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*The EU Charter of Fundamental Rights:  
in bad need of instructions for use?*

SUMMARY: 1. Preliminary remarks – 2. The scope of application of the Charter under its Article 51: continuity with the existing case-law – 3. The necessity of a «connection» to the implementation of EU law – 4. Categories of cases falling within the scope of application of the Charter in the post-Lisbon case-law – 5. Awaiting further clarification?

1. *Preliminary remarks*

The proclamation of the EU Charter of Fundamental Rights aroused considerable attention, even before the instrument acquired the same legal value as the Treaties. This can be explained, on the one hand, by the fact that the Charter seemed to fill a perceived gap in the legal framework of the European Union, that at the time lacked a written instrument concerning the protection of human rights, and, on the other hand, by its connection to the constitutional process which was ongoing at the time within the European Union<sup>1</sup>. The Court of Justice of the European Union (CJEU) itself underlined on several occasions the special importance of the provisions of the Charter<sup>2</sup>, even though its relation to the sources of EU law was still unclear.

Following the entry into force of the Lisbon Treaty, the relevance of the Charter increased as a consequence of its binding nature and of its rank in the legal system of the European Union<sup>3</sup>, which ensured a more solid

<sup>1</sup> K. LENAERTS, E. DE SMIJTER, *A «bill of rights» for the European Union*, in *Common Market Law Review*, 2001, p. 273 ff.; C. CALLIES, *The Charter of Fundamental Rights of the European Union*, in D. Ehlers (ed.), *European Fundamental Rights and Freedoms*, Berlin, 2007, p. 519.

<sup>2</sup> Cf. S. IGLESIAS SÁNCHEZ, *The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the CJEU's approach to Fundamental Rights*, in *Common Market Law Review*, 2012, p. 1565 ff.

<sup>3</sup> See, among others, L. DANIELE, *La Carta dei diritti fondamentali dell'Unione europea e il Trattato di Lisbona*, in *Il diritto dell'Unione europea*, 2008, p. 655 ff.; G. Di Federico (ed.),

foundation for the use of the Charter. In the new legal framework established by the Lisbon Treaty the Court of Justice was able to draw some conclusions about the functions that the Charter can be expected to perform<sup>4</sup>.

Firstly, as part of EU primary law, the compliance with the Charter is a condition of validity of EU secondary law: therefore, the Court is empowered to annul acts enacted by the European institutions that infringe principles related to the protection of fundamental rights and enshrined in the Charter<sup>5</sup>. For the same reason, the Charter may also have a significant impact on the interpretation of other sources of EU law<sup>6</sup>: while it is a common method to require an interpretation of EU acts in accordance with primary law<sup>7</sup>, the use of the Charter as an interpretative tool seems to disclose broader opportunities and in some cases it may lead to outcomes that can be seen as a departure from the literal meaning of certain provisions<sup>8</sup>.

In addition, as can be inferred from various judgments of the Court of Justice, the Charter may play a crucial role even *vis-à-vis* domestic law. On the one hand, in several cases it was held that some provisions of the Charter may contain rules to be directly applied by domestic courts in the

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<sup>4</sup> F. BESTAGNO, *I rapporti tra la Carta e le fonti secondarie di diritto dell'UE nella giurisprudenza della Corte di giustizia*, in *Diritti umani e diritto internazionale*, 2015, p. 259 ff.

<sup>5</sup> For a prominent example, cf. CJEU, 1<sup>st</sup> March 2011, C-236/09, *Association Belge des Consommateurs Test-Achats*.

<sup>6</sup> This may also include the interpretation of other rules of primary law in accordance with the Charter: see Court of Justice, judgment of 29 March 2012, C-500/10, *Belvedere Costruzioni*; 17 December 2015, C-419/14, *WebMindLicenses*; judgment of 5 December 2017, C-42/17, *M.A.S. e M.B.*

<sup>7</sup> Cf. F. BESTAGNO, *I rapporti tra la Carta e le fonti secondarie di diritto dell'UE nella giurisprudenza della Corte di giustizia*, p. 274 ff.

<sup>8</sup> See, in particular, CJEU, 5 April 2016, joined cases C-404/15 e C-659/15 PPU, *Aranyosi and Căldăraru*; CJEU, 25 July 2018, C-216/18 PPU, *LM*, both concerning the European Arrest Warrant, established by the Council Framework Decision 2002/584/JHA of 13 June 2002 [2002] OJ L 190, p. 1. The two judgments held that some additional grounds for non-execution of a European Arrest Warrant could be derived from the need to protect fundamental rights enshrined in the Charter. See also M. HONG, *Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi*, in *European Constitutional Law Review*, 2016, p. 549 ff.; A. TORRES PÉREZ, *A Predicament for Domestic Courts: Caught between the European Arrest Warrant and Fundamental Rights*, in B. de Witte, J.A. Mayoral, U. Jaremba, M. Wind and K. Podstawa (eds), *National Courts and EU Law. New Issues, Theories and Methods*, Cheltenham, 2012, p. 191 ff.

proceedings before them, even leading them to set aside conflicting national rules<sup>9</sup>, also in disputes between two private parties<sup>10</sup>. However, the Court seems reluctant to conclude that all the provisions of the Charter have the potential for direct application by domestic courts<sup>11</sup>. On the other hand, the Court has taken the view that the Charter is to be considered in the interpretation and in the application of domestic rules<sup>12</sup>, in order to ensure their compatibility with the needs underlying the protection of fundamental rights. In those cases, as the formula goes, the Court «must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures»<sup>13</sup>.

In the wake of the new rank of the Charter in the EU legal system<sup>14</sup>, a significant rise in the number of references to that instrument in the case-law of the Court of Justice has clearly occurred<sup>15</sup>. One of the main reasons for this trend is that increasingly national courts tend to raise preliminary questions concerning the interpretation of its provisions<sup>16</sup>. In fact, they seem to perceive the EU Charter of Fundamental Rights as an all-encompassing constitutional tool, having the same characteristics as national Constitutions: therefore, they seem to consider that a reference to the Charter can be relevant whenever they are called upon to assess the compatibility of a national rule with the

<sup>9</sup> See, for instance, CJEU, 22 January 2019, C-193/17, *Cresco Investigation*, para. 80; CJEU, 6 November 2018, joined cases C-569/16 and C-570/16, *Bauer*, para. 91.

<sup>10</sup> It is by now clear that the Court of Justice deems it possible that domestic courts apply at least some of the provisions contained in the Charter even when the dispute concerns two private parties: see, in particular, CJEU, 17 April 2018, C-414/16, *Egenberger*, para. 76, with regard to Article 21 of the Charter; CJEU, 6 November 2018, C-684/16, *Max-Planck-Gesellschaft*, para. 79, with regard to Article 31 of the Charter.

<sup>11</sup> CJEU, 15 January 2014, C-176/12, *Association de médiation sociale*, para. 48. For a commentary, see E. FRANTZIOU, Case C-176/12, *Association de Médiation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union*, in *European Constitutional Law Review*, 2014, p. 332 ff.

<sup>12</sup> CJEU, 10 July 2014, C-198/13, *Julian Hernández*, para. 32; CJEU, 9 March 2017, C-406/15, *Milkova*, para. 54 ff.

<sup>13</sup> See, e.g., CJEU, 26 September 2013, C-418/11, *Texdata Software*, para. 72; CJEU, 13 December 2017, C-403/16, *El Hassani*, para. 33.

<sup>14</sup> For a general recollection of the EU system for the protection of fundamental rights after the Lisbon Treaty, see DANIELE, *La protezione dei diritti fondamentali nell'Unione europea dopo il Trattato di Lisbona: un quadro di insieme*, in *Il diritto dell'Unione europea*, 2009, p. 645 ff.

<sup>15</sup> S. MORANO-FOADI, S. ANDREADAKIS, *Reflections on the Architecture of the EU After the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights*, in *European Law Journal*, 2011, p. 599 ff.

<sup>16</sup> See the data contained in European Commission, *2017 Report on the application of the EU Charter of Fundamental Rights*, available at [ec.europa.eu](http://ec.europa.eu), p. 26.

principles concerning the protection of fundamental rights, according to the technique of the alternative use of the preliminary ruling<sup>17</sup>.

This assumption has propelled a relatively large set of cases in which the Court of Justice of the European Union ruled that the preliminary questions raised by national courts were inadmissible<sup>18</sup>.

In some cases, the inadmissibility of the questions stemmed from a clear irrelevance of EU law with regard to the facts submitted by the referring court. For instance, in *Semeraro* the Court dealt with a case of abusive language during a football match between two local Italian teams<sup>19</sup>: the referring court submitted that the national legislator had decriminalised the corresponding criminal offense, claiming that this could lead to a violation of several rights protected by the Charter. Likewise, in *Demarchi* the Court was requested to give a preliminary ruling on the compatibility of purely national rules, concerning the enforcement of domestic judgments in matters of just satisfaction for the excessive length of proceedings, with the right to an effective remedy laid down in Article 47 of the Charter<sup>20</sup>.

In other cases, the situation appeared to be more nuanced. In *Consorzio Italian Management*, the referring court suggested that national law could be considered as incompatible with Article 16 of the Charter, insofar as it did not provide for price revision in a procurement procedure abstractly included in the scope of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors<sup>21</sup>. On the contrary, the Court of Justice held that it was not competent to provide the requested interpretation of the Charter, since the Directive did not place any obligation on the Member State as to price revision; consequently, the issue was outside the scope of EU law. In *Iida* the Court ruled that the situation of a third-country national did not fall within the scope of EU law, even though the national measure at issue was intended to implement Directive 2004/38/EC of the European Parliament

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<sup>17</sup> See also, concerning the so-called “citizens’ infringement procedure”, P. PESCATORE, Van Gend en Loos, 3 February 1963 – *A View from Within*, in L.M. Póiares Pessoa Maduro, L. Azoulai (eds), *The Past and Future of EU Law*, Cambridge, 2010, p. 3 ff.; B. DE WITTE, *The preliminary ruling dialogue: three types of questions posed by national courts*, in B. de Witte, J.A. Mayoral, U. Jaremba, M. Wind and K. Podstawa (eds), *National Courts and EU Law New Issues, Theories and Methods*, Cheltenham, 2012, p. 15 ff.

<sup>18</sup> In the same vein, S. IGLESIAS SÁNCHEZ, *The Court and the Charter*, p. 1588 f.

<sup>19</sup> CJEU, order 13 December 2016, C-484/16, *Semeraro*.

<sup>20</sup> CJEU, order 7 September 2017, C-177/17, *Demarchi*.

<sup>21</sup> CJEU, 19 April 2018, C-152/17, *Consorzio Italian Management*, paras 33-35. See also CJEU, 4 June 2020, C-32/20, *Balga*.

and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States<sup>22</sup>; nonetheless, the Court emphasised that the third-country national did not satisfy the requirements established by EU law in order to invoke the application of the Directive.

The above-mentioned cases clearly show that domestic courts are still in need of guidance with regard to the scope of application of the Charter of Fundamental Rights and to the competence of the Court of Justice in interpreting the Charter itself. Therefore, it is useful to shortly illustrate the solutions adopted so far by the Court of Justice in handling preliminary questions regarding the interpretation of the Charter, when the connection of the case to the scope of the Charter was not beyond any doubt.

## 2. *The scope of application of the Charter under its Article 51: continuity with the existing case-law*

Article 51 of the Charter of Fundamental Rights governs the applicability of its provisions, stating that they «are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law». Accordingly, whereas no doubt may arise as to the relevance of the Charter for the validity or the interpretation of EU acts, a clear limitation is set as to its interaction with domestic law<sup>23</sup>. The Explanations<sup>24</sup> clarify that the latter rule was derived from a principle set forth by the case-law of the Court of Justice, according to which Member States are under a duty to respect human rights when they are acting under EU law<sup>25</sup>.

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<sup>22</sup> CJEU, 8 November 2012, C-40/11, *Iida*, paras. 79-81. For a similar case, see CJEU, 22 May 2014, C-56/13, *Érsekcsanádi Mezőgazdasági*, paras 54-56.

<sup>23</sup> On the drafting history of Article 51, see, among others, R. ALONSO GARCÍA, *The General Provisions of the Charter of Fundamental Rights of the European Union*, in *European Law Journal*, 2002, p. 492 ff.; P. EËCKHOUT, *The EU Charter of Fundamental Rights and the Federal Question*, in *Common Market Law Review*, 2002, p. 945 ff. On the interpretation of the provision, see also N. LAZZERINI, *La Carta dei diritti fondamentali dell'Unione europea: i limiti di applicazione*, Roma, 2018, p. 183 ff.

<sup>24</sup> Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, [2007] OJ C303, p. 17 ff.

<sup>25</sup> On the principle, see the contributions contained in L.M. Poiares Pessoa Maduro, L. Azoulai (eds), *The Past and Future of EU Law*, Cambridge, 2010: F.G. JACOBS, Wachauf and the Protection of Fundamental Rights in EC Law, p. 133 ff.; D. CHALMERS, *Looking Back*

In fact, in the pre-Lisbon legal framework it was up to the Court of Justice, that had developed the principles underlying the protection of fundamental rights by way of judicial interpretation, to set the boundaries of their application. In so doing, the Court referred to the above-mentioned principle; however, it never gave a complete clarification as to when a situation could be considered as falling outside or within the scope of EU law, even though its case-law did provide some hints.

First, in a seminal case<sup>26</sup> the Court pointed out that Member States were called upon to protect fundamental rights, as recognised by the Court through general principles of EU law, when they were implementing an EU legislative act<sup>27</sup>. In that context, the notion of «implementation» of EU law was not confined to national rules transposing EU law or ensuring its enforcement; rather, it was broadly interpreted, in order to also include situations in which the Member State avails itself of national procedural rules in matters partially governed by EU law<sup>28</sup>.

Secondly, the Court stressed that, when a Member State enacts domestic legislation relying on a derogation provided for in EU primary law, it must be satisfied that the domestic measure does not conflict with the need to protect fundamental rights<sup>29</sup>. In such cases, despite the fact that the derogation is the consequence of the application of national rules, the connection with EU law lies in the fact that the derogation is possible only insofar as it is permitted by a provision of EU law<sup>30</sup>.

At the same time, the Court of Justice ruled out the possibility that a merely remote or hypothetical connection to the application of supranational rules can be sufficient to establish that a situation falls within the scope of EU law and that a national legislation must be interpreted in

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at *ERT and Its Contribution to an EU Fundamental Rights Agenda*, p. 141 ff.; Z. KUHN, Wachauf and ERT: *On the Road from the Centralised to the Decentralised System of Judicial Review*, p. 150 ff.; P. CRUZ VILLALÓN, *All the Guidance*, ERT and Wachauf, p. 162 ff.

<sup>26</sup> CJEU, 13 July 1989, C-5/88, *Wachauf*, para. 19.

<sup>27</sup> See also CJEU, 24 March 1994, C-2/92, *Bostock*, para. 16; CJEU, 15 February 1996, C-63/93, *Duff*, para. 29; CJEU, 17 December 1998, C-186/96, *Demand*, para. 35; CJEU, 13 April 2000, C-292/97, *Karlsson*, para. 37; CJEU, 22 October 2002, C-94/00, *Roquette Frères*, para. 26.

<sup>28</sup> See e.g. CJEU, 19 November 1998, C-85/97, *SFI*, para. 31; CJEU, 18 December 2008, C-349/07, *Sopropé*, para. 35.

<sup>29</sup> See also CJEU, 18 June 1991, C-260/89, *ERT*, para. 42; CJEU, 8 April 1992, C-62/90, *Commission v Germany*, para. 23; CJEU, 26 June 1997, C-368/95, *Verenigde Familiapress*, para. 24; CJEU, 12 June 2003, C-112/00, *Schmidberger*, para. 77.

<sup>30</sup> See also CJEU, 30 April 2014, C-390/12, *Pfleger*, para. 36.

accordance with EU principles regarding fundamental rights<sup>31</sup>. In particular, the Court clarified that, when national legislation indirectly affects the implementation of provisions of EU law, namely because its subject-matter has only a loose connection with general objectives laid down in EU Treaties, the situation does not fall within the scope of EU law<sup>32</sup>.

Accordingly, the application of the general principles concerning human rights in the legal system of the European Union can be granted only insofar as at least another provision of EU law could simultaneously play a role as a basis for the decision to be taken before the domestic court.

In the case-law of the Court of Justice the issue of the scope of those principles is also linked to the question of the jurisdiction of the Court itself in a reference for preliminary ruling. In fact, since its earliest cases<sup>33</sup>, the Court has constantly held that it does not have jurisdiction to rule on a question relating to the interpretation of principles regarding fundamental rights when it is clear that the national court is not called upon to settle a dispute that falls within the scope of EU law.

The Court has never given a detailed explanation of the reasons why it considered that it lacked jurisdiction with regard to a reference for preliminary ruling concerning the protection of fundamental rights in matters not covered by EU law. In fact, as a general rule, the Court applies a presumption of relevance of preliminary questions referred by a national court and it can declare those questions inadmissible only where the national court seeks the interpretation of provision of EU law that are clearly unrelated to the main action<sup>34</sup>. However, with regard to issues concerning fundamental rights the Court did not follow the same approach, as it usually engages into a review of the connection between national legislation and EU law, that goes further than its ordinary examination as to its jurisdiction<sup>35</sup>.

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<sup>31</sup> CJEU, 29 May 1997, C-299/95, *Kremzow*, para. 16; CJEU, order 26 March 2009, C-535/08, *Pignataro*, para. 16.

<sup>32</sup> See CJEU, 18 September 1997, C-309/96, *Annibaldi*, para. 22.

<sup>33</sup> In particular, CJEU, 11 July 1985, joined cases 60 and 61/84, *Cinéthèque*, para. 26; CJEU, 30 September 1987, C-12/86, *Demirel*, para. 28; CJEU, 4 October 1991, *Society for the Protection of the Unborn Children Ireland*, para. 31.

<sup>34</sup> See, for instance, CJEU, 7 June 2007, joined cases C-222/05 to 225/05, *van der Weerd*, para. 22; CJEU, 16 December 2008, C-210/06, *Cartesio*, para. 67.

<sup>35</sup> See, by contrast, the broader approach of the Court to the issue of purely internal situations. In the judgment of 17 September 2015, C-257/14, *van der Lans*, para. 20, the Court of Justice recalled that «according to settled case-law, the Court may decline to rule on a question referred for a preliminary ruling by a national court *only where, inter alia, it is quite obvious* that the provision of EU law referred to the Court for interpretation is incapable

### 3. *The necessity of a «connection» to the implementation of EU law*

Given the above-mentioned existing framework before the entry into force of the Lisbon Treaty, the different position attributed to the Charter of Fundamental Rights in the legal system of the European Union did not seem to entail a significant evolution, since the wording of Article 51 expressly echoes the pre-existing case-law of the Court of Justice<sup>36</sup>. In the interpretation of the provision the EU judges chose not to depart from their precedents and to show deference to its literal meaning: the same attitude of self-restraint was thus kept, showing that it was not a consequence of the non-written nature of the applicable principles, but the result of a voluntarily cautious approach of the Court in this regard<sup>37</sup>.

The position of the Court was clearly stated in *Åkerberg Fransson*<sup>38</sup>, when a Swedish court sought to clarify whether its domestic law was incompatible with the protection of fundamental rights insofar as it allowed to conduct criminal proceedings for tax evasion against a person who had been already subjected to a tax penalty for the same facts in other proceedings. As the preliminary question revolved around the application of domestic law rules apparently unrelated to the enforcement of EU law, the issue of the applicability of the Charter was expressly raised by several Governments and by the European Commission.

The Court of Justice referred to its previous case-law and asserted that the Charter, to be read in combination with the Explanations, had intended to reiterate the principles that had already been elaborated in the past with regard to the general principles of EU law in disputes concerning the protection of fundamental rights. The judgment underlined the necessity to draw a distinction between situations falling within or outside the scope of EU law and held that a national measure that is not adopted with a view to transposing a EU Directive, but serves the purpose of imposing sanctions for the infringement of rules emanating from that Directive, does, in fact, implement EU law. This was the case with the domestic measure at stake in

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of applying» (emphasis added). Cf. also M.E. BARTOLONI, *Competenze puramente statali e diritto dell'Unione europea*, in *Il diritto dell'Unione europea*, 2015, p. 339 ff.

<sup>36</sup> About possible discrepancies between the scope of general principles concerning protection of fundamental rights and of the Charter, see, however, S. PRECHAL, *The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?*, in C. Paulussen, T. Takács, V. Lazić, B. Van Rompuy (eds), *Fundamental Rights in International and European Law*, Berlin, 2016, p. 147.

<sup>37</sup> See *infra*, § 5.

<sup>38</sup> CJEU, 26 February 2013, C-617/10.



*Åkerberg Fransson*, as the tax penalty and the criminal proceedings were the result, *inter alia*, of a violation of rules concerning VAT, established under Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax<sup>39</sup>.

The subsequent case-law shed more light on the interpretation of Article 51 developed in *Åkerberg Fransson*<sup>40</sup>. In particular, it was argued that, according to the approach followed by the Court of Justice, the key factor to be taken into account for that purpose is the existence of a *sufficient connection* between EU law and national legislation<sup>41</sup>: only when such a connection can be ascertained, can the Charter influence the interpretation of national law or even lead to disregard its application and, at the same time, is the Court competent to deliver a preliminary ruling on the interpretation of the Charter itself. In other words, even if a connection to the legal system of the European Union may exist even when the action of national authorities is not entirely governed by EU law, that connection must show a certain degree of intensity and effectiveness.

Although the Court does not seem to often recall the notion of «sufficient connection»<sup>42</sup>, it can provide a useful framework for the explanation of the phrase «implementing Union law»<sup>43</sup>. In particular, the reference to such a general concept in the interpretation of Article 51 of the Charter can contribute to clarifying that the relevant passage of that provision in fact points

<sup>39</sup> [2006] OJ L 347, p. 1 ff.

<sup>40</sup> See, among others, A. BAILLEUX, *Entre droits fondamentaux et intégration européenne, la Charte des droits fondamentaux de l'Union européenne face à son destin*, in *Revue trimestrielle des droits de l'homme*, 2014, p. 215 ff.; A. ÉPINEY, *Le champ d'application de la Charte des droits fondamentaux: l'arrêt Fransson et ses implications*, in *Cahiers de droit européen*, 2014, p. 283 ff.; F. FONTANELLI, *Implementation of EU Law through domestic measures after Fransson: the Court of Justice Buys Time and "Non-preclusion" Troubles Loom Large*, in *European Law Review*, 2014, p. 682 ff.; N. LAZZERINI, *Il contributo della sentenza Åkerberg Fransson alla determinazione dell'ambito di applicazione e degli effetti della Carta dei diritti fondamentali dell'Unione europea*, in *Rivista di diritto internazionale*, 2013, p. 883 ff.; B. VAN BOCKEL, P. WATTEL, *New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson*, in *European Law Review*, 2013, p. 866 ff.

<sup>41</sup> The reference to the notion of "connection" is also underlined by S. IGLESIAS SÁNCHEZ, *The Court and the Charter*, cit., p. 1587; N. LAZZERINI, *La Carta dei diritti fondamentali dell'Unione europea: I limiti di applicazione*, p. 215 ff.

<sup>42</sup> See, however, CJEU, judgment of 6 March 2014, case C-206/13, *Siragusa*, para. 24, where the Court pointed out that «the concept of implementing Union law, as referred to in Article 51 of the Charter, requires a *certain degree of connection*» between the national measure at issue and EU law (emphasis added). See also judgment of 10 July 2014, case C-198/13, *Julian Hernández*, para. 33.

<sup>43</sup> For a comprehensive discussion of the notion of «connection» with the scope of EU law, see the Opinion of AG Bobek in case C-298/16, *Ispas*, paras 29-65.

to a multi-faceted concept rather than to a clear-cut scenario.

In this regard, the case-law does confirm that it is possible to envisage different situations in which Member States are, in fact, implementing EU law and consequently are bound by the provisions of the Charter. At the outset, a distinction must be drawn between those situations in which Member States are simply enforcing instruments of EU law, that are directly applicable or have direct effect and so leave no room for national legislation<sup>44</sup>, and those situations in which national legislation is bound to be applied in connection or in combination to provisions and principles of EU law or as a result of them. The first group of cases, actually concerning the concrete application of EU rules by national authorities, does not fall within the scope of this paper, as it deals with the interpretive impact of the Charter on EU acts and with the necessity to apply the latter in compliance with the protection of fundamental rights.

Nonetheless, it must be borne in mind that such a distinction is somewhat blurred, since the Court of Justice often deems it necessary to refer to the Charter through the “mediation” of certain acts of EU secondary law, moving from the assumption that such acts are relevant to the determination of the actual contents of specific provisions of the Charter itself<sup>45</sup>. The above-mentioned scenario arises especially when the Court of Justice is called upon to provide domestic courts with guidance on the compatibility of national legislation with principles of European social law. For instance, it is now settled case-law<sup>46</sup> that Article 31.2 of the Charter, concerning the right to paid annual leave, must be read and interpreted in combination with Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time<sup>47</sup>. Accordingly, the Court has often underlined<sup>48</sup> that the principles of equal treatment and of non-discrimination laid down, respectively, in Articles 20 and 21 of the Charter must be given effect taking into account the provisions of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for

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<sup>44</sup> See also the Opinion delivered by AG Cruz Villalón in case C-617/10, Åkerberg Fransson, para. 28.

<sup>45</sup> In several cases the Court of Justice found that a certain EU act gave «specific expression» to a principle enshrined in the Charter: see, for instance, CJEU, 1 October 2015, C-432/14, *O.*

<sup>46</sup> See, recently, CJEU, 29 November 2017, C-214/16, *King*, para. 56; CJEU, 6 November 2018, C-684/16, *Max-Planck-Gesellschaft*, para. 52.

<sup>47</sup> [2003] OJ L 299, p. 9 ff.

<sup>48</sup> See, e.g., CJEU, 19 April 2016, C-441/14, *Dansk Industri*, para. 22; CJEU, 9 November 2017, C-306/16, *Maio Marques da Rosa*, para. 50; CJEU, 17 April 2018, C-414/16, *Egenberger*, para. 81.

equal treatment in employment and occupation<sup>49</sup>.

However, this does not really call into question the usefulness of the suggested dichotomy, as in the above-mentioned cases Member States are still expected to give effect to their national legislation: in said context, EU secondary acts do not come into play because they set specific and compelling rules that Member States must simply enforce, but because they help define the obligation to act in conformity with the protection of fundamental rights. As a matter of fact, the Court has often used the reference to EU Directives as contributing to the determination of the contents of certain rights protected by the Charter, in order to overcome the well-known limits to their application as between private parties<sup>50</sup>.

#### *4. Categories of cases falling within the scope of application of the Charter in the post-Lisbon case-law*

Once clarified the scope of the analysis, it is now possible to try to categorise the situations in which national legislation can be attracted into the sphere of authority of the Charter and be subject to its primacy as a source of Union law. On this very point, several scholars have made attempts at setting out the most likely criteria for the definition of relevant connections between EU law and domestic law, depending on the type of EU rules at issue<sup>51</sup> or on the nature of the connection<sup>52</sup>.

Of course, it must be kept in mind that similar classifications may only tend to a rationalisation of the findings of the Court of Justice in its case-law: for that reason, one should not overlook the fact that the mechanism itself of the preliminary ruling and the willingness of the Court to take into consideration the specific features of individual cases cannot ensure that the conclusions to be drawn shall lead to the determination of a coherent framework. Nevertheless, some core points can be identified, especially taking stock of the existing elements of continuity with the pre-Lisbon period.

First, the notion of implementation of EU law referred to in Article

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<sup>49</sup> [2000] OJ L 303, p. 16 ff.

<sup>50</sup> See D. GALLO, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali*, Milano, 2018, p. 185 ff. and p. 314 ff.

<sup>51</sup> D. SARMIENTO, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, in *Common Market Law Review*, 2013, p. 1267 ff.

<sup>52</sup> M.E. BARTOLONI, *Competenze puramente statali e diritto dell'Unione europea*, p. 347 ff.

51 must be interpreted according to its literal meaning, that includes every situation in which national legislation is enacted in order to ensure compliance with the obligations imposed by EU rules through the adoption of more specific provisions. The Court of Justice accepted that the national legislation at stake was implementing EU law when it served the purpose of ensuring the transposition of a Directive<sup>53</sup> or when it gave effect to other acts having their legal basis in provisions of EU law, such as a Memorandum of Understanding between the Union and a Member State concerning financial assistance<sup>54</sup> or even the operational programme between two Member States adopted under an EU Regulation concerning regional funding<sup>55</sup>.

Secondly, as the precedent in *Åkerberg Fransson* shows, the Court considers that a Member State is implementing EU law even when it imposes sanctions established under national law, when they are necessary for the achievement of objectives stemming from EU rules. Accordingly, in that case EU law does not expressly set forth the specific measures to be carried out by Member States but refers to measures that exist under their national law.

The nature of such sanctions, regardless of whether they are criminal, civil or administrative, is in itself irrelevant to the application of the Charter (even though it may trigger the application of provisions concerning different rights<sup>56</sup>). On the contrary, the Court focuses its attention on the fact leading to the adoption of the sanctions: insofar as that fact amounts to a violation of rules of EU law, the Charter of Fundamental Rights applies, even though the sanctions are governed by domestic rules and are not specifically intended for the enforcement of EU law<sup>57</sup>. For instance, in *Berlioz Investment Fund*<sup>58</sup>

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<sup>53</sup> In *Egenberger* (judgment of 17 April 2018, C-414/16, cit.) the Court found that the statute to be applied by the referring court was enacted in order to implement Directive 2000/78 (see para.49). See also CJEU, 20 December 2017, C-664/15, *Protect*, para. 44; CJEU, 13 September 2018, C-358/16, *UBS Europe*, para. 52.

<sup>54</sup> CJEU, 13 June 2017, C-258/14, *Florescu*, paras 44-48.

<sup>55</sup> CJEU, 17 September 2014, C-562/12, *Liivimaa Lihaveis*, paras. 61-66: in particular, the Court underlined that the two Member States were under a duty to implement the operational programme and to adopt a programme manual, whose provisions had thus to comply with the principles enshrined in the Charter.

<sup>56</sup> However, the characterisation of national measures as criminal sanctions and the consequential applicability of the relevant provisions of the Charter do not rely merely on domestic law: see, e.g., CJEU, 20 March 2018, C-537/16, *Garlsson Real Estate*, para. 28.

<sup>57</sup> In matters of collection of VAT revenues, see CJEU, 5 April 2017, joined cases C-217/15 and C-350/15, *Orsi and Baldetti*, para. 16; CJEU, 20 March 2018, C-524/15, *Menci*, paras. 18-23. In matters of illegal immigration, see CJEU, 6 October 2016, C-218/15, *Paoletti*, paras 13-20.

<sup>58</sup> CJEU, 16 May 2017, C- 682/15, paras 33-42.

the Court held that the national legislation concerning sanctions for the failure to provide information to tax authorities had to be interpreted in accordance with the Charter, when the sanction, established under general provisions of domestic law, was imposed on the grounds of the failure to provide information requested under Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation<sup>59</sup>. In particular, when a domestic provision can be aimed at preventing violations both of domestic law and of EU law, the Charter is applicable provided that in the instant case the sanction is the actual result of a violation of EU law<sup>60</sup>.

In the third place, a similar situation can be envisaged when the applicability of the Charter of Fundamental Rights comes into play with regard to actions concerning rights which individuals derive from European Union law<sup>61</sup>. According to settled principles in the case-law of the Court of Justice the exercise of rights conferred by EU law is usually not governed by uniform rules, established under EU law itself, but it falls within the scope of the so-called «procedural autonomy» of Member States<sup>62</sup>. In practice, it is for the legal systems of each Member State to lay down the necessary procedural rules governing those actions (concerning time-limits, jurisdictional competence of national courts, *ex officio* powers, etc.) and Union law only demands that they comply with general requirements relating to the principles of equivalence and effectiveness<sup>63</sup>. Ordinarily, those rules are not intended to govern only claims having their legal basis in EU law, but Member States apply to those proceedings the existing rules for similar claims based on domestic law (e.g. actions for recovery of undue payments).

In that context, domestic procedural rules may serve as a means for ensuring the enforcement of substantive rights attributable to individuals under EU law and this is sufficient to establish a link between their application and the implementation of European Union law, which they indirectly contribute to. So far, the Court of Justice has followed such approach when, for instance, it was called upon to scrutinise domestic procedural rules to be applied to actions for the repayment of taxes levied in breach of the EU

<sup>59</sup> [2011] OJ L 64, p. 1 ff.

<sup>60</sup> See, for instance, CJEU, order 15 April 2015, C-497/14, *Burzio*, concerning criminal proceedings for violations in matters of direct taxation and not of value added tax.

<sup>61</sup> On the issue, see the seminal study of A. TIZZANO, *La tutela dei privati nei confronti degli Stati membri dell'Unione europea*, in *Foro italiano*, 1995, p. 13 ff.

<sup>62</sup> For a criticism of the reference to the principle of «procedural autonomy», see M. BOBEK, *Why There is no Principle of 'Procedural Autonomy' of the Member States*, in B. de Witte, H. Micklitz (eds), *The European Court of Justice and Autonomy of the Member States*, Cambridge, 2011, p. 305 ff.

<sup>63</sup> See, recently, CJEU, 24 October 2018, C-234/17, *XC*, para. 22.

Treaties<sup>64</sup> or for the payment of tax credits which the beneficiaries have been unduly deprived<sup>65</sup> of, to actions concerning State liability for the delay in the transposition of a Directive<sup>66</sup>, to actions for infringement of rights relating to personality with respect to the processing of personal data<sup>67</sup>, to actions concerning public participation in environmental matters<sup>68</sup>, to actions for the payment of agricultural aid under the common agricultural policy<sup>69</sup>. However, given the general scope of the case-law concerning the use of national procedural rules for the exercise of rights conferred by EU law, the mentioned approach does not seem likely to be confined to specific matters.

As earlier noted also with regard to sanctions, the Court has repeatedly held that a merely potential connection is not sufficient and has required that in the proceedings before the referring court the exercise of rights derived from EU law be actually at stake<sup>70</sup>. The approach of the Court in this regard appears to be quite strict, as it considers the Charter to be inapplicable when the main proceedings concerned rights based on domestic law, where they showed only a weak connection to EU law<sup>71</sup>.

A fourth group of cases covers a situation that had been envisaged even in the pre-Lisbon period, that is the situation in which a Member State takes advantage of a derogation from the fundamental freedoms established in the Treaties, subject to the requirements imposed by EU law to that end. After the entry into force of the Lisbon Treaty, the case-law dating back to the judgment in *ERT*<sup>72</sup> was given continuity in several cases, concerning especially the freedom to provide services and the regulation of games of chance<sup>73</sup>. In this regard, as has been repeatedly stressed by the Court of

<sup>64</sup> CJEU, 30 June 2016, C-205/15, *Toma*, paras 21-28.

<sup>65</sup> CJEU, 14 September 2017, C-628/15, *The Trustees of the BT Pension Scheme*.

<sup>66</sup> CJEU, 22 December 2010, C-279/09.

<sup>67</sup> CJEU, 27 September 2017, C-73/16, *Puškár*.

<sup>68</sup> CJEU, 8 November 2016, C-243/15, *Lesoochranárske zoskupenie*, para. 51.

<sup>69</sup> CJEU, 27 June 2013, C-93/12, *Agrikonsulting*.

<sup>70</sup> See CJEU, 10 July 2014, C-198/13, *Julian Hernandez*, paras 31-47; CJEU, 14 December 2017, C-243/16, *Miravittles Ciurana*, paras 33-34.

<sup>71</sup> In particular, in the judgment of 27 March 2014, case C-265/13, *Toralbo Marcos*, the Court held that the proceedings concerning the enforcement of a conciliation settlement did not fall within the scope of EU law, even if they were aimed at obtaining a legal finding of the insolvency of the claimant's employer, in order to access rights conferred by Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283, p. 36 ff.

<sup>72</sup> See above, fn. 29.

<sup>73</sup> Cf. CJEU, 30 April 2014, C-390/12, *Pfleger*, paras 35-36; CJEU, 11 June 2015, C-98/14, *Berlington Hungary*, para. 74; CJEU, 14 June 2017, C-685/15, *Online Games*

Justice, the underlying idea is that exceptions and derogations in that area are governed by EU rules which national legislation must comply with; accordingly, when a Member State makes recourse to them, it is, in fact, acting within the scope of EU law.

Lastly, a more controversial situation seems to arise in a relatively small set of cases, in which the Court of Justice has held that the scope could also be extended to situations relating to the use of discretionary power by Member States. The first example provided by the case-law of the Court concerned the so-called «sovereignty clause» in the Common Asylum System under Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national<sup>74</sup>. The Court has held that under that clause a State may decide to exercise discretionary power and to examine an asylum application departing from the uniform rules established by the Regulation; in any event, it must ensure compliance with the protection of fundamental rights as established in the Charter<sup>75</sup>.

The principle was subsequently reiterated in two more cases, regarding respectively mutual assistance by the authorities of the Member States in the field of direct taxation<sup>76</sup> and non-discrimination of persons with disabilities<sup>77</sup>; an implied reference to the same principle can be found in a case concerning the right to vote in the European elections<sup>78</sup>. While the position of the Court could have been influenced by the stance already taken with regard to cases of derogation from fundamental freedoms, a major difference is clearly discernible, insofar as the conditions for the use of such discretionary powers were not established under EU law. Conversely, the

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*Handels*; CJEU, 28 February 2018, C-3/17, *Sporting Odds*. Other references can be found in judgments concerning the freedom of establishment: see especially CJEU, 21 December 2016, C-201/15, *AGET Iraklis*, paras 64-65.

<sup>74</sup> [2003] OJ L 50, p. 1 ff.

<sup>75</sup> CJEU, 21 December 2011, joined cases C-411/10 and C-493/10, *N.S.*, paras 64-69.

<sup>76</sup> CJEU, 22 October 2013, C-276/12, *Sabou*, paras 26-27: the exercise of the power to request information in the field of direct taxation was considered to be within the scope of EU law. The Court found, however, that the Charter was not applicable *ratione temporis* in the instant case (para. 25).

<sup>77</sup> CJEU, 9 March 2017, C-406/15, *Milkova*, para. 52, relating to the dismissal of a civil servant with disabilities, to be scrutinised according to Article 7.2 of Directive 2000/78, granting Member States «the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment».

<sup>78</sup> CJEU, 6 October 2015, C-650/13, *Delwigne*, paras 25-33.

exercise of those powers was capable of affecting the application of rules of European Union law on the basis of a unilateral choice by a Member State<sup>79</sup>.

Although one can clearly perceive the reason why the Court of Justice has taken the view that in such cases the applicability of the Charter was not to be ruled out, those judgments may raise some doubts as to the consistency of the case-law. In fact, the existence of Member States' powers, whose exercise is not subject to conditions set out under EU law and is left to the discretion of the States themselves, seems to disclose a situation in which States are not bound by a specific obligation stemming from EU law. However, as mentioned above, in other cases the absence of such an obligation has led the Court to conclude that it lacked jurisdiction to provide a preliminary ruling concerning the interpretation of certain provisions of the Charter<sup>80</sup>, giving the impression that its approach is not devoid of inconsistencies.

### 5. *Awaiting further clarification?*

As we have seen, the entry into force of the Lisbon Treaty and the different legal position of the Charter of Fundamental Rights did not bring about a significant change in the attitude of the Court, insofar as the scope of the protection of fundamental rights is concerned. The solution adopted in *Åkerberg Fransson* reflects the previous case-law<sup>81</sup> and has been followed by the Court of Justice in several subsequent cases. It can thus be argued that a well-established principle now governs the applicability of the Charter *vis-à-vis* national legislation and requires an actual connection to the scope of EU law, that may emerge under various forms.

This conclusion can come as a disappointment for those domestic courts that have a tendency to consider the Charter as capable of ensuring a general constitutional review of national legislation<sup>82</sup>. However, the position of the Court of Justice clearly dismisses such an assumption, as it has placed significant emphasis on the limits set in Article 51 for the application of

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<sup>79</sup> See *supra*, § 1.

<sup>80</sup> CJEU, 19 April 2018, C-152/17, *Consorzio Italian Management* (see *supra*, fn. 20).

<sup>81</sup> Regarding the approach of the Court of Justice to the theory of precedent, see G. BECK, *The Legal Reasoning of the Court of Justice of the EU*, Oxford-Portland, 2012, p. 237 ff.

<sup>82</sup> Concerning the powers of constitutional review of the Court of Justice, see e.g. M. ROSENFELD, *Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court*, in *International Journal of Constitutional Law*, 2006, p. 618 ff.



the EU system of protection of fundamental rights as a tool for interpreting or reviewing national legislation. In fact, even though the Court never has held that the notion of scope of the Charter should be subject to a strict interpretation<sup>83</sup>, it has not limited itself to refusing to exercise its jurisdiction when the national legislation at issue had only a very weak connection or a general affinity to objectives pursued by EU law. Rather, in several occasions it has engaged in a thorough examination of the circumstances of the case, in order to ascertain whether single provisions of EU law were actually applicable and could provide a legal basis for the application of the Charter.

Now, a similar approach may serve at least two different purposes from the viewpoint of the Court of Justice.

In the first place, the reference to the scope of the Charter may serve as an informal selection mechanism in a docket of cases that has nowadays reached quite a large number (more than 800 cases per year). Although the existing rules do not allow the Court of Justice to refuse to deliver a preliminary ruling due to mere reasons of expediency, the mentioned principle could lead it to attain the same goal, insofar as it enjoys a broad discretion in defining the scope of EU law and of the Charter. Such a tendency has sometimes emerged in the case-law concerning the Charter, especially with regard to politically sensitive issues<sup>84</sup>, and it could result in the opportunity for the Court to focus only on the most relevant cases relating to the protection of fundamental rights and to avoid dealing with cases in which the EU legal system only has a very limited interest.

Secondly, the position of self-restraint taken by the Court of Justice with regard to the Charter can also be considered as an attempt to prevent possible tensions in the relationship with national constitutional courts and to avoid criticism of what has been often perceived as judicial activism<sup>85</sup>.

<sup>83</sup> As suggested, for instance, by D. APPANAH, *Charte des droits fondamentaux de l'Union européenne et convention européenne des droits de l'homme: entre cohérence et légitimation*, in *Revue générale de droit international public*, 2014, p. 333 ff.

<sup>84</sup> See, e.g., the very restrictive approach of the Court of Justice in the judgment of 27 November 2012, C-370/12, *Pringle*, paras 179-182, concerning the establishment of the European Stability Mechanism under a separate international treaty as between the Member States whose currency is the euro, and the more lenient position taken in the judgment of 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 29, concerning austerity measures leading to a reduction of remuneration for Portuguese judges.

<sup>85</sup> For a similar conclusion with regard to the judgment of the Court in *Aranyosi* and to its reception of the position of German Constitutional Court, see M. HONG, *Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi*, in *European Constitutional Law Review*, 2016, p. 549 ff.

While the new role of the Charter in the legal system of the European Union brought about some discomfort, fuelling concerns about its capacity to supersede the different extent of the protection of fundamental rights as granted by national Constitutions<sup>86</sup>, a cautious interpretation of Article 51 of the Charter may help mitigate those fears.

However, it is worth noting that this approach may also entail some risks. On the one hand, in the long run it is likely to trigger a reduction in the requests for preliminary rulings in cases concerning the protection of fundamental rights, especially from lower courts, as they are under no obligation to refer questions of interpretation and may not be willing to do so if the threshold for access to the Court is unclear. On the other hand, should the definition of the scope of the Charter represent a selective tool with regard to preliminary rulings, this could lead to inconsistencies in the interpretation and to the application of Article 51 of the Charter itself on a case-by-case basis rather than in accordance with objective criteria.

As the matter now stands, although the phrase «implementing Union law» contained in Article 51 is indisputably the starting point of the discussion, the Court did not lay out a consistent framework for the interpretation of the notion, but has preferred to rely on fragmentary indications, sometimes linked to the peculiar features of the cases referred to it. In this regard, several issues still call for thorough clarification, both in order to elucidate the theoretical relevance of the Charter in the European legal system and to ensure the smooth functioning of the cooperation with national courts, given the direct connection between the applicability of the Charter and the jurisdiction of the Court of Justice.

In particular, the Court will hopefully endeavour to explain whether it considers that the envisaged categories of cases in which the Charter is certainly applicable constitute an exhaustive list or, as happened for

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<sup>86</sup> The respective roles of the Court of Justice and of national Constitutional Courts are discussed in D. PARIS, *Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU*, in *European Constitutional Law Review*, 2015, p. 389 ff. With particular reference to the position of the Italian Constitutional Court, see, among others: D. BURCHARDT, *Belittling the Primacy of EU Law in Taricco II*, in *verfassungsblog.de*, pubblicato il 7 dicembre 2017; P. MORI, *Taricco II o del primato della Carta dei diritti fondamentali e delle tradizioni costituzionali comuni agli Stati membri*, in *DUE – Osservatorio europeo*, December 2017; L.S. ROSSI, *La sentenza 269/2017 della Corte costituzionale italiana: obiter “creativi” (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell’Unione europea*, in *www.federalismi.it*, n. 3/2018; D. SARMIENTO, *To bow at the rhythm of an Italian tune*, in *despiteourdifferencesblog.wordpress.com*, published 5 December 2017; C. SCHEPISI, *La Corte costituzionale e il dopo Taricco. Un altro colpo al primato e all’efficacia diretta?*, in *DUE – Osservatorio europeo*, December 2017.

other concepts of EU law, the determination of the scope of the Charter implies an approach based on teleological and expansive criteria, such as the principle of *effet utile*<sup>87</sup>, in the light of the role of the protection of fundamental rights as a key objective of the European Union. In addition, a more coherent reference to such categories, especially when they have no parallel in the pre-Lisbon case-law, would be very welcome, with a view to clarifying, for the sound administration of justice and in the general interest of the individuals concerned, the exact boundaries of the application of fundamental rights protected by European Union primary law.

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<sup>87</sup> On the role of that method when issues of general or fundamental principle are at stake, see G. BECK, *The Legal Reasoning of the Court of Justice of the EU*, p. 404 ff.