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## *Fundamental Rights, General Principles of EU Law, and the Charter*

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### Abstract

The purpose of this chapter is to explore selected aspects of the relationship between the general principles of EU law and the Charter of Fundamental Rights of the European Union. The chapter first looks at the expansion of fundamental rights in EU law and the importance of general principles by reference to three principles which have provided fruitful grounds for judicial activism: the right to judicial protection, the principle of non-discrimination, and the right to personal data. It then examines the sources of fundamental rights under Article 6 TEU and the relationship between Charter rights and general principles. Finally, it explores a pivotal issue in EU constitutional discourse, namely, the scope of application of the Charter and the general principles of law. The chapter concludes by observing that, far from declining in importance, the general principles of law continue to be an integral part of judicial methodology; that, following the introduction of the Charter, the CJEU applies a heightened level of judicial scrutiny; and that it favours a centralised approach opting for an autonomous interpretation of the Charter, granting it precedence over national constitutional norms, and understanding broadly its scope of application.

### I. INTRODUCTION

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<sup>1</sup> This chapter is based on the Lasok Lecture 2014, given by the author at the University of Exeter on 6 March 2014.

recent years, have provided fruitful grounds for judicial activism: the right to judicial protection, the principle of non-discrimination, and the right to protection of personal data. It then examines the sources of fundamental rights under Article 6 TEU and the relationship between Charter rights and general principles. Finally, it explores a pivotal issue in EU constitutional discourse, namely, the scope of application of the Charter and the general principles of law. The chapter concludes by observing that, far from declining in importance, the general principles of law continue to be an integral part of judicial methodology; that, following the introduction of the Charter, the ECJ applies a heightened level of judicial scrutiny; and that it favours a centralised approach opting for an autonomous interpretation of the Charter, granting it precedence over national constitutional norms, and interpreting broadly its scope of application.

## II. THE EXPANSION OF FUNDAMENTAL RIGHTS PROTECTION IN EU LAW

The development of fundamental rights protection in EU law has been first and foremost the product of case law. The Court's unwavering, intense commitment to the language of rights goes to the genes of European integration. Commitment to fundamental rights was seen, already at an early stage, as a force of legitimacy. It was the *quid pro quo* for recognising the primacy of EU law over the national constitutions.<sup>2</sup>

One of the most remarkable developments since the 2000s has been the expansion and deepening of the ECJ's jurisdiction on the protection of fundamental rights. Such expansion and deepening has occurred, among others, in the following ways. First, it has taken place through a broad interpretation of free movement. Since a national restriction on freedom of movement cannot be justified under the Treaties unless it respects fundamental rights, it follows that the broader the interpretation of free movement, the broader the jurisdiction of the ECJ to apply EU fundamental rights. *Carpenter*<sup>3</sup> and the iconoclastic judgment in *Karner*<sup>4</sup> provide examples of free movement and fundamental rights functioning as converging forces of integration. Secondly, the ECJ has held that fundamental rights, being an integral part of the founding treaties, can be used to mitigate rights emanating from free movement. In contrast to the first situation described

<sup>2</sup> See Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>3</sup> Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279. But see for a somewhat narrow understanding of that case: Case C-457/12 *S v Minister voor Immigratie, Integratie en Asiel*, judgment of 12 March 2014.

<sup>4</sup> Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025.

above, fundamental rights operate here as centrifugal forces. *Schmidberger*<sup>5</sup> and *Omega*<sup>6</sup> embrace the national constitutional traditions and endorse an integration model based on value diversity. The Court views national constitutional standards not as being in a competitive relationship with the economic objectives of the Union but as forming part of its polity.

Thirdly, the ECJ has deepened its jurisdiction through the increasing use of the ‘outcome’ approach in preliminary references. Under that approach, the ECJ reaches a conclusive result as to whether a national measure complies with EU fundamental rights, leaving no discretion to the referring court as to how to apply its ruling. This way, it provides leadership specifying a normative outcome rather than offering guidance to the national court.<sup>7</sup>

Finally, the Court’s jurisdiction on fundamental rights has been enhanced by the Charter which, since the entry into force of the Treaty of Lisbon, has become binding. The Charter is intended to reaffirm and strengthen fundamental rights by making them more visible.<sup>8</sup> There is no doubt that it has increased their resonance. Since the entry into force of the Lisbon Treaty, litigation on fundamental rights has increased and the most prominent judgments delivered by the Court tend to involve such rights rather than matters of classic economic integration.

The ECJ’s presence in the field of fundamental rights protection can be aptly illustrated by reference to three areas, namely the right to judicial protection, the principle of equal treatment, and the right to family life in conjunction with the right to the protection of personal data. Case law developments in those areas provide prominent examples of judicial activism and illustrate a double standard of judicial review. Whilst the ECJ is soft in reviewing the competence of the EU *ratione materiae*,<sup>9</sup> it is much harder in reviewing compatibility of its actions with fundamental rights.

<sup>5</sup> Case C-112/00 *Eugen Schmidberger, Internationale Transport und Planzüge v Austria* [2003] ECR I-5659.

<sup>6</sup> Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. See also Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505.

<sup>7</sup> For examples, of outcome cases, see *Carpenter* (n 3 above), *Schmidberger* (n 5 above), *Omega* (n 6 above), and more recently Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz*, judgment of 6 September 2012; Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk*, judgment of 22 January 2013. In some cases, the ECJ will provide the referring court with a strong presumption leaving it to make the final determination: see eg Case C-131/12 *Google Spain SL v Agencia Española de Protección de Datos (AEPD)*, judgment of 13 May 2014, nyr, discussed below at n 65. For a detailed discussion of the ‘outcome’ and other approaches followed by the Court, see T Tridimas, ‘Constitutional Review of Member State action: The virtues and vices of an incomplete jurisdiction’ (2011) 9 *International Journal of Constitutional Law* 737.

<sup>8</sup> See Preamble to the Charter, Recitals 4 and 5.

<sup>9</sup> This is so, for example, in relation to the interpretation of Art 114 TFEU. See eg Case C-380/03 *Germany v European Parliament and Council of the European Union* [2006] ECR I-11573 (*Second Tobacco Advertisement Directive case*); Case C-210/03 R (*on the application of Swedish Match AB*) v *Secretary of State for Health* [2004] ECR I-11893; For a recent case

## A. Judicial Protection

Although judicial protection lies at the heart of every system which abides by the rule of law, there are specific reasons which have granted it elevated status in EU law. Judicial protection is central to the integration through law paradigm. The transition of the European Communities from an international organisation to a new form of governance was effected through the dismantling of the nation state's monopoly in granting rights. *Van Gend en Loos*<sup>10</sup> signalled rights creation at supra-national level thus commencing a process towards the dispersal of political power and the strengthening of the role of the judiciary. But the granting of rights presupposes the recognition of the right to judicial protection which thus becomes the starting point of that process. Furthermore, the supremacy of EU norms cannot be asserted unless individuals have access to justice. Judicial protection is thus the gateway to primacy. Additionally, it serves as a source of legitimacy. It is the quid pro quo for transferring powers to the EU institutions. In doing so, it has helped to promote the autonomy of the EU legal order and enhance the power and the role of the Court of Justice.

The importance of the right to judicial protection can best be illustrated by reference to the *Kadi* cases which provide, perhaps, the most prominent illustrations of that right in the history of the Union. In *Kadi I*<sup>11</sup> the ECJ was concerned with the validity of EU regulations by which the Council implemented United Nations Security Council (UNSC) resolutions imposing economic sanctions on non-state actors associated with the Al Qaeda network. The names of the persons included in the sanctions list were determined by the UN Sanction Committee. Mr Kadi and the Al Barakaat International Foundation, who were among those persons, challenged the EU regulation freezing their assets. The ECJ held that measures adopted by the EU institutions to give effect to UNSC resolutions are subject to review on grounds of respect for fundamental rights as protected by EU law. Reversing the judgment of the Court of First Instance (now the General Court), the Court adopted a dualist approach holding that, whilst it does not have power to review the lawfulness of a UNSC resolution, it does have jurisdiction to review the compatibility of measures adopted by the EU institutions to implement it. Such review does not entail any challenge to the primacy of the UNSC resolution in international law.<sup>12</sup> The Court upheld

where the ECJ took a broad view of agency powers, see Case C-270/12 *United Kingdom v European Parliament and Council of the European Union (ESMA case)*, judgment of 22 January 2014.

<sup>10</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

<sup>11</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v European Council and Commission* [2008] ECR I-6351.

<sup>12</sup> *Kadi I*, *ibid*, paras 287–88.

the paramount nature of fundamental rights recalling its judgment in ‘*Les Verts*’ and reiterating that neither the Member States nor the EU institutions can avoid review of the conformity of their acts with the Treaties.<sup>13</sup> Thus, in the Court’s rationale, the primacy of the UN Charter takes place only in the sphere of international law. It does not penetrate the constitutional space of the EU and, within that space it cannot take precedence over the general principles of law of which fundamental rights form part.<sup>14</sup> On that basis, the Court proceeded to annul Regulation (EC) 881/2002 by which the assets of the applicants had been frozen, on the ground that the applicants’ right to a hearing, the right to judicial protection, and the right to property had been infringed. The applicants had not been informed of the evidence against them, no reasons had been given for the inclusion of their names in the sanctions list, and they had not been afforded any opportunity to put their case.<sup>15</sup>

The judgment of the ECJ in *Kadi I*<sup>16</sup> is of defining constitutional importance. The Court understood the EC Treaty (now the Treaty on the Functioning of the European Union) as establishing its own constitutional space, asserted the autonomy of EC law vis-à-vis international law, and held that responses to emergencies should be handled through, rather than outside the bounds of, the EU Treaties.

Although in *Kadi I* the ECJ established the paramount nature of fundamental rights, given the complete lack of engagement by the EU authorities with process rights, the judgment was concerned solely with constitutional principle. Once the Court decided that economic sanctions were reviewable despite their UN origins, it could only find a violation, since no reasons for the decision had been given and there was no attempt to respect the rights of defence. In *Kadi II*,<sup>17</sup> the focus shifted onto the task of balancing conflicting interests and the intensity of review.

Following *Kadi I*, the EU institutions decided to keep Mr Kadi’s name in the sanctions list but provided him with a summary of the reasons justifying his inclusion. The summary had been made available by the UN Sanctions Committee. In *Kadi II*, Mr Kadi challenged his new inclusion in the list. In its judgment, the ECJ concretised the process requirements that the EU institutions must fulfil when listing a person pursuant to a decision of the UN Sanctions Committee, and provided guidelines regarding the scope and intensity of judicial review and the handling of sensitive evidence.

<sup>13</sup> Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339, para 23; *Kadi*, n 11 above, para 281.

<sup>14</sup> *Kadi*, n 11 above, para 308.

<sup>15</sup> *Ibid*, paras 345 et seq.

<sup>16</sup> Above, n 11.

<sup>17</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi (Kadi II)*, judgment of 18 July 2013, nyr.

The Court held that the EU courts must ensure the full review of the lawfulness of economic sanctions in the light of fundamental rights. Full review means that the courts will examine whether the EU institutions have complied with process requirements which include the rights of defence, the right to effective judicial protection, and the obligation to state reasons.<sup>18</sup> It also means that jurisdiction is not limited to examining in the abstract the cogency of reasons but also verifying whether the decision is taken on a sufficiently solid factual basis and verifying the allegations made in the statement of reasons.<sup>19</sup> The right to judicial protection imposes here a series of positive duties and requires an administrative and also a judicial dialogue.<sup>20</sup> The Court may request the EU authority to produce information or evidence.<sup>21</sup> *Kadi II* laid down detailed guidelines on the evidence that must be provided. In general, a decision cannot be taken on the basis of undisclosed evidence. The Court accepted that, in exceptional circumstances, overriding public security reasons may preclude disclosure of the full evidence to the person concerned. In such cases, it is for the court to verify that such reasons indeed exist and, if they do, consider possibilities such as the disclosure of a summary to the person concerned. The bottom line is that it is for the EU courts to assess whether and to what extent the failure to disclose confidential evidence to the person concerned, and his consequential inability to submit observations, is such as to affect its probative value.<sup>22</sup>

The Court found justification for full review in the severe impact of sanctions and the fact that there was little protection in any alternative forum. Despite their preventive nature, sanctions impact gravely on the individuals concerned because of their scope and duration. As Sedley LJ put it, listed persons become ‘effectively prisoners of the state’.<sup>23</sup> They also produce adverse impact because of the public opprobrium that they provoke.<sup>24</sup> The Court also pointed out, as a secondary reason for full review, that the delisting procedures available at UN level did not guarantee effective judicial protection. In so ruling, it was assisted by the judgment of the Strasbourg Court in *Nada*.<sup>25</sup> In the circumstances, the Court examined each of the reasons stated in the summary of reasoning. It found that whilst some of them were vague and did not satisfy the requirement of reasoning, others were specific but were not supported by the evidence disclosed. It thus annulled the contested regulation.

<sup>18</sup> *Kadi II*, paras 117–18.

<sup>19</sup> *Kadi II*, para 119.

<sup>20</sup> See, in particular, *Kadi II*, paras 113 et seq and 120–21.

<sup>21</sup> *Kadi II*, para 120.

<sup>22</sup> Paras 128–29.

<sup>23</sup> *A, K, M, Q & G v HM Treasury* [2008] EWCA Civ 1187, at para 125, and *HM Treasury v Mohammed Jabar Ahmed and others* [FC] [2010] UKSC 2.

<sup>24</sup> *Kadi II*, n 17 above, para 132.

<sup>25</sup> *Nada v Switzerland*, Application No 10593/08, judgment of 12 September 2012, para 211.

The judgment indicates that the Court is prepared to scrutinise the evidence and allows little margin of error to the EU authorities. In effect, the ECJ understands full review as meaning that it must apply a high standard in scrutinising the statement of reasons and that it has jurisdiction to reconstruct the decision-making process. The ECJ articulated a more persuasive account of process rights than that envisaged by the General Court<sup>26</sup> and, in contrast to US courts,<sup>27</sup> followed a model of civil libertarianism by understanding the right to judicial protection as imposing positive duties and requiring an administrative and judicial dialogue.

## B. Non-discrimination

The case law on equality suggests that the general principles of law are not merely methodological tools but incorporate substantive standards of justice. The ECJ understands non-discrimination as empowering it to supplement the legislative process. Suffice it here to illustrate the principle by reference to selected cases.

In *Mangold* the ECJ elevated the prohibition of discrimination on grounds of age to a general, unwritten, principle of EU law which transcends concrete legislative outcomes and is capable of applying in horizontal situations.<sup>28</sup> Although this is a bold and, essentially, welcome judgment, its reasoning was ‘far from compelling’.<sup>29</sup> The Court cited as the sources of that general principle the international instruments listed in the preamble to the Framework Directive on Equality<sup>30</sup> and the constitutional traditions common to the Member States. This is, however, a creative reading of those sources. The preamble to the Framework Directive refers to a number of fundamental international conventions which pertain to the principle of equality before the law and the principle of equal treatment.<sup>31</sup> Only one of them makes express reference to age and this is only in a specific

<sup>26</sup> See the judgment at the first instance which was reversed by the ECJ: Case T-85/09, *Yassin Abdullah Kadi v European Commission (Kadi II)* [2010] ECR II-5177.

<sup>27</sup> See *Kadi v Geithner*, US District Court for the District of Columbia, judgment of 19 March 2012.

<sup>28</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

<sup>29</sup> See Opinion of Mazák AG in Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, para 94 and see the criticism by Herdegen, ‘General Principles of EU Law—The Methodological Challenge’ in Bernitz, Nergelius, and Cardner (eds), *General Principles of EU Law in a Process of Development* (London, Kluwer Law International, 2008) 343–55.

<sup>30</sup> Council Directive 2000/78/EC of 7 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

<sup>31</sup> Recital 4 refers to the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and ILO Convention No 111, which prohibits discrimination in the field of employment and occupation.

context.<sup>32</sup> The reference to the common constitutional traditions of the Member States appears unsubstantiated, since it is not backed by any comparative analysis of national laws or case law. In fact, the constitutions of only two Member States recognised the principle at the time of the judgment.<sup>33</sup> A further problem with the Court's reasoning is that the relationship between the prohibition of discrimination as a general principle of law and the Framework Directive remains unclear. *Prima facie*, there is an oxymoron: If the prohibition of discrimination on grounds of age is a general principle of EU law, Mr Mangold could have relied on it even in the absence of the Framework Directive. In fact, Advocate General Tizzano was not averse to that argument. The Court however went to lengths to discuss the Directive and delved into its effects before the period for its implementation had expired. The role of the Framework Directive in activating the dormant general principle of non-discrimination on grounds of age is normatively unclear and methodologically unsound. The Court treated the content of the general principle as co-terminous with the provisions of the Framework Directive. This creates a temptation to elevate a rule contained in a directive to a general principle of law and attribute to it a specific content with the benefit of hindsight, ie in the light of the provisions of the directive. There is, thus, a risk that provisions of directives would be interpreted as illustrations of pre-existing general principles and attributed the status of primary law, leading to their horizontal effect and the availability of enhanced remedies. This fusion between primary and secondary sources of law was rightly criticised by the Advocate General in *Dominguez*<sup>34</sup> and it appears that the ECJ heeded those dangers in subsequent case law.<sup>35</sup>

An equally activist approach is illustrated by *Test-Achats*.<sup>36</sup> Directive 2004/113 was adopted on the basis of Article 13(1) EC (now Article 19(1) TFEU) and laid down a framework for combating discrimination based on sex in access to and supply of goods and services.<sup>37</sup> The Directive prohibits the long-standing practice of using gender as an actuarial factor

<sup>32</sup> See ILO Convention No 111, Art 5(2).

<sup>33</sup> These were the Finnish and the Portuguese constitutions, see Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629 at 1654, fn 142.

<sup>34</sup> Case C-282/10 *Dominguez v Centre informatique du Centre Ouest Atlantique (CICOA)*, judgment 24 January 2012.

<sup>35</sup> Note that, although *Mangold* was confirmed in relation to the prohibition of age discrimination in Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG*, [2010] ECR I-365, the ECJ did not apply its reasoning in *Mangold* in relation to other rights in *Dominguez*, n 34 above, and Case C-176/12 *AMS v Union locale des syndicats CGT*, judgment of 15 January 2014 (discussed below). See further Case C-356/12 *Glatzel v Freistaat Bayern*, judgment of 22 May 2014, para 43.

<sup>36</sup> Case C-236/09 *Test-Achats v Conseil des ministres* [2011] ECR I-773.

<sup>37</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services ([2004] OJ L373/ 37).



in calculating insurance premiums. Article 5(2) provided for an extensive derogation. It allowed Member States 'to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data'. The Court found Article 5(2) to be invalid on the ground that it allowed the derogation to persist indefinitely. It held that such a provision, which enables Member States to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment, which is the very purpose of Directive 2004/113.<sup>38</sup> It is therefore incompatible with Articles 21 and 23 of the Charter, which enshrine the general principle of non-discrimination and the principle of equal treatment between men and women respectively.

On the face of it, the Court intervened on procedural grounds carrying out a test of internal consistency. Allowing Member States to introduce a permanent derogation ran directly counter to the objective of the Directive, which was to implement the principle of equal treatment. It thus made for incoherent and contradictory policy-making. The Court's reasoning is based on the premise that Article 5(1) prohibits *simpliciter* the use of sex as a factor in the calculation of benefits and premiums. This is not, however, the only reading of the Directive. The purpose of Article 5(1) is to prohibit the use of sex as such a factor only where it is discriminatory, ie in cases where men and women are in a comparable situation and there is no objective justification for their difference in treatment. The effect of Article 5(2) is to delineate the limits of the prohibition of Article 5(1) by indicating that the use of unisex premiums and benefits is not required where sex is an objective factor in differentiating risk. This interpretation is supported by the preamble to the Directive.<sup>39</sup> For one thing, as has been noted by Watson, Article 5 of the Directive could not prohibit the use of sex as a factor in calculating benefits or premiums unless such use constituted sex discrimination: if it went beyond that, it would be *ultra vires* the competence of the Council under Article 19(1) TFEU.<sup>40</sup> For another, to prohibit the use of sex as a relevant factor even where it can objectively be linked to differential risk would amount to treating different situation in the same way which might in itself be a breach of the general principle of non-discrimination.

<sup>38</sup> *Test-Achats*, para 32.

<sup>39</sup> Recital 19 of the Preamble states as follows: 'Certain categories of risks may vary between the sexes. In some cases, sex is one but not necessarily the only determining factor in the assessment of risks insured. For contracts insuring those types of risks, Member States may decide to permit exemptions from the rule of unisex premiums and benefits, so long as they ensure that underlying actuarial and statistical data on which the calculations are based, are reliable, regularly updated and available to the public'.

<sup>40</sup> See P Watson, 'Equality, fundamental rights and the limits of legislative discretion: comment on *Test-Achats*' (2011) 36 *European Law Review* 896 at 901–2.

The Opinion of Advocate General Kokott casts a lot more light on the argument in favour of illegality. The Advocate General pointed out that, in relation to insurance products, it is much easier to implement distinctions on the basis of sex. By contrast, '[t]he correct recording and evaluation of economic and social conditions and of the habits of insured persons is much more complicated and is also more difficult to verify, particularly since those factors may be subject to changes over time'.<sup>41</sup> She continued that practical difficulties and reasons of convenience could not justify '[t]he use of a person's sex as a kind of *substitute criterion* for other distinguishing features'.<sup>42</sup> As Watson states, however, there may be another way of looking at this issue: the use of a person's sex may not be a substitute criterion but merely a conclusion drawn from an assessment of a number of factors which shows, as a result of an objective actuarial exercise, that one or the other gender is more exposed to certain kinds of risk.<sup>43</sup>

A notable aspect of the judgment is the way the Court treated the consequences of incompatibility. It held that Article 5(2) must be declared invalid from the expiry of an 'appropriate' transitional period which, in a rare but not unprecedented example of judicial law-making, it set as 21 December 2012.<sup>44</sup> It is, however, interesting that the Court did not annul the directive as a whole. Given the widespread economic repercussions of the ruling, one may entertain doubts as to whether the EU legislature would have agreed to adopt the directive if Member States were deprived of the derogation in Article 5(2). The contrast with the *Tobacco Advertising I case* on this issue is striking.<sup>45</sup> In that case, the Court found that certain aspects of the directive prohibiting the sponsorship and advertising of tobacco products were beyond the scope of EU competence but annulled the directive as a whole on the ground that partial annulment would entail amendment of its provisions, which was a matter for the Community legislature.<sup>46</sup> The intervention of the Court in *Test-Achats* amounted to such selective amendment. Its approach is all the more activist given that Directive 2004/113 regulates private law relations.

<sup>41</sup> Above, n 36, at para 66 of the Opinion of AG Kokott.

<sup>42</sup> *Ibid*, para 67.

<sup>43</sup> Watson, n 40 above, at 899. As Watson points out, if it can be proved that a particular category of persons is less likely to be exposed to a specific risk than another category within the insured group why should it be prohibited for this to be reflected in the premium paid for coverage of that risk? See Watson, n 40 above, at 904.

<sup>44</sup> *Test-Achats*, n 35 above, paras 33–34. Kokott AG considered as appropriate a transitional period of three years, commencing from the delivery of the judgment, which would have expired on 1 March 2014. The AG however opined that after that transitional period existing tariffs, premiums and benefits should also be re-adapted: See paras 80–81 of the Opinion.

<sup>45</sup> Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419.

<sup>46</sup> *Ibid*, para 117.

The Court's activism can further be illustrated by *Sturgeon*.<sup>47</sup> The case concerned the right of air passengers to compensation in the event of a flight delay under Regulation No 261/2004.<sup>48</sup> The Regulation seeks to protect air passengers in the event that a flight is delayed or cancelled and provides for various forms of assistance and redress. The Court interpreted it as meaning that passengers are entitled to compensation not only where a flight is cancelled, which is expressly provided in Article 5, but also where a flight is delayed despite the absence of an express provision to that effect. It came to that conclusion on the ground that, in view of the objective of the regulation which was to strengthen passenger protection, situations covered by it must be compared by reference to the type and extent of the various types of inconvenience and damage suffered by the passengers concerned. In the light of the principle of equal treatment, it would be unjustifiable to offer compensation to passengers whose flights were delayed where they suffered a similar loss to those whose flights were cancelled.

In *Test-Achat* and *Sturgeon* the Court understood equal treatment as going well beyond a negative constitutional stipulation which constrains legislative discretion. It used the principle to promote specific policy outcomes in the economic and social sphere based on the putative intentions of the legislature rather than its actual dispositions. Showing constitutional empathy, the Court sees its role as being to contribute to the realisation of substantive values.

### C. Privacy and Personal Data

An area where the ECJ has been particularly active in recent times is the right to protection of personal data in combination with the right to privacy. Two cases stand out: *Digital Rights Ireland* and *Google Spain*.<sup>49</sup>

In *Digital Rights Ireland*<sup>50</sup> the Court annulled Directive 2006/24<sup>51</sup> which requires providers of electronic communication services to retain certain

<sup>47</sup> Joined Cases C-402/07 and C-432/07 *Sturgeon v Condor Flugdienst GmbH* [2009] ECR I-10923.

<sup>48</sup> Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights ([2004] OJ L46/1).

<sup>49</sup> Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources*, judgment of 8 April 2014; Case C-131/12 *Google Spain SL v AEPD*, judgment of 13 May 2014. For further cases involving those rights, see eg Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* [2010] I-11063; Case C-291/12 *Schwarz v Stadt Bochum*, judgment of 17 October 2013.

<sup>50</sup> Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, judgment of 8 April 2014.

<sup>51</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC ([2006] OJ L105/ 54).

customer data in the interests of public security. The judgment is important both for its substantive outcome and the methodology followed by the Court.

The Court first established that the retention of personal data directly and specifically affected private life and therefore the rights guaranteed by Article 7 of the Charter. It also affected the right to protection of personal data as guaranteed by Article 8 of the Charter. The Court classified the interference as being wide-ranging and particularly serious.<sup>52</sup> As the Court noted, the fact that the data were retained and subsequently used without the subscriber or registered user being informed was likely to generate in the minds of the persons concerned the feeling that their private lives were the subject of constant surveillance.<sup>53</sup>

In view of the importance of electronic communications data in investigating crime, the Court accepted that the provisions of the directive were appropriate to achieve its objectives. It found, however, that the directive did not lay down clear and precise rules circumscribing the extent of interference. The retention of data did not satisfy the standard of necessity for the following reasons.

First, the breadth of coverage of the directive was too wide. It required the retention of all traffic data covering all subscribers and registered users, entailing 'an interference the fundamental rights of practically the entire European population'.<sup>54</sup> It affected all persons using electronic communications services and applied even to persons for whom there was no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime.<sup>55</sup> Secondly, the directive did not specify substantive and procedural conditions under which national authorities could have access to the data. It thus did not lay down any objective criteria by which to determine the limits of access to data and their subsequent use.<sup>56</sup> Thirdly, the directive required retention of the data for a period of at least six months, without any distinction being made between the categories of data that needed to be retained on the basis of their possible usefulness or according to the persons concerned. Nor did it require that the determination of the period of retention must be based on objective criteria in order to ensure that it was limited to what was strictly necessary.<sup>57</sup> The Court pointed out a further mischief. The Directive did not provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective

<sup>52</sup> *Digital Rights Ireland*, para 37.

<sup>53</sup> *Ibid.*

<sup>54</sup> Para 56.

<sup>55</sup> Para 58.

<sup>56</sup> Paras 60 and 61.

<sup>57</sup> Paras 63–64.

protection of the data retained against the risk of abuse and their unlawful access and use.<sup>58</sup>

The judgment suggests that the ECJ takes seriously the right to privacy and the right to the protection of personal data. One of the reasons which led the Court to find the interference to be disproportionate was that the directive did not provide any rules governing access to the data by the public authorities, the conditions of access and use, and the number of persons who could access them; nor did it make such access dependent on a prior review carried out by an independent body. All those conditions could be implied since, in implementing EU law, Member States must comply with EU fundamental rights standards. The Member States must therefore be considered to be under an implicit obligation to allow access to the data only subject to strict compliance with those standards. The essence of the judgment appears to be that, where the EU legislature provides for a particularly serious interference with fundamental rights, it cannot outsource their protection to the Member States. Implicit restrictions provided by national law do not suffice.

The judgment is also important for the methodology followed by the ECJ. The Court was unusually forthcoming in determining the level of judicial scrutiny that it would employ. It held that the discretion of the EU legislature may prove to be limited depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference, and the objective pursued by the interference.<sup>59</sup> Although those factors could be derived by an analysis of the case law, it is rare that the Court refers to them explicitly. In the circumstances of the case, review was strict given the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference caused by the directive.<sup>60</sup>

The Court also followed a step-by-step approach to the application of Article 52(1) of the Charter, distinguishing and examining separately the requirement that the limitation on a right must not affect its essence from the requirement of proportionality.<sup>61</sup> It held that although the interference with the right to private life and the right to protection of personal data was wide ranging and particularly serious, it did not affect the essence of

<sup>58</sup> Paras 66–68.

<sup>59</sup> Para 47; the ECJ referred in support to Strasbourg case law under Article 8, in particular, *S and Marper v United Kingdom*, Application Nos 30562/04 and 30566/04, § 102, ECHR 2008-V.

<sup>60</sup> *Digital Rights Ireland*, para 48.

<sup>61</sup> Art 52(1) states that any limitation on the exercise of Charter rights must fulfill the following conditions: (a) it must be provided for by law; (b) it must respect the essence of the right concerned; and (c) it must meet the requirements of proportionality, namely it must be necessary and genuinely meet objectives of general interest.

those rights. The interference with the right to private life did not affect its essence because the directive did not permit acquisition of knowledge of the content of the electronic communication as such.<sup>62</sup> One may conclude *a contrario* that, if the directive enabled acquisition of the knowledge of the content of an electronic communication, that would be per se a breach of the right to privacy without any need for the Court to carry out a proportionality analysis to examine possible justifications.

Similarly, there was no interference with the essence of the right to personal data because the directive required certain principles of data protection and data security to be respected. In particular, under Article 7, Member States were required to ensure that appropriate technical and organisational measures were adopted against accidental or unlawful destruction, accidental loss or alteration of the data.<sup>63</sup> The Court held, however, that Article 7 did not provide for sufficient safeguards to ensure effective protection of the data retained against the risk of abuse and against their unlawful access and use. The difference appears to be between complete absence of provision of safeguards and safeguards which are inadequate. In the event of a complete absence, there is interference with the very essence of the right. If the legislature provides for such safeguards but they prove to be insufficient, this amounts to disproportionate interference. This distinction is somewhat reminiscent of the test which the Court follows in determining the threshold of seriousness for the purposes of the non-contractual liability of the EU.<sup>64</sup> It appears to be based, however, on a quantitative rather than qualitative criterion. In truth, it is difficult to determine objectively the degree of interference that must exist to do away with the balancing act that the principle of proportionality entails.

*Google Spain*<sup>65</sup> concerned the interpretation of Directive 95/46 on the protection of individuals with regard to the processing of personal data,<sup>66</sup> and raised issues pertaining to the so-called right to be forgotten. The origins of the case lie in a complaint lodged by Mr Costeja González with AEPD, the Spanish Data Protection Agency, against Google. He complained that, when his name was entered into the google search engine, the results showed links to archived pages of a newspaper containing an announcement of a court-ordered property auction for the recovery of his social security debts. The AEPD upheld his complaint, requiring Google to remove his personal data. Following proceedings initiated by Google, a preliminary reference was made.

<sup>62</sup> *Digital Rights Ireland*, para 39.

<sup>63</sup> Para 40.

<sup>64</sup> See Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission (Mulder II)* [1992] ECR I-3061.

<sup>65</sup> Case C-131/12 *Google Spain v AEPD*, judgment of 13 May 2014, nyr.

<sup>66</sup> Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L281/31.

In a bold judgment, the Court distinguished the obligations which the right to privacy and the right to protection of personal data may impose on the provider of a search engine from those that they may impose on the publisher of a website. It held that, by bringing together information about a person's private life which otherwise could not have been interconnected, a search engine facilitated a structured overview of information relating to an individual.<sup>67</sup> It thus made for an autonomous and intrusive interference with the rights protected by Articles 7 and 8 of the Charter. The Court held that the operator of a search engine may be obliged to remove from the list of results links to web pages published by third parties in cases where the information in question is not erased from those web pages and even when publication in itself on those pages is lawful.

The Court stated that a fair balance should be struck between the legitimate interest of internet users and the individual's fundamental rights. The Court tilted the balance in favour of privacy. It held that whilst, as a general rule, the individual's right to privacy overrides that interest of internet users, that balance may depend, in specific cases, on the nature of the information in question and its sensitivity for the individual's private life and on the interest of the public in having that information, which may vary, in particular, according to the role played by the individual in public life.<sup>68</sup>

The judgment establishes a qualified but extensive right to be forgotten. The Court stated, in particular, that even the processing of accurate data that was initially lawful may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.<sup>69</sup> An examination must be made in the circumstances of each case. Notably, the Court pointed out that the right to have information removed is not dependent on finding that its inclusion in the list of results causes prejudice to the individual concerned. The judgment places the burden on the search engine provider and draws the balance firmly in favour of privacy. The rights provided by Articles 7 and 8 of the Charter override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the individual's name. It would be otherwise only if, for reasons such as the role played by the individual in public life, the interference with his fundamental rights would be justified by the preponderant interest of the general public in having access to that information through the list of results.

<sup>67</sup> *Google Spain*, n 65 above, paras, 37, 80.

<sup>68</sup> Para 81.

<sup>69</sup> Para 93.

The judgment might be seen as a triumph for the individual's right to privacy but it is ripe with problems. It imposes an important economic burden on search engine providers which, no doubt, will be collectivised. Its implementation will pose huge challenges. Although it requires a balance to be drawn between the right to privacy of the individual concerned and the public's right to information, it tilts the balance too heavily in favour of the first. The judgment itself establishes a presumption in favour of privacy. Furthermore, the conflicting rights are likely to have unequal representation in practice. Whilst individuals will stand for their right to privacy, the constituency that will fight for the freedom of expression is more difficult to identify. Search engine providers do not have an obligation to enter into balancing competing interests. In some cases, at least, it will be easier for them to remove information upon request rather than stand for transparency.<sup>70</sup> Whilst in *Google Spain* the juxtaposition of interests was relatively straight-forward,<sup>71</sup> in many cases it will be much more complex. An online publication which contains adverse information about an individual in the publication of which there is no overriding public interest may also contain information about another individual which should be made available in the public interest. The solution may be to allow that information to appear as a search result selectively, ie when the name of one individual is entered but not when the name of another is entered, but it is far from clear how search engines will implement the resulting obligations. The judgment also leaves a host of issues unresolved. In particular, it is not clear whether an individual has a right of recourse only against a national supervisory body or also directly against a provider. Although this may depend on national law, a direct right of action against a provider may not be precluded.

### III. ARTICLE 6 TEU: WHAT IS THE ADDED VALUE OF GENERAL PRINCIPLES?

Following the Treaty of Lisbon, Article 6 TEU recognises essentially three sources of fundamental rights: the Charter, the European Convention on Human Rights, and the constitutional traditions common to the Member

<sup>70</sup> The first results following the delivery of the judgment are not encouraging. On 2 July 2014, Google removed from its search engine access to a blog on the financial crisis written by the BBC's economic editor in 2007. The blog mentioned only one individual by name, a senior figure in the financial services industry who was criticised for the investment policy of Merrill Lynch in the years leading to the financial crisis. For details, see *BBC News online*, 2 July 2014, [www.bbc.co.uk/news/business-28130581](http://www.bbc.co.uk/news/business-28130581), accessed on 2 July 2014.

<sup>71</sup> In the circumstances of the case, the ECJ came very close to providing an outcome by giving a strong indication to the referring court. It held that, given the sensitivity of the information for Mr González's private life and the fact that its initial publication had taken place 16 years earlier, in principle he had the right for the link to be removed from the search.



States. The Charter is granted the same legal value as the Treaties,<sup>72</sup> and thus becomes part of primary EU law. Fundamental rights, as guaranteed by the European Convention and as they result from the constitutional traditions common to the Member States, are recognised as general principles of EU law.<sup>73</sup> Article 6, however, is less helpful than it appears on first sight. It does not provide any guidance as to the relationship among the different sources of fundamental rights. It does not differentiate between the Charter and general principles of law as to their effects. It does not draw a priority between them nor does it state that the Charter may give rise to rights but general principles may not. The ambiguity is compounded since the Charter itself is said to contain both rights and principles.<sup>74</sup> Also Article 6 makes reference to the general principles of EU law but does not commit itself as to their function, their status, their ranking or the criteria for their recognition. It appears that, in a spirit of deliberate but ‘constructive ambiguity’, the authors of the Lisbon Treaty left a host of important issues undecided, leaving them in effect in the hands of the judiciary. How then can one shed light on the relationship between the Charter and the general principles of law? One could offer the following reflections.

Following the entry into force of the Lisbon Treaty, the primary point of reference for the protection of fundamental rights should be the Charter. This is in keeping with the intentions of the Treaty authors, which granted the Charter the same value as that of the Treaties, and also the objectives of the Charter as a document which defines the values of the EU polity. Viewing the Charter as the primary source of EU fundamental rights is also more in keeping with national constitutional cultures which, bred in a civil law tradition, feel more comfortable with written lists of rights, however indeterminate, than with case law.<sup>75</sup>

The case law of the ECJ confirms that the Charter is now the primary point of reference.<sup>76</sup> The Charter’s predominance, however, should be seen in context. It does not mean that fundamental rights are exhausted in the Charter. First, the interpretation of the Charter will be informed by the general principles of law. Furthermore, Article 6(3) TEU has been interpreted

<sup>72</sup> Art 6(1) TEU.

<sup>73</sup> Art 6(3) TEU. This corresponds to the pre-Lisbon version of Art 6(2) TEU, although the formulation of Art 6(3) as it currently stands is somewhat different.

<sup>74</sup> See Art 6(1) TEU and Art 52(5) of the Charter and the discussion below.

<sup>75</sup> An example of this is provided by the attitude of the German Federal Constitutional Court towards EU law. See, in particular, the post-*Mangold* judgment of the Bundesverfassungsgericht, BVERFG, 2 BvR 2661/06, 6 July 2010. For the English version, see: [www.bverfg.de/entscheidungen/rs20100706\\_2bvr266106en.html](http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html)

<sup>76</sup> See eg *Kadi II*, n 17 above; *Test Achats*, n 36 above; *Digital Rights Ireland*, n 49 above; *Google Spain*, n 7 above; Case C-426/11 *Alemo-Herron v Parkwood Leisure Ltd*, judgment of 18 July 2013; *Deutsches Weintor eG*, n 7 above; Case C-283/11 *Sky Österreich GmbH*, n 7 above.

as providing an independent source of rights. In *Festersen*,<sup>77</sup> for example, the Court held that the right of a person to move freely and choose his residence, which is guaranteed by Article 2(1) of Protocol No 4 to the ECHR, but is not provided as such in the Charter, is recognised by EU law, and applied it to support the free movement of capital.<sup>78</sup> *Festersen* was decided before the Charter became binding but there is no reason to suggest that the interpretation of Article 6(3) would now be different. Indeed, post-Charter, the ECJ has invoked Strasbourg case law under Article 2(1) of Protocol 4 to supplement treaty provisions on citizenship and free movement.<sup>79</sup> The various sources of rights provided in Article 6 are interrelated in a way which may make it difficult to ascertain the autonomous input of each source but this is not to deny that Article 6(3) can found rights which supplement the Charter. Notably, in *Glatzel* the Court held that the principle of non-discrimination, laid down in Article 21(1) of the Charter, is a particular expression of the principle of equal treatment which is a general principle of EU and is enshrined in Article 20 of the Charter.<sup>80</sup>

One can expect that the general principles of law will, in most cases, be used to influence and morph the interpretation of the Charter rather than establish autonomous, self-standing rights. The provisions of the Charter are so abstract and all-embracing that it is more likely that the ECJ will bring within them any emerging general principles of EU law. Keeping things under one roof makes eminent sense. The Charter itself appears to require that its provisions must be interpreted in the light of general principles of law. In particular, the Charter does not intend to restrict or adversely affect fundamental rights as recognised by Union law,<sup>81</sup> and therefore detract from the level of protection afforded by general principles. It must also be interpreted in harmony with the national constitutional provisions and in accordance with the Convention.<sup>82</sup> The treaty setting therefore provides a framework for the integration of general principles into the interpretation of the Charter. General principles have a substantive, independent input and, as stated above, the possibility exists that they

<sup>77</sup> Case C-370/05 *Festersen* [2007] ECR I-1129, para 36.

<sup>78</sup> In *Festersen* the Court held that Danish law, which required the acquirer of agricultural property to take up fixed residence in that property was a disproportionate restriction on the free movement of capital. In examining the compatibility of the requirement with the free movement of capital, the ECJ took into account the fact that it also interfered with the right to choose freely one's residence as guaranteed by the Convention. This led the Court to characterise it as particularly restrictive and follow a heightened level of review in examining its compatibility with EU law.

<sup>79</sup> See *Byankov*, n 114 below, para 47 referring to *Ignatov v Bulgaria* (Application No 50/02, judgment of 2 July 2009) and *Gochev v Bulgaria* (Application No 34383/03, judgment of 26 November 2009).

<sup>80</sup> Case C-356/12 *Glatzel v Freistaat Bayern*, judgment of 22 May 2014, para 43.

<sup>81</sup> See Charter, Art 53.

<sup>82</sup> See Charter Art 52(4).

may be relied upon as self-standing sources of rights. They also continue to have a value as underlying principles of the constitution which influence the interpretation and application of the law and provide yardsticks for determining the validity of legislation. This applies for example to the principle of protection of legitimate expectations and the principle of legal certainty, which have been used to annul EU measures or determine the scope of their application.<sup>83</sup> Whether, post-Lisbon, reference is made to legal certainty as a self-standing principle or, perhaps, as part of the right to judicial protection is of less importance. The essence is that, by design, Article 6 TEU recognises multiple sources of fundamental rights which are complementary and mutually reinforcing.

Beyond the Charter, the general principles of law continue to serve a number of functions. They serve to fill the *lacunae* of written law. They promote a systematic, teleological and consistent interpretation of the law rationalising polynomy and ensuring coherence.<sup>84</sup> They serve to promote the development of a *jus communae* even in areas which hitherto have been largely untouched by EU law, namely private and criminal law.

Finally, general principles fulfil an important methodological function. Being an integral part of ECJ methodology, they epitomise the incomplete character of the integration bargain and enable the ECJ to engage in a perpetual adjustment of constitutional imperatives. Proportionality, in particular, has developed into a universal standard of constitutionality. The methodology followed by the ECJ in interpreting the Charter is no different from its traditional methodology in applying the general principles of law. If anything, the Charter appears to have inspired a somewhat more coherent rights-based analysis and a higher standard of review.<sup>85</sup>

In the Charter itself the relationship between principles and rights remains uncertain. The Charter appears to draw a distinction between the two but the differences between them are not clear and, to the extent that they are, remain normatively unsatisfactory. Article 51(1) draws a distinction between rights and principles laid down in the Charter. Such a distinction is also made in Article 6(1) TEU and the Preamble to the Charter, which in fact recognises three categories, namely 'rights, freedoms and principles'.<sup>86</sup> The distinction is material since some provisions of the Charter apply only to rights and freedoms but not to principles.<sup>87</sup> Rights are to be observed

<sup>83</sup> See eg Case 120/86 *Mulder v Minister van Landbouw en Visserij (Mulder I)* [1988] ECR 2321; Case C-143/93 *Van eS Douane Agenten v Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-431.

<sup>84</sup> An example of this is the principle of abuse of right which has been recognised by the case law as a general principle of EU law. See eg Case C-321/05 *Hans Markus Kofoed v Skatteministeriet* [2007] ECR I-5795.

<sup>85</sup> See eg *Digital Rights Ireland* and *Google Spain*, n 49 above.

<sup>86</sup> See Charter, Preamble, recital 7.

<sup>87</sup> See Art 52(1) which circumscribes the limitations on the rights defined by the Charter.

whilst principles are to be respected.<sup>88</sup> It is unsatisfactory, however, that the Charter attributes legal significance to a distinction which it assumes but does not explain. Article 53(5) states as follows:

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

According to the Explanations accompanying the Charter, the difference is that, whilst rights give rise to 'direct claims for positive action' by the Union and national authorities, principles must be implemented by legislative or executive action at Union or Member State level and become material only for the purposes of the interpretation or judicial review of such acts.<sup>89</sup> Although these observations go some way towards explaining the differences between principles and rights, the distinction remains elusive. First, there is no reason why articles of the Charter which incorporate principles rather than rights should be denied any interpretative value in the absence of implementing action. Indeed, the value of constitutional principles is precisely to inform the interpretation of normative rules, including those that have not been adopted specifically in order to implement them. This is the case for example with the principle of environmental protection which is proclaimed in Article 37 of the Charter.<sup>90</sup> Secondly, as the Explanations themselves acknowledge, articles of the Charter may incorporate elements of both principles and rights.<sup>91</sup> Thirdly, the normative limitations imposed on principles by Article 53(5) appear somewhat contradictory. The case law has derived rights from general, unwritten principles.<sup>92</sup> By virtue of Article 6(3) TEU, those principles continue to be a source of fundamental rights. The distinction drawn in the Charter therefore does not prevent the Court from ruling that a principle can give rise to enforceable rights.

<sup>88</sup> See Art 51(1). This is reiterated in the Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C303/17/35 For the status of the explanations, see below.

<sup>89</sup> Explanations, *ibid*, p 35.

<sup>90</sup> Examples of provisions which lay down principles rather than rights are Arts 25 (rights of the elderly), Art 26 (integration of persons with disabilities), Art 37 (environmental protection).

<sup>91</sup> This is the case, for example, in relation to Arts 23 (equality between men and women), 33 (family and professional life) and 34 (social security and social assistance). Art 34 was considered in Case C-571/10 *Kamberaj Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] ECR I-0000, *nr*.

<sup>92</sup> See eg *Mangold*, n 28 above.

## IV. SCOPE OF APPLICATION OF THE CHARTER

The determination of the scope of application of the Charter is important both for practical and theoretical reasons. In practical terms, it is necessary to know in what kind of situations the Charter may be invoked. This is particularly so to the extent that its scope of application or the level of protection that it offers is broader or narrower than other sources of fundamental rights provided by national or EU law. In theoretical terms, it raises issues pertaining to the objectives and effect of the EU constitutional model and its relationship with the national constitutions. The broader the scope of application of the Charter, the more the EU asserts its own autonomous constitutional space and the more the Charter can be seen as a replacement of, rather than as a complement to, national constitutional norms.

The scope of the Charter is governed by Article 51. Article 51(2) states that the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify its powers and tasks as defined by the Treaties. Thus, the Union is not transformed into a human rights organisation. The Charter does not apply unless a situation is governed by Union law by virtue of a connecting factor other than the Charter. Also, the Charter may not in itself serve as the basis for the introduction of secondary legislation. The caveat of Article 51(2) is reiterated and supplemented by Article 6(1) TEU, which states that the Charter does not extend in any way the competences of the EU.<sup>93</sup> The same principle is stated in a declaration accompanying the Treaty of Lisbon.<sup>94</sup> Such successive references reveal the sensitivity of the Charter competence dynamic and serve to allay Member State fears of Charter rights' omnipresence. In *Dereci* the Court heeded the limitation of Article 51(2) by separating the application of fundamental rights from the definition of the substantive rights emanating from EU citizenship.<sup>95</sup>

Nonetheless, within the ambit of EU law, there is no limitation *ratione materiae* in the scope of application of the Charter. It applies to all fields of EU policies and activities, including the Common Foreign and Security Policy, although the Court of Justice has only very limited jurisdiction to apply it in that area.<sup>96</sup>

<sup>93</sup> See Art 6(1), sub-para 2, TEU.

<sup>94</sup> See the declaration concerning the Charter annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, signed on 13 December 2007, [2008] OJ C115/337. The declaration received judicial acknowledgment in Case C-339/10 *Asparuhov Estov and Others* [2010] ECR I-11465, para 12.

<sup>95</sup> Case C-256/11 *Dereci v Bundesministerium für Inneres*, judgment of 15 November 2011, paras 71–72; confirmed in Case C-87/12 *Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration*, judgment of 8 May 2013.

<sup>96</sup> Art 24(1) TEU and 275 TFEU.

Under Article 51(1), the Charter applies with due regard to the principle of subsidiarity and has two constituencies. It is addressed to the institutions, bodies, offices and agencies of the Union. It is also addressed to the Member States ‘only when they are implementing Union law’. The following sections will examine, in turn, the application of the Charter to acts of the Member States, acts of EU institutions and, finally, action by private individuals.

## A. National Measures

The application of the Charter to national measures gives rise to problems. On the face of it, Article 51(1) suggests that the Charter applies to Member States only when they implement Union law. A literal understanding of that expression would make its scope of application narrower than the application of fundamental rights as developed by the ECJ. Under the case law, Member States are bound to respect fundamental rights as general principles of law not only when they implement EU law but also when they act within its scope of application, a condition which the Court has progressively interpreted more broadly.<sup>97</sup> The Explanations on Article 51(1) accompanying the Charter provide little help.<sup>98</sup> Confusingly, they refer to the judgments in *Wachauf*, *ERT* and *Karlsson* and recall that, under the case law, ‘the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law’.<sup>99</sup> This appears to suggest that Article 51 is simply a confirmation of the existing case law, and this is how it was understood by Advocate General Trstenjak in the *NS* case.<sup>100</sup>

This view was confirmed by the Court in *Fransson*.<sup>101</sup> The Swedish authorities had imposed criminal and administrative penalties on the applicant for

<sup>97</sup> See above, section II.

<sup>98</sup> See Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C303/17. The explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They were subsequently updated under the responsibility of the Praesidium of the European Convention which drafted the aborted Constitutional Treaty. The Explanations do not as such have the status of law, however, under Art 6(1) TEU and Art 52(7) of the Charter, they must be given due regard by the EU courts and the courts of the Member States.

<sup>99</sup> [2007] OJ C303/17 at 32, referring to Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609; Case C-260/89 *ERT v Dimotiki Etairia Pliroforissis* [1991] ECR I-2925; Case C-309/96 *Annibaldi v Sindaco del Comune di Guidonia* [1997] ECR I-7493; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, para 37.

<sup>100</sup> See Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, judgment of 21 December 2011, [2011] ECR I-865 at para 76 of the Opinion. This is also how it was understood by an English court: *R (Zagorski and Baze) v Secretary of State for Business, Innovation and Skills* [2011] EuLR 315.

<sup>101</sup> Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, judgment of 26 February 2013.

providing false information in his VAT returns. The Swedish law pursuant to which the penalties were imposed had not been adopted specifically in order to implement the VAT directive but contained the general penalties for tax evasion provided by Swedish law. The issue arose whether those penalties were in implementation of EU law. Advocate General Villalón took a narrow view of the scope of application of the Charter. He opined that the mere fact that the exercise of public authority by a national agency has its ultimate origin in EU law does not in itself suffice to establish that a situation involves the implementation of Union law. For EU fundamental right standards to apply there must be a specific interest of the EU in ensuring that the exercise of public authority accords with the interpretation of the fundamental rights of the Union.<sup>102</sup> The ECJ did not follow that view and held that Article 51(1) confirms the case law relating to the scope of application of the general principles.<sup>103</sup>

The Opinion of the Advocate General has merit. His argument was in effect that the Charter should not replace national constitutional standards and that there must be a special EU interest to dislodge the national standard of human rights protection. This contrasts with the ECJ's monist approach which promotes the establishment of a common constitutional space. Still, the Opinion is problematic. First, the criterion that he employs is uncertain. When can it be said that there is 'a specific EU interest' that justifies the application of the EU standard? The Opinion adds a layer of enquiry which cannot be applied easily and is liable to give rise to uncertainties. Secondly, the applicable standard of fundamental rights should not differ depending on whether an EU rule was implemented by national law specifically adopted in order to give it effect or national law of more general application. This would be a random distinction since in both cases the penalty is imposed to enforce the same substantive obligation. Thirdly, unlike the Opinion, the judgment ensures conformity with the scope of application of general principles. It is difficult to see why it would make sense to maintain two sets of fundamental rights sources, namely the unwritten general principles of EU law and the Charter, with differential scopes of application. If the Charter were interpreted to apply to a narrower set of national measures, that would appear to run counter to the proclamation that it is intended simply to 'reaffirm' fundamental rights as they result from the constitutional traditions and international obligations common to the Member States, the ECHR, and the case law of the ECJ.<sup>104</sup> Also, giving to the Charter a narrower scope of application would be likely to prove ineffective. Insofar as the Charter and the case law protect the same rights, the limitation of Article 51(1) would be spineless since, by virtue of the case

<sup>102</sup> See para 40 of the Opinion.

<sup>103</sup> *Fransson*, n 101 above, para 18.

<sup>104</sup> See the Preamble to the Charter, Recital 5.

law, these rights would apply to a wider category of national measures. This is countenanced by Article 53, which states that the protection afforded by the Charter may not fall below the protection guaranteed by other provisions of EU law. It is true that, insofar as the Charter might be said to incorporate rights not expressly acknowledged by the case law on general principles, such rights, by virtue of Article 51(1), would have a narrower scope of application. This, however, would lead to inconsistency and confusion and would be likely to prove unsustainable. Given that the Charter and the general principles of law draw inspiration from the same sources, it makes sense for the ECJ to understand the two as being co-extensive, ie as applying to all national measures falling within the scope of EU law.

Whilst the approach of the ECJ in *Fransson* is preferable to that of the Advocate General, by confirming that Article 51(1) reflects the existing case law, the ECJ in effect transferred all its uncertainties to the Charter. The expression 'scope of application' remains elusive. In *Fransson* itself the Court gave two reasons why the Swedish penalties fell within the scope of application of EU law.<sup>105</sup> First, specific provisions of the VAT directives and Article 4(3) TEU required Member States to take all appropriate measures for ensuring collection and preventing evasion. Secondly, Article 325 TFEU requires Member States to counter fraud affecting EU finances. The Court did not say whether those reasons applied cumulatively, although it appears that at least the first would by itself be sufficient to bring the national regime within the scope of EU law. More generally, any national measure, eg a penalty, which is applied in a specific instance to enforce an obligation flowing from EU law falls within the scope of the Charter even if it might not have originally been adopted in order to give effect to EU law. Its application to give effect to EU law constitutes implementation for the purposes of Article 51(1).<sup>106</sup>

Notably, in *Fransson*, the Court added a 'conciliation' clause. It held that, where a national court reviews the compatibility with fundamental rights of a national measure which implements EU law but does so in a situation where national action is not entirely determined by the latter, the national court remains free to apply national standards of protection, on condition that the level of protection provided for by the Charter, and the primacy, unity and effectiveness of EU law are not compromised.<sup>107</sup> It is,

<sup>105</sup> *Fransson*, n 101 above, paras 25–26.

<sup>106</sup> This follows also from the duty of loyalty provided in Art 4(3) TEU which has been interpreted to require Member States to impose penalties for the infringement of EU law which are effective, proportionate and dissuasive. See e.g. Case 68/88 *Commission v Greece* [1989] ECR 2965, paras 23 and 24; Joined Cases C-387/02, C-391/02 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and Others*, [2005] ECR I-3565, para 53.

<sup>107</sup> *Fransson*, n 101 above, para 29; Case C-399/11 *Melloni v Ministero Fiscal* [2013] ECR I-0000, para 60, nyr.



however, difficult to see what is the added legal value of that clause. It does not provide a power to lower the level of fundamental rights or indeed, as *Melloni* shows,<sup>108</sup> to provide for a higher standard. It is a gesture of flexibility but it is questionable whether it has any hard content.

In *AMS*, decided after *Fransson*, the Court confirmed that the fundamental rights guaranteed in the legal order of the EU are applicable in all situations governed by European Union law without distinguishing among the various sources of rights provided for in Article 6 TEU.<sup>109</sup>

So far, the case law is guided by the express disposition that the Charter does not establish any new power for the Union.<sup>110</sup> In *Asparuhov Estov*<sup>111</sup> the applicants contested national law which prevented them from challenging a ministerial decision on town planning, on the ground that it was incompatible with Article 47 of the Charter, which guarantees the right to an effective remedy. The Court recalled that under the Charter and the settled case law, fundamental rights are binding on Member States whenever they implement European Union law. It also reiterated that the Charter does not establish any new power for the Union or modify its powers. Given that the order for reference did not contain any specific information to show that the contested ministerial decision would constitute a measure implementing European Union law ‘or would be connected in any other way’ with EU law, it declined jurisdiction to answer the question.<sup>112</sup> The same formula was used in *Vinkov*,<sup>113</sup> where a Bulgarian national resident in Bulgaria was fined for causing a road accident in Sofia. He challenged the unavailability of appeal under Bulgarian law as being contrary to Articles 47 and 48 of the Charter but the Court refused to answer the question for lack of connection with EU law.<sup>114</sup> A similar approach has been followed in other cases.<sup>115</sup> Those cases appear to confirm that the fact that an area falls within the potential competence of the EU, ie, within shared competence where the EU can potentially legislate, does not suffice for the Charter or general principles of law to apply. It would be otherwise if the area fell

<sup>108</sup> *Ibid.*

<sup>109</sup> Case C-176/12 *AMS v Union locale des syndicats CGT*, judgment of 15 January 2014, para 42.

<sup>110</sup> See above, Art 51(2) of the Charter and Art 6(1) TEU.

<sup>111</sup> Case C-339/10 *Asparuhov Estov and Others v Ministerski savet na Republika Bulgaria* [2010] ECR I-11465.

<sup>112</sup> *Ibid.*, para 14.

<sup>113</sup> Case C-27/11 *Vinkov v Nachalnik Administrativno-nakazatelna deynost*, judgment of 7 June 2012.

<sup>114</sup> See *ibid.*, para 59.

<sup>115</sup> See Case C-457/09 *Chartry v État belge*, order of 1 March 2011; Joined Cases C-483/11 and C-484/11 *Boncea and Others v Statul roman and Budan v Statul roman*, order of 14 December 2011; and see in relation to austerity measures: Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial—Companhia de Seguros SA*, order of 26 June 2014 and Case C-128/12 *Sindicato dos Bancários do Norte v BPN—Banco Português de Negócios SA*, Order of 7 March 2013.

within the exclusive competence of the EU or if the national measure in issue affected inter-state movement.<sup>116</sup>

In *Siragusa*,<sup>117</sup> the Court provided some further guidelines as to when a measure would be considered to fall within the scope of the Charter. Mr Siragusa was required to dismantle a building on the ground that it had been built in breach of an Italian law protecting cultural heritage and the landscape. The referring court raised the question whether the rigidity of Italian law was compatible with the right to property as guaranteed by the Charter, referring to the Aarhus Convention and a number of provisions of EU environmental law. None of those, however, appeared to have any link with the facts of the case or the decision of the Italian authorities ordering demolition.<sup>118</sup> The Court accepted that there was a connection between the proceedings and EU environmental law since protection of the landscape is an aspect of environmental protection. It held, however, that the concept of implementing Union law under Article 51 of the Charter requires ‘a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other’.<sup>119</sup> In determining whether a national measure implements EU law, the Court will take into account, among other things, the following factors: whether the measure is intended to implement a provision of EU law; the nature of that measure 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.<sup>120</sup>

Whilst there is still a considerable degree of indeterminacy, the test followed by the Court appears to be primarily objectives-based and effects-based: if national legislation pursues the same objectives as those pursued by EU law, then it will fall within the ambit of the Charter provided that the

<sup>116</sup> See eg Case C-249/11 *Byankov v Glaven sekretar na Ministerstvo na vatrešnite raboti*, judgment of 4 October 2012, where the Court found that national law which prohibited the applicant from leaving the national territory on the ground that he had unpaid debts to private parties was within the scope of EU law and contrary to it. The Court held that any national measure which affects inter-state movement falls within the scope of EU law irrespective of whether it is intended to implement or affect it: para 33 and Case C-434/10 *Aladzov v Zamestnik direktor na Stolichna direktsia na vatrešnite raboti kam Ministerstvo na vatrešnite raboti* [2011] ECR I-11659, paras 31–32.

<sup>117</sup> Case C-206/13 *Siragusa v Regione Sicilia—Soprintendenza Beni Culturali e Ambientali di Palermo*, judgment of 6 March 2014.

<sup>118</sup> The national court referred to Council Decision 2005/370 approving the Aarhus Convention, Council Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to EU institutions, Directive 2003/4 on public access to environmental information, Directive 2011/92 on environmental impact assessment, Arts 3(3) TEU and 21(2)(f) TEU, and Arts 4(2)(e), 11, 114 and 191 TFEU. Cf Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia*, judgment of 15 January 2013, where a link with EU environmental law was established.

<sup>119</sup> *Siragusa*, n 117 above, para 24.

<sup>120</sup> Para 25.

EU objectives are sufficiently concretised. The fact that national legislation falls within the potential scope of EU shared competence does not by itself suffice to activate the application of EU standards. Also, the measure will fall within the scope of EU law if it affects EU dispositions sufficiently directly. The rationale of this approach is based on the objectives of applying EU fundamental rights. The reason for applying EU rights to national action is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States.<sup>121</sup> The determination of the scope of application of EU law is guided by the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law.<sup>122</sup>

Although this appears to be a neat construct, in truth, a close analysis of the judgment suggests that the criteria remain uncertain. The fact that national legislation indirectly affects EU law is not in itself sufficient to trigger the application of EU fundamental rights standards but how direct do the effects need to be? The criteria articulated leave the Court good discretion to adopt different models.

In *Siragusa*, the ECJ also reiterated that the scope of application of general principles is the same as that of the Charter. After finding that the Italian measure could not be considered to fall within the scope of application of EU law, it followed by the same token that the Court did not have jurisdiction to apply the principle of proportionality.<sup>123</sup>

A further case which deserves attention is *NS*.<sup>124</sup> There, Article 51(1) became relevant in the context of the common European Asylum System. Regulation No 343/2003<sup>125</sup> lays down a list of criteria for determining the Member State responsible for examining an asylum application lodged in one of the Member States. Article 3(2) states that, by way of derogation, each Member State may examine an application for asylum lodged with it even if such examination is not its responsibility under the criteria. The issue arose whether, in taking the decision to examine a claim under Article 3(2), a Member State is implementing EU law within the meaning of Article 51(1). A number of Governments argued that a decision under Article 3(2) does not fall within the scope of EU law since it involves a discretionary power the exercise of which is an expression of national sovereignty. The Court, however, did not accept that argument. Article 3(2)

<sup>121</sup> Para 31.

<sup>122</sup> Para 32.

<sup>123</sup> Para 35.

<sup>124</sup> Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, judgment of 21 December 2011.

<sup>125</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 ([2003] OJ L50/1).

granted Member States a discretionary power which formed an integral part of the Common European Asylum System provided for by EU law.<sup>126</sup> Furthermore, Regulation 343/2003 laid down comprehensive rules governing the legal consequences of such a decision. Thus, a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of Regulation No 343/2003 and must, where appropriate, inform the other Member States concerned by the asylum application.<sup>127</sup>

Thus, according to *NS*, the conferment of discretion on Member States makes the discretionary power subject to the normative framework of EU law and therefore not only the actual exercise of that discretion but also the decision whether to exercise it or not is reviewable on grounds of compatibility with the Charter.

## B. EU Institutions

In general, the application of the Charter to EU acts of the EU institutions does not give rise to problems. An interesting issue, however, is whether the Charter may be said to apply to action undertaken under parallel international treaties concluded by Member States in the field of economic and monetary affairs. In *Pringle*,<sup>128</sup> the ECJ appeared to adopt a narrow interpretation. The issue raised was whether the establishment of the European Stability Mechanism (ESM) by the ESM Treaty was in breach of Article 47 of the Charter. The Court held that, since the founding Treaties did not confer any specific competence on the Union to establish the ESM, by doing so through an international treaty, the Member States were not acting within the scope of EU law.<sup>129</sup> The judgment, however, does not suggest that action undertaken under the ESM is beyond the reach of the Charter. The ruling is much narrower. The Court held that the general principle of effective judicial protection did not preclude either the conclusion or the ratification of the ESM Treaty by the Member States whose currency is the euro.<sup>130</sup>

It is submitted that action undertaken by the EU institutions pursuant to the ESM Treaty remains subject to the Charter. First, the ESM Treaty is intended to supplement the EU framework and promote the objectives of economic union and safeguard the financial stability of the euro area.<sup>131</sup> Both in terms of its substantive objectives and its institutional support,

<sup>126</sup> *NS*, n 124 above, para 66.

<sup>127</sup> Para 67.

<sup>128</sup> Case C-370/12 *Pringle v Government of Ireland*, judgment of 27 November 2012.

<sup>129</sup> *Ibid*, para 180.

<sup>130</sup> *Ibid*, para 181.

<sup>131</sup> See Art 12(1) of the ESM Treaty.

it is not self-standing but operates as a satellite treaty which falls within the broader project of European integration. It must therefore operate within the confines of Article 6 TEU, which, as the Court held in *Kadi I*, is all-embracing.<sup>132</sup> Secondly, the language of Article 51(1) of the Charter suggests that it applies to EU institutions irrespective of whether they act under EU law or under a mandate lawfully granted to them by the Member States. The extension of the Charter to institutional measures does not in any way increase the powers of the EU. Thirdly, Article 14(3) of the ESM Treaty expressly provides that the Memorandum of Understanding which details the conditions attached to the financial assistance granted to a Member State, and which is signed by the Commission, must be fully consistent with the measures of economic policy coordination provided for in the TFEU. Those, in turn, should be taken to include the constitutional standards of the Charter.

The issue whether national action undertaken by a Member State pursuant to the ESM Treaty may be reviewed in accordance with the Charter remains open. It is submitted however that, in principle, insofar as such action is required to comply with agreements or measures adopted by the EU institutions, it is implementing action that must comply with the Charter. The opposite solution would create a significant gap in the rule of law. It would result in a situation where national authorities were not bound by the same standards as the EU institutions even though they acted as agents of the latter. It would be incongruous to follow an interpretation where the EU institutions could avoid the obligation to comply with EU standards by delegating implementation to Member States.

### C. Horizontal Application

A further question which arises here is this: Is it possible for the Charter to bind individuals? In *Dominguez*,<sup>133</sup> Advocate General Trstenjak read Article 51(1) as precluding the horizontal effect of the Charter relying on an *a contrario* argument. Since the text of the provision makes the Charter binding on the EU institutions and the Member States, it appears to exclude its binding effect vis-à-vis private parties.<sup>134</sup> As a further argument, the Advocate General stated that individuals cannot satisfy the legislative proviso contained in Article 52(1) of the Charter under which any limitation

<sup>132</sup> See *Kadi I*, n 11 above.

<sup>133</sup> Case C-282/10 *Dominguez v Centre informatique du Centre Ouest Atlantique (CICOA)*, judgment 24 January 2012.

<sup>134</sup> The Presidium Explanations accompanying the Charter state that it applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law. See Explanations, n 88 above, at 32.

on the exercise of rights and freedoms recognised therein must be provided for by law. Finally, she added that the system of protection of fundamental rights provided for in the ECHR showed that it is not absolutely essential for fundamental rights to be directly binding on private individuals in order to guarantee reasonable protection.<sup>135</sup>

Despite those arguments, it is submitted that the Charter may produce at least indirect horizontal effect. Horizontality may take many forms.<sup>136</sup> As an instrument of primary law, the Charter has a strong interpretative force. It may thus be used for the interpretation of private obligations and state measures which affect private relations. Furthermore, courts may be required not to apply measures which regulate private relations where they offend fundamental rights. More broadly, courts, as agents of the state, are bound to uphold fundamental rights. They may therefore be bound not to give effect to private obligations which breach fundamental rights. The possibility of direct horizontality, where a private party relies directly on a Charter right against another party, also exists. Much will depend on the right invoked, the circumstances of the case, and the relationship between the parties. Some articles specifically include private parties as their addressees.<sup>137</sup> Even though Article 52(1) links the legitimacy of limitations on fundamental rights with the authority of the state to pass laws, this does not preclude the possibility that a private entity may breach the core element of a fundamental right or non-derogable aspects of it. Notably, in some cases such as *Mangold*, the ECJ has accepted that general principles of law may produce some kind of horizontal effect and that it would be best to grant the Charter a co-terminous scope of application of its provisions in relations between individuals. The most important question is not, perhaps, determining the addressee of a fundamental right but ascertaining whether it has a clear and precise minimum normative content which may be said to have been breached in the circumstances of the case.

The approach suggested above is consistent with the judgment in *AMS*.<sup>138</sup> In that case, the Court was concerned with Article 27 of the Charter which

<sup>135</sup> See para 84 of the Opinion, n 133 above.

<sup>136</sup> For an extensive discussion, see T Tridimas, 'Horizontal Effect of General Principles: Bold Rulings and Fine Distinctions' in U Bernitz, X Groussot and F Schulyok (eds), *General Principles of EU Laws and European Private Law* (London, Kluwer Law International, 2013) 213–32.

<sup>137</sup> See eg Art 24(2) which states that 'in all actions relating to children, whether taken by public authorities or *private institutions*, the child's best interests must be a primary consideration' (emphasis added). This provision is based on the New York Convention on the Rights of the Child signed on 20 November 1989. It was considered (but not in a horizontal situation) in Case C-648/11 R (*on the application of MA and Others*) v *Secretary of State for the Home Department*, judgment of 6 June 2013, nyr.

<sup>138</sup> Case C-176/12 *Association de médiation sociale (AMS) v Union locale des syndicats CGT*, judgment of 15 January 2014, nyr.

provides for workers' rights to consultation and information<sup>139</sup> and the exercise of which is governed by Directive 2002/14.<sup>140</sup> Article 3(1) of the Directive states that its provisions apply to undertakings employing at least 50 employees but leaves to the Member States the determination of the method for calculating the thresholds of persons employed. AMS, a French private law association, had brought proceedings against a trade union seeking to annul the appointment by the union of a workers' representative. It argued that it had fewer than 11 employees which, under the French law implementing the directive, was the threshold for the obligation to appoint staff representatives. French law excluded certain categories of employees for the purposes of calculating the threshold but, if those categories were included, AMS would have more than 50 employees, the number triggering the application of the directive. The Cour de Cassation asked whether Article 27 of the Charter could be invoked by itself or in conjunction with Directive 2002/14 in a dispute between private individuals in order to set aside a national law.

The Court held that the directive imposed a clear and precise obligation and that a national measure which excluded from the calculation of the staff numbers a specific category of employees was incompatible with it. Given, however, the status of AMS as a private law association, it was not possible for the trade union to rely on the directive against AMS. Nor could the interpretative duty imposed by *Marleasing*<sup>141</sup> force an interpretation consistent with the directive given the clear provisions of French law. The Court then proceeded to examine whether the trade union could rely on Article 27 of the Charter. It held that, since that article guarantees the right to consultation in the cases and under the conditions provided by EU law and national law, it could not be fully effective by itself. It did not incorporate a directly applicable rule of law.<sup>142</sup> The Court distinguished the case from *Küçükdeveci*<sup>143</sup> on the ground that the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, was sufficient in itself to confer rights on individuals. It followed that Article 27 could not be invoked to set aside a national provision incompatible with the directive.

<sup>139</sup> Art 27 states as follows: 'Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices'.

<sup>140</sup> Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29.

<sup>141</sup> Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

<sup>142</sup> AMS, n 138 above, para 46. See, to the same effect in relation to Art 26 of the Charter, Case C-356/12 *Glatzel v Freistaat Bayern*, judgment of 22 May 2014, para 78.

<sup>143</sup> *Ibid.* Case C-555/07 *Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365, para 46.

AMS does not exclude the horizontal effect of the Charter. The case affirms that Article 27 does not provide for a sufficiently concretised right and therefore it cannot by itself give rise to rights either in a vertical or in a horizontal situation. One might even argue that, if the Court considered that the Charter may never produce horizontal effect, it would have dismissed the arguments on that ground without entering into the discussion of direct effect. From that perspective, the Court's reasoning may be seen as an endorsement rather than a rejection of the argument that, in appropriate circumstances, the Charter, as the general principles of law, may produce at least indirect horizontality.

## V. CONCLUSION

In the last decade, the ECJ has both broadened and deepened its human rights jurisdiction. In an effort to enhance the legitimacy of the Union, it seeks to provide a one-stop forum for the protection of fundamental rights. This, in turn, defines its relative position vis-à-vis Strasbourg and the national constitutional courts. The case law projects an inclusive, centralised approach to the protection of fundamental rights placing the Charter at the apex of the edifice. The Court has been particularly activist in three areas: the right to judicial protection, the principle of non-discrimination, and the right to privacy. The case law can be seen as a triumph for individual rights but, as *Google Spain* shows, it is by no means unproblematic. Despite the fact that the Charter is the primary source for the protection of fundamental rights, the general principles of law remain important, their protean nature enabling the Court to adjust outcomes in line with constitutional imperatives. The methodology of the Court remains the same. Proportionality, in particular, has evolved to a pre-eminent balancing tool, and the standard of scrutiny seems to be higher in the post-Charter era.