *in casu*. There is thus no circumvention of the principle expressed in Article 51 (1): the dispute was not in the realm of national competence, but governed by a fundamental freedom of the Treaty applying horizontally, and Article 28 was merely applied as part of the interpretation of that fundamental freedom.

4.3.4. Mangold, *Kücükdeveci* and *Dominguez* are yet different. The common factor to these cases is that there is a concrete piece of national legislation, governing the relationship between two private parties, whose conformity with the Charter was raised. Therefore, they do not present an issue of direct horizontal effect *stricto sensu*. Rather, if the national legislation at issue constitutes an act of implementation of Union law, then Article 51 can be applied straightforwardly and the legislation be scrutinised against the standards of the Charter. In *Mangold* and *Kücükdeveci*, such scrutiny led the Court to find the national legislation at issue in conflict with the prohibition of discrimination on account of age and to require its setting aside as a consequence of the principle of primacy which had an "exclusionary effect".[167] It is true that, in both cases, leaving unapplied a discriminatory national rule indirectly goes to the detriment of the employer, i.e. another private person, but that does not mean that the employer was made an addressee of a fundamental right. Whether the Court rightly decided the threshold question that the national rule fell under Article 51 (1) is another question, not to be discussed here.

4.3.5. In the *Dominguez* case, the question was raised whether the approach of *Kücükdeveci* can be transposed to the context of the right to paid annual leave, by arguing that a national law is contrary to Directive 2003/88 and that this directive merely concretises Article 31 (2). In its judgment, the Court did not mention Article 31 (2), but it did refuse to attribute horizontal direct effect to the directive despite pleadings invoking Article 31 (2).[168] AG Trstenjak had dealt with the question explicitly and extensively, advancing a strong argument that a transposition of *Kücükdeveci* would be misplaced, as it would ignore the fundamentally different character of the social right in Article 31 (2) (if it is a right, not a mere principle) as compared to the equality rights, including the right not to be discriminated against in Article 21 (2)[169]: Whereas the normative content of the equality right in Article 21 (1) and the "concretising" Directive 2000/78 is essentially the same, coming down to the test whether differences of treatment on grounds of age are objectively and reasonably justified by a legitimate aim, the social right to annual paid leave by nature requires an important degree of legislative concretisation. Directive 2003/88 is one possible concretisation of Article 31 (2)

[166] Rosas / Armati, loc. cit., p. 161.
[167] On the distinction between "exclusionary " and "substitutionary" direct effect, see K. Lenaerts / J. Gutierrez-Fons (footnote 79), p. 1640; AG Bot, in: C-555/07, Kücükdeveci, [2010] ECR I-365, points 63-64.
[168] See also now pending case C-317/11, Reimann.
[169] AG Trstenjak, in: C-282/10, Dominguez, [nyr], points 145 et seq. See also K. Lenaerts / J. Gutiérrez-Fons (footnote 79), p. 1646, and M. Safjan / P. Miklaszewicz, 3 European Review of Private Law (2010), p. 475, 479, stressing differences in nature between fundamental rights.

but it cannot be considered as the only possible one; it would be thus wrong to "elevate" the precise content of the directive up to the level of primary law by importing it into Article 31 (2). In other words, whereas the prohibition of discrimination on account of age was unconditional and sufficiently precise to produce direct effect in *Mangold* and *Kücükdeveci*, the right to paid annual leave does not fulfill these classic conditions: Article 31 (2) only lays down the *"if"* of the right to paid annual leave, but not the *"how"* of that right; all the conditions and modalities necessary for according a quantified concrete claim for annual leave can only be set by the competent legislators at Union and national level. This conclusion is confirmed by another consideration: if, in a case such as *Dominguez*, the Court (and following it, the national judge) applied Article 31 (2) to leave unapplied merely one element of the French law on annual leave – i.e. that requiring a minimum annual work time of 10 days – while considering applicable the rest of the law and thus directly granting "X" days of leave, they would in reality apply a legislative torso, in disrespect of the legislator's sole responsibility for setting the appropriate level of annual leave. Article 31 (2), applied directly, would go beyond an "exclusionary direct effect" and instead acquire a "substitutionary" effect. The Court could be critizised as assuming a legislative role, raising questions of distribution of powers between the Union and its Member States and of institutional balance within the Union system.[170]

4.4. Dealing with colliding rights

This section examines how Union institutions contribute to an appropriate balance that needs to be found between colliding fundamental rights in many legal situations. Besides fundamental rights *stricto sensu*, the analysis includes also the classic fundamental freedoms of the Treaty and their balancing with counterveiling rights, given the importance this constellation has in Union law. Its emphasis is on instances where the Union legislator acts to strike a balance between colliding rights. This is followed by a brief look at the way the Court intervenes, interacting with national courts, to find the balance in absence of choices made in Union legislation.

4.4.1. The role of the Union legislator in balancing colliding fundamental rights and freedoms

It is by definition a central task of legislation to strike an appropriate balance between conflicting rights and interests of individuals, many of which ultimately benefit from some constitutional protection. With the gradual expansion of Union competences and policies, the Union legislator has also increasingly assumed that role. Indeed, if one looked across the board at the output of the European Parliament and the Council, one would no doubt find many cases of policy choices which, at a closer look, may also be seen as reconciling colliding fundamental rights and freedoms. It would be impossible, in this report, to engage in an exhaustive stock-taking. Instead, we look at three policy areas providing examples of

[170] See C-161/11, Vino II, [nyr], point 39, C-101/08; Audiolux, [2009] ECR I-9823, points 61-63, and AG Trstenjak's Opinion, point 107, for the Court as being part of the institutional balance. See also AG Mazak, in: C-411/05, Palacios de la Villa, [2007] ECR I-8531, point 138; AG Ruiz-Jarabo Colomer, C-55/07 and C-56/07, Michaeler and Others, [2008] ECR I-3135, points 21-25, in relation to the Mangold judgment (C-144/04, [2005] ECR I-9981).

actuality, i.e. legislation recently enacted, proposed or interpreted by the Court, that may illustrate *pars pro toto* some techniques and trends.

4.4.1.1. Social rights and labour law

Ultimately, all the Union's social policy legislation can be analysed as operating some sort of balancing between social rights and principles, as now reflected in particular in Title IV of the Charter, and counterveiling rights including the freedom to conduct a business. The issue of annual paid leave, as arising in the case *Dominguez* already discussed above, is topical. Two other areas of actuality deserve a special mention:

One is the EU's non-discrimination legislation, passed since 2000 in implementation of ex-Article 13 EC (now Article 19 TFEU), and which has since given rise to an impressive body of case law. This legislation is rightly given much prominence in the Questionnaire: the right to be effectively protected from discrimination on certain accounts may collide with freedom of contract but also other rights such as freedom of religion or of expression. Here, by far the most important choice made by the Council is on *which* areas of (national) law should be covered *at all* by the EU regime, and hence by the interpretive and enforcement competences of the Commission and the Court: While Directive 2000/78, on five grounds of discrimination, is limited to the areas of employment and occupation (though defined widely in its Article 3), Directive 2000/43 reaches out much further, for the sole grounds of race or ethnic origin, to cover also social protection, including social security and healthcare, social advantages, education, and access to and supply of goods and services available to the public, including housing. The importance of that choice – to act or not to act – is also illustrated by the fate of the Commission's proposal of 2008 to extend the EU regime on the other five grounds of discrimination essentially to the same scope as in Directive 2000/43: it meets with persistent deadlock in the Council, even though the Commission crafted some particular exclusions of scope or "without prejudice"-clauses to take into account the most sensitive situations requiring a balancing of rights[171]. Conversely, the normative content of these directives is not much more precise than that of the general principle of non-discrimination: for the main part they leave courts with the task of applying the classic test whether differences of treatment are objectively justified by a legitimate aim, appropriate and necessary.[172]

EU legislation has also been key as regards the issue of posting of workers, which requires a balancing between the fundamental freedom to provide services with that of the protection of workers' rights and of rights to collective bargaining, in the State where the workers are posted. Directive 96/71, while not harmonising the level of social protection of such workers in the host State, does coordinate Member States laws in that respect. In the much debated cases *Laval* and *Rüffert*, the Court has interpreted it as providing a framework laying down expressly, for certain matters including the level of wage, the degree of protection for posted

[171] COM (2008) 426. See in particular Article 3 paragraphs (1) in fine and (2) to (4).

[172] See, e.g., Article 2 (2) (b) (i), Article 6 (1) of Directive 2000/78. However, see also specific clauses addressing particular fundamental rights: Article 4 (2) on occupational requirements based on religion or belief; Article 5 on reasonable accomodation of disabled persons.

workers which the host State may require to be observed and not allowing Member States to require a higher pay as a more favourable condition of employment.[173] The directive, while leaving a large margin to Member States in setting the substantive standards, does require that this be done through a legal regime ensuring coherence, legal certainty and transparency for cross-border service providers; this sets limits to the powers of social partners.[174] *Laval* and *Rüffert* – unlike the *Viking* case - thus stand for situations where the Court, rather than having to proceed itself with a direct balancing between fundamental freedoms and social rights at primary law level, can rely on certain choices of the EU legislator who in turn has only set a framework for national legislation on social protection.[175]

4.4.1.2. Internal market and data protection

A closer look would probably reveal that internal market legislation abounds with examples of exercises of legislative balancing of fundamental rights and freedoms.[176] The challenge here is to recognise them as such, since they may often be inconspicuous. Take the example of the Community code on medicinal products regulating public information on such products and banning their advertisement. In two recent cases, the Court could limit itself to interpreting the directive without even mentioning fundamental rights. But it was informed by its Advocates General who pointed out how the legislator had weighed up counterveiling fundamental rights, – i.e. freedom of expression (including commercial speech), freedom to receive information and the freedom to conduct a business vs. the "right to health".[177]

In the coming years, the "digital internal market" is prone to become a major reference field for our topic, in which an increasing challenge will be to find the right balance between the protection of intellectual property rights – expressly highlighted in Article 17 (2) – and fundamental rights invoked by businesses and users wishing to reap more fully the potentials of the internet: the freedoms to receive and impart information and to conduct a business, but sometimes also the right to privacy and data protection. Already existing directives in this area contain choices of balancing of these rights, on which the Court was recently able to rely when censuring court injunctions requiring internet service providers and hosting providers to install a wide-ranging system of filtering of electronic communications, as incompatible with these directives read together with fundamental rights.[178] Two further examples may be found

[173] C-341/05, Laval, [2007] ECR I-11767, point 80; C-346/06, Rüffert, [2008] ECR I-1989, point 33.
[174] I.e. through law, regulations or administrative provisions or generally applicable collective agreements (Article 3 (1) and (8) of the Directive), which were lacking in both cases, see C-341/05, Laval, [2007] ECR I-11767, points 81, 83, 108, 110 and C-346/06, Rüffert, [2008] ECR I-1989, points 24-30.
[175] J.-P. Jacqué (footnote 12), p. 2, 10, observing that, in C-341/05, Laval, [2007] ECR I-11767, rather than against the employing undertaking, the workers should have protested against the Swedish authorities who could have enacted minimum wage legislation.
[176] An often cited "classic" is the "strawberry" Regulation 2679/1998. But it is not treated in depth here, because its content is in reality limited to a procedure, whereas on substance, it in no way concretises the balancing between free movement of goods and fundamental rights such as collective action or freedom of association or of speech, which Member States are left with in incidents covered by the regulation.
[177] C-249/09, Novo Nordisk, [nyr] and AG Jääskinen, points 47-50; C-316/09, MSD, [nyr] and AG Trstenjak, points 58, 59, 79-86. – The "right to health" is probably a "mere" principle in the Charter, but there is also the right to life and physical integrity.
[178] C-70/10, Scarlet Extended, judgment of 24 November 2011, [nyr]; C-360/10, SABAM, judgment of 16 February 2012, [nyr].

in the Commission's new "Digital Agenda for Europe.[179] The Commission has already proposed a directive on "orphan works"[180]: it would directly permit some limited uses of such works after a due diligence search for the unknown or unlocated rightholder and allow Member States to authorise further-reaching uses under certain conditions protecting subsequently emerging rightholders. This proposal stands for a rather typical combination model: in part, it operates itself a balancing between the above-mentioned rights, but it allows the Member State legislator to complete the balancing exercise. The second example, announced in the Digital Agenda and much more important in balancing these same rights, will be the proposal for a directive on collective rights management.[181]

A last suitable example of actuality is the Union's data protection legislation. Originating from an internal market logic in Directive 95/46, the Lisbon Treaty has now explicitly recognised this as a case where the legislator is tasked to implement a special European fundamental right.[182] The Commission's brand-new legislative proposals[183] will now open a major "construction site", at the heart of which lie multiple exercises of balancing between the right to data protection and various other fundamental rights and freedoms: the freedom to receive information (especially that of internet users), the freedom to provide services across Europe (again, especially in the internet, and without being unduly hampered by legal requirements and supervision of 27 Member States), the right to conduct a business, freedom of expression and of the arts (the "press privilege"[184]), workers' rights in the context of employment and collective action[185], freedom of association of trade unions and political parties (to collect "sensitive data"[186]), and freedom of religion as well as collective rights and status of churches and religious organisations under national law[187]. What makes this example particularly interesting for our topic, is that the Commission has proposed a general *regulation* to replace current Directive 95/46. This change of form, for which the Commission has made a forceful case[188], will clarify the architecture of rights-balancing in this field: Whereas so far national transposition legislators may have been induced to complement and interpret the directive, to cater for specific situations, traditions and sensitivities, this will now be possible only where specifically authorised by the proposed

[179] See the Commission's communication announcing this agenda, COM (2010) 245, and also the communication on "A Single Market for Intellectual Property Rights" (COM (2011) 287).
[180] COM (2011) 289; "Action 2" of the Digital Agenda. One might regret that in this case, the explanatory memorandum and the recitals do not make visible the balancing exercise operated in this proposal.
[181] "Action 1" of the Digital Agenda. The proposal has not been issued yet at the time of writing.
[182] Here, we do not treat the rules for data protection by the EU institutions themselves (Regulation 45/2001), nor the EU's regime for access to its own documents (Regulation 1049/2001). While these regulations also contain significant elements of balancing of fundamental rights, they are limited to the EU's own institutional sphere and have little impact on the law of the Member States.
[183] See in particular COM (2012) 11: General Data Protection Regulation (and also COM (2012) 10: Directive on data protection in the area of criminal law enforcement, which will not be cited further here). Note that recital 139 of the proposal expressly highlights the aspect of balancing between colliding rights.
[184] Recital 37 and Article 9 of Directive 46/95; recital 121 and Article 80 of the proposed regulation.
[185] Article 82 of the proposed regulation.
[186] Article 8 (2) (d) of Directive 95/46 and Aricle 9 of the proposed regulation.
[187] Article 85 of the proposed regulation.
[188] See the explanatory memorandum of the Commission's proposal (COM (2012) 10).

regulation.[189] The burden of balancing will to a large extent rest on the Union legislator itself, on the one hand, and on the Court as well as national authorities and courts who will apply directly the – often quite general – concepts of the regulation, on the other hand. However, at a closer look this change of form is more clarifying than systemic, since already Directive 95/46 is, in principle, a full harmonisation[190]. Furthermore, even in the regulation the Commission does propose specific mandates to national legislation to reconcile colliding rights by derogations or exemptions from the regulations or special rules adding to it[191]. The practical difference is that these will now have to take the form of special laws rather than elements of general data protection laws, which would have to be abrogated within the scope of the proposed regulation.

4.4.1.3. Judicial cooperation in civil matters

A last area of interest is provided by recent Union acts and proposals on mutual recognition and enforcement of civil decisions. Here, the main balancing exercise sees variants of the same fundamental right on both sides, Article 47. It protects, on the one hand, the right of a plaintiff who has won a title in one jurisdiction to see it speedily enforced in another, within Europe as a single area of justice. On the other hand, the question arises to which extent Article 47 should entail a right of the defendant to contest such enforcement in case of disrespect of fair trial or rights of defence. Further rights come into play in certain situations. EU legislation has retained different choices according to the fields concerned.

The "Brussels I" regulation 44/2001 concerning decisions in civil and commercial matters still offers the possibility to contest recognition and enforcement in the classic "exequatur" procedure on the ground of violations of public policy, which the Court has interpreted as encompassing manifest violations of the rights to defence.[192] In its recent proposal for reform of "Brussels I"[193], the Commission has proposed to abolish the costly and burdensome "exequatur" requirement and the public policy exception, and to create instead a special right to apply for a refusal of recognition or enforcement based on a more precisely defined ground of disrespect of fair trial. This will move the balance towards plaintiffs' rights of effective access to justice while still ensuring an appropriate protection of defendants. Interestingly however, the Commission proposes to maintain, for the moment, the "exequatur" system for judgments in defamation cases, given their sensitivity and the diverging approaches chosen by Member States in how to ensure compliance with the various fundamental rights affected, such as human dignity, respect for private and family life, data protection and freedom of expression and information. In this particular area, judges seem thus left with some leeway to

[189] See the classic case law prohibiting repetition of a regulation in national law: case 34/73, Variola, [1973] ECR 981; often confirmed since, see e.g., C-4/10 and C-27/10, Bureau national interprofessionnel du Cognac, [nyr]. The criticism of this change of form by J. Masing, Süddeutsche Zeitung of 9 January 2012, takes insufficient account of some features of the Union's comprehensive system of judicial protection, the degree of convergence between the Charter and national fundamental rights and the possible coexistence of EU and national fundamental rights regimes where the proposed regulation leaves margins of appreciation to Member States.
[190] C-468 and 469/10, ASNEF and FECEMD, [nyr].
[191] Articles 80, 82 of the proposed regulation.
[192] C-7/98, Krombach, [2000] ECR I-1935; C-394/07, Gambazzi, [2009] ECR I-2563.
[193] COM (2010) 748.

take into account the special way of their own legal system in balancing colliding rights, when hearing public policy objections.

In stark contrast to "Brussels I" (present or future), regulation 2201/2003 ("Brussels II a") has made a different and particularly resolute choice in balancing colliding rights when it comes to child abduction cases. As meanwhile confirmed by the Court[194], it gives full power to settle the case to the court of the country of last legal residence of the child before the abduction, and orders an automatic enforcement of that court's decision by the courts of the country from where the child has been abducted. The rationale is to deter child abductions. This justifies that, unlike under Brussels I, the abducting parent who lost a case in the country of last residence has no opportunity of a "second judicial check" of respect of his fundamental rights or even of the right of the child to be duly heard. The solution reduces procedurally the protection of the rights of one parent and occasionally of an individual child, in the superior interest of children in general. Nonetheless, the overall solution is compatible with the Charter, since all fundamental rights involved can and must be fully safeguarded by the courts of the last legal residence.[195]

Contrasting "Brussels I" and "Brussels IIa" leads, finally, to a more general question for the future, going beyond the context of colliding rights: to which extent can, or should, the EU legislator establish systems of mutual trust in national action implying intrusions into fundamental rights such as personal liberty – without allowing a double check of rights compliance in both Member States ? This question arises in three important EU regimes: mutual recognition of custody decisions, the execution of European arrest warrants and the transfer of asylum seekers under the "Dublin II" regulation. In the first two cases, the legislator has given quite different answers, and in the third the two European Courts had to fill a legislative lacuna[196]. Differentiated answers may well be justified, but a more systemic reflection would seem in place on the overall question.

4.4.2. The role of the Court and its dialogue with national courts, in balancing colliding fundamental rights and freedoms

To the extent that choices are not made by the EU legislator itself, the Court and national courts, cooperating under the preliminary reference procedure, need to ensure a fair balance between colliding rights, be it by scrutinising acts of national authorities or by setting the balance themselves in litigation between private parties. This can be particularly delicate for the Court: a balance must not only be found between colliding rights, but also between the respective remits and responsibilities of the intervening European and national levels.

[194] C-195/08 PPU, Rinau, [2008] ECR I-5271, point 84; C-491/10 PPU, Aguirre Zarraga, [nyr], points 42 et seq.
[195] AG Bot, in: C-491/10 PPU, Aguirre Zarraga, [nyr], points 127-130. J. Callewaert, DÖV 2011, p. 825, 830, pointing to the Strasbourg Court's decision in case Neulinger and Shuruk v. Switzerland, appl. n° 41615/07, considers that the two European Courts risk applying divergent approaches in child abduction cases, but one may wonder whether the Neulinger case can be compared with the EU legislator's choice made for abductions within the EU.
[196] ECtHR, case M.S.S. v. Belgium and Greece, appl. n° 30696/09; ECJ, joined cases C-411/10 and C-493/10, N.S. and Others, [nyr]

In the *Promusicae* case[197], characterised by a collision between two classic fundamental rights – data protection and intellectual property – arising within the scope of several EU directives, the Court first scrutinised whether the case was determined by an express choice of the EU legislator. This not being the case in the Court's view[198], the task fell on the national transposing legislator, and for the authorities and courts applying such legislation, to strike a fair balance in line with the principle of proportionality. Interestingly, rather than binding such national action directly by Union fundamental rights, the Court prefers to stress the duty of national authorities to rely on an interpretation of the relevant EU directives which is compatible with those rights and allows a fair balance to be struck. This approach is respectful of the national legislator but also encourages national judges to develop – and test with the Court – interpretations of EU legislation in the light of the Charter. However, the recent judgments *Scarlet Extended* and *SABAM*[199], delivered in the same area of the digital market and in a very similar constellation of colliding rights, show that the Court's deference has its limits: the Court does not hesitate to find itself that a national measure has exceeded a reasonable margin of appreciation where it appears *un*balanced on its face – but it is also remarkable how meticulously the Court scans the applicable acquis, so as to rely not on the Charter alone but in the first place on legislative provisions, read in the light of fundamental rights, when censuring the national measure.

The Court has more often been seized with collisions between a fundamental freedom and a fundamental right. The judgments *Schmidberger*, *Omega* and *Viking*[200] are emblematic in that regard. Crucially, in all cases the colliding fundamental freedom and fundamental right are approached as having the same rank and needing to be reconciled *in casu*, in line with the principle of proportionality. The sequence of assessment followed in the judgments – looking first at a restriction to the fundamental freedom which is in breach of the Treaty *unless* justified by the aim of protecting the fundamental right – entails no hierarchy between them. Rather, the fundamental freedom is simply the basis for the Court's competence to give preliminary ruling.[201] That said, the Court modulates the intensity of its scrutiny and the corresponding margin of appreciation afforded to the national authorities and judges. In *Schmidberger* and particularly in *Omega*, the Court leaves a wide margin to national authorities and accepts the restriction to a fundamental freedom as justified. In the latter case, it also shows deference to the national fundamental right of human dignity and its particular interpretation in Germany, considering it sufficient that Union law also recognises human dignity in principle. In *Viking,* the Court has a much closer look and, although leaving the ultimate decision to the referring judge, gives rather precise guidance for assessing whether the restriction to freedom of establishment by a trade unions' strike action can be justified. This difference in approach can be explained: the Court's scrutiny must be stricter where, as in *Viking*, the measures at issue may be protectionist and thus go directly against a

[197] C-275/06, 2008 [ECR] I-271.
[198] But see AG's Kokott's different view, at points 85 – 89 of her opinion; and P. Oliver, 46 CMLR (2009), p. 1443, 1466 et seq.
[199] See footnote 178 above.
[200] C-112/00, Schmidberger, [2003] ECR I-5659; C-36/02, Omega, [2004] ECR I-9609; C-438/05, Viking, [2007] ECR I-10779.
[201] V. Skouris, EBLR 2006, p. 225, 237 et seq.

fundamental Union value, than where there is no such dimension and perhaps even a basic value of a Member State's Constitution at stake, as in *Omega*.[202]

5. The accession of the EU to the ECHR

This section provides replies to questions 9 and 10 of the Questionnaire.

5.1. Introductory remarks

The Union's accession to the ECHR will mark a historic achievement on the way towards a coherent and effective system of fundamental rights protection in Europe. It will end an anomaly: that the Union's institutions are the only significant public power on the continent not directly and fully subject to the external control by the Strasbourg Court as regards the respect of the ECHR's guarantees. That situation had become ever more problematic given the substantial supranational powers that have been transferred to the Union over time, including in the most rights-sensitive areas such as justice and home affairs. The Union's legal system will be in the same position as national legal orders: it has its own bill of rights – the Charter – interpreted by its own judiciary and at the same time will participate in the ECHR's collective international system of protection of minimum human rights standards. This will enhance the Union's credibility: having made ratification of the ECHR a pre-condition of accession to the EU, it will finally itself take a step that it has been preaching to others. Accession is also a strong political symbol of coherence, on the basis of common values, between the Union and the "greater Europe" of the Council of Europe. In more legal terms, it best ensures a harmonious development in the case law of the two European courts, since it is formally excluded that Member State authorities are confronted with the – albeit largely theoretic – apory of conflicting obligations stemming from diverging rulings. Finally, accession will allow a full, regular representation of the Union's own legal order within the control system of the ECHR, which already has been dealing, albeit indirectly, with cases linked to Union law. These were, briefly recalled, the main reasons that prompted the second Convention and the Masters of the Treaty to provide for, and even require, the Union's accession to the ECHR.[203]

Launched in July 2010, the negotiations on an accession agreement have progressed much further in short time than many expected at the outset. The Council of Europe's "informal group of experts", meeting with the European Commission as the Union's negotiator, was able to submit, in July 2011, a full draft accession agreement to the political level.[204] Nonetheless, at the time of writing, the negotiations have not yet been completed, and while a strong consensus seems to exist on most elements, there is still a need for further work on a

[202] K. Lenaerts / J. Gutiérrez-Fons (footnote 79), p. 1666. Similarly AG Kokott, in: C-73/07, Satamedia, [2008] ECR I-9831, points 46-51. J.-P. Jacqué (footnote 12), p. 2, 9 et seq.; Editorial by LB and JHR, 4 EuConst (2008), p. 199. On Omega (C-36/02, [2004] ECR I-9609), see in particular L. Besselink, 6 Utrecht Law Review (2010), p. 36, 45.

[203] See in particular the final report of Working Group II of the Convention, CONV 354/02, p. 11-12; J.-P. Jacqué, 48 CMLR (2011), p. 995, 1000; C. Ladenburger (footnote 6), points 85 et s.

[204] Document CDDH (2011) 16 of 19 July 2011 (http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_documents/CDDH-UE_2011_16_final_en.pdf), hereafter the "draft accession agreement" or the "draft agreement".

few matters. For this reason and also in the light of the emphasis placed in the Questionnaire, this report will not present a comprehensive analysis of all questions that need to be addressed in the accession agreement. It will leave aside, in particular, those related to the institutional place of the Union in the ECHR's system, which include one of the main issues still under discussion to date.[205] As regards the fate of the *Bosphorus* test[206] with regard to the Union after its accession, raised in Question n° 10, we merely note one point: Both the Union negotiator and the Council of Europe States have deliberately refrained from raising this issue in the accession negotiations, thus leaving it to the Strasbourg Court; on the Union side, Member States had rapidly agreed with the Commission not to request a codification of that test in the accession agreement, despite some early calls to that effect.

The following sections focus on two interrelated elements of the draft accession agreement: the co-respondent mechanism and the prior involvement of the Court of Justice[207]. These elements, addressed in Question N° 9, are central to the challenge of taking into account the specificities of the Union's legal order. We discuss them on the basis of the latest published draft agreement[208], looking at their logic, at criticism levelled against them, and at key points of their functioning. We do so under the assumption that their features are now largely consensual and will not look very different in the final text. An important caveat must however be made: The Union will also need to adopt internal rules in view of accession, a crucial part of them being precisely on the two mechanisms. Since the Commission has not yet made a formal proposal on such internal rules, we cannot anticipate on them. It is therefore too early for a comprehensive analysis of the functioning of the two mechanisms.

5.2. The co-respondent mechanism

5.2.1. The co-respondent mechanism, as set out in Article 3 of the draft agreement, has been designed to cope with the particularity of the Union as a new contracting party, that its acts are most often implemented and applied by the authorities and courts of the Member States, i.e. by different contracting parties. Already Article 1 (b) of Protocol n° 8 required the Union to negotiate provisions accomodating that special feature. Consensus on the need in principle for a co-respondent mechanism was quickly reached in the technical group of experts: it "is not a procedural privilege for the Union or its Member States, but a way to avoid gaps in participation, accountability and enforceability in the Convention system"[209]. Where an alleged human rights violation stems from Member State action implementing a Union act, only a co-respondent mechanism guarantees that the Strasbourg Court's judgment is binding upon and enforceable against both the Union and the Member State, so that the Committee of Ministers may follow it up vis-à-vis both contracting parties until the breach is effectively

[205] Nor will we cover questions related to the precise scope of the accession agreement, particularly with regard to CFSP, which is another important issue still discussed. On this and all other aspects of the accession negotiations, see in particular J.-P. Jacqué, 48 CMLR (2011), p. 995; T. Lock, 48 CMLR (2011), p. 1025; see also C. Ladenburger, 47 RTD eur. (2011), p. 20.
[206] ECtHR, case Bosphorus Airlines v. Ireland, appl. n° 45036/98.
[207] Article 3 of the draft accession agreement on the co-respondent mechanism in general, and its paragraph 6 on prior involvement.
[208] See footnote 204.
[209] Draft explanatory report to the accession agreement, n° 33 (published also in document CDDH (2011) 16).

remedied.[210] The mechanism is thus indispensable for an effective functioning of the Strasbourg system. At the same time, it protects the autonomy of Union law: the Strasbourg Court can leave open in its judgment whether an identified violation results from the act of the Union institution or rather from the way it was implemented by the Member State (or from both); without the mechanism it would be forced to examine that question and inevitably be drawn into interpreting Union law. Finally, only as a co-respondent will the Union be able to defend all action of its institutions in the Strasbourg Court, with the full party rights that are not at the disposal of a mere third party intervener.

5.2.2. Concerns have however been voiced by academic writers and non governmental organisations about the complexity of a co-respondent mechanism and an undue impairment of the rights of applicants as compared to the normal functioning of the ECHR.[211] Where these voices question the very principle of the co-respondent mechanism, they not only fail to offer any alternative to make the ECHR system work in the unique situation that a legal act is adopted by one contracting party but implemented by another. They also overlook that the co-respondent mechanism serves applicants' interests as well, since it relieves them from any risk of seeing their case dismissed as directed against the wrong of two possible respondents.[212]

5.2.3. That said, the negotiators strived hard to design the mechanism in such a way as to optimise its functioning, by reconciling the objectives of speed and protection of applicants with the imperative of autonomy of Union law and that of preserving the essential features of the ECHR system. This applies to the *scope* of the mechanism, the *procedure*, and to its *impact* on the outcome of a case.

Regarding the scope, under the current draft the Union could become a co-respondent *"if it appears"* that the allegation made in an application *"calls into question the compatibility with the Convention rights of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law."* This wording is a compromise between wider and narrower formulae proposed in earlier versions.[213] It appropriately highlights what will be the main scenario for the mechanism: a situation of direct "normative conflict", for which the *Bosphorus* case is typical, where the alleged violation unavoidably results from a provision of Union law. Some insisted on limiting the mechanism only to this very situation, so as to reduce to the minimum needed the

[210] *Mutatis mutandis*, the mechanism also ensures full enforceability of a judgment in the – surely less frequent – situation where an application directly concerns an act of a Union institution (needing no national implementation), which is based on a provision of primary law that is allegedly the source of the violation. Since the Member States remain the Masters of the Treaties, they, and not the Union itself, bear international responsibility in that respect. Therefore they need to become collectively co-respondents. The Union itself would be unable to bring about the modification of its Treaties required to execute the judgment. This second situation of co-response, as laid down in Article 3 (3) of the draft accession agreement, will not be mentioned further in this report.

[211] See the contributions referred to in footnotes 216 and 217 below, and T. Lock, 48 CMLR (2011), p. 1025, 1045 et s.

[212] See Art. 3 (4) of the draft accession agreement: in case of doubt, it suffices to direct an application against both the EU and the Member State.

[213] Cf. Article 4 of the draft accession agreement in documents CDDH-UE (2011) 4 and (2011) 6.

burdens and complications allegedly going with it. However, the latest draft extends the scope of the mechanism to other cases brought before the Strasbourg Court, which present a qualified link with a provision of Union law, in that a judgment could result in calling that provision into question.[214] This is appropriate: Also in such cases must the Union be able to defend its law efficiently, and must it be possible to seek a prior ruling of the Court of Justice (see section 5.3. below). Finally, the latest drafting makes it clear that the Strasbourg Court, when authorising co-response, is only to examine, in a prima facie analysis, whether it is "plausible" that the test is met[215]; this means that the Strasbourg Court can defer largely to the Union's submission on the link with EU law.

Regarding the procedure, co-response may be requested only once an application has been notified to a contracting party as original respondent; i.e. the Strasbourg Court preserves its full possibility to dismiss manifestly inadmissible or ill-founded applications without further ado. The decision to authorise co-response will be made after comments that all parties may make within a short deadline; this is hardly an unreasonably complex procedure. The core principle is that the Union may become a co-respondent only upon its own request and by decision of the Court. This has been criticized as impairing the applicant's rights. Some have called for a veto right of the applicant against any second party becoming co-respondent.[216] But one fails to see why the situation of co-response would affect an applicant so seriously as to justify a requirement of his prior consent. Others regret that the Union cannot be obliged to become co-respondent and thus might even arbitrarily choose to stay outside the proceedings.[217] However, one could hardly empower the Strasbourg Court to enjoin the Union in such a situation, without risking that the Court appears to apply Union law and to prejudge the outcome of the proceedings. In any event, it will be in the Union's own best interest to join the proceedings whenever possible, to defend its own acts. Moreover, the EU's future internal rules will be important: they could further ensure that the Union's decision to become co-respondent will be based on an objective legal assessment and not prone to political considerations.

Finally, as regards the impact of co-response on the resolution of cases, a balance has again to be struck. Some have argued for leaving maximum flexibility to the Strasbourg Court on how it should treat co-respondents in judgments. But the autonomy of Union law is best taken into account if the Strasbourg Court, as a rule, finds any violation jointly against both co-respondents, thus refraining from assessing their respective share of responsibility based on interpretations of Union law. Such a rule might appropriately be enshrined in the accession agreement, provided that one leaves the Court free to pronounce itself on the responsibility of

[214] This might include a situation such as the one in case M.S.S. v. Belgium and Greece (appl n° 30696/09), which could also present risks to the autonomy of Union law, see J.-P. Jacqué, 48 CMLR (2011), p. 995, 1013, applauding the enlargement of the scope on p. 1015.
[215] Article 3 (5).
[216] NGOs' joint contribution of 3 December 2010; available at the Council of Europe's Website http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue_documents_EN.asp.
[217] ETUC's contribution of 16 June 2011, point 37; T. Lock, 48 CMLR (2011), p. 1025, 1045 et s.

each co-respondent where it can rely on a joint proposal of the co-respondents on this matter[218]; such a ruling will then facilitate a speedy implementation.

5.2.4. In sum, it is submitted that the co-respondent mechanism is indispensable for an orderly functioning of the ECHR system as regards Union acts implemented by the Member States and that, as devised in the latest draft accession agreement, it strikes an appropriate balance between all interests involved. It should however be born in mind that the Union's future internal rules must also do their part to avoid undue complexity and delay in the implementation of the mechanism.

5.3. The prior involvement of the Court of Justice

5.3.1. Article 3 (6) of the draft accession agreement accomodates a request made by the Union negotiator to take into account an issue raised by the Court of Justice in its discussion document of 5 May 2010.[219] In that paper, the Court of Justice called for a mechanism capable of ensuring that the question of the validity of a Union act can be brought effectively before it, before the Strasbourg Court rules on the compatibility of that act with the Convention. In the informal group of experts, after some initial hesitations the need for such a mechanism has in principle become consensual, in the light of the insistence of the Union negotiator but also of a joint communication from Presidents Costa and Skouris of 17 January 2011[220]. That document, making known the results of discussions between the two European Courts on the matter, suggests that a flexible procedure should be put in place to ensure that the Court of Justice may carry out an internal review before the Strasbourg Court carries out external review.

The problem as presented in the Court's discussion paper is that where a Member State implements a Union act and an individual claims that act to be in breach of ECHR rights, it may happen that the Strasbourg Court is asked to assess such an alleged breach before the Court of Justice has ever been called upon to perform that assessment. Normally, under the Union's decentralised judicial system, the individual will have to contest the Union act indirectly by challenging its implementation before a national court. But pursuant to the *Foto-Frost* principle only the Court of Justice may declare a Union act invalid.[221] The national court may make a preliminary reference to the Court of Justice on the validity of the Union act, and in last instance is obliged to do so unless it has no serious doubts on the validity under the *CILFIT* case law[222]. The Court recognises that the operation of Article 267 TFEU has given "altogether satisfactory results" over more than half a century. Nonetheless, "it is not certain that a reference for a preliminary ruling will be made to the Court of Justice in every case in which the conformity of Union action with fundamental rights could be challenged". The parties have no right to compel a preliminary reference, so that this procedure could hardly be considered a domestic remedy which must be exhausted before an

[218] F. Tulkens, RTD eur. (2011), p. 27, 30 et seq.
[219] http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf.
[220] See footnote 7 above.
[221] Case 314/85, Foto-Frost, [1987] ECR 4199, points 15-17.
[222] Case 283/81, Cilfit and Others, [1982] ECR 3415.

application can be lodged before the Strasbourg Court. As a complement to the Court's discussion paper, one may usefully refer to the presentation given by (then) Judge Timmermans before the constitutional committee of the European Parliament, where he sketched out a possible procedure capable of solving the problem raised by the Court.[223]

5.3.2. Some have questioned whether the problem as presented by the Court is serious enough as to justify an – alleged - exception to the normal functioning of the Strasbourg system which might in practice cause delay and burden to the applicant.[224] It has been suggested that one should have confidence in the national courts of last instance, functioning as a filter by submitting to the Court of Justice those challenges of validity of a Union act which they deem sufficiently serious. Since those national courts thereby exercise their responsibility of judges of Union law, the Union's system of judicial protection taken as a whole, so it is argued, appropriately ensures internal review before Strasbourg's external review can intervene. If necessary, one could remind supreme national courts of their duty to make preliminary references on validity or the Court of Justice could even tighten that duty by developing further its *CILFIT* case law in the field of fundamental rights.

5.3.3. However, we would submit that the Union negotiator and the informal expert group were right in recognising the issue as serious and in seeking a solution. It may undeniably occur that the Court of Justice is not seized with problems of validity of a Union act before Strasbourg deals with them, since a litigant cannot force a preliminary reference. And, although hopefully seldom, this can happen even where very serious fundamental rights issues are at stake; that mere possibility sits oddly with the exclusive responsibility of the Court of Justice to declare a Union act void *inter alia* for breaches of fundamental rights, which is an essential feature of Union law and of the institution's powers to be preserved pursuant to Protocol n° 8. The Court's discussion paper distinguishes the situation from that of national constitutional or supreme courts which may also be short-circuited before a challenge lands on Strasbourg's docket; its point is rather about ensuring that a court *of the Union*, as opposed to courts of the Member States, can perform internal review. True, one could approach this differently by regarding the Court of Justice and national courts together as "the Union's judiciary", but the Court's view is entirely in line with the basic logic of the accession agreement itself: as requested by the Member States from the outset, that agreement treats Member States not as sub-entities of the Union, but as contracting parties distinct from the Union; even where they implement Union law, their acts remain covered by their own ECHR responsibilities and are not fully subsumed by those of the Union assumed through accession.[225] Seen from this angle, the problem is indeed one specific to the Union's legal order.

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[223] http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71235/20100324ATT71235EN.pdf.

[224] Submission by the European Group of National Human Rights Institutions, 9 March 2011; ETUC's contribution of 16 June 2011, points 10, 39; T. Lock, 35 ELR (2010), p. 777, 792 et seq.; C. Kohler / L. Malferrari, EuZW 2011, p. 849; Th. Schilling, Humboldt Forum Recht, 8/2011, p. 83, 92 et seq.; see also critical questions of J.-P. Jacqué, 48 CMLR (2011), p. 995, 1017 et s. Explaining the Court's position and more generally on the future relationship between the two European courts, A. Tizzano, RTD eur. (2011), p. 9.

[225] See *e contrario* Article 1 (2) c of the draft agreement.

Moreover, once the problem is recognised, the alternative solutions that have been claimed to exist in Union law are not satisfactory. Were the Court to tighten the *CILFIT* criteria for this situation, it would risk to be flooded by preliminary references based even on far-fetched fundamental rights challenges; that would do away with the filtering function of national last instance courts which, fulfilled responsibly, is an important part of the Union's judicial system. And for the Commission systematically to bring infringement actions against Member States whose last instance courts omit to make references would be a delicate exercise; in any event it would not solve the fundamental rights problem *in casu*, since it could not purge Union law of an act that may be found incompatible by the Strasbourg Court.

The preceding reflections suggest that, what is needed can be qualified as a sort of "post-judicial catch-up procedure" ("procédure post-judicielle de rattrapage"), designed to remedy the consequences of a serious violation, by a national court of last instance, of its obligation under Article 267 TFEU. With the two Presidents and the informal group of experts, one may expect the procedure to be used rarely in practice[226], for even its very existence will serve as a useful reminder to national courts to take their obligation under Article 267 seriously. The instances of practical use of the mechanism would be further reduced if the Strasbourg Court interpreted the admissibility criterion of exhaustion of local remedies as requiring that the applicant must have suitably suggested to the last instance court to make a preliminary reference.[227]

5.3.4. On the concrete design of the future procedure, one needs to distinguish between what is needed in the accession agreement itself and what is left to future EU-internal rules. In short, very little will be for the former and almost everything for the latter.

Within the informal group of experts, the approach that made consensus on this point possible was to conceive the mechanism as an exclusively EU-internal one, to renounce notably on any procedure of interaction between the two European Courts, and to keep provisions in the accession agreement to a strict minimum. As a result, the draft accession agreement provides for no derogation from the normal functioning of the Strasbourg system, and indeed for no amendment to the ECHR on this point. It does not even contemplate a suspension of the proceedings pending in Strasbourg while the Court of Justice is seised, as had been suggested by Judge Timmermans. Instead, Article 3 (6) of the draft accession agreement limits itself to requiring that sufficient time shall be afforded for the Court of Justice to make its assessment of fundamental rights compatibility of the Union act and thereafter for the parties to make observations to the Strasbourg Court on the outcome of that assessment. The Union on its part commits to ensure that the assessment by the Court of Justice is made quickly so that the proceedings in Strasbourg are not unduly delayed. Importantly, prior involvement of the Court of Justice will be possible only in cases where the Union has become a co-respondent. In addition, the draft explanatory report formulates certain expectations as to the future EU-internal procedure before the Court of Justice: The parties involved, including the applicant will have the right to make observations. The

[226] 6th paragraph of the joint communication; point 58 of the draft explanatory memorandum.
[227] F. Tulkens, RTD eur. (2011), p. 27, 32.

applicant will be able to claim legal aid. An accelerated procedure should be applied by the Court of Justice, which is noted to have enabled the Court of Justice to give a ruling within 6 to 8 months.

But for these rudimentary indications, all features of the future procedure before the Court of Justice will have to be determined in EU rules, for which the Commission has not yet made a formal proposal. We therefore cannot elaborate in detail on those prospective features, but will limit ourselves to remarks on two aspects. They concern the beginning and the end of the procedure, i.e. how the procedure in the Court of Justice should be triggered and to which kind of judgment it should lead.

On the first point, a balanced solution would be to give both to the Commission and to the Member State respondent in Strasbourg a right to institute the procedure in the Court of Justice. The right to initiative would then be in the hands of the two institutional actors most familiar with the case at hand given their role as co-respondents in the Strasbourg proceedings[228]. As regards the Commission it is also in line with its responsibilities as guardian of the Treaties. The alternative of giving the right to the First Advocate General[229] would raise a difficulty: that person being an actor within the Court, the case would first have to be transmitted to the Court by an outside institution, which however could not be the Strasbourg Court under the philosophy of the draft accession agreement. Widening the circle of initiators beyond these two actors, by including the applicant in Strasbourg or other institutions or Member States, would entail the risk that the procedure is triggered more often than needed, contrary to its exceptional nature. More importantly, initiating the procedure should be *discretionary*[230], so that its use is flexible and can be reserved to the most serious cases where Union's decentralised system has not functioned properly. It would be problematic to formulate a rigid rule under which prior involvement of the Court of Justice would be mandatory whenever a Strasbourg case implies a fundamental rights challenge of a Union act which had not been assessed in Luxembourg before. This would result in the Court being flooded with insignificant cases which the national last instance courts have reasonably chosen not to bring before the Court.[231]

Judgments of the Court of Justice rendered under the future procedure should not be consultative but binding[232]. Where the Court finds a fundamental rights violation, it should declare the act invalid; otherwise the act is upheld. But this binding effect is limited to the

[228] This argument is based on the assumption that the Commission will represent the Union in proceeedings in the Strasbourg Court.
[229] J.-P. Jacqué, 48 CMLR (2011), p. 995, 1021.
[230] We interpret in that sense the intervention of judge Timmermans (see […) and the joint communications of the two Presidents (see 7th paragraph: "In that regard, it is important that the types of cases which *may* be brought before the CJEU are clearly defined." Admittedly, the rather absolute formulation in point 9 of the Court's discussion paper ("….the possibility must be avoided…") suggests the opposite; so does J.-P. Jacqué, 48 CMLR (2011), p. 995, 1021.
[231] The fact that the prior involvement mechanism will be available only in cases that the Strasbourg Court has notified to a Member State, should not in itself be taken to mean that each such case is serious enough to be submitted to the Court of Justice; otherwise, the character of the Strasbourg Court's very preliminary assessment made at that stage would be altered.
[232] See Opinion 1/91, points 3-4; J.-P. Jacqué, 48 CMLR (2011), p. 995, p. 1021.

purview of the Union's legal order and cannot constrain the assessment of international law obligations by the Strasbourg Court, as is made clear in Article 3 (6) of the draft accession agreement. The real problem arises with respect to the parties in the national litigation from which the Strasbourg case has arisen. Their case has been definitively judged by a last instance national court. Should it be reopened, in derogation from the *res judicata* principle, because its outcome rests on an EU act subsequently declared invalid by the Court of Justice? That would imply that the Union legislator imposes on Member States to introduce, in all their codes of procedure, a new case of mandatory revision of definitive judgments. Apart from the question of an EU competence for it, such an intrusion into national procedures does not seem justified by the ratio of the "prior involvement procedure": what matters is the possibility for the Court of Justice to be able to rule before the Strasbourg Court and to purge Union law of an act violating fundamental rights; this serves more the objective interests of the autonomy and authority of Union law than the applicant's interests. Those are fully safeguarded by the possibility of the Strasbourg Court to find a violation and afford just satisfaction as in any other case. In other words, the effects of a Luxembourg judgment under the new procedure would be *"erga omnes extra partes"*: a ruling by the Court of Justice declaring the Union act invalid would have effects on everyone except the applicant in Strasbourg, who consequently may not lose its status of victim in the Strasbourg proceedings.

5.3.5. Given all the above, the creation of a mechanism of prior involvement of the Court of Justice can be seen as a necessary consequence of the Union's accession, inherent in Article 6 (2) TEU in combination with Article 19 TEU and Protocol n° 8. This allows to consider that the appropriate procedure before the Court of Justice can be established without amending the EU Treaties, despite its novel, *sui generis* nature[233]. The assumption underlying the current draft accession agreement is that there will be a purely EU-internal procedure, leading swiftly to a judgment by the Court of Justice and *de facto* causing no extra delay in Strasbourg, and that it will be rarely needed in practice. As such, and if its concrete features are designed accordingly, it would be an appropriate way of accomodating a special feature of Union law without compromising the ECHR's functioning.

6. Conclusion and outlook: the future of fundamental rights protection in the EU as an ‘area of fundamental rights"

This section provides replies to the second part of question 13 and to question 14 of the Questionnaire.

The Lisbon Treaty, with its two complementary achievements of a legally binding Charter and an obligation for the EU to accede to the ECHR, marks a major step forward towards a stronger and more coherent system of fundamental rights protection in the Union. The Charter has already had very tangible effects on the EU institutions by considerably raising

[233] But see T. Lock, 48 CMLR (2011), p. 1025, 1049 et s., whose analysis about the Treaty-compatibility of a future procedure is based on the premise that it must be in accordance with the existing procedures, which leads to a number of intricate problems.

an ever higher awareness for fundamental rights aspects of EU law and policies, and in particular of one's own action. It is giving multiple impulses to the Court and national courts, acting in cooperation pursuant to Article 267 TFEU, to develop a modern fundamental rights law and to interpret the Union's acquis increasingly in the light of those rights. The Union's accession to the ECHR will end the problematic anomaly of a significant public power not being submitted to Strasbourg's external control system, and, if construed properly, will ensure a harmonious development of two bodies of European constitutional law, with two European Courts assuming their respective responsibilities in a clarified relationship.

A much debated question, also raised in the Questionnaire, is whether the Charter, combined with an increase in the EU's fundamental rights activity and an ever widening scope of EU law, will lead to transfer of human rights protection from Member States and from the Council of Europe and the ECHR system to the EU, with the former gradually losing their importance to the benefit of the latter. While it is surely too early for reliable predictions, key provisions of the Charter and first experiences with their application by the EU institutions, as discussed in this report, suggest that the perspective may not be appropriately framed in these terms: The scope of the Charter in relation to Member State action (Article 51 (1)) is construed prudently. The limits of EU competences in the field, unaltered by the Charter and accession, are acknowledged and respected (Article 51 (2)). EU fundamental rights can be applied cumulatively with national rights and those of the ECHR (Article 53). For those Charter rights corresponding to the ECHR (and they are pivotal in practice), Article 52 (3) incorporates the legal content of the latter instrument into the former and the two European Courts announce a "parallel" interpretation in which the Court will continue to faithfully follow the Strasbourg case law. And several provisions (Article 52 (4) and (6); Article 6 (3) TEU) suggest that the national constitutional traditions and legal systems remain relevant for the interpretation and development of the EU's corpus of fundamental rights, and that we will continue to observe the well-known phenomena of interaction and "commuting" between both levels[234], of an "osmosis of values"[235], which have allowed the shaping of general principles of EU law. If nonetheless, in Europe's polycentric system of human rights protection, a shift of importance towards the EU level is to occur over time, it will be less a consequence of the Charter itself or of the institutions' work in applying it, but rather result from other decisions that the Masters of the Treaty have taken (and may still take), namely from significant conferrals of legislative competence to the EU, both in most rights-sensitive policy areas such as justice and home affairs and as regards the realisation of specific fundamental rights such as non-discrimination in Article 19 (1) TFEU. There may also be a "spill-over" effect over time, in that interpretations given to the Charter will, even outside its scope, influence that of the ECHR and national bills of rights – but, as in the past, this is not likely to be a one-way street.

The main roles and challenges of EU institutions, especially the Commission, in this polycentric system are well encapsulated in the basic objective set out in the Commission's

[234] K. Lenaerts / J. Gutiérrez-Fons (footnote 79), p. 1653, citing T. Koopmans' well-put characterisation of general principles as "commuters who travel back and forth from national legal systems to EU law".
[235] A. Tizzano, DUE (2006), p. 9, 14.

"strategy" communication of 2010: *The Union must itself set an example to ensure that the fundamental rights of the Charter become reality*.[236] This is why the Commission's strategy focuses so strongly on a high level of rights compliance by the EU legislator. Significant challenges lie ahead in this regard: to maintain, or sometimes restore, a high level of rights protection in the dynamic development of the Union's tools to fight terrorism and serious crime or to manage migration flows; to perfect methods of ascertaining proportionate solutions in the legislative process, as required by the *Schecke* case law; to avoid compromises going towards the common minimum denominator among Member States, when exercising competences to concretise rights, e.g., guarantees of criminal procedure; to recognise the need for careful balancing of colliding rights, also in policy areas where in the past less attention was given to fundamental rights – e.g., the challenge of balancing intellectual property with other rights in the EU's digital internal market; to define a coherent approach towards EU regimes requiring some degree of mutual trust among Member States as regards rights-intrusive decisions. Not less demanding is the Commission's task of guardian of EU law vis-à-vis Member States regarding fundamental rights: confronted with more and more calls to get involved in sensitive national debates, the Commission must stay strictly within the purview of Article 51– as long as the thresholds of Article 7 TEU are not reached -, but not hesitate to tackle resolutely those problems presenting a clear nexus with EU law and thus, affecting the legitimacy of its legal order. As in other sectors, the Commission's focus is on prevention and early resolution of problems – acting in cooperation with national authorities and ombudsmen, the European Parliament, NGOs and citizens -, but sooner or later it may start bringing infringement proceedings with a specific fundamental rights focus.[237] Furthermore, in its classic role of *amicus curiae* the Commission can help the Court answer major open questions of horizontal importance regarding the Charter. One last challenge for the Commission lies ahead in the short term: as the Union's negotiator, to bring the process of the EU's accession to the ECHR to a good end, through a package that accommodates the EU's specificities while preserving the essential features of the Convention system and keeping its procedures protective and manageable.

By taking up these challenges lying ahead in the years to come, the Commission will contribute to realising the vision of the Lisbon Treaty and to building a fundamental rights system in Europe in which the judicial and political actors at each level – national, Union and pan-European – will retain their importance and should see their respective missions as complementary and mutually reinforcing.

[236] COM (2010) 573, p. 13.
[237] COM (2010) 573, p. 9-13.