

HANDBOOK



Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level

Guidance

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Guidance

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Foreword

The European Union has been equipped with its own bill of rights – the Charter of Fundamental Rights – since 2000. It became legally binding in 2009, and has the same legal value as the EU treaties.

As a very modern human rights catalogue containing many rights not found in established bills of rights, the Charter indeed looks good on paper. Those familiar with the main principles of EU law can usually quickly recite that the Charter is always binding on the EU, and binding on Member States only when they are “implementing EU law”. But what does this often-quoted language from Article 51 of the Charter actually mean?

The reality is that practitioners are often unsure whether or not the Charter applies to a given situation, and how it adds value. Even in expert circles, what does and does not fall within the Charter’s field of application is not always well understood. Not surprisingly then, a decade after the Charter’s entry into force, a review of its performance in practice yields a mixed picture. Legal practitioners – be they judges, civil servants or law and policymakers – seldom refer to the Charter. When they do, the references tend to be superficial. A sense of hesitancy emerges.

As a result, the Council of the European Union has encouraged Member States to exchange and map best practices on, and develop common tools for, raising awareness of the Charter. It has also noted that the Fundamental Rights Agency could help train national civil servants, and specifically requested the agency to draft a handbook on the Charter’s domestic application for practitioners and non-specialists.

This handbook aims to foster better understanding of the Charter, including when it applies in law and policymaking. Carrying out a detailed check on the Charter’s applicability will always pay off. Even when the conclusion is that it does not apply, performing a “Charter check” emphasises the relevance of human rights in the context of law and policymaking. That is in itself an achievement as it helps strengthen awareness.

A preliminary draft text was prepared by Dr. Mirjam de Mol, Maastricht Centre for European Law, guided by the agency and after consulting with a group of experts working in national parliaments. This was revised by FRA, which also consulted FRA’s 28 National Liaison Officers – a network of experts working in national administrations. The handbook was finalised after considering comments from our Scientific Committee. I would like to thank everyone who contributed for their valuable input.

Michael O’Flaherty
Director

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Acronyms and abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Charter	European Union Charter of Fundamental Rights
CJEU	Court of Justice of the EU
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment
EU	European Union
ESC	European Social Charter
ESC 96	European Social Charter (revised 1996)
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
ICCPR-OP2	Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization

OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OPCRC – SC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
P	Protocol (to the ECHR)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN GA	United Nations General Assembly

Introduction



This handbook offers guidance on the use of the EU Charter of Fundamental Rights (the Charter) at national level. According to Article 51 of the Charter, and in contrast with international and national human rights instruments, the “field of application” of the Charter is limited to areas falling within the scope of EU law. It is not meant to extend the field of application of Union law. However, as the case law of the Court of Justice of the European Union (CJEU) shows, the Charter is a highly relevant instrument for legal practitioners, including all those who work in law and policymaking.

This handbook offers a practical orientation on the scope of the Charter. It is not meant to deal with all details or to be complete. While it is based on the case law of the CJEU, it cannot replace a case-by-case assessment and the need to consult legal services as appropriate.

The “defensive” nature of the Charter

Whereas the Charter is phrased in “competence neutral” language, it does not apply to areas where the EU has nothing to say. Moreover, various provisions in EU primary law underline that the Charter is not meant to have the effect of shifting powers at the expense of the Member States:

“In order to preclude an extension of the European Union’s powers in relation to the Member States, Article 51(1) of the Charter of Fundamental Rights provides in particular that

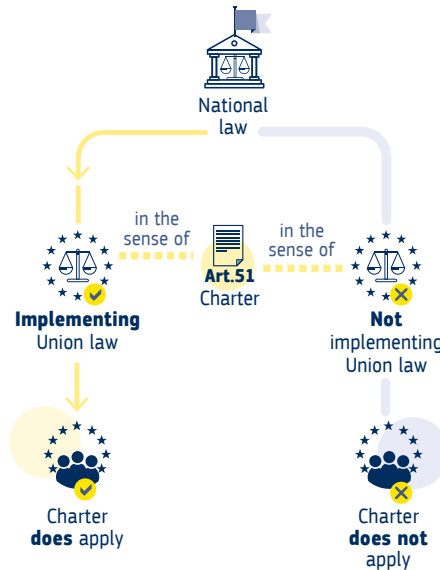
- *the application of the Charter must not restrict the principle of subsidiarity (first sentence of Article 51(1)),*
- *the Member States are bound by the Charter only when they are implementing EU law (first sentence of Article 51(1)),*

- *the observance and application of the Charter must respect the limits of the powers of the European Union as conferred on it in the Treaties (second sentence of Article 51(1)).*¹

Charter of Fundamental Rights, Article 51 – Field of application

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

Figure 1: Field of application of the Charter (which is limited compared to the European Convention of Human Rights)



Source: FRA, 2018

1 Opinion of Advocate General Trstenjak of 22 September 2011, para. 72 in CJEU, *N. S. (C-411/10) v. Secretary of State for the Home Department and M. E. and Others (C-493/10) v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [GC], Joined cases C-411/10 and 493/10, 21 December 2011.

Who is this handbook for?

The handbook is primarily designed for individuals engaged in legislative and policy processes at national level. These processes are vital for respecting and promoting fundamental rights in the European Union. The primary target group is thus all those involved in national legislative and administrative authorities, such as governments, parliaments, regional and local authorities. However, this handbook is also relevant for individuals working in courts and human rights institutions in the EU Member States.

What is your role in making the Charter's guarantees a reality?

Human rights apply foremost at national and local levels. It is here that rights make a real difference. EU law is typically implemented at national level. The obligations under the EU Charter of Fundamental Rights are thus of particular relevance to national policymakers. Typically, EU legislation leaves the national legislature a margin of appreciation when transposing and implementing EU law, and this room for manoeuvre has to be used in a way that is compatible with the Charter. This obligation imposes significant responsibility on national policymakers and legislators.

Legal practitioners working for national parliaments and/or administrations play a key role under the EU Charter of Fundamental Rights when developing legislation and/or policies, because they have to deliver three essential tasks. They must establish:

- whether or not the Charter applies in a given (legislative) proposal;
- what the Charter implies for the national legislature/the national administration in terms of negative and positive obligations to avoid violations of the Charter;
- whether there is potential in a specific instance of law and/or policymaking not only to respect the Charter but also to proactively promote it as required under Article 51 of the Charter.

National actors as key ‘Charter agents’

The EU acknowledges the utmost relevance of national actors for the implementation of the Charter. For example, the European Parliament has stressed that “national authorities (judicial authorities, law enforcement bodies and administrations) are key actors in giving concrete effect to the rights and freedoms enshrined in the Charter”.*

The Council of the European Union highlights the importance of applying the Charter as part of a wider set of applicable fundamental rights sources in national contexts. It underlines the “need to establish the applicability of the Charter in individual circumstances”, as well as the “need for particular attention by national authorities to those Charter provisions the meaning and scope of which are not determined by corresponding provisions of the European Convention on Human Rights (ECHR) with a view to the effective application of the Charter”.**

The Council also “welcomes the initiatives aimed at increasing awareness and improving the practical application of the Charter among policymakers [and] legal practitioners”***. This handbook is such an initiative. It hopefully contributes to addressing one of the “key challenges” standing in the way to bring “the Charter to life”, namely clarifying its scope.****

*Sources: *European Parliament (2015), Resolution on the situation of fundamental rights in the European Union (2013-2014) 2014/2254(INI), Strasbourg, 8 September 2015, paragraph 20
**Council of the European Union (2016), Council conclusions on the application of the Charter of Fundamental Rights in 2015, annex to Council document 10005/16 of 9 June 2016, paragraph 6
***Council of the European Union (2017), Council conclusions on the application of the Charter of Fundamental Rights in 2016, annex to Council document 11546/17 of 28 July 2017, paragraph 5
**** FRA (2012), Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice; see also FRA (2018), Challenges and opportunities for the implementation of the Charter of Fundamental Rights, Opinion of the European Union Agency for Fundamental Rights, Vienna, 04/2018*

How can you use this handbook?

- The handbook comprises two kinds of text. The main text in normal black text is meant to offer a quick overview to increase the reader’s understanding. Examples and further details are provided in grey text.
- The handbook consists of two parts and an annex.
- Part I provides a ‘General orientation’, offering an introduction to the Charter for all target groups, focusing on the:
 - EU system of fundamental rights protection (Chapter 1);
 - Charter’s relation to other fundamental rights instruments (Chapter 2);
 - reasons for applying the Charter (Chapter 3);

- scope of application of the Charter ([Chapter 4](#));
 - situations in which the Charter applies ([Chapter 5](#));
 - interpretation of and limitations on Charter rights ([Chapter 6](#)).
- Readers who are not yet well versed in EU law will find it useful to read Chapters 1 to 4, whereas others can jump to Chapters 5 and 6, and the practical tools.
 - [Part II](#) provides ‘Practical tools’, offering two checklists designed for people who are engaged in legislative and policy processes at national level:
 - A checklist to assess the applicability of the Charter with regard to national law and policymaking ([Chapter 7](#)): this checklist primarily focuses on national legislative and policy processes. It approaches the applicability of the Charter through situations to provide more practical guidance.
 - A checklist to gain an initial understanding of whether or not a (draft) national act is in line with the Charter ([Chapter 8](#)).
 - The [Annex](#) offers a quick summary of the Charter rights and how they relate to various other human rights catalogues, thus showcasing the added value provided by the Charter.

Terminology used in this handbook

- The handbook often refers to national “legislative proposals” or “legislation”, but it applies equally to all kinds of national measures.
- This handbook mostly refers only to the Charter, but it applies equally to EU fundamental rights as general principles of EU law (see [Chapter 1](#)).
- When referring to Charter provisions, the handbook does not necessarily differentiate between Charter rights and Charter principles. Please note that, whereas both sorts of Charter provisions are binding, their legal effects differ (for more, see Article 51(5) of the Charter and Chapter 1, Section on [Charter principles and Charter rights](#) of this handbook).

Note that this handbook uses the phrase “general principles of Union law” to refer to the unwritten court-made general principles inherent in the rule of law that can be invoked before courts as grounds for legal review. This source of law includes principles other than fundamental rights, such as the principle of legal certainty, the principle of legitimate expectations and the principle of proportionality. The phrase “general principles of Union law” as used in this handbook does not refer to institutional principles such as the principle of subsidiarity or the principle of institutional balance.

Part I: General orientation



1 European Union system of fundamental rights

Two sources of fundamental rights

- There are two main sources of fundamental rights in EU law: (i) the (unwritten) general principles of law; and (ii) the Charter.² Both the general principles and the Charter provisions constitute EU primary law, and they overlap. Both apply only within the scope of EU law and thus have the same field of application.³
- EU fundamental rights can also be found in treaty provisions⁴ and EU secondary law.⁵ This handbook focuses only on fundamental rights as general principles of EU law and under the Charter.

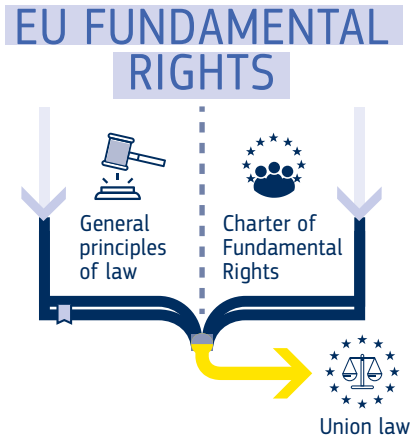
2 European Communities (2012), Consolidated version of the Treaty on European Union (TEU), OJ C 326, 26 October 2012, Art. 6.

3 The explanations to Art. 51(1) of the Charter ('Field of application') clarify that this provision is a codification of the CJEU case law concerning the scope of application of general principles. Currently, the CJEU uses Art. 51(1) of the Charter by analogy for general principles of law. See, for example, CJEU, C-406/15, *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, 9 March 2017, paras. 50 and 54.

4 See, for example, European Communities (2012), Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26 October 2012, Art. 157.

5 See, for example, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, OJ L 303, 2 December 2000, pp. 16–22.

Figure 2: Two sources of fundamental rights



Source: FRA, 2018

General principles of European Union law

- These are unwritten principles identified by the CJEU.
- They have existed since the late 1960s⁶ and can, just as other sources of EU primary law, be used “to determine whether an act of secondary law is valid or whether a provision of national law is applicable”.⁷
- The relevant treaty provision is Article 6(3) of the Treaty on European Union (TEU).

Treaty on European Union, Article 6(3)

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

6 CJEU, Case 29-69, *Erich Stauder v. City of Ulm – Sozialamt*, 12 November 1969; CJEU, Case 11-70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 17 December 1970; CJEU, Case 4-73, *J.Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, 14 May 1974.

7 Opinion of Advocate General Colomer of 24 January 2008, para. 19 in CJEU, Joined cases C-55/07 and C-56/07, *Othmar Michaeler (C-55/07 and C-56/07), Subito GmbH (C-55/07 and C-56/07) and Ruth Volgger (C-56/07) v. Amt für sozialen Arbeitsschutz and Autonome Provinz Bozen*, 24 April 2008.

Charter of Fundamental Rights of the European Union

- The Charter is a modern bill of 50 fundamental rights and principles. The additional four articles of the Charter concern the interpretation and application of these 50 provisions. For an overview of all the rights enshrined in the Charter see the [Annex](#).
- The Charter consists of seven chapters: Dignity (5 articles), Freedoms (14 articles), Equality (7 articles), Solidarity (12 articles), Citizens' rights (8 articles), Justice (4 articles) and General provisions (4 articles).
- It was drafted by a European Convention composed of members of parliaments (from both national parliaments and the European Parliament) and governments and received input from civil society as well.⁸
- It was proclaimed in 2000 and has been legally binding since the entry into force of the Lisbon treaty on 1 December 2009.⁹
- The relevant treaty provision is Article 6(1) of the TEU.

Treaty on European Union, Article 6(1)

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties.

Field of application

Charter of Fundamental Rights, Article 51 – Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union [...] and to the Member States only when they are implementing Union law.

- EU fundamental rights apply at national level only where Member States are "implementing Union law". However, this is a rather broad notion. "It follows unambiguously from the case-law of the Court of Justice" that this requirement

⁸ The Convention was composed of 15 representatives of the Heads of State and Government of the then 15 EU Member States, 30 representatives of the national parliaments, 16 representatives of the European Parliament and one representative of the European Commission.

⁹ See Official Journal of the European Union, OJ C 83, 30 March 2010, pp. 389–403.

covers “the Member States when they act in the scope of Union law”.¹⁰ Chapter 5 provides details in this regard.

- Therefore, EU fundamental rights are potentially relevant to a wide range of subject areas, including those covered primarily by national law.¹¹

The Charter can apply to a wide range of subject matter. This includes, for example, legal aid,¹² penalties for customs offences,¹³ cartels,¹⁴ recruitment of local police officers,¹⁵ blood donation,¹⁶ operation of gaming machines,¹⁷ support for rural development,¹⁸ advertising by TV broadcasters,¹⁹ disclosure of accounting documents,²⁰ obligation to issue fingerprints for a passport²¹ and retirement age.²²

- The use of the Charter by the CJEU suggests that certain policy fields are especially prone to raise arguments based on the Charter.²³

Before the CJEU, the Charter is frequently used in the following fields: social policy (e.g. employment and working conditions, insolvency, transfer of undertakings, parental leave); asylum and migration, consumer protection, judicial cooperation in civil matters (e.g. jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility); taxation (value added tax); intellectual property; agriculture; the environment; data protection; and judicial cooperation in criminal matters (European arrest warrant).

Whereas, at national level, there is no full sample of all national court decisions available that refer to the Charter, the agency has in recent years analysed up to

10 Explanations on Art. 51; see European Union (EU) (2007), Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, pp. 17–37.

11 See, for example, CJEU, C-276/12, *Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu* [GC], 22 October 2013.

12 CJEU, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010.

13 CJEU, C-546/09, *Aurubis Bulgaria AD v. Nachalnik na Mitnitsa Stolichna*, 31 March 2011.

14 CJEU, C-17/10, *Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže* [GC], 14 February 2012.

15 CJEU, C-416/13, *Mario Vital Pérez v. Ayuntamiento de Oviedo*, 13 November 2014.

16 CJEU, C-528/13, *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, 29 April 2015.

17 CJEU, C-390/12, *Robert Pflieger and Others*, 30 April 2014.

18 CJEU, C-401/11, *Blanka Soukupová v. Ministerstvo zemědělství*, 11 April 2013.

19 CJEU, C-234/12, *Sky Italia Srl v. Autorità per le Garanzie nelle Comunicazioni*, 18 July 2013.

20 CJEU, C-418/11, *Texdata Software GmbH*, 26 September 2013.

21 CJEU, C-291/12, *Michael Schwarz v. Stadt Bochum*, 17 October 2013.

22 CJEU, C-401/11, *Blanka Soukupová v. Ministerstvo zemědělství*, 11 April 2013.

23 During the period from 1 January 2014 to 1 September 2017.

three relevant court decisions using the Charter for each Member State for each year. Most of these decisions were identified in the areas of border checks, asylum and migration, and judicial cooperation in criminal matters, but also in the fields of employment, non-discrimination and data protection.²⁴

What is the rationale of Article 51 of the Charter?

- The point of departure of the EU system of fundamental rights protection is the duty of the Union to respect fundamental rights as laid down in Article 6 of the TEU.
- As the implementation and application of Union law takes place to a large extent at national level, the duty of the Union necessarily extends to acts adopted by national authorities, when such acts may be said to contribute to the implementation of Union law. If this were not the case, the Charter would not apply to many situations covered by EU law, and there would therefore be a gap in the protection of fundamental rights in EU law.
- The duty of the Member States to respect the Charter, therefore, exists as a necessary corollary of the EU's fundamental rights obligations. It complements human rights obligations that Member States have under their own constitutions and under international human rights treaties.

“Since the fundamental rights guaranteed by the Charter must [...] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.” CJEU, C-617/10, *Åklagaren v. Hans Åkerberg Fransson* [GC], 26 February 2013, para. 21

“It is also important to consider the objective of protecting fundamental rights in EU law, which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States.” CJEU, C-206/13, *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, 6 March 2014, para. 31

²⁴ See the chapters on the use of the Charter in the agency's Fundamental Rights Reports of the past five years.

Beneficiaries

- Where the Charter applies, individuals can rely on its provisions. Depending on the right and circumstances in question, this goes also for private legal persons, such as corporations and other such legal entities.²⁵
- They can rely on the Charter in their relations with the EU and/or the Member State(s). For the limited applicability of the Charter between individuals (“horizontal effect”), see p. 32.
- It appears that public entities can also rely on the Charter under certain circumstances.²⁶

Charter principles and Charter rights

- The Charter makes, in Article 52(5), a distinction between “rights” and “principles”. These are two types of provisions within the Charter (not to be confused with the distinction between the two sources of EU fundamental rights, namely the Charter and the general principles of EU law).
- Both these types of Charter provisions are binding. However, Charter rights have to be “respected” and Charter principles should be “observed”.²⁷ Whereas the rights can be invoked by individuals directly before national courts, this is not the case for principles.
- The Explanations to the Charter (an interpretative document originally prepared under the authority of the Praesidium of the Convention that drafted the Charter)²⁸ explicitly qualify certain provisions as Charter principles. For other provisions of the Charter, it is still unclear whether they are rights or principles under Article 52(2) of the Charter. Further case law by the CJEU will provide increasing clarity in this regard. In any event, it would be incorrect to assume, for instance, that the provisions listed in Chapter IV (Solidarity) all have the status of principles.

25 See, for example, CJEU, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, para. 52.

26 CJEU, C-610/10, *European Commission v. Kingdom of Spain* [GC], 11 December 2012, paras. 48–52; CJEU, C-176/13 P, *Council of the European Union v. Bank Mellat*, 18 February 2016, paras. 49 and 52; CJEU, C-200/13 P, *Council of the European Union v. Bank Saderat Iran*, 21 April 2016, para. 47; Opinion of Advocate General Sharpston of 26 February 2015, para. 43, in CJEU, C-176/13 P, *Council of the European Union v. Bank Mellat*, 18 February 2016; Opinion of Advocate General Sharpston of 20 February 2015, paras 34–47, in C-200/13 P, *Council of the European Union v. Bank Saderat Iran*, 21 April 2016.

27 European Union (EU) (2012), Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, Art. 51(1).

28 EU (2007), Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, pp. 17–37.

Example: Charter principles

Some provisions are explicitly identified in the Explanations relating to the Charter as Charter principles: Articles 25 (rights of the elderly), 26 (integration of persons with disabilities) and 37 (environmental protection). Some provisions are mentioned in the Explanations as provisions containing “both elements of a right and of a principle”: Articles 23 (equality between women and men), 33 (family and professional life) and 34 (social security and social assistance).

Charter of Fundamental Rights, Article 52(5)

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

- The principles included in the Charter may be implemented by legislative and executive acts of the Union, and by Member States’ acts when they are implementing Union law.²⁹ Only in the interpretation of implementing acts and for the assessment of their validity against the requirements of the Charter are the Charter principles to be “judicially recognisable”, that is, only in such circumstances can a Charter principle be invoked before a national court.³⁰ In other words, Charter principles do not give rise to direct claims before courts for positive action by the Union’s institutions or Member State authorities: they can be invoked only in combination with an implementing act adopted either by the EU or by national authorities.³¹

²⁹ EU (2012), Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, Art. 52(5).

³⁰ *Ibid.*

³¹ Opinion of Advocate General Cruz Villalón of 18 July 2013 paras. 49 and 50 in CJEU, C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT and Others* [GC], 15 January 2014.

2 How does the Charter relate to national and international fundamental rights instruments?

European Convention on Human Rights

Charter of Fundamental Rights, Article 52(3)

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

- The European Convention on Human Rights (ECHR) establishes the minimum threshold of protection. Union law may provide for more extensive protection.
- As long as the European Union has not acceded to the ECHR, the Convention does not constitute a legal instrument that has been formally incorporated into Union law.³²
- According to Article 6(2) of the TEU, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, in its Opinion 2/13, the CJEU concluded that accession under the proposed accession agreement would not be in line with EU primary law. The ECHR as such is thus not a source of EU law, and EU law is interpreted autonomously by the CJEU.
- However, fundamental rights recognised by the ECHR constitute general principles of the EU's law and hence play a crucial role in the EU legal system.³³
- The Charter and the general principles of Union law are the primary fundamental rights instruments when assessing EU law and national measures within the scope of application of EU law.³⁴

32 CJEU, Joined cases C-203/15 and C-698/15, *Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others* [GC], 21 December 2016, para. 127; CJEU, C601/15 PPU, *J. N. v. Staatssecretaris van Veiligheid en Justitie* [GC], 15 February 2016, para. 45; CJEU, C-501/11 P, *Schindler Holding Ltd and Others v. European Commission*, 18 July 2013, para. 32; CJEU, C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* [GC], 24 April 2012, paras. 59–62.

33 Compare European Communities (2012), Consolidated version of the Treaty on European Union (TEU), OJ C 326, 26 October 2012, Art. 6(3).

34 CJEU, Joined cases C-203/15 and C-698/15, *Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others* [GC], 21 December 2016, para. 128.

- The Charter contains rights that correspond to rights guaranteed by the ECHR (see [Figure 2](#) and the [Annex](#) for an overview of corresponding rights). The meaning and scope of those corresponding Charter rights (as well as the extent to which these can be limited) are to be the same as those laid down by the ECHR.³⁵
- The reference to the ECHR covers both the Convention and the protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments but also by the case law of the European Court of Human Rights and the CJEU.³⁶
- The added value of the Charter compared with the ECHR, especially with regard to socio-economic right is illustrated in [Figure 3](#). Note however that the actual scope of the ECHR goes beyond the wording of the text of the ECHR given that the Convention is a ‘living instrument’ and its provisions were interpreted in the case law by the European Court of Human Rights.

Other international human rights instruments

Charter of Fundamental Rights, Article 53 – Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.

- Other international rights instruments may also function as minimum standards and are in any event sources of interpretation. The level of protection afforded by other human rights instruments to which “the Union or all the Member States are party” should be maintained.³⁷ The CJEU takes such instruments into account when applying EU fundamental rights.
- International conventions of major relevance include the International Covenant on Civil and Political Rights (ICCPR),³⁸ the International Covenant on Economic,

35 EU (2012), Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, Art. 52(3).

36 EU (2007), Explanations relating to the Charter, OJ C 303, 14 December 2007, pp. 17–37, at p. 33.

37 EU (2012), Charter of Fundamental Rights of the European Union, Art.53, OJ C 326, 26 October 2012.

38 United Nations General Assembly (UN GA) (1966), *International Covenant on Civil and Political Rights*, 16 December 1966.

Social and Cultural Rights (ICESCR);³⁹ the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW);⁴⁰ the International Convention on the Elimination of Racial Discrimination (ICERD);⁴¹ the Convention against Torture (CAT);⁴² and the Convention on the Rights of the Child (CRC),⁴³ as well as the optional protocols to these instruments.⁴⁴ The Convention on the Rights of Persons with Disabilities (CRPD)⁴⁵ is of particular relevance, since the EU itself is party to this United Nations Convention.

- Many Charter articles reflect provisions enshrined in international human rights instruments that are hence of relevance when interpreting certain Charter provisions. The Geneva Convention is explicitly referred to in Article 78 of the Treaty on the Functioning of the European Union (TFEU) (concerning the common policy on asylum, subsidiary protection and temporary protection), as is the European Social Charter (ESC) in Article 151 of the TFEU (Social Policy). See the [Annex](#) for an overview of comparable rights. At the level of European instruments, the EU also signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).⁴⁶

National fundamental rights

Charter of Fundamental Rights, Article 52(4)

In so far as this Charter 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.

39 UN GA (1966), *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966.

40 UN GA (1979), *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979.

41 UN GA (1965), *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965.

42 UN GA (1984), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984.

43 UN GA (1989), *Convention on the Rights of the Child*, 20 November 1989; see also CJEU, C-540/03, *European Parliament v. Council of the European Union* [GC], 27 June 2006, para. 37.

44 For an overview of all UN human rights instruments and Optional Protocols, see the [website](#) of the UN Human Rights Office; for an overview of the ratification status among EU Member States, see FRA's online data explorer ([EU Member States and International Obligations - United Nations](#)).

45 UN GA (2006), *Convention on the Rights of Persons with Disabilities*, 13 December 2006.

46 Council of Europe (2011), *Council of Europe Convention on preventing and combating violence against women and domestic violence*, CETS No. 210, Istanbul, 11 May 2011. For an overview of the ratification status among EU Member States, see FRA's online data explorer ([EU Member States and International Obligations - Council of Europe](#)).

- National authorities and courts remain free to apply national standards of protection of fundamental rights. The level of protection of the Charter always applies as a minimum standard for national measures implementing EU law.⁴⁷ Therefore, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply higher national standards of protection of fundamental rights.
- However, according to the case law of the CJEU, this applies only under the premise that “the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised”.⁴⁸ The CJEU concludes this from the principle of primacy, according to which rules of national law – even of a constitutional order – cannot be allowed to undermine the effectiveness of EU law on the territory of that state.
- National fundamental rights can also help in interpreting Charter rights: as far as the Charter recognises fundamental rights as resulting from the constitutional traditions common to the Member States, those rights are to be interpreted in harmony with those traditions.⁴⁹

3 Reasons to check whether the Charter applies

Duty to respect, observe and promote the Charter

- According to Article 51(1) of the Charter, Member States have a duty to respect the rights, observe the principles and promote the application of the Charter.
- Therefore, when implementing EU law, Member States have to respect the Charter and promote its application. This duty rests on all organs of the Member States, including national lawmakers, administrations, judges, etc.
- Using the Charter in the legislative process is not only a means of making sure that national legislation is “Charter proof”; it also contributes to the Charter’s promotion. For further explanation, see [Chapter 4](#).

47 EU (2012), Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, Art. 53.

48 CJEU, C-399/11, *Stefano Melloni v. Ministero Fiscal* [GC], 26 February 2013, para. 60.

49 EU (2012), Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, Art. 52(4).

More and/or stronger rights offered by the Charter

- The Charter provides added value compared with other instruments. It does so by making rights more visible, by adding some rights to existing catalogues and by profiting from the strength of EU law.
- Many of the additional entitlements spelled out in the Charter, are already available in the case law of the ECtHR or national courts. However, the Charter makes rights and principles more visible, as it is a recent, modern instrument, bringing together the wide range of political, civil, economic and social rights and principles already recognised in the EU legal order in one single instrument.
- In addition, it includes rights that are EU-specific such as a number of rights accorded in the EU treaties to citizens of the Union (see the annex for an overview).

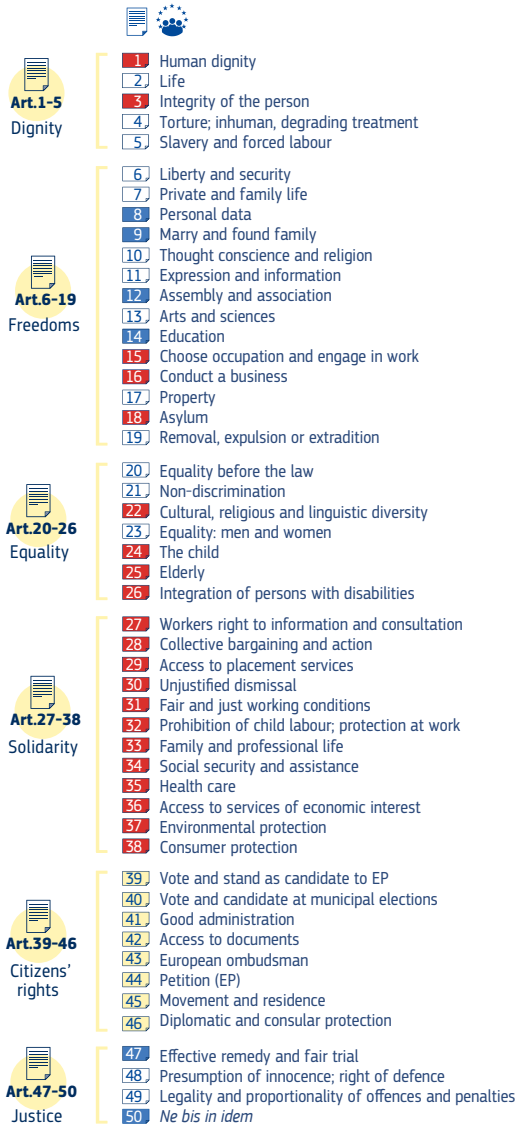
Example: rights that are available in the Charter but rarely in the texts of national constitutions or human rights instruments

Workers' rights to information and consultation within the undertaking (Article 27 of the Charter); Protection in the event of unjustified dismissal (Article 30 of the Charter); Prohibition of child labour and protection of young people at work (Article 32 of the Charter); Access to services of general economic interest (Article 36 of the Charter); consumer protection (Article 38 of the Charter).

Figure 3: Comparison of the texts of the Charter and the ECHR

Charter articles and text of the ECHR: differences and equivalence in coverage

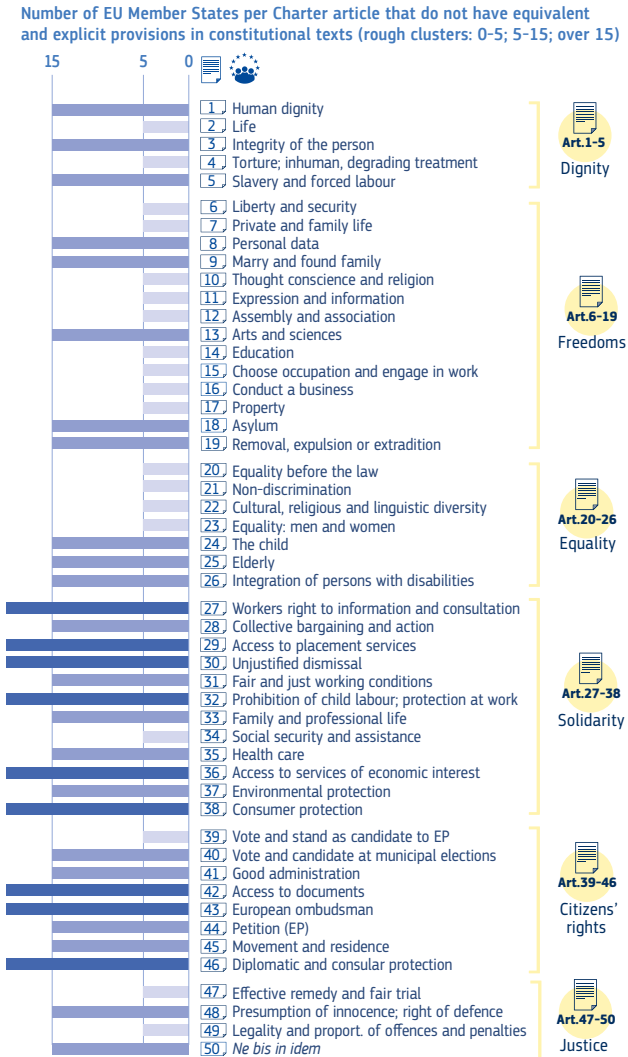
- No ECHR equivalent
- More extensive than ECHR
- Equivalent protection to ECHR
- EU context-specific



Note: The figure is based on the Explanations on the Charter and a textual comparison of the two documents in order to show how the Charter increases the visibility of entitlements (some of the right not explicitly contained in the ECHR are covered by the case law which however is less visible to a non-expert).

Source: FRA, 2018

Figure 4: Charter rights that are often not explicitly covered in national constitutions



Note: The figure is based on a textual comparison of the Charter and written constitutional law of the EU Member States in order to show under which provisions the Charter is most likely to increase the visibility of entitlements. EU-specific entitlements (the Charter provisions that are in Figure 3 marked in yellow) were considered as reflected in national constitutions if a comparable provision could be identified (for instance a constitutional provision concerning a national Ombudsman).

Source: FRA, 2018

- Where the Charter includes rights inspired by international or other European instruments, such as the ECHR, it sometimes broadens these rights.

Examples: Charter rights that have a broader scope than similar rights under the ECHR

- Article 6 of the ECHR guarantees access to a court and the right of defence only for civil claims and in the context of a criminal prosecution. Article 47 of the Charter goes further: within the scope of EU law, it guarantees the right to an effective remedy and to a fair trial in all domains, including in administrative procedures such as asylum and migration cases and taxation law.
- Article 20 of the Charter establishes equality before the law. In addition, Article 21 of the Charter contains detailed, extended and express grounds for non-discrimination – including age, disability or sexual orientation – that are not listed in more traditional international human rights instruments of an earlier generation. (These instruments typically include an open-ended list of prohibited grounds for discrimination; Article 14 of the ECHR is one example). This non-discrimination norm is complemented by specific provisions such as those set out in Article 23 of the Charter, according to which equality between women and men must be ensured in all areas, including employment, work and pay (note that Article 23 contains “both elements of a right and a principle”).⁵⁰ Article 24 of the Charter codified the essence of the children’s rights enshrined in the Convention on the Rights of the Child. Article 25 refers to the “rights of the elderly” and Article 26 refers to the “integration of persons with disabilities”.
- Article 14 of the Charter (right to education), which is based on the common constitutional traditions of the Member States and on Article 2 of the Protocol to the ECHR, has a wider scope than the corresponding ECHR provision. It also includes access to vocational and continuing training, the principle of free compulsory education and the freedom to found private educational establishments.
- The interpretation of certain fundamental rights by the CJEU within the specific context of the EU legal order may at times lead to different results from what may

⁵⁰ EU (2007), Explanations relating to the Charter of Fundamental Rights of the European Union, OJ C 303, 14 December 2007, pp. 17–35, at p. 35.

happen in other systems, which is an additional reason for checking whether EU law applies to any human rights issue.

Example: a different outcome

In *Soukupová*, the CJEU had to examine the Czech law on pension insurance that determines the retirement age in the context of granting support for early retirement from farming on the basis of an EU regulation.⁵¹ This Czech pension legislation determined a retirement age varying depending on the applicant's sex and, for women, on the number of children raised. The CJEU ruled that in the context of the EU's support for early retirement, it was incompatible with the Union's general principle of non-discrimination that the "normal retirement age" was determined differently depending on the gender of the applicant and, in the case of female applicants, on the number of children raised by the applicant.

In an earlier case, the European Court of Human Rights had ruled that the Czech old-age pension law was compatible with Article 14 in combination with the right to property of Article 1, Protocol No. 1, of the ECHR.⁵² *Soukupová* shows that it is possible for a national law to be compatible with the guarantee of non-discrimination in the enjoyment of the rights of the ECHR (Article 14 combined with Article 1, Protocol No. 1, of the ECHR) and yet to be found incompatible with the principles of equality and non-discrimination as guaranteed in the EU legal order within a specific context.

- Article 52(3) read in conjunction with the Explanations relating to the Charter establishes that the ECHR protocols (including those not yet ratified by a given Member State) may constitute an interpretative aid.⁵³

National courts can apply the Charter

- The effect of the Charter within national law does not depend on the constitutional law of the Member States (e.g. on how it relates to international law, on the spectrum between monism and dualism) but follows from EU law and is therefore based on the principles of direct effect and supremacy.

51 CJEU, C-401/11, *Blanka Soukupová v. Ministerstvo zemědělství*, 11 April 2013.

52 European Court of Human Rights (ECtHR), *Andrle v. the Czech Republic*, No. 6268/08, 20 June 2011.

53 According to Art. 52(3) of the Charter "[i]n so far as the rights in the Charter correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the [ECHR]." The Explanations on Art. 52 state in this regard that "[t]he reference to the ECHR covers both the Convention and the Protocols to it."

- National courts are obliged to interpret national measures in conformity with the Charter whenever they come within the scope of EU law (as interpreted by the CJEU).⁵⁴
- National measures can be reviewed in the light of the Charter whenever they come within the scope of EU law. Where the Charter provisions are sufficiently precise and unconditional, they can have a direct effect.⁵⁵ This implies that national norms conflicting with the Charter are rendered inapplicable.
- The direct effect allows individuals to invoke the Charter in proceedings before national courts. Moreover, the direct effect of the Charter can also lead to the creation of rights that are not available in national law.

Example: duty to provide suspensive effect

The *Abdida* case concerned Belgian asylum law and is an example of Article 47 of the Charter (right to an effective remedy and to a fair trial) granting, in specific circumstances, the right to a judicial remedy with a suspensive effect.⁵⁶ The CJEU ruled that the appeal against a return decision had to include interim protection because the enforcement of the return could have exposed the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

- Where discrimination contrary to EU law has been established, and when measures reinstating equal treatment have not been adopted, a national court must set aside any discriminatory provision of national law. It does not have to request or await its prior removal by the legislature, and must apply to members of the disadvantaged group the same arrangements as those enjoyed by persons within the favoured group.⁵⁷

54 CJEU, C-426/11, *Mark Alemo-Herron and Others v. Parkwood Leisure Ltd*, 18 July 2013, paras. 30 and 36; CJEU, C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria SA*, 17 July 2014, paras. 50 and 51.

55 CJEU, Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 5 February 1963.

56 CJEU, C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida* [GC], 18 December 2014, paras. 52 and 53; CJEU, C-239/14, *Abdoulaye Amadou Tall v. Centre public d'action sociale de Huy (CPAS de Huy)*, 17 December 2015, para. 58.

57 CJEU, C-442/00, *Ángel Rodríguez Caballero v. Fondo de Garantía Salarial (Fogasa)*, 12 December 2002, paras. 42 and 43; CJEU, C-399/09, *Marie Landtová v. Česká správa sociálního zabezpečení*, 22 June 2011, para. 51; CJEU, C-482/16, *Georg Stollwitzer v. ÖBB Personenverkehr AG*, 14 March 2018, paras. 30 and 45.

Example: duty to grant benefits to the disadvantaged group

In *Milkova*, the Bulgarian Labour Code was at stake. This law provided a legal framework conferring specific advance protection in the event of dismissal of employees with disabilities, but that guarantee did not extend to civil servants with the same disabilities. The CJEU considered that in the event that the referring court found that the principle of equal treatment had not been adhered to, that court must re-establish equal treatment by granting civil servants with disabilities, disadvantaged by the current system, the same benefits as those enjoyed by employees with disabilities, who were favoured by that system. As a result, the obligation to comply with EU law would require that the scope of the national rules protecting employees with a particular disability be extended so that those protective rules also benefited civil servants with the same disability.

- In certain circumstances, Charter rights may also generate horizontal effect, that is, obligations between private parties. The landmark cases of the CJEU that illustrate the existence of the horizontal direct effect of the Union's fundamental rights are *Mangold* and *Kücükdeveci*.⁵⁸ In these cases, the CJEU ruled that national courts should set aside any provision of national legislation contrary to the general principle of non-discrimination based on age. Where Charter rights are directly applicable, the Charter can apply in litigation between private parties (horizontal direct effect).

Example: horizontal direct effect of prohibition of discrimination based on age

Kücükdeveci, a case that arose in Germany, concerned a dispute between an employee and a private employer regarding the period of notice for dismissal. This period had been calculated on the basis of the length of service of the employee. However, in accordance with German law, no account was taken of periods of employment prior to the completion of the employee's 25th year of age. The CJEU considered this exception contrary to the principle of non-discrimination based on age. As a result, the national court had to set aside this exception.

- In the case *Egenberger*, the CJEU considered that the mandatory effect of Article 21 of the Charter was no different, in principle, from the various provisions of

⁵⁸ CJEU, C-144/04, *Werner Mangold v. Rüdiger Helm* [GC], 22 November 2005; CJEU, C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG* [GC], 19 January 2010.

the founding treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals.⁵⁹ Consequently, in a dispute between private individuals, the national court would be required to ensure, within its jurisdiction, the judicial protection for individuals flowing from Articles 21 (non-discrimination)⁶⁰ and 47 (right to an effective remedy and to a fair trial) of the Charter, and to guarantee the full effectiveness of those articles by disapplying, if need be, any contrary provision of national law.

- In the case of *AMS*, the CJEU clarified that other fundamental rights – beyond non-discrimination – might also be capable of having this kind of horizontal direct effect; and that the *Mangold/Kücükdeveci* approach applied in principle to both general principles of Union law and fundamental rights under the Charter.⁶¹
- Member States can also be held liable for damage caused to individuals as a result of breaches of the Charter. A Member State is thus required to make reparation for the damage caused where:
 - the rule of law infringed was intended to confer rights on individuals,
 - the breach is sufficiently serious (the Member State concerned has manifestly and gravely disregarded the limits on its discretion),
 - and there is a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.⁶²

The state can also incur liability under less strict conditions on the basis of national law.⁶³

59 CJEU, C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.* [GC], 17 April 2018, paras. 76, 77 and 79. The CJEU draws parallels with *Defrenne* (CJEU, Case 43-75, 8 April 1976, para. 39), *Angonese* (CJEU, C-281/98, 6 June 2000, paras. 33-36), *Angelo Ferlini* (CJEU, C-411/98, 3 October 2000, para. 50), *International Transport Workers' Federation and Finnish Seamen's Union* (CJEU, C-438/05, 11 December 2007, paras. 57-61). See also CJEU, C-68/17, *IR v JQ* [GC], 11 September 2018, paras. 69-71.

60 "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

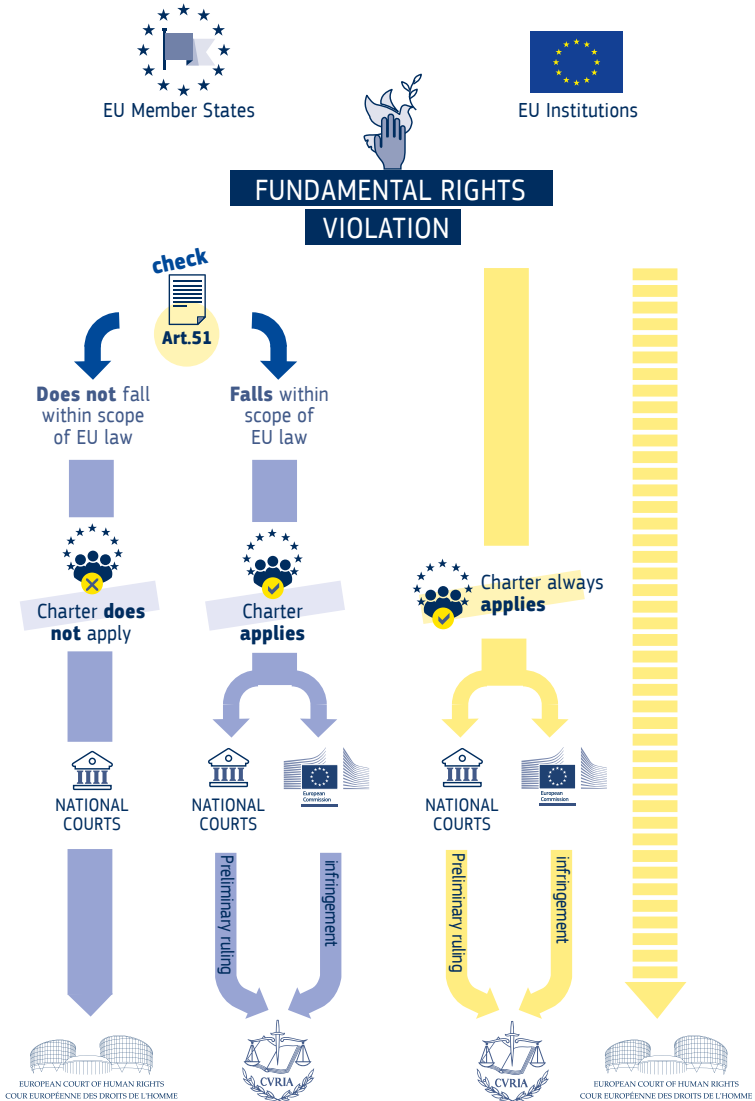
61 CJEU, C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT and Others* [GC], 15 January 2014, para. 47.

62 See CJEU, Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, 19 November 1991. In the specific context of breach of fundamental rights, see CJEU, C-300/04, *M. G. Eman and O. B. Sevinger v. College van burgemeester en wethouders van Den Haag* [GC], 12 September 2006, para. 69.

63 CJEU, Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, 5 March 1996, para. 66.

The Court of Justice of the European Union can interpret the Charter

Figure 5: The Charter and access to the Court of Justice of the European Union



Source: FRA, 2018

Treaty on the Functioning of the European Union, Article 267

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

- National courts can refer preliminary questions to the CJEU.⁶⁴ The possibility of referring or obligation to refer a matter to the Court of Justice is based on cooperation established with a view to ensuring the proper application and uniform interpretation of EU law, including the Charter of Fundamental Rights.
- It is for the national court to make the decision to refer a case to the CJEU. A preliminary reference will often offer swifter and greater legal protection than a complaint to the European Court of Human Rights. The CJEU has exclusive jurisdiction to declare EU acts invalid. Therefore, where and when a national courts has doubts about the validity of such an act, it must refer the matter to the Court, stating the reasons for which it considers that the act is invalid. Moreover, national courts or tribunals against whose decisions there is no judicial remedy under national law are under a legal obligation to refer a question of EU law raised before them to the CJEU. This is not the case where the court establishes that “the question is irrelevant” or the provision “has already been interpreted by the Court” or that the correct application of the provision is “so obvious as to leave no scope for any reasonable doubt”. When examining the absence of such doubt the court should take the “specific characteristics” of EU law into account, including “the particular

⁶⁴ See CJEU, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, in OJ C 257, 20 July 2018. See also the court’s factsheet on *Field of application of the Charter of Fundamental Rights of the European Union*, December 2017.

difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions” within the EU.⁶⁵

Example: different situation of a national judge vis-à-vis the European Court of Human Rights

Whereas a preliminary ruling under EU law allows national courts direct access to the CJEU, the situation is (currently) different vis-à-vis the European Court of Human Rights. Before an application can be filed with the ECtHR, the legal remedies available through domestic courts have to be exhausted, and the other conditions for admissibility must be complied with. These obstacles do not exist in preliminary reference proceedings at the CJEU. The CJEU also offers a much faster trial. The average duration of proceedings is 16.3 months.⁶⁶

Note, however, that on 1 October 2018 Protocol No. 16 to the ECHR entered into force. It allows the highest national courts to ask the ECtHR for advisory opinions “on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto” in pending cases before them. In that sense, the new procedure resembles to a certain extent the preliminary ruling procedure of the CJEU.⁶⁷

Violating Charter rights could lead to an infringement procedure

Treaty on the Functioning of the European Union, Article 258

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

- The European Commission supervises the application of the treaties. Whenever “the Commission considers that a Member State has failed to fulfil an obligation

65 CJEU, Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, 6 October 1982, para. 21.

66 CJEU (2018), Annual report 2017, Luxembourg, 2018, p. 14.

67 As of 1 August, only five EU Member States have ratified the instrument (Estonia, Finland, France, Lithuania and Slovenia).

under the Treaties” it can launch an infringement procedure (letter of formal notice, reasoned opinion, and referral to Court).⁶⁸

- The Charter is part of EU primary law and the European Commission can initiate an infringement procedure against a breach of the Charter by a Member State, provided the Charter applies (i.e. the alleged human rights violation occurred within the scope of application of EU law; see [Chapter 4](#)).⁶⁹

Example: the Charter and infringement procedures

Current examples of such an intervention by the Commission include an infringement procedure against a national asylum law in which the Commission considered that the latter did not comply with EU legislation (Directive 2013/32/EU on Asylum Procedures, Directive 2008/115/EC on Return, Directive 2013/33/EU on Reception Conditions) and several provisions of the Charter.⁷⁰ Another example (also still pending at the time of writing) concerns a law reforming the judiciary with the effect that a significant part of a Supreme Court would be forced to retire. The Commission is of the opinion that aspects of the reform undermine the principle of judicial independence, including the irremovability of judges, and thus runs counter obligations under Article 19(1) of the Treaty on European Union read in connection with Article 47 of the Charter of Fundamental Rights of the European Union.⁷¹

4 How to check whether the Charter applies

Where should you start your assessment?

- Article 51 is the point of departure for any assessment of whether or not the Charter applies. It codifies the case law of the CJEU regarding the application of general principles of EU law.⁷² See [Chapter 1](#), Sections on [Fields of application](#) and [What is the rationale of Article 51 of the Charter?](#)

68 European Communities (2012), Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26 October 2012, Art. 258.

69 On the infringement procedure and ways to optimise its use in the context of fundamental rights, see de Schutter, O. (2017), *Infringement proceedings as a tool for the enforcement of fundamental rights in the European Union*, Open Society Institute, October 2017.

70 Infringement No. 20152201.

71 Infringement No. 20172121.

72 See the Explanations on Art. 51(1) of the Charter, OJ C 303, 14 December 2007, pp. 17–37. See also Opinion of Advocate General Cruz Villalón of 12 June 2012, para. 25 in CJEU, C-617/10, *Åklagaren v. Hans Åkerberg Fransson* [GC], 26 February 2013. Regarding general principles of law and Art. 51 of the Charter, see note 8.

- To avoid any violation of EU law, decision-making processes at domestic level (including in particular legislative procedures) should systematically investigate whether or not the EU Charter of Fundamental Rights applies. This assessment should take place during the very early preparatory stages of any envisaged legislative or policy initiative. If certain categories of law or policymaking are from the outset exempted from any Charter-related scrutiny, there is a risk that any later impact assessment or legal scrutiny of the proposal will not take the Charter provisions into account even if the Charter – contrary to a too generic assumption of non-applicability of EU law – applies.
- A systematic check of whether or not the conditions laid down in Article 51 are met acts as an important tool to ensure that the application of the Charter is promoted. A regular “Article 51 screening” creates visibility, awareness and knowledge of the applicability of the Charter.

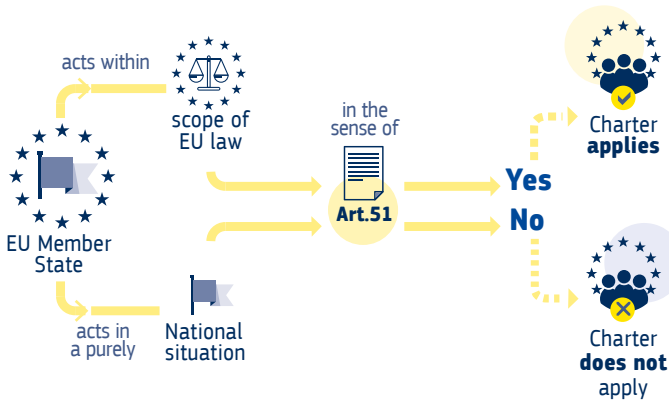
What is the necessary requirement for applying the Charter?

- The Charter is always binding upon the organs of the Union – even “when they act outside the EU legal framework”⁷³ but upon the Member States only when they are “implementing Union law”.
- According to the case law of the CJEU, “implementing Union law” has a broad meaning covering all execution (*mise en œuvre*) and application of Union law by the Member States.⁷⁴ It means the same as “acting within the scope of EU law” and covers all situations governed by EU law.
- Therefore, for the Charter to be applicable to a national act, it must (potentially) qualify as an act of implementation of Union law in the sense of Article 51(1) of the Charter, meaning that it is within the scope of application of EU law.

73 See CJEU, Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others v. European Commission and European Central Bank (ECB)* [GC], 20 September 2016, para. 67.

74 CJEU, C-419/14, *WebMindLicenses kft v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, 17 December 2015, para. 66; CJEU, C-650/13, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* [GC], 6 October 2015, paras. 25–27; CJEU, C-418/11, *Texdata Software GmbH*, 26 September 2013, para. 73; CJEU, C-265/13, *Emiliano Torralbo Marcos v. Korota SA and Fondo de Garantía Salarial*, 27 March 2014, paras. 29 and 30; CJEU, C-617/10, *Åklagaren v. Hans Åkerberg Fransson* [GC], 26 February 2013, para. 19.

Figure 6: Checking the Charter's applicability



Source: FRA, 2018

Existence of a link to European Union law as a minimum requirement

- Where it is not possible to identify any link with EU law, EU Member States are not under any EU fundamental rights obligation – the Charter does not apply.
- EU fundamental rights apply only “hand in hand” with provisions of EU law. The minimum requirement for the application of EU fundamental rights is that there must be a sufficient connection with Union law other than the Charter.⁷⁵
- The existence of any link with EU law does not necessarily mean that EU fundamental rights apply; not every link with Union law suffices to trigger the application of EU fundamental rights.⁷⁶

75 See, for example, CJEU, C-92/14, *Liliana Tudoran and Others v. SC Suport Colect SRL*, 3 July 2014, paras. 43–48; CJEU, C-483/12, *Pelckmans Turnhout NV v. Walter Van Gestel Balen NV and Others*, 8 May 2014, para. 20; CJEU, C-457/09, *Claude Chartry v. Belgian State*, 1 March 2011, paras. 22–25.

76 See, for example, CJEU, C-20/10, *Vino Cosimo Damiano v. Poste Italiane SpA*, 11 November 2010, paras. 53, 54, 56, 57 and 64; CJEU, C-161/11, *Vino Cosimo Damiano v. Poste Italiane SpA*, 22 June 2011, paras. 38 and 39.

Examples: “insufficient” EU links

- The matters (of the national act and a provision of EU law) are “closely related or one of those matters [has] an indirect impact on the other”⁷⁷ (see Chapter 7, Situation B.1).
- The mere fact that a national measure comes within an area in which the EU has powers⁷⁸ (see Chapter 7, Situation B.6).
- The national act qualifies as “more stringent protective measures of domestic law” (acts going beyond the minimum requirements laid down by Union)⁷⁹ (see Chapter 7, Situation A.3).
- There are voluntary references in national law to Union law⁸⁰ (see Chapter 7, Situation B.5).
- The link with EU law should be sufficiently concrete to qualify as “implementing Union law”. This link is sufficiently concrete if Member States act as agents for the EU, or if they need to rely on some kind of authorisation under EU law (see chapter 5).

5 In which situations does the Charter apply?

When Member States act as an agent for the European Union

- A Member State acts as an “agent” or “representative” of the EU if it acts on behalf of the Union. All authorities and the judiciary of the Member States can act as such.

77 CJEU, C-198/13, *Victor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, 10 July 2014, paras. 34–36. See also CJEU, Joined cases C-483/09 and C-1/10, *Criminal proceedings against Magatte Gueye (C-483/09) and Valentín Salmerón Sánchez (C-1/10)*, 15 September 2011.

78 CJEU, C-206/13, *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, 6 March 2014; CJEU, C-198/13, *Victor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, 10 July 2014, paras. 24, 27, 34–36 and 46. See also CJEU, C-309/96, *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio*, 18 December 1997.

79 CJEU, C-6/03, *Deponiezweckverband Eiterköpfe v. Land Rheinland-Pfalz*, 14 April 2005, paras. 58–64; CJEU, C-2/97, *Società italiana petroli SpA (IP) v. Borsana Srl*, 17 December 1998.

80 CJEU, C-482/10, *Teresa Cicala v. Regione Siciliana*, 21 December 2011.

- The “agent situation” concerns all execution or transposition of legal acts taken by the institutions, bodies, offices or agencies of the European Union.⁸¹ It could concern acts such as regulations,⁸² directives,⁸³ external agreements (international agreements concluded by the EU)⁸⁴ or specific treaty provisions.⁸⁵ The “implementing Union law” as an agent can arise in various situations where (draft) national acts play a role. Based on the extensive case law of the CJEU on the applicability of EU fundamental rights, various agent situations can be identified.⁸⁶
 - Transposition into national law of Union legal acts:⁸⁷ in this frequent situation, national acts are intended to transpose specific mandatory requirements by virtue of Union legal acts – for example, through the implementation of a directive. For further explanation, see Chapter 7, [Situation A.1](#) and [Situation A.2](#).
 - National acts adopted on the basis of powers conferred by Union law:⁸⁸ here, a Member State uses discretionary powers by virtue of EU law. An example of this would be decisions made by the Member States on the basis of discretion or an exception available to them under a Union legal act. For further information, see Chapter 7, [Situation A.3](#).

81 CJEU, C-587/15, *Lietuvos Respublikos transporto priemonių draudikų biuras v. Gintaras Dockevičius and Jurgita Dockevičienė*, 15 June 2017, paras. 36 and 44; CJEU, C-258/14, *Eugenia Florescu and Others v. Casa Județeană de Pensii Sibiu and Others* [GC], 13 June 2017, para. 35.

82 See, for example, CJEU, C-384/05, *Johan Piek v. Ministerie van Landbouw, Natuurbeheer en Visserij*, 11 January 2007, para. 32.

83 See for example, CJEU, Joined cases C-20/00 and C-64/00, *Booker Aquacultur Ltd (C-20/00) and Hydro Seafood GSP Ltd (C-64/00) v. The Scottish Ministers*, 10 July 2003, para. 88.

84 CJEU, C-7/98, *Dieter Krombach v. André Bamberski*, 28 March 2000, paras. 18–28; CJEU, Joined cases C-7/10 and C-9/10, *Staatssecretaris van Justitie v. Tayfun Kahveci and Osman Inan*, 29 March 2012, para. 23. See also CJEU, C-370/12, *Thomas Pringle v. Government of Ireland and Others*, 27 November 2012, paras. 178–181.

85 See for example, CJEU, C-300/04, *M. G. Eman and O. B. Sevinger v. College van burgemeester en wethouders van Den Haag* [GC], 12 September 2006, paras. 56–61; CJEU, C-650/13, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* [GC], 6 October 2015, para. 33.

86 These situations are partly based on De Mol, M. (2014), *De directe werking van de grondrechten van de Europese Unie*, Dissertation, Maastricht University, Oisterwijk Wolf Legal Publishers. Obviously, the case law of the Court is in development and, thus, the list is not to be considered exhaustive or otherwise set in stone.

87 See for example, CJEU, Joined cases C-20/00 and C-64/00, *Booker Aquacultur Ltd (C-20/00) and Hydro Seafood GSP Ltd (C-64/00) v. The Scottish Ministers*, 10 July 2003; CJEU, C-300/04, *M. G. Eman and O. B. Sevinger v. College van burgemeester en wethouders van Den Haag* [GC], 12 September 2006.

88 See, for example, CJEU, Joined cases C-356/11 and C-357/11, *O. and S. v. Maahanmuuttovirasto and Maahanmuuttovirasto v L*, 6 December 2012; CJEU, C-276/12, *Jiří Sabou v. Finanční reditelství pro hlavní město Prahu* [GC], 22 October 2013.

- National acts involving remedies, sanctioning or enforcement that can be deployed in connection with a Union legal act or Treaty provision:⁸⁹ according to the duty of sincere cooperation laid down in Article 4(3) of the TEU and in the absence of relevant EU procedural rules, Member States are obliged to ensure the effectiveness of EU rights and duties under Union law. Although Member States enjoy procedural autonomy, they need to use their procedures to ensure proper implementation of EU substantive rights (Chapter 7, [Situation A.4](#)).
- National acts involving legal concepts that are mentioned in a Union legal act:⁹⁰ sometimes Union legal acts refer to concepts of national law. Such national concepts may be said to contribute to the “implementation of EU law” when they are used in the context of the EU provisions at issue (Chapter 7, [Situation A.5](#)).
- National acts falling within the (exact) scope of Union legislation without explicit implementing legislation existing:⁹¹ this situation essentially concerns the omission of implementation (Chapter 7, [Situation B.1](#)).

When Member States need to rely on authorisation under European Union law

- This form of “implementing Union law” concerns national acts that fall under an EU prohibition. To justify such national acts, Member States need to use exceptions provided for by EU law. In such situations, EU law authorises the existence of such national acts, which, however, must not encroach on EU fundamental rights. For this reason, the Charter applies to ensure that EU law does not authorise Member States to take measures infringing fundamental rights.⁹²

89 See, for example, CJEU, C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes* [GC], 16 May 2017, paras. 40–42 and 49–52; CJEU, C-405/10, *QB*, 10 November 2011; CJEU, C-617/10, *Åklagaren v. Hans Åkerberg Fransson* [GC], 26 February 2013; CJEU, C-418/11, *Texdata Software GmbH*, 26 September 2013.

90 See, for example, CJEU, C-442/00, *Ángel Rodríguez Caballero v. Fondo de Garantía Salarial (Fogasa)*, 12 December 2002, paras. 29–32; CJEU, C-520/03, *José Vicente Olaso Valero v. Fondo de Garantía Salarial (Fogasa)*, 16 December 2004, para. 34; CJEU, C-177/05, *María Cristina Guerrero Pecino v. Fondo de Garantía Salarial (Fogasa)*, 13 December 2005, paras. 25 and 26.

91 See for example, CJEU, C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG* [GC], 19 January 2010.

92 CJEU, C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, 18 June 1991, paras. 41–43. See also CJEU, C-390/12, *Robert Pflieger and Others*, 30 April 2014, paras. 30–37; CJEU, C-145/09, *Land Baden-Württemberg v. Panagiotis Tsakouridis* [GC], 23 November 2010, para. 52.

Example: a national measure qualifying as restriction on free movement (and therefore in need of justification)

An example is national legislation prohibiting the operation of slot machines outside casinos. Such legislation restricts the freedom to provide services guaranteed by Article 56 of the TFEU and, therefore, is acceptable under EU law only if it can be justified by overriding reasons in the public interest. In examining if such a measure can be justified, the Charter becomes relevant. The national rules in question can be considered justifiable only if they are compatible with the Charter.⁹³

- Based on the case law of the CJEU on the applicability of EU fundamental rights, two main subcategories of this situation of EU authorisation can be distinguished.⁹⁴ For a further explanation of these categories, consult Chapter 7, Situation B.2.
 - National acts qualifying as restrictions on the free movement of persons, services, goods or capital or the freedom of establishment:⁹⁵ this situation reflects the classic approach in the case law of the CJEU.
 - National acts qualifying as deprivations of EU citizenship in the sense of Article 20 of the TFEU:⁹⁶ this situation concerns a more recent development in the case law of the CJEU.

Specific guidance for national legislative and policy processes: consult our checklist!

Chapter 7 of this handbook provides an 'Article 51 checklist' to be used in national legislative and policy processes to assess whether a (draft) national act qualifies as an "implementation of Union law" in the sense of Article 51(1) of the Charter.

⁹³ CJEU, C-98/14, *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v. Magyar Állam*, 11 June 2015.

⁹⁴ Obviously others may arise in future case law.

⁹⁵ CJEU, C-390/12, *Robert Pflieger and Others*, 30 April 2014, paras. 30–37.

⁹⁶ CJEU, C-98/14, *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v. Magyar Állam*, 11 June 2015, para. 74.

6 How to apply the Charter

Where during an examination of the drafting of national law or policies the conclusion is reached that the Charter applies, such national law and policies need to be interpreted in line with the Charter and, where necessary, reviewed against the Charter. This requires national actors to know how to interpret the Charter and to understand whether and to what extent the exercise of Charter rights can be limited.

What are the relevant tools for interpretation?

Various tools can inform the interpretation of Charter rights:

- The Explanations relating to the Charter.⁹⁷ The explanations are a useful point of departure providing guidance on the interpretation of the Charter and are to be taken into consideration when interpreting the Charter provisions.⁹⁸
- The case law of the CJEU.⁹⁹
- The ECHR and the case law of the European Court of Human Rights.¹⁰⁰
- Constitutional traditions common to the Member States.¹⁰¹
- Relevant sources of international law (other than the ECHR), particularly the European Social Charter, which inspired the formulation of a number of provisions of the EU Charter of Fundamental Rights. Both the Charter and its Explanations mention certain instruments of international law that are relevant for the interpretation of the Charter.¹⁰²
- Relevant national laws. Some Charter provisions make reference to national law. For example, Article 9 (right to marry and right to found a family) states that, “[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”.

97 Official Journal of the European Union, OJ C 303, 14 December 2007, pp. 17–35.

98 European Communities (2012), Consolidated version of the Treaty on the European Union (TEU), OJ C 326, 26 October 2012, Art. 6(1) and EU (2012), Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, Art. 52(7).

99 Available at [Curia](#) or [EUR-Lex](#).

100 EU (2012), Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, Art. 52(3).

101 EU (2012), Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, Art. 52(4).

102 See the Annex to this handbook.

FRA ACTIVITY

FRA assistance: Charterpedia and Handbooks

Several thematic handbooks co-produced by FRA and the Council of Europe/European Court of Human Rights are available on FRA's website. They provide an overview of the most relevant case law of the CJEU and the European Court of Human Rights concerning the use of the Charter and the ECHR in relevant policy fields and in all EU languages:

- *Handbook on European data protection law - 2018 edition*, 2018
- *Handbook on European non-discrimination law - 2018 edition*, 2018
- *Handbook on European law relating to access to justice*, 2016
- *Handbook on European law relating to the rights of the child*, 2015
- *Handbook on European law relating to asylum, borders and immigration*, 2014

FRA's Charterpedia provides an online one-stop shop that gives article-by-article access to European and national case law on the Charter. Moreover, Charterpedia provides, for all Charter provisions, the relevant provisions of national constitutional law, as well as of international and European human rights law. Charterpedia also allows easy access to country-specific Charter-related information (e.g. Charter country sheets).

Charterpedia can be accessed via FRA's website.

In what circumstances can the exercise of rights be limited?

Charter of Fundamental Rights, Article 52 – Scope and interpretation of rights and principles

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

- The Charter includes, in Article 52, a general provision concerning limitations on rights.
- A limitation on the exercise of the rights and freedoms recognised by the Charter is allowed under the following conditions:
 - it must be provided for by law;
 - it must respect the essence of those rights and freedoms;

- it must pursue objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (legitimate aim);
- it must, in accordance with the principle of proportionality, be necessary and genuinely meet the aims pursued (principle of proportionality).
- In addition, a limitation to a Charter right that corresponds to a right in the ECHR must also fulfil the requirements for limitation under the ECHR.¹⁰³

Specific guidance: consult our checklist!

Chapter 8 of this handbook provides a checklist that can be used to check the compliance of legislative proposals with the Charter of fundamental rights.

¹⁰³ EU (2012), Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, Art. 52(3).

Part II: Practical tools



7 Checklist on the applicability of the Charter

- This checklist is a tool for assessing whether or not, and to what extent, EU fundamental rights apply in national legislative and policy processes. It is based on pre- and post-Charter case law of the CJEU.¹⁰⁴
- The key question in such an Article 51 screening is whether or not the (draft) national act at issue qualifies as “implementation of Union law” in the sense of Article 51(1) of the Charter (hereinafter “implementation of Union law” or “implementing Union law”). For an introductory explanation, see [Chapter 1](#), [Chapter 4](#) and [Chapter 5](#).

Choose the route that reflects your starting point

- This checklist builds on two different “routes” depending on whether or not the national legislative or policy process is reacting to a specific EU act (e.g. a regulation, a directive, an external agreement or a specific Treaty provision). Your situation (see [Chapter 5](#)) will be of a different nature depending on what your point of departure is.

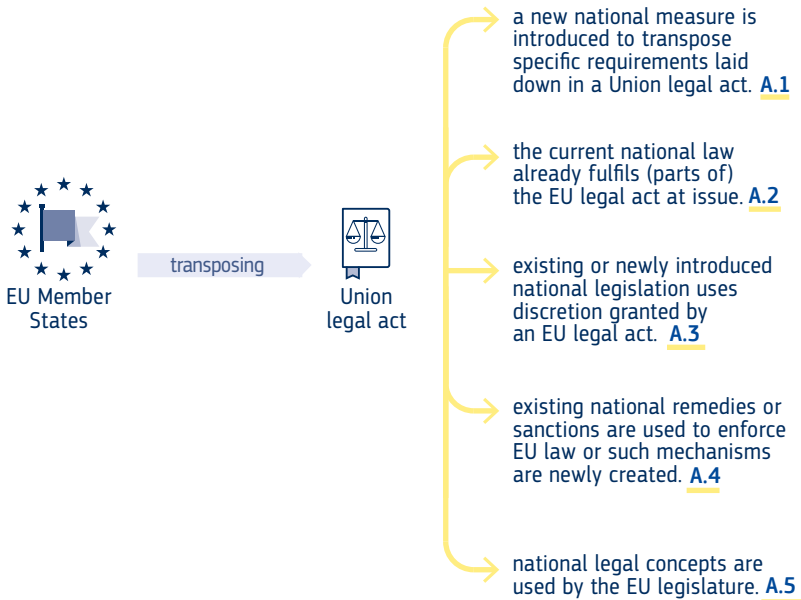
¹⁰⁴ This checklist is largely based on de Mol, M. (2016), ‘Article 51 of the EU Charter in the legislative processes of the Member States’, *Maastricht Journal of European and Comparative Law (MJ)*, 23(4), pp. 640–666.

- Use Route A if the aim of the national legislative or policy process is the transposition, application or execution of an EU act into the national legal system.
- Use Route B if the aim of the national legislative or policy process is not an EU legal act.

Route A: Cause of national legislative action is an EU act

- The most obvious example of “implementing Union law” is a scenario in which a Member State acts to transpose or implement a Union legal act. In this scenario, Member States are acting as “agents” or “representatives” of the EU (the “agent situation”, see [Chapter 4](#)). In such a scenario, it is clear that in principle EU fundamental rights apply.

Figure 7: Situations of Charter application in response to a Union legal act



Source: FRA, 2018

- Union legal acts can influence national legislative acts in various ways, thus resulting in different forms of “implementation of Union law” in the sense of Article 51 of the Charter. The following set of situations provides more detailed examples of what can in this context be considered “implementation of Union law”.

A new national measure is introduced to transpose specific substantive and/or procedural requirements laid down in a Union legal act (Situation A.1)

The Union legal act at issue might require the introduction of new national measures transposing specific substantive and procedural requirements. These national measures qualify as “implementing Union law”.¹⁰⁵ EU fundamental rights in principle apply.

Various kinds of binding Union acts

- Article 51: implementation concerns the transposition or application of legal acts taken by the institutions, bodies, offices or agencies of the EU.¹⁰⁶
- These legally binding EU acts can be, for example, regulations,¹⁰⁷ directives,¹⁰⁸ external agreements (concluded by the EU)¹⁰⁹ or specific Treaty provisions.¹¹⁰

Transposition by new national measures

- New national regulatory or legislative measures that need to be adopted in order to incorporate the mandatory requirements of EU acts into the national legal order qualify as “implementing Union law”.
- “Implementing Union law” covers all kinds of national measures from all Member State authorities: it includes national legislative or policy acts from central and decentralised bodies, from higher and lower legislatures, from administrative bodies, etc. All national measures that can be traced to EU legal acts constitute the “implementation of Union law”. In scenarios in which EU legal acts

¹⁰⁵ CJEU, Case 5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, 13 July 1989.

¹⁰⁶ CJEU, C-587/15, *Lietuvos Respublikos transporto priemonių draudikų biuras v. Gintaras Dockevičius and Jurgita Dockevičienė*, 15 June 2017, paras. 36 and 44; CJEU, C-258/14, *Eugenija Florescu and Others v. Casa Județeană de Pensii Sibiu and Others* [GC], 13 June 2017, para. 35.

¹⁰⁷ See, for example, CJEU, C-384/05, *Johan Piek v. Ministerie van Landbouw, Natuurbeheer en Visserij*, 11 January 2007, para. 32.

¹⁰⁸ See, for example, CJEU, Joined cases C-20/00 and C-64/00, *Booker Aquacultur Ltd (C-20/00) and Hydro Seafood GSP Ltd (C-64/00) v. The Scottish Ministers*, 10 July 2003, para. 88.

¹⁰⁹ CJEU, C-7/98, *Dieter Krombach v. André Bamberski*, 28 March 2000, paras. 18–28; CJEU, Joined cases C-7/10 and C-9/10, *Staatssecretaris van Justitie v. Tayfun Kahveci and Osman Inan*, 29 March 2012, para. 23. See also CJEU, C-370/12, *Thomas Pringle v. Government of Ireland and Others*, 27 November 2012, paras. 178–181.

¹¹⁰ See, for example, CJEU, C-300/04, *M. G. Eman and O. B. Sevinger v. College van burgemeester en wethouders van Den Haag* [GC], 12 September 2006, paras. 56–61; CJEU, C-650/13, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* [GC], 6 October 2015, para. 33.

are transposed by national legislation and further executed (on the basis of this national legislation) by other kinds of legislative or administrative measures, all levels of national measures qualify as “implementing Union law”.

Margin of appreciation

- Very often, EU legal acts allow Member States margins of appreciation. The clearest case is that of directives, which require States to achieve a particular result without dictating the means of achieving that result. However, other EU legal acts such as regulations often allow Member States some room for manoeuvre in their implementation.
- National measures making use of the margin of appreciation provided by the EU legislature qualify as “implementing Union law”.¹¹¹

Example: paid annual leave

An EU directive concerning the organisation of working time stipulates that Member States must take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice. In this example, the transposition into national law of the right to paid annual leave of four weeks qualifies as “implementing Union law”. In addition, the conditions for entitlement to, and granting of, such leave are “implementing Union law”, even though the EU directive leaves these conditions to the discretion of the Member States. In exercising this discretion, the Member States have to respect EU fundamental rights.¹¹²

The current national law is implementing EU law to the extent that it already reflects (parts of) the EU legal act at issue (Situation A.2)

Perhaps the current national law already sets out some of the specific substantive and procedural requirements deriving from the Union legal act at issue. In this case, the existing national rules that (already) fulfil the substantive and procedural requirements deriving from Union legal acts qualify as “implementing Union law”.¹¹³ EU fundamental rights in principle apply.

111 CJEU, C-384/05, *Johan Piek v. Ministerie van Landbouw, Natuurbeheer en Visserij*, 11 January 2007, para. 32.

112 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18 November 2003, Art. 7, pp. 9–19

113 CJEU, Case 5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, 13 July 1989.

Transposition by existing national legislation

- Sometimes it is possible to ensure that national law is consistent with the Union act at issue on the basis of pre-existing national provisions. In this case, there is no need to create new national provisions specifically intended to implement the Union legal act.
- These kinds of pre-existing national provisions capable of ensuring that national law is consistent with the Union legal act in question qualify as “implementing Union law”. With the entry into force of the relevant EU legislation, they change from being purely national measures to measures “implementing Union law”.
- Where pre-existing national provisions ensure that national law is consistent with new Union legal acts, the need arises to check the full compliance of those provisions with the Union legal act at issue and to revisit their Charter compliance.

Existing or newly introduced national legislation uses discretion granted by an EU legal act (Situation A.3)

The exercise of discretionary powers by virtue of EU legal acts qualifies in principle as “implementing Union law”. EU fundamental rights in principle apply, but there are exceptions to this rule.

Discretionary powers

- Very often EU legal acts leave discretion to Member States, most visibly in the case of directives.
- The exercise by Member States of such discretion qualifies in principle as “implementing Union law”, regardless of whether it concerns a mandatory or optional exercise of discretionary powers.¹¹⁴ However, there are exceptions where the use of discretion is not considered to be implementation of EU law.

Exception: more favourable or stringent national provisions (gold-plating)

- EU legal acts can allow the Member States to go beyond the minimum EU requirements by adopting more favourable or stringent national provisions. The exercise of this competence by the Member States does not qualify as “implementing Union

¹¹⁴ CJEU, C-276/12, *Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu* [GC], 22 October 2013, paras. 41–43; CJEU, C-406/15, *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, 9 March 2017, paras. 52 and 53; CJEU, Joined cases C-411/10 and C-493/10, *N. S. (C-411/10) v. Secretary of State for the Home Department and M. E. and Others (C-493/10) v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [GC], 21 December 2011, paras. 64–69 and 77.

law” if the option of more favourable legislation involves the mere recognition of the power that the Member States (already) enjoy under national law. The EU provision only confirms that the Member States retain the power at issue. It does not imply that the State action under such a clause would fall within the scope of EU law.¹¹⁵

- An indication that a situation involves the mere recognition of the already existing power to adopt more favourable national provisions is that the “more favourable national provisions” clause features in a chapter on general and final provisions. Another indication is that the power to adopt more favourable national provisions is based on treaty provisions such as Article 153(4) (social policy), Article 169(4) (consumer protection) or Article 193 (the environment) of the TFEU.

Example: more favourable national provisions not qualifying as “implementing Union law”

According to the directive concerning the organisation of working time, Member States must take the measures necessary to ensure that every worker is entitled to a paid annual leave of at least four weeks. In addition, one of the miscellaneous provisions of the directive states that “[t]his Directive shall not affect Member States’ right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers”.

If a Member State were to opt to grant annual leave of five weeks, EU fundamental rights would apply only to the national implementation of the EU minimum of four weeks, not to the extra week provided by the national legislature. This could, for example, be relevant if the fifth week of paid annual leave were granted only to employees aged 50 years or older. The Union principle of non-discrimination based on age would presumably not apply to this difference in treatment based on age, as the fifth week would not qualify as “implementation of Union law”.

However, the Union legal act at issue might explicitly provide that national gold-plating falls within the scope of EU law and therefore must comply with the Charter. In this scenario, it is clear that EU law, including EU fundamental rights, applies.

¹¹⁵ CJEU, C-2/97, *Società italiana petroli SpA (IP) v. Borsana Srl*, 17 December 1998, para. 40; CJEU, C-6/03, *Deponiezweckverband Eiterköpfe v. Land Rheinland-Pfalz*, 14 April 2005, paras. 62 and 63; CJEU, C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* [GC], 24 January 2012, paras. 45–50 (implicitly); CJEU, C-198/13, *Victor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, 10 July 2014, paras. 44 and 45.

Example: gold plating qualifying as “implementing Union law”

Article 4(1) of the Audiovisual Media Services Directive provides that “Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive *provided that such rules are in compliance with Union law*” (emphasis added).¹¹⁶ In this case, it follows from the directive itself that more stringent protective measures under domestic law fall within the scope of EU law. Consequently, the Charter applies not only to the minimum requirements of the directive, but also to national gold-plating.¹¹⁷

- It is possible that the more stringent protective measures of domestic law may fall under some sort of Union prohibition. If this is the case, the Charter does apply to national gold-plating, because these measures need authorisation from the EU on the basis of possible grounds for justification. For further details, see [Situation B.2](#).

Exception: standstill clauses

- Sometimes EU legal acts authorise the Member States to retain certain provisions of their earlier national legislation that would, without that authorisation, be incompatible with that Union legal act.
- In so far as a Member State retains such provisions, it does not implement Union law in the sense of Article 51(1) of the Charter. Rather, and as in the case of gold-plating, this exception recognises the power that Member States (already) enjoy under national law.

Example: a standstill clause in the area of tax law

Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes did not provide full harmonisation. This is because this so-called sixth directive, by virtue of Article 28(3) (b),

¹¹⁶ *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services*, OJ L 95/ 1, 15 April 2010, and *corrigendum*, OJ L 263/15, 6 October 2010.

¹¹⁷ CJEU, C-234/12, *Sky Italia Srl v. Autorità per le Garanzie nelle Comunicazioni*, 18 July 2013, para. 14.

unreservedly authorises the Member States to retain certain provisions of their national legislation predating the sixth directive that would, without that authorisation, be incompatible with that directive. Consequently, the CJEU stated that “in so far as a Member State retains such provisions, it does not transpose the Sixth Directive and thus does not infringe either that directive or the general Community principles which Member States must, according to *Klensch*, comply with when implementing Community legislation”.¹¹⁸

The introduction or use of national provisions concerning remedies, sanctioning and enforcement that will apply with regard to the EU legal act at issue or with regard to national legislation transposing that EU legal act (Situation A.4)

National measures that are used to guarantee the application and effectiveness of EU law (sanctioning, remedies and enforcement) qualify as “implementation of Union law” in the sense of Article 51(1). EU fundamental rights apply to these national measures if they are used in this context. This rule normally applies irrespective of whether or not the Union legal act at issue contains specific provisions (obligations) concerning the effectiveness (sanctioning, remedies and enforcement) of EU law.

Treaty on European Union, Article 4(3)

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

Duty to take all measures necessary to render Union legal acts effective

- The obligation for the Member States to implement the specific (substantive and procedural) obligations of Union legal acts is accompanied by a duty

¹¹⁸ CJEU, C-36/99, *Idéal tourisme SA v. Belgian State*, 13 July 2000, paras. 37 and 38.

to take all measures necessary to render Union legal acts effective within their national legal order.

- There is a duty to implement EU law such that individual parties can invoke the rights accorded them under EU legislation. This duty always exists, even when EU legal acts do not contain specific provisions concerning sanctions, remedies and enforcement.¹¹⁹ There is a general duty regarding the effectiveness of EU law that derives from the principle of sincere cooperation as laid down in Article 4(3) of the TEU. It follows from the case law of the CJEU that this implies a duty to render EU law effective.¹²⁰ More specific expressions of this principle can be found in Articles 19(1) and Article 325 of the TFEU and in secondary EU law provisions.
- National measures that are intended or used to guarantee the application and effectiveness of EU law qualify as “implementation of EU law” in the sense of Article 51(1) of the Charter.¹²¹ Such measures include penalties (criminal or administrative) for an infringement of EU law, legal remedies to ensure judicial protection of individual rights under Union law, procedural rules governing such actions, measures concerning the refund of charges levied in breach of EU law and measures to penalise conduct harmful to the financial interests of the Union.
- These kinds of measures qualify as “implementing Union law” irrespective of whether or not they are adopted to transpose EU law into national law.¹²² They can also be general measures of penal law or procedural law falling within the

119 See, for example *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, OJ L 303, 2 December 2000, Art. 9, pp. 16–22. Examples in the case law of the CJEU of cases in which the Charter or general principles of Union law applied even though there was no specific duty in secondary legislation to render EU law effective (e.g. by sanctioning non-compliance): CJEU, C-262/99, *Paraskevas Louloudakis v. Elliniko Dimosio*, 12 July 2001, para. 67; CJEU, C-430/05, *Nttonik Anonymi Etaireia Emporias H/Y, Logismikou kai Paroxis Ypiresion Michanografisis and Ioannis Michail Pikoulas v. Epitropi Kefalaiagoras*, 5 July 2007, paras. 50, 52 and 53; CJEU, C-546/09, *Aurubis Bulgaria AD v. Nachalnik na Mitnitsa Stolichna*, 31 March 2011, para. 41; CJEU, C-405/10, *QB*, 10 November 2011, para. 48; CJEU, C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes* [GC], 16 May 2017, para. 41.

120 CJEU, C-177/95, *Ebony Maritime SA and Loten Navigation Co. Ltd v. Prefetto della Provincia di Brindisi and others*, 27 February 1997, para. 35; CJEU, C-186/98, *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos*, 8 July 1999, para. 14; CJEU, C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern* [GC], 13 March 2007, para. 38; CJEU, C-268/06, *Impact v. Minister for Agriculture and Food and Others* [GC], 15 April 2008, para. 44.

121 CJEU, C-617/10, *Åklagaren v. Hans Åkerberg Fransson* [GC], 26 February 2013, paras. 26 and 27.

122 CJEU, C-218/15, *Gianpaolo Paoletti and Others v. Procura della Repubblica*, 6 October 2016, para. 18.

national sovereign competences of the Member States, but only as long as they are used within the context of EU law.

Example: administrative penalty for non-compliance with EU law

Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be published on those securities does not expressly provide for a system of penalties where the information recorded in the listing proves to be inaccurate or misleading. Accordingly, Member States are empowered to choose the penalties that seem appropriate to them. In *Ntioniok en Pikoulas*, the CJEU stated that the exercise of that power must be in accordance with the general principles of law.¹²³

Example: penal law sanction for non-compliance with EU law

Another example is Regulation (EC) No. 1013/2006 on shipments of waste.¹²⁴ National penal measures sanctioning the failure to comply with provisions of this regulation qualify as Article 51 implementation. In *Garenfeld*, it was concluded that the German Criminal Code qualified as implementation in the context of this regulation and that Article 49(1) of the Charter (principle of the legality of criminal offences and penalties) applied.¹²⁵

The CJEU said: “This principle [the principle of the legality of criminal offences and penalties], which the Member States, in particular, are required to observe when they prescribe a penalty to punish failure to comply with provisions of EU law, implies that legislation must define clearly offences and the penalties which they attract. That requirement is satisfied where the individual concerned is able, on the basis of the wording of the relevant provision and, if need be, with the help of the interpretative guidance given by the courts, to know which acts or omissions will make him criminally liable.”

123 CJEU, C-430/05, *Ntioniok Anonymi Etaireia Emporias H/Y, Logismikou kai Paroxis Ypiresion Michanografisis and Ioannis Michail Pikoulas v. Epitropi Kefalaiaioras*, 5 July 2007, paras. 50, 52 and 53.

124 *Regulation (EC) No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste*, OJ L 190, 12 July 2006, pp. 1-98.

125 CJEU, C-405/10, *QB*, 10 November 2011, para. 48.

- It remains to be settled in the case law of the CJEU whether or not the same approach applies to *civil* law measures against private parties for violation of norms that are based on EU law (e.g. civil liability). These kinds of measures, whether they should be regarded as measures having a character of legal redress (compensation) and/or as being of a punitive nature, could be qualified as “implementing measures”.¹²⁶ However, the *Miravittles et al.* case could be an indication of a stricter approach on the part of the Court.¹²⁷ Certainly, these kinds of national acts do qualify as “implementing measures” if EU legislative acts expressly provide for them.

Example: civil law sanction for non-compliance with EU law

Article 12 of the Eleventh Council Directive concerning disclosure requirements in respect of branches states that Member States must provide for appropriate penalties in the event of failure to disclose the matters set out in the directive.¹²⁸ In *Texdata Software*, the CJEU considered that the Austrian legislation imposing a periodic penalty for failure to comply with the disclosure obligation of the eleventh directive constituted a case of “implementing Union law”, for the purposes of Article 5(1) of the Charter. As a result, the provisions of the Austrian Commercial Code had to comply with the Charter.¹²⁹

An EU legal act refers to concepts of national law (Situation A.5)

In this situation, EU fundamental rights apply to the (possibly pre-existing) national concepts if they are used in conjunction with the Union legal acts at issue or with national legislation transposing that Union legal act.

References to concepts of national law by the EU legislature

- Provisions of Union legal acts may refer to concepts of national law – for example, in the absence of harmonisation at EU level. In this way, the EU legislature “borrows” concepts of national law falling within the competence of the Member States.

¹²⁶ Opinion of Attorney General Bot of 27 July 2017, para. 53 in CJEU, C-243/16, *Antonio Miravittles Ciurana and Others v Contimark SA and Jordi Socias Gispert*, 14 December 2017.

¹²⁷ CJEU, C-243/16, *Antonio Miravittles Ciurana and Others v. Contimark SA and Jordi Socias Gispert*, 14 December 2017, paras. 33 and 34.

¹²⁸ *Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State*, OJ L 395/36, 30 December 1989, pp. 36-39.

¹²⁹ CJEU, C-418/11, *Texdata Software GmbH*, 26 September 2013, paras. 71-75.

- The result is that legislation or policy acts that use such existing national concepts may result in situations where Member States are implementing EU law in the sense of Article 51, but only if the concepts are relied on in the framework of the EU provisions at issue.¹³⁰
- As a national lawmaker, it is therefore necessary to check whether these national concepts are “Charter proof” when they apply within the context of EU law.

Example: insolvency

The directive relating to the protection of employees in the event of insolvency states that it is without prejudice to national law as regards the definition of terms such as “employee”, “employer” and “pay”. The directive thus refers to national law; it is for national law to specify these terms and define them. If these national legal concepts are used in the context of that directive, EU fundamental rights apply, regardless of whether these concepts are introduced in new national legislation specifically intended to transpose the directive or whether they are existing national legal concepts (e.g. in employment law).¹³¹

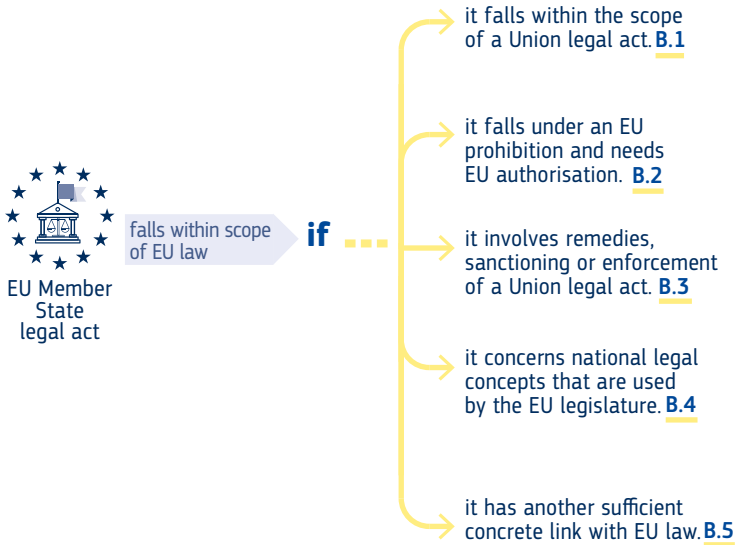
Route B: Legislative proposals outside the process of transposing EU legal acts

- National legislation that is not adopted to implement EU law and is thus of purely national descent can involve the “implementation of Union law” in several situations (see [Figure 8](#)).
- For legislative proposals that are purely national in origin and thus not initiated as a result of Union legal acts, there may be less, or no, awareness of the possible binding force of the Charter.
- However, even in scenarios in which Member States legislate within their competences or legislate without the intention of transposing EU law into national law, the Charter may apply.

¹³⁰ See for example, CJEU, C-442/00, *Ángel Rodríguez Caballero v. Fondo de Garantía Salarial (Fogasa)*, 12 December 2002, paras. 29–32; CJEU, C-177/05, *María Cristina Guerrero Pecino v. Fondo de Garantía Salarial (Fogasa)*, 13 December 2005, paras. 25 and 26.

¹³¹ CJEU, C-520/03, *José Vicente Olaso Valero v. Fondo de Garantía Salarial (Fogasa)*, 16 December 2004, paras. 4 and 34.

Figure 8: Situations of Charter application outside the process of transposing EU legal acts



Source: FRA, 2018

The national legislative measure falls within the scope of an EU legal act (Situation B.1)

National measures falling within the material, personal and temporal scope of Union legal acts qualify as Article 51 implementation, even when they are not designed to implement that legislation.¹³²

Non-implementation as implementation in the sense of Article 51(1) of the Charter

- Essentially, this form of “implementing Union law” can be seen as an omission of implementation. The national lawmaker does not intend to implement EU law; however, it should do so.

¹³² CJEU, C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG* [GC], 19 January 2010, para. 25.

Example: case involving the German Civil Code

In *Kücükdeveci*, the national legislation at issue was the German Civil Code (*Bürgerliches Gesetzbuch*), which included provisions on the notice period for dismissal.¹³³ This legislation was not adopted to implement EU law. The CJEU considered, however, that in this specific case the German legislation fell within the scope of Union law, since conditions of dismissal are a matter governed by Directive 2000/78/EC.¹³⁴ Consequently, this directive had the effect of bringing the national legislation at issue within the scope of Union law. As a result, the general principle of non-discrimination based on age applied.

Mere interaction with EU legal acts is not sufficient

- The legislation at issue should truly fall within the scope of a particular Union legal act, be it regarding its personal scope (who is covered?), its substantial scope (what situations are covered?) or its temporal application. The mere interaction of the subject matter of national legislation with a Union legal act is not sufficient to bring that national legislation within the scope of EU law.¹³⁵

Example: case involving the Spanish Criminal Code

In *Gueye and Sanchez*, the question was whether or not Article 7 of the Charter (respect for private and family life) applied with respect to a provision of the Spanish Criminal Code (*Código Penal*) regarding the effects of an ancillary penalty requiring the offender to stay away and prohibiting him from approaching, in particular, the victim.¹³⁶ The CJEU considered that the substantive national law at issue could not be assessed in the light of the provisions of the Charter. In particular, the Framework Decision on the standing of victims in criminal proceedings¹³⁷ did not have the effect of bringing the national legislation at issue within the scope of EU law. The aim of the framework decision was only that, within criminal proceedings, minimum standards should be drawn up for the protection of victims of crimes and that victims should be afforded a high level of protection, particularly with respect to their access to justice.

133 CJEU, C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG* [GC], 19 January 2010.

134 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16, 2 December 2000, pp. 16–22.

135 CJEU, C-206/13, *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, 6 March 2014, para. 24; CJEU, C-198/13, *Victor Manuel Julian Hernández and Others v. Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, 10 July 2014, paras. 25 and 37.

136 CJEU, joined cases C-483/09 and C-1/10, *Criminal proceedings against Magatte Gueye (C-483/09) and Valentín Salmerón Sánchez (C-1/10)*, 15 September 2011, para. 69. See also CJEU, C-117/14, *Grima Janet Nisttahuz Poclava v. Jose María Ariza Toledano (Taberna del Marqués)*, 5 February 2015, paras. 30–38 and 40–42.

137 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82, 22 March 2001, pp. 1–4.

Furthermore, it must be borne in mind that if a Member State, in the exercise of its powers to enforce the law, ensures that its criminal law provisions offer protection against acts of domestic violence, the objective is to protect not only the interests of the victim as he or she perceives them but also other, more general, interests of society.

The national legislative measure falls under a prohibition under EU law and must therefore rely on an authorisation (justification, derogation) by virtue of EU law (Situation B.2)

National measures falling under a prohibition under EU law and relying on a justification by virtue of EU law qualify as “implementing Union law”.¹³⁸

Prohibition and authorisation

- The concept of implementation does not apply only in situations in which a Member State operates as an agent of the EU (see [Chapter 4](#)). Another form of implementation occurs in situations in which a Member State uses an exception provided for by EU law to justify a national act that would otherwise be prohibited by EU law. These national measures need an authorisation by virtue of EU law, and for this reason EU fundamental rights apply. The basis of this form of implementation is that EU law may not authorise Member States to take measures infringing the Charter.¹³⁹
- According to the relevant case law as it has developed so far, this situation materialises where national measures:
 - qualify as discrimination based on nationality by virtue of Article 18 of the TFEU;
 - qualify as restrictions on the free movement of Union citizens (Article 21 of the TFEU), persons (Articles 45 and 49 of the TFEU), services (Article 56 of the TFEU) or capital (Article 63 of the TFEU) or as (measures having equivalent effect to) quantitative restrictions on imports and exports (Articles 34 and 35 of the TFEU);

¹³⁸ CJEU, C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, 18 June 1991, paras. 41–43; CJEU, C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis* [GC], 21 December 2016, paras. 62–64.

¹³⁹ CJEU, C-235/14, *Safe Interenvios, SA v. Liberbank, SA and Others*, 10 March 2016, para. 109; CJEU, C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, 18 June 1991, paras. 41–43; CJEU, C-390/12, *Robert Pflieger and Others*, 30 April 2014, paras. 30–37; CJEU, C-145/09, *Land Baden-Württemberg v. Panagiotis Tsakouridis* [GC], 23 November 2010, para. 52.

- o have the (potential) effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as citizens of the Union (Article 20 of the TFEU).
- To decide whether a legislative proposal involves this form of “implementing Union law” it is first necessary to assess whether or not the national legislative proposal falls under some kind of prohibition by EU law.¹⁴⁰

Example: national rules concerning the closure of shops

Pelckmans concerned Belgian legislation on opening hours in commerce, crafts and services.¹⁴¹ According to the CJEU, the Charter did not apply, because national rules concerning the closure of shops normally do not qualify as a restriction on the free movement of goods (Articles 34 and 36 of the TFEU), if such rules are enforceable against all economic operators pursuing activities within the national territory and they affect, in the same way, in law and in fact, the sale of domestic products and of products from other Member States.

Free movement restrictions

- National measures qualifying as discrimination based on nationality by virtue of Article 18 of the TFEU, as a restriction on the free movement of Union citizens (Article 21 of the TFEU), persons (Article 45 of the TFEU), services (Article 56 of the TFEU) or capital (Article 63 of the TFEU), or on the freedom of establishment (Article 49 of the TFEU), or as (measures having equivalent effect to) quantitative restrictions on imports and exports (Articles 34 and 35 of the TFEU) are in principle forbidden, unless the Member State can justify the restriction at issue.
- A free movement restriction is justifiable if it is necessary to pursue a legitimate aim in the public interest. In assessing whether or not the legislative proposal at issue is justifiable under EU law, the Charter becomes relevant; national rules qualifying as free movement restrictions can benefit from EU exceptions/justifications only if they are compatible with Union fundamental rights.¹⁴²

140 CJEU, C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others*, 4 October 1991, paras. 27 and 31.

141 CJEU, C-483/12, *Pelckmans Turnhout NV v. Walter Van Gestel Balen NV and Others*, 8 May 2014, paras. 24 and 25.

142 CJEU, C-98/14, *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v. Magyar Állam*, 11 June 2015, para. 74; CJEU, C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis [GC]*, 21 December 2016, para. 63.

- National legislative acts qualifying as free movement restrictions have to comply with the Charter, even if they concern areas falling within the competence of the Member States.

Example: prohibition of crosswords

In *Familiapress*, the Austrian Law on Unfair Competition (*Gesetz über unlauteren Wettbewerb*, UWG) was at stake.¹⁴³ The UWG contained a general prohibition on offering consumers free gifts linked to the sale of goods or the supply of services. This prohibition also applied to publishers of periodicals that invited consumers to take part in prize draws. The legality of this prohibition was challenged by a newspaper publisher established in Germany. It wanted to sell publications in Austria that offered readers the chance to take part in games (crossword puzzles) for prizes. The CJEU considered that the prohibition constituted a restriction on the free movement of goods (a measure having equivalent effect). Subsequently, Austria needed to rely on a ground for justification.

The Austrian government argued that the aim of the national legislation in question was to maintain press diversity. To decide whether or not the restriction at issue was justifiable, the CJEU assessed if maintenance of press diversity could constitute an overriding requirement justifying a restriction on the free movement of goods and if the principle of proportionality was complied with. In addition, Article 10 of the ECHR (freedom of expression) was applied as a general principle of Union law. The CJEU considered that the prohibition at issue could detract from the right to freedom of expression. Therefore, the prohibition had to fulfil the requirements of Article 10 of the ECHR (i.e. that it was prescribed by law and that it was necessary in a democratic society) to be justifiable under EU law.

Deprivation of the substance of EU citizenship rights

Treaty on the Functioning of the European Union, Article 20

Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. [...]

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

¹⁴³ CJEU, C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, 26 June 1997.

- National measures having the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as citizens of the Union are in principle forbidden by Article 20 of the TFEU.¹⁴⁴ However, as is the case with the free movement provisions, Article 20 of the TFEU allows for the possibility of a justification for derogation.
- Member States can rely on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security.
- In assessing whether or not the legislative proposal at issue is justifiable under EU law, the Charter becomes relevant; the national proposal can profit from EU exceptions/justifications only if it takes Union fundamental rights into account.¹⁴⁵

Example: residence permit of a father of an EU citizen

Mr Rendón Marín, a Colombian national, had sole care and custody of his children in Spain. However, because of his criminal record, he was refused a residence permit and faced his removal from Spanish territory and, therefore, from the territory of the EU, which the two minor children, his dependants, would leave as a consequence. The referring court was uncertain in the light of Article 20 of the TFEU whether or not in such a situation national law might prohibit, without any possibility of derogation, the granting of a residence permit. Whereas the CJEU admitted that Article 20 of the TFEU did not prevent Member States from relying on public security, it stressed that Article 7 of the Charter (respect for private and family life) read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter, must be respected.¹⁴⁶

The national legislative measure involves remedies, sanctioning or enforcement that can be deployed in connection with EU legal acts (Situation B.3)

National measures that are used to guarantee the application and effectiveness of EU law (sanctioning, remedies and enforcement) qualify as "implementing Union law" in the sense of Article 51(1). EU fundamental rights apply to these national measures if they are used in this context.

¹⁴⁴ CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* [GC], 8 March 2011; CJEU, C-87/12, *Kreshnik Ymeraga and Others v. Ministre du Travail, de l'Emploi et de l'Immigration*, 8 May 2013.

¹⁴⁵ CJEU, C-304/14, *Secretary of State for the Home Department v. CS* [GC], 13 September 2016, para. 36; CJEU, C-165/14, *Alfredo Rendón Marín v. Administración del Estado* [GC], 13 September 2016, para. 81.

¹⁴⁶ CJEU, C-165/14, *Alfredo Rendón Marín v. Administración del Estado* [GC], 13 September 2016, paras. 66 and 81.

For more details and specific points for attention regarding to such measures, see the explanation for [Situation A.4](#).

The national legislative measure involves a legal concept that has been used in an EU legal act (Situation B.4)

Sometimes a Union legal act refers to concepts of national law. EU fundamental rights apply to these national concepts if they are used in conjunction with the Union legal acts at issue or with national legislation transposing that Union legal act.¹⁴⁷

For more details and specific points for attention regarding to such measures, see the explanations for [Situation A.5](#).

The national legislative measure involves voluntary references to (concepts of) EU law (Situation B.5)

The Charter does not apply in circumstances in which the national legislature – in regulating purely internal situations – voluntarily refers to provisions or concepts of Union law.

A voluntary reference to EU law does not qualify as “implementing Union law”

- Mere reference to concepts of Union law does not bring national measures within the scope of EU law.¹⁴⁸
- Consequently, by virtue of Union law, there is no duty for Member States to respect EU fundamental rights in this situation.

Note on the jurisdiction of the CJEU

- It must be noted that the CJEU in certain circumstances has jurisdiction under Article 267 of the TFEU (preliminary ruling procedure) to interpret provisions or concepts of Union law even when the situation in question is not governed directly by Union law (e.g. if the national reference to EU law is “direct and unconditional”).

¹⁴⁷ See, for example, CJEU, C-442/00, *Ángel Rodríguez Caballero v. Fondo de Garantía Salarial (Fogasa)*, 12 December 2002, paras. 29–32; CJEU, C-520/03, *José Vicente Olaso Valero v. Fondo de Garantía Salarial (Fogasa)*, 16 December 2004, para. 34; CJEU, C-177/05, *María Cristina Guerrero Pecino v. Fondo de Garantía Salarial (Fogasa)*, 13 December 2005, paras. 25 and 26.

¹⁴⁸ CJEU, C-482/10, *Teresa Cicala v. Regione Siciliana*, 21 December 2011, para. 17 and dictum.

- The basis for this approach is that it is in the interest of the Union legal order to forestall future differences of interpretation of provisions or concepts taken from Union law, as they should be interpreted uniformly, irrespective of the circumstances in which they are to apply.¹⁴⁹ In the process of interpreting Union provisions, the Charter may play a role as an interpretative tool.¹⁵⁰

The existence of EU powers is in itself not sufficient

- The mere fact that the subject matter of a national legislative proposal falls within an area in which the European Union has powers is not sufficient to render EU fundamental rights applicable.¹⁵¹

The national legislative proposal falls within an area in which the EU has powers (Situation B.6)

The mere fact that a national legislative proposal falls within an area in which the EU has competence is not sufficient to render EU fundamental rights applicable.¹⁵²

Example: Spanish employment law

Poclava concerned the Spanish legislation establishing and regulating an employment contract of indefinite duration to support entrepreneurs and providing for a one-year probationary period.¹⁵³ The CJEU held that even though protection for workers in the event of the termination of an employment contract is one of the means of attaining the objectives laid down in Article 151 of the TFEU, and even though the EU legislature has competence in this field in accordance with the conditions laid down in Article 153(2) of the TFEU, situations that have not been covered by measures adopted on the basis of those provisions do not fall within the scope of EU law.

149 CJEU, C-28/95, *A. Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, 17 July 1997, para. 34; CJEU, C-482/10, *Teresa Cicala v. Regione Siciliana*, 21 December 2011, paras. 17–20.

150 This becomes also evident with regard to national law. See FRA (2018), *Challenges and opportunities for the implementation of the Charter of Fundamental Rights*, Opinion of the European Union Agency for Fundamental Rights, Vienna, 04/2018.

151 CJEU, C-198/13, *Victor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, 10 July 2014, para. 46. See, however, the far reaching suggestion by GA Sharpston in her opinion in C-34/09, 30 September 2010, para 163.

152 CJEU, C-198/13, *Victor Manuel Julian Hernández and Others v. Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, 10 July 2014, para. 46.

153 CJEU, C-117/14, *Grima Janet Nisttahuz Poclava v. Jose María Ariza Toledano (Taberna del Marqués)*, 5 February 2015, para. 41.

- The existence of EU competence in the relevant field becomes relevant only if two conditions are fulfilled:
 - the EU has exercised its competence by adopting legislative measures;
 - the national measure comes within the exact scope of application of these EU legislative measures (for details, see [Situation B.1](#)).

There is another kind of connection between the national legislative proposal and provisions of EU law (Situation B.7)

EU fundamental rights apply only if this connection with Union law implies that the national proposal involves the application of EU law.

Assessment of other EU links in light of the rationale of Article 51(1) of the Charter

- If, based on the situations described above, you do not reach the conclusion that EU fundamental rights apply, it is likely that they do not.
- If, however, you have identified some other sort of EU connection, it cannot be excluded that this connection might trigger the application of EU fundamental rights.
- For a final assessment, it is necessary to keep the rationale of Article 51(1) of the Charter in mind, which is to ensure that EU fundamental rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States (see [Chapter 4](#)).¹⁵⁴

8 Charter compliance check

- This chapter provides 11 questions to check the fundamental rights compatibility of national legislative proposals.
- It focuses on EU fundamental rights as general principles of EU law or under the Charter. EU fundamental rights can also be expressed in treaty provisions¹⁵⁵ or

¹⁵⁴ CJEU, C-206/13, *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, 6 March 2014, para. 31.

¹⁵⁵ See Art. 157 of the Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26 October 2012.

in EU secondary law.¹⁵⁶ If a legislative proposal comes within the ambit of such provisions of EU law, the specific requirements of these provisions should also be taken into account.

- In legal theory and practice, the sequence and exact scope of the steps and questions to be taken and asked when assessing human rights compliance diverge. Neither is the case law fully consistent in this regard. This checklist is not intended to establish any “model”; rather, it aims to provide the user with assistance when assessing relevant human rights dimensions in relation to a specific legislative proposal.

Stage I: Identification of limitations on fundamental rights

Charter of Fundamental Rights, Article 52(1)

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

1. Does the proposal limit EU fundamental rights?

- Are rights affected by the proposed national measure?
- Check the exact content of relevant fundamental rights with the help of the sources of interpretation mentioned in [Chapter 6](#). This will help in understanding whether or not the proposal restricts the exercise of fundamental rights recognised by the Charter.

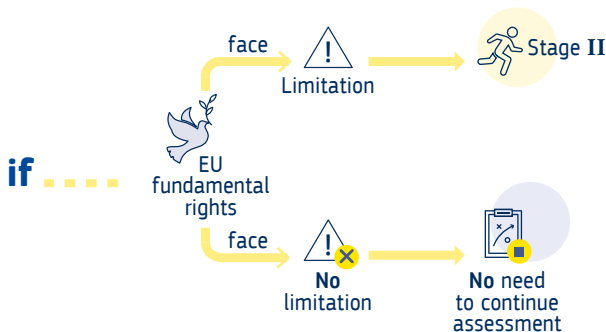
¹⁵⁶ See, for example, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, OJ L 303, 2 December 2000, pp. 16–22.

Examples: Limitations imposed on rights

An example of a limitation of Article 15(1) of the Charter (the right of everyone to engage in work and to pursue a freely chosen occupation) is a prohibition on a pilot continuing to fly once he or she reaches the age of 65. At the same time, such a prohibition establishes discriminatory treatment based on age (Article 21(1) of the Charter).¹⁵⁷

An example of a limitation on the exercise of the right to vote (Article 39(2) of the Charter) is national legislation providing for the deprivation of the right to vote in the case of a criminal conviction.¹⁵⁸

An example of a limitation of the right to respect for private life (Article 7 of the Charter) is the preparation and use of a psychologist's expert report in the context of an application for international protection relating to the sexual orientation of the applicant.¹⁵⁹ This is the case even if the performance of the psychological tests on which the expert's report is based is formally conditional upon the consent of the person concerned. According to the CJEU, in the context of an asylum procedure, it must be considered that consent is not necessarily given freely, being de facto imposed under the pressure of the circumstances in which applicants for international protection find themselves.



¹⁵⁷ CJEU, C-190/16, *Werner Fries v. Lufthansa CityLine GmbH*, 5 July 2017, paras. 34 and 71.

¹⁵⁸ CJEU, C-650/13, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* [GC], 6 October 2015, para. 45.

¹⁵⁹ CJEU, C-473/16, *F v. Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, paras. 52–54.

An example of limitation with the freedom to conduct a business (Article 16 of the Charter) is the obligation for certain taxable persons to provide a guarantee for the purposes of VAT registration (that can amount to up to EUR 500,000). The CJEU considered this, in the circumstances in *BB Construct*, a constraint, restricting the unhindered use of the financial resources of the undertaking and thus constituting interference with the freedom to conduct a business.¹⁶⁰

Stage II: Assessment of whether or not limitations are at all allowed

2. May the fundamental rights that are affected be subject to limitations?

- Check whether there is an absolute Charter right at issue.
- The Charter does not explicitly identify the rights that are absolute. Based on the Charter explanations,¹⁶¹ the ECHR and the case law of the European courts, it is submitted that human dignity (Article 1 of the Charter),¹⁶² the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 of the Charter),¹⁶³ the prohibition of slavery and forced labour (Article 5(1) and (2) of the Charter),¹⁶⁴ internal freedom of thought, conscience and religion (Article 10(1) of the Charter),¹⁶⁵ the presumption of innocence and right of defence (Article 48

160 CJEU, C-534/16, *Finančné riaditeľstvo Slovenskej republiky v. BB construct s.r.o.*, 26 October 2017, para. 38.

161 According to the Explanations to the Charter, both the meaning and the scope of Art. 4, 5(1) and (2), 10(1), 48 and 49(1) of the Charter are the same as the corresponding articles of the European Convention on Human Rights (ECHR).

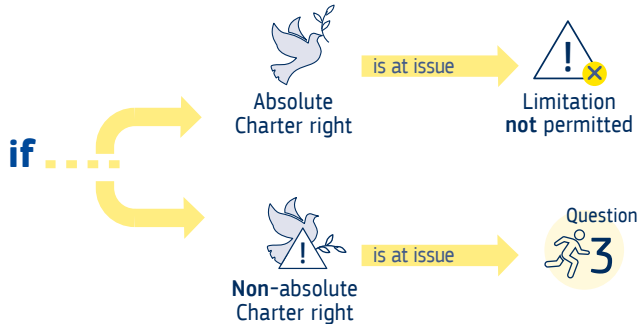
162 According to the Explanations, none of the rights in the Charter may be used to harm the dignity of another person, and the dignity of the human person is part of the substance of the rights laid down in the Charter. It must therefore be respected, even where a right is restricted.

163 Corresponding to Art. 3 of the ECHR. This provision does not contain a limitation clause. It is also explicitly mentioned as non-derogable in Art. 15(2) of the ECHR (Art. 15 deals with derogation in time of emergency).

164 Corresponding to Art. 4 of the ECHR. This provision does not contain a limitation clause. It is also explicitly mentioned as non-derogable in Art. 15(2) of the ECHR.

165 Corresponding to Art. 9(1) of the ECHR. According to this provision, only the right of freedom to manifest one's religion or belief can under certain conditions be subject to limitations. But note that Art. 15 of the ECHR does not mention Art. 9(1) as non-derogable.

of the Charter),¹⁶⁶ the principle of legality (Article 49(1) of the Charter)¹⁶⁷ and the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50 of the Charter)¹⁶⁸ can be considered absolute rights.



3. Are the limitations provided for by law?

- Check whether or not the limitations are provided for by law; this can be either by national law¹⁶⁹ or by EU legal acts.¹⁷⁰
- Check whether or not the limitations are adequately accessible and foreseeable. Foreseeability is a core criterion when drafting legal acts and has been developed in some detail in the case law of the European Court of Human Rights.

Example: accessibility and foreseeability

An act is accessible if it has been properly published (EU law is, for instance, published in the EU Official Journal). Foreseeability requires an act to be formulated with sufficient precision to enable the citizen to adapt his or her behaviour to the norm. Citizens must be able to foresee, to a reasonable degree, the

¹⁶⁶ Corresponding to Art. 6(2) and (3) of the ECHR. These provisions do not contain limitation clauses. But note that Art. 15 of the ECHR does not mention Art. 6(2) and (3) as non-derogable.

¹⁶⁷ Corresponding to Art. 7(1) of the ECHR. This provision does not contain a limitation clause. It is also explicitly mentioned as non-derogable in Art. 15(2) of the ECHR.

¹⁶⁸ As the Explanations on Art. 50 point out, according to Art. 4 of Protocol No. 7 to the ECHR, no derogation from *ne bis in idem* may be made.

¹⁶⁹ See, for example, CJEU, C-650/13, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* [GC], 6 October 2015, para. 47.

¹⁷⁰ For example, an EU regulation or EU directive: CJEU, C-190/16, *Werner Fries v. Lufthansa CityLine GmbH*, 5 July 2017, para. 37; CJEU, C-601/15 PPU, *J. N. v. Staatssecretaris van Veiligheid en Justitie* [GC], 15 February 2016, para. 51.

consequences that a law entails. The law must also indicate with sufficient clarity the scope of any discretion conferred on the competent authorities implementing the law.¹⁷¹

4. Is respect for the essence of the fundamental right at issue guaranteed?

- Check whether or not the essential content¹⁷² of the right at issue is affected. Does the limitation call into question the right as such? Does the limitation respect the actual substance of the right at issue?
- It is likely that a limitation does not call into question the right as such if it restricts its exercise in well-defined and limited circumstances.¹⁷³

Example: right to respect for private life (Article 7 of the Charter)

In *Schrems* and *Digital Rights*, the CJEU considered legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications to compromise the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter.¹⁷⁴

Example: right to an effective remedy (Article 47 of the Charter)

In *Schrems*, the CJEU considered that legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, did not respect the essence of the right to an effective remedy and to a fair trial, as enshrined in Article 47 of the Charter.¹⁷⁵

171 ECtHR, *Sunday Times v. United Kingdom*, No. 6538/74, 26 April 1979, para. 49; ECtHR, *Malone v. United Kingdom*, No. 8691/79, 2 August 1984, para. 68.

172 The CJEU uses also expressions such as the “actual substance”, “the very substance” and “the very principle”; see, for example, CJEU, Joined cases C-379/08 and C-380/08, *Raffinerie Mediterranée (ERG) SpA, Polimeri Europa SpA and Syndial SpA v. Ministero dello Sviluppo economico and Others (C-379/08) and ENI SpA v. Ministero Ambiente e Tutela del Territorio del Mare and Others (C-380/08)* [GC], 9 March 2010, para. 88.

173 See, for example, CJEU, C-258/14, *Eugenia Florescu and Others v. Casa Județeană de Pensii Sibiu and Others* [GC], 13 June 2017, para. 55; CJEU, C-190/16, *Werner Fries v. Lufthansa CityLine GmbH*, 5 July 2017, paras. 38 and 75; CJEU, C-524/15, *Criminal proceedings against Luca Menci* [GC], 20 March 2018, para. 43

174 CJEU, C-362/14, *Maximilian Schrems v. Data Protection Commissioner* [GC], 6 October 2015, para. 94.

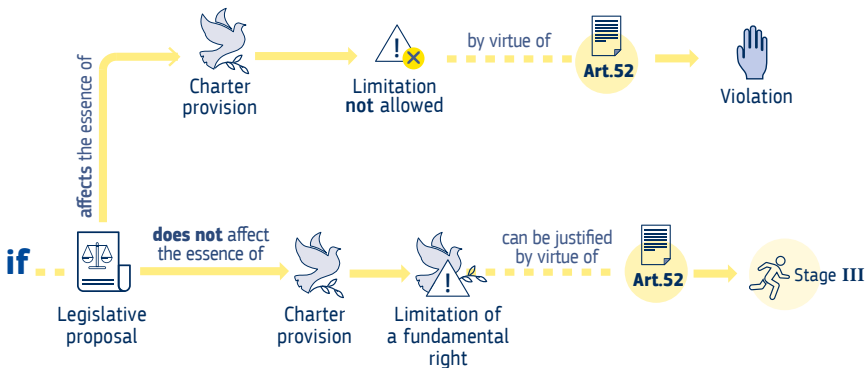
175 *Ibid.*, para. 95.

Example: right of Union citizens to vote in elections to the European Parliament (Article 39(2) of the Charter)

Delvigne concerned national legislation providing for the deprivation of the right to vote in the case of a criminal conviction.¹⁷⁶ The CJEU considered that this limitation on the exercise of the right guaranteed in Article 39(2) of the Charter respected the essence of this right. The limitation did not call into question that right as such, since it had the effect of excluding certain persons, under specific conditions and on account of their conduct, from those entitled to vote in elections to the Parliament, as long as those conditions were fulfilled.

Example: right of everyone to engage in work and to pursue a freely chosen occupation (Article 15(1) of the Charter)

In *Fries*, the CJEU assessed the validity of an EU regulation entailing a restriction of the freedom to choose an occupation of holders of a pilot's licence who have attained the age of 65, because they may no longer, from the date of their 65th birthday, act as pilots in the field of commercial air transport.¹⁷⁷ This restriction did not affect the actual substance of the freedom to choose an occupation, since it merely imposed certain restrictions on the professional activity of holders of a pilot's licence who have attained the age of 65.



¹⁷⁶ CJEU, C-650/13, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* [GC], 6 October 2015, para. 48.

¹⁷⁷ CJEU, C-190/16, *Werner Fries v. Lufthansa CityLine GmbH*, 5 July 2017, para. 38.

Stage III: Assessment of whether or not limitations can be justified

5. Do the limitations serve a legitimate objective?

- What is the aim of the limitation?
- Check whether this aim is legitimate. Does it meet objectives of general interest or the need to protect the rights and freedoms of others? The CJEU has followed a rather broad approach when qualifying an objective as legitimate.¹⁷⁸
- The coexistence of a number of aims does not preclude the existence of a legitimate aim.¹⁷⁹
- Check whether or not courts can identify the legitimate aim for the purpose of review: the aim pursued must be clear either from the measure itself or from other elements of the general context of the measure concerned.

Example: right to respect for private and family life (Article 7 of the Charter)

In the context of an application for asylum, interference with an applicant's private life can be justified by the search for information enabling his actual need for international protection to be assessed. In this case, the interference concerned the assessment of statements made by an applicant for international protection relating to his sexual orientation.¹⁸⁰

Example: freedom to conduct a business (Article 16 of the Charter)

In the context of VAT, interference with a person's freedom to conduct a business can be justified by the legitimate objectives of ensuring the correct

178 For example, the following objectives have been considered "legitimate": the establishment of a common organisation of the market (CJEU, Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 13 December 1979); the protection of public health and public security (CJEU, C-293/97, *The Queen v. Secretary of State for the Environment, Minister of Agriculture, Fisheries and Food, ex parte: H. A. Standley and Others*, 29 April 1999); and the requirements of international security (CJEU, Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [GC], 3 September 2008). However, purely economic grounds, such as promotion of the national economy or its proper functioning, cannot serve as justification for obstacles prohibited by EU law (CJEU, C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengysis* [GC], 21 December 2016, para. 72).

179 CJEU, Joined cases C-159/10 and C-160/10, *Gerhard Fuchs (C-159/10) and Peter Köhler (C-160/10) v. Land Hessen*, 21 July 2011, para. 44.

180 CJEU, C-473/16, *F v. Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, para. 58.

collection of that tax and preventing tax evasion.¹⁸¹ In this case, the interference related to the requirement to provide a guarantee to be registered for VAT.

6. Is the limitation appropriate to address the problem identified?

- Check the appropriateness of the limitation. Is the limitation suitable to meet the objective pursued?
- Check internal consistency: the legislation is appropriate for ensuring the attainment of the objective pursued only if it pursues those goals consistently and systematically.¹⁸²
- Check whether or not exceptions to the provisions of a law can, in certain cases, undermine the consistency of that law, in particular where their scope is such that they lead to a result contrary to the objective pursued by that law.¹⁸³

7. Does the limitation go beyond what is necessary to achieve the objective pursued? Are there any measures available that would interfere less in fundamental rights?

- Check the necessity for the limitation. Are there alternatives?
- When there is a choice between several appropriate measures, recourse must be had to the least onerous, that is, the measure that interferes least with the fundamental right at issue.¹⁸⁴

8. Are the limitations proportionate to the aim pursued?

- The disadvantages caused must not be disproportionate to the aim pursued.¹⁸⁵

¹⁸¹ CJEU, C-534/16, *Finančné riaditeľstvo Slovenskej republiky v. BB construct s.r.o.*, 26 October 2017, para. 39.

¹⁸² CJEU, C-190/16, *Werner Fries v. Lufthansa CityLine GmbH*, 5 July 2017, para. 48.
¹⁸³ *Ibid.*

¹⁸⁴ CJEU, C-134/15, *Lidl GmbH & Co. KG v. Freistaat Sachsen*, 30 June 2016, para. 33; CJEU, C-189/01, *H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v. Minister van Landbouw, Natuurbeheer en Visserij*, 12 July 2001, para. 81.

¹⁸⁵ CJEU, Joined cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen [GC]*, 9 November 2010, paras. 76 and 77; CJEU, C-189/01, *H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v. Minister van Landbouw, Natuurbeheer en Visserij*, 12 July 2001, para. 81.

- The measure should not impose a disproportionate and excessive burden on the persons affected by the limitation in relation to the objective pursued.¹⁸⁶
- It is necessary to balance the interest in fulfilling the legitimate aim against the interference with the fundamental right at issue.
- Where several fundamental rights are at issue, it is necessary to reconcile the requirements for the protection of those different rights and achieve a fair balance between them.¹⁸⁷

Example of the right to respect for private and family life (Article 7 of the Charter)

In *F.*, the CJEU considered the preparation and use of a psychologist's expert report in the context of an application for international protection relating to the sexual orientation of the applicant disproportionate to the aim pursued, since the seriousness of the interference with the right to privacy could not be regarded as proportionate to the benefit that it might possibly represent for the assessment of the facts and circumstances required by the relevant directive, Directive 2011/95/EC.¹⁸⁸

Example of the freedom to conduct a business (Article 16 of the Charter)

In *BB Construct*, the CJEU sets out the elements that have to be taken into account to assess whether or not national legislation requiring a guarantee for registration for VAT is necessary to attain the objective of ensuring the correct collection of VAT and the prevention of tax evasion.¹⁸⁹ Relevant factors are the fact that the amount of the guarantee is automatically calculated by an information technology system, without any means of amending that amount. This could lead, in certain cases, to an outcome going beyond what is necessary to ensure the correct collection of VAT and the prevention of tax evasion. The principle of proportionality furthermore requires that the amount of the guarantee must be in correlation to the risk of non-payment in the future and the amount of the earlier tax debts.

In the case at issue, the referring court stated that the guarantee amounted to EUR 500,000 and that it was likely, in view of the amount, to compel BB Construct

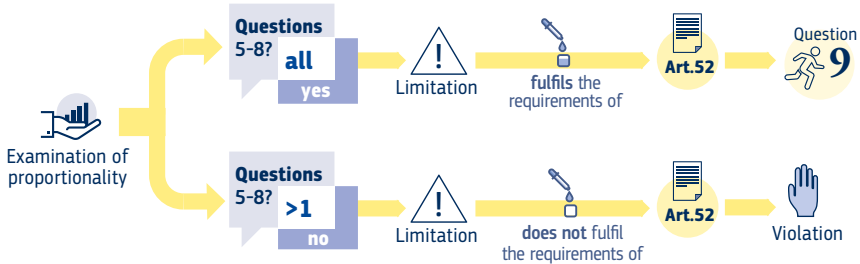
186 CJEU, C-258/14, *Eugenia Florescu and Others v. Casa Județeană de Pensii Sibiu and Others* [GC], 13 June 2017, para. 58.

187 CJEU, C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk* [GC], 22 January 2013, para. 60; CJEU, C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU* [GC], 29 January 2008, paras. 65 and 66.

188 CJEU, C-473/16, *F v. Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, paras. 59–69.

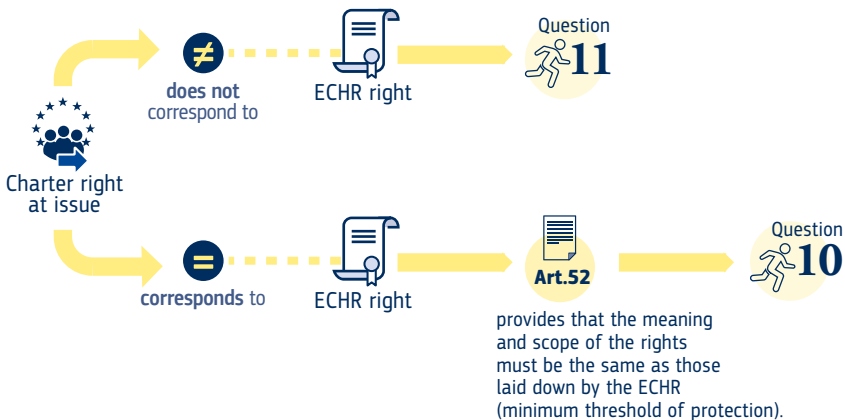
189 CJEU, C-534/16, *Finančné riaditeľstvo Slovenskej republiky v. BB construct s.r.o.*, 26 October 2017, paras. 40–42.

to declare itself insolvent. The CJEU held that the provision of the guarantee – having regard to the fact that it was for a significant amount – would deprive, without justification, the company concerned of its resources from the moment of its creation and would prevent it from developing its economic activities, and that the guarantee was a manifestly disproportionate interference with the freedom to conduct a business.



9. Does the Charter right at issue correspond to a right guaranteed by the ECHR?

- Check the Explanations to the Charter on the right at issue and the list provided in the Explanations on Article 52(3) of the Charter. See [Annex](#).



10. Are the limitations consistent with the ECHR?

- In laying down limitations on rights corresponding to ECHR rights, it is necessary to comply with the standards set by the detailed limitation arrangements laid down in the ECHR.

- Check the ECHR and the case law of the European Court of Human Rights to determine if the limitation is allowed.

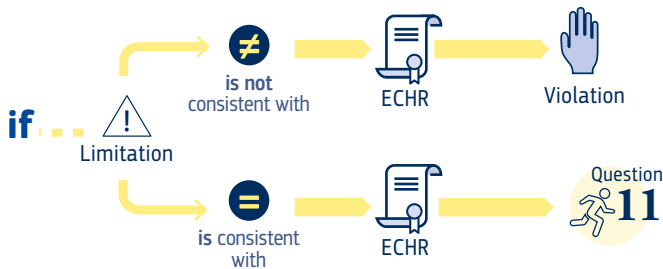
Example: right to freedom of expression

Article 10 of the ECHR (freedom of expression) contains limited detailed grounds for restrictions of this freedom. Consequently, only those grounds can be taken into account as legitimate aims for justifying limitations on the corresponding Charter right (Article 11).

Example: right to liberty

Al Chodor concerned the assessment of a limitation on the exercise of the fundamental right to liberty enshrined in Article 6 of the Charter, which corresponds to Article 5 of the ECHR.¹⁹⁰ The CJEU therefore referred to the European Court of Human Rights, according to which any deprivation of liberty must be lawful not only in the sense that it must have a legal basis in national law, but also in the sense that lawfulness concerns the quality of the law and implies that a national law authorising the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness.

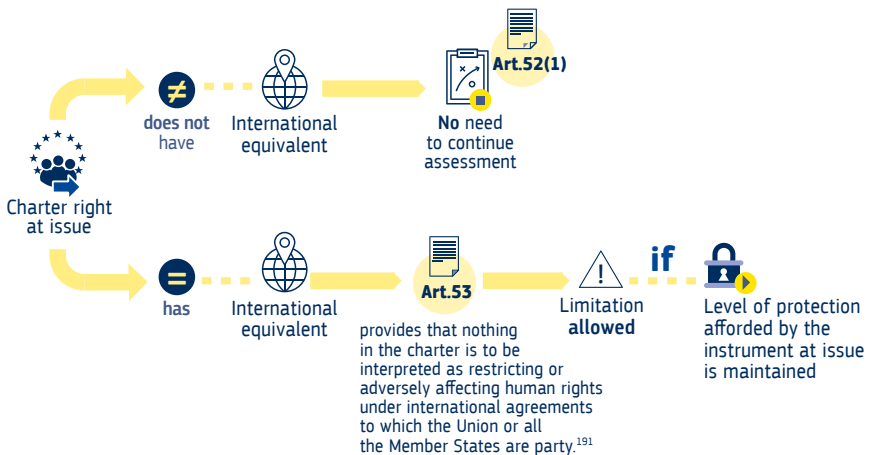
Al Chodor concerned the detention of applicants for asylum. The CJEU considered this a serious interference with those applicants' right to liberty that was subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness. It ruled in this case that only a binding provision of general application could meet these requirements.



¹⁹⁰ CJEU, C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others*, 15 March 2017, para. 37-47.

11. Is there, of the Charter rights at issue, an equivalent provision in other human rights instruments to which the Union or all the Member States are party?

- Check whether or not such equivalent provisions are at stake. See the [Annex](#) for an overview of such rights.
- Check whether or not the level of protection of this equivalent provision is respected.



¹⁹¹ An overview of the status of ratification of most relevant human rights conventions by the EU Member States is available at the FRA website (UN level and CoE level).

Annex: Overview of Charter rights

Based on the Charter's Explanations, this Annex gives an overview of the 50 fundamental rights of the Charter, setting these in the context of the Council of Europe and United Nations human rights instruments, as well as sources of EU law and the national law.

A. Corresponding provisions of the ECHR

- According to Article 52(3) of the Charter, the meaning and scope (including authorised limitations) of those corresponding Charter rights are to be the same as those laid down by the ECHR (including protocols).
- For this reason, the overview indicates the corresponding ECHR articles on the basis of:
 - the Explanations to the Charter on each provision; and
 - the Explanations to the Charter on Article 52(2).

B. Equivalents provisions in other human rights instruments

- According to Article 53 of the Charter, the level of protection afforded by other human rights instruments to which the Union or all the Member States are party should be maintained.
- For this reason, the overview gives the equivalent rights in other human rights instruments to which the Union or all the Member States are party. These sources are sometimes mentioned in the Explanations to the Charter, but not always.
- If the source is not mentioned in the Explanations to the Charter, the provision at issue is marked with an asterisk (*).

C. Relevant EU and national legal sources

- According to Article 52(2) of the Charter, rights recognised by the Charter, for which provision is made in the treaties, are to be exercised under the conditions and within the limits defined by those treaties. For this reason, the overview mentions these provisions if they are referred to in the Explanations to the Charter.

- The overview also mentions references in the Explanations to the Charter to provisions of secondary EU law. For additional references visit Charterpedia.
- It also mentions the rights that, according to the Explanations to the Charter, correspond to the national constitutional traditions. According to Article 52(4) of the Charter, those rights are to be interpreted in harmony with those traditions.
- It mentions references to national law mentioned in the Explanations to the Charter.
- It provides miscellaneous information derived from the Explanations to the Charter, such as whether a right is EU specific (e.g. the right to vote in EU elections).

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
1	Human dignity			Art. 1 ICCPR; Art. 1 ICESCR; Art. 17 CRPD	CJEU case law
2 (1)	Right to life	Art. 2		Art.6 (1) ICCPR; Art. 10 CRPD; Art. 6 CRC	
2 (2)	No death penalty	Art. 1 and 2 P6; P13-1		Art. 6 (2)-(6) ICCPR; ICCPR-OP2	
3	Right to the integrity of the person		Conv. on Human Rights and Biomedicine (ETS 164 and additional protocol ETS 168)*	Art. 7 ICCPR; Article 7 (1)(g) of the Statute of the International Criminal Court adopted in Rome on 17 July 1998*	CJEU case law
4	Prohibition of torture and inhuman or degrading treatment or punishment	Art. 3	ECPT	Art. 7 ICCPR; CAT Art. 15 CRPD; Art. 37 CRC; Art. 5 (b) ICERD	
5 (1)	Slavery or servitude				
5 (2)	Forced or compulsory labour	Art. 4		Art. 8 ICCPR	

1 These ECHR provisions are referred to also in Charter Explanations (with the exceptions of Articles 20 and 23 of the Charter where the Explanations do not refer to the ECHR).

2 Only a selection of relevant provisions is provided. Only core human rights conventions are considered which have been ratified by all 28 EU Member States (exception: ESC and ESC 96).

3 Only a selection of relevant provisions is provided. Only core human rights conventions are considered which have been ratified by all 28 EU Member States (exception: OPCRC – SC was signed by 28 but ratified only by 27).

* Provisions that are referred to in the Explanations to the Charter are marked with an asterisk (*).

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
5 (3)	Trafficking in human beings		Convention on Action against Trafficking in Human Beings	Art. 8 (1) and (2) ICCPR	Annex to the Europol Convention, especially its Art. 27 (1); EU Framework decision on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1)
6	Right to liberty and security	Art. 5		Art. 9 and 10 ICCPR; Art. 14 CRPD	Art. 82, 83 and 85 TFEU
7	Respect for private and family life	Art. 8		Art. 17 ICCPR Art. 22 CRPD; Art. 16 CEDAW; Art. 16 CRC; Art. 5 (d) ICERD	
8 (1)	Protection of personal data	Art. 8			
8 (2)	Fair, specific purpose, consent or legitimate basis, access, rectification		Data Protection convention (Conv. 108)*		Art. 16 TFEU and Art. 39 TEU; Directive 95/46/EC; regulation 45/2001
8 (3)	Control by independent authority				
9	Right to marry and right to found a family	Art. 12		Art. 23 ICCPR	Reference to "national legislation"
10 (1)	Freedom of thought, conscience and religion	Art. 9		Art. 18 ICCPR; Art. 14 CRC; Art. 5 (d) ICERD	Reference to "national constitutional traditions" and "national legislation"

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
10 (2)	Conscientious objection	Art. 9			CJEU case law; Protocol on the system of public broadcasting in the Member States annexed to the Treaties; Council Directive 89/552/EC (particularly its seventeenth recital)
11 (1)	Freedom of expression	Art. 10		Art. 19 ICCPR; Art. 21 CRPD; Art. 13 CRC; Art. 5 (d) ICERD	
11 (2)	Freedom and pluralism of the media			Art. 17 CRC	CJEU case law; Protocol on the system of public broadcasting in the Member States annexed to the Treaties; Council Directive 89/552/EC (particularly its seventeenth recital); Reference to EU "competition law"
12 (1)	Freedom of assembly and of association	Art. 11		Art. 21 and 22 ICCPR; Art. 8 ICESCR; Art. 15 CRC; Art. 5 (d) ICERD	Art. 11 Community Charter of the Social Rights of Workers of the Fundamental Social Rights of Workers (in the following; Community Charter of the Social Rights of Workers) ⁴ *

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
12 (2)	Political parties				Art. 10 (4) TEU
13	Freedom of the arts and sciences	Art. 10			Cross-reference to Art. 1 of the Charter
14	Right to education	Art. 2. P1	Article 10 ESC*	Art. 13 ICESCR; Art. 24 CRPD; Art. 10 CEDAW; Art. 28 CRC; Art. 5 (e) ICERD	Common constitutional traditions of Member States; Point 15 Community Charter of the Social Rights of Workers*
14 (1)	Education, vocational, continuing			Art. 13 (2)(b) ICESCR	
14 (2)	Free compulsory education			Art. 13 (2)(a) and 14 ICESCR	Cross-reference to Art. 24 of the Charter
14 (3)	Educational establishments; parents' choice			Art. 13 (3) ICESCR	Cross-reference to Art. 16 of the Charter and "national legislation"
15 (1)	Freedom to choose an occupation and right to engage in work		Art. 1 (2) ESC*	Art. 6 (1) ICESCR; Art. 27 CRPD; Art. 11 CEDAW; Art. 5 (e) ICERD	Case law of the CJEU; Art. 156 TFEU (with regard to the term "working conditions"); reference to national legislation; point 4 Community Charter of the Social Rights of Workers*

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs)	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
15 (2)	Freedom to seek employment, to work, exercise the right of establishment and to provide services				Freedom guaranteed by Art. 26, 45, 49 and 56 TFEU
15 (3)	Non-discrimination of third country nationals authorised to work		Art. 19 (4) of the ESC*		Art. 153 (1)(g) TFEU; reference to "national legislation" (regarding the recruitment of seamen)
16	Freedom to conduct a business				CJEU case law; Art. 119 (1) and (3) of the TFEU
17	Right to property	Art. 1 P1;		Art. 5 (d) ICERD	Case law of the CJEU; reference to EU "secondary legislation"
18	Right to asylum				Art. 78 TFEU; Protocols relating to the UK, Ireland and Denmark; Protocol on Asylum
19 (1)	Collective expulsion	Art. 4 P4		Art. 5 ICERD; Art. 13 ICCPR*	
19 (2)	Protection in the event of removal, expulsion or extradition	Art. 3*	Art. 3 ECPT	Art. 3 CAT; Art. 22 CRC; Art. 13 ICCPR	

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
20	Equality before the law	Art. 6 and 14; Art. 1 P12		Art. 14 (1) und Art. 16 ICCPR	"General principle of law which is included in all European constitutions"; case law of the CJEU
21	Non-discrimination	Art. 14	Art. 11 Convention on Human Rights and Bio-medicine as regards genetic heritage*; Art. 3 Convention on Action against Trafficking in Human Beings	ICERD; Art. 2 and 27 ICCPR; Art. 5 CRPD; CEDAW	Art. 19 TFEU; Paragraph 2 corresponds to Art. 18 (4) TFEU "and must be applied in compliance with that Article"
22	Cultural, religious and linguistic diversity			Art. 27 ICCPR; Art. 15 ICESCR; Art. 30 CRPD; Art. 5 (e) ICERD	Art. 6 TEU; Art. 167 (1) and (4) TFEU; Art. 3 (3) TEU; Art. 17 TFEU
23	Equality between women and men	Art. 14; P12	Art. 20 ESC 96*; Art. 17 Convention on Action against Trafficking in Human Beings	Art. 3 ICCPR; Art. 3 CEDAW	Art. 3 TEU; Art. 8 TFEU; Art. 157 TFEU; Directive 76/207/EEC (equal treatment for men and women); point 16 Community Charter of the Social Rights of Workers*
24	The rights of the child			Art. 3, 9, 12 and 13 CRC*; Art. 24 ICCPR; Art. 7 CRPD; OPCRC – SC	Art. 81 TFEU

Charter of Fundamental Rights	Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
25	The rights of the elderly	Art. 23 ESC 96*		Art. 24 and 25 Community Charter of the Social Rights of Workers*
26	Integration of persons with disabilities	Art. 15 ESC*	CRPD	point 26 Community Charter of the Social Rights of Workers*
27	Workers' right to information and consultation within the undertaking	Art. 21 ESC 96*	ILO conventions	Art. 154 and 155 TFEU; Directives 2002/14/EC (consultation of employees), 98/59/EC (collective redundancies), 2001/23/EC (transfers of undertakings) and 94/45/EC (European works councils); points 17 and 18 Community Charter of the Social Rights of Workers*
28	Right of collective bargaining and action	Art. 6 ESC*		Case law of the ECtHR on Art. 11 ECHR; reference to "national laws and practices"; points 12–14 Community Charter of the Social Rights of Workers*

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
29	Right of access to placement services		Art. 1 (3) ESC*		point 13 Community Charter of the Social Rights of Workers on the rights of workers*
30	Protection in the event of unjustified dismissal		Art. 24 ESC 96*	Art. 5 (e) ICERD	Directive 2001/23/EC (transfers of undertakings), Directive 80/987/EEC (insolvency of employer) as amended by Directive 2002/74/EC.
31 (1)	Fair working conditions		Art. 3 ESC*; Art. 26 ESC 96*	Art. 7 ICESCR; Art. 5 (e) ICERD	Directive 89/391/EEC (safety and health of workers); "working conditions" is to be understood in the sense of Art. 156 TFEU; point 19 Community Charter of the Social Rights of Workers on the rights of workers*;

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
31 (2)	Maximum working hours		Art. 2 ESC*	Art. 7 (d) ICESCR	Directive 93/104/EC (working time); point 8 Community Charter of the Social Rights of Workers*
32	Prohibition of child labour and protection of young people at work		Art. 7 ESC*	Art. 10 (3) ICESCR	Directive 94/33/EC (protection of young people at work); points 20-23 Community Charter of the Social Rights of Workers*
33 (1)	Family and professional life		Art. 16 ESC*	Art. 23 (1) ICCPR; Art. 10 ICESCR	
33 (2)	Protection from dismissal		Art. 8 ESC*; Art. 27 ESC 96*	Art. 10 (2) ICESCR	Council Directive 92/85/EEC (health at work of pregnant workers); Directive 96/34/EC on the framework agreement on parental leave
34	Social security and social assistance			Art. 9-11 ICESCR; Art. 28 CRPD; Art. 13 CEDAW; Art. 26 CRC; Art. 5 (e) ICERD	

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
34 (1)	Social security and social assistance		Art. 12 ESC*		Art. 153 and 156 TFEU; point 10 Community Charter of the Social Rights of Workers*
34 (2)	Residing or moving legally within the EU		Art. 12 (4) and 13 (4) ESC*		Regulation (EEC) No 1408/71 and Regulation (EEC) No 1612/68; point 2 Community Charter of the Social Rights of Workers*
34 (3)	Combat social exclusion and poverty		Art. 13 ESC*; Articles 30 and 31 ESC 96*	Art. 5 (e) ICERD	Art. 153 TFEU; point 10 Community Charter of the Social Rights of Workers*
35	Health care		Art. 11 and 12 ESC*	Art. 12 ICESCR; Art. 25 CRPD; Art. 12 CEDAW; Art. 24 CRC	Art. 168 TFEU
36	Access to services of general economic interest				Art. 14 TFEU; reference to "national provisions"
37	Environmental protection			Art. 12 (b) ICESCR	Art. 3(3) TEU; Articles 11 and 191 TFEU; "draws on the provisions of some national constitutions"

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
38	Consumer protection				Art. 169 TFEU
39	Right to vote and to stand as a candidate at elections to the European Parliament			Art. 29 CRPD; Art. 7-8 CEDAW; Art. 25 ICCPR; Art. 5 (c) ICERD	Art. 20 (2) and Art. 22 TFEU; Art. 14 (3) TEU
40	Right to vote and to stand as a candidate at municipal elections			Art. 29 CRPD; Art. 7-8 CEDAW; Art. 25 ICCPR; Art. 5 (c) ICERD	Art. 20 (2) and Art. 22 TFEU
41	Right to good administration				Case law of the CJEU; Art. 20 (2)(d), 25, 296, 298 and 340 TFEU; cross-reference to Art. 47 of the Charter
42	Right of access to documents				Art. 15 (3) TFEU; regulation (EC) No 1049/2001 (access to documents);
43	European Ombudsman				Art. 20 and 228 TFEU
44	Right to petition				Art. 20 and 227 TFEU
45	Freedom of movement and of residence			Art. 12 ICCPR; Art. 18 CRPD; Art. 10 CRC; Art. 5 (d) ICERD	Art. 20 (2)(a) TFEU; case law of the CJEU; Art. 77, 78 and 79 TFEU

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs) ¹	Other corresponding CoE instruments ²	UN Human rights instruments ³	EU law / national law as referred to in the Charter Explanations
46	Diplomatic and consular protection				Art. 20 and 23 TFEU
47 first paragraph	Right to an effective remedy before a tribunal	Art. 13		Art. 2 (3) ICCPR; Art. 13 CRPD; Art. 40 (2)(b) CRC; Art. 6 ICERD	Case law of the CJEU; Art. 251–281 TFEU
47 second paragraph	Fair and public hearing	Art. 6 (1)		Art. 14 (3)(d) ICCPR ; Art. 40 (2)(b) CRC	Case law of the CJEU;
47 third paragraph	Legal aid (needs-based)	Art. 6 (1)		Art. 14 (3)(d) ICCPR; Art. 40 (2)(b) CRC	
48	Presumption of innocence and right of defence	Art. 6 (2) and (3)		Art. 14 (2) and (3) ICCPR; Art. 40 (2)(b) CRC	
49 (1) and (2)	Principles of legality and proportionality of criminal offences and penalties	Art. 7*		Art. 15 ICCPR*; Art. 40 (3) CRC	Reference to “common constitutional traditions” and the case law of the CJEU
49 (3)	Proportional penalties				
50	Right not to be tried or punished twice in criminal proceedings for the same criminal offence	Art. 4 P7*		Art. 14 (7) ICCPR	Case law of the CJEU; Schengen Convention; Art. 7 Convention on the Protection of the European Communities’ Financial Interests

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