

IMPLEMENTATION AND USE OF THE CHARTER AT NATIONAL LEVEL

2

2.1.	A SHARED RESPONSIBILITY	46
2.2.	THE CHARTER AND THE JUDICIARY	46
2.2.1.	CONSTITUTIONAL REVIEW	46
2.2.2.	INTERPRETATION OF NATIONAL LAW	48
2.2.3.	PROTECTING INDIVIDUAL RIGHTS	48
2.2.4.	REQUESTS FOR PRELIMINARY RULINGS	49
2.3.	THE CHARTER AND LAWMAKERS	51
2.3.1.	USE OF THE CHARTER OUTSIDE THE LEGISLATIVE PROCESS	51
2.3.2.	USE OF THE CHARTER IN THE LEGISLATIVE PROCESS	52
2.4.	THE CHARTER AND GOVERNMENT POLICIES	54
2.5.	THE CHARTER AND OTHER ACTORS	55
2.5.1.	NHRIS AND OTHER INDEPENDENT BODIES	56
2.5.2.	CIVIL SOCIETY ORGANISATIONS, PROFESSIONAL ASSOCIATIONS, AND ACADEMIA	57
	FRA OPINIONS	59
	ENDNOTES	61

The year 2020 marked a special milestone for the EU Charter of Fundamental Rights. On 7 December, it was exactly 20 years since the EU proclaimed the Charter in Nice. The European Commission used that date to launch its new 'Strategy to strengthen the application of the Charter of Fundamental Rights in the EU'. The strategy puts increased focus on the Charter's application in the Member States and on the role of national actors in making the Charter effective in people's lives. It provides a blueprint for further collective efforts in the years to come. The Commission also encouraged a more concerted implementation of the Charter at EU level. Meanwhile, its use by national courts, parliaments, governments and other actors continued to show mixed results. National courts paid growing attention to the Charter, but government measures to promote its application remained sparse. Although the COVID-19 crisis strained fundamental rights protection, it also spurred more attention to the EU's bill of rights.



2.1. A SHARED RESPONSIBILITY

The Charter of Fundamental Rights of the European Union is of equal relevance to the EU and its Member States.¹ Consequently, the European Commission's new strategy to strengthen its application stresses that all its aspects – prevention, promotion, implementation and enforcement – need to build on shared responsibility and require a collective effort from all concerned.

The strategy stresses that the Charter is a tool for “national and local authorities, including law enforcement authorities, rights defenders, legislators, judges and other legal practitioners, and civil society organisations [CSOs] active in fundamental rights. All these key actors for the Charter's effective application have a role to play in making the Charter a reality in people's lives.”²

2.2. THE CHARTER AND THE JUDICIARY

Judges are the key to making the Charter relevant in people's lives, as the new Charter strategy highlights. The use of the Charter in national courtrooms is becoming more explicit and frequent.

At the same time, the strategy stresses that knowledge remains low among national justice practitioners. FRA has analysed consultations by the Commission for the purposes of the Charter strategy. Fewer than one third of legal professionals consulted have benefited from training on the Charter, the results show. Most of the judges and other judicial practitioners consulted would welcome training on the Charter to share experiences.³ This points to a potential for a more prominent role of the Charter in the future.

As in previous years, FRA asked its research network, FRANET, to identify at least two of the most relevant cases in each Member State in which the Charter played a relevant role. These cases were decided in 2020. Nearly half concerned either policies on border checks, asylum and immigration or the area of criminal law. This is similar to previous years.

In many Member States, judgments used the Charter in Dublin procedures or in European Arrest Warrant cases. This is also consistent with earlier findings, as is the relative prominence of certain articles: 19 of the 50 decisions analysed referred to the right to an effective remedy and to a fair trial (Article 47).

In 22 of the 50 national (high) court decisions analysed, the judges brought in the Charter as a legal argument. The intensity of the Charter's usage in the judicial decisions varies. The spectrum ranges from cases in which they assess national law directly against the Charter to those in which the Charter provides a source of information rather than a decisive normative source.⁴

2.2.1. Constitutional review

Given that the Charter is a constitutional standard, constitutional courts have a relevant role in its application.

The Constitutional Court of **Germany** confirmed this, stressing in a European Arrest Warrant case that “fundamental rights of the Basic Law are not applied as a direct standard of review when deciding legal questions that are fully determined by Union law”.⁵ In areas that EU legislation harmonises, it is thus not national fundamental rights but EU fundamental rights, including the Charter, that serve as the relevant standard.



“With the Charter, we have made a clear shift from the EU being primarily an economic venture, to a Union built on shared values and fundamental rights.”

Věra Jourová, Vice-President for Values and Transparency, European Commission, speech at the event ‘Reinforcing the EU Charter: Rights of people in the EU in the next decade’, 7 December 2020



“The Charter has strengthened the role of judges as ‘guardians of democracy, liberty and justice’ in the EU legal order, since judges are called upon to provide effective judicial protection of the rights that EU law confers on individuals, including those recognised by the Charter.”

Koen Lenaerts, President of the Court of Justice of the European Union, speech at the event ‘Reinforcing the EU Charter: Rights of people in the EU in the next decade’, 7 December 2020

“Rights of the Charter of Fundamental Rights can be asserted as constitutionally guaranteed rights according to Art. 144 B-VG and [...] within the scope of application of the Charter of Fundamental Rights [...] they form an examination standard in the procedure of general norm control.”

Austria, Constitutional Court,
Case G302/2019, 26 June 2020

FRA ACTIVITY

New e-guidance on Charter’s scope of application

In 2020, FRA developed an online tool to support national judges on questions concerning the applicability of the Charter. This new Charter e-guidance includes elements that they can use in judgments, but it can be equally useful to other legal practitioners.

The tool has two components: step-by-step guidance for a specific case through a series of questions on the Charter’s applicability; and a set of concrete examples of cases, allowing users to assess and expand their knowledge.

The tool is available on the agency’s website, in a section entitled **‘FRA e-learning’**. It complements other FRA Charter tools, such as Charterpedia, the Charter country factsheets, videoclips on the Charter, thematic handbooks and more (available online on FRA’s webpage on **‘FRA Charter resources’**).

In **Austria** too, the Constitutional Court underlined that the Charter forms a standard of constitutional review.⁶ Frequently, a review of national norms and decisions against the Charter takes place before administrative courts. For example, the highest administrative court quashed a decision not to hold a hearing in an asylum procedure.⁷

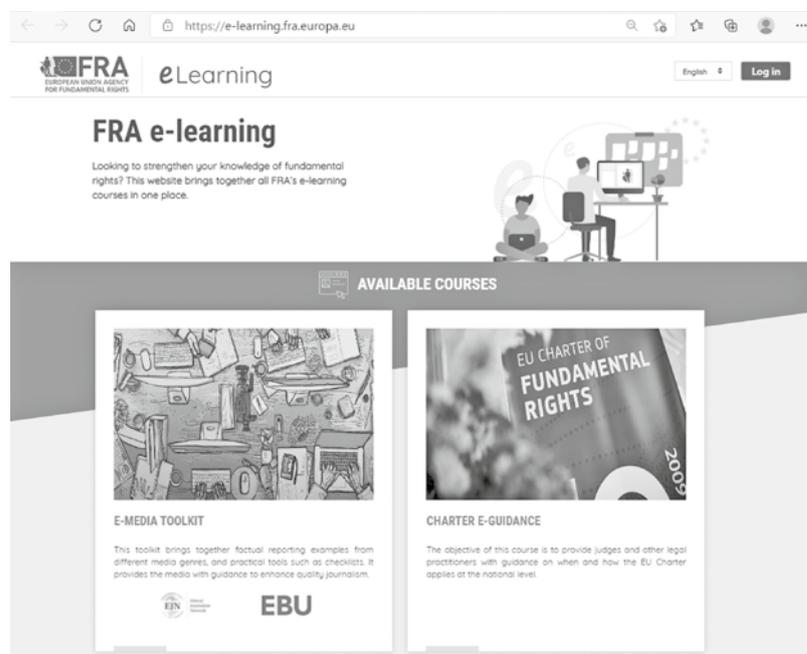
In **Italy**, the Constitutional Court reaffirmed its jurisdiction concerning cases of conflict between national legal principles and the principles enshrined in the Charter. In a case addressing the legality of national provisions establishing that third-country citizens wishing to apply for certain child allowances must hold an EU long-term residence permit, the court stressed the Charter’s role in constitutional review. The Charter complements the guarantees that the Italian constitution lays down, thereby excluding any protection gaps.⁸

In **Croatia**, the Constitutional Court examined a provision of the Act on International and Temporary Protection. The act allows an administrative body to decide on detention. In the view of the petitioner, that violated guarantees of national constitutional law. The court stressed that the examination is not to be limited to national constitutional law, but also includes the Charter.⁹

In **Estonia**, the Supreme Court drew the legislature’s attention to the fact that a provision allowing a court to deprive a person of liberty “must be sufficiently precise and foreseeable to apply in accordance with both the case law of the European Court of Human Rights and Article 52 (1) of the EU Charter of Fundamental Rights, to avoid any risk of arbitrariness”.¹⁰

The Charter is most frequently used in combination with provisions of national constitutional law and the European Convention on Human Rights (ECHR). This also applies where national law is checked against higher ranking law.

For instance, the Constitutional Court in **Romania** had to determine the legality of provisions that allow judges to assess the appropriateness of the length of a procedure when they were themselves responsible for the delay. Having checked the provision against the relevant norms, including Article 47 of the Charter, the court ruled that Article 524, paragraph 3, of the Romanian Code on Civil Procedure is unconstitutional and hence no longer applicable.¹¹



The screenshot shows the FRA e-learning website interface. At the top, there is a navigation bar with the FRA logo, the text 'eLearning', and language options for 'English' and 'Log in'. Below the navigation bar, the main heading is 'FRA e-learning' with a subtext: 'Looking to strengthen your knowledge of fundamental rights? This website brings together all FRA's e-learning courses in one place.' To the right of this text is an illustration of a person sitting at a desk with a computer monitor. Below the main heading, there is a section titled 'AVAILABLE COURSES' which displays two course cards. The first card is titled 'E-MEDIA TOOLKIT' and features an illustration of various media-related icons. The second card is titled 'CHARTER E-GUIDANCE' and features an image of the EU Charter of Fundamental Rights document. Below each card is a brief description of the course's objective.

2.2.2. Interpretation of national law

Sometimes the Charter can be used as a constitutional standard for checking national legislation. However, in most cases, courts check national law against EU secondary law as interpreted in light of the Charter.

It is widely established that, if national law falls within the scope of EU law, national judges need to interpret it in light of the Charter.

A case from **Ireland** illustrates this. It raised the question of whether or not the right to a fair trial (Article 47) obliges Member States to provide legal aid not only to natural but also to legal persons. The judgment rejected such an interpretation. It stressed that, contrary to the applicant's claim, the Court of Justice of the European Union (CJEU) case law does not establish a general requirement that legal aid must, in principle, be available to all persons relying on the Charter.

The Irish court referred explicitly to the "interpretative obligation (also known as the doctrine of harmonious interpretation)" of national courts. Quoting the CJEU, it explained that this requires national courts to use the "whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive".¹² Where such an interpretation would be *contra legem* (against the wording of the law in question), that law must not be applied.

The obligation to disregard national law that contradicts EU law might already follow from national constitutional law. In **Poland**, the Supreme Court underlined that the duty for judges to disregard laws in conflict with the Charter follows from Article 91 (3) of the Constitution of the Republic of Poland, which provides that international agreements have precedence in the event of a conflict of laws.¹³ However, the Constitutional Court later deemed the Supreme Court's approach to contradict both constitutional law and even Article 2 of the Treaty on European Union (TEU).¹⁴

2.2.3. Protecting individual rights

Where courts apply the Charter, individuals can end up with more or better-protected rights.

In **Czechia**, the Constitutional Court referred to the legal status of consumer protection. This is a fundamental right under the Charter, but the national legal order does not recognise it as such. The case concerned a proofreading company that delivered a service that did not satisfy the claimant. The Constitutional Court pointed out that the district court could have applied Article 38 of the Charter to ensure a high level of consumer protection when applying relevant provisions of the civil code.

Data protection is an area where national courts frequently refer to the rights of individuals.

"Among the sources of EU law, the Charter has particular importance for the activities of the Constitutional Court, which the Constitutional Court has described in its previous case law as part of the reference framework for review [...] or has emphasised the need to look at the matter also from the point of view of the Charter."

Czechia, Constitutional Court,
Case II. ÚS 78/19, 24 January 2020



In **Spain**, the Supreme Court had to deal with an app called ‘Juas’. It describes its main purpose as follows: “Laugh out loud playing prank calls to your friends and sharing their reactions”. After a person was not amused at being subjected to this game, the Spanish Data Protection Agency concluded that the company had committed a data-processing breach without consent. It imposed a fine of € 6,000. The Supreme Court upheld that decision, making extensive reference to the Charter and relevant CJEU case law.¹⁵

In **Hungary**, the Charter played a role in deciding on the redress available to an applicant for the position of a judge. The plaintiff had twice applied for two different positions at Budapest-Capital Regional Court. In both procedures, the plaintiff received the highest scores in the evaluation process. Nonetheless, in both procedures, the President of the National Office for the Judiciary (NOJ) declared the application unsuccessful.

The case came before the Supreme Court, which had to decide whether or not the Hungarian legislation gave the plaintiff the right to challenge the resolutions of the President of the NOJ. Interpreting national law in light of Article 2 of the TEU, Article 19 of the Treaty on the Functioning of the European Union (TFEU), and Article 47 of the Charter, the court declared that the plaintiff did have that right.¹⁶

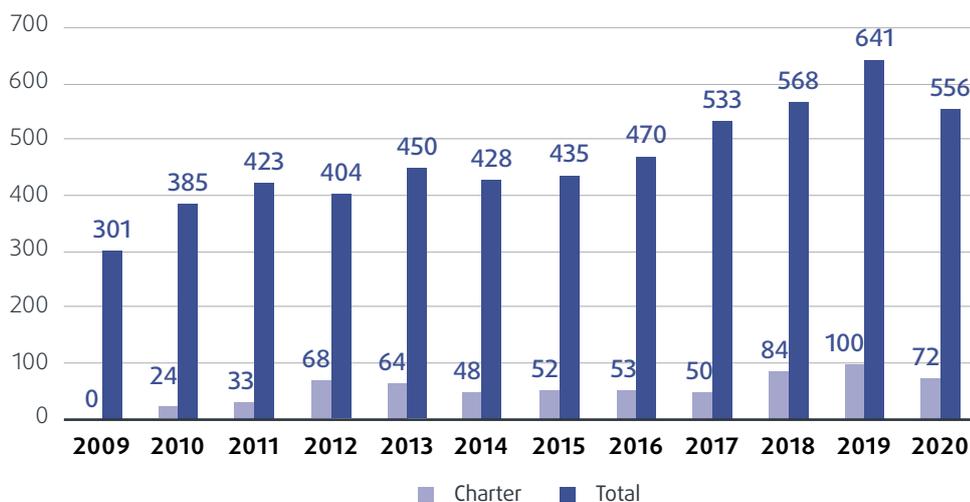
2.2.4. Requests for preliminary rulings

In 2020, courts from EU Member States sent 556 requests for preliminary rulings to the CJEU. Of these, 72 made reference to the Charter. This proportion, 13 %, is broadly in line with previous years.

“The rights of subjects laid down in the Treaty on European Union and in the Treaty on the Functioning of the European Union take precedence over provisions of national law which are contrary to them. The same applies to the [Charter], which under Article 6 (1) of the [TFEU] has the same legal force as the Treaties.”

Bulgaria, Supreme Administrative Court,
Case 7423/2020, 20 August 2020

FIGURE 2.1: REQUESTS FOR PRELIMINARY RULINGS, 2009–2020, AND NUMBER THAT REFER TO THE CHARTER



Source: FRA, 2021 [based on data received from the CJEU]

Requests for preliminary rulings may concern technical details or issues of political relevance. Two examples from **Latvia** illustrate this.

In one case, the Supreme Court requested a CJEU preliminary ruling about certain swamp lands included in an area protected under Natura 2000. National law places an absolute ban on cranberry plantations on this land. EU legislation provides that compensation for restrictions on the use of protected lands is to be provided.

The national court requested guidance on the situation when an owner is neither allowed to undertake commercial activity (making cranberry plantations) nor entitled to compensation. It asked the CJEU if such a situation is compatible with the right to property (Article 17), taking into account that the owner knew about the situation before acquiring the land.¹⁷

A second case involved a matter of major political interest: the use of languages in Latvian universities. The preliminary ruling request concerned amendments to the law on the establishment of higher educational institutions. The law provides that all establishments of higher education – state and private – must implement study programmes in Latvian only, except in a very few cases in which courses in EU languages are permitted.

The Constitutional Court found that the norm violated academic freedom as protected by the constitution. It referred questions to the CJEU regarding the compatibility of the law with both free movement of services and the freedom of establishment, as well as with the freedom to conduct a business, as provided by Article 16 of the Charter.¹⁸

When national courts request preliminary rulings and the CJEU provides its judgment, the national courts can proceed with the case based on the CJEU's interpretation. This process can trigger additional legal questions for the national courts to clarify.

For example, in **Poland**, the Supreme Court issued a decision establishing criteria to assess when a court formation is unduly appointed, including appointments under the current Act on the National Council for the Judiciary.¹⁹ Due to the manner in which the present Council is constituted, the Supreme Court ruled that panels convened by the Supreme Court are defective when

they include individuals appointed based on a recommendation by the current Council. This Supreme Court decision aimed to implement a judgment of the CJEU regarding the independence and impartiality of courts. However, it was then deemed unconstitutional by the Constitutional Court.²⁰

2.3. THE CHARTER AND LAWMAKERS

The European Commission's new Charter strategy stresses that national parliaments are central to promoting and protecting Charter rights. It also acknowledges that the use and awareness of the Charter in national parliaments remain low. In its strategy, the European Commission invites "the European Parliament and national parliaments to develop interparliamentary cooperation on issues related to the application of the Charter, to which the Commission stands ready to contribute".²¹

Moreover, the strategy calls on the Member States to use impact assessments and legislative scrutiny procedures to ensure that initiatives implementing EU law comply with the Charter.²² So far, these procedures tend not to refer to the Charter, even though a significant part of national law and policymaking falls under the scope of EU law and so has to conform fully with the Charter.²³

Nevertheless, there are examples of national law- and policymaking referring to the Charter in 2020. FRA analysed 33 examples of political debates and 35 examples of impact assessments or legal scrutiny procedures from across the EU. Data protection emerges as the policy area with the most examples of Charter use.

2.3.1. Use of the Charter outside the legislative process

Sometimes national political debates with no link to a specific legislative process refer to the Charter.

For instance, the parliament in **Belgium** adopted a resolution on the so-called LGBT-free zones in Poland. It referred to the prohibition on discrimination in Article 21 of the Charter.²⁴ The **Irish** parliament also referred to the Charter when criticising related government policies in **Poland**. It considered that they violate freedom of expression and information (Article 11) and non-discrimination (Article 21).²⁵

A group of parliamentarians addressed similar concerns in **Italy**.²⁶ These members of the Senate drew attention to arrests and pre-trial custody of activists in Poland. They also highlighted the need to respect non-discrimination (Article 21). They asked if the Italian minister for foreign affairs was aware of these events and if he was considering advocating the liberation of the activists and intervention by the European Commission.

Another example also involved a group of Italian senators. They asked the government if it was aware of allegations concerning municipal elections in Venice. Candidates had reported to the local press that they had sent a formal letter to the President of the European Commission, alleging the violation of the right to vote and stand as a candidate in local elections (Article 40 of the Charter) and of Directive 94/80/EC. They argued that the municipal authorities of Venice had not provided adequate information to EU citizens living in Venice on how to participate as voters in the municipal elections, which require local registration.²⁷

COVID-19 and related government measures prompted political debates concerning the fundamental rights foundations that need to be respected when designing and implementing national policies to counter the pandemic.

In **France**, the European Affairs Committee of the Senate recognised the need for Member States to take urgent measures to tackle the COVID-19 epidemic, but stressed that “the Charter of Fundamental Rights of the European Union continues to apply during the epidemic”.²⁸

2.3.2. Use of the Charter in the legislative process

Debates on adopting bills

Interventions in parliamentary debates sometimes use the Charter to argue for or against the adoption of a bill. For instance, in **Portugal**, the Charter was used to support a bill that aims to exempt students with disabilities from paying tuition fees.²⁹ Parliamentarians in Portugal also referred to the Charter when opposing proposals to legalise euthanasia.³⁰ Meanwhile, others rejected the introduction of a new national charter on digital rights, stating that such an initiative would duplicate rights that other instruments, including the Charter, already established.³¹

Lawmakers also referred to the Charter when discussing COVID-19-related measures. For instance, in **Estonia** a member of parliament made reference to the Charter when expressing concerns about data protection related to a COVID-19 hotline.³²

In **Finland**, the parliament discussed a government decree that temporarily restricted the freedom of movement to and from the capital region of Uusimaa in order to control the spread of the COVID-19 pandemic. Members referred to the Charter given that it specifically provides a right to free movement (Article 45).³³

Similar debates took place in other countries, such as **Croatia**, where data protection (Article 8) was referred to in the context of introducing electronic tracking of people’s locations.³⁴

Preparation of national bills

Explanations of bills tend to refer to the Charter when the bills are implementing EU legislation and are relevant to fundamental rights. The preparatory work for bills also refers to the Charter to bolster arguments in favour of legislative proposals.

For instance, in the context of ratifying the Protocol of Amendment to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, **Estonia** made reference to the fact that data protection “has recently been included as a fundamental right in Article 8 of the EU Charter of Fundamental Rights”.³⁵

In **Croatia**, a legislative proposal to establish an ombudsperson for the elderly referred to the Charter, which recognises the rights of elderly people to lead a life of dignity and independence and to participate in social and cultural life (Article 25).³⁶

In **Hungary**, a member of parliament submitted a bill to bring Hungarian legislation on civil society organisations in line with the CJEU’s judgment in case C-78/18.³⁷ It refers to the respect for private and family life (Article 7), data protection (Article 8) and freedom of assembly (Article 12).³⁸ The legislature did not take the bill into consideration.

In **Lithuania**, a bill amending the Law on Criminal Intelligence states in its explanation that the provisions of the law that was then in force would

violate the Charter. Therefore, the obligations under the Charter were one of the motivations of the bill.³⁹

In **Romania**, a bill seeks to amend existing anti-discrimination legislation by adding colour as a protected ground of discrimination. It specifies that that is a protected ground under Article 21 of the Charter.⁴⁰

(Legal) opinions on bills

In **Bulgaria**, the president maintained that the proposal to criminalise “distributing incorrect information about the spread of an infectious disease” contradicted a number of EU and international standards, including the freedom of expression and information as laid down in Article 11 of the Charter. The president also opposed a provision for a mandatory upper limit on the prices of goods and services during a state of emergency. He maintained that this would violate the principle of free movement of goods and services and the freedom to conduct a business, stipulated in Article 16 of the Charter. Both provisions were removed from the bills.⁴¹

The Supreme Bar Council of Bulgaria also argued against a bill by invoking the Charter. Increased punishments for computer crimes, sexual crimes, and crimes against intellectual property would render these crimes ‘serious’ and thus allow the tracing of contacts, locations and other circumstances of the personal lives of citizens and their correspondence. The council argued that this would bring a risk of violating citizens’ rights, including the right to private and family life (Article 7) and data protection (Article 8).⁴²

In **Finland**, amendments were proposed to the Communicable Diseases Act to develop a mobile application that helps trace and alert people who may have been exposed to COVID-19. The Constitutional Law Committee of Parliament referred to the Charter when reviewing their constitutionality.⁴³ The parliament and the president adopted the bill after the amendments that the committee suggested were introduced.

In the **Netherlands**, the Council of State used the Charter (in addition to the ECHR) to check if emergency measures to restrict the movement of persons due to COVID-19 were allowed.⁴⁴ The council stressed the importance of proportionality but also the need to draft measures clearly and publish them in such a way that citizens can adhere to them.



2.4. THE CHARTER AND GOVERNMENT POLICIES

The new Charter strategy stresses that national and local administrations, as well as law enforcement authorities, are “central to promoting and protecting Charter rights”. The European Commission intends “to work hand in hand with Member States’ national and local authorities to ensure the full application of the Charter and of EU laws that promote and protect the rights it enshrines”.⁴⁵

To prevent Charter violations, the Commission stresses that a regular dialogue with Member States and law enforcement authorities is useful to resolve, at an early stage, any emerging issues of incompatibility. Moreover, the strategy underlines that it is “important that Member States promote the development of tools, monitoring mechanisms, training and strategies to ensure compliance with the Charter”.⁴⁶

More specifically the new strategy calls on the Member States to deliver on 10 points. It invites them to:

- share best practices on the use and awareness of the Charter, including at local level;
- nominate a Charter focal point to ease coordination and cooperation;
- use impact assessments and legislative scrutiny procedures to ensure that initiatives implementing EU law comply with the Charter;
- develop guidance and training for national and local administrations;
- ensure that EU funds are used in compliance with the Charter and establish the arrangements provided in the Common Provisions Regulation⁴⁷;
- support national and local staff to design and implement programmes that comply with the Charter, in cooperation with the Commission;
- facilitate the coordination and coherent implementation of enabling conditions for EU funds and make the best use of available technical assistance;
- include fundamental rights bodies in the monitoring committees;
- promote a supportive and safe environment for CSOs and rights defenders in their country, including at local level;
- develop initiatives to promote people’s awareness of their Charter rights and of where to turn when their rights are breached, in particular by empowering local actors.

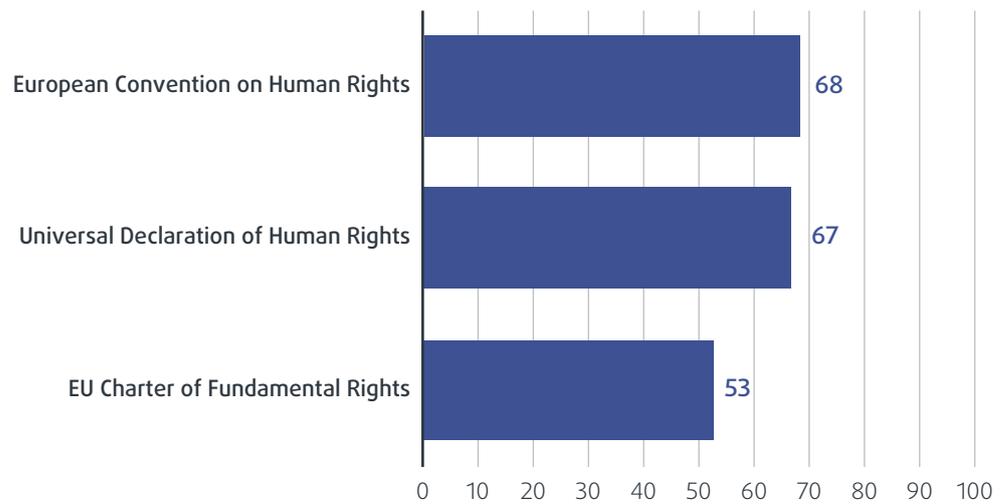
The strategy also expects solid cooperation from the Member States in the Council. It invites the Council to contribute to better implementation of the Charter by promoting exchanges among Member States in its Working Party for Fundamental Rights, Citizens’ Rights and Free Movement of Persons (FREMP) and to follow up on the Commission’s annual report that will be published in the course of 2021.

Policies related to the Charter and on promoting the application of its provisions could help increase awareness of the instrument. Awareness of the Charter is lower than of the key human rights catalogues established at the level of the Council of Europe (ECHR) or the United Nations (Universal Declaration of Human Rights), FRA survey data show.⁴⁸

However, the data also suggest that there is less of a gap between the awareness of the ECHR and the awareness of the Charter in countries that have more recently ratified the ECHR. This indicates that time is a key factor in raising awareness of a human rights catalogue.

Notes: Out of all respondents in the EU-27 who were asked to complete the section 'Rights awareness & responsibilities' of FRA's Fundamental Rights Survey 2019 (n = 24,354); weighted results.

FIGURE 2.2: AWARENESS OF HUMAN RIGHTS INSTRUMENTS



Source: FRA, *Fundamental Rights Survey 2019* [Data collection in cooperation with CBS (NL), CTIE (LU) and Statistics Austria (AT)]

Raising awareness through training and education

A number of existing practices can guide the development of similar initiatives concerning the application of the Charter.

For instance, in 2020, the Ministry of Justice of **Finland** organised an online course on fundamental rights and human rights in the legislative drafting process.⁴⁹ In the **Netherlands**, the Expert Centre on European Law of the Ministry of Foreign Affairs provides general information about the Charter.⁵⁰

In **Italy**, the Milan Bar Association (*Ordine degli Avvocati di Milano*) organised a training session on applying the Charter in national judicial proceedings concerning family reunification and legislation countering terrorism. The training was part of the EU-funded project 'Lawyers4Rights', involving legal professionals based in Bulgaria, Italy and Spain.

The local dimension of the Charter was emphasised in **Croatia**. The Association of Cities (*Udruga Gradova*) published an online article on the role of local authorities in implementing the Charter.⁵¹

In **Italy**, the School Department of the Emilia-Romagna Region carries out an educational programme on rights awareness. It focuses on educating young people about the Charter.⁵² It consists of a game for students and an e-learning platform for teachers, providing some key definitions and instruments that can be used during the training sessions. A mobile phone app allows the students to play from home as well.

2.5. THE CHARTER AND OTHER ACTORS

The new strategy on better implementation of the Charter stresses that, even though public authorities are primarily responsible for upholding and promoting the Charter, other actors also play a role in its implementation. Rights defenders, such as national human rights institutions (NHRIs), but also civil society, including academia, have an important role in promoting the use and awareness of the Charter and a culture of values.⁵³ The strategy calls on the Member States to increase the capacity of these actors.

2.5.1. NHRIs and other independent bodies

NHRIs, ombuds institutions, equality bodies and other statutory bodies play an important role in the national fundamental rights landscape. However, NHRIs appear to not yet be using the full potential of the Charter. Only four of the 33 NHRIs that FRA consulted for a previous report said they use the Charter systematically.⁵⁴

Nonetheless, some do invoke the Charter in their work. For instance, in **Slovenia**, the Advocate of the Principle of Equality, the national equality body, issued recommendations on a legislative proposal amending the Housing Act. The advocate argued for extending the right to apply for non-profit rental housing to all third-country nationals to avoid a violation of the Charter (Article 34 on social security and social assistance).⁵⁵

In the context of COVID-19-related measures, the National Data Protection Authority (*Comissão Nacional de Proteção de Dados*, CNPD) in **Portugal** issued guidelines for the collection of workers' health data, namely their body temperature. It invoked Article 8 of the Charter, stressing that the consent of the data subjects is relevant only if conditions guarantee that it is free and informed. The authority considered this to be extremely difficult in the context of a working relationship.⁵⁶

Where NHRIs are also active in the field of litigation, they may also make use of the Charter. For example, in **Estonia** the Chancellor of Justice referred to non-discrimination (Article 21) and the integration of persons with a disability (Article 26) in a submission to the CJEU. She raised the question of whether or not an official whose hearing is impaired can be dismissed without assessing if reasonable accommodation can be provided so that he can, for instance, carry out his job using hearing aids.⁵⁷ The case is likely to clarify the duty to provide reasonable accommodation within the scope of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

Where national bodies have a mandate to deal with individual complaints, the Charter offers an important standard. In **Lithuania**, the Equal Opportunities Ombuds institution referred to equality (Article 20) and the rights of the elderly (Article 25) in a decision on discrimination on the ground of age. The case concerned a job advertisement targeting people aged 30 to 50. The offender amended the advertisement.⁵⁸

In **Slovakia**, the Office of the Public Defender of Rights (*Kancelária verejného ochrancu práv*) referred to the Charter when assessing various complaints related to data protection, access to documents, refusal of an exemption for entry into the territory of the Slovak Republic for the complainant's fiancée, and the failure of a Slovak embassy to issue a national visa. It identified violations in all four cases.⁵⁹

National bodies also use the Charter in training contexts or to raise rights awareness. For example, in **Belgium**, the equality body referred to the rights of the elderly (Article 25) on the occasion of the International Day of Older Persons (1 October).⁶⁰ In **Romania**, the country's NHRI organised a training course on the Charter for lawyers.⁶¹

“The implementation of returns carries significant risks related to the fundamental rights set out in the EU Charter of Fundamental Rights, including the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, the right to an effective remedy and the principle of *non-refoulement*.”

Slovakia, Ombuds institution, **Annual report** submitted to the parliament, p. 15

2.5.2. Civil society organisations, professional associations, and academia

Civil society organisations and other associations sometimes raise Charter-related arguments when commenting on bills, and in the broader context of law- and policymaking.

For instance, in **Austria**, the Association of the Wood and Paper Industry Austria and Austropapier invoked the right to conduct a business (Article 16) when criticising a bill. The bill aims to temporarily oblige wood-processing companies to give priority to buying damaged timber from the surrounding region when there is a threat of mass propagation of certain forest pests.⁶²



In **Luxembourg**, the Chamber of Employees commented on a bill that introduced the obligation to wear masks in certain conditions. Referring to the Charter, the opinion emphasised that the state's interference in the private life of citizens must be strictly limited to the absolute minimum necessary.⁶³

Advocacy campaigns have also used the Charter. In **Germany**, the German Bar Association voiced serious concerns about the announcement of the Greek government that it would suspend the registration of asylum seekers for one month. The association referred to the Charter, among

others.⁶⁴ In **Sweden**, seven of the largest CSOs published an opinion piece in a major daily newspaper. It referred to the Charter, calling on the government to rescue unaccompanied minors stuck in refugee camps on the Greek islands.⁶⁵

Interest groups and NGOs also use the Charter in strategic litigation. For instance, in **Hungary**, the Hungarian Civil Liberties Union brought a case in the CJEU against the European Commission, for failing to comply with the right to freedom of expression and information (Article 11) concerning public lighting projects that the EU financed. A company in which allegedly persons close to the government held an interest won the tenders. The European Anti-Fraud Office investigated the matter, but the outcome was not made public. Meanwhile, the case before the CJEU was still pending at the time of writing.⁶⁶

Transparency issues also came up in **Malta**, where a law allows only EU citizens who have been resident for more than five years to request information from the government. Access-Information, a non-profit organisation, challenged this law in court, arguing that it violates a number of legal provisions, including the Charter.⁶⁷

Finally, academia can also play an important role in promoting the implementation of the Charter.

For example, in **Slovenia**, two academics drew attention to the importance of the Charter in a daily newspaper. They stressed that, although as much as 80 % of national legislation has its source in EU law, the Charter has so far not been used much.⁶⁸

In **Italy**, a research centre published a blog series entitled ‘All EU-r rights’ because it found it “difficult to find expert information in an accessible, concise format which is written in an understandable language”. The series addresses a wider audience by providing short article-by-article comments on the Charter’s provisions.⁶⁹

Academic writings published in 2020 used the Charter’s anniversary to take stock of its implementation⁷⁰ or deal with general Charter-related issues.⁷¹ Other writings analysed specific aspects of the Charter, such as social rights,⁷² asylum-related questions,⁷³ protection of children,⁷⁴ coronavirus-related aspects,⁷⁵ remedies and access to justice,⁷⁶ administrative law,⁷⁷ the use of the Charter before national courts,⁷⁸ the interaction between the national legal system and the Charter,⁷⁹ or other aspects.⁸⁰ Moreover, extensive article-by-article commentaries were published in French⁸¹ and Greek,⁸² which can also provide useful guidance for legal practitioners when applying the Charter.⁸³

FRA opinions

The Charter is of fundamental relevance for the EU, national and local levels of government, binding them whenever they are acting within the scope of EU law. However, at national level, engagement with the Charter remains rather limited, the evidence shows. This indicates a need for further support by the EU and its Member States, as well as reinforced cooperation. The following three opinions address the EU, national and local levels of government, respectively.

EU level

Whereas the new European Commission strategy to strengthen the application of the Charter dedicates increased political attention to the national level, it also announces additional EU guidance, stimulus and support, including through new EU programmes. For instance, it announces that the European Commission will strengthen its partnership with EU Member States in various contexts to better help them implement the Charter.

In addition, the European Commission invites both the Council and the Parliament, respectively, to enter into an 'inter-institutional discussion' with the Commission. Agencies are also of relevance in this regard. Whereas FRA and its work are frequently referred to, the strategy does not in more general terms address the role of EU agencies. EU agencies all can contribute to the application of the Charter, although awareness of the Charter and obligations under it vary between agencies, as does their readiness to increase their investment in raising awareness, FRA has reported.

The Charter is important not only for the key EU institutions but for all EU actors, such as, for instance, the Committee of the Regions. Especially its Commission for Citizenship, Governance, Institutional and External Affairs (CIVEX) has an obvious role to play in highlighting local practices and fostering an exchange amongst regional and local actors on how best to apply and promote the Charter.



FRA OPINION 2.1

The EU institutions, when discussing the application of the Charter as suggested in the European Commission's Charter strategy, should make sure that evidence from relevant national actors is sufficiently taken into account. In addition to FRA, attention should also be dedicated to other EU agencies that have the potential to contribute to better implementation and promotion of the rights in the Charter. Finally, the Committee of the Regions could engage in an annual exchange of promising practices and challenges in the application and promotion of the Charter provisions at local level. This could provide additional evidence to feed into the 'inter-institutional discussion' at EU level, to which the Charter strategy refers.

FRA OPINION 2.2

EU Member States should consider establishing dedicated Charter focal points, as invited to do under the Charter strategy. This would allow governments to coordinate national actions with actions at EU, regional and local levels to implement the new Charter strategy more effectively. Ideally, the implementation of the strategy would follow a structured process based on concrete targets, milestones and timelines. This could take the form of a dedicated Charter action plan, or making specific references to the Charter in existing action plans or strategies. To allow for mutual learning and synergetic exchange, adopting and implementing these planning documents should go hand in hand with coordination at EU level – for instance, through targeted discussions in FREMP.

National level

The data collected for this and earlier fundamental rights reports point to a lack of national policies to promote the application of the Charter. Consequently, the 2020 Charter strategy puts a major focus on the role of EU Member States in implementing the Charter. Given the number of concrete proposals for Member States to take action, the strategy forms a blueprint for the years to come.

Application of the Charter could be strengthened by setting up Charter focal points in the national administrations, adapting procedures concerning impact assessments and legal scrutiny, ensuring that committees with sufficient Charter expertise monitor the management of EU funds or, finally, establishing and/or strengthening NHRIs.

Other measures that the strategy lays down require refreshed national policy measures, for example in the area of training, awareness raising or promoting a supportive and safe environment for CSOs and rights defenders. These proposals will require a shift in the fundamental rights culture at national level, which so far appears rather focused on national constitutional law and the ECHR, thereby underusing the added value of the Charter.

FRA OPINION 2.3

EU Member States should promote the new Charter strategy among local and regional authorities, and explore how these authorities could more regularly refer to and promote fundamental rights in general and the Charter's added value in particular. Local and regional authorities should ensure that relevant local and regional instruments, procedures and policies refer to the Charter. Existing Charter practices should be communicated to the new national Charter focal points to ensure that these can share such practices and experiences with other Member States – for instance, through the European e-Justice Portal. Cities could consider becoming human rights cities and thereby stepping up fundamental rights considerations in their work, programmes, and activities.

Local level

Local administrations are not very aware of the Charter, according to **FRA's analysis of the data from the consultations** that the European Commission carried out while preparing the strategy. At the same time, the Charter "applies to regional or local bodies, and to public organisations, when they are implementing Union law" (see Explanations, Article 51, Official Journal of the European Union C 303/17 - 14.12.2007).

The strategy uses the term 'local' 17 times. It not only calls for the sharing of best Charter practices at local level and promoting a supportive and safe environment for CSOs and rights defenders at local level, but also demands that Member States provide sufficient guidance at local level so that local authorities can comply with their Charter duties. The strategy also points to the potential of local actors to raise awareness about people's rights and about what people can do if their rights are breached.

FRA is currently working on a concept for human rights cities in the EU. That framework of commitment will integrate various Charter-related components and could help increase Charter engagement at local level.

Index of country references

AT	47, 57
BE	51, 56
BG	53, 55
CZ	48
DE	46, 57
EE	47, 52, 56
ES	49, 55
FI	52, 53, 55
FR	52, 58
GR	57, 58
HR	47, 52, 55
HU	49, 52, 57
IE	48, 51
IT	47, 51, 55, 58
LT	52, 56
LU	57
LV	50
MT	57
NL	53, 55
PL	48, 50, 51
PT	52, 56
RO	47, 53, 56
SE	57
SI	56, 57
SK	56

Endnotes

- 1 For Charter chapters in previous Fundamental Rights Reports, see FRA's [webpage on the agency's Charter resources](#).
- 2 European Commission (2020), *Strategy to strengthen the application of the Charter of Fundamental Rights in the EU*, COM(2020) 711 final, 2 December 2020, p. 3.
- 3 See FRA (2020), *Analysis of the targeted consultations for the Commission's new Charter strategy*.
- 4 Compare for instance two examples that come from the same court. See Slovakia, Constitutional Court, **Case II. ÚS 376/2019-61**, ECLI:SK:USSR:2020:2.US.376.2019.2; Constitutional Court, **Case I. ÚS 183/2019-194**, ECLI:SK:USSR:2020:1.US.183/2019, 11 February 2020.
- 5 Germany, Constitutional Court, **Case 2 BvR 1845/18**, ECLI:DE:BVerfG:2020:rs20201201.2bvr184518, 1 December 2020. With this decision, the Second Senate of the Court followed the landmark judgment delivered by the First Senate in November 2019 (on the right to be forgotten). See Bundesverfassungsgericht (2020), *'Successful constitutional complaints against surrender to Romania for the purposes of criminal prosecution and the execution of a custodial sentence'*, press release, 30 December 2020; FRA (2020), *Ten years on: Unlocking the Charter's full potential*, Luxembourg, Publications Office.
- 6 Constitutional Court of Austria, **Case G302/2019**, 26 June 2020.
- 7 Austria, Highest Administrative Court, **Case Ra 2019/14/0509**, 19 February 2020.
- 8 Italy, Constitutional Court, **Ordinance No. 182/2020**, 8.7.2020. The Constitutional Court decided to ask the Court of Justice of the European Union (CJEU) if the Charter applies to birth and maternity allowances and if, consequently, the EU law must be interpreted as allowing national law to exclude third-country citizens who hold a work permit but not an EU long-term residence permit from such benefits.
- 9 Croatia, Constitutional Court, **Case U-I-503/2018**, 24 June 2020. In its assessment the Court also referred to CJEU case law, CJEU, Case C-601/15 PPU, EU:C:2016:84, 15 February 2016.
- 10 Estonia, Supreme Court, **Case 3-19-1068**, 17 April 2020.
- 11 Romania, Constitutional Court, **Case No. 2.493/271/2016**, 16 July 2020.
- 12 Ireland, High Court, **Case IEHC 454**, 15 September 2020. On the limits of this harmonious interpretation, see also Germany, Federal Labour Court, **Case 1 AZR 149/19**, ECLI:DE:BAG:2020:210120.U.1AZR149.19.0, 21 January 2020. Another case from Ireland asked if a 2011 act is valid under an EU directive properly interpreted in light of the Charter. The case concerns a prominent murder. Key evidence was obtained through access to mobile communication data. The judge had doubts that access to data under the Irish act of 2011 meets the standards identified by the CJEU in its jurisprudence (which again strongly relies on the Charter) and asked the CJEU for a preliminary ruling. Ireland, Supreme Court, **Case record No: 2019/18**, 24 February 2020.
- 13 Poland, Supreme Court, **Case BSA I-4110-1/20**, 23 January 2020.
- 14 Poland, Constitutional Court, **Case U 2/20**, 20 April 2020.
- 15 Spain, Supreme Court, **Case STS 2031/2020**, 22 June 2020, ECLI:ES:TS:2020:2031.
- 16 Hungary, Supreme Court (*Kúria*), Mfv. 10.251/2019/12, 22 April 2020. Note that the European Commission also makes a link between judicial independence and the Charter (see European Commission (2020), *2020 Rule of Law Report – The rule of law situation in the European Union*, COM(2020) 580 final, Brussels, 30 September 2020, p. 26). It expressed its concern about the "absence of effective control over the NOJ President increas[ing] the possibility of arbitrary decisions in the management of the judicial system". See European Commission (2020), *2020 Rule of Law Report – Country Chapter on the rule of law situation in Hungary*, SWD(2020) 316 final, Brussels, 30 September 2020.
- 17 Latvia, Senate of the Supreme Court Department of Administrative Law, **Case No. SKA-238/2020**, ECLI:LV:AT:2020:0603.A420186017.4.L, 3 June 2020. For the CJEU proceedings, see Case C-234/20 or C-238/20.
- 18 Latvia, Constitutional Court, **Case No. 2020-33-11**, 14 July 2020.
- 19 Poland, Supreme Court, **Case BSA I-4110-1/20**, 23 January 2020.
- 20 Poland, Constitutional Court, **Case U 2/20**, 20 April 2020.
- 21 European Commission (2020), *Strategy to strengthen the application of the Charter of Fundamental Rights in the EU*, COM(2020) 711 final, 2 December 2020, pp. 5 and 7.
- 22 *Ibid.*, p. 6.
- 23 FRA (2020), *Ten years on: Unlocking the Charter's full potential*, Luxembourg, Publications Office, p. 11.