

**MAKING THE EU CHARTER OF FUNDAMENTAL RIGHTS A REALITY
FOR ALL:
10TH ANNIVERSARY OF THE CHARTER BECOMING LEGALLY
BINDING**

KEYNOTE SPEECH

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Commissioner,

Excellencies,

Dear colleagues,

Ladies and gentlemen,

It is a great honour for me to deliver the keynote speech at this important conference jointly organised by the European Commission, the Finnish Presidency of the Council of the European Union (EU) and the EU Fundamental Rights Agency in order to mark the 10th anniversary of the EU Charter of Fundamental Rights as a source of primary EU law.

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Since the entry into force of the Lisbon Treaty, the Charter has the same legal value as the Treaties, which has increased considerably the visibility of fundamental rights, both within and outside the EU legal order. The Charter has thus become a ‘paramount reference of EU law’ that is ‘at the forefront of European integration’.¹ The binding character of the Charter complements longstanding commitment on the part of the Court of Justice of the European Union (‘Court of Justice’) to upholding fundamental rights as an integral part of the rule of law of the EU. Before the Charter became legally binding in 2009, fundamental rights were only occasionally examined by the Court of Justice. Nowadays, by contrast, the Charter is invoked in about 10% of all preliminary ruling procedures, which indicates not only a quantitative shift in the Court of Justice’s case law but also a qualitative change, going well beyond matters that concern the regulation of the internal market.

The Charter, as a legally binding text of a constitutional nature, has given rise to a series of seminal judgments of the Court of Justice that have placed the protection of fundamental rights at the core of the European legal order. Transforming the Charter into a source of primary EU law has increased the effective judicial protection of fundamental rights and given the Court of Justice the opportunity to resolve numerous questions that are of key importance for the Union’s legal order.

¹ D. Sarmiento, ‘Who’s afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe’ (2013) 50 Common Market Law Review 1267, at 1268.

It is against that background that I will explain why it is of the utmost importance to make the Charter a ‘reality for all’, as the title of our conference suggests. I will do so by sharing with you some thoughts on the application of the Charter to the Member States that is essential in order ‘to guarantee and enforce the democratic genesis of EU law’² in the decades to come.

My speech will be divided into three parts. Part I explores the scope of application of the Charter. In Part II, it will be argued that the Charter does not rule out diversity but that a higher national level of protection may be applied where EU law does not provide for a uniform level of protection. Finally, Part III addresses the horizontal application of fundamental rights.

I. The scope of application of the Charter

The interpretation and application of the Charter must comply with the principle of conferral. Article 51(1) of the Charter therefore states that ‘[t]he provisions of [the] Charter are addressed [...] to the Member States *only* when they are implementing Union law’.

The meaning of that expression – *implementing Union law* – is, however, more complex than it might seem at first glance. As I have already stated on previous occasions, ‘the Charter is the “shadow” of

² M. Dawson, *The Governance of Fundamental Rights*, (Cambridge University Press: Cambridge), 2017, at 31.

EU law.³ This means, in essence, that there can be no situation that is governed by EU law in which the Charter does not apply. The existence of any such ‘gap’ would simply be contrary to the rule of law within the EU.

Thus, in order to determine whether a Member State is implementing EU law, one must look at the scope of application of EU law and, in particular, at the link between that law and the national measure in question. However, just as with any shadow, there are grey areas where it is difficult to determine precisely where darkness ends and brightness begins.⁴

A. Implementing EU law

In broad terms, it is safe to say that the notion of *implementing EU law* pursuant to Article 51(1) of the Charter covers two main situations:

First, it comprises all the situations in which the Member States are required to fulfil one or more specific obligations under the Treaties or under EU secondary law. Such situations are not limited to the obligation to implement EU Directives.

³ K. Lenaerts and J.A. Gutiérrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’, in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights : A Commentary* (Oxford, C.H. Beck, Hart, Nomos, 2014) 1560, at 1568.

⁴ P. Benedikt, ‘Mapping the Scope of Application of EU Fundamental Rights: A Typology’ (2018) 3 *European Papers* 133.

Thus, the Court of Justice held in *Åkerberg Fransson* that a Member State was implementing EU law when it imposed tax penalties and instituted criminal proceedings against a person for breaches of the obligation to declare VAT. Indeed, in a situation where EU primary and secondary law requires the Member States to take all the legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory and, in so doing, to protect the financial interests of the European Union, the Member States are implementing EU law, within the meaning of Article 51(1) of the Charter.⁵

Second, the expression *implementing EU law* covers all the situations where national legislation is such as to obstruct one or more of the fundamental freedoms guaranteed by the EU Treaties and the Member State concerned relies on overriding reasons in the public interest in order to justify such an obstacle.

In *AGET Iraklis*, for example, the Court held that in such a situation national legislation may justify the obstacle only if it complies with the fundamental rights guaranteed by the Charter.⁶ That obligation to comply with fundamental rights falls within the scope of EU law and, consequently, within that of the Charter.⁷

It follows that the concept of *implementing EU law* refers to complex situations in which the scope of application of the Charter is not

⁵ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para 25 to 27.

⁶ Judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, para 63.

⁷ *Ibid.*, para 64.

always immediately obvious. That is perhaps the reason why the Court of Justice provided additional guidance for examining such ‘penumbra’ cases.

In *Iida*, for example, it held that in determining whether a national measure is implementing EU law within the meaning of Article 51(1) of the Charter, ‘it must be ascertained *among other things* whether the national legislation at issue is intended to implement a provision of [EU] law, what the character of that legislation is, and whether it pursues objectives other than those covered by [EU] law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of [EU] law on the matter or capable of affecting it’.⁸ The case concerned the German authorities’ refusal to grant a Japanese national a ‘residence card of a family member of a Union citizen’ for the purposes of the Citizenship Directive (2004/38). The Court emphasised that M. Iida did not satisfy the conditions for obtaining a residence card in accordance with that directive and had not applied for the status of long-term resident in Germany in accordance with another directive. As a result, M. Iida’s situation showed no connection to EU law and therefore fell outside the scope of the Charter⁹.

⁸ Judgment of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, para. 79.

⁹ *Ibid.*, paras 80 to 82.

B. Articles 51(1) of the Charter and 19(1) TEU

In order to further specify the scope of application of the Charter, recent case law of the Court of Justice relating to the rule of law has drawn a distinction between the notion of *implementing EU law* within the meaning of Article 51(1) of the Charter and the expression ‘in the fields covered by EU law’ within the meaning of Article 19(1) TEU.

With respect to the rights deriving from EU law, Article 19(1) TEU requires that the Member States provide remedies that are sufficient to ensure effective legal protection *in the fields covered by Union law*. That right to an effective remedy is also guaranteed by Article 47 of the Charter in situations where the Member States *implement EU law*. Consequently, the question arises whether those two expressions have the same scope.

In the *Portuguese Judges* case, the Court of Justice emphasised that the EU is founded on the values set out in Article 2 TEU, including respect for the rule of law, to which Article 19 TEU gives concrete expression by entrusting ‘the responsibility for ensuring judicial review in the EU legal order not only to the [Court of Justice] but also to national courts and tribunals’.¹⁰

Thus, the Court of Justice decided that every Member State must ensure that the bodies, which, as ‘courts or tribunals’, adjudicate

¹⁰ Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, para. 32.

within its judicial system in the fields covered by EU law, meet the requirements of effective judicial protection, including judicial independence.¹¹ That requirement applies irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter.

This means, in essence, that, even though Articles 51(1) of the Charter and 19(1) TEU do not have the same scope *ratione materiae*, they both serve to define the way in which the EU system of fundamental rights protection operates: whilst Article 51(1) of the Charter aims to allocate responsibilities between the EU and its Member States concerning effective protection of fundamental rights, Article 19(1) TEU serves to protect the judicial architecture on which the Union's legal order is based.

That distinction was confirmed in the recent judgments of the Court in the context of infringement actions brought by the Commission against Poland on the ground that a series of reforms governing the internal organisation of the Polish judiciary failed to uphold the requirements of judicial independence with the consequence that the Member State in question had failed to fulfil its obligations under Article 19(1) TEU.¹²

¹¹ Ibid., paras 42 to 44.

¹² See judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, para 50; of 5 November 2019, *Commission v Poland (Independence of ordinary courts)*, C-192/18, EU:C:2019:924, para 101.

II. The Autonomous Development of the Charter

Once it is established that a national measure implements EU law, and that the Charter thus applies, the question arises whether the need for normative consistency between the level of protection guaranteed by the Charter and that provided for by the European Convention on Human Rights ('ECHR') imposes limits on the power of interpretation exercised by the Court of Justice, and also whether national law may provide for a higher level of protection of fundamental rights.

A. The ECHR as a minimum threshold of protection

In so far as the Charter contains rights that correspond to those guaranteed by the ECHR, it follows from Article 52(3) of the Charter that 'the meaning and scope of those Charter rights shall be the same as those laid down by the said Convention'.

That means, in essence, that the level of protection guaranteed by the Charter may not be lower than that guaranteed by the ECHR.¹³ Conversely, EU law may provide for more extensive protection.

The seminal ruling of the Court of Justice in *Menci*, which concerned the application of the *ne bis in idem* principle in the context of non-payment of VAT, illustrates this point.¹⁴

¹³ See, e.g., judgments of 14 September 2017, K., C-18/16, EU:C:2017:680, para. 50; of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, para. 62; of 26 September 2018, *Staatssecretaris van Veiligheid en Justitie* (Suspensory effect of the appeal), C-180/17, EU:C:2018:775, para. 31.

In that case, the Court of Justice had to decide whether to align its interpretation of Article 50 of the Charter with the case law of the European Court of Human Rights (the ‘ECtHR’), according to which the fact that the same violation of tax law is sanctioned both in tax and criminal proceedings does not infringe the *ne bis in idem* principle enshrined in Article 4 of Protocol No 7 to the ECHR, where those tax and criminal proceedings have a sufficiently close connection both in substance and in time.¹⁵

In its judgment, the Court of Justice followed a different approach, emphasising that the ECHR ‘does not constitute (...) a legal instrument which has been formally incorporated into EU law’.¹⁶

Thus, it held that a duplication of tax and criminal proceedings and penalties constitutes a limitation on the *ne bis in idem* principle laid down in Article 50 of the Charter. Consequently, in order for that limitation to be justified, the national law that implements EU law must meet a number of conditions. First, the national law providing for such a duplication must pursue an objective of general interest that is capable of justifying it (e.g. combatting VAT offences) and the tax and criminal proceedings at issue must have complementary objectives. Second, national law must contain rules ensuring coordination that limits the disadvantages resulting from such a

¹⁴ Judgment of 20 March 2018, Menci, C-524/15, EU:C:2018:197. See, e.g., M. Luchtman, ‘The ECJ’s recent case law on *ne bis in idem*: implications for law enforcement in a shared legal order’ (2018) 55 Common Market Law Review 1717, at 1730.

¹⁵ ECtHR, judgment of 15 November 2016, A and B v Norway, CE:ECHR:2016:1115JUD002413011, § 132.

¹⁶ Judgment of 20 March 2018, Menci, C-524/15, EU:C:2018:197, para. 22.

duplication to the strict minimum. Third, national law must provide for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence.¹⁷ Finally, the Court of Justice observed that its interpretation of Articles 50 and 52(1) of the Charter provided a level of protection of fundamental rights that was compatible with that guaranteed by the ECHR.¹⁸

B. The democratic principle and levels of fundamental rights protection

The issue I have just examined concerning the relationship between different levels of fundamental rights protection is highly relevant to the way in which the Court of Justice draws the dividing line between European unity and national diversity.

In analysing that issue, the Court of Justice strives to accommodate two often-conflicting perspectives from which fundamental rights may be examined. On the one hand, fundamental rights are a symbol of universality that unites individuals in their human condition. On the other hand, the way in which fundamental rights are weighed against objectives of general interest may differ between the EU and some Member States or between the Member States themselves.

¹⁷ Ibid., para. 63.

¹⁸ Ibid., para. 60.

When understood in that latter sense, the balancing exercise that must be carried out may serve as a means of protecting national, regional and local identities. The objective of accommodating those two often-conflicting perspectives is embedded in the Preamble to the Charter, which states that ‘[t]he Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels’.

It follows that neither European unity nor national diversity is absolute.

On the one hand, the EU legislator may impose a uniform level of fundamental rights protection, provided that it does not undermine the level of protection guaranteed by the Charter. Needless to say, the EU legislator is free to decide whether to impose a uniform level of protection that is higher than that guaranteed by the Charter. Any such uniform level of protection inevitably rules out diversity as it precludes the application of higher levels of protection under national law.

On the other hand, where the EU legislator has not provided for a uniform level of protection, there is room for national diversity. However, that diversity is not absolute as it must, first, comply with the level of protection guaranteed by the Charter and, second, respect ‘the primacy, unity and effectiveness of EU law’.

It follows that, subject to compliance with the Charter and other provisions of primary EU law, the choice between European unity and national diversity is a political question to be resolved by the Union's legislator in accordance with the principle of representative democracy.

Some commentators have compared the judgment of the Court of Justice in *M.A.S. and M.B.* (also known as *Taricco II*) with that in *Melloni*, musing whether the latter judgment had effectively been overruled.¹⁹ However, that is *clearly not* the right approach. The reason is very simple: whilst in *Melloni* the EU legislator had laid down a uniform level of protection, that was *not* the case in *M.A.S. and M.B.*²⁰

Let me explain that reasoning in more detail.

In *Melloni*, the EU legislator had amended in 2009 the European Arrest Warrant Framework Decision with a view to protecting the procedural rights of persons who were subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States. To that effect, the EU legislator established a list of circumstances under which the executing judicial authority may *not* refuse execution of a European Arrest Warrant issued against a person convicted *in absentia*.

¹⁹ F. Vigano, 'Melloni overruled? Considerations on the 'Taricco II' judgment of the Court of Justice' (2018) 9 New Journal of European Criminal Law 18.

²⁰ See, in this regard, C. Rauegger 'National constitutional rights and the primacy of EU law: M.A.S.' (2018) 55 Common Market Law Review 1521, at 1533.

In that regard, the Court of Justice noted that the new provision complied with Articles 47 and 48 of the Charter – both of which are in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the Convention²¹ – given that it only applied to situations where the person convicted *in absentia* was deemed to have voluntarily and unambiguously waived his or her right to be present at the trial in the issuing Member State.

Since the EU legislator had itself struck a balance between the protection of those fundamental rights and the requirements of mutual recognition of judicial decisions, in compliance with the Charter, the application of a higher national level of protection was ruled out.

The situation was different in *M.A.S. and M.B.* The Court of Justice recalled in that case that the Member States must ensure, in cases of serious VAT fraud, that effective and deterrent criminal penalties are adopted.²² However, in the absence of EU harmonisation, it is for the Member States to decide on the limitation periods applicable to criminal proceedings in such cases.

This means, in essence, that whilst a Member State must impose effective and deterrent criminal penalties in cases of serious VAT fraud, it is free to consider, for example, that rules establishing limitation periods form part of *substantive* criminal law. Where that is the case, the Court of Justice pointed out that such a Member State must comply with the principle that criminal offences and penalties

²¹ Judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, para. 50.

²² Judgment of 5 December 2017, M.A.S. and M.B., C-42/17, EU:C:2017:936.

must be defined by law, a fundamental right enshrined in Article 49 of the Charter which corresponds to Article 7(1) of the Convention.²³

Accordingly, even where the limitation periods at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious VAT fraud, the national court is under no obligation to disapply those rules insofar as that obligation conflicts with Article 49 of the Charter. That does not mean, however, that those limitation periods are left untouched to the detriment of the financial interests of the EU. In the light of the primacy, unity and effectiveness of EU law, it is, first and foremost, for the national legislator to modify those limitation periods so as to avoid impunity in a significant number of cases of serious VAT fraud.

The judgment of the Court of Justice in *M.A.S. and M.B.* is analogous in this respect to the judgments in *Åkerberg Fransson*,²⁴ or, more recently, *Dzivev*,²⁵ where the EU legislator did not lay down a uniform level of fundamental rights protection.

III. The Horizontal Application of the Charter

In our interconnected world in which the dividing line between what is ‘public’ and what is ‘private’ may be more difficult to draw than in the past, another question of the utmost practical importance is

²³ Ibid., para. 55.

²⁴ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para. 29.

²⁵ Judgment of 17 January 2019, *Dzivev and Others*, C-310/16, EU:C:2019:30.

whether the fundamental rights catalogue in the Charter may produce horizontal direct effect. Given that private parties are not explicitly mentioned in Article 51(1) of the Charter amongst its addressees, some commentators have argued that the Charter as a whole is incapable of producing such horizontal direct effect.²⁶

However, in *Association de médiation sociale*,²⁷ the Court of Justice recognised, albeit implicitly, that certain provisions of the Charter may produce horizontal direct effect. Indeed, instead of ruling that the Charter as a whole could not produce such effect, the Court examined whether a specific provision of the Charter – Article 27 on the workers’ right to information and consultation within the undertaking – satisfied the requirements for being directly applicable in disputes between private parties. Whilst Article 27 of the Charter did not meet those requirements,²⁸ subsequent judgments have confirmed that other provisions of the Charter do so.

Thus, in the recent *Egenberger*, *IR*, *Bauer and Willmeroth*, *Max-Planck* and *Cresco Investigation* cases,²⁹ the Court of Justice held that a fundamental right enshrined in the Charter may produce horizontal direct effect *provided that* the provision concerned is sufficient in itself and does not need to be made more specific by other provisions

²⁶ See Opinion of Advocate General Trstenjak in *Dominguez*, C-282/10, EU:C:2011:559, points 80 et seq.

²⁷ Judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2.

²⁸ See judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, para. 63.

²⁹ Judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, para. 57; of 11 September 2018, *IR*, C-68/17, EU:C:2018:696; of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871; *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, and of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43.

of EU or national law to confer on individuals a right on which they may rely as such. In that case, the provision is unconditional and mandatory in nature and therefore applies not only to the action of public authorities, but also in disputes between private parties.³⁰ The Court has so far confirmed that the following Charter rights enjoy horizontal direct effect: the right to non-discrimination, the right to paid annual leave and the right to effective judicial protection.

Moreover, in *Bauer and Willmeroth* and *Max-Planck* – two cases concerning the horizontal application of the right to paid annual leave enshrined in Article 31(2) of the Charter – the Court of Justice explicitly stated that no significance attaches to the fact that Article 51(1) of the Charter does not mention individuals amongst its addressees. First, ‘the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals’.³¹ Second, Article 51(1) of the Charter does not alter the fact that certain provisions of the Charter – such as the principle of non-discrimination in Article 21(1) – are sufficient in themselves to confer on individuals rights on which they may rely as such in a dispute with another individual. Third and last, the exercise of some fundamental rights entails, by the very

³⁰ K. Lenaerts, ‘Limits on Limitations: The Essence of Fundamental Rights in the EU’ 20 GLJ (2019), at 779 et seq.; K. Lenaerts and J.A. Gutierrez-Fons, ‘The European Court of Justice as the Guardian of the Rule of “EU Social law”’ in F. Vandenbroucke, C. Barnard, and G. De Baere (eds), *A European Social Union after the Crisis* (Cambridge, CUP, 2017) 407, at 446 et seq.

³¹ Judgments of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, para. 88; *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, para 77.

nature of those rights, the imposition of obligations on other private individuals.³²

Another important aspect of *Bauer and Willmeroth* and *Max-Planck* is that only the *essence* of the right to paid annual leave may produce horizontal direct effect. This contrasts with Articles 21(1) and 47 of the Charter which may produce such effect in their entirety.

IV. Concluding remarks

Allow me briefly to conclude.

In retrospect, the entry into force of the Charter as a source of primary Union law is one of the most important achievements in the history of European integration. It shows that the European integration project is more than its internal market. The EU is, first and foremost, a union of democracies, a union of justice and a union of rights and values, which draws on the constitutional traditions common to the Member States.

Since Lisbon, it is beyond dispute that fundamental rights are taken seriously at EU level. Indeed, fundamental rights are part and parcel of the rule of law within the EU, which the Court of Justice firmly upholds.

³² Judgments of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paras 87 to 90; *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paras 76 to 79.

True, prior to 1st December 2009, fundamental rights in the EU were already protected as general principles of EU law but the entry into force of the Lisbon Treaty has given much greater visibility to those rights. The binding nature of the Charter has enabled the EU legal order to develop into a globally-renowned beacon of fundamental rights protection.

In order to keep that beacon shining brightly and to make it ‘a reality for all’, my hope for the future is that all of us with a stake in that legal order will act to ensure that the multilevel protection of fundamental rights in Europe continues to benefit all subjects of the law.

Thank you very much for your attention.