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Koenraad Lenaerts

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Koen Lenaerts

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Koen Lenaerts*

Scope of application of Charter – What does ‘implementing Union law’ mean? – Application of v. derogation from EU law – Asylum cases, *N.S. – Familiapress*, *Schmidberger*, *Viking* – Implementing to include derogation – *Annibaldi* and *Dereci* – Interpretation of the Charter – ‘Provided for by law’ – The ‘essence’ of a right or freedom – Legitimate objectives and proportionality – Rights both in EU treaties and in Charter: citizenship – Charter and ECHR – Constitutional Traditions, level of protection and deference – Article 53 not according to *Solange*, but like *Omega* and *Sayn-Wittgenstein* – Principles and Rights

INTRODUCTION

Since 1 December 2009, when the Treaty of Lisbon entered into force, the Charter of Fundamental Rights of the European Union (‘the Charter’)¹ stands on an equal footing with the TEU and the TFEU.² Stated differently, the Charter is primary EU law.³ By rendering fundamental rights visible and by merging and systematizing in a single document the sources of inspiration scattered in various national and international legal instruments,⁴ the Charter marks a new stage in the process of European integration.

*Vice-President of the Court of Justice of the European Union, and Professor of European Union Law, Leuven University. All opinions expressed herein are personal to the author.

¹ *OJ* [2010] C 83/02.

² See Art. 6(1) TEU.

³ See generally J. Kokott and C. Sobotta, ‘The Charter of Fundamental Rights of the European Union after Lisbon’, *EUI Working Papers, Academy of European Law* (2010) No. 2010/06, Distinguished Lectures of the Academy, available at: <<http://cadmus.eui.eu/handle/1814/15208>>; D. Denman, ‘The Charter of Fundamental Rights’, 4 *E.H.R.L.R.* (2010) p. 349; X. Groussot and L. Pech, ‘Fundamental Rights Protection in the European Union Post Lisbon Treaty’, *Foundation Robert Schuman – Policy Paper*, No. 173 (2010), available at: <www.robert-schuman.eu/doc/questions_europe/qe-173-en.pdf>.

⁴ See P. Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’, 39 *CML Rev.* (2002) p. 951; L.S. Rossi, ‘How Fundamental Are Fundamental Rights? Primacy and Funda-

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However, during the drafting process of the Charter, some member states feared that an EU catalogue of fundamental rights would threaten their national sovereignty. In their view, similarly to what happened in the US,⁵ the European Court of Justice (the 'ECJ') would rely on the Charter as a 'federalising device', replacing fundamental rights as defined by the national constitutions with a single common standard.⁶ Accordingly, the authors of the Charter had to reassure those member states that the Charter, whilst having an added value, would not become a centripetal force at the service of European integration. In order to avoid a competence creep via judicial activism, Title VII of the Charter (Articles 51 to 54) specifies the situations under which the Charter may be invoked, and determines how the provisions of the Charter are to be interpreted.

The purpose of the present contribution is to explore Title VII of the Charter, in light of the case-law of the ECJ. It is divided into two sections. Section I looks at Article 51 of the Charter, i.e., its field of application. Section II examines the rules that the ECJ and national courts must follow when interpreting the Charter. Last, but not least, a brief, but concise, conclusion outlines the main differences between the general principles of EU law and the Charter regarding their scope of application and interpretation.

THE SCOPE OF APPLICATION OF THE CHARTER

Since from now on the Charter is primary EU law, it fulfils a triple function.⁷ First, just as general principles of EU law, the Charter also serves as an aid to interpretation, since both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter. Second, just as general principles, the Charter may also be relied upon as providing grounds for judicial review. EU legislation found to be in breach of an Article of the Charter is to be held void and national law falling within the scope of EU law that contravenes the Charter must be set aside. Finally, it continues to operate as a source of authority for the 'discovery' of general principles of EU law.⁸

mental Rights after Lisbon', 27 *YEL* (2008) p. 77.

⁵ See, e.g., Opinion of A-G Sharpston in Case C-34/09 *Ruiz Zambrano*, delivered on 30 Sept. 2010, not yet reported, paras. 172 and 173.

⁶ See A. Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union', 42 *CML Rev.* (2005) p. 367.

⁷ K. Lenaerts and J. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', 47 *CML Rev.* (2010) p. 1629, at 1656 et seq.

⁸ After the entry into force of the Treaty of Lisbon, see Case C-403/09 *PPU Detiček* [2009] *ECR* I-12193, para. 53 (where the Charter was relied upon as an aid to interpretation of Regulation Brussels II bis, *OJ* [2003] L 338/1). See also Case C-555/07, *Kücükdeveci*, judgment of 19 Jan. 2010, not yet reported, para. 22.

However, from the fact that the Charter is now legally binding it does not follow that the EU has become a 'human rights organisation'⁹ or that the ECJ has become 'a second European Court on Human Rights' (ECtHR). To this effect, the second paragraph of Article 6(1) TEU stresses that '[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties'. A similar statement is reproduced in Article 51(2) of the Charter.¹⁰ It requires that, in interpreting and applying the Charter, the ECJ respects the principle of conferral as set out in Article 5(2) TEU.

The scope of application of the Charter is therefore the keystone which guarantees that the principle of conferral is complied with. To this effect, Article 51(1) of the Charter states that 'the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'.¹¹ While in relation to the EU institutions, bodies, offices and agencies, Article 51(1) focuses on guaranteeing compliance with the principle of subsidiarity, this Article makes the Charter applicable to the member states 'only when they are implementing Union law'.¹² But what does 'implementing Union law' mean?

In accordance with Article 6(1) TEU, '[t]he rights, freedoms and principles in the Charter shall be interpreted [...] with due regard to the explanations [relating to it]'.¹³ In the same way, Article 52(7) of the Charter states that '[those] explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States'. As explained below, the ECJ may not interpret the Charter in a way that conflicts with the explanations relating to it. In this regard, in order to clarify the exact

⁹T. Tridimas, *The General Principles of EU Law*, 2nd edn. (OUP 2006) at p. 613.

¹⁰Art. 51(2) of the Charter reads as follows: '[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'.

¹¹Please note that Art. 51(1) of the Charter does not refer to private parties. Thus, one could argue that, unlike general principles of EU law (see Case C-555/07, *Kücükdeveci*, *supra* n. 8), the provisions of the Charter do not apply in a private dispute. In this vein, see Kokott and Sobotta, *supra* n. 3, at p. 14 (opining that 'Article 51 of the Charter [...] does not provide for a direct effect of the prohibition of age discrimination on private parties. Article 51 only refers to institutions, bodies, offices and agencies of the Union and Member States implementing Union law, but not to private parties. Moreover, the Charter repeatedly emphasizes the limits of the Union's competencies [...]. Accordingly, the Charter should not be seen as a reason to extend the Union's competencies').

¹²In German, 'ausschließlich bei der Durchführung des Rechts der Union'. In French, 'aux États membres uniquement lorsqu'ils mettent en oeuvre le droit de l'Union'. In Dutch, 'uitsluitend wanneer zij het recht van de Unie ten uitvoer brengen'. In Spanish, 'a los Estados miembros únicamente cuando apliquen el Derecho de la Unión'. In Italian, 'agli Stati membri esclusivamente nell'attuazione del diritto dell'Unione'.

¹³See the explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/17 ('the explanations relating to the Charter').

meaning of the terms ‘implementing Union law’ one must look at the explanations relating to Article 51 of the Charter, which read as follows: ‘As regards the Member States, it follows unambiguously from the case-law of the [ECJ] that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of [EU] law’.

Next, the explanations relating to Article 51 of the Charter cite *Wachauf*, *ERT* and *Annibaldi*.¹⁴ They also quote a passage from paragraph 37 of *Karlsson*,¹⁵ which reads as follows: ‘In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the [EU] legal order are also binding on Member States when they implement [EU] rules ...’.

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

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

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

Wachauf as a token of positive action on the part of the member states

As is well-known, in *Wachauf* – to which the explanations relating to Article 51(1) of the Charter refer –, the ECJ held that fundamental rights, understood as general principles of EU law, were binding upon the member states when they applied EU (then Community) rules on the common organisation of the milk market as provided for by Regulation No. 1371/84.¹⁶ For the case at hand this meant that

¹⁴ Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR I-2925, and Case C-309/96 *Annibaldi* [1997] ECR I-7493.

¹⁵ Case C-292/97 *Karlsson* [2000] ECR I-2737, para. 37.

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

national authorities had to apply EU (then Community) rules governing the transfer of milk quotas which were exempted from an additional levy following a change of ownership or occupancy of a holding, in such a way as to ensure that a lessee was not deprived of the fruits of his labour and of his investment in the tenanted holding without compensation.¹⁷

Likewise, in *Karlsson* – another milk quota case to which the explanations relating to Article 51(1) of the Charter also refer –, the ECJ examined whether Swedish law, which sought to implement Regulation No. 3950/92 complied with the principle of equality.¹⁸ That regulation limited the production of milk in Sweden to 3.3 million tons per year. At the outset, the ECJ noted that new milk producers and producers who had increased their milk production were treated less favourably than normal producers who had not altered their average milk production from 1991 to 1993. Unlike the milk quotas allocated to normal producers, the milk quotas allocated to them were set at a level below their production capacity.¹⁹ However, the ECJ held that such a difference in treatment pursued a legitimate aim recognised by the common organisation of the milk market, namely the reduction of structural surpluses and the improvement of the milk market. Notably, the ECJ observed that ‘the reductions applied unilaterally to new producers and producers who [had] increased their production appear[ed] to be objectively justified, having regard to the specific contribution made by such producers to exceeding the guaranteed total quantity’.²⁰ As to the principle of proportionality, the milk quotas allocated to new producers and producers who had increased their production did not go beyond what was necessary for achieving the legitimate aim pursued, as their milk quotas were calculated on the basis of the risk that the total quantity of milk would be exceeded.²¹

Wachauf and *Karlsson* show that, when adopting national measures which aim to apply a normative scheme put in place by the EU legislator, member states are implementing EU law, and are thus bound by the fundamental rights contained in the Charter. This is so even if ‘Member States enjoy wide discretion in ensuring the implementation of [EU] rules within their territory’,²² as the recent ruling of the ECJ in *N.S.* illustrates.²³

In that case, the ECJ was called upon to determine whether the Charter was applicable to a national decision adopted by a member state on the sole basis of

¹⁷ Case 5/88 *Wachauf*, *supra* n. 14, paras. 20–21.

¹⁸ Council Regulation (EEC) No. 3950/92, of 28 Dec. 1992, establishing an additional levy in the milk and milk products sector, *OJ* [1992] L 405/1.

¹⁹ Case C-292/97 *Karlsson*, *supra* n. 15, para. 42.

²⁰ *Ibid.*, para. 47.

²¹ *Ibid.*, para. 59.

²² *Ibid.*, para. 35.

²³ Joined Cases C-411/10 and 493/10 *N.S.*, judgment of 21 Dec. 2011, not yet reported.

Article 3(2) of Regulation No. 343/2003 (the ‘Dublin Regulation’).²⁴ In accordance with that provision, which is known as the ‘sovereign or discretionary clause’, a member state is, in principle, free to decide whether it examines a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Dublin Regulation.

In *N.S.*, the question thus boiled down to whether, having decided to make use of that provision, a member state must comply with the Charter, in particular with Articles 1, 4, 18, 19(2) and 47 thereof. The ECJ replied in the affirmative. It noted that Article 3(2) of the Dublin Regulation ‘grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the [EU] legislature’.²⁵ That discretionary power, the ECJ wrote, ‘must be exercised in accordance with the other provisions of that regulation’.²⁶ Indeed, the ECJ pointed out that

a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of [the Dublin] Regulation [...] and must, where appropriate, inform the other Member State or Member States concerned by the asylum application.²⁷

Accordingly, ‘a Member State which exercises that discretionary power must be considered as implementing [EU] law within the meaning of Article 51(1) of the Charter’.²⁸

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

As to the substance, the ECJ ruled that the concept of ‘Member State responsible’ for examining an asylum application within the meaning of Article 3(1) of the Dublin Regulation could not be interpreted as designating a Member State with

systemic deficiencies in the asylum procedure and [whose] reception conditions of asylum seekers [...] amount to substantial grounds for believing that the asylum

²⁴ Council Regulation (EC) No. 343/2003 of 18 Feb. 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national, *OJ* [2003] L 50/1.

²⁵ Joined Cases C-411/10 and 493/10 *N.S.*, *supra* n. 23, para. 65.

²⁶ *Ibid.*, para. 66.

²⁷ *Ibid.*, para. 67.

²⁸ *Ibid.*, para. 68.

seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.²⁹

Consequently, the member state where the asylum seeker is present must proceed to examine the other hierarchical criteria listed in the Dublin Regulation so as to determine the 'Member State responsible', provided that such determination does not take an unreasonable length of time which could worsen the situation of the asylum seeker. If that determination is excessively time-consuming, the member state where the asylum seeker is present must itself examine his or her application under Article 3(2) of the Dublin Regulation. Stated differently, if compliance with fundamental rights requires the member state where the asylum seeker is present to examine the asylum application, that member state has no choice but to do it.³⁰

Moreover, the principle of effectiveness, which is now enshrined in Article 19(1) TEU,³¹ ensures that the substantive rights which EU law confers on individuals do not become 'an empty promise'. By virtue of that principle, in the absence of EU measures harmonising national rules of procedure, it is for the member states to ensure the *full effect* of EU law. In this regard, the ECJ has, time and again, stated that national remedies must afford an effective judicial protection to EU rights,³² a fundamental right which is now enshrined in Article 47 of the Charter. The ruling of the ECJ in *DEB* illustrates this point.³³

In that case, the ECJ was requested to rule on the question whether EU law and, more specifically, the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that, in the context of a procedure for pursuing a claim, brought by a legal person, seeking to establish State liability under EU law, that principle precludes a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs and under which a legal person does not qualify for legal aid even though it is unable to make that advance payment. The ECJ found that that principle must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. In that connection, it is for the

²⁹ *Ibid.*, para. 94

³⁰ *Ibid.*, para. 98.

³¹ Art. 19(1) TEU states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

³² The explanations relating to the Charter, *supra* n. 13, at 29, refer to Case 222/84 *Johnston* [1986] ECR 1651; Case 222/86 *Heylens* [1987] ECR 4097, and Case C-97/91 *Borelli* [1992] ECR I-6313.

³³ Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft*, judgment of 22 Dec. 2010, not yet reported

national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right, whether they pursue a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which the national rule seeks to achieve.³⁴ The ECJ further held that, in making that assessment, the national court must take into consideration the subject-matter of the litigation, whether the applicant has a reasonable prospect of success, the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively. In order to assess the proportionality of the national rule, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. With regard, more specifically, to legal persons, the national court may take into consideration, *inter alia*, the form of the legal person in question and whether it is profit-making or non-profit-making, the financial capacity of the partners or shareholders and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.³⁵

Referring expressly to Article 51 of the Charter,³⁶ the ECJ held that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, may be relied upon in order to determine the limits within which a member state may exercise its procedural autonomy. This means that a national court may have recourse to the principle of effective judicial protection, as enshrined in Article 47 of the Charter, in order to set aside a national procedural rule that prevents a legal person from bringing a claim seeking to establish state liability under EU law. Stated differently, the principle of effective judicial protection, as enshrined in Article 47 of the Charter, applies in relation to national procedural rules which hinder the effectiveness of EU law in general and thus, relate to the implementation of EU law in the member state concerned. That is sufficient to qualify these procedural rules as 'implementing Union law'. Hence, they fall within the scope of application of the Charter.

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

³⁴ Ibid., paras. 59 and 60.

³⁵ Ibid., paras. 61 and 62.

³⁶ Ibid., para. 30.

The derogation situation

For some scholars, the Charter should not apply when examining the validity of national measures derogating from EU requirements, i.e., in the so-called 'derogation situation'.³⁷ For example, contrary to the general principles of EU law, the Charter should not apply in cases such as *Familiapress*, *Schmidberger*, or *Viking Line*.³⁸

This narrow reading of the terms 'when [the Member States] are implementing Union law' finds support in the drafting process of the Charter, which 'illustrates an emergent reluctance to commit the Member States to observing the norms of the Charter other than in the cases which are most closely linked to the European Union where the Member States have little or no autonomy'.³⁹

Likewise, the Convention on the Future of Europe also favoured limiting the scope of application of the Charter, so as to minimise national resistance to the Charter's legally binding status as provided for by the Treaty establishing a Constitution for Europe.⁴⁰ Put simply, both the Convention in charge of drafting the Charter and the Convention on the Future of Europe sought to assure the member states that the Charter would not upset the vertical allocation of powers.

For Lord Goldsmith, where member states derogate from EU law, 'the protection of fundamental rights for the citizen will be the existing structure of national law and constitutions and important international obligations like [the European Convention for the Protection of Human Rights and Fundamental Freedoms, (the "ECHR")]'.⁴¹ In his view, the Charter has to be read as an instrument which limits the powers of the EU, as opposed to 'an exercise in extending [its] competences'.⁴² Likewise, former A-G Jacobs – writing extrajudicially – argued that in derogation situations, a member state's compliance with fundamental rights should not be subject to judicial review of the ECJ.⁴³ He posited that '[o]nce it has been established that a restriction is justified from the perspective of [EU] law,

³⁷ Case C-260/89 *ERT*, *supra* n. 14.

³⁸ Case C-368/95 *Familiapress* [1997] ECR I-3689; Case C-112/00 *Schmidberger* [2003] ECR I-5659, and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'*, [2007] ECR I-10779.

³⁹ G. De Búrca, 'The Drafting of the European Union Charter of Fundamental Rights', 26 *EL Rev.* (2001) p. 126, at p. 137.

⁴⁰ Knook, *supra* n. 6, at 373.

⁴¹ Lord P. Goldsmith, 'A Charter of Rights, Freedoms and Principles', 38 *CML Rev.* (2001) p. 1201, at p. 1205.

⁴² *Ibid.*, at p. 1206.

⁴³ F. Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice', 26 *EL Rev.* (2001) p. 331.

the restriction might still be caught as infringing fundamental rights. But that would be a matter for national law, or possibly the [ECHR], not for [EU] law'.⁴⁴ The former Advocate General referred to *Familiapress*⁴⁵ to illustrate this point. In that case, the ECJ was asked to determine whether Austrian legislation prohibiting the sale of periodicals containing prize competitions complied with Article 34 TFEU (ex Article 28 EC). Austria alleged that its legislation was justified on the ground of preserving press diversity, an important aspect of the freedom of expression. According to the former Advocate General, the ECJ should have limited itself to examining whether the Austrian legislation at issue complied with the public policy derogations contained in the Treaty. If so, then that national measure should have been upheld as a matter of EU law. The question whether such a measure complied with the freedom of press was a separate issue, and was not for EU law to decide. However, Eeckhout argues that the problem with that view is that it would allow 'the relevant Treaty provisions [to] be interpreted in a way which tolerates the violation of fundamental rights'.⁴⁶ In addition, he rightly notes that the notion of 'public policy' is difficult to apprehend without considering fundamental rights. By way of example he observes that had the ECJ decided in *Grogan*⁴⁷ that the freedom to provide services was applicable to the Irish ban on the distribution of specific information about clinics in another member state where abortions were performed, it would have been very difficult for the ECJ to decide whether such a measure complied with EU law without considering Ireland's argument based on the right to life.⁴⁸ Most importantly, in the 'derogation situations', determining whether a member state complies with fundamental rights vests the rulings of the ECJ with legitimacy. It reassures national courts, in particular the constitutional courts, that the Union embraces the values and principles in which national constitutions are grounded. As Tridimas says, the protection of fundamental rights guarantees 'ideological continuity' between the two levels of governance.⁴⁹ Accordingly, in order to demonstrate that the Union takes fundamental rights seriously, 'they should be all pervasive in EU law'.⁵⁰ Even if Article 51(1) of the Charter were subject to a strict interpretation, the scope of application of general principles of EU law should not be adversely affected. General principles would take over where the scope of application of the Charter ends. However, Dougan believes that such a dual regime would not be without difficulties, as it

⁴⁴ Ibid., at p. 336.

⁴⁵ Case C-368/95 *Familiapress*, *supra* n. 38.

⁴⁶ Eeckhout, *supra* n. 4, at p. 977.

⁴⁷ Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others* [2001] ECR I-4685.

⁴⁸ Eeckhout, *supra* n. 4, at p. 978.

⁴⁹ Tridimas, *supra* n. 9, at p. 302.

⁵⁰ Eeckhout, *supra* n. 4, at p. 977.

'might prove burdensome'.⁵¹ He notes that, while the fundamental rights protected may be the same, a dual regime could give rise to arbitrary divergences as to the actual quality and potency of those rights.⁵² In the same way, AG Bot observes that by weakening the protection of fundamental rights at EU level, such a dual regime would run counter to Article 53 of the Charter.⁵³

It seems to me that the terms 'implementing Union law' must be read so as to also include the derogation situation.⁵⁴ Indeed, the explanations relating to Article 51(1) of the Charter expressly refer to *ERT*.⁵⁵ In that case, the ECJ held that national rules which constitute a restriction on the freedom to provide services may be justified on the grounds laid down in Article 52(1) TFEU, in so far as those rules are 'interpreted in light of [...] fundamental rights'. In order for those rules to fall within the scope of Article 52(1) TFEU, they must be 'compatible with the fundamental rights the observance of which the [ECJ] ensures'.⁵⁶ It follows from *ERT* that when a member state derogates from the substantive law of the EU, it is also 'implementing EU law', given that such derogation must always meet the conditions imposed by EU law. Not only must the national measure conflicting with the fundamental freedoms pursue a legitimate interest recognised by EU law, be free from any discrimination, and respect the principle of proportionality, but it must also comply with fundamental rights. Contrary to the views of Lord Goldsmith and former A-G Jacobs, *ERT* suggests that whether the derogations put forward by a member state comply with fundamental rights is a determination that does not fall outside the scope of application of the treaties. Far from that, all derogations put forward by a member state must always pass muster under EU law, of which the Charter is now part and parcel.

Moreover, this would mean that the scope of application of the Charter and that of general principles of EU law overlap. Thus, the Charter would not alter the scope of application of fundamental rights protection under EU law, respecting the constitutional allocation of powers sought by the authors of the treaties. Does this mean, as Weiler considers,⁵⁷ that a catalogue of fundamental rights has

⁵¹ M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts', 45 *CML Rev.* (2008) p. 617, at p. 664-665.

⁵² *Ibid.*

⁵³ See Opinion of A-G Bot in Case C-108/10 *Scattolon*, delivered on 5 April 2011, not yet reported, para. 120.

⁵⁴ Eeckhout, *supra* n. 4, at p. 993. See Opinion of A-G Bot in Case C-108/10 *Scattolon*, *supra* n. 53, paras. 118 and 119. A-G Bot supports the contention that 'implementing Union law' should be interpreted as 'acting within the framework of Union law'. In so doing, he relies on the explanations relating to the Charter.

⁵⁵ Case C-260/89 *ERT*, *supra* n. 14.

⁵⁶ *Ibid.*, para. 43.

⁵⁷ J. Weiler, Editorial: Does the European Union Truly Need a Charter of Rights?, 6 *E.L.J.* (2000) p. 95.

little added value? In my view, the answer to this question should be in the negative. Since the material scope of the Charter is broader than that of general principles,⁵⁸ the Charter may contribute significantly to the 'discovery' of general principles.

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

Finally, the explanations relating to Article 51(1) of the Charter also refer to *Annibaldi*.⁵⁹ Contrary to *Wachauf* and *ERT*, it seems that the authors of the explanations relating to the Charter chose *Annibaldi* in order to illustrate the situations where EU law imposes no obligation on the member states, i.e., cases where the compatibility of national measures with fundamental rights cannot be examined under EU law.

That case involved the refusal of Italian authorities to grant Mr Annibaldi permission to plan an orchard of 3 hectares within the perimeters of a regional park. Such refusal was adopted on the basis of Regional law No. 22 of 20 June 1996, according to which the regional park was created in order to protect and enhance the value of the environment and cultural heritage of the area concerned. For his part, Mr Annibaldi, who owned an agricultural holding 33 hectares of which were located within the park, argued that the refusal at issue in the main proceedings amounted to an expropriation without compensation which was contrary to his fundamental right to property. At the outset, the ECJ recognised that the EU (then the Community) pursues objectives in the fields of the environment, culture and agriculture. However, it noted that Regional Law No. 22 of 20 June 1996 was not intended to implement a provision of EU law in any of those three fields.⁶⁰ Notably, that law pursued objectives other than those covered by the common agricultural policy and was general in character.⁶¹ Most importantly, in light of Article 345 TFEU (ex Article 222 EEC), EU (then Community) rules relating to the common organisation of the agricultural markets have no effect on systems of agricultural property ownership.⁶² The ECJ thus ruled that it lacked jurisdiction to answer the questions referred by the Italian court.

It follows from *Annibaldi* that the compatibility of national measures which are not a means for a member state to fulfil its obligations under EU law, with fundamental rights cannot be examined by the ECJ. Recently, the ruling of the ECJ in *Dereci* confirmed this point.⁶³

⁵⁸ Knook, *supra* n. 6, at p. 371.

⁵⁹ Case C-309/96 *Annibaldi*, *supra* n. 14.

⁶⁰ *Ibid.*, para. 21.

⁶¹ *Ibid.*, para. 22.

⁶² *Ibid.*, para. 23.

⁶³ Case C-256/11 *Dereci*, judgment of 15 Nov. 2011, not yet reported.

The question in that case was whether Mr Dereci, a third-country national, was entitled to a derivative right of residence grounded in his children's status of European citizen, in spite of the fact that the latter had never left the member state of which they were nationals (Austria). The ECJ noted that, unlike the factual situation in *Ruiz Zambrano*,⁶⁴ a refusal to grant Mr Dereci a residence permit ('the contested decision') did not deprive his children, who were minors, 'of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.⁶⁵ The contested decision did not force his children 'to leave not only the territory of the Member State of which [they were] national[s] but also the territory of the Union as a whole'.⁶⁶ Accordingly, the contested decision did not fall within the scope of the Treaty provisions on EU citizenship. This meant that, under EU law, the member state in question, i.e., Austria, had no obligation to grant such a residence permit to Mr Dereci. Just as in *Annibaldi*, since Austria was not 'implementing EU law', the ECJ lacked jurisdiction to examine whether such refusal was compatible with Article 7 of the Charter.

The fact that the refusal to grant Mr Dereci a residence permit could adversely affect his right to a family life and that of his children was not by itself sufficient to trigger the application of the Charter. This did not mean, however, that the fundamental rights of Mr Dereci and that of his children were left unprotected. If '[the national court] takes the view that that situation is not covered by [EU] law, [the ECJ reasoned that] it must undertake that examination in the light of Article 8(1) of the ECHR'.⁶⁷

THE INTERPRETATION OF THE CHARTER

Unlike the TEU or the TFEU, the Charter lays down binding instructions as to the way in which it must be interpreted. Article 6(1) TEU – which refers to Title VII of the Charter and to the explanations relating to it – stresses the importance of those instructions.

This section is structured as follows. Part 1 looks at the limitations on the exercise of the rights and freedoms recognised by the Charter. Part 2 examines the rights contained in the Charter whose definition is already provided for by the treaties. Part 3 explores the relationship between the Charter and the ECHR. Part 4 is devoted to determining the importance given by the Charter to the constitutional traditions common to the member states. Part 5 studies the distinction between principles and rights provided for by Article 52(5) of the Charter. Last,

⁶⁴ Case C-34/09 *Ruiz Zambrano*, judgment of 8 March 2011, not yet reported.

⁶⁵ *Ibid.*, para. 42.

⁶⁶ Case C-256/11 *Dereci*, *supra* n. 63, para. 66.

⁶⁷ *Ibid.*, para. 72.

but not least, Part 6 examines the interpretative value of the explanations relating to the Charter.

The limitations on the exercise of the rights and freedoms recognised by the Charter

Under the system of the ECHR, every right whose exercise may be subject to limitations ('qualified rights') is followed by a specific derogation clause.⁶⁸ By contrast, the Charter contains a horizontal provision. Article 52(1) is thus a 'general limitation clause',⁶⁹ which sets out the conditions that every limitation on the exercise of the rights and freedoms recognised by the Charter must fulfil in order to comply with EU law. However, it is worth noting that, just as under the ECHR, no limitation may be imposed on the rights under Title I of the Charter (Articles 1 to 5), i.e., human dignity,⁷⁰ the right to life, the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour.

The wording of Article 52(1) of the Charter is largely inspired by the case-law of the ECJ on the protection of fundamental rights,⁷¹ which, in turn, draws on the case-law of the ECtHR.⁷² Article 52(1) of the Charter states that '[a]ny limitation on the exercise of the rights and freedoms recognised by [the] Charter must be provided for by law'. In addition, any limitation must respect 'the essence of those rights and freedoms' and comply with the principle of proportionality, i.e.,

⁶⁸ See, e.g., Arts. 8, 9, and 10 ECHR as well as Protocol 1. See generally C. Ovey and R. White, *Jacobs and White, The European Convention on Human Rights*, 4th edn. (OUP 2006) at p. 6 et seq.

⁶⁹ See L. Burgorgue-Larsen, « L'article II-112 », in L. Burgorgue-Larsen et al. (eds.), *Traité établissant une Constitution pour l'Europe. L'architecture constitutionnelle*, Partie II – La Charte des droits fondamentaux de l'Union, Commentaire article par article (Bruylant 2005) at p. 658. See also Réseau UE d'experts indépendants en matière de droits fondamentaux, « The Commentary of the Charter of Fundamental Rights of the European Union », 20 June 2006 ('Commentaire du REIDF'), at p. 397, <http://ec.europa.eu/justice/doc_centre/rights/charter/docs/network_commentary_final%20_180706.pdf>.

⁷⁰ See the explanations relating to the Charter, *supra* n. 13, at p. 17 (given that 'the dignity of the human person is part of the substance of the rights laid down in this Charter [, it] must therefore be respected, even where a right is restricted'). The same applies in relation to the right to life and to the right to the integrity of the person. In this regard, see Case C-112/00 *Schmidberger*, *supra* n. 38, para. 80 ('unlike other fundamental rights enshrined in [the ECHR], such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose').

⁷¹ See, e.g., Case C-62/90 *Commission v. Germany* [1992] ECR I-2575, para. 23; Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, para. 55; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, para. 45; Joined Cases C-317/08 to C-320/08 *Alasini and Others* [2010] ECR I-2213, para. 63.

⁷² See, e.g., ECtHR, *Fogarty v. United Kingdom*, judgment of 21 Nov. 2001, No. 37112/97, § 33, ECHR 2001-XI.

‘limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others’.

‘Provided for by law’

In light of *Knauf Gips v. Commission*,⁷³ the terms ‘provided for by law’ are to be interpreted as meaning that, in the absence of a specific legal basis, an EU act of individual application may not *by itself* impose limitations on the exercise of the rights and freedoms recognised by the Charter. In that case, the ECJ held that the European General Court (EGC) had erred in considering that, in the absence of a specific legal basis, the Commission could limit the rights of an undertaking to an effective remedy and of access to an impartial tribunal, as guaranteed by Article 47 of the Charter.⁷⁴

The question is then under what circumstances an EU act of individual application – or, as the case may be, a national measure of individual application implementing EU law –, which limits a fundamental right, has (or lacks) a sufficient legal basis. For instance, is it possible to interpret the terms ‘provided for by law’ as only including EU acts adopted under the ordinary legislative procedure? Or, should the ECJ follow the case-law of the ECtHR, according to which those terms should also include EU acts adopted under a special legislative procedure? In accordance with the case-law of the ECtHR, a limitation is ‘provided for by law’, provided that it meets the three following cumulative conditions. First, the limitation must have some basis in domestic law. However, the ECtHR has ruled that the intervention of the parliament is not always mandatory.⁷⁵ Second, the persons concerned must be able to know those limitations in advance, by, for example, reading them in the *Official Journal* of the EU. Finally, those limitations must be foreseeable.⁷⁶ Stated differently, any limitation on the fundamental rights recognised by the Charter must be consistent with the principle of legal certainty, i.e., it must be clear and precise.⁷⁷

In *Volker und Markus Schecke*,⁷⁸ the ECJ rejected a strict interpretation of the terms ‘as provided for by law’. In that case, the referring court asked, in essence,

⁷³ Case C-407/08 P *Knauf Gips v. Commission* [2010] ECR I-6371.

⁷⁴ *Ibid.*, paras. 87 et seq.

⁷⁵ ECtHR, *Sunday Times v. United Kingdom*, judgment of 26 April 1979, Series A No. 30. See also *Müller v. Switzerland*, judgment of 5 Nov. 2002, No. 41202/98 (Sect. 2) (Eng).

⁷⁶ ECtHR, *Kruslin v. France*, judgment of 24 April 1990, Series A No. 176-A, § 27.

⁷⁷ See to this effect, Opinion of A-G Cruz Villalón in Case C-70/10 *Scarlet Extended SA*, delivered on 14 April 2011, not yet reported.

⁷⁸ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, judgment of 9 Nov. 2010, not yet reported.

whether Council Regulation No. 1290/2005⁷⁹ and Commission Regulation No. 259/2008⁸⁰ were compatible with Articles 7 (right to respect for his or her private and family life, home and communications) and 8 (right to the protection of personal data) of the Charter. Article 44a of Council Regulation No. 1290/2005, on the financing of the common agricultural policy, provided that member states had to ensure annual *ex-post* publication of the beneficiaries of the EAGF and the EAFRD and the amounts received per beneficiary under each of these Funds. That information had to be the subject of ‘general publication’. For its part, Commission Regulation No. 259/2008 set out the content of the publication, adding that ‘the municipality where the beneficiary resides or is registered and, where available, the postal code or the part thereof identifying the municipality’ also had to be published. Article 2 of that regulation prescribed that the information was to be made available on a single website per member state so that it could be consulted by means of a search tool.

In relation to the existence of an interference with the rights recognised by Articles 7 and 8 of the Charter, the ECJ held that the ‘publication on a website of data naming those beneficiaries and indicating the precise amounts received by them thus constitutes an interference with their private life within the meaning of Article 7 of the Charter’.⁸¹ In addition, the ECJ ruled that the publication required by Article 44a of Regulation No. 1290/2005 and Regulation No. 259/2008 constitutes the processing of personal data falling under Article 8(2) of the Charter.⁸²

As to the justification of the interference with the rights recognised by Articles 7 and 8 of the Charter, the ECJ ruled that ‘it is common ground that the interference arising from the publication on a website of data by name relating to the beneficiaries concerned must be regarded as “provided for by law” within the meaning of Article 52(1) of the Charter. Articles 1(1) and 2 of Regulation No. 259/2008 expressly provide for such publication’.⁸³ Stated differently, limitations on the fundamental rights recognised by the Charter, which are grounded in a Council Regulation, must be considered as ‘provided for by law’. It follows that

⁷⁹ *OJ* [2005] L 209/1, as amended by Council Regulation (EC) No. 1437/2007 of 26 Nov. 2007, *OJ* [2007] L 322/1 (‘Regulation No. 1290/2005’).

⁸⁰ Commission Regulation (EC) No. 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation No. 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), *OJ* [2008] L 76/28 (‘Regulation No. 259/2008’).

⁸¹ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, *supra* n. 78, para. 58.

⁸² *Ibid.*, para. 60.

⁸³ *Ibid.*, para. 66.

Article 52(1) of the Charter does not require limitations on fundamental rights to be grounded in an EU measure whose adoption is conditioned upon the European Parliament's co-decision.

Respecting the essence of the rights and freedoms recognised by the Charter

In providing that any limitation must 'respect the essence of [the rights and freedoms recognised by the Charter]', the latter guarantees that no limitation will deprive those rights and freedoms of their substance. The term 'essence' of a right or freedom draws on the constitutional traditions common to the Member States,⁸⁴ as well as on the case law of the ECtHR.⁸⁵ In the same way, the ECJ has consistently held that any limitation on fundamental rights may only be justified, 'provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute disproportionate and intolerable interference, impairing *the very substance of the rights guaranteed*'.⁸⁶

Legitimate objectives and the principle of proportionality

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

As to the former type of objectives, they are set out not only in Article 3 TEU but also in specific Treaty provisions.⁸⁷ The case-law of the ECJ clearly shows that the latter has followed a rather broad approach when qualifying an objective as being 'of general interest recognised by the Union'. For example, the following objectives have been recognised as falling within that category: the establishment of a common organisation of the market,⁸⁸ the protection of public health and public security,⁸⁹ and the requirements of international security.⁹⁰ For example, in *Volker und Markus Schecke*, the ECJ found that, in light of the recitals of the

⁸⁴ See, e.g., Art. 19(2) of the German Basic Law, which provides that '[i]n no case may the essence of a basic right be affected'.

⁸⁵ See, e.g., ECtHR, *Sporrong and Lönnroth v. Sweden*, judgment of 23 Sept. 1982, Series A No. 52.

⁸⁶ In relation to the right to property, see Case 44/79 *Hauer* [1979] ECR 3727, para. 23; Case 265/87 *Schröder HS Kraftfutter* [1989] ECR 2237, para. 15; Case C-293/97 *Standley and Others* [1999] ECR I-2603, para. 54; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351, para. 355; and Joined Cases C-379/08 and C-380/08 *ERG* [2010] ECR I-2007, para. 80 (emphasis added).

⁸⁷ See, e.g., Arts. 36, 45(3), and 52 TFEU.

⁸⁸ Case 44/79 *Hauer*, *supra* n. 86.

⁸⁹ Case C-293/97 *Standley and Others* [1999] ECR I-2603.

⁹⁰ Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, *supra* n. 86. In the context of the internal market law, see C. Barnard,

contested Regulations, the publication of the names of the beneficiaries of aid from the EAGF and the EAFRD and of the amounts which they receive from those Funds was intended to enhance transparency regarding the use of Union funds in the CAP and improve the sound financial management of these funds, in particular by reinforcing public control of the money used.⁹¹ The principle of transparency is stated in Articles 1 and 10 TEU, as well as in Article 15 TFEU. It enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.⁹² Hence, the ECJ ruled that 'by aiming to increase the transparency of the use of funds in the context of the CAP, Article 44a of Regulation No. 1290/2005 and Regulation No 259/2008 pursue an objective of general interest recognised by the European Union'.⁹³

Moreover, limitations on the fundamental rights of the Charter may have both a vertical and horizontal dimension.⁹⁴ This means that, when asserting a fundamental right, one must comply with 'the need to protect the rights and freedoms of others'.⁹⁵ The terms 'rights and freedoms of others' refer not only to the fundamental rights of third parties, but also to all rights bestowed upon them by EU law,⁹⁶ notably the rights that stem from the Treaty provisions on free movement and Union citizenship.⁹⁷ In relation to conflicts between fundamental rights, or between fundamental rights and fundamental freedoms, it is worth noting that there is no hierarchy of qualified rights under the Charter.⁹⁸ Given that all quali-

'Derogations, Justifications and the Four Freedoms', in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Hart Publishing 2009) at p. 245 et seq.

⁹¹ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, *supra* n. 78, para. 67.

⁹² *Ibid.*, para. 68.

⁹³ *Ibid.*, para. 71.

⁹⁴ For a discussion on the conflict between rights, see E. Brems (ed.), *Conflicts between Fundamental Rights* (Intersentia 2008).

⁹⁵ In relation to a conflict between the right to private life and the freedom of expression, see, e.g., Case C-101/01 *Lindqvist* [2003] ECR I-12971, para. 86 and Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, paras. 53 to 56.

⁹⁶ See, e.g., ECtHR, *Barthold v. Germany*, judgment of 23 March 1985, No. 8734/79, Series A, No. 90, § 58.

⁹⁷ See, e.g., Case C-112/00 *Schmidberger* [2003] ECR I-5659; Case C-36/02 *Omega* [2004] ECR I-9609; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779; Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135; Case C-244/06 *Dynamic Medien* [2008] ECR I-505.

⁹⁸ Needless to say, I am not referring here to the fundamental rights under Title I of the Charter. See O. De Schutter and F. Tulken, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in Brems (ed.), *supra* n. 94, at p. 179 et seq.

fied rights stand on an equal footing, conflicts between them must be solved by striking the right balance.

In that regard, Article 52(1) of the Charter states that any limitation on the rights thereof must comply with the principle of proportionality. It is thus for the EU institutions and, as the case may be, for the national authorities participating in the implementation of EU law to verify that any limitation on fundamental rights is suitable to meet the 'objectives of general interest recognised by the Union' and 'the need to protect the rights and freedoms of others'; and that it does not go beyond what is necessary for achieving the legitimate aim pursued. For example, in *Volker und Markus Schecke*, the ECJ found that the publication on a website of the names of the beneficiaries of aid from the EAGF and the EAFRD and of the amounts which they receive from those Funds was liable to increase transparency with respect to the use of the agricultural aid concerned. The ECJ reasoned that such display of information reinforced public control of the use to which that money is put and contributes to the best use of public funds.⁹⁹ However, regarding the necessity of the publication in question, the ECJ held that it went beyond what was necessary for achieving the legitimate aims pursued, given that neither the Council nor the Commission had 'sought to strike [the right] balance between the European Union's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds, on the one hand, and the fundamental rights enshrined in Articles 7 and 8 of the Charter, on the other'.¹⁰⁰ Indeed, derogations and limitations in relation to the protection of personal data must apply only in so far as it is strictly necessary.¹⁰¹ Thus, the Council and the Commission should have examined whether the legitimate objective pursued by the contested regulations could not be achieved by measures which interfere less with the right of the beneficiaries concerned to respect for their private life in general and the protection of their personal data in particular.¹⁰² Accordingly, the ECJ ruled that Article 44a of Regulation No. 1290/2005 and Regulation No. 259/2008 were invalid.

Rights for which provision is made in the treaties

Article 52(2) of the Charter provides that '[r]ights recognised by [the] Charter for which provision is made in the treaties shall be exercised under the conditions and

⁹⁹ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, *supra* n. 78, para. 75.

¹⁰⁰ *Ibid.*, para. 80.

¹⁰¹ Case C-73/07 *Satakunnan Markkinapörssi and Satamedia*, *supra* n. 95, para. 56.

¹⁰² Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, *supra* n. 78, para. 78, and paras. 81 to 86 (where the ECJ referred, as an example, to measures 'limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid, or the frequency or nature and amount of aid received').

within the limits defined by those 'Treaties'. By making a reference to the treaties, Article 52(2) seeks to prevent the Charter from replacing the EU *acquis*. For example, regarding EU citizenship, both Article 20(2)(a) TFEU and Article 45(1) of the Charter provide that every citizen of the Union has 'the right to move and reside freely within the territory of the Member States'. However, in accordance with Article 52(2) of the Charter, it is not Article 45(1) of the Charter which determines the conditions for exercising such right, but Article 20(2)(a) TFEU. The same applies to all other rights attaching to the status of EU citizenship, laid down in Article 20 TFEU, which are also reproduced under Title V of the Charter.

The importance of the ECHR

In light of the explanations relating to Article 52(3) of the Charter,¹⁰³ the latter 'is intended to ensure the necessary consistency between the Charter and the ECHR', 'without thereby adversely affecting the autonomy of [EU] law and of that of the [ECJ]'. However, the autonomy of EU law may only be grounded in the principle 'of the more extensive protection', i.e., the level of protection guaranteed under EU law may never be lower than that guaranteed by the ECHR (as interpreted by the ECtHR).¹⁰⁴

A combined reading of Article 52(3) and Article 53 of the Charter demonstrates that if the ECtHR raises the level of protection of a fundamental right (or decides to expand its scope of application) so as to overtake the level of protection guaranteed by EU law, then the autonomy of EU law may no longer exist.¹⁰⁵ With a view to attaining the level of protection guaranteed by the ECHR, the ECJ will be obliged to reinterpret the Charter. Conversely, if the ECtHR ever decides to lower the level of protection below that guaranteed by EU law, by virtue of Article 53 of the Charter, the ECJ will be precluded from interpreting the provisions of the Charter in a regressive fashion. Stated differently, interpreted as a 'stand-still

¹⁰³ Art. 52(3) of the Charter states that '[i]n so far as [the] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

¹⁰⁴ See Burgorgue-Larsen, *supra* n. 69, at p. 33.

¹⁰⁵ Art. 53 of the Charter reads as follows: '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions'.

clause', Article 53 of the Charter preserves the constitutional autonomy of EU law.¹⁰⁶

As to the rights recognised by the Charter which correspond to rights guaranteed by the ECHR, Article 52(3) of the Charter states that, without prejudice of a more extensive protection, 'the meaning and scope of those rights shall be the same as those laid down by [ECHR]'.¹⁰⁷ The explanations relating to the Charter provide a list enumerating those rights.¹⁰⁸ It does not come as a surprise that the approach encapsulated in Article 52(3) of the Charter is no less than the codification of the case-law of the ECJ, according to which the ECHR, as interpreted by the ECtHR, has 'special significance' in the protection of fundamental rights within the EU legal order.¹⁰⁹ In addition, the explanations relating to Article 52(3) of the Charter provide a list with 'the Articles [whose] meaning is the same as the corresponding Articles of the ECHR, but [whose] scope is wider'.¹¹⁰ However,

¹⁰⁶ See the explanations relating to the Charter, *supra* n. 13, at 35, which provide that '[t]his provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law'. The adverb 'currently' refers to the moment when the Charter, as primary EU law, entered into force, i.e., 1 Dec. 2009.

¹⁰⁷ Regarding Art. 7 of the Charter and Art. 8 of the ECHR, the ECJ has held that they both have the same meaning and scope. See Case C-400/10 PPU *McB.*, judgment 5 Nov. 2010, not yet reported, para. 53. Likewise, the ECJ has also ruled that 'the second paragraph of Art. 47 of the Charter corresponds to Article 6(1) of the ECHR'. See Case C-279/09 *DEB*, *supra* n. 33, para. 32.

¹⁰⁸ See the explanations relating to the Charter, *supra* n. 13, at p. 33 and 34. Those rights are the following: '– Article 2 corresponds to Article 2 of the ECHR, – Article 4 corresponds to Article 3 of the ECHR, – Article 5(1) and (2) corresponds to Article 4 of the ECHR, – Article 6 corresponds to Article 5 of the ECHR, – Article 7 corresponds to Article 8 of the ECHR, – Article 10(1) corresponds to Article 9 of the ECHR, – Article 11 corresponds to Article 10 of the ECHR without prejudice to any restrictions which Union law may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR, – Article 17 corresponds to Article 1 of the Protocol to the ECHR, – Article 19(1) corresponds to Article 4 of Protocol No 4, – Article 19(2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights, – Article 48 corresponds to Article 6(2) and (3) of the ECHR, – Article 49(1) (with the exception of the last sentence) and (2) correspond to Article 7 of the ECHR'.

¹⁰⁹ See, e.g., Joined Cases 46/87 and 227/88 *Hoechst v. Commission* [1989] ECR 2859, at 2859; and Case C-274/99 P *Connolly v. Commission* [2001] ECR I-1611, para. 37.

¹¹⁰ See the explanations relating to the Charter, *supra* n. 13, at 34. Those rights are the following: '– Article 9 covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation, – Article 12(1) corresponds to Article 11 of the ECHR, but its scope is extended to European Union level, – Article 14(1) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training, – Article 14(3) corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents, – Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation, – Article 50 corresponds to Article 4 of Protocol No. 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States, – Finally, citizens of the European Union may not be considered as

one must point out that the previous sentence is not entirely accurate, as that list also includes Articles of the Charter whose ‘meaning is wider’,¹¹¹ as well as Articles of the Charter ‘whose meaning *and* scope’ are wider,¹¹² than those of the corresponding Articles of the ECHR.

Moreover, the interpretation of Article 50 of the Charter (the *ne bis in idem* principle) appears to be particularly complex, since its scope and meaning fluctuate according to the context in which that provision is invoked. In this regard, the explanations relating to Article 50 of the Charter state that, if the *ne bis in idem* principle is relied upon in a cross-border situation, then that principle must be interpreted in compliance with the EU *acquis*, i.e., in light of the case-law of the ECJ under the Convention implementing the Schengen agreement.¹¹³ By contrast, where the *ne bis in idem* principle is relied upon in a purely internal situation, then that principle has the same meaning and the same scope as the corresponding right in the ECHR. Such a dual regime may be problematic, notably in cases where it is difficult to ascertain whether a situation is purely internal. However, one must point out that in *Sergey Zolotukhin v. Russia*,¹¹⁴ the ECtHR has recently decided to interpret the concept ‘*idem*’ in light of the case-law of the ECJ, so that in interpreting the principle of *ne bis in idem*, the approach of both courts converges.¹¹⁵

aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context’.

¹¹¹ See Art. 9 of the Charter (whose wording allows gay marriage, in contrast to the wording of Article 12 of the ECHR which provides that ‘[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right’).

¹¹² See Art. 47 of the Charter (which applies to both EU institutions and national authorities ‘implementing EU law’. In addition, the protection offered by that provision is more extensive since it guarantees the right to an effective remedy before a court. Hence, in contrast to Art. 6(1) of the ECHR, Art. 47 is not limited to proceedings relating to ‘the determination of his civil rights and obligations or of any criminal charge against him’).

¹¹³ Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345.

¹¹⁴ ECtHR, *Sergey Zolotukhin v. Russia*, judgment of 10 Feb. 2009 [GC], No. 14939/03, ECHR 2009.

¹¹⁵ In that case, the ECtHR reconsidered its approach in relation to the concept of the ‘same offence’. In placing the emphasis on the identity of the facts instead of their legal classification, the ECtHR held that the terms ‘same offence’ must be interpreted as meaning ‘identity of the material acts’. In so doing, the ECtHR noted that ‘[t]he difference between the terms “same acts” or “same cause” (“*mêmes faits*”) on the one hand and the term “[same] offence” (“*[même] infraction*”) on the other was held by the [ECJ] to be an important element in favour of adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant. In so finding, [the ECJ] emphasised that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his sentence or had been acquitted, he need not fear further prosecution for the same act’. The ECtHR referred to Case C-367/05 *Kraaijenbrink* [2007] ECR I-6619. See ECtHR, *Sergey Zolotukhin v. Russia*, *supra* note 114, §§ 37 and 79.

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

Finally, the Charter also incorporates rights that cannot be found in the ECHR.¹¹⁶ As a result, it is for the ECJ itself to interpret and develop those rights. Needless to say, the ECJ will still take into account the other sources of inspiration set out in Article 52 of the Charter, such as international agreements ratified by the EU or all its member states, or the constitutional traditions common to the member states.

The importance of the constitutional traditions common to the member states

In accordance with Article 52(4) of the Charter, '[i]n so far as [the latter] recognises fundamental rights as they result from the constitutional traditions common to the member states, those rights shall be interpreted in harmony with those traditions'. By referring to the constitutional traditions common to the member states, the Charter does not seek to define the fundamental rights recognised thereby in accordance with the 'smallest common denominator' of the member states' constitutions, but to interpret the fundamental rights enshrined therein in a way that offers a high level of protection; that is adapted to the nature of EU law; and that is in harmony with the national constitutional traditions.

Moreover, Article 53 of the Charter states that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, [...] by the Member States' constitutions'. The question is then whether Article 53 of the Charter must be interpreted as a codification of the '*Solange*' approach,¹¹⁷ according to which the primacy of EU law is conditioned upon that law offering a level of

¹¹⁶ See, e.g., the economic and social rights under Title IV of the Charter, such as the right of collective bargaining and action, including the right to strike. See also the right to good administration (Art. 41 of the Charter). The Charter also aims to provide an answer to the challenges brought about by the new technologies, in particular, by bioethics. See, e.g., in relation to the concept of 'human embryos', Opinion of A-G Bot in Case C-34/10 *Brüstle*, delivered on 10 March 2011, not yet reported.

¹¹⁷ See the judgments of the German *Bundesverfassungsgericht* of 29 May 1974, known as *Solange I* (2 BvL 52/71) and of 22 Oct. 1986, known as *Solange II* (2 BvR 197/83); the judgment of the Italian *Corte Costituzionale* of 21 April 1989 (No. 232, *Fragd*, in *Foro it.*, 1990, I, 1855); the declaration of the Spanish *Tribunal Constitucional* of 13 Dec. 2004 (DTC 1/2004). See also ECtHR, *Bosphorus Hava Yolları Turizm v. Ireland ve Ticaret Anonim Şirketi*, judgment of 30 June 2005, ECHR 2005-VI.

fundamental rights protection, at least equivalent to that guaranteed by the legal orders of the member states.¹¹⁸

For some scholars, such an interpretation of Article 53 of the Charter must be ruled out. They argue that that provision does not aim to limit the primacy of EU law, but to reassure the member states that the Charter does not replace their constitutions.¹¹⁹ To that effect, they posit that the terms ‘in their respective fields of application’ was included by the authors of the Charter with a view to clarifying that Article 53 does not limit the primacy of EU law.¹²⁰ Since the Charter does not apply to situations falling outside the scope of application of EU law, those situations will remain entirely governed by the member states’ constitutions. However, such an interpretation of Article 53 appears to repeat what is already provided for by Article 51. Hence, such an interpretation would deprive Article 53 of the Charter of its *effet utile*.¹²¹

Alternatively, it is argued that the terms ‘[n]othing in this Charter’ have a more limited scope than that of the terms ‘no provision of EU law’. Accordingly, even if the provisions of the Charter may not run counter to the national constitutions, the provisions of the TEU and TFEU may do so.¹²²

In my view, the thesis put forward by Azoulai seems to be the most convincing.¹²³ He does not read Article 53 of the Charter as a rule of conflict, but as a rule which seeks to strengthen the primacy of EU law by demanding from the ECJ that it state the reasons why it decided to follow (or depart from) the level of fundamental rights protection provided for by the member states’ constitutions. Article 53 of the Charter thus mandates the ECJ to engage in a dialogue with the national constitutional courts or, as the case may be, with the national supreme courts. In accordance with such a reading, Article 53 of the Charter would be an expression of constitutional pluralism.¹²⁴ Article 53 of the Charter would not

¹¹⁸ See, e.g., R. Alonso Garcia, ‘The General Provisions of the Charter of Fundamental Rights of the European Union’, 8 *ELJ* (2002) p. 492, at p. 513.

¹¹⁹ J. Bering Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?’, 38 *CML Rev.* (2001) p. 1171, at p. 1198 (opining that Art. 53 of the Charter ‘is a politically useful inkblot meant to serve as an assurance to the Member States [...] that the Charter does not replace national constitutions and that it does not, by itself, threaten higher levels of protection’).

¹²⁰ Besselink, ‘The Member States, the National Constitutions and the Scope of the Charter’, 1 *MJ* (2001) p. 68.

¹²¹ Bering Liisberg, *supra* n. 119, at p. 1191.

¹²² *Ibid.*

¹²³ L. Azoulai, ‘L’article II-113’, in Burgorgue-Larsen, *supra* n. 69, at p. 689.

¹²⁴ See, e.g., N. Walker, ‘The Idea of Constitutional Pluralism’, 65 *Modern Law Review* (2002) p. 317; M. Poiares Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003) p. 501 et seq.; M. Kumm, ‘Who Is the Final Arbiter of Constitutionality in Europe’, 36 *CML Rev.* (1999) p. 356; J. Komárek, ‘European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles

endorse the primacy of an EU law measure which does not pay due homage to the constitutional traditions common to the member states; nor would that provision of the Charter deprive EU law of its primacy because of a national constitution which, though offering a higher level of protection than that guaranteed under EU law, does not take into account the essential elements of that law. Accordingly, Article 53 of the Charter is not to be interpreted in accordance with the ‘*Solange*’ approach, but in light of the rulings of the ECJ in *Omega*¹²⁵ and *Sayn-Wittgenstein*.¹²⁶ In those cases, the ECJ ruled that

it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State.¹²⁷

This means that, in so far as the essential interests of the EU are not adversely affected by national measures implementing EU law, the ECJ defers to the member states the question of determining the level of protection of fundamental rights they consider consistent with their national constitution.¹²⁸

The distinction between principles and rights

During the works of the Convention on the Future of Europe, some member states (the UK and Denmark) expressed serious doubts as to the incorporation of economic and social rights into the Charter.¹²⁹ In order to overcome their reluctance, the Convention on the Future of Europe added a paragraph to Article 52 of the Charter [Article 52(5)], whose aim is to stress that certain provisions of the Charter do not contain judicially cognisable rights, but programmatic norms requiring the intervention of the EU legislator or, as the case may be, that of the national legislator. To that effect, Article 52(5) of the Charter draws a distinction between ‘principles’ and ‘rights’, according to which ‘principles’ become significant for the Courts only when acts adopted by the Union in accordance with its powers, and by the member states only when they implement EU law, are interpreted or re-

in Disharmony’, 44 *CML Rev.* (2007) p. 9. For an account on the different views of constitutional pluralism, see M. Avbelj and J. Komarek (eds.), ‘Four Visions of Constitutional Pluralism’, 21 *EUI Law Working Papers* (2008), <cadmus.eui.eu/dspace/handle/1814/9372>.

¹²⁵ Case C-36/02 *Omega*, *supra* n. 97.

¹²⁶ Case C-208/09 *Sayn-Wittgenstein*, judgment of 22 Dec. 2010, not yet reported.

¹²⁷ *Ibid.*, para. 91 (referring to Case C-36/02 *Omega*, *supra* note 97, paras. 37 and 38).

¹²⁸ See Kokott and Sobotta, *supra* n. 3, at p. 12.

¹²⁹ Burgogue-Larsen, *supra* n. 69, at p. 683 et seq.

viewed. The explanations relating to Article 52(5) of the Charter state that principles 'do not [...] give rise to direct claims for positive action by the Union's institutions or Member States authorities'.

Logically, the question is then under what circumstances a provision of the Charter contains a 'principle' instead of a 'right'. Needless to say, Article 52(5) of the Charter does not exclude the justiciability of all social rights. Since the ECJ has already held that certain social rights are judicially cognisable,¹³⁰ Article 53 of the Charter would oppose an interpretation of Article 52(5) to the contrary. Unfortunately, neither the Charter nor the explanations relating to it provide sufficient criteria indicating the provisions under Title IV thereof that contain principles.¹³¹ By way of examples, the explanations relating to Article 52(5) of the Charter qualify as 'principles' the precautionary principle,¹³² the rights of the elderly,¹³³ and the integration of persons with disabilities.¹³⁴ The explanations also state that some Articles of the Charter may contain both principles and rights, referring to Articles 23, 33 and 34.¹³⁵ Given that the distinction between 'rights' and 'principles' remains unclear, it is for the ECJ to clarify it.

Moreover, scholars are divided into two camps when interpreting the concept of 'principle' as provided for by Article 52(5) of the Charter. On the one hand, one may argue that applicants may never rely on 'principles' before courts, unless they do so in relation to EU measures or, where appropriate, national measures implementing EU law which give expression to those principles. However, such a reading of Article 52(5) would prevent applicants from challenging EU measures or national measures implementing EU law that, though not giving expression to those principles, clearly violate them.¹³⁶ On the other hand, a broader reading of the term 'principle' would suggest that Article 52(5) of the Charter provides for a limited justiciability: whilst principles may not impose positive obligations on the EU or, as the case may be, on national authorities, they may however be relied upon with a view to setting aside conflicting legislation. Put simply, they may

¹³⁰ Regarding the right to collective bargaining and action (Art. 28 of the Charter), see Case C-438/05 *Viking Line*, *supra* n. 38; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767; Case C-271/08 *Commission v. Germany* [2010] ECR I-7087. See also D. Ashiagbo, 'Economic and Social Rights in the European Charter of Fundamental Rights', 1 *E.H.R.L.R.* (2004) p. 62, at p. 71 (arguing that 'it is by no means clear that the social and economic rights contained in the Charter can simply be rendered non-justiciable, especially as many such rights originate in Community social law or the ESC, and have been shown to be capable of judicial or quasi-judicial interpretation and application').

¹³¹ See the explanations relating to the Charter, *supra* n. 13, at p. 35.

¹³² Art. 37 of the Charter.

¹³³ Art. 25 of the Charter.

¹³⁴ Art. 26 of the Charter.

¹³⁵ See the explanations relating to the Charter, *supra* n. 13, at p. 35.

¹³⁶ Burgorgue-Larsen, *supra* n. 69, at p. 687.

produce an 'exclusionary effect' (« invocabilité d'exclusion »). As De Schutter points out, Article 52(5) would oppose the adoption of certain EU or national measures that would call into question the effectiveness of 'a principle of the Charter', as defined by the existing normative framework put in place by the EU legislator.¹³⁷ In other words, mirroring the 'stand-still' effects of Article 53 of the Charter, the 'principles of the Charter' would prevent the EU legislator or, where appropriate, the national legislator from adopting regressive measures. In addition, such a reading of Article 52(5) seems also consistent with the ruling of the EGC in *Pfizer*. In that case, the EGC tested the consistency of a Council regulation in light of the precautionary principle.¹³⁸

Explanations relating to the Charter

In the previous parts of this section, I have often referred to the explanations relating to the Charter in order to endorse (or reject) a given interpretation. In contrast to the Charter itself, the explanations relating to it – which were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter – 'do not as such have the status of law'. However, 'they are a valuable tool of interpretation intended to clarify the provisions of the Charter'.¹³⁹

The question is then what interpretative value one must give to the explanations relating to the Charter. Are they a manifestation of the 'authentic interpretation' of the Charter or just 'certified *travaux préparatoires*'? The difference in value between those two options is by no means irrelevant. Given that Article 6(3) TUE provides that the explanations relating to the Charter 'set out the sources of [the] provisions [thereof]' (as opposed to interpreting the Charter), Ziller opines that those explanations are a compilation of *travaux préparatoires*, but, technically speaking, they are not a manifestation of the 'authentic interpretation of the Charter'.¹⁴⁰ Stated differently, the explanations relating to the Charter do not interpret the provisions thereof but limit themselves to indicating the sources in the light of which the rights and freedoms recognised by the Charter must be interpreted.¹⁴¹

¹³⁷ O. De Schutter, 'Les droits et principes sociaux dans la Charte des droits fondamentaux de l'Union européenne', in J.Y. Carlier and O. De Schutter (eds.), *La Charte des droits fondamentaux de l'Union européenne* (Bruylant 2002) p. 117, at 112.

¹³⁸ Case T-13/99 *Pfizer Animal Health v. Council* [2002] ECR II-3305.

¹³⁹ See the explanations relating to the Charter, *supra* n. 13, at 17. See Case C-279/09 *DEB*, *supra* n. 33, para. 32, where the ECJ referred for the first time to the explanations relating to the Charter.

¹⁴⁰ J. Ziller, 'Le fabuleux destin des Explications relatives à la Charte des droits fondamentaux de l'Union européenne', in *Chemins d'Europe: Mélanges en l'honneur de Jean-Paul Jacqué* (Dalloz 2010) p. 765.

¹⁴¹ *Ibid.*, at 778.

However, I believe that the explanations relating to the Charter have a higher interpretative value than that of *travaux préparatoires*. Although not legally binding, one may not obviate the fact that both the authors of the Treaty of Lisbon and those of the Charter insisted in the importance of those explanations. Thus, it would be very difficult for the ECJ to interpret the provisions of the Charter in a way conflicting with those explanations. Otherwise, the ECJ would be engaging in judicial activism. In my view, only where the explanations relating to the Charter provide no (complete) answer to the questions of interpretation with which the ECJ is confronted may the latter have recourse to other methods of interpretation.

CONCLUSION

Throughout the first section of the present contribution, I have advocated that the scope of application of the Charter and that of general principles of EU law should overlap. A dual regime should be avoided, since it would give rise to arbitrary divergences as to the actual quality and potency of those rights.

Unlike the provisions of the TEU and those of the TFEU, the Charter – notably its Article 52 – lays down interpretative guidelines which are binding upon both EU and national courts when interpreting the rights and freedoms recognised thereby. The question is then whether the interpretation of the Charter differs from that of general principles of EU law. Whilst it is too early to provide a complete answer to that difficult question, I would however like to make two final comments, namely the first relating to the level of protection provided for by Article 53 of the Charter, the second resulting from the difference between ‘rights’ and ‘principles’ laid down in Article 52(5) of the Charter.

I have argued that Article 53 of the Charter should be interpreted as a ‘stand-still’ clause, according to which the Charter does not allow a reduction of the level of fundamental right protection currently attained by EU law. A regressive interpretation of the Charter is thus prohibited. In that respect, the fact that the ECtHR may itself follow a regressive interpretation of the ECHR is irrelevant. In the realm of fundamental rights, it is precisely the prohibition of regression that crystallises the constitutional autonomy of the Union. However, it follows from Article 53 of the Charter that such prohibition is limited to the provisions of the Charter. Accordingly, though it is very unlikely to happen in light of the recent case-law of the ECJ, nothing prevents the latter from interpreting the general principles of EU law in a regressive fashion. Hence, in my view, in order to avoid a regressive interpretation, general principles of EU law should not apply where the corresponding provisions of the Charter offer a higher level of protection.

Moreover, the distinction between ‘principles’ and ‘rights’, laid down in Article 52(5) of the Charter, may cause problems of coherence with the general principles of EU law. In addition to the problems of semantics that a different definition of the term ‘principle’ may cause within the EU legal order, a restrictive interpretation of that term would render very difficult for the ECJ and national courts to interpret the provisions of the Charter which contain simultaneously a ‘principle of the Charter’ and a general principle of EU law (as is the case for the precautionary principle). Arguably, it seems that a good way of overcoming such difficulties would be for the term ‘principle’ laid down in Article 52(5) of the Charter to be interpreted as meaning ‘capable of producing exclusionary effects’ in order to prevent the EU legislator or, where appropriate, the national legislator from adopting regressive measures. Put simply, with a view to declaring invalid secondary EU measures or, as the case may be, to setting aside conflicting national measures implementing EU law, individuals should be able to rely on a ‘principle’ of the Charter, as defined by the existing normative framework set out by the EU legislator.

