HUMAN RIGHTS IN THE EU

1 CENTRAL ISSUES

i. The status of human rights within the EU legal order has changed dramatically since its foundation in the early 1950s. While the draft European Political Community Treaty in 1953 would have made the European Convention on Human Rights part of the law of the new Communities, this Treaty was never adopted due to France's rejection of the closely-linked Defence Community Treaty in 1954. Consequently, the EEC and Euratom Treaties in 1957 omitted any reference to human rights. Over sixty years later, however, human rights occupy a central position within the EU legal order. The EU Charter of Fundamental Rights and the general principles of EU law now rank alongside Treaty provisions as primary norms of EU law, and there is a growing EU case law dealing with human rights issues.

ii. Three formal sources for EU human rights law are today listed in Article 6 TEU. The first and most important is the EU Charter of Fundamental Rights which gained binding legal force in 2009. The second is the ECHR, which for decades was treated by the ECJ as a 'special source of inspiration' for EU human rights principles. The third is the 'general principles of EU law', a body of legal principles, including human rights, which were articulated and developed by the ECJ over the years before the Charter of Rights was drafted. General principles are said by the ECJ to be derived from national constitutional traditions, from the ECHR, and from other international treaties signed by the Member States. These three sources overlap, creating a certain amount of legal confusion. Other sources of international human rights law have occasionally been invoked by the ECJ.

iii. The CJEU has made it clear in recent years that the Charter is now the principal basis on which the EU Courts will ensure that human rights are observed, and the proportion of cases in which the CJEU has drawn on the ECHR and on the case law of the Strasbourg Court has declined since the coming into force of the Charter.

iv. Article 6(2) TEU declares that the EU shall accede to the ECHR. The long-discussed idea of EU accession to the ECHR was intended to introduce a degree of external accountability by ensuring that EU action could be challenged before a non-EU court for compatibility with ECHR provisions. However, the CJEU dealt a surprising blow to the prospects for EU accession when it ruled in 2014 that the long-negotiated draft Agreement on Accession of the EU to the ECHR was incompatible with the EU Treaties and with the autonomy of the EU legal order in several fundamental ways.

v. EU human rights standards, including the provisions of the Charter and general principles of law, are binding on the EU and its institutions and bodies in all of their activities, and on the Member States when they are acting within the scope of application of EU law. A stream of cases has come before the CJEU to try to clarify whether particular national laws and actions fall within the scope of application of EU law for this purpose, but further guidance is clearly needed.

vi. The EU has gradually integrated (or 'mainstreamed') human rights concerns into many of its policies. The most important internally-oriented policy of this kind is EU anti-discrimination law and a second is the field of data protection and privacy. In EU external relations, human rights have featured prominently, if inconsistently. The EU actively promotes its 'human rights and democratization' policy in many countries around the world, and uses human rights clauses in its international trade and development policies. It has imposed a human rights-based 'political conditionality' on candidate Member States, and claims to integrate human rights concerns throughout its Common Foreign and Security Policy. The EU in 2009 concluded its first major international human rights treaty, the UN Convention on the Rights of Persons with Disabilities, with both internal and external policy implications.

vii. Other significant institutional initiatives in the human rights field include the establishment in 1999 of a sanction mechanism for serious and persistent breaches of human rights in Article 7 TEU, and the creation of an EU Fundamental Rights Agency in 2007. However, despite much debate and critique, most recently in relation to the adop of repressive and anti-democratic measures by the Hungarian Government in recent years, the Article 7 mechanism has not yet been used.

viii. Notwithstanding these extensive developments in the human rights field, the EU's status as a significant human rights actor or organization has been questioned. Critics have suggested that EU attention to human rights often constitutes little more than rhetoric or self-serving instrumentalism. In the fields of immigration and asylum, the EU has been sharply criticized for neglecting and undermining human rights concerns. With thousands of asylum-seekers and refugees dying at Europe's borders and on the seas, the EU Ombudsman opened an investigation into compliance with human rights standards by the EU's border agency, Frontex. Even within the EU, the austerity measures mandated by the EU in response to the Euro-crisis have been

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2 Ch 24.
7 Own Initiative Inquiry concerning the means through which FRONTEX ensures respect for human rights in Joint Return Operations, OI/9/2014/MIH, opened in October 2014.
2 INTRODUCTION

The constitutional framework of the EU today boasts an impressive array of human rights provisions. The Treaties declare that the EU is founded on respect for human rights, they give binding effect to the Charter of Fundamental Rights and Freedoms, and they mandate EU accession to the ECHR. The Treaties require all candidate Member States to adhere to these values and they include a sanction mechanism for existing Member States which seriously and persistently violate such rights. Article 19 TEU provides a legal basis for a strong anti-discrimination regime. The centrepiece of the EU's human rights framework is Article 6 TEU which provides:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
   The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
   The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

These developments however are relatively recent. For many years the European Economic Community was primarily focused on the creation of a common market, even if efforts to broaden the integration project were never entirely off the agenda. It was not until the 1970s that human rights concerns regained formal institutional recognition by the European Community, including by the EJC and the Member States. The most significant developments came throughout the 1990s with the adoption of the Maastricht and Amsterdam Treaties and the drafting of the EU Charter of Fundamental Rights, followed by the enactment of the Lisbon Treaty. Yet the legacy of the EEC's roots in the common market project retains its significance since, despite the EU's constantly changing nature and the recognition of human rights as part of its law and policy, the EU's dominant focus today remains economic.

3 THE EJC DISCOVERS THE GENERAL PRINCIPLES OF EU LAW

In a series of cases which came before the CJEU in the 1950s and 1960s, the Court initially resisted attempts by litigants to invoke rights and principles recognized by domestic law (eg legitimate expectations, proportionality, and natural justice), and was unwilling to treat them as part of the EU's legal order, even where they were fundamental principles common to the legal systems of most or all Member States. In 1969, however, in the Stauder case, the Court announced a change in attitude.

For some years beforehand, anxious discussions had taken place within the European Commission and Parliament about the implications of the doctrine of supremacy of EU law which the Court had pronounced in Costa v ENEL, and especially about the perceived risk that human rights protected under domestic constitutions might be undermined by this doctrine. The Commission President argued that fundamental human rights were part of the 'general principles' of EU law which, although autonomous in source from national constitutions, nevertheless took into account the common legal conceptions of the Member States. Taking its cue from these discussions, the EJC in Stauder responded positively to an argument based on the fundamental right to human dignity, which the applicant alleged was violated by the domestic implementation of an EU provision concerning a subsidized butter scheme for welfare recipients. Having construed the EU measure in a manner consistent with protection for human dignity, the EJC declared that it 'contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court'. In Stauder the EJC thus for the first time affirmed a category of general principles of EU law, which included protection for fundamental human rights. Notably, the impetus for this development was the fear of a threat to the supremacy of EU law—a concern which, as we shall see below, continues to animate the Court's development of EU human rights law.

The famous Internationale Handelsgesellschaft case followed shortly afterwards, in which the German Federal Constitutional Court was asked to set aside an EU measure concerning forfeiture of an export-licence deposit which allegedly violated German constitutional rights and principles such as economic liberty and proportionality.

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THE ECI DEVELOPS THE GENERAL PRINCIPLES OF EU LAW

4 THE ECI DEVELOPS THE GENERAL PRINCIPLES OF EU LAW

The ECJ henceforth both emphasized the autonomy of EU general principles of law as well as their origin in the legal cultures and traditions of the Member States. In Nold, concerning the drastic impact on the applicant’s right to a livelihood of the EU’s regulation of the market in coal, the Court identified international human rights agreements and common national constitutional traditions as the two primary sources of ‘inspiration’ for the general principles of EU law.
(o) OTHER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Apart from the ECHR, the ECHR has been a major influence on other domestic and international instruments, of human rights. It has been described as the "European Court of Human Rights," and as the "European Court of Human Rights." The ECHR and the Human Rights Act, 1998 have been used as a key source of inspiration for the development of human rights law in the UK and other member states of the European Union.

A number of key cases have been directly precedent-setting for the development of human rights law in the UK and other member states of the European Union. For example, in case C-9/99 on the constitutionality of the UK's use of derogation clauses under Article 13 of the ECHR, the European Court of Human Rights ruled that the UK's use of derogation clauses was not compatible with the ECHR. This decision has been seen as a significant step forward in the development of human rights law in the UK and other member states of the European Union.

In addition, the ECHR has been used as a key source of inspiration for the development of human rights law in other countries. For example, in the case of the European Convention on Human Rights and Fundamental Freedoms, the ECHR has been used as a key source of inspiration for the development of human rights law in other countries, including the United States.

The ECHR has also been used as a key source of inspiration for the development of international human rights law. For example, the ECHR has been used as a key source of inspiration for the development of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Additionally, the ECHR has been used as a key source of inspiration for the development of the International Criminal Court.

In conclusion, the ECHR has been a major influence on the development of human rights law in the UK and other member states of the European Union, and has been used as a key source of inspiration for the development of international human rights law. The ECHR has played a key role in the development of human rights law, and its influence continues to be felt in the development of human rights law today.
trust, has given rise to critical comment. The emphasis by the CJEU on the autonomy of the EU legal order in its recent rejection of the draft Agreement on Accession of the EU to the ECHR is only likely to further sharpen those critiques.

(c) NATIONAL CONSTITUTIONAL TRADITIONS

The judgments of the Court have drawn relatively infrequently on national constitutional provisions, despite the symbolic prominence given both by the Court and the European Treaties to the 'common constitutional traditions' of the states. While occasionally the Advocate General has conducted a survey of national constitutional provisions, the Court has much more rarely cited any specific constitutional provision.

The reasons are to some extent obvious, in that it is more difficult for the ECJ to assert a 'common' approach where a particular right does not appear in every national constitution, whereas an instrument like the ECHR is intended to reflect the collectively shared commitments of all Member States. Further, the fear of compromising the doctrinal supremacy of EU law by appearing to defer to a particular national constitutional provision has animated the ECJ's case law ever since Costa v ENEL.

This was evident in the case of Hauer in which the referring German Federal Administrative Court declared that an EU agricultural regulation which was incompatible with German fundamental constitutional rights would not be applied. The ECJ in response grounded its decision both in the 'common constitutional traditions' of the states and in the collective commitments of the ECHR.

Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727

THE ECJ

14. As the Court declared in its judgment of 17 December 1970, Internationale Handelsgesellschaft [1970] ECR 1125, the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community.

15. The Court also emphasized in the judgment cited, and later in the judgment of 14 May 1974, Nold [1974] ECR 481, that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the Constitutions of those States are unacceptable in

the Community, and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law. That conception was later recognized by the joint declaration of the European Parliament, the Council and the Commission of 5 April 1977, which, after recalling the case law of the Court, refers on the one hand to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

17. The right to property is guaranteed in the Community legal order in accordance with the ideas common to the Constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights...

20. (It is necessary to consider also the indications provided by the constitutional rules and practices of the nine member states. One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, article 14 (1), first sentence, to its social function (Italian Constitution, article 42 (2), to the subordination of its use to the requirements of the common good (German Grundgesetz, article 14 (2), second sentence, and the Irish Constitution, article 43.2.2*), or of social justice (Irish Constitution, article 43.2.1*).

A further question arising when the 'common constitutional traditions' are cited as a source for EU human rights is whether the ECJ should recognize only those rights shared by all (or most) states, or whether recognition as a fundamental right by even one Member State should suffice (the so-called 'maximum standard' approach) to be part of the general principles of EU law. In Maaîmannenriven-Werke, concerning the right to remain silent in the context of competition proceedings, the General Court was dismissive of the 'maximum standard' approach and rejected the argument that a general principle against self-incrimination could be derived from the legal systems of the Member States, even if there was such a principle in German law.

In the case of AM & S, not all Member States were happy with the Court's derivation of a principle of lawyer-client confidentiality from a comparative survey of the laws of the Member States, and the French Government in particular argued that the case represented 'an attempt to foist on the EU what was no more than a domestic rule of English law.' However, the Advocate General took the view that a general principle could be distilled from among the various states even if the 'conceptual origin' of the principle and 'the scope of its application in detail' differed as between Member States. In AKZO, however, the ECJ refused to extend the EU's general principle of legal professional privilege beyond the context of independent lawyers, despite the fact that a number of Member States have extended the privilege to in-house lawyers, since the Court took the view that there was no 'developing trend' or 'uniform tendency' in this direction across the Member States such as to justify widening the EU's general principle.

In Omega Spielhallen, the ECJ abstracted from the particular conception of human dignity within German law to a more general concept of human dignity shared by all Member States, in order to


54 Case T-112/98 Maaîmannenriven-Werke (n 24) [84].

55 See AG Werner in Case 15579 AM & S (n 24) 1575, 1653. Case 1774 Transocean Marine Paint (n 51) provides another example of the recognition by the Court of a general principle of Community law where none but some not all of the Member States afford protection to the particular right or principle.

56 Ibid.

57 Case C-550/07 P Akzo Nobel (n 27) 69-176.
permit Germany to derogate from EU free movement rules. Yet, even where there may be general consensus amongst the states that a particular abstract right exists, it seems inevitable that there will be disagreement as to how that right should be interpreted and 'translated' into a general principle of EU law. For example, while all Member States recognize the right to life, a handful of the twenty-eight states including Ireland and Malta continue to maintain extremely restrictive national abortion laws, which in Ireland's case partly reflects the constitutional status of the right to life of the foetus. Another example can be seen in the strong protection given by Germany's Grundgesetz to economic rights and to the freedom to pursue a trade or profession, while the constitutions of other states reflect different social priorities. In Grant v D & V Council, the ECJ relied in part on different national legal conceptions of marriage to deny that there had been any breach of the applicants' rights under the general principles of EU law. In other words, although the idea of 'common constitutional traditions' as a foundation for the general principles of EU law is attractive in principle, the differences between specific national conceptions of particular human rights are often very significant.

5 INSTITUTIONAL AND POLICY DEVELOPMENTS

(A) THE INCLUSION OF HUMAN RIGHTS IN THE TREATY FRAMEWORK

There was, as we saw, no mention of human rights in the ECSC, Euratom, or EEC Treaty in the 1950s and the Court was initially reluctant to entertain rights-based challenges to EU law. Once the Court changed its stance, however, the move to recognize 'general principles of EU law' rapidly gained political approval. It did so initially through a joint declaration of the Parliament, Council, and Commission in 1977, and later through a series of non-binding declarations, charters, and resolutions. Human rights eventually found their way back into the EU Treaties with the amendments introduced by the Maastricht, Amsterdam, Nice, and Lisbon Treaties. First, Article 6 TEU, which is set out above, lists the various sources of human rights within EU law: the Charter, which is given the same binding status as the Treaties, the ECHR, and common national constitutional traditions which inspire the general principles of EU law. The provisions of the ECHR are thus relevant to EU law in three ways at present: (i) those provisions of the Charter which are based on provisions of the ECHR are to have the 'same' meaning as the ECHR provisions; (ii) the ECHR is one of the main sources of inspiration for the general principles of EU law; and (iii) the provisions of the ECHR will become formally binding on the EU if the EU eventually accedes to the ECHR. By comparison, the provisions of the Charter of Fundamental Rights and the general principles of EU law are already fully binding provisions of EU law, enjoying the same status as provisions of the EU Treaties. Secondly, following the Amsterdam Treaty, respect for the values on which the EU is founded was made a condition of application for membership of the EU by Article 49 TEU. After the Lisbon Treaty, Article 2 TEU now expresses and expands on the list of values on which the EU is said to be founded:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3 TEU, in setting out the goals and objectives of the EU, adds further to these by declaring that it 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'. In its external relations Article 3(5) declares that the EU shall, amongst other things, 'contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child'.

Thirdly, Article 7 TEU, which was also introduced by the Amsterdam Treaty, empowers the Council to suspend some of the voting and other rights of a Member State which is found by the European Council to be responsible for a serious and persistent breach of the principles in Article 2. Article 7 was amended by the Nice Treaty in 2000 to provide for fair procedures to be followed before a negative determination against a Member State is made, and includes the option for the Council to address recommendations to a state which has been found to be clearly at risk of committing a serious breach. However, despite the symbolism of Article 7 TEU, none of the attempts made within the European Parliament to instigate its application have been successful, and its lack of practical use has drawn criticism. Most recently, the failure to instigate the Article 7 procedure in relation to a series of repressive and anti-democratic measures taken by the Hungarian Government has generated a slew of proposals, as well as a communication from the Commission setting out a kind of early warning system to supplement Article 7.

(b) THE FUNDAMENTAL RIGHTS AGENCY

In 2007 an EU Fundamental Rights Agency (FRA) was established, to subsume and replace the previous EU Monitoring Centre for Racism and Xenophobia. There was a debate preceding the establishment of the Agency over whether its powers should include monitoring Member States for the

63 For an account of the 'Haider controversy' which led to the enactment of the Nice amendments see M Meilinger, C Muddle, and U Sedelmeier, 'The Right and the Righteous': European Norms, Domestic Politics and the Sanctions against Austria (2001) 39 FCMS 59.
64 A Williams, 'The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's Invasion of Iraq' (2006) 31 ELR 3. See also W Sudarsky, 'Adding a Bite to a Bark: A Story of Article 7, the EU Enlargement and Jorg Haider' (2010) 16 CIEL 385.
purposes of Article 7 TEU, but the Member States refused to include this within the mandate of the new FRA. Instead, the FRA’s remit mainly covers the collection of information, formulating opinions, highlighting good practices, networking with civil society, and publishing thematic reports. The FRA has been active since its establishment and has published influential reports on issues including racism, access to justice, disability, homophobia, the Roma, security and human rights, poverty, migration, data protection, child rights, and violence against women.

(c) EU HUMAN RIGHTS POWERS AND POLICIES

EU Treaty changes since 1997 significantly strengthened the status and role of human rights within the EU legal order, as the provisions of Articles 2, 3, 6, and 7 TEU indicate. Respect for human rights is a condition for the legality of EU measures, and EU laws must be interpreted and construed with a view to respecting human rights. What is less clear, however, is exactly what kind of legal competence the EU possesses to enact laws in the field of human rights protection.

In its first opinion rejecting the compatibility of EU accession to the ECHR in 1996, the ECU ruled that no specific Treaty provision ‘confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field’, and that the residual powers clause in Article 235 (now Article 352 TFEU) was subject to certain constitutional limits.48 The situation has changed since then, in particular as regards external EU competence and the power to conclude international agreements. One striking example of this is the EU’s negotiation and conclusion of the UN Convention on the Rights of Persons with Disabilities, the first major international human rights treaty which the EU has concluded.49 As far as competence to promote human rights within the EU is concerned, however, it is not clear exactly how much the situation has changed. Despite the declaration in Article 2 that the EU is founded, inter alia, on the value of respect for human rights, and the stipulation in Article 3 that the EU’s aim is to promote its values, the EU still requires specific competence under another provision of the Treaties if it is to take concrete action. The Treaties still do not provide the EU with any ‘general power to enact rules on human rights’.

Nevertheless, the EU today possesses a powerful human rights tool in the specific field of non-discrimination, since Article 19 TFEU confers competence on the EU to adopt measures combating discrimination on a range of specified grounds. This important field of EU human rights policy is discussed in more detail in Chapter 24. Another significant rights-based field of EU policy since the enactment of the Charter for these purposes, but it was replaced by a differently functioning framework, FRALEX, within the context of the FRA, which has not been given this power.

48 The previous ‘network of experts on fundamental rights’ had informally begun to monitor the Member States’ compliance with the Charter for these purposes, but it was replaced by a differently functioning form, FRALEX, within the context of the FRA, which has not been given this power.

49 See e.g. the FRA’s work on human rights in the EU, see http://fra.europa.eu/en/publications-and-resources/publications. For an interesting report by the FRA on the use of the EU Charter by national courts, see http://fra.europa.eu/sites/default/files/annual-report-2013_charter_en.pdf.


that the EU shall contribute ‘to the protection of human rights’ in its relations with the wider world, and Article 21(1) TEU provides that the EU’s action on the international scene should be guided by the principles of ‘democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity’ amongst others. This gives a Treaty basis to the EU’s policy over the past decade to integrate human rights protection into its external relations. The EU’s regular practice since 1995 has been to include human rights clauses in external agreements dealing with trade, development, and association relationships,52 and it has occasionally imposed sanctions or withdrawn trade concessions for human rights violations, as in the cases of Myanmar and Sri Lanka. It has used human rights-based conditionality in the accession process for new Member States,53 and runs an extensive international human rights and democratization programme known as the EIDHR.54 These and other EU activities in the field of human rights are outlined each year in the EU’s Annual Report on Human Rights.55

There is no express Treaty commitment to the protection and promotion of human rights across the EU’s internal policies, as there is for external policy. There are however four ‘mainstreaming’ clauses in Articles 8, 9, 10, and 11 TFEU, which require all EU policies and activities to take into account gender equality, a range of social policy concerns, other grounds of discrimination, and environmental protection respectively, but no general requirement to mainstream human rights. This difference between the emphasis on human rights in external and internal policies has led to criticisms of a double standard in the EU’s approach to human rights,56 which has been acknowledged by the Council of Ministers.57 Nevertheless, it continues to be a theme in critiques of the EU’s human rights policies.58 On the other hand, the Commission has sought to develop a Charter ‘impact assessment’ for EU policies, which should help over time to address the double-standard critique.59 Further, even if the EU lacks any general lawmaking powers in the field of human rights, many of its specific pieces of legislation set human rights standards, such as criminal law, family reunification, refugee law, and data privacy.60

The approach of Member States to developing the EU’s legal powers in the field of human rights has been equivocal. Although important EU institutions and norms for the protection of human rights have been adopted in recent decades, such as the Charter of Fundamental Rights, Article 19 TFEU (on combating discrimination), and the FRA, Member State governments have simultaneously sought to restrict these new powers and institutions. Thus Article 51 of the Charter declares that no new task or power has been created by its adoption; there has been heated debate over the scope of the Charter’s application to Member States, and the FRA was deliberately not given power to monitor Member States’ compliance with the purposes of Article 7 TEU. The political opposition to EU intervention even when serious human rights abuses may be taking place within a Member State, for example at the time of France’s collective expulsion of Roma people in 2010,61 or Hungary’s restrictions on the media and

52 L Bartels, Human Rights Conditionality in the EU’s International Agreements (Oxford University Press, 2005);

53 U Khalil, Ethical Dimensions of the Foreign Policy of the EU: A Legal Analysis (Cambridge University Press, 2009).

54 For the purposes of Article 7 TEU.


56 For discussion see A Williams (n 5).

57 For discussion see A Williams (n 5).


61 K Severance, France’s Expulsion of Roma Migrants: A Test Case for Europe (Migration Policy Institute, 2010), available at www.migrationinformation.org/.
interference with judicial independence, suggests that there is continued resistance on the part of Member States to the EU’s development of such a role.

6 THE EU CHARTER OF FUNDAMENTAL RIGHTS

(A) INTRODUCTION

The Charter of Fundamental Rights was first drawn up in 1999–2000, following an initiative of the European Council to ‘showcase’ the achievements of the EU in this field. The novel Convention process by which the Charter was adopted, which became a model for the Treaty–revision procedure now contained in Article 48 TEU, produced a draft Charter in less than a year. The Charter was then solemnly proclaimed by the Commission, Parliament, and Council and politically approved by the Member States at a European Council summit in December 2000, but its legal status was deliberately left undetermined at the time, pending the outcome of the series of constitutional processes on which the EU had embarked. The horizontal clauses at the end of the Charter were amended slightly during the constitution-drafting process which took place in 2003–2004, but following the failure of the Constitutional Treaty, the legal status of the Charter was not finally resolved until the adoption of the Lisbon Treaty. Article 6 TEU now unequivocally grants it the same legal status as the Treaties themselves.

At the time of the Lisbon Treaty, however, the UK and Poland (with the Czech Republic later to join) negotiated a Protocol which purports to limit the impact of the Charter in those states. The Protocol contains two Articles which read:

**Article 1**

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

82 See n 63 on developments in Hungary.
87 For a case which firmly applies the Court’s case law on primacy to the provisions of the Charter, see Case C-617/10 Åkerberg Fransson EU:C:2013:105, [42]-[48].
89 Protocol No 30 to the Lisbon Treaty. See also Declarations 51, 62, and 63 annexed to the Lisbon Treaty, made by the Czech Republic and Poland respectively.

82 Cases C–411 and 495/10 NS and ME v Minister for Justice EU:C:2011:865, [119]-[120]. Compare the subsequent reaction of UK High Court Judge M knight in AB v Secretary of State for the Home Department [2013] EWHC 3453 (Admin), and the analysis by V Miller, Effects of the EU Charter of Rights in the UK, UK House of Commons Standard Note SN06765, 17 Mar 2014. See also R Clayton and C Murphy, ‘The Emergence of the EU Charter of Fundamental Rights in UK Law’ (2014) EHRIR 469.
83 For some evidence from the UK, see (n 92).

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

**Article 2**

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

Whatever the intention of the three signatory states, there has been a debate as to whether the Protocol has anything more than declaratory effect. Article 1 declares that it ‘does not extend the ability of the CJEU to review national measures for compatibility with fundamental rights, but the CJEU had for decades previously exercised jurisdiction to review acts of the Member States within the scope of EU law for compliance with the general principles of EU law. The Protocol does not overturn this earlier case law of the ECJ, and since the contents of the Charter are largely based on the instruments which the ECJ had cited as the inspiration for EU legislation, Article 1(1) appears primarily declaratory. Article 1(2) is designed to support or supplement Article 52(7) of the Charter by deeming Title IV of the Charter (on solidarity rights) not to have created any new justiciable rights in Poland or the UK, but again it can be argued that since the Charter is largely declaratory of what the ECJ had been doing for years under the language of the ‘general principles of law’, Title IV simply gave the general principles an explicit legal footing.

While some initially referred to the protocol as an ‘opt-out’, the CJEU soon confirmed the view of the majority of commentators that this was not so. In NS and ME, a case concerning the application of EU asylum law in the UK, the CJEU responded to an argument made before the UK courts by the UK Secretary of State that the Charter did not apply in the UK by ruling that: ‘Protocol No 30 does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol... Article 1(1) of Protocol No 30 explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions’. Time will tell how the national courts of the three Member States will treat the Protocol.
The mandate given by the European Council to the Charter-drafting body was to consolidate and render visible the EU’s existing ‘obligation to respect fundamental rights’ rather than to create anything new. Yet the Charter contains several innovative provisions, such as a prohibition on reproductive human cloning, and there are also notable omissions, such as protection for the rights of minorities. Overall the Charter could perhaps best be described as a creative distillation of the rights contained in the various European and international agreements and national constitutions on which the CJEU had for some years already drawn.

Following its lofty Preamble in the name of the ‘peoples of Europe’, the Charter is divided into seven chapters. The various rights are grouped into six distinct chapters, and the final chapter contains the ‘horizontal clauses’ or general provisions. The first six chapters are headed: I Dignity, II Freedoms, III Equality, IV Solidarity, V Citizens’ Rights, and VI Justice.

The first chapter contains foundational rights such as the right to life, freedom from torture, slavery, and execution. While these rights once appeared anomalous in a Charter addressed primarily to the institutions of an economic union, the EU’s current body of policing, criminal, migration, refugee, and anti-terrorism policies suggests that this is no longer so.

The second chapter on freedoms also concentrates on the basic civil and political liberties to be found in the ECHR, such as liberty, association, expression, property, and private and family life, but contains in addition certain fundamental social rights such as the right to education, the right to engage in work, and the right to asylum, as well as a number of provisions which are prominent in the EU context, such as the right to protection of data and freedom to conduct a business.

Chapter III on equality contains a basic equality-before-the-law guarantee, as well as a provision similar (though not identical) to that in Article 19 TFEU, a reference to positive action provisions in the field of gender equality, protection for children’s rights, and some weaker provisions guaranteeing ‘respect’ for cultural diversity, for the rights of the elderly, and for persons with disabilities.

Chapter IV on solidarity contains certain labour rights and reflects some of the provisions of the European Social Charter which have already been integrated into EU law. This chapter contains a mixture of fundamental provisions such as the prohibition on child labour and the right to fair and just working conditions, as well as others which were criticized as insufficiently fundamental to have a place in this Charter, such as the right to a free place service. This chapter of the Charter was particularly criticized for the weak formulation of many of the rights (including some, such as environmental and consumer protection, which are not formulated as rights or freedoms at all), and because of the phrase ‘in accordance with Community law and national laws and practices’ which follows them and which seems to undermine the content of the guarantee.

Chapter V contains ‘citizens’ rights’, many of which, unlike the other provisions of the Charter, are not universal but are guaranteed only to EU citizens. These include the rights of EU citizenship in Articles 20–25 TFEU, while the more broadly applicable rights include the right of access to documents and the right to good administration.

Chapter VI, entitled Justice, includes several of the rights of the defence, such as the right to a fair trial, the presumption of innocence, the principle of legality and proportionality of penalties, and the familiar EU right to an effective remedy.

(c) THE HORIZONTAL CLAUSES

The final Charter VII contains the general clauses which relate to the scope and applicability of the Charter, its addressees, its relationship to other legal instruments, and the ‘standard’ of protection.

Article 51(1) indicates that the Charter is addressed to the various institutions and agencies of the EU, but to the Member States only when they are ‘implementing’ Union law. The exact meaning and scope of this phrase has generated considerable debate and analysis. The principle of subsidiarity is mentioned in Article 51(1), although its import in this context is unclear. Article 51 goes on to specify that the EU and the Member States respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the EU’s powers under the Treaties. There is a tension between the obligation to ‘promote’ the rights in the Charter and the repeated emphasis on the limits of the EU’s powers, which appears also in Article 51(2). Article 51(2) asserts that the Charter does not create any new power or task for the EU nor modify any existing task. Despite the insistence that the Charter is simply a codified or slightly supplemented form of what existed already under prior ECJ jurisprudence, a set of standards against which EU and Member State action within the scope of existing EU policies and powers is to be judged, and not a source of or basis for positive action, the obligation to ‘promote’ the rights suggests something more proactive. Certainly the proposition in Article 51 that none of the EU’s tasks has been ‘modified’ by the adoption of the Charter seems almost oxymoronic.

Article 51(2), which draws on the jurisprudence of both the ECJ and the ECHR, contains a general ‘derogation’ clause, indicating the nature of the restrictions on Charter rights which will be acceptable. Any limitation on the exercise of rights and freedoms contained in the Charter must be ‘provided for by law’ and must respect the essence of those rights and freedoms. Limitations must meet the requirements of proportionality and must be ‘strictly necessary and genuinely meet objectives of general interest recognized by the Union’, or the need to protect the rights and freedoms of others.

Article 51(2) addresses the question of overlap between existing provisions of EU law and the provisions of the Charter, providing that rights recognized by the Charter ‘for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties’.
This seems intended to avoid any potential differences in the interpretation of similarly worded provisions of the Charter and of the EU Treaties, most notably the citizenship provisions.

The tricky relationship between the ECHR and the Charter is illustrated in the introduction of this chapter. Article 52(3) relates specifically to the ECHR and aims to promote harmony between the provisions of the ECHR and those of the Charter while preventing the EU from developing more extensive protection than is provided for under the Convention.

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.

This provision does not address the question of the relationship between the two European Courts, the ECtHR and the CJEU, although it seems to have been intended to promote observance—or at least close attention—to the part of the CJEU to the case law of the ECHR. As we have seen above, the CJEU has indeed drawn on the case law of the ECtHR in a range of cases, although it has not done so in others.

The Lisbon Treaty added four further paragraphs to Article 52 of the Charter. Article 52(4) stipulates that the provisions of the Charter derived from national constitutional traditions should be interpreted in harmony with those traditions. Paragraph (6) complements this by stipulating that ‘full account’ should be taken of national laws and practices as specified in the Charter. Article 52(7), together with Article 6(2) TEU, gives interpretive weight to the explanatory memorandum to the Charter which was drafted by the secretariat to the Charter-drafting Convention.

The most contentious amendment made by the Lisbon Treaty to the Charter as originally adopted in 2000 is contained in Article 52(5), which seeks to distinguish provisions of the Charter containing ‘principles’, and stipulates that provisions containing ‘principles’ will be ‘judicially cognisable’ only when they have been implemented by legislative or executive acts of the EU or the Member States, and only in relation to interpretation or rulings on the legality of such acts. This amendment seems to have been intended to introduce into the Charter some version of the traditional (and often-criticised) distinction between negatively-oriented civil and political rights and positively-oriented economic and social rights, with a view to rendering the latter largely non-justiciable. The Court has not yet addressed this provision in any detail, although the Advocate General did so in the same case.

Article 53 of the Charter contains a kind of non-regression clause similar to that contained in Article 53 of the ECHR, which refers not only to the ECHR but also to national constitutions and international agreements:

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, the Community or any Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.

The presence of this clause and the absence of a ‘supremacy’ clause in the Charter guaranteeing the primacy of EU law prompted some to ask whether the long-established supremacy doctrine was being called into question. In Melloni, the CJEU dismissed such an interpretation of Article 53, and categorically reaffirmed the primacy of EU law. In this case the Spanish Constitutional Court asked the CJEU whether Article 53 of the Charter permits a Member State which surrenders an individual pursuant to the EU Arrest Warrant to subject the surrender of a person convicted in absentia to an additional condition, in order to avoid undermining a national constitutional right to a fair trial and rights of the defence. The CJEU ruled:

56. The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 44(1) of the Framework Decision 2002/584.

57. Such an interpretation of Article 53 of the Charter cannot be accepted. That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to destroy EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution.


105 See supra.


59. It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, paragraph 21, and Opinion 1/90 [2011] ECR I-1137, paragraph 65), 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...

The CJEU concluded that although Article 53 left national courts free to apply national standards of protection for fundamental rights, this was subject to the condition that the primacy, unity, and effectiveness of EU law would not be affected. The Framework Decision establishing the arrest warrant was, in the Court’s view, precisely intended to reflect a consensus reached by Member States and a “harmonization” of the procedural rights of a person who had been tried in absentia. Allowing Spain to plead its own specific constitutional version of the rights of the defence in order to impose an additional condition on surrender would cast doubt on the uniformity of the standard of protection of fundamental rights defined in that framework decision as well as undermining the principle of mutual trust and recognition between Member States. This interpretation of Article 53 of the Charter as an unequivocal reassertion of the primacy of EU law over national constitutional rights in the event of conflict, rather than a more pluralist vision of coexisting human rights systems, has drawn critical comment,113 but the CJEU in Opinion 2/13 on EU accession to the ECHR clearly confirmed its Melloni ruling in this respect.113

Finally, Article 54 contains a clause modelled on Article 17 of the ECHR, which provides that no provision of the Charter shall imply the right to engage in activity aimed at the destruction or excessive limitation of any of the rights contained therein.

7 HUMAN RIGHTS-BASED JUDICIAL REVIEW OF EU ACTION

Since the coming into force of the Charter, the number of cases in which the CJEU has entertained challenges to EU legislation on grounds of human rights violations has grown substantially.116 Even before the Charter became legally binding, the Court had begun to entertain human rights claims seriously and engage with the case law of the European Court of Human Rights in evaluating the validity of EU laws. While litigants enjoyed some success in challenging individual administrative acts of the Commission and other EU actors for violation of rights, the Court for many years was deferential to the EU legislator and slow to annul EU legislation, even in the face of strong fundamental rights challenges.116 In recent years, however, this has begun to change, particularly in the field of sanctions,117 and more generally since the coming into force of the Charter.117

113 Case C-399/11, ibid [65].
114 Benkelnik et al (n 113).
115 Opinion 2/13 on EU Accession to the ECHR EUC:2014:2454, [288]. See also Case C-617/10 Äkerberg Fransson EUC:2013:105, [29].
118 See EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions (Oxford University Press, 2010). Following the two Kadi cases, there have been dozens of other CJEU and General Court challenges to sanctions imposed by the EU, both anti-terrorist and country sanctions, many of them successful. See (n 136) below and text.
119 See, eg, Case C-295/12 Digital Rights Ireland v Minister for Communications EUC:2014:238 in which the Data Retention Directive was annulled for violation of Arts 7 and 8 of the Charter.

(a) CHALLENGES TO EU LEGISLATION

Although the Court in the early case of Nold had already declared that ‘general principles of law’ would take precedence, in the event of conflict, over specific Community measures, the ECJ ruled that the rights to property and to a trade or profession were far from absolute, and that limitations in this case were justified by the ECJ’s overall objectives.118 This approach has characterized many of the cases since concerning property and economic rights,118 as well as intellectual property.120 Since the drafting of the Charter of Fundamental Rights, many other kinds of human rights challenges have been mounted to EU legislation. Cases have been brought to challenge a wide range of EU legislative measures, including the Biotechnology Directive,121 the Family Reunification Directive,122 the Framework Decision on an Arrest Warrant,123 the Money Laundering Directive,124 the Audiovisual Media Services Directive,125 the Biometric Passports Regulation,126 the Directive on Driving Licences,127 the Regulation on compensation of passengers for air travel delays,128 and the Schengen Implementing Convention.129 In each of these cases, however, the Court, having considered whether the alleged restriction was disproportionate, upheld the EU legislation. Nevertheless, there have been some notable recent cases in which the CJEU annulled EU legislation for violation of fundamental rights.130 In Digital Rights Ireland, the Data Retention Directive was annulled on the ground that it disproportionately restricted the privacy and data protection guarantees of the Charter of Fundamental Rights.131 It is in the field of anti-terrorism in the post-9/11

120 eg Case C-369/10 (n 119). For discussion see J Griffith and L McDonough, “Fundamental Rights and European IP Law—The Case of Article 17(2) of the EU Charter” in C Geiger (ed), Constructing European Intellectual Property (Edward Elgar, 2010).
123 Case C-399/11 Melloni v Ministero Fiscal EUC:2013:107 challenging the Framework Decision establishing an Arrest Warrant for violation of the right to an effective judicial remedy and a fair trial; also Case C-303/05 Advocaat weerd de Wetering v Leden van de Ministerraad [2007] ECR I-3633.
125 Case C-291/11 Michael Schwartz v Stadt Bolchum EUC:2013:670 challenging the Biometric Passports Reg for violation of the right to private life.
127 Case C-121/13 McDonough v Essays EUC:2013:43 challenging the Regulation on compensation for air passengers in the event of delay and cancellation for violation of the right to conduct a business.
128 Case C-129/14 FPU Zoran Spasic EUC:2014: challenging the Schengen Implementing Convention for violation of the principle of free movement of persons. In 2016 the CJEU annulled the publication rules contained in an EU agricultural subsidies reg for violation of EU data privacy rights and the right of privacy under the EU Charter and the ECHR.
129 Case C-298/12 Digital Rights Ireland (n 117).
era, however, that the Court’s willingness to strike down EU laws for disproportionately violating individual rights has been most vividly evident. In an early judgment in this field, in the Bosphorus case, the ECJ ruled that the fundamental interests of the international community could justify restrictions of property and trade rights caused by the impounding of a Yugoslav-owned aircraft leased by the applicant, even where the latter appeared to be entirely uninvolved in any activities of the Yugoslav state. However, in a series of important judgments handed down since 2009, most dramatically in Kadi I and Kadi II, the CJEU and the General Court have struck down a range of EU laws imposing sanctions, including both ‘autonomous’ EU measures as well as UN-mandated measures, for violating a range of rights, most notably due process (rights of defence) and the right to property.

The Kadi cases raised many interesting questions about the relationship of EU law to the international legal order, and became an inspiration for the European Court of Human Rights in its own subsequent case law involving UN-related economic sanctions. For the purposes of this chapter, however, the most significant aspects of the judgment are those which deal with the ECJ’s treatment of fundamental rights.

125 Cases C–207/09 P Yassin Abdullah Kadi and Ali Barakaat International Foundation v Council and Commission (2010) ECR I–8351. [Note Lisbon Treaty renumbering: Art 6 EU is Art 6 TEU; Art 220 EC is Art 19 TEU; Art 287 EC is Art 347 TFEU; Art 300(7) EC is Art 216(2) TFEU; Art 307 EC is Art 351 TFEU]

The EU adopted a set of legislative measures including regulations designed to implement a series of UN Security Council Resolutions, beginning with Resolution 1267 (1999). These UN Resolutions were adopted in the wake of the 11 September 2001 attacks on the United States, and required all states to freeze the funds and other financial resources of any persons or entities controlled directly or indirectly by the Taliban, or associated with Osama bin Laden or the Al-Qaeda network, and established a Sanctions Committee to ensure their implementation. In 2001 Kadi, together with Yusuf and the Al Barakaat Foundation, who were named on the UN and the EU lists, brought proceedings before the General Court (then CFJ) to challenge the EU implementing measures. They argued that the contested EU regulations disproportionately infringed their fundamental rights, in particular their right to the use of their property and the right to a fair hearing. The General Court ruled that it had no jurisdiction to question Resolutions of the UN Security Council, even indirectly, other than for violation of jus cogens; and that in this instance there was no violation of jus cogens. On appeal, the ECJ took a different approach.

THE ECJ

281. In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 Lex Vers v Parliament [1986] ECR 1339, paragraph 23).

282. It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community.

283. In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance.

284. It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C–112/00 Schmidtberger [2003] ECR I–6659, paragraph 73 and case-law cited).

285. It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty. Thus, in this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.
304. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judiciary of the lawfulness of Community measures as regards their consistency with those fundamental rights.

305. Nor can an immunity from jurisdiction for the contested regulation with regard to the review of its compatibility with fundamental rights, arising from the alleged absolute primacy of the resolutions of the Security Council to which that measure is designed to give effect, find any basis in the place that obligations under the Charter of the United Nations would occupy in the hierarchy of norms within the Community legal order if those obligations were to be classified in that hierarchy.

306. Article 300(7) EC provides that agreements concluded under the conditions set out in that article are to be binding on the institutions of the Community and on Member States. 307. Thus, by virtue of that provision, supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary Community law...

308. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

[The ECJ went on to rule that the procedure for re-examining the listing of individuals before the UN Sanctions Committee was essentially diplomatic and intergovernmental, and did not offer guarantees of judicial protection. There was no right of representation, no obligation to give reasons or evidence, and no opportunity for judicial review. To grant immunity from jurisdiction to the listing measures within the EU legal order would constitute "a significant derogation from the scheme of judicial protection of fundamental rights" laid down by the EU Treaties.]

326. It follows from the foregoing that the Community judiciary must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

334. In this regard, in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.

335. According to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 8 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1)...

352. It must, therefore, be held that the contested regulation, in so far as it concerns the appellants, was adopted without any guarantee being given as to the communication of the inculpatory evidence against them or as to their being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the appellants' rights of defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed.

353. It follows from all the foregoing considerations that the pleas in law raised by Mr Kadi and Al Barakaat in support of their actions for annulment of the contested regulation and alleging breach of their rights of defence, especially the right to be heard, and of the principle of effective judicial protection, are well founded...

354. Next, it falls to be examined whether the freezing measure provided by the contested regulation amounts to disproportionate and intolerable interference impairing the very substance of the fundamental right to respect for the property of persons who, like Mr Kadi, are mentioned in the list set out in Annex I to that regulation.

355. The contested regulation, in so far as it concerns Mr Kadi, was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him.

370. It must therefore be held that, in the circumstances of the case, the imposition of the restrictive measures laid down by the contested regulation in respect of Mr Kadi, by including him in the list contained in Annex I to that regulation, constitutes an unjustified restriction of his right to property...

372. It follows from all the foregoing that the contested regulation, so far as it concerns the appellants, must be annulled.

The ECJ however maintained the relevant Regulation in effect for three months, to allow the EU institutions time to cure the procedural breach and to re-list the applicants. Following the publication and communication to the applicants of summary reasons provided by the UN Sanctions Committee, the Commission adopted a new regulation maintaining the sanctions against Kadi, who promptly brought a further action for annulment. The General Court, and the CJEU on appeal, ruled that the evidence offered to justify the sanctions was inadequate, and annulled the Regulation once again.

The Kadi cases and many of those which followed are important and raise complex legal issues for the EU and the Member States, and they have generated international controversy, as well as possibly helping to trigger reform of the UN sanctions system, given the global relevance of many of the sanctions. But what is most striking, for the purposes of the present chapter, is that the CJEU and the General Court were less deferential to the EU institutions, and even to international institutions such as the UN Security Council, when considering challenges based on fundamental rights in several of the sanctions cases. Nevertheless, it has also been pointed out that some of the judicial victories (including that of Kadi, whose eventual removal from the UN sanctions list came about due to the intervention of the UN Ombudsperson rather than the EU Courts) have been pragmatic. Further, developments arising out of the Kadi litigation, such as the proposed introduction of rules permitting secret evidence to be heard by the General Court, are likely to create further problems for fundamental rights.

Nevertheless, the stream of high-profile and politically salient anti-terrorism sanctions cases in recent years has shown both the General Court and the ECJ displaying greater willingness to review and to strike down EU legislation for violation of basic rights, and to assert the priority of...
fundamental rights in EU law over secondary EU legislation, and even over the most important norms of international law.

(ii) RIGHTS-BASED CHALLENGES TO EU ADMINISTRATIVE ACTION

Rights-based challenges to EU administrative action have also regularly been made. Two particular contexts in which such claims have often been successfully made are those of state disputes concerning EU bodies and institutions, and competition law proceedings involving the Commission.

(i) Staff Cases

In a range of staff and recruitment cases the EU Courts have entertained arguments based on pleas including the violation of freedom of expression, 144 freedom of religion, 145 private and family life, 146 and non-discrimination, 147 and required the EU institutions to amend several of their practices. Administrative proceedings affecting EU staff are subject to the rights of the defence. 148 The EU Civil Service Tribunal (CST), established in 2005, now hears all staff complaints at first instance prior to any appeal to the General Court or CJEU. The CST has ruled that the EU staff regulations and conditions of employment must be read in the light of the provisions of the Charter of Fundamental Rights. 149

(ii) Competition Proceedings

The area of the Commission's enforcement powers in competition proceedings has been a fertile source of litigation, in which general principles of law and fundamental rights—often the cluster referred to as the rights of the defence, 150 including the right to a fair hearing, 151 effective judicial review, 152 and related principles such as non-retroactivity of penal liability, 153 data protection, and privacy, 154 or nullum crimen, nulla poena sine lege 155—have frequently been invoked to challenge EU executive action.

The Commission's powers in competition proceedings are very wide, including the authority to investigate and make searches, as well as to impose severe financial penalties, and affected parties have repeatedly called upon the Court to limit and control their exercise by reference to fundamental legal principles. 156 In the early (pre-Charter) case of Hochtief, in which the applicant company challenged various decisions of the Commission ordering an investigation into its suspected anti-competitive practices, the Court ruled that the right to inviolability of the home was amongst the general principles of EU law. 157 However, drawing for support on Article 8 ECHR, the Court ruled that this right did not extend to a company's business premises, although companies as well as individuals were entitled under the general principles of EU law to protection against arbitrary interference by public authorities. 158 The Court found on the facts of the case that there had been no breach by the Commission of any of the principles invoked by the applicants. The judgment was criticized on various grounds, including for having overlooked existing case law of the ECHR, 159 but the ECJ later accepted that Article 8 ECHR, as clarified in subsequent ECHR case law, 160 did extend to business premises.

Similarly, in relation to the right to a fair trial in Article 6(1) ECHR, the initial decision of the ECJ in Orkem, 161 in which it ruled that Article 6 did not confer the right 'not to give evidence against oneself', was at odds with the subsequent ruling of the ECJ in Funke, in which that court indicated that Article 6 protected the right 'to remain silent and not to contribute to incriminating oneself'. 162 However the ECJ in Hills and later case law emphasized the significance of the ECHR and the case law of the ECHR and ruled that the presumption of innocence applies to competition proceedings which may result in fines. 163 The General Court, too, despite its occasional objection to direct reliance on the general provisions of the ECHR and the case law of the ECHR, has been willing to cite and to follow ECHR

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146 Case T-58/08 Commission v Raadhuysen [2009] ECR II-3797 on the meaning of the term 'non-marital partnership' in the EU Staff Regs. Compare earlier cases C-142 and 125/99 P v D v Council (n 59).
148 In Case C-344/05 P Commission v De Bry [2006] ECR I-10951, however, the ECJ ruled that the rights of the defense did not include any obligation on the Commission to give a prior warning to an employee before a staff appraisal.
150 For some examples, see the principle of non bis in idem in Case C-397/03 P Archer Daniels Midland v Commission [2006] ECR I-4429, the right of access to documents (specifically to the file containing objections and evidence against a defendant) in Case T-210/03 GRC v Commission [2005] ECR I-5575; Cases C-204-210/00 P Aalborg Portland AS et al v Commission [2004] ECR I-123; and the right to challenge findings of fact in Case C-407/08 P Krug Gips KG v European Commission (2010) ECR I-6375, [90]–[92]; more generally the right to effective judicial protection: Case C-27/09 KME Germany and others v Commission EUC:2011:810.
(c) CONSTRUING EU LEGISLATION IN CONFORMITY WITH FUNDAMENTAL RIGHTS

Another way in which the EU judiciary has increasingly taken account of fundamental rights is by interpreting EU measures, even when their annexation is not sought, in conformity with such rights. This technique of requiring EU legislation to be interpreted and implemented in compliance with fundamental human rights has the effect both of insulating EU legislation against challenge and, as we shall see below, of imposing human rights obligations, as a matter of EU law, on national authorities. In the famous case of Google Spain, for example, the CJEU interpreted the EU Data Processing Directive in the light of Articles 7 and 8 of the Charter in such a way that it was ‘required to be forgotten’ (ie the right to have data concerning oneself deleted from search engines, in certain circumstances) had to be protected by the operator of a search engine.

(i) SUMMARY

i. From the time of the ECJ’s acceptance in the early 1970s that fundamental human rights were part of the general principles of EU law until the Charter of Fundamental Rights acquired binding force in 2009, the two main sources of inspiration for those rights have been the ECJ and national constitutional traditions. Other international human rights instruments have played a marginal role. The Charter now dominates as the most important source of fundamental human rights in EU law.

ii. Despite the clear Treaty basis for the various sources of human rights within EU law in Article 6 TEU, their application by the ECJ to the concrete circumstances of specific cases has been more contested. The Court has adopted neither a ‘universal standard’ based on the highest level of protection given by any single Member State, nor a ‘lowest common denominator’ approach which would recognize only the common level of protection accorded by all states, but instead a pragmatic case-by-case approach to identify the scope and content of particular rights which are pleaded.

iii. With the enactment of the Charter of Fundamental Rights, the CJEU has increasingly drawn on this instrument, and less on the ECHR or the common constitutional principles of Member States, as the EU’s autonomous source of human rights law. In Melloni the Court made clear that Article 53 of the Charter does not change its long-standing ruling that fundamental rights under national constitutions cannot call into question the primacy of EU law, which should prevail in the event of conflict.

iv. Until such time as the EU follows the mandate in Article 6(2) TEU and accedes to the ECHR—a prospect which has been further postponed due to the Court’s negative Opinion 2/13 on the draft Accession Agreement—the Convention is not formally binding on the EU. However, even in so-called Charter cases, the CJEU has interpreted the Charter as the ‘living instrument’ and the Charter as the ‘fundamental instrument’ in EU law, the CJEU and the General Court continue to cite provisions of the ECHR and sometimes make reference to the case law of the European Court of Human Rights, particularly in cases governed by Article 52(3) of the Charter.

v. The CJEU was formerly reluctant to engage in robust rights-based review of EU policy and legislation. However, with the enactment of the Charter, and the expansion of EU policy activities into the fields of internal and external security, human rights-based challenges against EU action have more recently met with greater success before the CJEU. This is particularly notable in cases challenging economic and financial sanctions imposed by the EU.

vi. The General Court and the Civil Service Tribunal have also entertained many rights-based challenges to administrative action, particularly in the context of EU competition proceedings and staff disputes.

vii. The EU’s policy competence in the field of human rights has gradually broadened since the Charter’s adoption, and the Court has further acknowledged the general principles of law. While the EU’s legislative competence to enact internal rules on human rights is largely sector-specific, or requires recourse to the residual treaty basis of Art 352 TFEU, human rights feature prominently in EU external relations. Supporting institutions such as the Fundamental Rights Agency have also been created, and debate continues over how to operationalize the sanction mechanism in Article 7 TEU.

8 HUMAN RIGHTS-BASED CHALLENGES TO MEMBER STATE ACTION

Thus far we have mainly examined the role of human rights as standards for assessing the legality of EU action and as constraints on the acts of the EU institutions. However, the CJEU’s ruling that fundamental rights were binding only on the EU institutions but also on the Member States when they are acting within the scope of application of EU law, and as we have seen, when the Charter of Fundamental Rights was enacted, its provisions were made binding not just on the EU institutions but also on the Member States when ‘implementing Union law’. However, the extension of EU fundamental rights review to Member State action remains controversial, not only because...
it is not always clear whether states are acting within the scope of application of EU law, but also because some Member States remain resistant to the very idea of the CJEU determining standards of human rights protection to be applied to them. The state of the law as regards the circumstances in which Member State action may be reviewed by the CJEU for compliance with EU fundamental rights review (whether the general principles of EU law or the Charter) is outlined below, followed by the question whether the Charter can be directly applied to the conduct of private actors.

(A) MEMBER STATES AS AGENTS OF THE EU: IMPLEMENTING AND APPLYING EU MEASURES

The EFCJ first indicated, in the case of Rutili in 1975, that when Member States are applying provisions of EU legislation which are based on protection for human rights, they are bound by the general principles of EU law. Rutili concerned the provisions of Directive 64/221, whose limitations on the restrictions Member States could impose on the free movement of workers were treated as specific expressions of the general principles enshrined in the ECHR. Similarly in Johnston v RUC, the requirement of judicial control in the 1976 Equal Treatment Directive was described by the Court as reflecting a general principle of EU law which means it should be interpreted as providing the right to an effective remedy. More current examples can be seen in relation to the EU Data Protection Directive 95/46 and Regulation 45/2001 which have been held to reflect rights of privacy protected under the ECHR and the Charter, and to require interpretation and application by national authorities in that light.

Other recent rulings of this kind have been given in relation to EU Directive 2004/83 on minimum standards for refugees, which is based on the UN Geneva Convention and is said by the CJEU to reflect other provisions of the EU Charter including respect for human dignity and the right to asylum. Similarly, if more recently contested, the EU's 'Dublin' Regulations 2003/343 and now 604/2013, concerning the determination of the Member State responsible for asylum applications, have been said to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter, and to prevent violations of the prohibition on degrading treatment under Article 4 of the Charter.

These Regulations have however been the subject of extensive ECHR case law, in which the operation of the EU asylum system has been challenged—and sometimes condemned—for violation of Article 3 ECHR concerning inhuman and degrading treatment. The upshot of the CJEU rulings, however, is that when Member States are implementing or applying EU measures which are based on or reflect fundamental rights, their action can be scrutinized by the CJEU to ensure they have done everything necessary to avoid violating rights guaranteed under EU law. Thus, for example, they must not return asylum-seekers to a Member State encountering systemic deficiencies and in which they are likely to face inhuman or degrading treatment, they must not require asylum-seekers to undergo 'tests' to prove their sexual orientation, and in determining who qualifies as a refugee they must ensure protection for family life, freedom of religion, and other rights. Further, when applying EU laws which are based on certain fundamental rights, national authorities must also ensure a fair balance between these and other rights protected as part of EU law.

Long before the Charter was enacted, however, the EFCJ had already gone beyond the kinds of cases described above, in which EU measures themselves embody a particular right, and had required Member States to ensure that EU fundamental rights are protected whenever states are implementing an EU measure, even one which on its face has little to do with rights. Thus in Wachauf, a case concerning the regulation of milk production, the EFCJ ruled that Member States are bound, when implementing EU law, by all of the same general principles and fundamental rights which bind the EU in its actions. One way of explaining this broader extension of EU fundamental rights review to Member State action is to view Member States as agents of the EU when they implement or enforce EU measures, with the result that they are bound by the range of rights protected as part of EU law.

It is this ground and judicial human rights mainstreaming technique, in accordance with which EU legislation is strengthened by the imposition on Member States of an obligation to protect all of the rights guaranteed by the Charter and the general principles of EU law when implementing such measures.
Examples which pre-date the binding enactment of the Charter include the cases of Ordre des barreaux francophones et germanophones concerning the right to a fair trial in the implementation of the Money Laundering Directive;188 Specter Photo Group concerning the presumption of innocence in the implementation of the EU Insider Dealing Directive 2003/6;189 Varec on the rights of the defence under the review procedures put in place to implement the EU Public Procurement Directive;190 Chakroun on the right to family life in the implementation of the EU Family Reunification Directive 2003/86;191 Salaluddin Abdulla on protection of the integrity of the person in determining the risk of persecution when assessing applications for refugee status under the EU Directive;192 Kabel Deutschland Vertriebs concerning protection for freedom of expression and media pluralism in the context of the implementation of the Universal Service Directive;193 Damgaard concerning protection for freedom of expression in the context of the prohibition of advertising of medical products under EU Directive 2001/83;194 Promusicae concerning reconciliation of the rights to property, data protection, and private life in the domestic transposition of EU directives on electronic commerce, intellectual property, and electronic communications;195 Tietojoivaantuletu concerning data protection and the reconciliation of freedom of expression and privacy rights in the context of the publication of tax information by a Finnish newspaper;196 and Aguirre Zarraza on the rights of the child in considering a custody dispute under EU Regulation 2201/2003.197 Further, the cluster of cases which deal with national remedies for breaches of EU rights, and which describe the right to access to a remedy as a fundamental right which must be provided by domestic law, also fall into this category.198

Since the Charter became binding in 2009, many other such cases have been decided. Examples include the actions of Member State authorities in the implementation of the EU Arrest Warrant,199 the Data Protection Directive's,200 EU intellectual property law,201 child custody,202 the rights of long-term residence third-country nationals,203 anti-discrimination law,204 recognition and enforcement of judgments,205 economic sanctions,206 and free movement measures.207

188 Case C-305/05 Ordre des barreaux francophones (n 124); M Luchtman and R van der Hoeven, Note (2009) 46 CMLRev 301.
190 Case C-450/06 Varec v Belgium [2008] ECR I-581.
191 Case C-578/08 Chakroun (n 168).
192 Case C-275-179/08 Salaluddin Abdulla et al v Germany, 2 Mar 2010. See also, on the Refugee Returns Dir 2008/15, Case C-61/11 PPU EL Dridi, 28 April 2011, [42]–[43].
196 Case C-73/07 Tietojoivaantuletu v Satakunnan Markkinapalvelut Oy [2008] ECR I-9831, [52]–[62].
198 See the cases cited at (n 176).
200 Case C-131/12 Google Spain v APD EU:C:2014:37.
201 Case C-277/10 Martin Lukan v Petrus van der Lee EU:C:2012:65.
202 Case C-409/10 PPU MJ & B [n 30].
203 Case C-91/10 Servet Kamberaj v IES EU:C:2012:233, [79]–[80].
204 Case C-104/10 Kelly v NUT EU:C:2011:506.
206 Case C-314/13 Uluslararası Farklılık Muhafızları [2014] E-165/14, [24]–[26].
207 Case C-300/11 ZZ v Secretary of State for the Home Department EU:C:2013:363.

(b) MEMBER STATES DEROGATING FROM EU RULES OR RESTRICTING EU RIGHTS

Thus far we have considered a variety of situations in which Member States were implementing EU measures. However, Member States are also sometimes permitted by the Treaty or by analogous principles developed by the ECJ to derogate from or restrict EU rules on public policy or other grounds. After initial uncertainty in the case law,208 the ECJ in ERT declared that it had a duty to ensure that Member States adequately respected fundamental rights which were part of EU law when they adopted measures derogating from EU law. The case concerned the compatibility with EU law of exclusive rights granted by Greek legislation to ERT, which had the effect of restricting the free movement of services and establishment. The defendant argued that the effect of the legislation on its freedom of expression should also be taken into account by the Court.


[Note Lisbon Treaty renumbering: Arts 56 and 66 EC are now Arts 52 and 62 TFUE respectively]

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42. As the Court has held (see Cases C-60 & 61/84 Cinécithèque, paragraph 25 and Case C-12/86 Demipel v Stadt Schwäbisch Gmünd, paragraph 228), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all of the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.

43. In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Article 56 and 66 only if they are compatible with the fundamental rights, the observance of which is ensured by the Court.

44. It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.

45. The reply to the national court must therefore be that the limitations imposed on the power of the Member States to apply the provisions referred to in Articles 56 and 56 of the Treaty on grounds of public policy, public security and public health must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights.

This ruling extended further the Court's jurisdiction in this sensitive field, namely to review Member State compliance with EU fundamental rights in situations in which they arguably seek to escape the
remit of EU law.209 And despite arguments made, even by members of the Court itself, to reduce the scope of these rulings,210 they have been confirmed many times since.211

In the field of immigration, for example, there has been a steady stream of rulings concerning the right to family life or due process where states have relied on the public policy or public interest derogation either to expel a migrant who was covered by EU law or to refuse some other family benefit. In cases such as Orfanopoulos,212 MRAX,213 Baumbast,214 Carpenter,215 Commission v Germany,216 Tsakouridis,217 Ruiz Zambrano,218 ZZ,219 O and S,220 and Ziefedt,221 the Court has emphasized the requirement on states to take adequate account of the impact of their proposed actions on the right to family life as well as other Charter rights.

Less controversially in Schmidberger, the Court confirmed that the protection of human rights in itself constitutes a legitimate interest which will justify a restriction on EU free movement rules.222 Austria had relied on protection for freedom of expression and assembly as a public policy justification for the closure of roads (and trade routes) between Austria and Italy in order to facilitate environmental protests. According to the ECI, since both the EU and the Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by EU law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.223 Similarly in Omovga Spißlaußen, Germany successfully pleaded the protection of human dignity as a ground for restricting the marketing in Germany of laser games which simulated the killing of human beings.224

209 See Cases C-259/06 United Post-Europa Communications Belgium v Belgium [2007] ECR I-11135 and C-336/07 Kobel Deutschland (a. 193) and in Case C-368/95 Vereinigte Familienpress Zeitungsverlag- und Vertriebs-GmbH v Heinrich Bauer Verlag [1997] ECR I-3869, the ECI clarified that Member States must comply with fundamental rights even when the provisions in question derogate from Treaty derogation, but on the broader range of public interest justifications developed by the ECI for ‘indistinctly applicable’ national measures.


212 Case C-482/04 and 493/04 Orfanopoulos and Oliveri v Land Baden-Württemberg [2006] ECR I-5357, [97]–[100].

213 Case C-459/99 MRAX v Belgium [2002] ECR I-6591, [51], [61], [62].

214 Case C-413/09 Baumbast and R v Home Secretary [2002] ECR I-7901, [72]–[73].

215 Case C-6/00 Carpenter v Home Secretary [2002] ECR I-6279. In this case the ECI indeed seemed to stretch to fit the facts of the case within the ‘scope of application of EU law’ for the purpose of fundamental freedom review. For a similar stretching approach, see Case C-71/02 Karner v Umwelt- und Tourismus [2004] ECR I-3025.


219 Case C-300/11 ZZ v Secretary of State for the Home Department [EU:2013] 363.


223 Case C-112/00 Schmidberger, ibid [74].

224 Case C-360/02 Omega Spißlaußen (n 10); also Case C-208/09 Saym-Wittgenstein [2010] ECR I-13693, [87] and Case C-244/06 Dynamic Metals (n 37); in Case C-34/05 Land on Prittwitz Sräniga Byggnadsutvecklare [2007] ECR I-1176, [101]–[111], and C-438/06 International Transport Workers’ Federation v Viking [2007] ECR I-10779, [74]–[90]; the fundamental right to strike was taken into account in determining whether a restriction on the free movement of services/establishment caused by collective industrial action could be justified on the protection of workers.


226 For a comment on this aspect of the original drafting of the Charter in 1999–2000, see De Buxa, ‘The Drafting of the Charter and Member State’s Authority’ (2000) 25 ELRev 33. Note however that the Charter was subsequently revised during the 2003–2004 Convention and IGJ on the Constitutional Treaty, and that it has been proclaimed and adopted by a range of different actors. Discussing the intention of the multiple drafters would be a difficult task.

227 Case C-617/10 Åkerberg Fransson EU:2013:305. See also Case C-390/12 Pfleger EU:2014:281, [35]–[36] and Case C-145/09 Tsakouridis (n 217) [52].

228 Ibid. The Explanations to Art 51 cite Case C-260/89 ERT [1991] ECR I-2925 in support of this wider phrasing: see (n 25).

229 Case C-617/10 (n 226).

230 For a case in which the ECI treated the scope of application of Art 51 of the Charter in exactly the same way as the scope of application of other general principles of EU law—notably proportionality—see Case C-206/13 Cruciano Stirraga v Regione Sicilia EU:2014:512, [34]–[35]. For discussion of this issue of the parallelism of the scope of application of the Charter and the general principles of law, see Ronsen (n 172).
17. It is to be recalled in respect of those submissions that the Charter’s field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.

18. That article of the Charter thus confirms the Court’s case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.

19. The Court’s settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Charter ensures (see inter alia, to this effect, Case C-260/09 ERR [1991] I-2925, paragraph 42; ...).

20. That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-278/09 DEB [2010] ECR I-13849, paragraph 32). According to those explanations, ‘the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law’.

21. Since the fundamental rights guaranteed by the Charter must therefore 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.

22. Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-468/11 Curà and Others [2012] ECR I-0000, paragraph 26).

23. These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see Derat and Others, paragraph 71).

The Court notably, if predictably, insists that the Charter does not extend the scope of application of EU law, but rather follows its scope of application. The key sentence in the judgment, which is unfortunately not a particularly helpful one, is that ‘the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter’. The Court seems to be saying that if EU law is genuinely applicable to the specific facts of the case in respect of which a rights violation is claimed, then the Charter will also be applicable, and the CJEU will have jurisdiction to review whether there has been compliance with its provisions. But that still leaves many questions about when exactly EU law is genuinely applicable to the facts of the case. In Francasini itself, the CJEU declined to follow the Opinion of the Advocate General who had advised that the linking between the Swedish penalties and EU tax law was insufficient to bring the case within the terms of Article 51 of the Charter. Instead, the CJEU ruled that even though the national laws on the basis of which the tax penalties and criminal proceedings had been brought had not been adopted specifically to implement an EU tax Directive, they were nonetheless designed in part to penalize infringements of the Directive (as well as of national law) in relation to the EU obligation to declare and collect VAT, and this brought them within the scope of application of EU law for the purposes of the Charter.

In subsequent rulings, the CJEU has given further guidance on the scope of Article 51 of the Charter, but still at a level of considerable generality and abstraction. In the Cruciano Singsusa and Julian Hernandez cases, the Court declared that the reasons for requiring fundamental rights review of Member State action falling within the scope of EU law is the same as the original reason for requiring fundamental rights review of EU action in the early Handelsgesellschaft case: namely to ensure the supremacy of EU law. In the Court’s words, the scope of Article 51 is intended ‘to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law’.

In subsequent rulings as to whether national action constitutes ‘implementation’ within the meaning of Article 51 of the Charter the Court has stated, still rather vaguely, that relevant factors include whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.

Somewhat more sharply, the Court insisted that the concept of implementing EU law in Article 51 ‘presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other’. The fact that a national measure comes within an area in which EU law has powers is itself insufficient to bring it within the scope of application of EU law, and to render the Charter applicable. Thus the fact that national measures may ‘indirectly affect EU law will not be enough to bring the situation within Article 51, while the fact that EU law imposes an obligation on the state with regard to the subject matter of the case probably will suffice to bring the situation within the scope of application of EU law. In NS and ME, the Court indicated that the fact that a Member State exercises discretion to determine whether or not to avail of an option under asylum legislation does not mean that the situation falls outside the scope of EU law: in this case the UK’s decision to examine a claim for asylum which was not its responsibility under the criteria set out in EU Regulation 343/2003 fell within the scope of Article 51 of the Charter, since that option was an integral part of the EU asylum system.”

239. Case C-477/10 Átklagaren v Åkerberg Fransson EU:C:2012:361, [63]–[64].

240. Ibid [24]–[28]. The CJEU also ruled that the national court was free to apply domestic standards of fundamental rights, since the national law in question was not entirely determined by EU law, so long as these did not compromise the level of protection under the Charter of the unity and consistency of EU law.

241. Case C-260/13 Cruciano Singsusa v Regione Sicilia EU:C:2014:126, [32]; Case C-198/13 Julian Hernandez EU:C:2014:2055, [47]. There is a clear convergence between this ruling and that of the CJEU in Case C-399/11 Melloni (n 110) as to why, despite the language of Article 53 of the Charter, the EU Arrest Warrant could not be reviewed for compliance with Spanish constitutional rights, but only for compliance with Charter provisions.

242. Cases C-206/13 Cruciano Singsusa (n 229) [25]; also cases C-40/11 Iida EU:C:2012:691, [79]; C-87/12 Ymera EU:C:2013:291, [41].

243. Cases C-198/13 Julian Hernández (n 232) [44]; C-206/13 Cruciano Singsusa (n 232) [24].

244. See Cases C-198/13 Julian Hernández, ibid, C-683/09 and C-1160 Gurye and Salomão Sánchez EU:C:2011:583, [69]–[70] and C-370/12 Pringle EU:C:2012:2756, [104]–[105], [108]–[111].


246. Case C-415/10 NS v Home Secretary and Case C-493/10 ME v Refugee Applications Commissioner and Minister for Justice and Law Reform EU:C:2011:865, [65]–[68]. Compare Case C-333/13 Dane EU:C:2014:2538 where a Member
It can only be hoped that further case law will lead to better and sharper criteria to determine the contours of this still elusive category of Member State action falling within the scope of application of EU law which amounts neither to a straightforward implementation of EU law nor to a derogation from it.248

(d) SITUATIONS FALLING OUTSIDE THE SCOPE OF EU LAW

As we have seen above, the Court in Fransson made clear that its pre-Charter case law on situations falling outside the scope of EU law also remains relevant. In other words, it follows from Article 51 that the Court has no jurisdiction to review Member State compliance with the Charter in situations which lie beyond the scope of EU law.239 Yet cases such as Carpenter,240 Fransson, NS, and others discussed above demonstrate that it is difficult to predict which situations will be deemed to lie ‘outside’ and which ‘inside’ the field of application of EU law for the purposes of human rights review.41

There has been a steady stream of case law since the Charter gained binding force on the scope of Article 51, and a great many cases have by now been rejected by the CJEU for falling outside the scope of EU law and hence outside its jurisdiction to review state action for compatibility with the Charter.242 While some of the cases are clearly outside the scope of EU law, or the national referring courts give no explanation as to why they may be considered within the scope of EU law, and hence they are dispensed with promptly by order of the CJEU or left for the national court to decide,243 others are more complex and borderline cases which require fuller reasoning on the part of the Court. These include situations such as national legislation adopted in the exercise of an exclusive national competence, which grants workers in certain circumstances more extensive protection than that provided under related EU employment law;244 a Member State’s refusal to grant a residence permit to a family member of an EU national who does not satisfy the conditions of residence set by EU legislation;245 a state’s refusal of legal aid to an individual under provisions of national law even where the main proceedings for which legal aid was sought concerned EU law;246 and a Member State’s definition of what constitutes a ‘special non-contributory cash benefit’ for the purposes of EU rules on coordination of social security, since the EU rules do not purport to define the national scope of such benefits.247

However, it is notable that even where a particular issue has been deemed to lie outside the scope of application of EU law and therefore to be unreviewable by the CJEU for compliance with EU fundamental rights, the CJEU nevertheless often draws the Member State’s attention to its ‘international obligations under the ECHR’.248

(e) HORIZONTAL APPLICATION OF THE CHARTER?

Article 51 of the Charter, as we have seen, declares that the provisions of the Charter are binding on the EU institutions and the Member States, but makes no reference to their effect on individuals. However, since the ECHR had previously declared that Treaty provisions addressed to Member States could also impose obligations on individuals,249 and had also ruled that general principles of law in certain circumstances have horizontal direct effect,250 the question whether the provisions of the Charter might also impose legal obligations on individuals soon arose. The issue came directly before the Court in the AMS case.251 The question was whether Article 27 of the Charter concerning the rights of workers to be consulted could be invoked by an employee against a private employer. While the Court on the facts of the case ruled that Article 27 was insufficiently specific to be able to create an obligation on an employer to include certain categories of worker for the purposes of calculating staff numbers, it left open the larger question of whether a sufficiently precise provision of the Charter could be binding on an individual.252 This question will certainly remain to the Court again before long.

9 THE EU AND THE ECHR

(A) ACCESSION BY THE EU TO THE ECHR

The possible accession of the EU to the ECHR has been a regular part of the EU integration debate at least since the 1970s. The revival of proposals for accession at that time followed from the earlier abandonment of the 1950s federalist blueprint for an EU which was fully integrated with the ECHR system.253 However, the fact the EU by now has its own Charter of Fundamental Rights which is partly
modelled on the ECHR, and a fairly extensive ‘domestic’ human rights system of its own, raises the question why accession is still considered to be desirable today. There are several possible answers. First, the EU continues to encounter criticism of its human rights role, and scepticism as to whether its commitment to promoting human rights is genuine. The ECJ has been accused of using human rights discourse in an attempt to extend the influence of EU law over areas which should remain the primary concern of the Member States, and manipulating the rhetorical force of the language of fundamental human rights to promote the integration goals or the internal market goals of the EU. Accession to the ECHR could therefore help to signal the credibility of the EU as far as human rights commitments are concerned. A related concern for some is that the CJEU should not act as a parallel European Human Rights Court but should leave this task to the ECHR, a court which was specifically entrusted by the Member States of the Council of Europe with the task of monitoring their compliance with the ECHR. The ECCHR is perceived to have acquired an expertise and a moral stature which the CJEU does not yet share. A further concern has been that the CJEU’s extension of its jurisdiction to review national laws for compliance with fundamental rights raises the possibility of conflict between the pronouncements of the two European Courts on similar issues. While some see any conflict of interpretation between the two Courts as unlikely, others view it as a clear risk. Finally, the desirability of being able to challenge acts of the EU directly before the ECCHR is perhaps the strongest argument in favour of accession. Accession would mean that the CJEU will no longer be the final official arbiter of the compliance of EU action with human rights. If accession takes place, the EU will have its own judge on the ECHR, alongside each Council of Europe Member State. According to the European Commission, accession will develop a common culture of fundamental rights in the EU, reinforce the credibility of the EU’s human rights system and external policy, place the EU’s weight behind the Strasbourg system, and will ensure the harmonious development of the case law of the two Courts. In a first serious political move in this direction, the Court of Justice was asked by the Council in 1994 for its opinion under Article 228(6) EC (now Article 218(11) TFEU) on the compatibility of accession with the EU Treaties. The Court responded that the EU lacked competence under the Treaties, and that an amendment would be necessary. Thirty years later, Article 2(2) TEU was introduced by the Lisbon Treaty, providing not only competence but a legal obligation (‘the EU shall accede’) for the EU to accede to the ECHR. Yet while the terms of the Court’s Opinion 2/94 had

254 See, eg, the controversy over the Irish abortion information, Case C-159/90 SPUC v Grogan [1991] ECR I-16685, which led to an attempt by the Irish Government to insulate the Irish constitutional prohibition on abortion, and on information and referral services, from the possible impact of EU law: see Protocol No 35 to the TEU and TFEU.

255 See Coppél and O’Neill (n 115).

256 See, eg, the argument of the UK Government in Case 118/75 (n 131) 197. Note that Judge Skouris, President of the CJEU, has been quoted recently in support of this view, declaring that the CJEU is not a ‘human rights court’: see J. Besalel, http://www.verificationblog.eu/european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/#/W0D-ld-Yg.


indicated that the Court had concerns about the ‘fundamental institutional implications’ and ‘constitutional significance’ of accession, it had not explained the nature of these concerns in any detail. Most observers nonetheless assumed that the Lisbon Treaty’s amendment to Article 6(2) TEU had removed any obstacle to accession from the side of the EU. From the side of the Council of Europe, lengthy delays caused by Russia were also finally overcome to allow the enactment of Protocol 14 to the ECHR which amended the statute of the Council of Europe to allow the EU to accede. It seemed that everything was in place for the EU to succeed, if political negotiations on the text of the accession treaty proceeded smoothly. The Draft Agreement on Accession (DA) took three years to complete, with hesitations from the UK and France along the way, but by mid-2013 it seemed that most of the sticking points had been overcome. To bring about accession, the DA would need to be concluded by the Committee of Ministers of the Council of Europe, and unanimously by the Council of Ministers of the EU, as well as gaining the assent of the European Parliament and being ratified by all forty-seven Council of Europe states. Key provisions of the DA which were drafted to address concerns about the specificity of EU law, which had been voiced by the CJEU during the negotiation process, included: (i) a mechanism for prior involvement of the CJEU to ensure the ECCHR would not rule on the compatibility of an EU act with the Convention until such time as the CJEU had first ruled on the matter; (ii) a co-respondent mechanism to allow the EU to become party to ECHR proceedings against a Member State, where the compatibility of EU law with the ECHR may be at issue; and (iii) a provision to prevent Article 55 ECHR (which prohibits ECHR Member States from bringing disputes arising from the interpretation of the Convention before other dispute-settlement systems) from being interpreted to apply to proceedings before the CJEU, or otherwise lead to a violation of Article 344 TFEU. These provisions, however, proved insufficient to address the concerns of the CJEU, and in its Opinion 2/13 on the DA in December 2014 the Court declared that the DA was incompatible with Article 6(2) TEU. The Court was not satisfied with the mechanisms provided in the DA in relation to the three points mentioned above, as well as with a range of other features of the agreement, including the failure to properly clarify the relationship between Article 53 of the Charter and Article 53 of the ECHR, the risk of undermining the principle of mutual trust between Member States within the field of Justice and Home Affairs, the fact that the Strasbourg Court would gain jurisdiction to review EU Common Foreign and Security Policy measures while the CJEU is largely excluded from the TEU from doing so, and the risk that Protocol 16 to the ECHR would enable Member States courts to request interpretative rulings from the ECCHR on matters relating to EU law before the CJEU would have a chance to consider them. The overriding theme of the Court’s objections to the
various ‘problematic’ provisions of the DAA is the need to preserve the specificity and the autonomy of the EU legal order, as well as the exclusivity of its own jurisdiction.

The Opinion is lengthy and complex, and requires careful reading. Initial reactions have been overwhelmingly critical, with academic commentators describing the Court as ‘Humpty Dumpty’ and a ‘clear and present danger’ to the protection of human rights; and the Opinion as ‘a bag of coal’ and ‘a Christmas bombshell’. A leading former European Parliamentarian declared that the EU is ‘in deep trouble’ with its Court. Thus far at least, defenders of the Opinion have been few. While the Advocate General’s Opinion as to the problematic provisions of the DAA was not so different from that of the Court, her advice was ultimately expressed in terms which confirmed the compatibility of the DAA with the Treaties so long as several conditions were ensured as a matter of binding international law. The Court, however, while sharing much of the substance of her Opinion, ruled that the DAA was incompatible with the Treaties, thereby throwing the future of the DAA into doubt, and rendering the future accession of the EU to the ECtHR a difficult political task once more. While it seems unlikely—especially in view of the mandatory nature of Article (2) TEU—that plans for accession will be shelved, it is difficult to predict at present what the path forward in this respect will be.

(a) INDIRECT REVIEW OF EU ACTS BY THE ECtHR PRIOR TO ACCESSION

In the absence of EU accession to the ECtHR, however, while complaints cannot be brought directly against the EU before the Strasbourg Court, the ECtHR has been prepared in a range of circumstances to accept indirect complaints against EU acts when they are brought against one or all Member States. In 1999, the ECtHR ruled in Matthews v United Kingdom that, while the Convention did not preclude the transfer by a state of national competences to an international organization such as the EU, the responsibility of states for violations of the ECtHR would continue even after such a transfer. Many subsequent cases were brought before the Strasbourg Court involving various forms of EU action, and the ECtHR seemed willing to entertain indirect challenges of this kind including to a Commission decision, a CJEU judgment, and a Common Position of the CFSP, although in most cases

279 For decisions of the previously existing Commission on Human Rights on this and on several other related questions, see App No 13528/87 Melcher (M) v Germany, decision of 9 Feb 1990; App No 21990/92 Heine v Contracting States and Parties to the European Patent Convention, decision of 10 Jan 1994; App No 21072/92Guerra v Italy, decision of 16 Jan 1995; App No 13645/04 Cooperatieve Prodcumentenorganisatie van de Nederlandse Kiezerklik voor UA v the Netherlands, decision of 20 Jan 2009.

it dismissed the challenge for other reasons, such as the lack of a victim or the non-applicability of the substantive right.

The key ruling of the ECtHR concerning its jurisdiction over EU acts, however, is Bosphorus. This case was brought by a Turkish company against Ireland for the impounding, without compensation, of an aircraft which the applicant company had leased from the national airline of the former Yugoslavia. The Irish authorities had impounded the aircraft in reliance on an EU regulation, following the interpretation of that regulation by the CJEU on a reference from the Irish Supreme Court, which implemented the UN sanctions regime against the former Yugoslavia during the civil war in the early 1990s. The ECtHR took the view that the alleged violation was committed by Ireland due to the state’s compliance with a binding and non-discretionary EU law obligation: in other words, the EU regulation was the real source of the alleged violation. The ECtHR in this case set out the approach which it would adopt when complaints of this kind are brought:

Application No 45036/98 Bosphorus v Ireland
Judgment of 30 June 2005
E UROPEAN COURT OF HUMAN RIGHTS

1. The question is therefore whether, and if so to what extent, that important general interest of compliance with EC obligations can justify the impugned interference by the State with the applicant’s property rights.
2. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supra-national) organisation in order to pursue co-operation in certain fields of activity (the M. & Co. decision, at p. 144 and Matthews at p 32, both cited above). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party…
3. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.
4. In reconciling both these positions and thereby establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its perennial character and undermining the practical and effective nature of its safeguards (M. & Co. at p. 145 and Waite and Kennedy, at § 67). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention…

See, eg, App No 51772/99 Gutrin Automobiles v les 15 Etats de l’UE, decision of 4 July 2000; App No 56572/00 DDR-Senator Linke GmbH v the 15 Member States of the EU, decision of 10 Mar 2004; App No 68022/00 and 99940/02 SGI v the 15 Member States of the EU, decision of 23 May 2002; App No 60222/00 Lineas Sugar v Netherlands, decision of 13 Jan 2005.


5. In the Court’s view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to be fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see the above-cited M. & Co. decision, at p. 145, an approach with which the parties and the European Commission agreed). By ‘equivalent’ the Court means ‘comparable’: any requirement that the organisation’s protection be ‘identical’ could run counter to the interest of international co-operation pursued (paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights’ protection.

6. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention’s role as a ‘constitutional instrument of European public order’ in the field of human rights...

7. It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. The numerous Convention cases cited by the applicant at paragraph 117 above confirm this. Each case (in particular, the Centruljovic judgment, at § 260) concerned a review by the Court of the exercise of State discretion for which EC law provided... The Mattevi case can also be distinguished: the acts for which the United Kingdom was found responsible were ‘international instruments which were freely entered into’ by it (§ 33 of that judgment)...

8. Since the impugned act constituted solely compliance by Ireland with its legal obligations flowing from membership of the EC (paragraph 148 above), the Court will now examine whether a presumption arises that Ireland complied with its Convention requirements in fulfilling such obligations and whether any such presumption has been rebutted in the circumstances of the present case.

The ECtHR proceeded to survey the EU’s system of protection for fundamental rights, and found that the presumption that Ireland complied with its ECHR obligations did indeed arise, on the basis that the EU provided human rights protection ‘equivalent’ to that of the ECHR system, and there was no dysfunction in the EU’s control system such as to rebut that presumption in the case at hand.283

Two separate concurring opinions were signed by seven judges in the case, however, expressing certain reservations about the majority approach. They expressed concern about the replacement of a case-by-case review of compliance with a largely abstract review of the organization’s general system of ‘equivalent protection’ for human rights. They also drew attention to the weaknesses in the EU’s system of judicial protection due to the limited locus standi for private parties before the ECJ, and raised the question whether this amounted to a violation of Article 6(1) ECHR.

Since the Bosphorus case, however, the Strasbourg Court has indirectly reviewed EU action for compatibility with the ECHR on numerous occasions, and has shown itself quite willing to conclude that the presumption of equivalence is inapplicable, and to apply its normal standard of review. In cases involving the operation of the EU asylum system, the ECtHR held that since the states in question had discretion to decide whether to deal with an asylum application even if it was not their responsibility under the EU regulation, the action was not strictly required by EU law and hence the presumption of equivalence would not apply.284 Interestingly, in Michaud v France, the ECtHR ruled that since a reference had not yet been made to the CJEU on the compatibility of an EU Money Laundering Directive with Article 8 ECHR, the EU system of human rights had not been given a chance to demonstrate its ‘full potential’, so that the presumption would not be applied here either.285 The ECtHR has also been willing to engage with an applicant’s argument that the presumption of equivalence had been rebutted by the circumstances of the case.286 The Court in Michaud also elaborated further on the underlying reason for adopting a ‘presumption of equivalence’ approach in relation to organizations such as the EU, emphasizing that it was ‘only where the rights and safeguards it protects are given protection comparable to that afforded by the Court itself’ that the Court would reduce the intensity of its supervision of state action taken to comply with the obligations flowing from membership of such organizations.287

Where the complaint is brought before the ECtHR in relation to EU action adopted not by an implementing state but by an autonomous EU institution such as the Commission or the Court, it seems that the Strasbourg Court will look to ensure that the act was indeed in some way attributable to the Member State or states against which the action is brought.288

There has been speculation as to whether the ECtHR might lessen its degree of deference towards EU action in view of the CJEU’s negative ruling in Opinion 2/13 on EU accession to the ECtHR. In this regard, it is interesting to note that the President of the Strasbourg Court, speaking shortly after Opinion 2/13 had been delivered, expressed disappointment at the Opinion and declared firmly that: ‘the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention’s territory, whether the violation can be imputed to a State or to a supranational institution.’289

(c) MUTUAL INFLUENCE OF THE CJEU AND THE ECHR PRIOR TO ACCESSION

We have seen above how the CJEU cites and sometimes pays close attention to ECHR rulings, particularly now in cases in which similar rights under the EU Charter are invoked, since Article 52(3) of the Charter stipulates that the meaning and scope of Charter rights which correspond to ECHR rights are to be the same as those laid down by the ECHR.290 It is certainly evident that the number of cases in which the CJEU bears claims based on fundamental freedoms, whether the provisions of the Charter or of the ECHR or both, is continually increasing.291

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284 See, eg, App No 30966/09 M SS v Belgium and Greece, Grand Chamber judgment of 21 Jan 2011 and App No 2921/72 Tarakhel v Switzerland, Grand Chamber judgment of 4 Nov 2014. For a list of other ECHR case law on the EU’s Dublin asylum system, see www.echr.coe.int/Documents/FS_Dublin_ENG.pdf.

285 App No 12338/11 M ichaud v France, judgment of 6 Dec 2012. Compare the case of App 3890/11 Powse v Austria, judgment of 18 June 2013, [77]–[83] in which the presumption of equivalence was applied where an Austrian court was enforcing an Italian court order under the terms of the EU Brussels II Reg 2001/2005, and a preliminary reference had already been made to the CJEU.

286 Powse v Austria ibid [84]–[87].

287 Michaud v France (in 285) [104].

288 See, eg, App T3274/01 Connolly v 15 Member States, in which the applicant complained of his dismissal by the EU Commission. The ECtHR mentioned that the Bosphorus presumption of equivalence was applicable and had not been rebutted, but also ruled that the act complained of was not attributable to the Member States.


290 (N 30).

The potential for differences in interpretation between the two Courts on the same issue was evident even from early case law. Compare, for example, the judgment of the ECJ in Open Door Counselling295 with the Advocate General’s opinion in Grogan,296 or the approach of the ECJ in ERT297 with that of the ECJ in Lentia v Austria,298 or the decision of the ECJ in Hochsch299 with that of the ECJ in Niemietz300 or the ECJ in Orkem301 with the ECJHR in Funka,302 and subsequent cases of the ECJ and CFI cases concerning various rights of the defence in EU competition proceedings.303

Despite the potential for conflict, however, there has clearly been a desire on the part of both Courts to avoid conflict in their respective case law, and to demonstrate a degree of deference towards one another on similar questions arising before them.304 This is certainly the approach which Article 52(3) of the Charter encapsulates,305 and which the Strasbourg Court has also in recent years made many references to,306 and actively accommodated EU law and the CJEU.307 The Charter has been cited in many judgments of the ECJHR,308 which has even followed the lead of the Luxembourg Court in a number of instances.309 Further, the ECJHR has acted as enforcer of EU law in cases concerning the failure of a national court to make a preliminary reference to the CJEU, finding this under certain circumstances to constitute a violation of Article 6 ECJHR.310 The two Courts also hold regular meetings ‘to discuss general questions of common interest’.311

295 On whether the role of the AG might violate Art 6(2) ECJHR on the right to a fair hearing, see Case C-179/98 Emena Sugar (n 114); R Lowen, Note (2000) 57 CMLRev 98; the opinion of the AG in Case C-466/01 Keha v Home Secretary [2003] ECHR 1-2219; and from the ECJHR side, Vermeulen v Belgium [1996] 1 Reports of Judgments and Decisions 224 and App No 35956/98 Kreuz v France, judgment of 11 June 2001 and App no 13645/05 Coopertieve Produktiegorganisatie van de Nederlandse Kokkellijverijen (1A v the Netherlands), decision of 20 Jan 2009.


297 Case C-159/90 (n 254).

298 Case C-260/89 ERT (n 227).


301 Niemietz v Germany (n 160). See however the subsequent decision of the ECJ in Case C-94/00 Roquette Frères (n 161) citing the later EC2HR judgment in App No 35791/97 Colas Est v France, 16 Apr 2002.

302 Case 374/87 (n 156).

303 Funka v France (n 163).

304 See eg Cases T-213/95 and 18/96 SKC (n 151) [56]–[57]; T-305-335/94 Limburgse Vlaai Maatschappij NV v Commission (1999) ECHR II-913, [1420]; C-185/95 P Baustahlwerke (n 151); Lenaerts and de Smijter (n 103); C-94/00 Roquette Frères (n 161).


306 See (n 26–29) and text.

307 For references to EU anti-discrimination law, see App Nos 65731/01 and 65900/01 Stec v United Kingdom, judgment of 12 Apr 2006, [58]; App No 57352/00 DH and Others v Czech Republic, Grand Chamber judgment of 13 Nov 2007, [85]–[91], [187].


309 Prominent examples include App No 28957/95 Goodwin v United Kingdom, judgment of 11 July 2001, [100]; App No 35405/97 Demir and Baykara v Turkey, judgment of 12 Nov 2008, [47], [150]; App No 10243/03 Scoppolo v Italy, judgment of 17 Sept 2009; App No 23960/04 Rasteva v Russia and Cyprus, judgment of 7 Jan 2010.

310 Most notably in the anti-terrorism sanctions cases, see App No 10593/08 Nuda v Switzerland, judgment of 12 Sept 2013 and App 5809/08 Al-Dalumi v Switzerland, judgment of 26 Nov 2013 (currently on reference to the Grand Chamber).


312 See the reference to a 'regular dialogue' between the two Courts in Declaration No 2 on Art 6(2) TEU; and see the joint communiqué of 24 Jan 2011 issued by the Presidents of the two Courts during the negotiations on EU accession to the ECJHR. http://curia.europa.eu/jcur/docs/application/pdf/2011-02/echr_cjue_english.pdf. For discussion see L Schreck, 'Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks', Garmet Working Paper 23/07 (2007).

313 N (106).

314 De Boó (n 106).

10 CONCLUSIONS

i. Human rights occupy an increasingly significant place within EU law and policy today. The Charter of Fundamental Rights has binding legal force. Compliance with human rights standards is a condition for the admission of new Member States, and serious non-compliance forms the basis for the symbolic sanction mechanism in Article 7 TEU. However, there is increasing concern that the Article 7 tool is unsuited in practice, and that a more effective mechanism is required.

ii. The case law of the CJEU and the General Court dealing with human rights matters continues to grow exponentially, and covers a wide spectrum of different human rights issues. Since the adoption of the Charter, the CJEU has shown itself willing to strike down EU laws for violation of its provisions.

iii. While national governments remain ambivalent about the EU’s role in relation to human rights matters within the EU, the CJEU has taken a broad (if still fuzzy) view of what falls within the scope of EU law for the purposes of Article 51 of the Charter. It has unequivocally asserted the primacy of EU law and of the Charter over national constitutional law in the event of conflict. However, it has not yet clarified whether the Charter can impose obligations on private parties.

iv. While both the Strasbourg and the Luxembourg Courts have sought to avoid conflict between their respective bodies of case law, with Article 52(3) of the Charter promoting deference by the CJEU to the ECJHR, and the ECJHR increasingly accommodating and citing EU law, the CJEU clearly remains very concerned to protect the autonomy of the EU legal order and the exclusivity of its own jurisdiction. This concern demonstrated itself most dramatically in Opinion 2/13, in which the CJEU found the draft Agreement on Accession of the EU to the ECHR to be incompatible with the EU Treaties.

11 FURTHER READING

ALSTON, P, HEENAN, J, and BUSTELO, M (eds), The EU and Human Rights (Oxford University Press, 1999)

Nevertheless, as the European Parliament recently put it in a study of the fundamental rights case law of the two Courts, the CJEU sometimes 'manifestly expressed the preference for the Charter over the Convention, without entering into conflict with the ECJHR'. This tendency towards increasing reliance on the Charter as the source of EU human rights law, and towards more autonomous interpretation of the Charter without reference to the ECJHR, 'echoes the wariness of the CJEU in Opinion 2/13 as regards any arrangement that would tie EU human rights norms too closely, as a matter of law, to the ECHR and particularly to the rulings of the ECJHR.'
ENFORCEMENT ACTIONS AGAINST MEMBER STATES

i. Article 17(1) TEU entrusts to the Commission the task of ensuring and overseeing the application of EU law 'under the control of the Court of Justice'. One crucial component of the Commission's task is to monitor Member State compliance and to respond to non-compliance.

ii. The TFEU provides for various enforcement mechanisms involving judicial proceedings against the Member States, which are brought either by the Commission or—much less frequently—by a Member State. Article 258 TFEU establishes the general enforcement procedure, giving the Commission broad power to bring infringement proceedings against Member States which it considers to be in breach of their obligations under EU law.1

iii. The enforcement procedure performs several functions. It is in part an elite channel for the amicable resolution of disputes involving Member States without recourse to litigation, in part a channel for individuals to complain to the Commission about breaches of EU law, and in part an 'objective' law enforcement tool in the hands of the Commission and Court.2 It has also been described as a

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1 See, eg, Art 108(2) TFEU on state aid, and Art 114(9) TFEU on internal market measures. Under Art 271 the Board of the European Investment Bank and the Council of the European Central Bank have powers similar to those of the Commission under Art 258 TFEU. Art 348 TFEU provides for a different and specialized enforcement procedure where Member States have relied on Art 347 TFEU to derogate from fundamental EU rules: see Case C-120/09 R Commission v Greece [2011] ECR 1-3077. On the interaction between the derogation in Arts 346 and 347 TFEU (ex Arts 296–298 EC) and the infringement procedure see Cases C-284/05 Commission v Finland, C-294/05 Commission v Sweden, C-372/05 Commission v Germany, C-387/05 Commission v Italy, C-461/05 Commission v Denmark, all 15 Dec 2009; Case C-38/06 Commission v Portugal, 4 Mar 2010; Case C-337/05 Commission v Italy [2008] ECR I-2173, and Case C-157/06 Commission v Italy [2008] ECR I-7313; M Trybus, Note (2006) 46 CMLRev 973. Another very serious although non-judicial and as yet unused mechanism for monitoring and enforcing EU law is the sanction mechanism under Art 7 TEU, for Member States which seriously and persistently breach the values on which the EU is based. This mechanism is discussed in Ch 11 on human rights in the EU. Finally, Art 126 TFEU provides for a specialized enforcement procedure for the 'excessive deficit procedure' within EU monetary policy, and Art 126(10) explicitly excludes the possibility of recourse to Arts 258–259 TFEU for that purpose.

2 The original infringement procedure under Art 88 of the Coal and Steel Treaty (which expired at the end of 2002) gave considerably more power to the Commission (then called the High Authority), which was empowered to record the failure of a state to fulfil its obligations, without first bringing the case before the ECJ. However, the state itself could then bring the matter before the Court. A proposal for conferring a similar power on the Commission today was discussed during the negotiations on the Lisbon Treaty and its predecessor Constitutional Treaty, but was dropped. Following the enactment of the Lisbon Treaty, Arts 258–260 TFEU now also govern the Euratom Treaty.