## Articles

# "Same Legal Value as the Treaties"? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights

*By Lucia Serena Rossi*[*]


## Abstract

Article 6 of the TEU states that the EU Charter of Fundamental Rights "shall have the same legal value as the Treaties." This Article investigates the Charter's real status in the EU legal order. To this end, the Charter's force will be analyzed relative to EU institutions, the Member States, and individuals. The resulting picture will enable consideration of the Charter's place in the EU hierarchy of norms, as well as the question of its primacy and direct effect.


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## A. Premise

As is known, it was the Treaty of Lisbon that conferred binding force on the EU Charter of Fundamental Rights, enabling the latter to overcome its previous status as soft law, a position it had remained in since 2000, the year in which it was "proclaimed" in Nice. Instead of incorporating the Charter into the Treaties—the strategy used for the Constitutional Treaty—it was decided that the Treaty of Lisbon should simply refer to the Charter as a source that would be external to the Treaty itself but internal to the EU system. Therefore, under Article 6 of the Treaty on European Union (TEU), the Charter "shall have the same legal value as the Treaties."

Formally, then, the Charter is recognized as primary law, and it has even been suggested that it could gain constitutional status, on the reasoning the Charter enshrines the Union's fundamental principles[1] and some general legal principles—such as *ne bis in idem*.[2] If it received constitutional status, the Charter would have precedence or primacy over the Treaty. Even though the Charter is "external" to the Treaty of Lisbon, its status as primary law meant, among other things, that it could only be amended through the ordinary revision procedure set forth in Article 48 TEU. Still—and this could weigh in favor of the Charter's status as "supra-primary" law, considering the fact that it was drafted by a convention—the same article does not seem to provide that the EU institutions may agree to an amendment without calling a convention.

One might ask whether that "same legal value" is such in a substantive sense as well, and in particular, whether it means that the Charter, or at least some of its provisions, are subject to the structural principles stated in deciding the *Van Gend & Loos* case[3] and the *Costa Enel* case[4]—namely, the principle of direct effect and that of the primacy of EU law. Indeed, there is no way to properly determine the Charter's status without considering whether these principles apply to it, for they are the most effective gauge by which to assess the weight the Treaties carry in the legal systems of the Member States.

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[1] Antonio Tizzano, *L'application de la Charte des droits fondamentaux dans les Etats membres à la lumière de son article 51*, paragraphe 1, 19(3) IL DIRITTO DELL'UNIONE EUROPEA, 429-38 (2014). *See also* Case C-101/08, Audiolux SA e.a v. Groupe Buzelles Lambert SA et. al., ECLI:EU:C:2009:626, Judgment of Oct. 15, 2009, para. 63 ("The general principles of Community law have constitutional status.").

[2] *See* TAKIS TRIDIMAS, GENERAL PRINCIPLES OF EU LAW (2006); Michael Wimmer, *The Dinghy's Rudder: General Principles of European Union Law through the Lens of Proportionality*, 20(2) EUR. PUB. L. 331–53 (2014).

[3] Case 26-62, Van Gend & Loos v. Netherlands Inland Revenue Administration, EU:C:1963:1, Judgment of Feb. 5, 1963.

[4] Case 6-64, Costa v. E.N.E.L., EU:C:1964:66, Judgment of July 15, 1964.

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Under Article 6 of the TEU, the rights, freedoms, and principles set forth in the Charter are to be construed in accordance with the general provisions contained in its Title VII. It follows that to assess the Charter's status we have to look at Articles 51 and 52 of the Charter, the CFR's Presidium Explanations—as stated in Article 6(1) TEU and reiterated by the European Court of Justice (ECJ)[5] —and the copious case law of the ECJ.

Article 51 of the Charter tells us that the Charter itself is addressed to the EU institutions. Indeed, while these institutions are bound to comply with the Charter both in adopting and applying normative acts, the Member States are bound by the Charter only when it comes to "implementing" EU law. In this Article, the Charter's status as it relates to EU institutions will therefore be considered separately from its status as it relates to the Member States, while bearing in mind that the two questions are not separate, but are rather two faces of the same coin. The Charter's status relative to the EU institutions is twofold, for on the one hand the Charter plays a passive role as a benchmark against which to assess the legality of the acts adopted by those institutions, while on the other hand it plays an active role in guiding EU legislation and framing its limits.

As concerns the Charter's status relative to the Member States, first, this Article will have to take into account the scope of its application, a concept the ECJ's recent case law reveals to be still in the making. Then, this Article will turn to the question of Charter's primacy and to that of its direct effect. As much as these two structural principles may seem to overlap—so much so that the ECJ has spoken of "the primacy of directly applicable EU law," they are, in effect, distinct. The primacy concerns the relation between the EU legal system and the legal systems of its Member States: This is a relation of hierarchical supremacy making the law of the Member States *ipso iure* inapplicable under that hierarchy. The Charter's primacy also raises the question of its own rank in the hierarchy of the sources of EU law. As concerns the principle of direct effect—under which individuals may directly invoke EU law in challenging the force of national laws in national courts—this Article will consider the actual weight the Charter may carry for individuals in relation to the Member States, as well as to other individuals.

In the closing remarks, this Article will size things up by considering the conclusions that may be drawn from the discussion, while also bringing back into focus the problem of the Charter's rank in the EU legal system.

[5] Case C-129/14 PPU, Spasic, EU:C:2014:586, Judgment of May 27, 2014.

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### B. The Charter's Status Relative to EU Institutions and the Problem of Its Rank in the Union's Hierarchy of Sources of Law

With regard to the Charter's status relative to the EU institutions, it is to be retained that under Article 6(1) of the TEU the Charter is not intended to extend the powers conferred on them. Several provisions of the Charter itself clarify this notion: Preamble and Article 51;[6] Protocol 30 on the application of the Charter to Poland and the United Kingdom; Declarations 1, 53: Charter declaration by the Czech Republic; and Declaration 61: Poland. All these statements aim to avoid a scenario where EU bodies and institutions use the Charter to "overstep" the powers conferred on them; rather, these institutions must comply with the principle of subsidiarity.[7] The Charter's function is in fact the opposite. It is aimed at limiting the powers conferred on EU bodies and institutions by requiring them to comply with the fundamental principles. It is precisely through these limitations that the Charter is entrusted with the distinctive function of national constitutions—namely, to ensure that public power is subject to the rule of law and that it protects individual rights.[8]

To determine whether the Charter has an equal hierarchical standing with the Treaty with regard to the acts adopted by EU institutions, once must first assess its rank in the hierarchy of EU sources of law. More precisely, the rule that the Charter "shall have the same legal value as the Treaties" should mean that: (a) The Charter is not subordinate to the Treaty itself; (b) as a higher-order norm, the Charter must be complied with whenever enacting any derived legislation—including the agreements the EU concludes with non-EU countries and with international organization—and whenever implementing acts adopted by EU institutions; (c) any such derived legislation that should contradict the Charter could be declared invalid or annulled by the ECJ; and (d) the Charter can influence the EU institutions'

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[6] Charter of Fundamental Rights of the European Union art. 51, § 1.

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Charter of Fundamental Rights of the European Union [henceforth CFR] art. 51, § 2 ("The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.").

[7] Tizzano, *supra* note 1 ("*C'est le droit de l'Union qui délimite le champ d'applicaiton de la Charte et non pas le contraire* [it is Union law that delimits the Charter's scope, not the other way around].").

[8] From the outset, in the Nice proclamation of 2000, the European Commission and the Council of Ministers vowed that they would respect the Charter even if it was to never enter into force.

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lawmaking, as both a positive standard—setting out what is to be achieved through such activity—and a negative one—placing limits on the same activity.

*I. Relations Between the Charter and the EU Treaties.*

As concerns the relation between the Charter and the Treaty, some overlap can be observed, raising the question of what should prevail. In the matter of the free movement of EU citizens, provided for in both the Treaty—Article 21 of the TFEU—and the Charter—Article 45 of the CFR. Unlike the TFEU, the Charter frames this as an unconditional right, without making allowance for the limitations adopted in applying the Treaty, meaning the limitations contained in derived legislation. If the Charter and the Treaty had the same status, the former, as *lex specialis*, should trump the latter. Yet, that relation of primacy is ruled out under Article 52(2) of the Charter, under which, "rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties." This sets up a sort of blanket subordination of the Charter to the Treaty, but does not foreclose a situation in which the ECJ, entrusted with striking a balance among EU norms, should find that a provision of the Charter takes primacy over a Treaty provision having a different scope. Even before the Treaty of Lisbon came into force in the *Omega* judgment[9] and the *Schmidberger* judgment,[10] the ECJ held that a fundamental freedom set forth in the Treaty may be trumped by a fundamental right set forth in the Charter.

*II. Relations Between the Charter and EU Secondary Legislation.*

As concerns the relation between the Charter and secondary sources of law, Article 52(1) of the CFR reads as follows:

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

[9] Case C-36/02, Omega Spielhallen- und Automatenaufstellungs v. Oberbürgermeisterin der Bundesstadt Bonn, EU:C:2004:614, Judgment of Oct. 14, 2004.

[10] Case C-112/00, Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, EU:C:2003:333, Judgment of June 12, 2003.

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Reference to this provision is made in the law of the Member States, a matter this Article will return to shortly. The provision also seems to say that a lower source of EU law, meaning the acts adopted by EU institutions, may limit the exercise of the freedoms set forth in the Charter when satisfying the conditions of proportionality and general interest in the article.

This element sets the Charter's rank apart from that of the Treaty of Lisbon. While the Treaty contains some specific exceptions for secondary legislation, the Charter seems to fashion this into a general ability of secondary legislation to introduce such exceptions; for example, consider the economic conditions attached to the freedom of movement of EU citizens. This is at least the conclusion we have to draw if we do not take the view that the Presidium Explanations on Article 52 of the CFR are exhaustive in making reference to the objectives listed in Article 3 of the TEU and the principle of conferral contained in Article 4(1) of the TEU—both of which certainly apply to EU institutions. That view seems implausible, given that the classic restrictions that Member States may impose on the exercise of fundamental rights under Articles 36 and 346 of the TEU are included among the "general interests" mentioned in the Presidium Explanations.

It should be kept in mind that the ECJ has affirmed the general principle of interpretation under which EU acts must be interpreted to the extent possible in such a way as to preserve their validity—that is, an interpretation that would ensure their consistency with primary EU law generally and with the Charter in particular.[11] In *Lanigan*,[12] for example, Framework Decision 2002/584/JHA on the European arrest warrant was interpreted by the ECJ in light of Article 6 of the Charter.

The scenario configured in Article 52(1) of the Charter—under which the Charter may "give way" to an act adopted by an EU institution—seems to be inconsistent with the possibility of using the same Charter as a standard by which to assess the legitimacy of EU acts. The latter possibility can be easily extracted from the ECJ's case law, and it is indirectly recognized under Article 52(5) of the Charter, limiting that possibility to Charter provisions that contain principles.

It stands to reason, therefore, that the ability of an EU act to limit the rights contained in the Charter should be taken as an exception that must be shown to be appropriately grounded in the principles of necessity and proportionality, and that is in any event subject to judicial review by the ECJ. As has been pointed out in the literature, although the "provision by law" does not necessarily mean that EU acts must be passed under an ordinary legislative

[11] *See* Case C-12/11, McDonagh v. Ryanair Ltd., EU:C:2013:43, Judgment of Jan. 31, 2013, para. 44; C-579/12 RX-II, Commission v. Strack, EU:C:2013:570, Judgment of Sept. 19, 2013, para. 40.

[12] C-237/15 PPU, Minister of Justice and Equality v. Lanigan, EU:C:2015:474, Judgment of July 16, 2015.

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procedure, they must be published.[13] In any event, according to an authoritative view,[14] the rights enshrined in Title I of the Charter are entrenched: There is no circumstance in which limitations might plausibly be imposed on the right to human dignity, life, or integrity of the person, nor can any exceptions be made to the prohibitions on torture, inhumane or degrading treatment, or slavery and forced labor.

*III. The Charter as an Instrument of Legality Review*

Similar to the Treaty of Lisbon, the Charter can serve as a benchmark against which to judge the legality and validity of acts adopted by EU institutions. Although none of these acts have ever been struck down, there have been cases in which the ECJ has declared them to be invalid, either in full or in part, in light of the Charter itself or otherwise using the Charter in conjunction with other sources.

An example of the above phenomenon is *Schecke*,[15] which involved a Council regulation on the financing of the common agricultural policy requiring publication of personal data on the beneficiaries of agricultural aid without making distinctions as to the duration, frequency, or nature and amount of the aid received. Some of the provisions in this regulation were invalidated by the ECJ as being incompatible with Articles 7 and 8 of the Charter. Another example is *Association Belge des Consommateurs Test-Achats*,[16] in which a provision of Directive 2004/113 was invalidated as incompatible with Articles 21 and 23 of the Charter. Still another example is *Schrems*,[17] in which the ECJ invalidated Decision 2000/520/EC, finding it to be incompatible with Directive 95/46/EC on the protection of personal data, as construed in light of the Charter. In *Digital Rights Ireland*,[18] the ECJ invalidated the entire Directive 2006/24/EC for being in violation of Articles 7 and 8 of the Charter, with respect to private and family life and the protection of personal data. Unlike what the ECJ did in the previously mentioned cases, here it looked to the Charter as the sole standard of judgment.

A general limit on the Charter's ability to serve as a criterion of legitimacy arguably lies in Article 52(5) of the Charter, under which the Charter provisions containing quite a number

[13] *See* Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8(3) EUR. CONST. L. REV. 375–403 (2012).

[14] *Id.* at 388.

[15] Case C-92/09 & C-93/09, Schecke v. Land Hessen, EU:C:2010:662, Judgment of Nov. 9, 2010.

[16] C-236/09, Association Belge des Consommateurs Test-Achats and Others v. Conseil des Ministres, EU:C:2011:100, Judgment of Mar. 1, 2011.

[17] C-362/14, Schrems v. Data Protection Commissioner, EU:C:2015:650, Judgment Oct. 6, 2015.

[18] Cases C-293/12 and C-594/12, Digital Rights Ireland v. Minister for Communications and Kärntner Landesregierung and Others, EU:C:2014:238, Judgment of Apr. 8, 2014.

of principles can be invoked in a court only for the purpose of interpreting or ruling on the legality of the legislative and executive acts taken by EU institutions implementing those principles. This limitation seems to exclude the use of the Charter for the judicial review of other EU acts. If this is correct, the Charter's hierarchical supremacy over acts adopted by EU institutions would be subject to a limit not applicable to the Treaty, and so it may prove more difficult to invalidate these acts under the Charter than under the Treaty.

*IV. Compliance Assessment*

As to the Charter's role in relation to the EU institutions' enactment of secondary law, the Charter, unlike the Treaties, contains no legal basis to rest the powers and procedures for such enactment. Even so, every proposed act presented by the European Commission must provide an assessment of compliance with the fundamental rights set forth in the Charter.

In reality, the Charter is having an increasing impact on the activities of EU institutions. On the one hand, the Charter's provisions translate into guidelines for the enactment of EU acts. These guidelines prompt EU institutions to adopt acts that will either implement fundamental rights or bear a direct or indirect relation to them.[19] On the other hand, as has been pointed out,[20] these provisions could act as a standstill rule preventing EU institutions from lowering the existing level of protection. This possible limitation is a consequence of the Charter's function as a potential criterion of legality.

**C. The Charter's Status for the Member States: Its "Scope"**

More complex than the effects the Charter may have on EU institutions and their acts is the question of the Charter's relation to the norms enacted by Member States. Indeed, the Charter is mainly aimed at EU institutions, and only when "implementing Union law" does it apply to Member States.[21] Member States are thus bound to comply with the fundamental rights and respect and promote the underlying principles, and only within that scope does the Charter apply to them.

[19] That impact of the Charter has been analyzed in detail in Elise Muir, *The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges*, 51 COMMON MKT. L. REV. 219–46 (2014). *See also* Allan Rosas and Heidi Kaila, *L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice: Un premier bilan*, 16(1) IL DIRITTO DELL'UNIONE EUROPEA, 1-28 (2011).

[20] *See* Koen Lenaerts, *Exploring the Limits of the EU Charter*, 8 EUR. CONST. L. REV. 3, 375–403 (2012). *See also* Oliver De Schutter, *Les droits et principes sociaux dans la Charte des droits fondamentaux de l'Union européenne*, *in* LA CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE 117 (J.Y. Carlier & O. De Schutter eds., 2002).

[21] CFR art. 51, § 1. On CFR art. 51, see also P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945–94 (2002); Eleanor Spaventa, *The interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures*; Study for the Petition Committee, PE 556.930; Michael Dougan, *Judicial Review of Member State Action under the General Principles and the Charter: Defining the Scope of Union Law*, 52 COMMON MKT. L. REV. 1201–46 (2015).

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A broader, and more ambiguous, interpretation of that scope—or field of application—is contained in the explanations provided by the Presidium. To the extent that they concern Article 51 of the CFR, these explanations clarify that under the ECJ's case law, 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 Union law. Yet, the same explanations also quote the ECJ in that regard: "In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States *when they implement Community rules*".[22]

The principle that the Charter's fundamental rights can be asserted by the EU only against Member States acting within the scope of Union law is certainly not new; it has been reiterated by the ECJ in a series of cases from *Grogan*[23] to *Kremzow*.[24] In several opinions, the ECJ has stated that the Charter applies to Member States that both: (a) Implement EU law as in *Wachauf;*[25] and (b) invoke exceptions provided by that law, either explicitly under the Treaties or by interpreting overriding requirements in the public interest, as in ERT.[26]

Before the Treaty of Lisbon went into effect, the ECJ was solely competent to decide on the scope of EU law in asserting the Member States' obligation to respect the fundamental rights. The court's findings have occasionally been surprising, a case in point being its judgment in *Carpenter*.[27] But, when the Charter explicitly addressed its own field of application in Article 51, it turned the spotlight on that issue, drawing the Member States' constitutional courts to it as well.

[22] Case C-292/97, Karlsson and Others, EU:C:2000:202, Judgment of Apr. 13, 2000, para. 37 (emphasis added).

[23] Case C-159/90, Society for the Protection of Unborn Children Ireland v. Grogan and Others, EU:C:1991:378, Judgment of Oct. 4, 1991.

[24] Case C-299/95, Kremzow v. Republik Österreich, EU:C:1997:254, Judgment of May 29, 1997.

[25] Case C-5/88, Wachauf v. Bundesamt für Ernährung and Forstwirtschaft, EU:C:1989:321, Judgment of July 13, 1989.

[26] Case C-260/89, Elliniki Radiophonia Tiléorassi v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others, EU:C:1991:254, Judgment of June 18, 1991.

[27] Case C-60/00, Carpenter v. Secretary of State for the Home Department, EU:C:2002:434, Judgment of July 11, 2002.

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*I. The Scope of the Charter*

The Presidium Explanations offer two different concepts of implementation of EU law: A broad one and a strict one. In *Annibaldi*,[28] well before the Charter was proclaimed in Nice, the ECJ held that the concept of implementation concerned not only the transposition of EU law by Member States, but also any instance in which a norm enacted by the latter should "fall within the scope of Community law" by virtue of their pursuing the same aims. But, in the case at hand, the Italian norm was manifestly devoid of any connection whatsoever with any norm of the Community system.

When the Treaty of Lisbon went into effect, the ECJ initially applied Article 1 of the Charter, both in the positive[29] and in the negative,[30] without considering the meaning of that article. Subsequently, in *Iida*,[31] the court held that the Charter's field of application only extends to norms implementing EU law and to the cases covered by it—precisely the opposite of the situation in the case at hand.

Later, in *Åkerberg Fransson*,[32] a case concerning the *ne bis in idem* principle in fiscal matters,[33] the ECJ gave a quite broad interpretation of Article 51 of the CFR, finding that the Charter's scope covers every State legislation falling under the scope of EU law.

A concerned response to that finding came from the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*, or BVerfG). In a ruling handed down on April 24, 2013[34] concerning a German law establishing a counterterrorism database, the German court held that the ECJ lacks the jurisdiction needed to decide whether a German law is in violation of the fundamental rights enshrined in the Charter, and that this legal conclusion

[28] Case C-309/96, Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio, EU:C:1997:631, Judgment of Dec. 18, 1997.

[29] *See* Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft v. Bundesrepublik Deutschland, EU:C:2010:811, Judgment of Dec. 22, 2010.

[30] For a case clearly falling outside the scope of EU law, see Case C-339/10, Estov and Others v. Ministerski savet na Republika Bulgaria, EU:C:2010:680, Judgment of Nov. 12, 2010.

[31] Case C-40/11, Iida v. Stadt Ulm, EU:C:2012:691, Judgment of Nov. 8, 2012.

[32] Case C-617/10, Åklagaren v Åkerberg Fransson, EU:C:2013:105, Judgment of Feb. 26, 2013, para. 25–27.

[33] The ECJ remanded to the national court the task of ruling on whether the tax penalties in question were administrative or criminal, thus deciding whether there had been a violation of the *ne bis in idem* prohibition.

[34] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Apr. 24, 2013, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1 BvR 1215/07 [hereinafter Judgment of Apr. 24, 2013], http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/04/rs20130424_1bvr121507en.html.

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is not affected by the holding in *Åkerberg*. If the latter decision is to be regarded as not having been taken *ultra vires*, the German court said, it:

> [M]ust thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR.[35]

In the wake of the *Åkerberg Fransson* judgment and the concerns it gave rise to, the ECJ seems to have wavered in its case law regarding the Charter's field of application. Accordingly, in the *Hernandez* judgment of 2014,[36] the ECJ held that a national norm cannot be made to fall within the scope of EU law, and hence of the Charter, simply because it covers a subject matter where the EU is competent. For that to happen, the national legislation needs to also pursue aims coinciding with those of an EU norm.

But then in 2015, in *WebMindLicenses Kft*,[37] the ECJ took up the same view it had stated in *Åkerberg Fransson*. This case also concerned VAT, and in particular a VAT assessment to determine whether a certain transaction was fraudulent. Under Article 51(1) of the Charter, the court held this assessment qualified as an implementation of the VAT directive and of Article 325 of the TFEU, and so of EU law. But in this case, because the court upheld the national norm, which was found not to preclude the implementation of EU law, it may well be that this decision will not raise the same controversies as *Åkerberg Fransson*.

Finally, in *Delvigne*, the ECJ reiterated that, "the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law."[38] A French law depriving individuals of the right to vote in elections of the European Parliament once

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[35] *Id.* at para. 91.

[36] Case C-198/13, Víctor Manuel Julian Hernández v. Reino de España, EU:C:2014:2055, Judgment of July 10, 2014.

[37] Case C-419/14, WebMindLicenses v. Nemzeti Adó, EU:C:2015:832, Judgment of Dec. 17, 2015, paras. 77–85, with special emphasis on paragraph 76.

> [P]reventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive (see *inter alia*, to this effect, judgment in *Halifax and Others*, C‑255/02, EU:C:2006:121, paragraph 71), investigative measures carried out in the context of a criminal procedure with a view, in particular, to prosecuting offences in that sphere have an aim which meets an objective of general interest recognised by the European Union.

[38] Case C-650/13, Thierry Delvigne v. Commune de Lesparre-Médoc and Préfet de la Gironde, EU:C:2015:648, Judgment of Oct. 6, 2015, para. 26.

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they have been found guilty of a crime was considered by the court to fall in the scope of the Charter. Indeed, even it if falls within the powers of the Member States to say who has the right to vote, the exercise of that power is subject to certain obligations under EU law. This restriction can be seen in the 1976 act on the election of representatives to the European Parliament,[39] Article 14(3) of the TEU, and, in particular, the obligation to "ensure that the election of Members of the European Parliament is by direct universal suffrage and free and secret."[40] But in the case at hand, the court held that even though the French law did limit the voting right granted under Article 39(2) of the Charter, this limitation was justified under Article 52(1) of the same Charter.

Once the "dust settled" after the *Åkerberg Fransson* judgment, the ECJ seems to have reverted to the broad conception of the Charter's scope it had set out in that case. Yet, this may turn out to be a tentative position in an ongoing attempt to specify the meaning of Article 51 of the CFR—a process in which the court will momentarily, and cautiously, use "broad" definitions when the laws of the Member States prove to be compatible with the Charter,[41] confining itself to stigmatizing national legislations only when they fall within the "narrower" conception of the Charter's scope. After all, the number of cases from which the court recused itself for lack of jurisdiction is quite high.

The Charter's provisions apply to the Member States even when the latter invoke exceptions provided for under EU law. This can be easily asserted on the basis of the Presidium Explanations—pointing to the *ERT* judgment[42] in which it was found that national law may invoke exceptions only if it respects the fundamental rights. That view of applicability has recently been upheld by the ECJ in the *Pfleger*[43] and *Berlington Hungary* judgments.[44] In the latter judgment, the court pointed out that:

> [W]here a Member State relies on overriding requirements in the public interest in order to justify

[39] Act Concerning the Election of the Members of the European Parliament by Direct Universal Suffrage, annexed to Council Decision 76/787, Euratom, 1976 O.J. (L 278) 1 (ECSC), as amended by Council Decision 2002/772, Euratom, 2002 OJ (L 283) 1 (EC).

[40] Case C-650/13, *supra* note 38, at para. 32.

[41] *See* Case C-418/11, Texdata Software, EU:C:2013:588, Judgment of Sept. 26, 2013; Case C-195/12, Industrie du bois de Vielsam, EU:C:2013:598, Judgment of Sept. 26, 2013.

[42] Case C-260/89, Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis, EU:C:1991:254, Judgment of June 18, 1991, para. 43. *See also* Case C-368/95, Familiapress v. Heinrich Bauer Verlag, EU:C:1997:325, Judgment of June 26, 1997, para. 24, and C-573/12, Ålands Vindkraft, EU:C:2014:2037, para. 125.

[43] Case C-390/12, Pfleger and Others, EU:C:2014:281, Judgment of Apr 30, 2014.

[44] Case C-98/14, Berlington Hungary Tanácsadó és Szolgáltató and Others v. Magyar Állam, EU:C:2015:386, Judgment of June 11, 2015.

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> rules which are liable to obstruct the exercise of the freedom to provide services, such justification, provided for by EU law, must be interpreted in the light of the general principles of EU law, in particular the fundamental rights henceforth guaranteed by the Charter.[45]

*II. What Falls Outside the Scope of the Charter?*

Which rules of the Member States are to be deemed as falling outside the Charter's field of application? Certainly, all rules that are not aimed at implementing, making exception to, or barring the application of EU law would fall outside the Charter's field of application. Furthermore, in the *Siragusa* judgment,[46] the ECJ stated that "the concept of 'implementing Union law' . . . requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other." In this case, the court therefore declared itself as lacking the jurisdiction needed to pass judgment on Italian landscape preservation rules on the reasoning that these rules fall outside the scope of EU environmental law, even though under Italian law, landscape preservation is part of environmental protection.[47]

Finally, it needs to be pointed out that because the Charter applies to Member States only when they are implementing or claiming an exception to a rule of EU law, any infringement will necessarily refer to those rules in addition to the relevant provisions of the Charter. From that consideration follows a key difference setting the status of the Charter apart from that of the Treaty: It seems impossible to initiate proceedings against Member States solely on the ground that they have violated the Charter.

**D. The Charter's Primacy over the Member State's Law and Constitutional Reservations**

Having thus delimited the scope of the Charter's applicability to the Member States, this Article now considers whether the Charter is like the other rules of the Treaties and the secondary acts in having primacy over national law, and, if so, to what extent. Under the doctrine the ECJ has built up starting from *Van Gend & Loos*, the primacy of EU law over national law holds not only for the founding treaties, but also for any act adopted by the EU institutions. More than fifty years after primacy was first formulated as a judicial doctrine, it

[45] *Id.* at para. 74.

[46] Case C-206/13, Siragusa v. Regione Sicilia, EU:C:2014:126, Judgment of Mar. 6, 2014.

[47] For a list of other judgments where the Charter has been found to be inapplicable, see Spaventa, *supra* note 21.

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is still regarded by Member States as something they are willing to accept in practice, but it is not something they will not formally acknowledge in the Treaties.[48]

In the view of the ECJ, primacy instead stands as the cornerstone of the EU system, and is closely bound up with the principle of the EU system's autonomy and that of the Member States' sincere cooperation with the Union. Primacy resolves itself into a hierarchical ordering that, on the one hand, preempts the validity of any subsequent national norm, and, on the other hand, requires courts as well as central and local government officials and public administration to strike down national norms conflicting with any higher-order norm. Starting from the judgment in *Simmenthal*,[49] the ECJ has rested its case law on the view that primacy entails disapplication, that is, on a monistic conception where EU law has supremacy over national law.[50] In *A* v. *B and Others*,[51] the ECJ extended this conception to the Charter, holding that national courts are bound to disapply national norms contrary to the Charter, without waiting for a review of their constitutionality.

In an ongoing dialogue from distant posts between the ECJ and the Member States' constitutional or supreme courts, the question of the primacy of EU law has always been entwined with that of the rival primacy of the fundamental principles protected under national constitutions.

Although the Charter is primarily intended to make the EU institutions comply with the fundamental rights, rather than assuring the courts of such compliance, it seems to have heightened their sense of vigilance. Even though the Charter itself must not be interpreted to undercut the protections afforded by national constitutions under Article 53 of the Charter, jurists are divided over the actual force of that provision.[52]

Is it possible that the Charter, similarly to the Treaty, should be subject to "counterchecks," understood as constitutional exceptions that may be raised by Member States?

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[48] The Treaty of Lisbon makes no reference to the primacy of EU law except in the Declaration Concerning Primacy, which, unlike the Constitutional Treaty, never came into force. Declaration No. 17, annexed to the final act of the intergovernmental conference that signed the Treaty into law on Dec. 13, 2007.

[49] Case C-106/77, Amministrazione delle Finanze dello Stato v. Simmenthal, EU:C:1978:49, Judgment of Mar. 9, 1978.

[50] *See* Case C-105/14, Taricco and Others, EU:C:2015:555, Judgment of Sept. 8, 2015.

[51] Case C-112/13, A v. B and Others, ECLI:EU:C:2014:2195, Judgment of Sept. 11, 2014.

[52] On the events leading to that provision on the level of protection, see Jonas Bering Liisberg, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?*, 38(5) COMMON MKT. L. REV. 1171–99 (2001). On CFR art. 53, see Bruno De Witte, *Tensions in the Multilevel Protection of Fundamental Rights: The Meaning of Article 53 EU Charter*, *in* CITIZENSHIP AND SOLIDARITY IN THE EUROPEAN UNION: FROM THE CHARTER OF FUNDAMENTAL RIGHTS TO THE CRISIS—THE STATE OF THE ART 205–17 (Canothilho Silveira & Madeira Froufe eds.); *see also* L. Besselink, *The Parameters of Constitutional Conflict after Melloni*, 39(4) EUR. L.REV. 531–52 (2014).

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The ECJ does not formally recognize exceptions to the primacy of EU law, not even where the exception may be grounded in a constitutional provision,[53] or in the basic rights enshrined in a national constitution. Clearly testifying to that fact is the *Melloni* case,[54] where the ECJ addressed a reference for a preliminary ruling by the Constitutional Court of Spain and found that EU law has primacy over the Member States' basic constitutional rights when the subject matter has been harmonized by an act of the EU.

Note that in taking that view, the ECJ seems to interpret the Member States' constitutional protections as if they were "mandatory requirements"; the latter, according to the court's settled case law, can no longer be invoked once the subject matter has been harmonized. Therefore, in *Melloni*, the court held that Member States should not be able to invoke national standards offering greater protections, on the reasoning that the European arrest warrant harmonizes different national standards for the protection of the fundamental rights.

The same view has been upheld on those rare occasions when the court has taken account of the Member States' constitutional principles. For example, in *Sayn-Wittgenstein*,[55] the court accepted that the Austrian State's democratic principle should prevail over the right of a German citizen to use designation of her noble status.

In the *Hernández* judgment,[56] the Court made it clear that the reason for pursuing the objective of protecting fundamental rights in EU law, with regard to both action at the EU level and the implementation of EU law by the Member States, is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy, and effectiveness of EU law. The Member States' constitutional or supreme courts, for the most part, have subscribed to that view as a general proposition. But, in doing so, they have developed different doctrines of "counterchecks" and constitutional reservations aimed at constraining the effects of primacy in cases where EU law might come into contrast with norms or values deemed to be essential to the national system of law. As much as constitutional reservations may vary from state to state, they all revolve around the concept of *ultra vires* review—of

[53] *See* Case C-285/98, Kreil v. Bundesrepublik Deutschland, EU:C:2000:2, Judgment of Jan. 11, 2000; *see also* C-571/10, Kamberaj, EU:C:2012:233, Judgment of Jan. 11, 2000.

[54] Case C-399/11, Melloni v. Ministerio Fiscal, EU:C:2013:107, Judgment of Feb. 26, 2013.

[55] Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, EU:C:2010:806, Judgment of Dec. 22, 2010.

[56] Case C-198/13, Hernández v. Reino de España, Judgment of July 10, 2014; *see also* WebMindLicenses, *supra* note 37, at para. 47.

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norms the EU has adopted beyond its powers—or around the fundamental constitutional principles, especially the right to dignity (identity review).[57]

These constitutional reservations have been announced for some time, but only as theoretical assertions, failing to hold up in practice under the concrete challenge posed by EU norms. Only recently, in response to the *Landtová* judgment,[58] has a national court—the Constitutional Court of the Czech Republic—gone so far as to find an ECJ judgment to be *ultra vires*. Subsequently, echoing that stance was a decision by the BVerfG; having already threatened to reach similar conclusions in the *Gauweiler* case,[59] the BVerfG found it legitimate for a German court not to enforce a European arrest warrant issued by an Italian court for a U.S. citizen who was staying in Germany. In reaching this holding, the BVerfG argued that the warrant violated the U.S. citizen's due process rights under German law, and that it was empowered, where necessary, to carry out an identity review under Article 4(2) of the TEU, requiring the EU to respect the Member States' constitutional identities.[60] It is interesting to note that in this order, the BVerfG held that the clause requiring respect for national identities under Article 4 of the TEU is an exception to the sincere cooperation principle set forth in the same article. In the case at hand, the BVerfG ultimately decided not to proceed to that identity review, nor did it refer the matter to the ECJ, for it felt that this case did not meet the criteria set out in the same framework decision on the European arrest warrant. That doctrine is a "rebuttal" to the ECJ's judgment in *Melloni*.

Further support for the ability to resort to an identity review could seem to come from Article 52(4) of the Charter, providing that where the Charter itself recognizes the basic rights enshrined in the constitutional traditions common to the Member States, those rights

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[57] On this question, see Lucia Serena Rossi, *How Fundamental Is a Fundamental Principle? Primacy and Fundamental Rights after the Lisbon Treaty*, 27(1) YEARBOOK OF EUR. L. 65–87 (2008).

[58] Case C-399/09, Landtová v. Česká správa socialního zabezpečení, EU:C:2011:415, Judgment of June 22, 2011. In a sort of "rebuttal" to that judgment, the Czech court held that Council Regulation No. 1408/71 was inapplicable on the ground that it was issued *ultra vires*. On this matter, see Jan Komarek, "Playing with Matches: The Czech Constitutional Court's *Ultra Vires* Revolution," *Verfassungsblog: On Matters Constitutional*, Feb. 22, 2012, http://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/.

[59] On two previous occasions–*Lissabon Urteil* (Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Jun. 30, 2009, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2 BvR 2/08) and *Honeywell* (Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], July 6, 2010, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2 BvR 2661/06)–the BVerfGE held that it could decide not to apply an EU norm enacted *ultra vires* if the norm could threaten a core value of the German constitution. On the *Gauweiler* case (Case C-62/14, Peter Gauweiler and Others v. Deutscher Bundestag, EU:C:2015:400, Judgment of June 16, 2015), see Francesco Munari, *Da Pringle a Gauweiler: I tormentati anni dell'unione monetaria e i loro effetti sull'ordinamento giuridico europeo*, 20(4) IL DIRITTO DELL'UNIONE EUROPEA 723-755 (2015) at 746–47 and *Editorial Comments Ultra Vires: Has the Bundesverfassungsgericht Shown Its Teeth?*, 50(4) COMMON MKT. L. REV. 925–29 (2013).

[60] *See* BVERFGE, 2 BvR 2735/14, Dec. 15, 2015. On this matter, see D. Sarmiento, "Awakenings: the "Identity Control" Decision by the German Constitutional Court," *Verfassungsblog: On Matters Constitutional*, Jan. 27, 2016, http://verfassungsblog.de/awakenings-the-identity-control-decision-by-the-german-constitutional-court/.

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must be construed "in harmony with those traditions." The notion of constitutional traditions common to the Member States was conceived by the ECJ, not as a total or "median" of all the Member States' constitutional traditions, but as an open-ended formula under which, on a case-by-case basis, the ECJ reserves for itself the power to recognize a tradition as "common" to protect it under EU norms. This ultimately amounts to a European—or Community—concept, instead of an aggregate or lowest common denominator of national concepts.

The obligation to interpret the Charter "in harmony" with the national traditions seems to limit the ECJ's discretion, by reinforcing the provision under Article 4 of the TEU—requiring the EU to respect the Member States' constitutional identities. Specifically, the obligation set forth in the Charter could prompt national constitutional courts to subject EU acts to an identity review in light of the Charter itself, either interpreting the Charter in keeping with their constitutional traditions or, inversely—if the ECJ should read the Charter too "liberally" —viewing it as contrary to the same traditions.

But, in reality, given that these traditions are not itemized in any list, the ECJ will always be able to discretionarily choose whether or not a given tradition is to be included among the ones common to the Member States. It would therefore seem that Article 52(4) of the Charter is not destined to have a meaningful impact, in comparison with what has occurred until now, when it comes to annulling or invalidating an EU act.

It should finally be pointed out that the primacy of EU law and the autonomy of its legal system are two concepts of fundamental importance in working out what the Charter's own relation is to other sources of international law—especially the European Convention on Human Rights (ECHR), under Article 53 of the Charter, and also in addressing the problem of the EU's accession to the same convention.

While in the abstract, the standards written into the Charter can and have to accommodate the greater levels of protection afforded under the ECHR system, there is the problem of working out whether—and, if so, to what extent—an act by the EU institutions, or a norm passed by a Member State implementing that act, can be assessed on the basis of criteria that are "external" to the EU system. The external criteria are in turn subject to the interpretation of courts that are "external" to the same system. The ECJ has always treated the ECHR more as a source of inspiration than as a source of obligations. This consolidated approach is echoed in Article 6(3) of the TEU, stating that "external" sources, the ECHR, and "the constitutional traditions common to the Member States shall constitute general principles of the Union's law." These sources accordingly become "internal," and thus subject to the ECJ's interpretation and power to pass judgment on their application. On this view, Article 6 of the TEU does not, and cannot, assign the Charter a lower rank than the ECHR or the constitutional traditions common to the Member States because the Charter is an internal source. Whereas, in the EU system, "external" sources carry force only as principles that are "internal" to the EU system.

In Opinion 2/13,[61] of December 18, 2014, the ECJ took a view contrary to the EU's accession to the ECHR, showing that even the explicit inclusion of such accession in Article 6(2) of the TEU has undermined this approach: The autonomy of the EU system entails that the ECJ has to be the court of last resort in EU law. But even if the EU should eventually accede to the ECHR, the convention's place in the hierarchy of sources would be equal to that of any other convention entered into by the EU. It would rank higher than EU acts, but lower than the EU Treaties,[62] and because the Charter "shall have the same legal value as the Treaties," it would also rank lower than the Charter.

We should finally ask whether the Charter's primacy is weakened by some of its own general provisions.

Article 52(1) CFR allows for the possibility of placing limitations on the exercise of the rights and freedoms recognized by the Charter itself, so long such limitations are provided for by law, necessary and proportionate, and designed to meet objectives of general interest. Configured in that provision of the Charter is a test for the ECJ to apply in evaluating limitations on rights by Member States acting within the scope of the Charter. This test, according to the Presidium Explanations, takes its cue from the ECJ's case law[63], stating that:

> [R]estrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights.

That rule can apply to all legislation passed by Member States. This can be seen in the first place from the Explanations, which mention not only EU norms like Article 3 of the TEU, Union's aim; and Article 4(1) of the TEU, principle of conferral. It can also be seen in the exceptions that Member States may claim under Articles 36 of the TFEU, restrictions on the free movement of goods;[64] and 346 of the TFEU, exceptions connected with national

[61] *See*, *inter alia*, C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, ECLI:EU:C:2008:461, Judgment of Sept. 23, 2008, paras. 282ff.

[62] Opinion 2/13 of the ECJ, EU:C:2014:2454, Dec. 18, 2014.

[63] Karlsson, *supra* note 22, at para. 45.

[64] The Praesidium Explanations also refer to an inexistent Paragraph 3 of Article 35 TFEU.

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security interests. Furthermore, the ECJ's case law states that the admissible restrictions are not confined to the examples made in the Explanations.

After the Charter entered into force, the test just mentioned was used by the ECJ in *Delvigne*.[65] That case involved a French citizen who had been barred from voting for the European Parliament in France on account of a prior conviction, even though a *lex mitior* applying to his case was subsequently passed in the same country. Under the test, the ECJ found that this restriction of rights was consistent with Article 49 of the Charter insofar as it was provided for by law, did not empty the right of substance, and was proportionate.

In the *Léger* judgment,[66] the ECJ was asked to rule on the validity of a French norm that put a ban on blood donations from gay men as persons whose sexual behavior would expose recipients to the risk of blood-transmitted diseases. The ECJ held that it was up to national courts to decide whether that law—discriminating between individuals on the basis of their sexual orientation, and hence incompatible with Article 21 of the Charter—was disproportionate. The EJC reasoned that there are reliable techniques by which to identify serious diseases transmissible by blood or, absent such techniques, less restrictive methods than a ban on blood donations as a way to protect recipients.

In the *McB* judgment,[67] the issue was whether it was legitimate for a biological father to have custody of his child under Regulation No. 2201/2003, even though no such custodial rights are provided for under national law. The court decided against recognizing such custody because it "would be incompatible with the requirements of legal certainty and with the need to protect the rights and freedoms of others, within the meaning of Article 52(1) of the Charter, in this case those of the mother."

The various "steps" in the proportionality test the court carries out under Article 52(1) of the Charter resemble those it has been using to test for so-called mandatory requirements ever since the judgment in *Cassis de Dijon*:[68] Necessity, adequacy, and proportionality. As surprising as this may seem at first sight—especially considering the constitutional nature of the fundamental rights—it actually fits into the parallel relation between the Charter and the Treaties. Just as the fundamental freedoms contained in the Treaty may be restricted in view of mandatory requirements, the rights contained in the Charter would be subject to exceptions under national norms, so long as these norms satisfy the test of proportionality

[65] Case C-650/13, Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde, ECLI:EU:C:2015:648, Judgment of Oct. 6, 2015; *see also* Council Decision 76/787, *supra* note 39.

[66] Case C-528/13, Léger v. Ministre des Affaires Sociale, EU:C:2015:288, Judgment of Apr. 29, 2015.

[67] Case C-400/10 PPU, McB v. L. E., EU:C:2010:582, Judgment of Oct. 5, 2010, para. 59.

[68] Case C-22/10 P, Rewe-Zentral v. Office for Harmonisation in the Internal Market, 120/78, EU:C:1979:42, Judgment of Feb. 20, 1979.

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and respond to general interests. These general interests echo in part the theory of mandatory requirements, and in part the theory of the limitations that can be placed on the European Convention on Human Rights (ECHR). The last say on the balance between these "national/European" requirements and individual rights ultimately belongs to the ECJ.

Even if the provisions in Article 52(1) and 52(4) of the Charter can limit the Charter's own application, no limitation on its primacy that differs in any way from what happens with the provisions in the Treaty is established, given that in either case the derogations are contained in the document itself. In fact, it could even be claimed that it is the very status of the Charter relative to the Treaty that makes it possible for these derogations to take effect. More relevant instead are the "inherent limitations" hardwired into the Charter itself and stated in its Article 52(6), under which "full account shall be taken of national laws and practices as specified in this Charter." Indeed, different provisions in the Charter expressly state that certain rights are protected, but when it comes to the conditions under which such protections are afforded, it refers in various phrasings to "national laws and practices."

These laws and practices could be described as "horizontal reservations" that turn up in several Charter provisions, conditioning their application either in whole or in part. These are the provisions contained in: Article 8, the protection of personal data; Article 9, the right to marry and right to found a family; Article 10, freedom of thought, conscience, and religion; Article 14, the right to education; Article 16, the freedom to choose an occupation and the right to engage in work; Article 17, the right to property; Article 27, workers' right to information and consultation within a business; Article 30, protection against unjustified dismissal; Article 34, social security and social assistance; Article 35, health care; Article 36, access to services of general economic interest; and Article 41, right to good administration.

It is these "built-in" limitations that, from a substantive point of view, may deprive the Charter of its ability to have any concrete effects on the legal systems of the Member States, even when these states are acting within the scope of Article 51 of the Charter. It would indeed be difficult in these cases to judge whether the norms they enact are consistent with the Charter.

It will be up to the court to decide whether to soften the effect of these limitations, as by taking the Charter into account as a standard of judgment along with other EU norms or by bringing the principle of proportionality into play. It must be pointed out that Member States do not have full discretion in implementing these provisions, for they cannot prejudice the essence of the rights set forth in them.[69] Furthermore, the limitations cannot be triggered until the EU passes a harmonization act; in which case, Member States come under an

[69] *See*, *e.g.*, Case C-34/09, Ruiz Zambrano v. Office national de l'emploi, ECLI:EU:C:2011:124, Judgment of Mar. 8, 2011. *See also* Armin Von Bogdandy et al. *Reverse Solange: Protecting the Essence of Fundamental Rights against member States*, 49 COMMON MKT. L.REV. 489-519 (2012).

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obligation to conform their law to such acts, and, in so doing, they are bound to comply with the rights contained in the Charter.

### E. The Charter's Status for Individuals: The Problem of Direct Effects

Closely bound up with the principle of the primacy of EU law is that of its direct effect, which the ECJ introduced back in 1963 in dealing with the founding Treaties,[70] and which it then extended to directives as well.[71] Under the principle of direct effect, the Treaty—regarded as the source and expression of "a new legal order"—can exert its effect not only on Member States but also on individuals. Individuals can ask that those provisions be applied by the courts and administrative and local government agencies,[72] so long as its provisions are unconditional and sufficiently precise In that case. The court subsequently enriched the theory of direct effect by providing for further remedies which state it should not suffice for national courts to refrain from applying national provisions in conflict with EU law. Two remedies are clearly written in *Dominguez*:[73] The obligation of national courts to interpret domestic legislation in conformity with EU law and the ability of an injured party to claim damages for the loss sustained.

While direct effects can clearly be invoked in a relation between individuals and states, the horizontal effect of EU law is more problematic, which the ECJ has explicitly ruled out for directives,[74] and which is not always clear even as concerns the Treaties.[75]

Similar to the Treaty, the Charter and its provisions must be looked at in teasing out whether it can have direct effects and what kinds these are.[76] It may seem at first sight that many of

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[70] Case 32/84, Van Gend & Loos v. Inspecteur der Invoerrechten en Accijnzen, Enschede, ECLI:EU:C:1985:104, Judgment of Feb. 5, 1963*; see also* Van Gend, *supra* note 3.

[71] This began with Case 33-70, SACE v. Finance Minister of the Italian Republic, EU:C:1970:118, Judgment of Dec. 17, 1970.

[72] Case 243/78, Simmenthal v. Commission of the European Communities, ECLI:EU:C:1980:65, Judgments of Mar. 9, 1978; *supra,* Note 50; Case 103/88, Costanzo v. Comune di Milano, EU:C:1989:256, June 22, 1989.

[73] Case C-282/10, Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, EU:C:2012:33, Judgment of Jan. 24, 2012, and the case law cited in that judgment.

[74] Case C-91/92, Faccini Dori v. Recreb Srl, EU:C:1994:292, Judgment of July 14, 1994.

[75] *See* Christopher Krenn, *A Missing Piece in the Horizontal Effect 'Jigsaw': Horizontal Direct Effect and the Free Movement of Goods*, 49(1) COMMON MKT. L. REV. 177–216 (2012) (pointing out that the Treaty's horizontal effects stand on much shakier ground in the movement of goods than in that of persons, in that the latter is bound up with the question of EU citizenship).

[76] For an interesting classification of the different kinds of provisions contained in the Charter, see Daniel Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50(5) COMMON MKT. L. REV. 1267–304 (2013).

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the rights contained in the Charter can have direct effects, even between individuals. For example—so long as the case at hand falls within the scope of EU law—this could be said of: The prohibition on using the human body as a source of profit, Article 3(2) of the CFR; the prohibition on forced labor, Article 5; the protection of personal data, Article 8; the prohibition on discriminating against people on account of the views they hold or their membership in various groups, Article 21; equality between women and men, Article 23; protection against unjustified dismissal, Article 30; fair working conditions, Article 31; the prohibition against child labor, Article 32; and protection from dismissal for maternity, Article 33.

That said, it is equally clear, that some of the Charter's provisions, such as many of those mentioned above, cannot have any direct effect because their implementation hinges on EU law or on the laws of the Member States.[77] These provisions can, in a sense, be claimed to lack the requirement of "unconditionality," an essential element of direct effect.

Furthermore, Article 52 of the Charter draws a distinction between rights and principles,[78] stating that "the provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers." Given that these provisions "shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality," the Charter itself implicitly yet clearly rules out the possibility that they may have any direct effects, even if the national courts can still use them for interpreting their national law in conformity with those provisions.[79]

As is stated in the Presidium Explanations, from Article 51(1) of the Charter, it can be gathered that, "subjective rights shall be respected, whereas principles shall be observed." The rights mentioned in the Explanations by way of example include those contained in: Articles 25, the rights of the elderly; 26, integration of persons with disabilities; and 37, environmental protection. The Explanations also state that some of the Charter's provisions may be construed as containing rights and principles alike, as is the case with Articles 23, 33,

[77] *See* Dorota Leczykiewicz, *Horizontal Application of the Charter of Fundamental Rights*, 38 EUR. L. REV. 479–97 (2013).

[78] For a recent commentary in that regard, see D. Guðmundsdóttir, *A Renewed Emphasis on the Charter's Distinction between Rights and Principles: Is a Doctrine of Judicial Restraint More Appropriate?*, 53(3) COMMON MKT. L.REV. 685–720 (2015).

[79] We should consider whether a difficult situation may arise when UK or Polish citizens invoke the Charter. It would seem that on a first reading of Protocol 30, on the Charter's application to Poland and the UK, this scenario can be ruled out. But in the *N. S.* judgment of December 21, 2011, the ECJ held that this protocol "does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions." *N. S.* (C-411/10) and *M. E. and Others* (C-493/10), Joined Cases C-411/10 and C-493/10, EU:C:2011:865.

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and 34 of the Charter. In *Glatzel*,[80] the issue was whether a national norm on driver's licenses for the disabled was compatible with Article 26 of the Charter, and the ECJ relied on the Explanations for holding that Article 26 does not confer actionable rights. By stating that these provisions "may be implemented through legislative or executive acts adopted by the Union," means that, by virtue of such implementing acts, they gain the ability to be invoked by individuals. Furthermore, the principles contained in the Charter certainly serve as criteria that national courts and the ECJ alike are to take into account in interpreting acts of the EU.

The judgments, which have interpreted acts of the EU in light of the Charter, are now a great number, and here we will only consider a few examples. As far as EU regulations are concerned, the ECJ has recently used two such regulations in conjunction with Article 47 of the Charter to strike down a rule in a national gas network code preventing network users from challenging the network regulator's decisions in a national court.[81] In the previously mentioned *A* v. *B and Others*, the ECJ considered whether it was legitimate for a national court to try a defendant in absentia through a court-appointed representative after having established that the defendant had no known place of residence and so could not be served with a summons to appear in court. The court found that the representative's appearance in court could not be equated with that of the defendant being represented, arguing that this is the way Article 24 of Regulation 44/2001 needs to be interpreted if read in light of Article 47 of the Charter.

Even more frequently in the ECJ's case law, the question has come up of how these principles ought to be coupled with EU directives. In principle, the Charter and the directives can support one another in such a way as to yield direct effects. There is not any doubt that failure to implement a directive in time is a matter falling within the Charter's field of application as governed by Article 51 of the Charter.

There are several ECJ rulings that can be mentioned in that regard. For example, in *Sähköalojen ammattiliitto ry*,[82] the ECJ considered a Finnish law preventing a labor union from having claims assigned to a worker posted to another country where such claims could instead be recovered. The court found the law to be inconsistent with a reading of Directive 96/71/EC—concerning the posting of workers in the framework of the provision of

[80] C-356/12, Glatzel, EU:C:2014:350, Judgment of May 22, 2014. On this question, see Krommendijk, *Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice*, 11 EUR. CONST. L. REV. 321–56 (2015), and Lenaerts, *supra* note 13.

[81] Case C-510/13, EON Földgáz Trade Zrt v. Magyar Energetikai, EU:C:2015:189, Judgment of Mar. 19, 2015.

[82] Case C-396/13, Sähköalojen ammattiliitto ry v. Elektrobudowa Spolka Akcyjna, EU:C:2015:86, Judgment of Feb. 12, 2015; Lenaerts, *supra* note 13.

services—in light of Article 47 of the Charter. In *Fenoll*,[83] the court interpreted Directive 2003/88/EC in conjunction with Article 31(2) of the Charter, finding that a "worker" as defined in that directive includes a disabled person placed in a work rehabilitation center. In *Kücükdeveci*,[84] the ECJ considered the principle prohibiting age discrimination contained in Article 21(1) of the Charter. Upholding the view set out before the Charter in *Mangold*,[85] and reiterating that EU directives cannot have horizontal effects, the ECJ held that the Charter principle is sufficient to confer rights on individuals, and that national courts are to interpret national laws consistently with that principle whenever possible.

That said, the same directives may present an inherent weakness in what concerns direct effects, especially horizontal ones, and here any amount of synergy with the Charter may not prove sufficient. In *Association de médiation sociale*,[86] the matter in dispute involved Article 27 of the Charter, providing that "workers or their representatives must . . . be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices." The ECJ accordingly held that this article needs to rest on provisions of EU or national law if it is to have its full effect. But, in this case, given that the provisions of Directive 2002/14 could not have any horizontal effect, the Charter could not, in conjunction with the same directive, guarantee the effective application of the rights in question. Certainly, in a situation such as this one, there is always the option of claiming damages by bringing suit against the member state that has failed to properly implement the directive.

As concerns the horizontal effects of the Charter's provisions, there is a peculiar predicament that comes about regardless of any EU acts in conjunction with which the Charter may be interpreted: When, in any given case, two parties claim different rights having equal protection in the Charter. In these cases, it is up to the ECJ to decide how the rights in question are to be balanced against one another. In *Lindqvist*,[87] the issue was whether a woman had committed a privacy violation by publishing personal data online on a number of people working with her in a church parish. The court found against the woman, arguing that the parishioners' right to privacy outweighed her freedom of expression.

The court's balancing will have to be done on a case-by-case basis rather than by setting general standards. This means that—except in rare circumstances, such as when at issue is

[83] Case C-316/13, Fenoll v. Centre d'aide par le travail "La Jouvene" and APEI, EU:C:2015:200, Judgment of Mar. 26, 2015.

[84] Case C-555/07, Kücükdeveci v. Swedex GmbH & Co. KG., EU:C:2010:21, Judgment of Jan. 19, 2010.

[85] Case C-144/04, Mangold v. Rüdiger Helm, EU:C:2005:709, Judgment of Nov. 22, 2005.

[86] Case C-176/12, Association de médiation sociale v Union locale des syndicats CGT and Others, EU:C:2014:2, Judgment of Jan. 15, 2014, paras. 43–47.

[87] C-101/01, Lindqvist, EU:C:2003:596, Judgment of Nov. 6, 2003.

a matter of human dignity, considered to be the most basic of all rights—there is no fixed ranking that can be established among the different rights set forth in the Charter.

**F. Closing Remarks**

It can be concluded in light of the foregoing analysis that in reality the Charter's force as a primary source is reduced from within, notwithstanding that the EU Charter of Fundamental Rights may formally have equal rank with the EU Treaty and may in the abstract be subject to the same structural principles as the latter: The principles of conferral, primacy, and direct effect. Written into the Charter itself are a series of provisions limiting its own effects, with extra caution taken where interference may arise with the Member States' legal systems. This, after all, seems to be in keeping with the function originally entrusted to the Charter by its drafting convention as a tool designed not to bring *new* rights into being but to firm up *existing* ones.

The Charter has primarily been conceived as a limit to the power of EU institutions, as well as a benchmark against which to judge the legitimacy and validity of the acts they take. This was seen as a way to fill the legal void resulting from the inability of Member State courts to rely on either national constitutions or the ECHR, in states that had yet to accede to it, to either annul or invalidate an EU act.

Undeclared, but certainly in the background, was the intent to constrain the ECJ's discretionary power to interpret, and often even introduce, fundamental rights in the EU system of law. Indeed, before the Maastricht Treaty, the ECJ held exclusive interpretation in the matter of fundamental rights, and the court retained that broad discretion even when the same treaty was amended by introducing into it an article requiring compliance with the same fundamental rights by the EU, in effect just codifying the earlier ECJ's doctrine.

The ECJ more emphatically brought to bear the fundamental rights when considering the Member States' implementation than when passing judgment on the validity of legality of EU acts, or at least this had been the case until the *Omega* and *Schmidberger* judgments—which in any event felt the influence of the Charter of Fundamental Rights proclaimed in 2000 in Nice. To limit that discretion of the court, it was decided not only to draw up a catalogue of rights, but also to attach explanations to it.

Paradoxically, when the Charter was proclaimed in Nice and when the Treaty of Lisbon came into force, Member States felt that their constitutional systems had come under threat, so they thought it advisable to weaken the Charter from within. The perceived threat was probably tied not to the Charter's ability to lower the standards of national constitutions—considering the fact that the Charter sets itself up as a *minimum* standard—but to the "constitutionalization" of the EU system as a whole. The choice made in the Treaty of Lisbon to "unbundle" the Charter from the rest of the Treaty was dictated precisely by a broader project to "deconstitutionalize" the constitutional Treaty. It is also likely that there was a

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fear that the fundamental rights would "harmonize" by a bottom-up convergence[88] as a result of national courts applying the Charter even beyond its proper scope, which is indeed what wound up occasionally happening, especially in the period of "legal limbo" stretching from the Nice proclamation to the entry into force of the Treaty of Lisbon.[89]

Those are the political reasons behind the cautions that have accreted around the Charter. That said, the goal has been to diminish the Charter's breadth and effects, not only in relation to national systems—Article 51 of the CFR—but also, and especially, in relation to the EU's own institutions. This can be done with what were previously described as "horizontal reservations" and through the distinction between rights and principles.

Having said that, the Charter continues to carry weight as a powerful instrument. Over time, probably by proceeding with gradual caution, the ECJ will surely be able to bring its full constitutional potential to bear. Indeed, in time the Charter will make it possible to "reread" EU norms and their transposition into the Member States in such a way as to create a legal heritage of common values.

After all, the Charter has already "constitutionalized" the European Court of Justice; if it has fully vested in the ECJ the power to "rule on rights," it has also placed greater emphasis on the court's function of making sure that the EU retains its constitutional autonomy. This effort can be observed to proceed along two fronts: On the one hand, it faces the question of the Member States' constitutions, as can be seen in *Melloni;* on the other hand, it must deal with the ECHR, as can be seen in Opinion 2/2013. A new idea of primacy then comes into view, for this is no longer only a matter of recognizing EU law as taking precedence over other sources of law, but it also involves a concern with protecting the EU's constitutional autonomy.

At the same time, we should not fail to appreciate that, as much as the Charter poses a greater challenge than the Treaties as a standard by which to assess the legitimacy or validity of the acts adopted by EU institutions, it is still bound to exert an increasing influence on these acts as an essential tool that the ECJ and national courts alike must rely on in interpreting them.[90]

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[88] See, Lucia Serena Rossi, *La Carta dei diritti come strumento di costituzionalizzazione dell'U.E.*, 13(3) QUADERNI COSTITUZIONALI 565-576 (2002).

[89] A broad casuistry of the Charter's application even in this period may be found at www.europeanrights.eu. On the Charter's influence on the ECJ's case law, see also Sara Iglesias Sánchez, *The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights*, 49(5) COMMON MKT. L. REV. 1565–1611 (2012).

[90] According to a settled doctrine of the ECJ, "the European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights." See in that connection the judgments in Schrems, *supra* note 17, at para. 60; Cases C-584/10 P, C-593/10 P, and C-595/10 P, Commission and Others v. Kadi, EU:C:2013:518, Judgment of July 18, 2013,

Even if the Charter formally has the "same value" as the Treaties, and even if from a substantive point of view it probably has a lower value, it is destined to play a greater role than the Treaties themselves as the system's constitutional fabric.

para. 66; Case C-583/11 P, Inuit Tapiriit Kanatami and Others v. Parliament and Council, EU:C:2013:625, Judgment of Oct. 3, 2013, para. 91; Case C-274/12 P, Telefónica SA v. European Commission, EU:C:2013:852, Judgment of Dec. 19, 2013, para. 56.

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