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8

EU Charter of Fundamental Rights and its use by Member States



At the end of 2014, the Charter of Fundamental Rights of the European Union celebrated its fifth anniversary. It entered into force as a legally binding document in December 2009. The Charter applies to the European Union (EU) itself and to its Member States when they act in the scope of EU law. Five years on, it is a well-recognised bill of rights that EU institutions draw upon extensively. The Charter has a limited scope of application in national contexts, so it is less used at national level. Still, Member States occasionally refer to it in the legislative process and it is sometimes also referred to in parliamentary debates. Its most prominent use is at the Court of Justice of the European Union, with ever more court decisions relying on the Charter. National courts also make references to the Charter but not always with much relevance for the outcome. Awareness of the Charter remains, nonetheless, limited. Member States' relevant policies hardly focus on increasing knowledge about it amongst practitioners or the general population.

In 2014, the European Union placed further emphasis on its Charter of Fundamental Rights. An example of this is the European Commission's First Vice-President, who is responsible for ensuring that every Commission proposal and initiative complies with the EU Charter of Fundamental Rights.¹

Experts as well as politicians took a greater interest in the Charter in 2014, exemplified by the publication of an English article-by-article commentary extending over 2,000 pages and a new edition of a flagship commentary in German.² Such detailed examinations aside, expert attention³ continued to focus on the field of application of the Charter,⁴ with the United Kingdom and Poland attracting particular interest due to the country-specific protocol on the application of the Charter.⁵ The horizontal application of the Charter (between individuals rather than between an individual and a public authority)⁶ remained high on the agenda. The fact that 2014 was its fifth anniversary also sparked some more general assessments of the Charter⁷ and of how it interacts with national situations.⁸

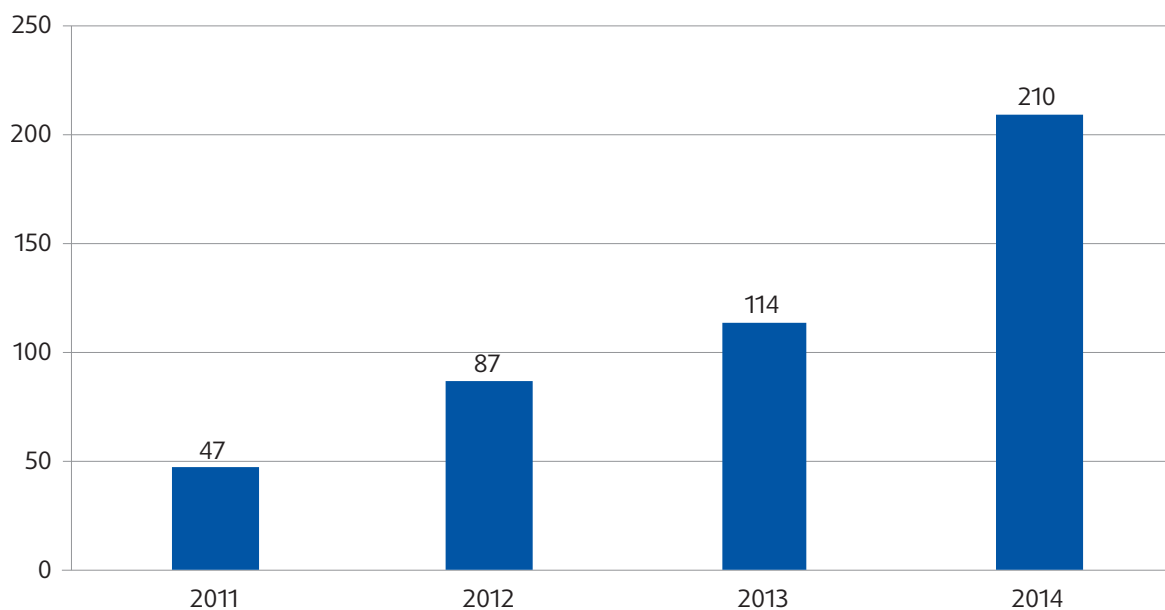
But it is not only in the political arena and expert circles where the Charter aroused interest. It also drew attention from practitioners, with a high-level

conference at the end of 2014 on the Charter-related training needs of legal professionals and public officials. The conference, organised by the European Commission, aimed to map training needs, take stock and share existing best practices as well as identify remaining challenges.⁹ Moreover, the practical relevance of the Charter is confirmed by the ever-increasing amount of case law before the Court of Justice of the European Union (CJEU) using the EU Charter of Fundamental Rights in the operational part of the decisions (Figure 8.1).

8.1. Guidance provided by the Court of Justice of the European Union

The increase registered in 2014 is all the more remarkable because the overall number of decisions handed down by the CJEU in the course of 2014 increased only marginally from 2013. Nevertheless, the total number of decisions referring to the Charter rose by 84 %, from 114 decisions in 2013 to 210 in 2014.

CJEU rulings in 2014 provided guidance to Member States in various contexts, including clarification of the

Figure 8.1: Number of decisions in which CJEU referred to the Charter in its reasoning, 2011–2014

Note: CJEU 'decisions' include (here and in the text) judgments, decisions and orders delivered by all court formations at the Luxembourg court.

Source: FRA, 2015, based on CJEU data

material and temporal scope of the Charter's application; its relationship to secondary EU law; and the further clarification of a number of specific Charter rights.¹⁰

8.1.1. Scope of application of the Charter provisions

The court continued to define the reach of the Charter. It addressed, for instance, the question of when Member States are "implementing EU law" in the sense of Article 51 of the Charter. According to the court's judgment in the case of *Siragusa v. Sicily* (C-206/13), this question can be answered by determining "whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it".¹¹ This line was continued in the case of *Hernández v. Reino de España* (C-198/13).¹² In *Robert Pflieger* (C-390/12), the court added that implementing Union law within the meaning of Article 51 (1) of the Charter also addresses all those situations where Member States use "exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty".¹³

Moreover, the court provided a number of examples where the Charter was held not to be applicable, for instance *Dano* (C-333/13), where the court stressed that "when the Member States lay down the conditions for

the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law" (for context see Chapter 3 on Roma inclusion).¹⁴ In *Liivimaa Lihaveis* (C-562/12), the court clarified the application of the Charter in the context of the disbursement of EU funds. The fact that a national body is administering the disbursement of such funds does "not prevent Article 47 [right to an effective remedy and to a fair trial] of the Charter from applying". Since the relevant act by the body – the adoption of the programme manual and the rejection of an application for subsidies – fell within the scope of EU law, "the lack of any remedy against such a rejection decision deprives the applicant of its right to an effective remedy, in breach of Article 47 of the Charter".¹⁵

In *Kamino International Logistics BV*, the court underlined that, as the Charter of Fundamental Rights of the European Union entered into force on 1 December 2009, it does not apply to proceedings and demands that took place earlier.¹⁶

8.1.2. The Charter and interpretation of EU secondary law

The CJEU also gave guidance on how national courts should apply EU secondary law in the light of the Charter. For instance, in the case of *Juan Carlos Sánchez Morcillo and María del Carmen Abril García* (C-169/14) concerning consumer protection, the court stressed that Article 7 (1) of the Directive on unfair terms in consumer contracts has to be read in conjunction with

the Charter right to an effective remedy and a fair trial (Article 47). Such a reading excludes a system of enforcement providing that mortgage enforcement proceedings may not be stayed by the court of first instance, whereas the creditor seeking enforcement may bring an appeal against a decision terminating the proceedings or ordering an unfair term to be disregarded.¹⁷ In *Bashir Mohamed Ali Mahdi* (C-146/14 PPU), the court concluded that reading the Return Directive (2008/115/EC) in the light of the provision on the Charter rights to liberty and security (Article 6) and to an effective remedy and a fair trial (Article 47) implies that “any decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a third-country national, on the further course to take concerning the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision”.¹⁸

In a number of cases (C-416/13, C-543/12, C-530/13), the court clarified to national courts that, where both a Charter provision and a provision of secondary law detailing the Charter provision apply, the case is to be solved solely in the light of the relevant piece of EU secondary law.¹⁹ This clarification does not, however, do away with the obligation to interpret secondary law in the light of the Charter.

8.13. Interpretation of Charter rights

The CJEU provided guidance by interpreting the reach of specific Charter rights. Of special interest is the right to good administration (Article 41), which according to its wording applies only to “institutions, bodies, offices and agencies of the Union”. In a number of judgments, the court confirmed that “it is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union” (C-166/13).²⁰ In *H. N. v. Minister for Justice, Equality and Law Reform* (C-604/12), the court emphasised, however, that Article 41 of the Charter also reflects a general principle of EU law.

“Accordingly, where [...] a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable in a procedure for granting subsidiary protection, such as the procedure in question in the main proceedings, which is conducted by the competent national authorities.”

CJEU, C-604/12, *H. N. v. Minister for Justice, Equality and Law Reform and others*, 8 May 2014

Both aspects – Article 41 as a Charter right directed to the EU only and the same right as an expression of a general principle of law also applying to Member States – were also addressed before national courts.

Other rights for whose interpretation the court provided substantial guidance include the presumption of innocence and the right of defence (Article 48) (C-220/13P),²¹ the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50, see Chapter 7 on access to justice) and respect for private and family life (Article 7) and dignity (Article 1) (Joined cases C-148/13 to C-150/13).²² The case regarding the last two rights refers to practices that FRA has already criticised²³ as incompatible with the Charter. In 2014, the court pointed out in *A, B, C v. Staatssecretaris van Veiligheid en Justitie* (Joined cases C-148/13 to C-150/13) that the “submission of the applicants to possible ‘tests’ in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts” lacks probative value and by its nature infringes human dignity. Moreover, “interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum” and “questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7”.²⁴

The court addressed the integration of persons with disabilities (Article 26) in *Wolfgang Glatzel v. Freistaat Bayern* (C-356/12).²⁵ The case concerned the refusal by a German state to grant Mr Glatzel a driving licence for small buses as defined by Directive 2006/126 on the grounds that his eyesight was not as good as required in Annex III of the directive. The national court had argued that the requirements of the directive constitute discrimination on the grounds of disability under Article 21 of the Charter and Article 2 of the United Nations (UN) Convention on the rights of persons with disabilities (CRPD) – the only core international human rights treaty the EU has so far ratified.

In its ruling, the CJEU reiterated that the CRPD is “an integral part of the European Union legal order”. Given this, provisions of secondary legislation must, as far as possible, be interpreted in a manner consistent with the convention. However, the court also emphasised that “since the provisions of the convention on disabilities are subject, in their implementation or their effects, to the adoption of subsequent acts of the contracting parties, the provisions of that convention do not constitute, from the point of view of their content, unconditional and sufficiently precise conditions which allow a review of the validity of the measure of EU law in the light of the provisions of that convention”. In the court’s view, the directive balances the requirements of road safety and the right to non-discrimination of persons with visual impairments in a manner that is proportionate to its objectives; the EU’s ratification of the CRPD did not alter the outcome.

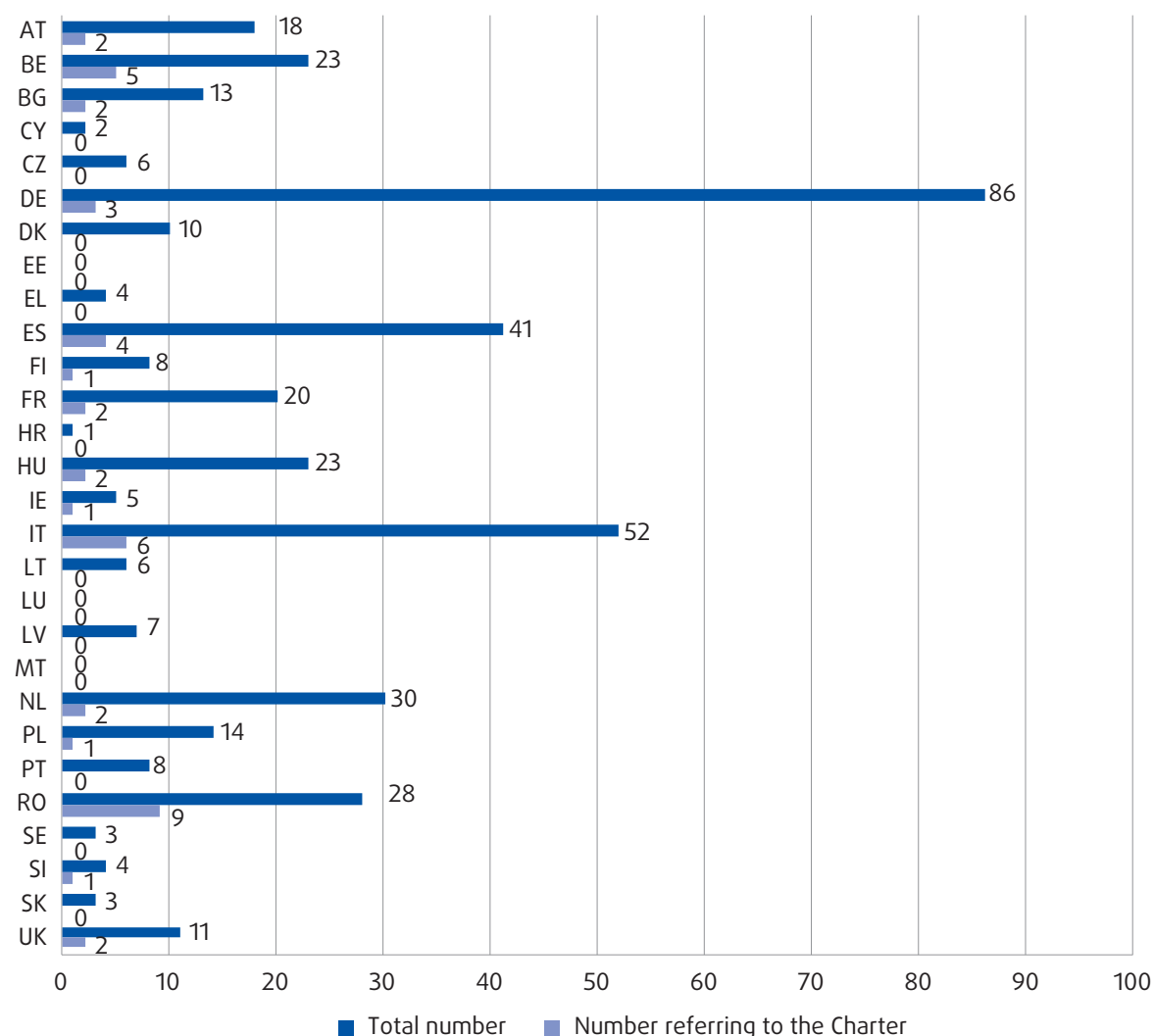
Turning to the Charter, the court stated that,

“although Article 26 of the Charter requires the [EU] to respect and recognise the right of persons with disabilities to benefit from integration measures, the principle enshrined by that article does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in [EU] or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such.”²⁶

8.1.4. Cooperation between the courts

The overall number of cases in which national courts request the CJEU to provide an interpretation of provisions of EU law (preliminary rulings) varies substantially from one Member State to another. Those with the most requests for preliminary rulings are the same in 2014 as in 2013: **Germany, Italy, Spain** and the **Netherlands** (Figure 8.2). The relative share of those requests, however, that contain references to the Charter changed considerably. Whereas in 2013 only **Bulgaria** had shown a relatively high share of requests for preliminary rulings using the Charter, 2014 saw relatively high numbers of Charter-related requests in **Romania, Ireland, Belgium** and **Bulgaria**. In **Romania**, such requests rose from 6 % (2013) to 32 % (2014), and in **Belgium** from 4 % (2013) to 22 % (2014).

Figure 8.2: Requests for preliminary rulings: total number and number referring to the Charter by EU Member State, 2014



Source: FRA 2015, based on CJEU data

Where national courts raise questions related to the Charter, they give the CJEU the opportunity to further clarify the reach of the Charter, as happened in the *Melloni* case (C-399/11, decided on 26 February 2013), the first ever reference the Spanish Constitutional Court made to the CJEU. The request for clarification of the Charter's procedural provisions concerned the possibility to provide higher safeguards stemming from the Spanish Constitution than those guaranteed under the EU law. On 13 February 2014, in line with the CJEU preliminary ruling, the Spanish Constitutional Court handed down its judgment rejecting the appeal by Stefano Melloni.²⁷

Of relevance to the cooperation between EU and national courts was the decisions in *A v. B and Others* (C-112/13). The CJEU confirmed that the system of preliminary rulings precludes national legislation under which ordinary courts hearing an appeal or adjudicating at final instance are under a duty, if they consider a national rule to be contrary to the Charter right to an effective remedy and a fair trial (Article 47), to apply to the constitutional court for that statute to be generally struck down. This applies if such a duty to address the national constitutional court first would prevent all other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the CJEU for a preliminary ruling.²⁸

8.2. The Charter in national legislation and policies

The Charter thus plays a role in courtrooms (Section 8.1.4), and is equally relevant for administration and legislation, as both have to respect the Charter when acting in the scope of EU law. It might also be referred to in specific policies (Section 8.2.5), parliamentary debates (Section 8.2.3) or national legislation (Section 8.2.4). Moreover, the legislature looks at the impact (Section 8.2.2) and the compatibility with fundamental rights (Section 8.2.1) of upcoming legislation and policies; these activities are critical moments when the Charter can potentially play a role.

There are a variety of mechanisms in place at EU level aiming to make sure that EU legislation and policies conform to the Charter. Impact assessments look at the impact different policy options might have on fundamental rights, and compatibility checks look at the compatibility of legislative proposals with the Charter. In 2014, further steps were taken to improve these mechanisms. Following up on the *Digital Rights Ireland* judgment (Joined cases C-293/12 and C-594/12),²⁹ the Council has updated its guidelines³⁰ on methodological steps to be taken to check fundamental rights. The guidelines are to ensure that Council preparatory bodies take the methodological steps necessary to identify and deal with

fundamental rights issues arising in connection with the proposals under discussion at the given Council preparatory bodies. They provide steps to follow to check for compliance with fundamental rights, as well as a fundamental rights checklist, similar to the one used by the Commission, to help assess compatibility with fundamental rights.

So far, the impacts the services of the European Commission are looking at do not address fundamental rights as a separate category (in addition to economic, environmental and social impacts) but rather try to look at fundamental rights in a horizontal manner when examining other impacts.³¹ The European Commission is, however, revising the European Commission's Impact Assessment Guidelines. The revision process will examine, among other aspects, the tools for assessing impacts on fundamental rights.

8.2.1. Assessment of fundamental rights compliance of bills

In most Member States, there is an explicit obligation to check bills against national fundamental rights standards. The European Convention on Human Rights (ECHR), which, in contrast to the Charter, is not limited to situations falling within the scope of EU law, is also often mentioned as an explicit benchmark that bills have to comply with. For instance (please note that here and in the sections below the references to Member States are illustrative), in the **United Kingdom** every bill prepared by the government comes with a written statement about the compatibility of the provisions of the bill with the rights enshrined in the ECHR ('statement of compatibility'). In addition, a number of specific memoranda on the compatibility of specific bills with the ECHR have been presented, including in 2014 one on the Serious Crime Bill, one on the Anti-social Behaviour, Crime and Policing Act and one on the Immigration Bill.³²

The Charter can enter such national processes when the compatibility of a bill with EU law is examined. In a number of Member States, including **Bulgaria**,³³ **Estonia**³⁴ and **Slovakia**,³⁵ procedural rules establish that draft laws come with explicit reasoning, a separate accompanying explanatory report and an opinion or letter analysing the draft's compatibility with EU law. How such procedural norms refer to EU law differs. In **Italy**, bills are assessed through the lens of relevant EU case law, explicitly also referring to pending infringement procedures (known as technical normative analysis).³⁶ It appears that in most Member States fundamental rights are not explicitly mentioned as part of the EU law check. The **Finnish** procedure, however, explicitly requires examining the bill's compatibility with EU fundamental rights.³⁷ But even if reference is made to fundamental rights, there might not be an explicit mention of the Charter and its rights;

see, for example, **Romania**,³⁸ whose procedures do explicitly refer to fundamental rights and freedoms.

Nevertheless, documents accompanying the respective bills occasionally also refer to the Charter. This was the case in 2014 in **Luxembourg**, where one opinion by the Council of State referred to the principles of legality and proportionality (Article 49) of the Charter and another to the right of access to documents (Article 42).³⁹ In the **Netherlands**, in 2014 the Council of State made nine advisory opinions in which it referred to the Charter.⁴⁰ Moreover, explanatory memoranda examined specific Charter articles. The Act on Job Agreement and Quotas for Occupationally Disabled Persons⁴¹ referred to the right to protection of personal data (Article 8 of the Charter) and the Act on Responsible Growth of Dairy Farming,⁴² to the Charter right to property (Article 17). In **Estonia**, an explanatory letter to the Child Protection Bill stated that the act shall be enacted in accordance with, among other things, the Charter.⁴³

In some Member States, the procedures for checking the compatibility of bills with fundamental rights differ depending on whether the government or parliamentarians have drafted a legislative proposal. For instance, in **France**, bills initiated by members of parliament (*propositions de loi*) do not undergo the assessment that government-proposed bills (*projets de loi*) must go through. This was criticised within the National Assembly.⁴⁴

Promising practice

Providing guidance on Charter implementation

The Dutch National Human Rights Action Plan of December 2013 entailed among other things the preparation of a guide on the implementation of the Charter. The guide, primarily addressing policy and legal officers developing new policies and legislation, was finalised in March 2014. It aims to ensure compliance with the Charter and to draw special attention to those parts of the Charter that add value to other international sources, especially the ECHR. For this purpose, it clusters all Charter provisions into four categories: Charter rights with the same meaning and scope as the corresponding ECHR rights; Charter rights with the same meaning as the corresponding ECHR rights but a wider scope; Charter rights with no corresponding ECHR right, but often with corresponding European Social Charter rights; and Charter rights that are specific to the EU context, such as the right to vote and to stand as a candidate at elections to the European Parliament (Article 39).

For more information, see: ICER-Handleiding nationale toetsing EU-Handvest Grondrechten

Even in Member States where the procedure for scrutinising the legal quality of a bill is the same whether it comes from the government or the parliament, the question remains – just like at EU level – how to assess changes to a bill introduced after the bill was tabled. For instance, in the **Netherlands**, the Council of State – which has the same role vis-à-vis bills deriving from the government and bills deriving from parliament – does not give advice on amendments to a bill.⁴⁵ In **Hungary**, the Deputy State Secretary for Pre-legislative Coordination and Public Law Legislation of the Ministry of Justice has to monitor the bills under parliamentary debate and ensure that the bills are constitutional and compatible with fundamental rights standards.⁴⁶

8.2.2. Assessment of fundamental rights impacts

Based on the information FRA received from its expert network, it appears that around a third of EU Member States examine in advance (ex ante) the potential economic, social, environmental or other impacts of the different policy options for a bill in a regular and formal manner. Such an examination typically takes place separately from the examination of the legal compatibility of a bill (with the national constitution and international obligations), as discussed in [Section 8.2.1](#). However, the legal compatibility check and the assessment of impacts are not necessarily done in separate procedures. The **French** impact study (*Étude d'impact*) can assess not only the bill's legal compatibility but also its potential impact. Other countries may deal with the bill's potential impact indirectly as part of the legal scrutiny. The legal proportionality check, for instance, will assess the bill's potential impact to select, from various potential measures, the one that interferes least with the fundamental rights. Some Member States carry out a full-fledged impact assessment only when they expect significant effects. In **Estonia**, for instance, the rules for 'good legislation' envisage an impact assessment when 'significant' impacts are foreseen, such as on economics, security and foreign relations, the environment, regional development or organisation of public administration.⁴⁷

Even where there are specific procedures available for assessing impacts of draft legislation, they often – just like at EU-level – do not look at fundamental rights as a specific category in relation to which the impact of a draft law should be assessed. For instance, in **Croatia** the assessment of impacts includes an analysis of positive and negative effects of regulations on the economy (including financial effects), social welfare and the environment, but the effects on human rights are not explicitly stated. Consultations with the public are, however, conducted simultaneously, and comments, suggestions and opinions are to be taken into consideration. Since NGOs most frequently address and identify impacts related to fundamental rights,

this sort of impact assessment exercise de facto also covers fundamental rights.⁴⁸ In the **Slovak Republic**, too, a standardised methodology for the assessment of selected impacts is in place. The potential impacts are divided into seven main thematic areas: public finances, social situation within the country, employment, enterprising entities, functioning of markets, the environment and information technologies in society.⁴⁹

Promising practice

Identifying fundamental rights impacts

In **Finland**, when the legislature looks at societal impacts of bills, it regularly considers potential fundamental rights implications by addressing the following questions:

- Does the bill have an impact on the realisation of fundamental rights and legal protection? Does the bill have an impact, for example, on the realisation of fundamental rights mentioned in Chapter 2 of the constitution regarding an individual person?
- Does the bill have an impact on the mutual relationship between people and the decision-making regarding this relationship?
- Does the bill have an impact on citizens' opportunities to participate in and influence society?
- Does the bill have an impact on equality and the prevention of discrimination?
- Does the bill have an impact on children?
- Does the bill have gender impacts?
- Does the bill have an impact on people's predisposition to commit crimes?
- Does the bill have an impact on security?
- Does the bill have an impact on data protection and information security regarding the citizens and companies?

For more information, see: Finland, Ministry of Justice, Impact assessment guidelines, as in force at the end of 2014, and http://oikeusministerio.fi/material/attachments/om/toiminta/laitjalainvalmistelunkehittaminen/6FloyjjqR/Vaikutusten_tunnistamisen_tarkistuslista.pdf

In some cases, such as in the **Czech Republic**, impact assessment procedures refer explicitly to fundamental rights but not to the Charter.⁵⁰ This, however, does not imply that the Charter would not be referred to in practice; the Act on Cybercrime⁵¹ and the Amendment to the Act on Railways⁵² are examples of acts that refer to it. Again, in other cases certain fundamental rights aspects might be singled out. In **Spain**, for instance, every bill the government proposes has to be accompanied by a report on the gender impact of the proposed legislation.⁵³

8.2.3. Parliamentary debates

Based on information collected through FRA's network of experts, it appears that in half of the Member States, the Charter was not referred to in parliamentary debates. Moreover, in many instances Charter references remain rather superficial. For example, a search for "Charter of Fundamental Rights" in the database for parliamentary debates in **Ireland** yields 40 hits, the majority of which lead to Charter references that do not further analyse the Charter's provisions and their impact.⁵⁴

On the other hand, in 2014 there were examples of the Charter playing a role in important debates, some of which had a constitutional nature. Parliamentarians in **Romania**, for example, referred to the Charter in the context of proposed amendments bringing the constitutional equality provision in line with the wording of the Charter's Article 21 on non-discrimination.⁵⁵ In **Poland**, the Sejm's Commission on the European Union recommended dismissing the proposal tabled by a group of members of parliament to revoke Protocol 30, which addresses the application of the Charter in the legal systems of Poland and the United Kingdom.⁵⁶

In the **United Kingdom**, the standing of the Charter within the national legal system was debated and was additionally the subject of a parliamentary report. The report published by the European Scrutiny Committee analyses the scope of the Charter's application in the United Kingdom, seeking to clarify its impact. The report concludes on what the Charter does and does not do. The committee urged the government to intervene in CJEU proceedings to limit the Charter's scope in the United Kingdom. Moreover, it proposed amending the European Communities Act 1972 and declaring the Charter not applicable to the United Kingdom, to which the government replied that, as long as the United Kingdom is a member of the European Union, it has a duty to implement all EU law applying to it and any unilateral decision to the contrary would have political, legal and diplomatic consequences.⁵⁷

"Protocol 30 [addressing the application of the Charter in Poland and United Kingdom] was designed for comfort rather than protection: it is in no sense an opt-out Protocol; consequently, the Charter is directly effective in the UK with supremacy over inconsistent national law (as it is for all other EU Member States); it does not apply to all areas of national law, however, only those that fall within the scope of EU law, a test which the ECJ has interpreted broadly; it will nonetheless broaden the ambit of EU law and increase human rights litigation in the UK."

United Kingdom, House of Commons, European Scrutiny Committee (2014), The application of the EU Charter of Fundamental Rights in the UK: a state of confusion, Forty-third Report of Session 2013-14

References to the Charter in parliamentary debates appear in diverse contexts. To take **Bulgaria** as an example, a parliamentarian referred to the non-discrimination provision (Article 21) of the Charter, among other Bulgarian and international legal norms, to argue that a bill from the party Ataka calling for imprisonment of one to five years and a fine of BGN 5 to BGN 10.000 for those who manifest publicly their or someone else's homosexual orientation or identity was unacceptable.⁵⁸ Another Charter reference concerned the employment status of former collaborators of state security services; a 2011 ruling by the Bulgarian constitutional court was quoted. The court had used the Charter provision on the freedom to choose an occupation (Article 15 (1)) and argued that disproportionate restrictions on the freedom to exercise a profession are inadmissible.⁵⁹ The Charter right to vote and to stand at elections to the European Parliament (Article 39) was referred to in **Bulgaria**, in a discussion on a referendum concerning, among other things, the introduction of obligatory and electronic voting.⁶⁰ Finally, the need to respect the non-discrimination clause (Article 21) and cultural, religious and linguistic diversity (Article 22) of the Charter was referred to in the context of the deployment of EU funds.⁶¹

References are more likely where national bills are implementing EU directives. In **France**, for instance, the Senate referred to the Charter when discussing the bill implementing the Directive on the right to information in criminal proceedings (2012/13/EU).⁶²

Moreover, references to the Charter in national parliaments are not limited to discussions on bills falling within the scope of EU law. This diversity can be exemplified in **Spain**, where the Charter was referred to when discussing amendments to the legislative proposal on telecommunications,⁶³ but also when discussing a non-legislative proposal regarding the extension of political rights to EU citizens in national and regional elections in Spain related to the European citizens' initiative 'Let me vote',⁶⁴ and several other non-legislative proposals and parliamentary questions on the need to revise the Spanish Code of Civil Procedure.⁶⁵

8.2.4. National legislation

FRA asked its network of experts to identify laws adopted in 2014 that refer to the Charter of Fundamental Rights. For more than half of the Member States, the experts could not identify such legislation.

Generally speaking, references to the Charter are to be found in simple legislation rather than in laws of constitutional rank, apart from a few examples at regional level – some statutes of regions in **Spain**⁶⁶ and **Italy** for instance do refer to the Charter.⁶⁷ However, in 2014 a **Maltese** act to amend the constitution referred in its reasoning to the Charter, stating that the amendment

“brings the protection from discrimination contained in the Constitution in line with the protection contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union, and makes such protection justiciable, thereby empowering victims to seek redress”.⁶⁸

The examples of national laws adopted in 2014 referring to the Charter suggest that the national legislatures refer to the Charter in a wide spectrum of policy fields ranging from children's rights to equality and data protection. An example from **Spain**⁶⁹ shows that the Charter was referred to in legislation dealing with children. Equality related legislation adopted in **Italy**⁷⁰ and **Spain**⁷¹ made Charter references. Legislation in **Belgium**⁷² and **Spain**⁷³ referred to the Charter in the context of data protection and telecommunication. But even an area such as cooperation for development offers examples of Charter references, as an **Italian** law shows.⁷⁴

Most of the examples identified are rather superficial in nature and simply refer to the Charter as one source of inspiration during the legislative process.⁷⁵ Sometimes the reference to the Charter may simply result from the fact that the national norm reproduces the text of an EU act, as examples from **Ireland**⁷⁶ and **Malta**⁷⁷ show.

However, 2014 also saw the Charter being referred to in a more substantial way. For instance, a **Spanish** criminal law not only indicates that it shall be applied in conformity with fundamental rights as enshrined in the Spanish Constitution, EU primary law and the ECHR, but also refers to the violation of the Charter as a ground for refusing recognition and enforcement of decisions relating to an economic sanction.⁷⁸ Similarly, a **German** regional law concerning public security refers to the Charter in the context of the cross-border exchange of data and establishes that such an exchange is excluded where it would contravene the rights, freedoms and principles enshrined in the Charter.⁷⁹ This corresponds to similar provisions concerning cross-border exchange in other German laws.⁸⁰

8.2.5. National policy measures

FRA's expert network was only able to identify policy measures focusing on the Charter of Fundamental Rights in a third of Member States. **Bulgaria**, **Croatia**, **France**,⁸¹ **Italy**,⁸² **Romania** and **Slovakia** provide examples of strategy documents referring to the Charter. In **Bulgaria**, charter references are to be found in ongoing strategies such as the one for Roma integration (2012–2020)⁸³ as well as in new strategies such as the one on the integration of persons having received international protection (2014–2020).⁸⁴ Similarly, the **Croatian** National Programme for the Protection and Promotion

of Human Rights (2013–2016) contains references to the Charter.⁸⁵ In **Romania**, the draft government strategy on social inclusion of persons with disabilities refers to a number of Charter articles.⁸⁶ Implementing documents on general strategies may also refer to the Charter, as the initial material of **Slovakia's** migrants' rights working group shows.⁸⁷ Such references appear to be general in nature. This is not specific to the Charter; references to other international documents, including the ECHR, also remain superficial, if they are to be found at all.

There are, however, examples of more Charter-specific engagement by the Member States. In **Finland**, the government's 2014 human rights report notes the importance of the EU in the promotion of fundamental and human rights within the Union and stresses the importance of making the Charter known among the general public. Although no concrete measures are suggested, the report refers to the Commission's annual report on the application of the Charter. It notes the importance of the Charter in legislative work at the Union level and in the Member States and calls for further development of relevant tools for legislators as well as making good use of such tools.⁸⁸

Promising practice

Clarifying the Charter's relevance at national level

Knowledge about the Charter's scope and effects is not (yet) sufficiently available in legal professions, nor do NGOs, trade unions or other stakeholders of relevance in this regard know how Charter rights can be protected. This was the reason for launching the project 'CFREU – Making the Charter of Fundamental Rights a Living Instrument', which was co-financed by the EU and carried out in **Austria, Italy, Poland and Croatia**. The project resulted in a series of training events informing civil society, NGOs and trade unions on the content and the legal relevance of the Charter. It was carried out by the Ludwig Boltzmann Institute of Human Rights (BIM), Vienna, in cooperation with the Istituto di Studi Giuridici Internazionali (CNR-ISGI), Rome; the Institute for Law and Society (INPRIS), Warsaw; the Faculty of Law of the University of Milan; and the Office for Human Rights, Zagreb, as an associate partner.

For more information, see: the manual and the civil society guidelines: <http://bim.lbg.ac.at/en/making-charta-fundamental-rights-living-instrument>

Concrete training on the Charter took place, for instance, in **Croatia**, where the government's Office for Human Rights and the Rights of National Minorities organised,

among other training, educational programmes on the Charter for judges in Zagreb, Osijek and Split and for public prosecutors in Zagreb. Seminars and panel discussions targeting NGOs, trade unions and other civil society actors also took place. Similar activities were carried out in in **Austria, Italy and Poland**. These activities were the fruits of a research project that looked into the impact of the Charter on the legal order and practice in these four Member States with a focus on social rights. One of the aims of the project was the development of a European fundamental rights curriculum for judges and legal professionals, which was tested in pilot training programmes and resulted in the publication of a training manual on the Charter intended for judges and judicial officers.

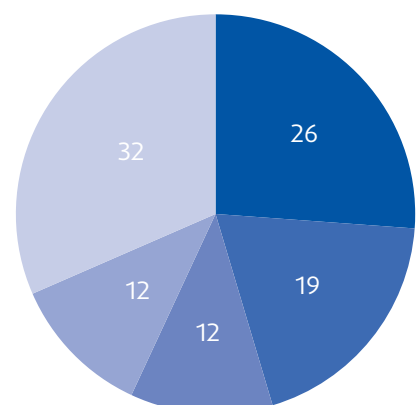
8.3. The Charter before national high courts

The Agency for Fundamental Rights asked its expert network to provide information for each Member State on three cases that were handed down by national high courts in 2014 and in which a reference to the Charter played a role in the court's reasoning. Based on this request, 65 court decisions from 25 Member States were analysed. For **Denmark, Estonia and Latvia**, no decisions fulfilling these criteria were identified. The information given below is based on the analysis of these 65 decisions delivered by constitutional, supreme, cassation, high and supreme administrative courts.

8.3.1. Most relevant policy fields and Charter rights

Slightly more than a quarter (26 %) of the national decisions analysed concern the area of justice, freedom and security, often dealing with matters of access to justice. Asylum and immigration come next, accounting for almost 20 %. The prominence of references to the Charter in the context of asylum and immigration was already stressed in last year's annual report chapter on the use of the Charter (14 out of 70 decisions analysed in 2013 fall in this area). The high number of decisions that concern either justice, freedom and security or asylum and immigration reflects the fact that in these policy areas – all especially prone to fundamental rights violations – EU legislation plays a prominent role and Member States are thus bound by the Charter. In 2014, employment and social policy as well as information society were prominently represented in the sample analysed (Figure 8.3). Before the CJEU a similar picture to 2013 emerged, with employment and social policy, competition policy, and common foreign and security policy accounting for well over half of the decisions analysed (Figure 8.4).

Figure 8.3: National Charter-related decisions, by policy area (%)



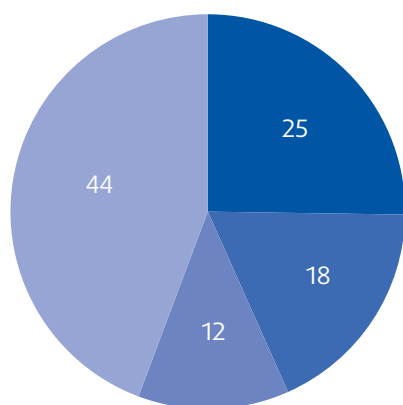
- Justice, freedom and security
- Asylum and immigration
- Employment and social policy
- Information society
- Other policy areas

Notes: Based on 65 decisions issued in 25 EU Member States in 2014, Denmark, Estonia and Latvia are not included. Four decisions were each related to two policy areas and thus counted as 0.5 decision per policy area. Due to the use of standard rounding, the percentages indicated in the figure may not sum up to exactly 100 %.

Source: Data provided by FRA's research network, 2014

Turning to the question of which rights in the Charter were referred to most frequently in the analysed decisions delivered by national courts, the following picture emerges. Among the 65 decisions, the greatest number of references were made to the Charter chapters on Justice (VI) and General Provisions (VII). The right to an effective remedy and to a fair trial (Article 47), the scope and interpretation of rights and principles (Article 52) and the field of application of the Charter (Article 51) make up one third of all the Charter references in the analysed national decisions of 2014. The second prominent category concerns rights that can be clustered together because of their often procedural nature or function: presumption of innocence and right of defence (Article 48), good administration (Article 41), protection of personal data (Article 8) and non-discrimination (Article 21). These constitute one fifth of the Charter references in the analysed decisions. Finally, there is a category of substantial rights that were often referred to, namely respect for private and family life (Article 7) and the rights of the child (Article 24), which were often invoked together with the provisions of other fundamental rights documents, such as national constitutions or international treaties (11 % of all the references to Charter articles in the decisions analysed). Interestingly, these, and also other substantial rights such as freedom of expression (Article 11) or freedom of assembly (Article 12), played a certain role in the national decisions analysed, whereas they are rarely referred to before the CJEU (see Figure 8.5).

Figure 8.4: CJEU Charter-related decisions, by policy area (%)



- Employment and social policy
- Competition
- Common foreign and security policy
- Other policy areas

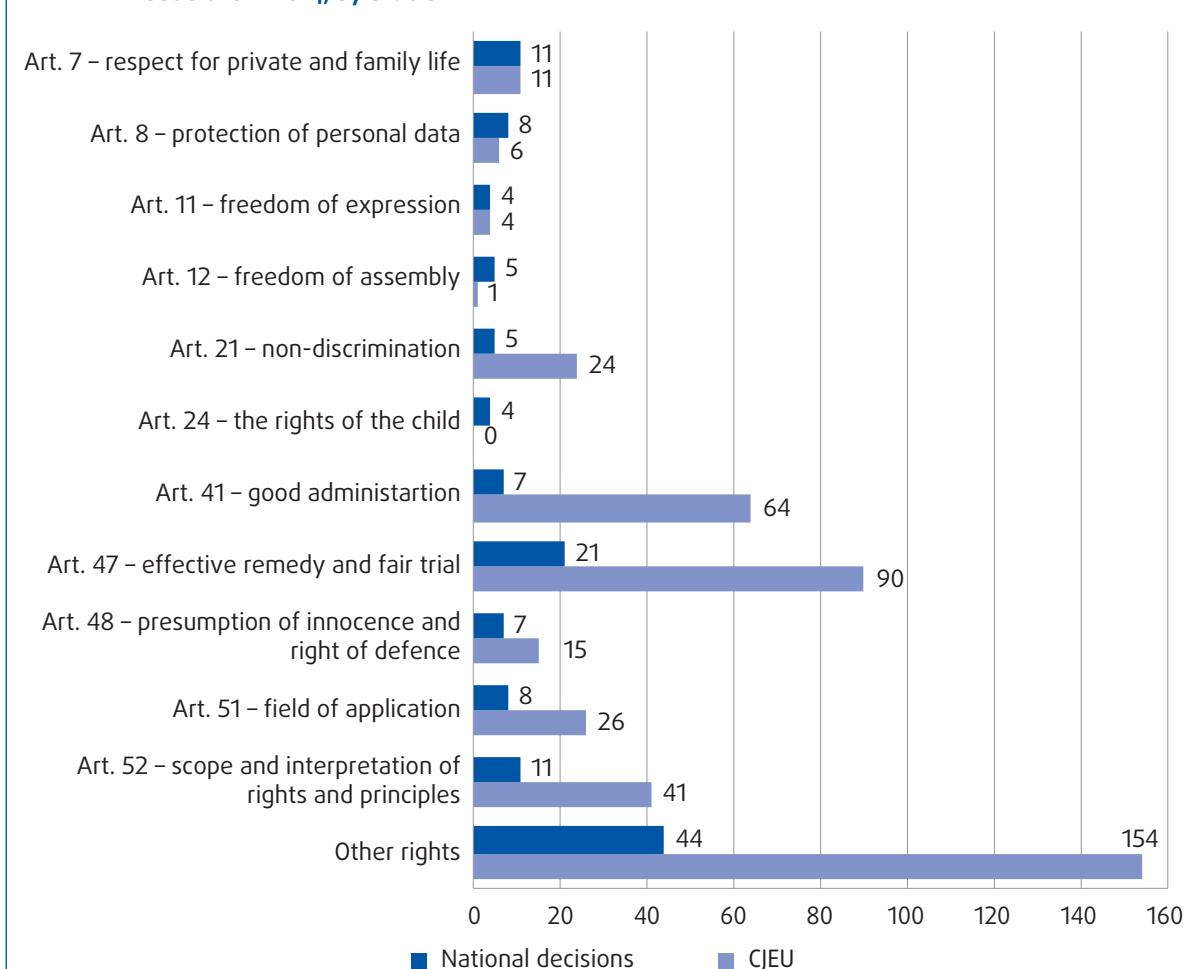
Notes: Based on 210 CJEU decisions issued in 2014. Due to the use of standard rounding, the percentages indicated in the figure may not sum up to exactly 100 %.

Source: CJEU, 2014

Looking back to 2013, the data from the two years are quite similar. Articles 47, 51 and 52 also accounted for almost one third of all Charter references in the national cases considered in 2013. However, whereas protection of personal data (Article 8) was not invoked in any of the national decisions in the 2013 sample, in 2014 it was referred to eight times. This can be explained by this year's judgment by the CJEU in the joined cases *Digital Rights Ireland* (C-293/12 and C-594/12),⁸⁹ where the CJEU held the Data Retention Directive (2006/24/EC)⁹⁰ to be invalid, thereby providing an incentive to submit national provisions implementing the abovementioned directive to a judicial review (see Chapter 5 on information society, privacy and data protection).

For the CJEU, the right to an effective remedy and fair trial (Article 47), the scope and interpretation of rights and principles (Article 52) and the right to good administration (Article 41) were the most prevalent Charter provisions in 2014. However, unlike in the national courtrooms, the rights of the child (Article 24) and freedom of assembly (Article 12) hardly feature in the decisions of the court. The right to property (Article 17) and the freedom to conduct a business (Article 16) were both repeatedly mentioned in the cases found in the CJEU, but not even once in any of the national decisions analysed.

Figure 8.5: Number of references to Charter articles in selected decisions by national high courts and in CJEU decisions in 2014, by article



Notes: Based on the total number of references made to the Charter in 65 national decisions in 25 EU Member States (Denmark, Estonia and Latvia are not included) and 210 CJEU decisions in 2014.

The category 'Other rights' contains different rights for national courts and the CJEU.

Source: Data provided by FRA's research network, 2014; CJEU, 2014

8.3.2. Application field of the Charter

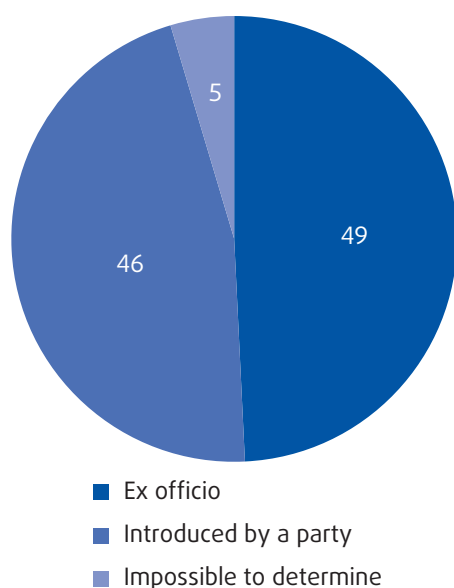
Judges in national courts in 2014 referred to the Charter on their own initiative in almost half of the decisions analysed. In the other half, Charter references built on earlier references made by the parties involved (Figure 8.6). This confirms the picture emerging from the cases analysed in the previous annual report that national courts not only refer to the Charter after it is invoked by the parties but equally rely on it on their own motion.

What also appears to confirm last year's findings is that national courts seldom explicitly address the question of whether or not the Charter applies in the case at hand. Thus, the Charter was often relied on – in many cases alongside national constitutional provisions or other international legal sources – without any explanation of whether or not the Charter legally applies,

making it difficult to analyse the concrete impact of the Charter provision in question on the reasoning of the national courts.

This is even true of the Charter right to good administration (Article 41), a special Charter article in that, unlike the Charter's other articles, it applies only to the EU's own institutions and bodies (see, however, *H. N. v. Minister for Justice, Equality and Law Reform* (C-604/12), mentioned in Section 8.1.3). This specific scope of the Charter provision was, for instance, not addressed in a case (Case 3705/15) before the State Council in **France** which referred to Article 41 and the general clause on the Charter's field of application in Article 51.⁹¹ By mentioning the right to good administration (Article 41) in combination with the right to an effective remedy and to a fair trial (Article 47), courts situate such cases within the general scope of the Charter as defined in Article 51 of the Charter. For instance, the Supreme Administrative

Figure 8.6: References to the Charter introduced by a party/on court's own motion (ex officio) (%)



Note: Based on 65 decisions issued in 25 Member States in 2014. Member States not included: Denmark, Estonia and Latvia.

Source: Data provided by FRA's research network, 2014

Court of **Lithuania** (in Case A858-47/2014) overruled the decision of the Ministry of Foreign Affairs based on the argument that in certain cases it had the right to enjoy absolute discretion in taking decisions to freeze money. The court disagreed with the ministry's statement and said that Article 41 establishes the right to good administration, one of its components being the duty of administration to give reasons for its decisions. The competent national authority does not enjoy absolute discretion and must exercise its powers in a manner which upholds the rights provided for in Article 47 of the Charter.⁹² How the two provisions interact in their impact on the reasoning of the national courts is difficult to assess but in any event Article 41 is considered relevant to national administrations. In another case (Case A822-1265/2014), the Supreme Administrative Court referred to Article 41 of the Charter as an "expression of the common legal heritage" that can serve as an additional source for interpretation of national law.⁹³

"The CJEU states that the right to be heard in every procedure is currently enshrined not only in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, which ensure respect for the rights to a defence and the right to a fair trial in any court proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. The aforementioned Article 41, paragraph 2 provides that this right to good administration notably implies the right of every person to be heard when a detrimental individual measure is taken against him/her."

Italy, Supreme Court, Joint Civil Chambers, Case 19667, 18 September 2014

A rather rare example where the scope of application of the Charter was dealt with in detail – including references to the relevant case law of the CJEU and literature – was offered by the **Austrian** Constitutional Court. The case (Case B166/2013) concerned a homosexual couple from the Netherlands who wanted to repeat their marriage in Tyrol. The couple's claim, based on the non-discrimination clause (Article 21) of the Charter, was rejected with the argument that the national non-discrimination provision in question does not have to be in compliance with Article 21 of the Charter, as it does not aim to implement any Union law. Moreover, the national provisions are outside the scope of application of the EU equality directives, so that "there is no provision of Union law which is specific to this area or might influence it". Therefore, the Constitutional Court continued, the Union rules in the present case do not formulate obligations of the Member States and the fundamental rights of the Charter are not applicable regarding the national rules which determine this case.⁹⁴

Another example (Case IEHC 83) is the **Irish** judicial review of decisions made by the Minister of Justice and Equality in relation to R.O.'s asylum claim.⁹⁵ R.O. claimed that, as a result of the CJEU's judgment in the case of *Ruiz Zambrano* (C-34/09),⁹⁶ **Ireland** was precluded from refusing R.O. a right of residence in Ireland, in so far as that decision would deprive his children of the genuine enjoyment of the substance of their rights to family life. The *Zambrano* line of argument (no deportation of a citizen child's non-national parent if that expulsion deprives the child of its genuine enjoyment of EU citizens' rights) was not accepted, on the basis that the complainant was not the natural father of one of the three children (the only one who is an EU citizen) and neither did a legal relationship exist between the mother and R.O. The Irish High Court held the Charter not to be applicable to this case, also because the deportation at stake was "pursuant to domestic legislation and is not in the course of the implementation of European Union law".

Just as in earlier years, there were examples where the Charter was referred to in contexts where EU law did not appear to apply. In that sense, the reach of the Charter does not necessarily stop short of purely internal situations. In such cases, the Charter is mentioned without the question of applicability and scope being raised. Such references seem more frequent with regard to procedural provisions concerning the right to good administration (Article 41), the right to effective remedy and a fair trial (Article 47) or the presumption of innocence and right of defence (Article 48). These Charter provisions – as interpreted by the CJEU – thus appear, alongside provisions of national constitutional law, to shape national administrative cultures even beyond the scope of EU law.

8.3.3. The Charter and other international instruments in national rulings

As in the past, the court cases analysed show that, when citing the Charter, courts frequently also draw on other provisions of international law, in particular those in the ECHR. In more than half of all the cases analysed, the ECHR was invoked along with the Charter's provisions. Other legal sources of the Council of Europe mentioned this year include the Framework Convention for the Protection of National Minorities and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (each of them referred to in one decision). UN conventions were also referred to alongside the Charter. The instruments most frequently mentioned were the UN International Covenant on Civil and Political Rights, the UN Universal Declaration of Human Rights and the UN Convention on the Rights of the Child (each mentioned in five out of 65 cases analysed), as well as the UN Refugee Convention, which was mentioned in four of the cases analysed.

In the sample of cases analysed, there were examples from most Member States of courts mentioning the ECHR alongside the Charter, but the relationship between these two human rights instruments was seldom addressed. The Supreme Administrative Court in **Poland** (in Case I ONP 1/14), for instance, read the provision on the scope and interpretation of rights and principles (Article 52) of the Charter, stating that the aim of this provision is to provide a cohesive standard preventing discrepancies between Charter and convention standards and the respective case law of the ECtHR and the CJEU. However, the provision would not mean that the ECHR was a part of EU law.⁹⁷ In **Belgium**, the Constitutional Court (in Case 1/2014) decided that the right of asylum seekers to an effective remedy guaranteed under Articles 47 and 52 of the Charter should be seen through the lense of the ECHR: “[the right should] be defined with reference to the meaning and scope given by the ECHR. It requires, therefore, also that the appeal is suspensive and that it allows for a strict and complete examination of the applicants’ complaints by an authority with full jurisdiction.”⁹⁸

In the decision by the Constitutional Court of **Austria** (Case B166/2013) regarding the applicability of the principle of non-discrimination (Article 21) of the Charter mentioned in [Section 8.3.2](#), the Constitutional Court concludes with a hypothetical statement. Building on the case law of the ECtHR, the Constitutional Court states that, even if the Charter were applied in the given case, it would not make any difference to its outcome. As the ECtHR has shown in *Schalk and Kopf* (Case 30141/04)⁹⁹ – so the Constitutional Court emphasises – the decision on the question of whether or not

homosexual couples have to have the same access to marriage as heterosexual couples presupposes the assessment of societal developments, which might be different in the different Member States of the EU. Returning to the law of the EU, the Court states: “Regarding the question of access to marriage of same sex couples a competence for the Union is missing, therefore [Article 21 of the Charter] is not opposed to the fact that the requirements stemming from the prohibition of discrimination diverge amongst member states, as long as – which is true for the case in question as the quoted jurisprudence of the ECtHR shows – the understanding and scope of the prohibition of discrimination corresponds to Art. 14 ECHR [...]”¹⁰⁰

Differences in the scope of the Charter and the ECHR were addressed in the context of immigration and asylum procedures. For instance, the Supreme Administrative Court in **Finland** (in Case KHO:2014:114) stated that, according to the provision on the scope and interpretation of rights and principles (Article 52 (3)) of the Charter, “the meaning and scope of fundamental rights in the EU shall be the same as those laid down by the ECHR”. The court then referred to the Constitutional Court of Austria (Case U 466/11-18, U 1836/11-13), which “has found that in a matter in which the Charter is applicable, even when this falls outside the scope of Article 6 of the ECHR, an oral hearing shall in principle be held on the same grounds as established in the case law of the ECtHR concerning comparable matters where Article 6 is applicable [...] According to this case law, in many administrative procedure matters there is no absolute obligation to conduct an oral hearing.”¹⁰¹ Aside from reading the Charter in the light of the ECHR in a context where the ECHR as such does not apply (given the limited scope of Article 6 ECHR), the **Finnish** Supreme Administrative Court here provides an example not only of how the two prominent bills of rights interact but also of how an interconstitutional dialogue on EU matters can develop amongst high courts of different Member States.

8.3.4. Role of the Charter in the national legal systems

Where the Charter was (explicitly or implicitly) held to be applicable, it was used to interpret EU or national law or even to serve as a quasi-constitutional benchmark against which national law is checked. An example of the interpretation of EU secondary law comes from **Ireland**, where the High Court dealt in the *Maximillian Schrems* case (Case [2014] IEHC 310) with the question of the obligation to interpret the relevant EU provisions in the light of the Charter. The High Court discussed the applicability of the Charter rights of respect for private and family life (Article 7) and protection of personal data (Article 8), confirming that the right to protection of privacy was interfered with, according to both the Irish national law and the

Charter's fundamental principles.¹⁰² The High Court decided to refer to the CJEU for a preliminary ruling, asking if the interpretation of pre-Lisbon instruments of the EU should be re-evaluated in the light of the subsequent adoption of the Charter of Fundamental Rights. The CJEU has yet to address the reference (see ► also Chapter 5).

"The position under EU law is equally clear and, indeed, parallels the position under Irish law, albeit perhaps that the safeguards for data protection under the EU Charter of Fundamental Rights thereby afforded are perhaps even more explicit than under our national law."

High Court of Ireland, Case IEHC 310, Maximilian Schrems v. Data Protection Commissioner, 18 June 2014

The Charter can also be used to interpret national fundamental rights. In the *Melloni* case, the **Spanish** Constitutional Court used the Charter (alongside the ECHR) to define the essential core of fundamental rights as guaranteed by the Spanish constitution. More frequently, national courts use the Charter to interpret national laws, which can result in providing fundamental rights aspects in the reading of certain national provisions. For instance, a court in **Croatia** (in Case VSRH KŽ eun5/2014-4) held that although the national law on judicial cooperation in criminal matters did not provide the victim of a crime a right to appeal against a negative decision concerning the execution of a European arrest warrant, this legislation should be interpreted broadly in the light of human rights standards, including the Charter.¹⁰³ Similarly, in **Italy**, the Supreme Court (in Case 11404) acknowledged the need to provide a broad interpretation of the expression 'family member' laid down in the national legislative decree. It considered that the expression 'any other family members' can include unconventional relations such as the *kafala* (Islamic adoption/guardianship system) provided that certain conditions are fulfilled.¹⁰⁴

The interpretation of national law in the light of the Charter can also be accompanied with an interpretation of the Charter itself, and eventually lead to a call on the legislature to adapt legislation in line with the Charter. In **Germany**, the Federal Social Court (in Case B 11 AL 5/14 R) emphasised that equality rights have to be guaranteed not only to unemployed persons with disabilities but also to people with disabilities who have a job and want to make a career change. The court stressed that it is not enough "to allow disabled people to carry out any kind of activity that civil servants regularly exercise". To "meet the requirements of Article 21 and Article 26 of the Charter", the legislator and employer are requested to modify the requirements for access to the civil service.¹⁰⁵ The Constitutional Court in the **Czech Republic** interpreted the right to consumer protection (Article 38) of the Charter and concluded – by also referring to the

horizontal consumer protection clause in Article 12 TEU and the policy provision in Article 169 TFEU – that this charter provision does not grant an individual right and is not directly enforceable.

"Consumer protection cannot be deemed to be one of the fundamental rights and freedoms guaranteed under the constitution [...]; constitutions usually speak not of a subjective right but rather of a constitutionally set goal of State policy [...] Article 38/2 [of the Charter] is also not a subjective right enforceable directly by a legal action, but is a principle that EU institutions and Member States reflect when transposing EU legislation, whereas it is possible to claim the principle of consumer protection before the courts only for the purpose of interpretation and to check the legality of these acts, as set out in Article 52, section 2 of the EU Fundamental Rights Charter and explanatory reports to the Charter."

Czech Republic, Constitutional Court (Ústavní soud), Case III. ÚS 3725/13, 10 April 2014

This example shows that the Charter plays a role not only in the interpretation of national law but also, admittedly more rarely, in checking the legality of national law. As stated in last year's annual report, **Austria** provides the Charter with constitutional status, allowing it to be used as a legal benchmark. In 2014, the Austrian Constitutional Court (in Case G47/2012 ua) examined the constitutionality of the national data retention laws implementing the Data Retention Directive (2006/24/EC).¹⁰⁶ The court stressed once more that within the scope of EU law the Charter rights form benchmarks when checking the legality of national norms.¹⁰⁷ The supremacy of EU law can in this context provide for efficient and directly applicable rights for individuals. Regarding the right to asylum for instance, the Supreme Court of **Ireland** (in Case IESC 29) stressed that because of the Charter, Ireland, along with other Member States, has a duty to grant refugee status to those who qualify as refugees in accordance with the Qualifications Directive (2004/83/EC).¹⁰⁸ This right derives "exclusively from the law of the European Union since the State is obliged to give effect to European law and it cannot, by way of legislation or otherwise, deny or limit the rights conferred by the Charter and the relevant Directives given the primacy which is accorded by the Constitution to the law of the European Union".¹⁰⁹

The fact that the majority of references to the Charter in the national court decisions analysed did not clearly show what the concrete impact of the Charter on the respective decisions was is also because the Charter tends to be used as one amongst other legal arguments, be they constitutional provisions or references to the ECHR (see also Section 8.3.3). Nevertheless, in conclusion one can say that the Charter clearly plays a relevant role in national case law, as it is used by national high courts to interpret EU legislation as well as national norms, thereby adding an additional fundamental rights perspective to the reasoning of national high courts.

FRA conclusions

- At the end of 2014, the Charter had been in force for over five years, with the strong upward trend of references to the Charter in the Court of Justice of the European Union (CJEU) continuing. In some cases, Member States' high courts also turn to the Charter for guidance and inspiration, sometimes also in cases falling outside the scope of EU law and sometimes not using the full potential of the Charter. Court decisions handed down in 2014 confirm that the Charter plays a role in the cooperation between the CJEU and the national courts. In over a tenth of the cases where national courts ask the CJEU for advice, the Charter is explicitly used.

Given this situation, EU Member States should assess and address training needs among practising lawyers and in the judiciary. It is worth considering positive incentives for practitioners to participate in such training so that the relevant key actors are made aware of both the potential and the limitations of the Charter.

- The evidence available to FRA shows that national courts frequently use the Charter in combination with other prominent human rights sources, such as national constitutional law or international law. In half of the 2014 national court decisions that FRA collected and analysed, the Charter was used in combination with the European Convention on Human Rights (ECHR).

Based on this evidence, EU Member States should make sure that training on the Charter is not offered in isolation but embedded in the wider fundamental rights framework, including the ECHR and the case law of the European Court of Human Rights (ECtHR).

- In only a very small proportion of the total decisions by national courts referring to the Charter is the CJEU asked for a preliminary ruling. National judges are regularly left to their own devices when using the Charter, without having readily available means to easily access the experiences of judges from other EU Member States in this regard.

To foster a shared understanding and interpretation of the Charter, the EU and its Member States could

pool forces to allow for increased levels of exchange between and among national judiciaries. Relevant instruments for this would be the extension of existing databases, such as Charterpedia, the extended use of the European Case Law Identifier (ECLI) and the establishing of regular transnational exchanges on the application of the Charter among judges, thereby also enhancing mutual trust.

- The role of the Charter in the national legislative process depends on the respective procedural rules in place. There is a diversity of existing procedures, practices and approaches on how to assess upcoming national legislation's (*de jure*) compliance with and (*de facto*) impacts on fundamental rights. Evidence collected in 2014 shows that these rules not only differ between EU Member States, but may also differ depending on whether governments submitted or parliaments prepared draft legislation. Moreover, assessments of impact and legal scrutiny can be limited to the initial policy options and bills proposed, whereas later changes to those bills might not be subject to such checks.

Based on this variety of experiences, the EU and its Member States should use untapped potential for the exchange of promising practices and mutual learning with regard to Charter checks and Charter impact assessments. Building on earlier discussions in the Council Working Group dealing with fundamental rights (FREMP), FREMP could provide a forum for Member States and EU institutions to exchange experiences of the Charter, allow mutual learning and thereby contribute to making national and EU legislation more fundamental rights friendly.

- As the evidence collected for the annual report shows, the Charter was referred to in various 2014 fundamental rights policy documents at national level, but there appear to be hardly any Charter-specific policies aiming to strengthen knowledge and awareness of the Charter.

EU Member States could consider developing national policies for the implementation of the Charter, including awareness-raising campaigns, training of professionals and enhanced use of the Charter (and the corresponding CJEU case law) in legality checks and impact assessments in government services.

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