

The EU Charter of Fundamental Rights before national courts and non-judicial human rights bodies



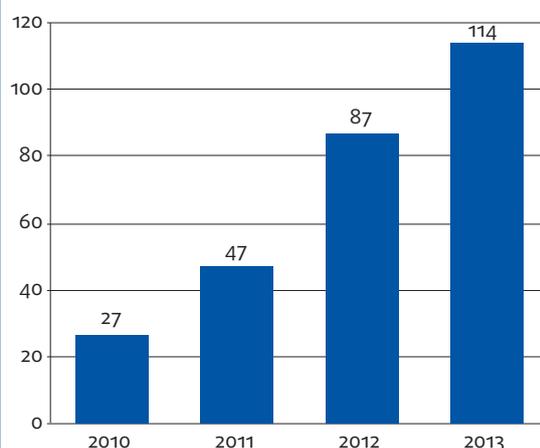
The Charter of Fundamental Rights of the European Union (Charter), the EU's human rights bill, expresses the values at the heart of the Union which all Member States have pledged to uphold. Although a new instrument, it is gaining in use and prominence. As the Charter approaches its fifth anniversary as a binding document in December 2014, it is timely to explore its impact. Much is already known about how the Charter works at the level of the EU. Indeed, the Charter primarily addresses the EU, including its institutions and bodies. However, there is more to the Charter, namely its use at national level. The Charter binds the EU Member States and thereby all its authorities at various levels of governance, including regions or municipalities when they are acting in the scope of EU law. One indicator of how the Charter penetrates national legal systems is its use in national court rooms. For the first time, the FRA Annual report looks at national court judgments and the use of the Charter by national bodies with a human rights remit such as national human rights institutions, equality bodies and Ombudsperson institutions, thereby throwing light on a lesser-known side of the Charter's life.

The Charter of Fundamental Rights of the European Union (Charter) is cited across EU legislative and administrative acts, European Parliament petitions and European Ombudsman cases. Similarly, it is carving an ever deeper imprint into jurisprudence, with a steady rise in mentions of its provisions by the Court of Justice of the European Union (CJEU). The number of decisions in which the CJEU (in all its formations: Court of Justice, General Court and Civil Service Tribunal) quotes the Charter in its reasoning, for example, more than quadrupled in three years to 114 decisions in 2013 from 27 in 2010 (some 7 % of the total number of decisions in 2013 as opposed to 2 % in 2010, see [Figure 0.1](#)),¹ whereas the general number of CJEU decisions in the same time increased only from 1,152 in 2010 to 1,587 in 2013 – a rise in three years of almost 38 %. In 2013 alone, the CJEU referenced the Charter more often than in the nine years from the Charter's proclamation in late 2000 to the end of 2009, when it became legally binding with the entry into force of the Lisbon Treaty.

The CJEU's increasing number of citations makes the Charter relevant in practice, as demonstrated by the greater interest from national courts which can refer cases to the CJEU. Such requests for preliminary rulings by national courts invoking the Charter increased from

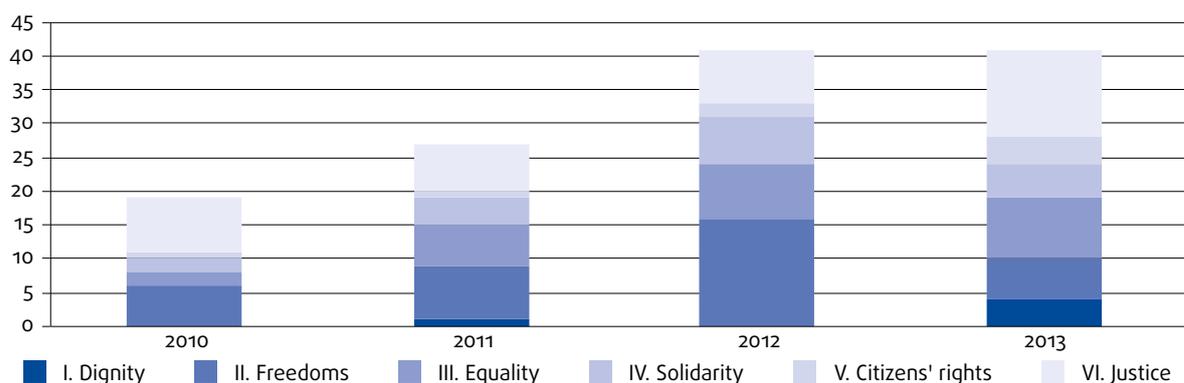
18 in 2010 to 27 in 2011² and reached 41 in 2012. In 2013, 9 % of the cases that national courts referred to the CJEU (41 of them) cited the Charter.³ [Figure 0.2](#) shows the rise in such references over the years and the Charter title that the courts referenced.

Figure 0.1: Number of decisions in which the CJEU references the Charter in its reasoning, 2010–2013



Source: FRA 2013, based on CJEU data

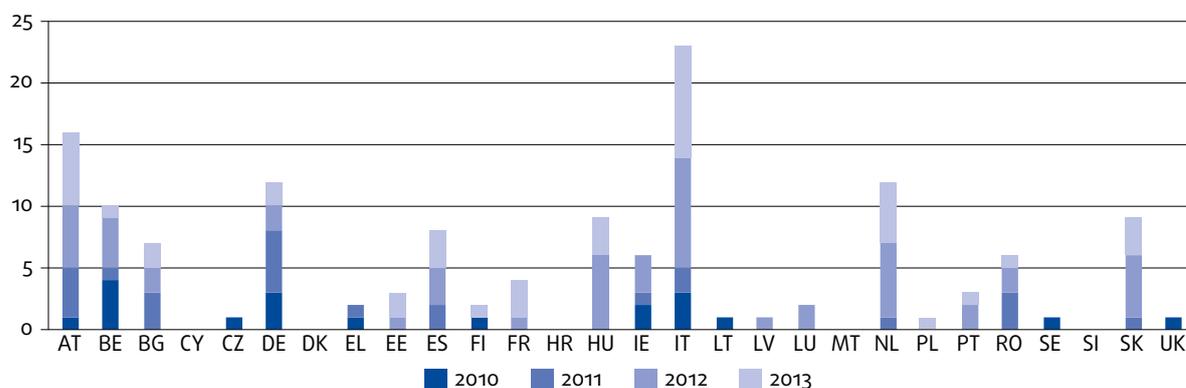
Figure 0.2: Total number of requests for preliminary rulings in which national courts mention the Charter, by Charter title, 2010–2013



Note: This chart excludes cases concerned with Title VII (general provisions) of the Charter.

Source: European Commission (2014), 2013 report on the application of the EU Charter of Fundamental Rights, p. 8

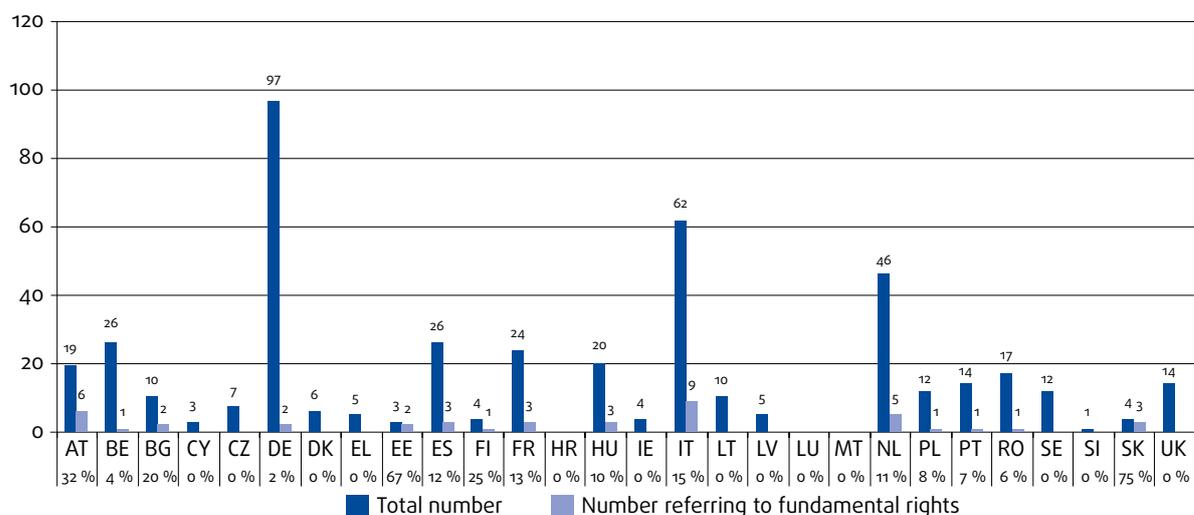
Figure 0.3: Number of requests for preliminary rulings in which national courts mention the Charter, by EU Member State, 2010–2013



Note: Croatia is included as from the date it joined the EU, 1 July 2013.

Source: Data available with the European Commission

Figure 0.4: Requests for preliminary rulings: total number and number referring to the Charter, by EU Member State, 2013



Note: The percentage figure below the country code corresponds to the share of requests for preliminary rulings referring to the EU Charter of Fundamental Rights.

Source: FRA 2014; CJEU (2014), Annual Report 2013

When looking at the EU Member States' courts and how often they refer to the Charter when approaching the CJEU for a preliminary ruling, no overall trend appears. As shown in [Figure 0.3](#), **Austria** shows a definite rise in Charter-related requests, but most Member States do not display such a clear-cut trend (e.g. **Belgium, Bulgaria, Ireland** and **Italy**). Some Member States' courts have yet to make a single reference to the Charter in their requests for preliminary rulings by the CJEU since the Charter entered into force. Besides **Croatia**, which joined the EU only in July 2013, this applies to **Cyprus, Denmark, Hungary** and **Slovenia**.

However, national courts also use the Charter beyond requests to the CJEU for preliminary rulings. Indeed, only a fraction of cases in which national courts refer to the Charter reach the CJEU. The Charter is regularly used in national courtrooms. Nevertheless, so far the attention has been focused on the EU institutions' Charter use, for instance before the CJEU.⁴ Less light has been thrown on how national courts use the Charter.⁵

Given that EU law is mainly implemented at national level through national institutions, the national judiciary's use of the Charter is an important facet to examine. Every judge at national level serves two masters, the national and EU systems, and has hence to apply – where appropriate – EU law, including the Charter. In fact, national courts began using the Charter before it became legally binding. In some of these cases, they even used the Charter to prevent the application of contradictory national norms.⁶ It thus appears timely and important to take up the Council of the European Union's recent call and follow the Charter's use in national courtrooms.

“The Council considers it important to follow developments in evolving case-law and notes the Fundamental Rights Agency's work in publishing regular updates in this regard.”

Council of the European Union (2013), Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Justice and Home Affairs Council meeting Luxembourg, 6 and 7 June 2013, Point 2, available at: www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/137404.pdf

To examine national developments, FRA asked its Franet contractors to provide key information across the 28 EU Member States on national case law referring to the Charter. More specifically, FRA requested information on up to five national judgments, preferably from the highest courts, including constitutional courts, supreme courts and the highest administrative courts which used the Charter in their reasoning.

For **Belgium, Bulgaria, Slovenia** and **Sweden**, Franet experts did not identify any judgments satisfying this request. For the other Member States, FRA received information on 70 judgments altogether, 50 of which were delivered by a high court. Since the national experts were asked to identify the five most relevant

judgments and in many Member States fewer than five were found, this set of judgments probably represents a good proportion of the most relevant 2013 Charter references made before the 28 EU Member States' national courts. Nevertheless, the sample is still limited, since references to the Charter before lower courts will often not be traceable because these sorts of decisions are not public and courts' registers do not mark Charter references.

Very often, the national court only reports that parties referred to the Charter but does not picking up the Charter in its own legal arguments. In **Belgium**, for instance, the Constitutional Court in 2013 handed down judgments referring to Article 47, Article 18 and Articles 20, 21, 26 and 34 of the Charter without relying on these provisions in its own reasoning.⁷ The 70 judgments that were included in the sample did not contain such references to the Charter.

The Charter's 'national life' also unfolds outside the courtroom before other bodies with a human rights remit, such as national human rights institutions (NHRIs), equality bodies and Ombudsperson institutions. Therefore, this chapter offers some additional information on the use of the Charter outside courtrooms in the [Section](#) on 'How non-judicial bodies at national level use the Charter'.

How national courts deploy the Charter

The most relevant policy fields

Of the relevant judgments that national courts handed down in 2013, the most prevalent substantive areas were on asylum and immigration. Out of the 70 judgments analysed for the year 2013, the largest group, namely 14 judgments, concerned these two fields. Other prominent areas for the year were tax law (nine judgments) and consumer protection (six judgments). There were also four judgments in each of the following fields: employment, social security, expropriation/compensation and administrative procedures. These findings are similar to those of 2012, when FRA looked into 240 national judgments by 15 EU Member States' courts and found that half dealt with asylum and immigration issues.⁸ Asylum and immigration unsurprisingly comprise the lion's share of rulings, because they are defined principally by EU secondary law and are highly sensitive from a fundamental rights point of view.

The patterns of reference to the Charter differ between national and CJEU judgments. For the CJEU, 114 decisions referred to the Charter in 2013;⁹ in contrast to national courts, these judgments dealt principally with the EU

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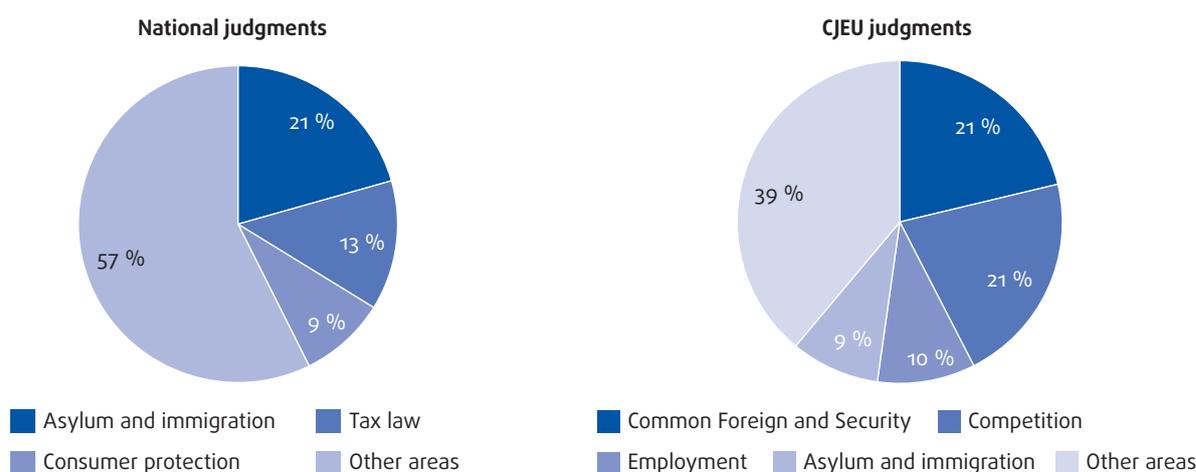
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Figure 0.5: Charter-related judgments, national or CJEU, by policy area (%)



Source: FRA, 2013, own data

Common Foreign and Security Policy, as well as with competition policies. The EU plays a strong role in both these fields, with competition policy a prime example of an area in which the EU is also entrusted with implementation. Other very prominent areas – again, similar to the situation before national courts – included employment (particularly employment at EU institutions), and asylum and immigration.

Charter rights that receive most prominent use

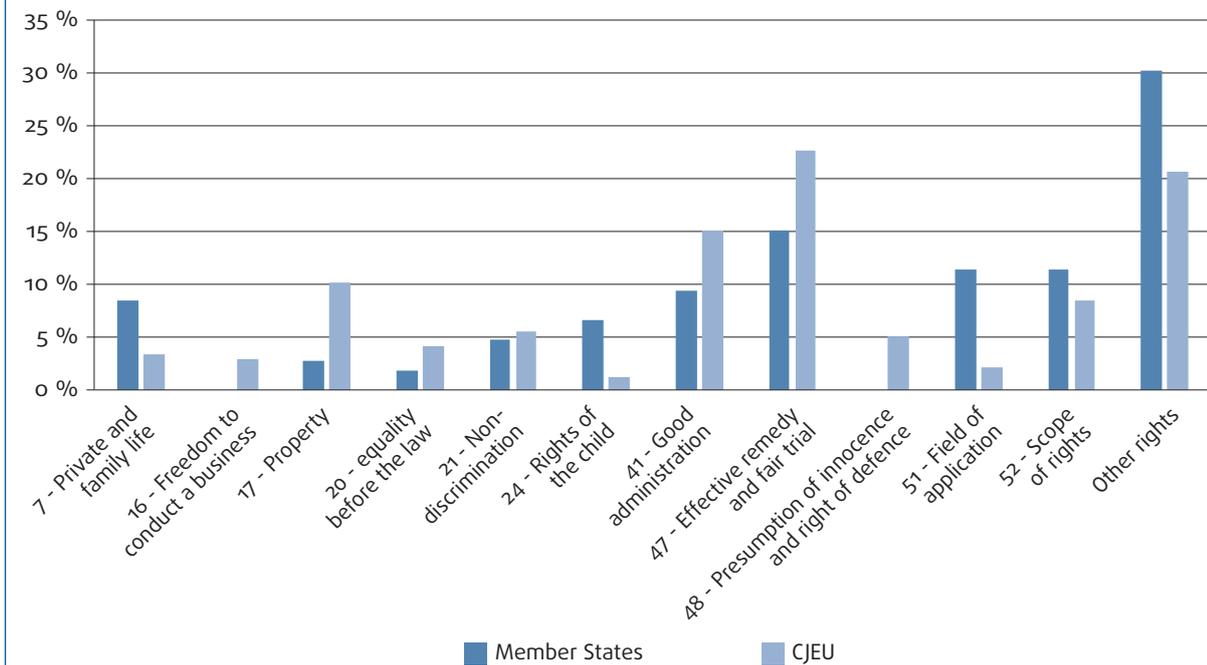
The right to an effective remedy and a fair trial (Article 47) was the Charter right most frequently referred to in national courtrooms. Indeed, this right and the right to good administration (Article 41) together accounted for almost a quarter (23 %) of all the national references analysed. The Charter’s horizontal provisions on its application and scope (Articles 51 and 52) represent almost another quarter (22 %) of the national judgments. The right to privacy and family life (Article 7), the rights of the child (Article 24) and the right to non-discrimination (Article 21) were referred to in one in five of the cases (19 %) analysed. Additionally, 25 of the remaining Charter articles received one or two references.

In the national judgments analysed, 22 Charter articles received no mention at all. These concern some rights not easily compromised by EU law, including the right to life (Article 2), the right to the integrity of the person (Article 3) and the prohibition of slavery and forced labour (Article 5). Others left unmentioned concern rights that are especially relevant to policy fields where the EU’s competence is limited, such as the right to marry and found a family (Article 9), the freedom of arts and science (Article 13) or the right to education (Article 14). It is also not surprising that national courts

failed to refer to rights that address the EU level, such as the right to access to documents (Article 42), related to the European Ombudsman (Article 43), the right to petition (Article 44), or diplomatic and consular protection (Article 46). An easy explanation does not, however, suggest itself for the entire picture. Of the 12 rights listed under the Charter’s ‘solidarity’ title, for instance, the national judgments analysed made no mention of eight.

When comparing the 2013 national court decisions analysed with the 114 CJEU decisions that refer to the Charter, both differences and similarities emerge. The right to an effective remedy and a fair trial is used most often, at both the EU and national levels. The right to good administration comes second, again in both CJEU and national court references. Finally, both the CJEU and national courts give the right to non-discrimination similar importance. However, these 2013 judgments also reveal differences. Close to 10 % of the national judgments analysed referred to the rights of the child, but the CJEU share is much smaller: it mentioned Article 24 in just three of its 114 Charter-related decisions. The right to private and family life (Article 7) also features more prominently in the national cases analysed than in the CJEU’s 2013 decisions. In contrast, the CJEU refers more often to the right to property (Article 17) and the freedom to conduct a business (Article 16). With regard to the horizontal provisions in Title VII of the Charter, national courts often referred to the Charter’s field of application (Article 51). The CJEU invoked this article less often, preferring instead to refer to the scope and interpretation of rights and principles (Article 52). This reflects the nature of the articles. Article 51 incorporates EU Member States as Charter addressees, whereas the Charter’s interpretation (Article 52) falls as a core task to the CJEU as interpreter of EU primary law.

Figure o.6: References to Charter articles in national court and CJEU decisions, by article (% of total Charter references in decisions analysed)



Note: The category 'other rights' contains different rights for national courts and the CJEU.

Source: FRA, 2014

The reach of the Charter and the scope of EU law

National procedural laws differ substantially on the degree to which the arguments put forward by the parties determine the scope of the proceedings. Consequently, whether or not a Court can raise a 'Charter argument' independently (*ex officio*) differs from state to state.¹⁰ In 2013, out of the 70 cases examined, 31 included an earlier invocation by parties. In a further 33 cases, the adjudicating Court raised the Charter as a legal argument in its reasoning without the parties having done so.¹¹ Thus, the Charter enters national courtrooms not only by the initiative of the parties but also through the national courts, which themselves often invoke the Charter as a legal source.

Since the Charter addresses the EU Member States "only when they are implementing Union law" (Article 51), one critical argument for a national court to refer to the Charter would seem to be that EU law applies to the case at hand. Although this holds true in part for courts, parties do not necessarily appear to check whether or not EU law applies. However, there are also national judgments in which the Court uses the Charter in its reasoning in cases that do not display any link with EU law. In most of these cases, the Charter was referred to in a rather superficial manner; the court did not explicitly state whether or not the Charter directly applies. In any event, the Charter did

not appear to make any difference to the outcome of these cases.

The Charter was invoked, as were other international documents, in, for instance, a **Czech Republic** case concerning the violation of human dignity. A woman who was chained to a toilet for four hours in a psychiatric hospital died, allegedly as a result of insufficient supervision.¹² In other cases, the Charter functioned as an "additional confirmation" of the rights guaranteed by the European Convention of Human Rights (ECHR).¹³ In cases appearing to fall outside the scope of EU law, the Charter often served to strengthen rights guaranteed by national constitutional law. In a judgment from **Portugal**, for instance, Article 53 of the Constitution, laying down the right to job security, is described as central element in the constitutional architecture whose "extreme importance [...] is [...] consolidated by its condition as a principle of European public law, as stated in [...] Article 30 of the EU Charter of Fundamental Rights".¹⁴ Sometimes national courts used the Charter to interpret national law. In an **Italian** case concerning gender balance in an executive body of a municipality, the court referred to Charter Articles 21 and 23, concluding that "a normative *corpus* exists and it should become the tool for interpreting the domestic legal order".¹⁵ Another Italian court judgment, while recognising that the Charter did not apply to the case at hand, seemed to say that this would not necessarily limit its interpretative value. The Italian court underlined that

the Charter was an expression of common principles of European legal systems and therefore had – as a source of interpretation – a function within the national legal system even outside the scope of EU law.¹⁶

In contrast, however, other national courts have denied the Charter’s interpretive function precisely because they recognise the case as falling outside the scope of EU law. In a judgment from **Portugal**, for instance, the court recalls that the Charter applies to the EU Member States only when they are implementing EU law. Accordingly, the constitutional court found that the interpretation of what is the right to a fair trial as enshrined in the Portuguese Constitution is not “directly bound up in the hermeneutical assessment emitted by the Charter”. Rather, what should apply is an “autonomous interpretation, founded within the precinct of internal constitutional rule-making, even”, the court continues, “if it is unable to disregard the enlightening function of other external sources about the contents of the fundamental rights in question”.¹⁷

When the national courts examine whether or not the facts of a case fall within the scope of EU law, their approaches differ widely. In some judgments, a detailed assessment is provided. This assessment sometimes includes reference to the case law of the CJEU in general or to specific judgments. An **Austrian** court,¹⁸ for instance referred to the CJEU judgment in the *Åkerberg-Fransson* case¹⁹ and a **Danish** court²⁰ referred to the CJEU judgment in the *Marks & Spencer* case.²¹ In some judgments, the national court even provides a detailed assessment of the facts of the case against the CJEU’s case law concerning the scope of law. Such was the case when an **Irish** court referred to the CJEU judgment in the *Zambrano* case and the subsequent CJEU case law, and presented the respective principles of EU law.²² There are also examples where judgments deal with the scope of EU law by referring to statements in earlier national court judgments or opinions from academic literature.²³

At the other end of the spectrum, there are national judgments that do not even raise the question of the Charter’s applicability and yet nevertheless provide an interpretation of the Charter. In a **Slovak Republic** case, for instance, a regional court invoked the Charter without examining its scope and applicability and stated that “Article 98” would oblige all EU Member States to ensure a high level of consumer protection. What is meant, instead, is obviously Article 38, not 98, and it merely states that “Union policies [not Member States] shall ensure a high level of consumer protection”.²⁴

In general, it appears that national courts do not consistently address in their judgments the question of whether or not the Charter applies. While national courts frequently quoted Article 51 on the field of application of the Charter, such a reference rarely led them to

decide how the situation at stake would qualify under this provision.²⁵ Equally, few judgments provide an interpretation of Article 51, even if they identify a wider or a more restrictive reading of the Charter’s scope. A judgment from **Malta** might serve as an example of the latter type of reading. The Maltese court stated that the Charter was “totally unrelated [to the facts of the case] as the rights in the Charter only apply to administrative acts of the European Institutions and to the regulations, directives and decisions emerging from the Treaties”.²⁶

The standing of the Charter in the national legal system

In many cases analysed, the Charter was used to add (additional) legal heft to the interpretation of a national law provision, including cases dealing with national constitutional law. To give an example from **Spain**, the Constitutional Court referred to its standing case law when stating that treaties and international agreements including EU law may constitute “valuable interpretive criteria of the meaning and scope of the rights and freedoms recognised by the Constitution”. The court underlined that these “valuable interpretive criteria” also includes the interpretation developed by the organs established in those treaties and international agreements.²⁷ Such judgments reveal that the Charter’s guiding function is not necessarily limited to cases where EU law in general and the Charter in particular apply.²⁸

Less frequent were judgments using the Charter to interpret EU secondary law, although there is an example from **France** in the context of the Free Movement Directive (2004/38/EC). There are also cases where the Charter, secondary law and national law implementing EU legislation are looked at from the perspective of a triangular relationship, as a **German** judgment did. At stake was the scope of Article 2 (2) of the Employment Directive (2000/78/EC), which says that the directive “shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.” The case concerned alleged age discrimination in a regional provision, which required house inspectors to be no older than 70. The national court admitted that the provision did indeed compromise Article 21 of the Charter, but it argued that this intrusion was justified in accordance with Article 52 (1) of the Charter. The justifications for interference under that article are, the court said, “for the very same reasons” as those justifying interferences with fundamental rights under national constitutional law.²⁹

In the **United Kingdom**, the standing of the Charter in the national legal system was addressed explicitly in



some judgments and consequently picked up in the political debate. In a case concerning an asylum seeker who was returned to his country of origin, the claimant argued that the UK government interfered with his rights under Article 7 of the European Charter, among others, by causing private information to be disclosed to his home country's authorities. In the end, the claim was dismissed. However, the judge referred to the judgment of the CJEU in the case *N. S. v. Secretary of State for the Home Department*,³⁰ stressing that:

“The constitutional significance of this decision can hardly be overstated. The Human Rights Act 1998 incorporated into our domestic law large parts, but by no means all, of the European Convention on Human Rights. Some parts were deliberately missed out by Parliament. The Charter of Fundamental Rights of the European Union contains, I believe, all of those missing parts and a great deal more. Notwithstanding the endeavours of our political representatives at Lisbon it would seem that the much wider Charter of Rights is now part of our domestic law. Moreover, that much wider Charter of Rights would remain part of our domestic law even if the Human Rights Act were repealed.”³¹

In another judgment, a national court in the **United Kingdom** took a more operational approach to the standing of the Charter. The case concerned two applicants: a cook at the Sudanese embassy and a member of the domestic staff of the Libyan embassy. Both had made claims arising out of their employment and were met with pleas of state immunity. These pleas were upheld by two separate employment tribunals and both parties appealed. The claimants invoked Article 47 of the Charter and argued that the State Immunity Act 1978 (SIA), which provides for state immunity in UK law, should be disapplied to the extent the claims fell within the material scope of EU law. The employment appeal tribunal addressed the question whether a direct application of the Charter implies that national law contrary to the Charter must be disapplied in a claim litigated between private individuals. The Court stated that the claims relating to discrimination, harassment and breaches of the Working Time Regulations were subject to Article 47 of the Charter, but those for unfair dismissal and minimum wages were not. The Court concluded that, whereas the Human Rights Act “does not permit the disapplication of any statutory provision, [...] EU law requires it where it concerns the material scope of EU law”; thus, for the claims covered by EU law, certain provisions of the SIA were “to be disapplied”.³² The discussions that were sparked by these judgments led the European Scrutiny Committee in the House of Commons to prepare a report on the application of the Charter in the UK, which will be presented in 2014.

The sample of cases analysed here does not contain cases where the standing of the Charter was addressed in other Member States, but this should not lead to the conclusion that national courts in other countries did not address the Charter's legal standing. A look back to 2012 is instructive in this regard. The Constitutional Court in **Austria** had referred to a principle of equivalence and concluded that the rights of the Charter can be invoked as constitutional rights and, within the scope of the Charter, constitute a standard of review in the proceedings of constitutional complaints, in particular pursuant to specific provisions of the Austrian Constitution (Articles 139 and 149).³³ In the same year, the Constitutional Court of **Romania** said that Charter provisions are applied when checking constitutionality, basing this Charter role on the Romanian constitution's integration clause in Article 148.³⁴ In 2013, a national court in **France** stressed, in a case concerning the lack of suspensive effect of an appeal against expulsion orders, that the national judge does not have the power under the Code of Administrative Justice to rule on the compatibility of such laws with the provisions of an international convention or reject their application under the European Union law. However, the court added that the situation is different where these legal dispositions appear to be manifestly incompatible with European Union law requirements, which was – according to the national court – not the case.³⁵ In a case in **Cyprus**, the parties referred in their argumentation to the Charter as higher-ranking law. The court, however, limited itself to establishing that Articles 20 and 21 of the Charter are largely identical to the national constitution's provisions and “for that reason” there was no need to refer a question of interpretation to the CJEU.³⁶

The Charter and other non-national legal sources

Even if the Charter within the EU system is the most prominent legal source of fundamental rights, it is by no means the only relevant document in the field. The Charter text makes the link to the ECHR explicit. Article 52 (3) of the Charter establishes that the “meaning and the scope” of the rights in the Charter are linked to the corresponding rights in the ECHR. This parallelism is reflected in national case law. In nearly two thirds of the 69 national judgments, reference was made to the ECHR. Just as the data collection for 2012 revealed, there is a degree of parallelism in using the ECHR and the Charter.

A few judgments explicitly mention the relationship between the Charter and the ECHR by referring to Article 52 (3) and underlining that the meaning and the scope of the rights mentioned in both instruments are the same. In **Romania**, a court identified Charter Article 41 as a benchmark for the administrative conduct of EU Member States' public authorities. Where the state complies with this benchmark, protection ensured

by Article 6 of the ECHR is guaranteed.³⁷ Conversely, in a judgment from the **Netherlands**, the national court, “not taking into consideration whether in this case the law of the Union is implemented in the sense of [A]rticle 51”, checked the national norms against Article 6 of the ECHR and concluded that national law is not contrary to Article 6 of the ECHR and therefore, given the similarity of the provisions in the ECHR and the Charter, also not contrary to Article 47 of the Charter.³⁸

Where national courts are confronted with differences in wording between the Charter and the ECHR, European Court of Human Rights (ECtHR) case law may play a special role. For instance, unlike the ECHR’s wording, the Charter establishes in Article 47 (2) that everyone shall have “the possibility” of being advised, defended and represented in judicial proceedings. Given ECtHR case law establishing that a statutory obligation to be represented by a lawyer before certain courts does not infringe Article 6 of the ECHR, a national court in **Germany** developed case law clarifying that such an obligation is thus also in line with Article 47 of the Charter.³⁹ In another judgment delivered by a German court, EU secondary law was interpreted not through CJEU case law but through that of the ECtHR. The judgment concerned the Free Movement Directive and how it relates to homosexual relationships. Since the ECtHR subsumes questions of sexual self-determination and of one’s sex life under the term ‘private life’ protected by Article 8 (1) of the ECHR, the court saw no need for a preliminary ruling by the CJEU. Against the background of the ECtHR’s case law, the national court had no doubts on the classification of homosexuality and considered the feature of “sexual orientation” to be an element which forms identity as defined in Article 10 (1) (d) of EU Directive 2004/83/EC.⁴⁰

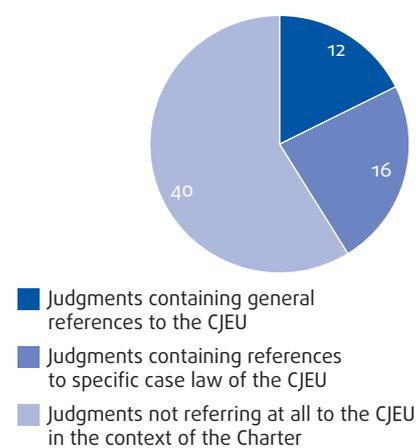
Unlike the ECHR, Charter Article 53 also recognises other international agreements to which the Union or all the EU Member States are party. Where national courts use the Charter in their reasoning, they sometimes refer in parallel to other international documents. Such parallel references are not as frequent as parallel references to the ECHR. Most prominently featured is the UN Convention on the Rights of the Child, to which six judgments referred. Judgments also made three references to the Universal Declaration of Human Rights; two references to the International Covenant on Economic, Social and Cultural Rights; two references to the International Covenant on Civil and Political Rights; two references to the European Social Charter; and one reference to the Convention on the Elimination of All Forms of Racial Discrimination.

National courts and the Court of Justice of the European Union

In 41 of the 70 judgments analysed, the CJEU was not mentioned at all. However, 13 judgments referred to the

court in general terms and 17 also referred to specific CJEU judgments. National courts might also refer to CJEU case law more generally, as a judgment from **Poland** shows. In this example, the national court denied a violation of Article 47 of the Charter, “as neither this provision nor the Court of Justice of the European Union provide such procedural requirements”.⁴¹ Other judgments gave concrete and detailed reference to CJEU judgments, at times setting them into the perspective of national law. In a ruling from **Slovakia**, for instance, the national Constitutional Court’s conclusions are set in relation to the CJEU’s conclusions.⁴²

Figure 0.7 References to the CJEU in the context of the Charter in national judgments (analysed)



Source: FRA, 2014

The CJEU’s jurisprudence was used to provide guidance in the interpretation of national constitutional law outside the scope of EU law, for example in a judgment from **Spain**. In a case concerning the civil legislation that regulates the order of surnames in Spain and civil registration of names, the national court used the CJEU judgment in C-208/09, the *Sayn-Wittgenstein* case, to stress that the name of a person is an element of his or her identity and privacy, whose protection is guaranteed by Article 7 of the Charter.⁴³

Some preliminary references were sparked by a doubt concerning the interpretation of a Charter right, without it necessarily translating into questions explicitly mentioning the Charter. In some cases, national courts do not share a party’s view that the Charter right in question was not clear in a given context. For instance, in an **Austrian** judgment, the court saw no need to ask for clarification on the (non-)applicability of Article 47 in the context of national electricity legislation.⁴⁴ In a case from **Lithuania**, the Supreme Court decided to stay the proceedings and refer to the CJEU question in the context of Article 47 of the Charter and the applicability of consumer protection rules. The case concerned a contract concluded between a practising lawyer and a natural person; it was unclear if this

contract should be viewed as concluded between a customer and a business service provider, which would make consumer protection rules applicable. In an **Estonian** case concerning Article 47 of the Charter, the question arose whether a circuit court was entitled to suspend the procedure and refer the case to the CJEU for a preliminary ruling.⁴⁵ The case concerned an Estonian–Latvian Territorial Cooperation Programme implemented under the EU’s cohesion policy. The decisions of the programme’s monitoring committee could not be appealed against, raising the question of their conformity with the Charter, especially with Article 47.

The **Netherlands** made a preliminary reference to the Court of Justice in the context of the Charter right to good administration (Article 41).⁴⁶ The national court sought guidance from the CJEU on how to read the “right of defence” in the administrative context. The Dutch court acknowledges CJEU case law, recognising that this right is now also laid down in Article 41 of the Charter. It notes, however, that CJEU case law shows that the right is not absolute and that the Charter, “according to its wording, is only addressed to institutions, bodies, offices and agencies of the Union”. A judgment delivered in **Portugal** illustrates a case in which the court discussed in detail whether or not to refer it to the CJEU.⁴⁷ In a case concerning a legal amendment to lower the pension rights of former communist security officials, a regional Court in **Poland** requested the CJEU for a preliminary ruling whether the amendment was not infringing with Charter Articles 1 (human dignity), 17 (right to property), 20 (equality before the law), 21 (non-discrimination) and 47 (right to an effective remedy and to a fair trial). For this case, Protocol No. 30 on the applicability of the Charter is of relevance.⁴⁸

How non-judicial bodies at national level use the Charter

Fundamental rights generally, and the Charter specifically, should be embedded within the work of all entities that provide and support access to justice at all levels of government. Courts alone do not carry out this function. A range of bodies with a human rights remit, some of which are considered non-judicial in that they do not adjudicate cases, also play a crucial role. Some of these bodies are called quasi-judicial; they adjudicate cases but are not courts of law. EU Member States have a wide range of such bodies, whose powers, goals and operations vary greatly.

To explore the extent to which these bodies make use of the Charter and related EU fundamental rights law, the European Commission (DG Justice, C1) started in 2013 to collect information from NHRIs accredited under the Paris Principles, equality bodies and ombudsperson institutions as well as specific ombudsperson institutions for children. The information was

collected through the respective European networks of these four types of bodies, and FRA was asked to provide an analysis.

The categorisation into the four types of bodies mentioned is not clear cut: an NHRI can at the same time serve as an equality body and also as an ombudsperson institution, and any of these bodies could also have an explicit mandate regarding children, thus forming part of the European network for such bodies. In addition, a designated equality body is a requirement for all Member States under EU law,⁴⁹ whereas no such legal requirement exists for the other bodies. Basically, each Member State could have an entity in each of the four categories, but, commonly, Member States do not have all types. Some states have more than one of a particular type of body; the United Kingdom, for example, has separate NHRIs for Scotland and Northern Ireland, as well as one for England and Wales (for more details on NHRIs, see [Chapter 8](#) on access to justice and judicial cooperation and [Chapter 10](#) on EU Member States and international obligations). A short questionnaire containing six broad questions was sent to the relevant bodies in all EU Member States. The questions concerned the role of the Charter in:

1. training
2. awareness raising
3. processing complaints
4. advising government
5. litigating cases before courts
6. mediation.

Each of the six areas contained subquestions to quantify the responses, such as how many persons had undergone training on the Charter or how many cases had related to the Charter. Not all the questions would be applicable to all bodies; some provide training, others advise governments and yet others process complaints or litigate on behalf of complainants.

The time frame about which answers should be provided was between the entry into force of the Charter, in December 2009, and the questionnaire’s cut-off date, 31 October 2013. The last two areas, litigation and mediation, were an exception: answers about them were to refer solely to 2013.

All told, there are approximately 100 bodies of the four types across the 28 EU Member States. In total, there were 43 responses to the questionnaire. Bodies across all four types responded from 25 of the 28 EU Member States. Among the respondents were five specialised in children and five regional Ombudsperson institutions (from Italy and Spain). The European Ombudsman also responded.

Of the six questions, some received more concrete responses, largely because of the nature of the issues

they cover being more or less precise. Awareness raising, in particular, tends to be done through general campaigns on, say, equality. A particular role for the Charter, or relevant EU legislation which the questionnaire also addressed, cannot usually be distinguished. Training has a similar nature in that it tends to cover issues and principles, drawing on the most relevant sources which may include UN, Council of Europe and EU law. But again, specific references to EU fundamental rights standards might not be needed for training, so it is difficult to pinpoint the role these standards play in training. Still, it is clear from the responses, in particular from the equality bodies, that the transposed EU law on equality is very influential.

Processing complaints and advice is more easily associated with EU fundamental rights. The same applies to litigation where the bodies in question have judicial functions or can support or bring cases before courts. Finally, the sixth area, mediation, is difficult to associate with any legal standards, given that legal arguments are probably not at the core of such a process. The brief overview of the responses below consequently focuses on those provided to Questions 3, 4 and 5.

Comparability is essential for detailed analysis. The diversity of the organisations that responded to questions that were intentionally brief and straightforward did not allow for a strong comparative framework. For this reason, the number of bodies responding positively or negatively should be read as a general indication rather than as a detailed review.

Training and awareness raising

About half of the bodies (22 of the 43 that responded) provided training related to the Charter and or EU legislation. The scope of the training varied from general staff-only training to outreach including thousands of participants. Twenty-one bodies said they provided no training, with six explaining that training was outside their mandate. A few said they limited their training focus to the ECHR or, for bodies active in this area, to the UN Convention on the Rights of the Child.

More concrete examples of engagement with EU fundamental rights instruments include the **Romanian** Institute of Human Rights. It organises a week-long summer course every year, to which a Charter module was added after the entry into force of the Lisbon Treaty in 2009. Practitioners and academics participate, some 30 per year.

The Parliamentary Ombudsman in **Sweden** organised internal training for some 50 persons covering the Charter in greater detail. The Public Defender of Rights in **Slovakia** said it covers the Charter right to good administration (Article 41) in all staff training.

Slightly fewer than half (18) of the bodies provided awareness raising on EU fundamental rights. About half (22) responded negatively, with five stating that it was not within their mandate. A few others said they focused on the ECHR and the UN Convention on the Rights of the Child. The Mediator in Luxembourg said it planned a campaign on Article 41 of the Charter.

Processing complaints

Of the 43 bodies which responded, 26 processed complaints using EU fundamental rights. Seventeen answered no. Of these, 12 responded that they had not yet received any complaints related to EU fundamental rights. Two said that they were not mandated to deal with complaints or cases.

Complaints that refer to EU fundamental rights appear to be limited. The European Ombudsman replied that some 13 % of cases referred explicitly to the Charter. The Parliamentary Ombudsman in **Sweden** estimates that only applicants include such references in a mere 1 %–3 % of complaints. It could not identify any case where the Charter would have had a clear and traceable impact on the outcome. The Defender of Rights in **France** estimated the equivalent number to be a fraction of 1 %. The Ombudsman in **Greece** concluded that in some 2 %–3 % of cases the complainant would invoke the Charter. The Advocate of the Principle of Equality, the equality body in **Slovenia**, reported that 15 % of complaints made reference to EU fundamental rights, but that in the majority of these cases the EU element was provided by the Advocate of the Principle of Equality, not the complainant.

As for the Charter's influence on substantive issues, the European Ombudsman stressed public administration and the related relevance of Charter Article 41, as did the Parliamentary Ombudsman in **Finland**. The Ombudsman in **Greece**, the equality body, referred to discrimination against Roma. Other equality bodies, including the National Centre for Human Rights in **Slovakia** and the Centre for Equal Opportunities and Opposition to Racism in **Belgium**, also noted that the equality title of the Charter was influential. The Parliamentary Ombudsman in **Finland** also mentioned cases concerning freedom of movement, access to healthcare and discrimination on the basis of religion.

Advising government

Around half (21) of the bodies that replied to the survey provide advice to governments on the basis of the Charter or related EU legislation. Of those responding, 17 answers were negative, with 10 of the bodies not having a mandate to provide such advice. Of those lacking a mandate on the Charter, four reported that they were authorised to advise on the basis of other instruments, such as the constitution or international



treaties. The National Commission for the Promotion of Equality in **Malta** reported that it had used EU secondary legislation on discrimination to provide advice. Although the Charter is a relative newcomer among human rights instruments and many bodies do not have mandates explicitly referencing the Charter, the act establishing the **Danish** Institute for Human Rights contains an explicit reference to the Charter as part of the basis on which the body should operate.⁵⁰ The Human Rights Defender in **Poland** has advised the government on the basis of the Charter in relation to age discrimination, gender equality, rights of persons with disabilities and data protection.

Litigating cases before courts and mediation

Litigation before courts based on EU fundamental rights law was used by just over a quarter (12) of the bodies responding. This also reflects the limited mandate of many of the bodies. In fact, out of 30 responses saying that the body did not litigate, 18 said that their mandate prevented them from bringing cases before a court. Another four of those 30 responses said they had not dealt with any cases related to EU fundamental rights law. One of the 43 responses was not clear on whether or not litigation was possible.

Four of the bodies provided explicit examples of how the Charter had related to their litigation work. The Public Defender of Rights in the **Czech Republic** assisted a court case that concerned discrimination. The Human Rights Defender in **Poland** has motioned the constitutional court, supported by the Charter in relation to the freedom of assembly, rights of persons with disabilities and data protection. The Commissioner for Fundamental Rights in **Hungary** has sought the Charter's support when bringing cases to the constitutional court concerning data protection, right to an effective remedy and to a fair trial, freedom of information, the right to property and the right to social security. The Public Defender in **Spain** reported that claimants use Article 41 of the Charter to argue that bodies within the public administration should justify their decisions.

Five of the bodies referred to mediation in the context of EU fundamental rights. Thirty-five responded negatively. Of these, 12 responded that the reason was a lack of mandate for it. Six of the 35 stated that it would be possible to rely on EU fundamental rights if there were a case appropriate for mediation.

Conclusion

It is in the fields of asylum and immigration that national courts most often refer to the Charter of Fundamental Rights of the European Union. More than one in five of the cases analysed deal with these policies (21 %). The Charter right that national courts most commonly refer to is the right to an effective remedy and a fair trial (Article 47). Together with the right to good administration (Article 41), these rights formed a quarter of all the references to the Charter in the 2013 judgments analysed. This reflects the situation before the CJEU, which invokes Articles 41 and 47 in half of all the cases in which it refers to the Charter.

Of all the cases in which national courts referred to the Charter, 22 % were devoted to the Charter's horizontal provisions, encompassing its scope (Article 51) and interpretation (Article 52). Despite these provisions' prominence before national courts, their judgments rarely analyse the Charter's reach in detail. The Charter is often rather superficially referred to as a means of interpretation, without the question of whether or not the Charter applies being addressed.

Occasionally, national courts also refer to the Charter in their reasoning in cases that clearly fall outside the scope of EU law. As an expression of the values on which the Union is built and to which all Member States adhere, the Charter thus reverberates beyond EU law.

National courts tend to cite in parallel the Charter, which is the EU human rights bill, and the ECHR, the Council of Europe's human rights treaty. In nearly two thirds of the judgments analysed, the courts paired references to the Charter and the ECHR.

The Charter is also used and referred to before bodies with a human rights remit, including NHRIs, Ombudsperson institutions and equality bodies. However, given the diversity of these institutions, the role of the Charter is more mixed and less pronounced than before national courts. Just like the national courts, the bodies with a human rights remit often refer both to the Charter and to human rights treaties, although the latter see more use than the former. Many of the bodies are specialised equality bodies, which tend to draw on the Charter's equality title. However, other rights, including to data protection and to good administration, are also highlighted before such bodies. Nevertheless, there remains potential for much greater use of the Charter before bodies with a human rights remit.

Endnotes

All hyperlinks accessed on 30 April 2014.

- 1 European Commission (2012), *2011 report on the application of the EU Charter of Fundamental Rights*, p. 8, http://ec.europa.eu/justice/fundamental-rights/files/charter_report_en.pdf; European Commission (2013), *2012 report on the application of the EU Charter of Fundamental Rights*, p. 24, <http://ec.europa.eu/justice/fundamental-rights/report/2012/index.html>.
- 2 European Commission (2012), *2011 report on the application of the EU Charter of Fundamental Rights*, p. 8, http://ec.europa.eu/justice/fundamental-rights/files/charter_report_en.pdf.
- 3 European Commission (2014), *2013 report on the application of the EU Charter of Fundamental Rights*, p. 7.
- 4 European Parliament (2012), 'Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights', PE462.446, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462446/IPOL-LIBE_ET\(2012\)462446_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462446/IPOL-LIBE_ET(2012)462446_EN.pdf). A recent example is de Burca, G. (2013), 'After the EU Charter of Fundamental Rights: The Court of Justice as a human rights adjudicator', *Maastricht Journal*, Vol. 20, No. 2, pp. 168–184.
- 5 For exceptions confirming the rule, see de Visser, M. (2013), 'National constitutional courts, the Court of Justice and the protection of fundamental rights in a post-Charter landscape', *Human Rights Review*; Bazzocchi, V. (2011), 'The European Charter of Fundamental Rights and the courts', in Di Federico, G. (ed.), *The EU Charter of Fundamental Rights*, Springer, pp. 55–75.
- 6 Italy, Corte Appello Firenze sez. I (2007), judgment of 9 June 2007, quoted by Amici, F., Papa, V., and Sacca E., (2009), *The courts and the Nice Charter: Technical arguments and interpretative activity*, p. 259, http://csdle.lex.unict.it/Archive/AC/Dossiers/EU%20law/20120206-101728_INT_dossier12_fund-rights_2009.pdf; Italy, Tribunale Ravenna (2008), judgment of 16 January 2008, quoted *ibid.*, p. 268.
- 7 Belgium, Cour constitutionnelle/Grondwettelijk Hof, No. 73/2013, 30 May 2013, No. 107/2013, 18 July 2013, and No. 124/2013, 26 September 2013.
- 8 Similarly, the ACA general report on the implementation of the Charter (Seminar of 24 November 2011) states: "The area of law in which the Charter seems to have played the most prominent role to date is immigration and asylum law: apart from *Spain, Hungary and Austria*, the Charter has had an impact (to a greater or lesser extent) in this area of law in every country." ACA, *General report*, www.aca-europe.eu/seminars/DenHaag2011/Gen_Report_en.pdf.
- 9 For the list of the 114 decisions, see the annex to European Commission (2014), *2013 report on the application of the EU Charter of Fundamental Rights*, Luxembourg, Publications Office.
- 10 See Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (2012), *General report*, p. 10, www.aca-europe.eu/seminars/DenHaag2011/Gen_Report_en.pdf.
- 11 In some of the judgments, it remained unclear whether or not the Charter had already been referred to by the parties.
- 12 Czech Republic, Nejvyšší soud, Case 30 Cdo. 3223/2011, 14 May 2013, www.nsoud.cz/judikatura/judikatura_ns.nsf/WebSearch/BDA2B059E16E4F1EC1257B97002EB949?openDocument&Highlight=0; see, similarly, Poland, Sąd Apelacyjny w Białymstoku, Case I SA/Wa 1012/13, 17 April 2013, [http://orzeczenia.bialystok.sa.gov.pl/content/\\$N/15050000001006_II_AKzw_000665_2013_Uz_2013-04-17_001](http://orzeczenia.bialystok.sa.gov.pl/content/$N/15050000001006_II_AKzw_000665_2013_Uz_2013-04-17_001).
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- 14 Portugal, Tribunal Constitucional, Case 754/13, 29 August 2013, www.tribunalconstitucional.pt/tc/acordaos/20130474.html.
- 15 Italy, Tribunale regionale amministrativo (TAR) – Rome (second section), Case 633, 21 January 2013.
- 16 Italy, Corte Suprema di Cassazione, Case 41, 3 January 2013.
- 17 Portugal, Tribunal Constitucional, Case 117/12, 15 July 2013, <http://www.tribunalconstitucional.pt/tc/acordaos/20130404.html>; for a similar emphasis on autonomy, see Portugal, Tribunal Constitucional, Case 274/2013, 23 May 2013, www.tribunalconstitucional.pt/tc/acordaos/20130274.html.
- 18 Austria, Verwaltungsgerichtshof, judgment 2012/15/0021, 19 March 2013, www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vwgh&Dokumentnummer=JW_T_2012150021_20130319X00.
- 19 CJEU, Case C-617/10, 26 February 2013.
- 20 Denmark, Landsskatteretten, Case 04-0002640, judgment of 4 June 2013, www.afgoerelsesdatabasen.dk/ShowDoc.aspx?q=04-0002640&docId=dom-lsr-04-0002640-full.
- 21 CJEU, C-446/03, *Marks & Spencer*, 13 December 2005.
- 22 See Ireland, High Court (2013), Case IEHC 246s, judgment of 30 April 2013, especially para. 50, www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/917c1eda5of25d3d80257b8f002fbc7?OpenDocument.
- 23 See Austria, Oberster Gerichtshof, judgment 8 Ob 7/13g, 4 March 2013, at 2.3, www.ris.bka.gv.at/Dokumente/Justiz/JJT_20130304_OGH0002_00800B00007_13G0000_000/JJT_20130304_OGH0002_00800B00007_13G0000_000.pdf.
- 24 See Slovakia, Okresný súd Piešťany, Case 7C/127/2012, judgment of 1 August 2013, www.justice.gov.sk/Stranky/Sudne-rozhodnutia/Sudne-rozhodnutie-detail.aspx?PorCis=3622CDA6-5E78-4D78-9B3C-B6962D4019EA&PojCislo=169769.
- 25 Examples of judgments explicitly denying that the scope of the Charter is activated are Hungary, Alkotmánybírósága, Case 3140/2013, judgment of 24 June 2013; Netherlands, Centrale Raad van Beroep, Case BZ2161, judgment of 22 February 2013, <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2013:BZ2161>; Netherlands, Centrale Raad van Beroep, Case 1090, judgment of 12 July 2012, <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2013:1090>.
- 26 Malta, Criminal Court of Appeal, Case 98/2011, judgment of 15 July 2013.
- 27 Spain, Tribunal Constitucional, Case 61/2013, judgment of 14 March 2013, <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2013-3797.pdf>.
- 28 See Spain, Tribunal Constitucional, Case 167/2013, judgment of 7 November 2013, <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2013-11678.pdf>.
- 29 Germany, Hessischer Verwaltungsgerichtshof, Case 7 C 897/13.N, judgment of 7 August 2013, <http://openjur.de/u/642867.html>.
- 30 CJEU, Case C-411/10, *N.S. v. Secretary of State for the Home Department*, judgment of 21 December 2011.
- 31 United Kingdom, High Court (Queen's Bench Division – Administrative Court), Case EWHC 3453 (Admin), judgment of 7 November 2013.
- 32 United Kingdom, Employment Appeal Tribunal, Case UKEAT 0401_12_0410, judgment of 4 October 2013, www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKEAT/2013/0401_12_3004.html&query=janah+and+v+and+Libya+and+Benkharbouche+and+v+and+Embassy+and+of+and+the+and+Republic+and+of+and+Sudan%92&method=boolean.

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- 34 Romania, Curtea Constituțională a României, Case 1021D/2012, judgment of 20 November 2012, www.ccr.ro/files/products/Do967_12.pdf.
- 35 France, Haute Cour administrative, judge for urgent cases, Case No. 371316, judgment of 23 August 2013, www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000027990506&fastReqId=885337519&fastPos=34.
- 36 Cyprus, Supreme Court, Civil Appeal No. 77/2012, judgment of 13 February 2013, www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_1/2013/1-201302-77-12PolEf.htm.
- 37 Romania, Înalta Curte de Casație și Justiție, Case 2001/54/2011, judgment of 22 January 2013.
- 38 Netherlands, Administrative Jurisdiction Division of the Council of State, Case BZ2265, judgment of 25 February 2013, <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2013:BZ2265>.
- 39 Germany, Bundesfinanzhof, Case X K 11/12, judgment of 6 February 2013, para. 13, www.bundesfinanzhof.de/entscheidungen/entscheidungen-online.
- 40 Germany, Verwaltungsgerichtshof Baden-Württemberg, Case A 9 S 1872/12, judgment of 7 March 2013, http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&GerichtAuswahl=VGH+Baden-W%FCrttemberg&Art=en&sid=4f6610e44d88e7782a6911dc4ee61600&nr=16837&pos=0&anz=1.
- 41 Poland, Naczelny Sąd Administracyjny, Case II OZ 327/13, judgment of 1 August 2013, <http://orzeczenia.nsa.gov.pl/doc/46581FD26A>.
- 42 Slovakia, Ústavný súd Slovenskej republiky, Case II. ÚS 499/2012-47, judgment of 10 June 2013, http://portal.concourt.sk/SearchRozhodnutia/rozhod.do?urlpage=dokument&id_spisu=499748.
- 43 See Spain, Tribunal Constitucional, Case 167/2013, judgment of 7 November 2013, <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2013-11678.pdf>.
- 44 Austria, Oberster Gerichtshof, Case 80b7/13G, judgment of 4 March 2013, www.ris.bka.gv.at/Dokumente/Justiz/JJT_20130304_OGH0002_00800B00007_13G0000_000/JJT_20130304_OGH0002_00800B00007_13G0000_000.pdf.
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- 48 Poland, Częstochowa Regional Court, *R. Panczyk v. Ministry of Interior and Administration*, IV U 147/02, 20 December 2013. See also consolidated versions of the TEU and TFEU Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2012:326:TOC>.
- 49 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*Racial Equality Directive*), OJ 2000 L 180, p. 22, Art. 13; 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 (*Gender Goods and Services Directive*), OJ 2004 L 373, p. 37, Art. 12; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (*Gender Equality Directive*), OJ 2006 L 204, p. 23, Art. 20.
- 50 Act No. 553 of 18 June 2012, Art. 2 (6).