THE CHARTER OF FUNDAMENTAL RIGHTS WITHIN THE EU LEGAL ORDER

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SELECT partnership

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Executive summary

This document aims to contribute to the effective and correct application of European Union law through the training of honorary and lay judges on the Charter of Fundamental Rights of the European Union.

Aims to awareness of the EU Charter of Fundamental Rights added value implemented and strengthened.

The goal is to enhance the role of lay judges for the proper functioning of European judicial systems promoting the systematic training of this category on EU law and the cross-border know-how exchange and cooperation among lay judges.

The SELECT Manual analyses the main elements of the Charter of Fundamental Rights of the European Union as applied to the reality of lay judges: in this way, it is intended to integrate the principles contained in the Charter into the daily activities of the beneficiaries.

Introduction to SELECT project

The project aims to develop a training course through frontal lessons and e-learning instruments able to provide lay and honorary judges involved with didactic and practical tools suitable to support the correct application of the "Charter of Fundamental Rights of the European Union" (so-called Charter of Nice) in the national legal systems. The Charter is relevant in significant areas for the judicial protection of individuals, such as immigration law, family and children law, labour and consumer law, anti-discrimination law and criminal law. Its application with respect to internal rules, in addition to being required for the fulfilment of the obligations set by EU law, enriches the tools for the protection of individuals, determining, in many cases, greater protection than that provided by the national law.

However, the assessment of the criteria for the application of the Charter is a very complex task for national justice operators, since a constant reference to case-law of the EU Court of Justice and to EU rules is required.

The project, therefore, responds to the need for follow up on a constant updating to which justice professionals are legally subjected.

Consortium Composition

- Università degli Studi della Campania "L. Vanvitelli" - UniVan (Lead Partner) [IT]
- European Union of Judges in Commercial Matters - UEMC [FR]
- Concilium Schlichtung und Beratung GmbH - CSBG [AT]
- Associazione Nazionale Giudici di Pace - ANGDP [IT]
- FB European Consulting - FBEC [IT]

The Consortium has been structured to successfully develop all project activities. Specifically:

- **UniVan** and **CSBG** will deal with the training material designing and training activity management;
- **UEMC** and **ANGDP** will deal with target group involvement;
- **FBEC** will deal with communication and dissemination activities management.

SELECT Overall Budget

- Total SELECT cost: **€ 476.886,04**
- EU Co – Financing: **€ 429.197,45**

SELECT Objectives

1. **General Objective (GO) 1**: Contributing to the effective and coherent application of EU law by providing training to honorary and lay judges on the EU Charter of Fundamental Rights.
   A. **Specific Objective (SO) 1.1**: SELECT Manual on UE Charter of Fundamental Rights designed, adapted to the needs of European lay judges and useful for making Charter principles exploitable in carrying out their functions as justice operators;
   B. **SO 1.2**: 6 SELECT training courses (210 total hours) on EU Charter of Fundamental Rights provided in 2 languages towards at least 300 Honorary and Lay Judges, in order to affect on: a) EU Charter knowledge gaps, and b) application of UE Charter's principles in Lay Judges jurisdictional function execution;
   C. **SO 1.3**: SELECT Training Methodology Booklet designed to adapt lay judges' training needs on the EU Charter of Fundamental Rights according to the function held in each EU Member States.
2. **GO 2**: Highlighting Lay Judges role for the proper functioning of European judicial systems, promoting the systematic training of this category on EU law and the cross-border know-how exchange and cooperation among lay judges.
   A. **SO 2.1**: Online and offline raising-awareness campaign on training activities and on Lay Judges role carried out, specifically in relation to their contribution to the proper functioning of the judicial systems.

SELECT Overall work plan

SELECT project will be developed according to the following Work Packages (WP):

- **WP1 – Project Management & Coordination** (December 2020 / November 2022) will deal with project management and coordination between partners;
- **WP2 – Preparatory activities and design of the Manual** (January 2021 / August 2021) will deal with project preparatory activities and SELECT Model design;
- **WP3 – Training on SELECT Manual** (September 2021 / May 2022) will deal with the realization of 6 training courses in 3 EU Member States;
- **WP4 – Learners involvement and know-how exchange** (January 2021 / August 2021 – June 2022 / October 2022) will deal with target group direct involvement, networking activities and know-how exchange events;
- **WP5 – Communication and Dissemination activity** (December 2020 / November 2022) will deal with external communication and dissemination of SELECT activities results.

INTRODUCTION

THE NICE CHARTER FOR HONORARY JUDGES

SUMMARY: 1. The birth of the SELECT project. – 2. Why the Nice Charter? – 3. What is the Charter of fundamental rights? – 4. The structure of the Manual.

1. The birth of the SELECT project

The SELECT project stems from a twofold intuition: on the one hand, from the perception of the growing centrality that the honorary judiciary is acquiring in the European legal space, attested by several recognitions from the EU institutions; on the other hand, from the preponderant - dare I say absorbing - importance that EU law has acquired, and continues to acquire, within national legal systems.

Under the first profile, I refer not only to the recent conclusions of the EU Council of 8 March 2021 ("Conclusions on strengthening the application of the Charter of Fundamental Rights" (6795/21 JAI 233 FREMP 38) in which the honorary judiciary has been equated with the ordinary judiciary in the "role of guarantor of the law", but also and above all to the judgment of the Court of Justice of the EU of 16 July 2020 (rendered in Case C-658/18, UX v. Italy). In this ruling, the ECJ - in providing the national court with elements for the resolution of the main dispute (i.e. the question of whether the Italian justice of the peace can be qualified as a fixed-term worker, and therefore the recipient of non-discriminatory treatment with respect to comparable categories) - made a reconstruction which in principle substantially equalizes justices of the peace ("*giudici di pace*") and ordinary judges. In particular, it is central the point of the judgment in which justices of the peace are recognised as having the indispensable characteristics of independence, autonomy and respect for the adversarial process (in spite of the position expressed by the Italian Government) that make it a national court within the meaning of EU law.

As regards the second profile, it should be noted that the continuous and widespread interference that EU law exerts in the domestic systems

of Member States corresponds to a complex legal system, in terms of institutions, sources, jurisdiction, division of competences between the Union and Member States, etc., which requires unprecedented orientation skills and specific technical knowledge. In other words, as is well known, it is a legal system which through, inter alia, the principle of primacy and that of direct effect, has fundamentally undermined the reassuring system of sources with which each national system is endowed in the light of its own Constitution.

It is precisely this twofold intuition - the centrality of honorary judges and the pervasiveness and complexity of EU law - which, by grafting one onto the other, gave rise to the Select project: a training course on the Charter of Fundamental Rights (also known as the Nice Charter), aimed at a category of judges whose role in the administration of justice is increasingly important.

The successful character of this intuition is highlighted by the Council Conclusions, just mentioned, which state that training is an instrument of affirmation of the Charter and that judges, including justices of the peace, "*are the true guarantors of the Charter, as they are called upon to ensure effective judicial protection of the rights*" (point 22). In the Conclusions, moreover, there is an explicit confirmation of the goodness of the project, implicitly qualified by the Council as best practice. Point 23 of the document reads in fact:

"*The Council calls on Member States to explore further avenues to improve the proficiency of the judiciary and other justice practitioners on the Charter, drawing on dedicated training material, including e-learning tools. The Council suggests that Member States encourage networks of judges, lay and honorary judges and other justice practitioners to put a renewed emphasis on the application of the Charter at national level, namely by cooperating on training and sharing of practice…*"

2. Why the Nice Charter?

Why the Nice Charter? Among many, four main reasons can be mentioned.

First, the Charter is not only the main source of protection of fundamental rights within EU law, but also an instrument of horizontal or transversal application. That is, it applies wherever EU law is called upon to intervene, thus operating across the entire scope of application of European law. Consequently, like ordinary judges, honorary judges are called upon to avail themselves of the fundamental rights protected by the Charter where there are situations and cases governed by European law.

Second, with regard to the Charter - which is a relatively recent instrument of fundamental rights protection (see below) - questions of coordination with competing instruments of fundamental rights protection, such as the ECHR and national Constitutions, arise. Honorary judges must therefore know how to orient themselves in the selection of the appropriate instrument on a case-by-case basis.

Thirdly, the Charter is a useful instrument to address the challenges in the protection of fundamental rights, democracy and the rule of law that every democratic society has to face. Challenges that have emerged in recent years in the EU and its Member States include the reception and integration of asylum seekers and migrants, the digital transition, the use of artificial intelligence, the rise of disinformation and hate speech, the protection of personal data and privacy, the shrinking space for civil society, external threats to the integrity of elections and the democratic process, climate change and the cross-border protection of vulnerable adults.

Finally, the protection of fundamental rights and the Union's values is a shared responsibility which requires a collective effort from all stakeholders, i.e. not only EU institutions, bodies, offices and agencies, but also national, regional and local authorities, among which a central role is played by judges, who administer justice on a daily basis.

3. What is the Charter of Fundamental Rights?

The Charter of Fundamental Rights (also called the Nice Charter), as well known, was proclaimed in 2000, but only became binding in 2009.

The Charter is a specific catalogue of fundamental rights whose ges-

tation proved to be very complex, starting with the many steps involved in its drafting. From the eve of the Treaty of Nice, when the idea of a catalogue of fundamental rights took concrete shape, to the entry into force of the Treaty of Lisbon, which gave binding effect to the Charter with the status of primary law, more than ten years of intense debate and negotiations passed.

To confine ourselves to the most significant passages, work on the Charter began with the Presidency conclusions of the Cologne European Council of 3-4 June 1999 and the subsequent Tampere European Council of 15-16 October 1999, which laid down the details of the Convention responsible for drafting the Charter. On 2 October 2000, the Convention submitted draft articles to the European Council, which adopted them at its meeting in Biarritz on 14 October 2000. But it was the Nice European Council of 7 December 2000 that solemnly proclaimed the Charter and submitted it for signature by the presidents of the three political institutions (Council, Commission, European Parliament).

Despite this proclamation, however, in the absence of attribution of any binding force the Charter's legal status remained in a limbo. The question of the Charter's binding nature therefore had to be resolved. The Laeken European Council then adopted the Laeken Declaration on the future of the European Union, calling a new Convention to prepare a new IGC (intergovernmental conference) to transform the Treaties into a "Constitution" and, as far as we are concerned, to redefine the legal status of the Charter.

As is well known, the 'Constitution' failed to pass the hurdle of the French and Dutch referendums and, after a period of institutional reflection that ended with the June 2007 European Council, a different path was chosen. Instead of incorporating the Charter into the body of the Treaty, as the Constitution had provided for, it was decided that a specific article of the future Treaty should make an explicit reference to the Charter and at the same time give it the same legal value as the Treaties. The article in question is Article 6(1) of the current Treaty on European Union, which cites the Charter, refers to its content and recognises it as having 'the same legal value' of the Treaties.

In terms of content, the Charter of Fundamental Rights contains a preamble and 54 articles, grouped in 7 chapters:

- chapter I: **dignity** (human dignity, the right to life, the right to the integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labour);
- chapter II: **freedoms** (the right to liberty and security, respect for private and family life, protection of personal data, the right to marry and found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association, freedom of the arts and sciences, the right to education, freedom to choose an occupation and the right to engage in work, freedom to conduct a business, the right to property, the right to asylum, protection in the event of removal, expulsion or extradition);
- chapter III: **equality** (equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly, integration of persons with disabilities);
- chapter IV: **solidarity** (workers' right to information and consultation within the undertaking, the right of collective bargaining and action, the right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection, consumer protection);
- chapter V: **citizens' rights** (the right to vote and stand as a candidate at elections to the European Parliament and at municipal elections, the right to good administration, the right of access to documents, European Ombudsman, the right to petition, freedom of movement and residence, diplomatic and consular protection);
- chapter VI: **justice** (the right to an effective remedy and a fair trial, presumption of innocence and the right of defence, principles of legality and proportionality of criminal offences and penalties, the right not to be tried or punished twice in criminal proceedings for the same criminal offence);
- chapter VII: **general provisions**.

4. The structure of the Manual

In light of the proliferation of texts and monographs on the Charter, this manual has been drafted with the specific aim of responding to the training and professional needs of honorary judges, as emerged from the answers given in the questionnaires administered in the Member States of the Partnership. It is therefore a handbook that has been "tailor-made" for the category of honorary judges, but which, being slim and dry, is also suitable for use by other categories of legal practitioners.

The handbook can be ideally divided into three parts: a first, "general" part with the aim of contextualising the Charter in the context of the sources of EU law; a second, "specific" part examining the individual fundamental rights selected on the basis of the results of the questionnaires; and a third part illustrating the role played by the honorary judge within the jurisdictional dynamics of the European Union, in particular highlighting his role as a constant interlocutor with the Court of Justice.

More in detail, the first part consists of two chapters (ch I and II). The first chapter deals with "protecting fundamental rights within the EU legal order" and sets the Charter within the overall system of European sources of law (section 1), with particular reference to the other instruments for the protection of fundamental rights provided by the Union's legal order (section 2). This chapter, then, is concerned with contextualising the Charter within the system of sources. Chapter II sets out to illustrate the criteria triggering the application of the Charter, which, as already mentioned, applies only in cases or situations of relevance to Union law.

The second part (chap. 3), in which the analysis of specific rights selected on the basis of the results of the questionnaires converges, focuses on the following areas of interest: the right to asylum (section 1); the right of the child (section 2); the protection of fundamental rights in criminal matters (section 3); the right to respect for private and family life (section 4); consumer protection (section 5).

The third part (ch. 4), finally, systematically places the figure of the justice of the peace in the European judicial system, examining its function in the dialogue with the Court of Justice through the preliminary reference system.

A final note: the manual, which is unique and common to the entire category of justices of the peace/honorary judges, may be used, so to speak, "à la carte", in relation to the specific needs of each "national" group of judges.

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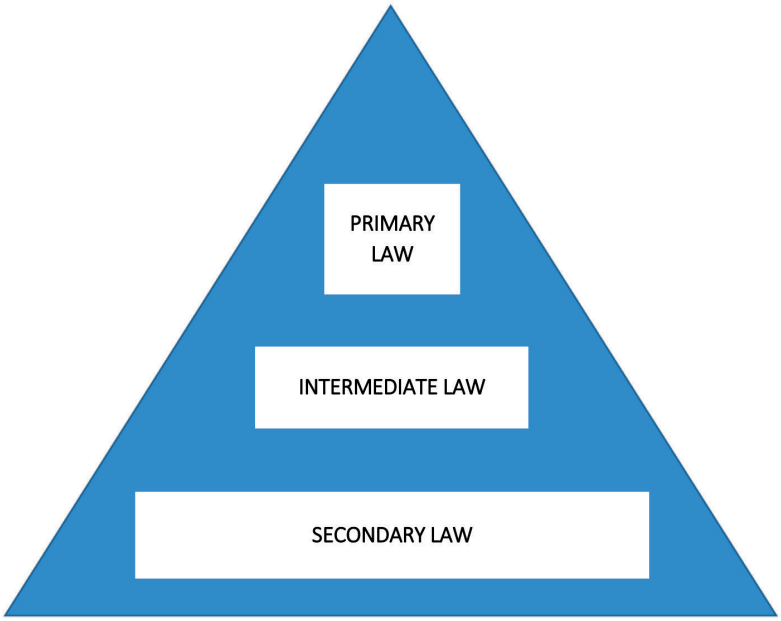
Chapter I
PROTECTING FUNDAMENTAL RIGHTS WITHIN THE EU LEGAL ORDER

Section I – THE CHARTER OF FUNDAMENTAL RIGHTS WHITHIN THE SYSTEM OF EU LEGAL SOURCES

1.1. Introduction

The EU legal order is based on an original system of sources, differing from the system of sources of public international law and the systems of sources of law in the Member States. The different nature of these sources does not allow us to delineate the traditional hierarchy of sources also because there is no Treaty provision which would systematise sources of EU law.

Nevertheless, on the basis of the indications provided by the case law of the Court of Justice of the European Union, the doctrine has attempted to establish a hierarchy of sources. At the interpretative level, it is possible to describe the following hierarchy of sources:



1.2. Primary law

The main sources of primary law are the Treaties: the Treaty on the EU, the Treaty on the Functioning of the EU; the amending EU Treaties; the protocols annexed to the founding Treaties and to the amending Treaties. Primary law also includes the Charter of Fundamental Rights (since the Treaty of Lisbon in December 2009) and the general principles of law.

1.2.1. The Treaties

Treaties are international law agreements created directly by the Member States and, for this reason, they are at the top of the hierarchy of sources of law. The various annexes, appendices and attached protocols are intended to modify and complete the Treaties and have the same value as these.

After the Lisbon Treaty, which entered into force in 2009, the global structure of the European Union is based on two international Treaties: the TEU (Treaty of the European Union) and the TFEU (Treaty on the Functioning of the European Union).

1. The **TEU** (Treaty on European Union) sets out the cardinal principles on which the EU is founded and outlines the framework and powers of the "Institutions of the Union" (The European Parliament, the European Council, the Council, the European Commission, the Court of Justice, the European Central Bank (ECB), the Court of Auditors).
2. The **TFEU** (Treaty on the Functioning of the European Union) contains rules for the functioning of the Union.

The TEU and the TFEU have the same legal validity and there is no hierarchy between them.

The Court of Justice of the European Union does not consider the EU Treaties as "classic" international agreements but recognises their constitutional nature.

It is necessary to point out that in accordance with the interpretation presented in *Costa v. ENEL (*Judgement of 15 July 1964, Case 6/64), the Treaty created its own legal order which after the Treaty came into force, became an integral part of legal systems of the Member States and which the Courts of these States are obliged to apply.

In the light of this interpretation, which is a part of the EU *acquis*, the whole law of the European Union is no longer international law enjoying the national status determined by constitutional rules.

In particular, the Court of Justice of the European Union, in the *Van Gend & Loos judgment* (Judgement of 5 February 1963, Case 26/62), clarified the legal nature of the Treaties and the effects of their rules.

In this legal dispute, the Dutch transport company Van Gend & Loos filed an action against the Netherlands customs authorities for imposing an import duty on a chemical product from Germany which was higher than duties on earlier imports.

The company considered the imposition of the duty as violation of Article 12 of the TCEE (a provision which prohibits the introduction of new import duties or any increase in existing customs duties between Member States) even though the provision could not be effective since the Netherlands had not made the Treaty operational by adopting a domestic implementing law. The Dutch Court, therefore, suspended the proceedings and remitted the question to the Court of Justice for clarification of the scope and legal implications of the aforementioned article.

The Court of Justice used this case as an opportunity to set out a number of observations of a fundamental nature concerning the legal nature of the EU. In its judgment, the Court stated that*: "the objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States"*. This view is confirmed by the preamble to the Treaty, which refers not only to governments but also to people.

In that judgment, the Court made it clear that the provisions of the Treaty, unlike an international agreement, produce effects independently of an implementing state law. In particular, the Court stated that treaty provisions produce direct effects.

The direct effect is a principle of EU law. It enables individuals to immediately invoke a European provision before a national or European Court.

The CJEU identified three situations necessary to establish the direct effect of primary EU law. These are that:

- the provision must be sufficiently clear and precisely stated;
- the provision must be unconditional and not dependent on any other legal provision;
- the provision must confer a specific right upon which a citizen can base a claim.

Direct effect can apply both horizontally and vertically, with the distinction based on against whom the right is being enforced, and the nature of the right itself.

✓ **Vertical direct effect**

Vertical direct effect concerns the relationship between EU law and national law, and the State's obligation to ensure its legislation is compatible with EU law. Where this compatibility is lacking, citizens can invoke Union law directly in actions against the State.

✓ **Horizontal direct effect**

Horizontal direct effect is a legal doctrine developed by the CJEU whereby individuals can rely on the direct effect of provisions in the Treaties, which confer individual rights, in order to make claims against other private individuals before national Courts. Considering the doctrine of the direct effect of Treaty provisions, individuals can rely directly on EU law before their national Courts.

1.2.2. The Charter of Fundamental Rights

The Charter of Fundamental Rights first drawn up in 2000 with the original objective of consolidating fundamental rights that are applicable at the EU level into a single text.

It was solemnly proclaimed at the Nice European Council on 7 December 2000, but this was merely a political commitment carrying no binding legal effect.

After, it was signed and solemnly proclaimed by the Presidents of the Commission, the European Parliament and the Council on 12 December 2007. The Charter was given legal status by the Lisbon Treaty, which came into force on 1 December 2009.

The Charter has now become a binding bill of rights for the European Union. It brings together in one text all the fundamental rights protected in the Union, and through the explanations, provides guidance on their

scope, ultimately making them visible and predictable. This has significant scope and can be used as a powerful tool to implement protection standards in the EU rights.

According to the art. 6 TEU, the Union recognises the rights, freedoms and principles set out in the Charter, and that it shall have the same legal value as the Treaties. Nevertheless, Article 6 also states that the provisions of the Charter shall not extend, in any way, the competences of the Union as defined in the Treaties.

Within the EU legal framework, the Charter of Fundamental Rights of the EU has a higher normative status than all EU legislation adopted under the Treaties and all national laws implementing Union law. Now, the Charter has the same legal value of the Treaties themselves, and has such, offers all EU residents and citizens more legally secure. Since that the EU Charter is part of primary EU law, it reinforces the necessity of interpreting EU law, including secondary law, in light of fundamental rights. This means, in practice, that a provision of EU legislation or national law that is implementing EU law is invalid if it infringes the EU Charter.

For further information on all Charter, see the following chapters.

1.2.3. The general principles of law

Beside written primary law, there are unwritten general principles of law, constituting a specific link between national law and EU law. Their significance consists not only in enabling the Court of Justice of the EU to redress loopholes in the Treaty provisions but primarily in the fact that thanks to the general principles EU law reflects the values constituting the basis of legal systems of the Member States.

Written Union law for the most part deals only with economic and social matters, and is only to a limited extent capable of laying down rules of this kind, which means that the general principles of law form one of the most important sources of law in the Union. They allow gaps to be filled and questions of the interpretation of existing law to be settled in the fairest way.

These principles are given effect when the law is applied, particularly in the judgments of the Court of Justice, which is responsible for ensuring that in the interpretation and application of this Treaty the law is observed.

The main points of reference for determining the general principles of law are the principles common to the legal orders of the Member States. They provide the background against which the EU rules needed for solving a problem can be developed, in the absence of written rules.

General principles of law include the principles of autonomy, direct applicability and the primacy of Union law. Other legal principles include the guarantee of basic rights, the principle of proportionality, the protection of legitimate expectations, the right to a proper hearing and the principle that the Member States are liable for infringements of Union law.

1.3. Intermediate law

The intermediate law is a particular category that include the international agreements with non-EU Countries or with international organisations are an integral part of EU law.

The European Union is the subject of international law and similarly as the Communities earlier has the capacity for concluding international agreements. International agreements serve to assist the EU in achieving its political goals. They cover a variety of fields, such as trade, cooperation and development, or may affect specific policy areas, such as textiles, fisheries, customs, transport, science and technology.

Article 218 of the Treaty on the Functioning of the European Union (TFEU) establishes the procedures and competences of the EU Institutions with regard to the negotiation and adoption of agreements between the Union and third countries or international organizations.

These agreements are different from primary law and secondary legislation, and they form a *sui generis* category. Indeed, according to some judgments of the CJEU, they can have direct effect and their legal force is superior to secondary legislation, which must therefore comply with them.

1.4. Secondary law

The doctrine defines the legal acts enacted by EU Institutions as 'secondary law', distinct from 'primary law', in principle adopted by the Member States.

Indeed, to exercise the Union's competences, the Institutions shall adopt regulations, directives, decisions, recommendations and opinions.

The article 288 TFEU distinguishes between regulations, directives and decisions, all of which have **a binding effect**, and recommendations and opinions, **which do not**.

The consequences of the Union legal act depend upon its specific nature:

- **Regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States (Art 288, par 2 TFEU).
- **Directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods (Art 288, par 3 TFEU).
- **Decision** shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only upon them (Art 288, par 4 TFEU).
- **Recommendations and opinions** shall have no binding force (Art 288, par 5 TFEU).

According to Article 289 TFEU, only regulations, directives and decisions can be adopted by the ordinary legislative procedure, as defined in Article 294 TFEU, consists in the joint adoption by the European Parliament and the Council of a Commission proposal.

Both binding and non-binding legal instrument have a common rule: **obligation to state reason**.

In fact, according to the article 296 TFEU, legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.

In a system based on the principle of conferral, the obligation to state reason responds to the dual need: to make known to the interested parties, Member States and individuals, the way in which the Institution has applied the Treaty, to allow the European Court of Justice to exercise his control over the act.

The motivation is an essential element of the act. Although the Treaties do not expressly refer to it, legal acts must contain an express indication of the legal basis (the provision that enables the institution to adopt an act). The Court of Justice in its judgment in *Spain v. Council* (Judgment

of 20 September 1988, Case 203/86) stated that the obligation to indicate the legal basis of an act is part of the duty to state reasons.

Furthermore, the absence of legal basis constitutes a violation of the substantive forms and the consequent illegitimacy of the act that can be criticized in the judicial context (art. 263 TFEU).

1.4.1. The binding legal instruments

The binding legal instruments that constitute the secondary legislation of the EU are **regulations, directives and decisions.**

1.4.2. The regulation

The legal acts that enable the Union Institutions to affect furthest on the domestic legal systems are the regulations. Regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. So, a regulation is typified by three elements:

a) **general application;**

The regulation (unlike the decisions) is not addressed to specific recipients, but to one or more abstractly determined categories of recipients.

b) **binding effect in its entirety;**

The rules contained in the regulations are binding in all its aspects and, therefore, directly regulate the subject matter to which they apply.

c) **direct applicability**

The direct applicability means that regulations do not require (unlike directives) the adoption of national implementing measures by the Member States.

Normally if a State enters into an agreement with another State, although that agreement may be binding in international law, it will only be effective in the legal system of that state if it is implemented in accordance with the state's constitutional requirements.

For example, if the Italy entered into an agreement with France, in order to the agreement to be enforceable in Italy an Act of Parliament would normally have to be enacted. The Act may incorporate (e.g. copy) the agreement into the relevant act, or it may simply refer to the agreement and provide for it to be effective in the Italy.

If the EU regulation were an agreement entered into by the European Union, it would need to be implemented by means of a rule enacted by national legislatures in order to take effect.

This would be very burdensome, because the Union adopts a large number of regulations each year. The whole Union system would very quickly halt if a regulation had to be incorporated into the national law of each of the Member States before it is effective. Regulations, especially in the agricultural policy area, quite often require speedy implementation in order to have the desired effect. Such regulations would lose their effect if the Union had to await incorporation by each Member State into their respective national legal systems. It is for this reason that Art 288 TFEU provides that a regulation shall be directly applicable. This means that EU regulations shall be taken to have been incorporated into the national legal system of each of the Member States automatically and come into force in accordance with Art 297 TFEU.

They are binding on anyone coming within their scope throughout the whole of the European Union. They require no further action by Member States and can be applied by the Courts of the Member States as soon as they become operative.

1.4.3. The directive

The directive is the most important legislative instrument alongside the regulation. Its purpose is to reconcile the dual objectives of both securing the necessary uniformity of Union law and respecting the diversity of national traditions and structures. What the directive primarily aims for, then, is not the unification of the law, which is the regulation's purpose, but its harmonisation. The idea is to remove contradictions and conflicts between national laws and regulations or gradually resolve inconsistencies so that, as far as possible, the same material conditions exist in all the Member States.

According to the article 288 TFEU, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A directive is typified by three elements:

a) **specific application**

A directive differs from a regulation in that it applies only to those Member States to whom it is addressed, although normally a directive will be addressed to all Member States.

b) **not binding effect in its entirety**

A directive sets out the result to be achieved, but leaves some choice to each Member State as to the form and method of achieving the end result.

c) **not direct applicability**

A directive is not directly applicable. Unlike regulation, a directive is not directly applicable. It requires each Member State to incorporate the directive in order to it to be given effect in the national legal system.

When adopted, directives give Member States a timetable for the implementation of the intended outcome. In particular, the directive has two deadlines: one for its entry into force (directives will come into force on the date specified in the directive or, if no date is specified, 20 days after publication in the Official Journal); another term indicates the period within which the State must achieve the objective indicated in the directive. This second term is always indicated in the directive.

The directives have certain limiting effects on the Member States even before the end of the transposition period. Indeed, in view of the binding nature of a directive and their duty to facilitate the achievement of the Union's tasks (Article 4 TEU), Member States must abstain, before the end of the transposition period, from any measure which could jeopardise the attainment of the objective of the directive.

Occasionally, the laws of a Member State may already comply with this outcome, and the State involved would be required only to keep its laws in place.

Since the 1970s, the Institutions have developed practice to adopt directives with the objective in such detailed terms as to leave the Member States with no room for manoeuvre (detailed directives). These directives allow States only the choice of means for their implementation. In this case, the states have the task to reproduce the detailed directives in domestic law, limiting the choice of the type of act to be adopted.

This practice appears functional to the need to avoid the maintenance of different rules in the Member States in some particularly delicate matters for the functioning of the internal market or the protection of the rights of individuals.

More commonly, instead, Member States' discretionary power is more.

In this case, within the timeline set in the directive, the objective set at EU level is translated into actual legal or administrative provisions in the Member States. Even if the Member States are in principle free to determine the form and methods used to transpose their EU obligation into domestic law, EU criteria are used to assess whether they have done so in accordance with EU law. The general principle is that a legal situation must be generated in which the rights and obligations arising from the directive can be recognised with sufficient clarity and certainty to enable the Union citizen to invoke or, if appropriate, challenge them in the national Courts. This normally involves enacting mandatory provisions of national law or repealing or amending existing rules.

The Court of Justice has pointed out that, according to its settled case law, the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation. A general legal context may be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner. Mere administrative practices, which, by their nature, are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaties.

Usually, directives do not as a rule directly confer rights or impose obligations on the Union citizen. They are expressly addressed to the Member States alone. Rights and obligations for the citizen flow only from the measures enacted by the authorities of the Member States to implement the directive. Implementation methods do not matter to citizens as long as the Member States actually comply with their Union obligation. But there are disadvantages for Union citizens where a Member State does not take the requisite implementing measures to achieve an objective set in a directive that would benefit them, or where the measures taken are inadequate.

For these reasons, the Court of Justice has refused to tolerate such disadvantages, and a long line of cases has determined that in such circumstances Union citizens can plead that the directive or recommendation has direct effect in actions in the national courts to secure the rights conferred on them by it.

The Court defines direct effect of directive as follows:

- The provisions of the directive must lay down the rights of the EU citizen/undertaking with sufficient clarity and precision;
- The exercise of the rights is not conditional;
- The national legislative authorities may not be given any room for manoeuvre regarding the content of the rules to be enacted;
- Time allowed for implementation of the directive has expired.

The judgements of the Court of Justice concerning direct effect are based on the general view that the Member State is acting unlawfully if it applies its old law without adapting it to the requirements of the directive. This is an abuse of rights by the Member State and the recognition of direct effect has the purpose of penalising the offending Member State. In that context, it is significant that the Court of Justice has applied the principle solely in cases between citizen and Member State, and then only when the directive was for the citizen's benefit and not to their detriment (vertical direct effect). When provisions of directives having direct effect, national Courts must disregard domestic law where there is a conflict between the directive and domestic law, and apply the directive in vertical sense.

Unlike Treaties provisions, the Court of Justice has not accepted the direct effect of directives in relations between citizens themselves (horizontal direct effect). The Court concludes from the punitive nature of the principle that it is not applicable to relations between private individuals, since they cannot be held liable for the consequences of the Member State's failure to act. What the citizen needs to rely on is certainty in the law and the protection of legitimate expectations. The citizen must be able to count on the effect of a directive being achieved by national implementing measures.

Only a directive that is not implemented with sufficient clarity and precision can produce direct effects.

The provisions (contained in directives) which have no direct effect

because they lack the requirements of clarity, precision and unconditional character, can produce **indirect effects** such as interpretative effect and damage.

- **Interpretative effect**

The interpretative effect requires national Courts, as organs of the Member State responsible for the fulfilment of EU obligations, to interpret domestic law consistently with directives. This doctrine achieves indirectly, through the technique of judicial interpretation of domestic law, the result obtainable through the doctrine of direct effect of directives.

In the case of a directive lacking direct effect, the national Courts must make every effort to interpret domestic law in a manner compatible with the directive.

Interpretative effect is of vital importance to the enforcement of EU rights against private persons (horizontal direct effect). As directives have only vertical direct effect in claims based on directives against private persons, domestic law may be the only legal basis for a claim. The domestic Court is obliged to exert itself to ensure that domestic law is interpreted consistently with the EU directive. However, this result is obtainable insofar as the national law is not wholly inconsistent with EU law.

- **Damages**

In its judgment in *Francovich* (Judgment of 19 November 1991, Joined Cases C 6/90 and C 9/90) the Court of Justice held that Member States are liable to pay damages where loss is sustained by reason of failure to transpose a directive in whole or in part.

Both cases were brought against Italy for failure to transpose on time Council Directive 80/987/EEC of 20 October 1980 on the protection of employees in the event of the employer's insolvency, which sought to protect the employee's rights to remuneration in the period preceding insolvency and dismissal grounds of insolvency.

According to the Court, the State to be required to compensate for the damage caused to the individual by the failure to implement a directive without direct effect under three conditions:

1. that it is aimed at conferring rights on individuals;
2. that there is a serious and manifest violation of the law (the Court assumes that the State has not implemented it itself);
3. that there is the presence of damage.

1.4.4. The decision

The third category of binding EU legal acts is that of decisions. According to article 288 TFEU a decision shall be binding in its entirety. A decision, which specifies those to whom it is addressed, is binding only on them.

The basic characteristics of a decision can be summed up as follows:

a) **individual application**

It is distinguished from the regulation by being of individual application: the persons to whom it is addressed must be named in it and are the only ones bound by it. This requirement is met if, at the time the decision is issued, the category of addressees can be identified and can thereafter not be extended. The actual content of the decision must be such as to have a direct, individual impact on the citizen's situation. Even a third party may fall within the definition if, by reason of personal qualities or circumstances that distinguish him or her from others, he or she is individually affected and is identifiable as such in the same way as the addressee.

b) **binding in its entirety**

A decision is distinguished from the directive in that it is binding in its entirety (whereas the directive simply sets out objectives to be attained).

c) **direct applicability**

A decision is directly applicable to those to whom it is addressed. A decision addressed to a Member State may, incidentally, have the same direct effect in relation to the citizen.

1.4.5. Delegated and implementing acts

The TFEU introduces a particular category of rules into binding secondary legislation: delegated acts and implementing acts.

- **Delegated acts (Article 290 TFEU)**

They are legally binding acts that allow the European Commission to supplement or amend non-essential parts of EU legislative acts. The power of the European Commission to adopt this type of act is conferred by the European Parliament or the Council.

- **Implementing acts (Article 291 TFEU)**

These acts are generally adopted by the Commission, which implements EU law in some cases, the Council can also adopt implementing acts.

1.4.6. The non-binding legal instruments

A final category of legal measures explicitly provided for in the article 288 TFEU is recommendations and opinions. They enable the Union Institutions to express their view to Member States, and in some cases to individual citizens, which is not binding and does not place any legal obligation on the addressee.

- **Recommendations** call upon the party to whom they are addressed to behave in a particular way without imposing them under any legal obligation.
- **Opinions** issued by the EU Institutions give assessments of situations or developments in the Union or in the individual Member States. They may also prepare the way for subsequent, legally binding acts, or be a prerequisite for the Institution of proceedings before the Court of Justice.

1.4.7. The authentication of acts, the forms of advertising and the entry into force

The article 297 TFEU specifies formal and publicity requirements necessary for the legal act to acquire definitive character and enter into force.

In particular, **legislative acts** adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council. Legislative acts adopted under a special legislative procedure shall be signed by the President of the Institution which adopted them. Legislative acts shall be published in the Official Journal of the European Union. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.

Non-legislative acts adopted in the form of regulations, directives or decisions, when the latter do not specify to whom they are addressed, shall be signed by the President of the institution which adopted them.

The ways in which the acts must be publicized differ according to the nature of the deed itself. The acts of **general scope**, i.e. legislative acts as well as regulations, directives which are addressed to all Member States and decisions which do not designate the addressees, are published in the Official Journal of the European Union. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.

The acts of individual scope, and more precisely, the other directives and decisions designating the addressees are notified to the addressees and shall take effect upon such notification.

1.5. Conclusion

The European Union has legal personality and as such its own legal order from which it is distinct international law. Furthermore, EU law affects - directly or indirectly - the laws of its Member States e it becomes part of the legal system of each Member State.

The Union juridical legal system is divided into primary, intermediate and secondary legislation. Within this hierarchical system, the **Charter of Fundamental Rights is a primary source** and compliance with its provisions determines the validity of the other sources of law. The Charter, according to art. 6 TEU, has the same legal value as the Treaties. For a detailed explanation of the genesis, value, and effects of the Charter, see the following section and Chapter 2 of this manual.

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SECTION II – THE CHARTER OF FUNDAMENTAL RIGHTS AND COMPETING TOOLS

1.6. The general principles of EU law concerning the protection of fundamental rights

The European network of protection of human rights is based on the interaction of several sources. There are three sources of fundamental rights in the EU. Apart from the Charter of Fundamental Rights of the EU, par.3, they can be synthetized as follows as mentioned in article 6, par.3, TUE: • the European Convention for the Protection of Human Rights and Fundamental Freedoms • the constitutional traditions of the Member States. The objective of protecting these rights within the Union legal system was initially based on the principles drawn from the constitutional traditions common to the Member States and the International Treaties concluded in this matter. At any rate, after the entry into force of the Lisbon Treaty, the placement of fundamental rights in multiple sources is a relevant step in the integration process but the major impact has originated from the incorporation of the Charter of Fundamental into the founding treaties through article 6, by giving it the same legal value of the Treaties. It has, therefore, become a source of primary EU law[1].

In parallel, article 6 TEU confirms the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutional traditions of the Member States as sources of the general principles of law. Finally, the same article also contemplates the possibility for the EU to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Besides, the agreement on such accession will have to be unanimously adopted by the Council and ratified by all Member States. Furthermore, a protocol on the possible accession of the EU must not change its competences, nor concern the powers of its institutions.

As a result, the Charter of Fundamental Rights and the general principles are now binding on the European Union. The ECHR, on the other

[1] See the text of Article 6 TUE in the consolidated version, avalaible on: https://eur-lex.europa.eu/.

hand, does not directly bind the Union, even if its content helps to form the general principles, as mentioned. Anyway, in this context, it cannot be overlooked that the ECHR has already represented the source through which the general principles on this matter have been reconstructed. Moreover, from the reading of article 6, par. 2 TEU, it is clear that, among various International Treaties on human rights, the ECHR is solely mentioned, taking into account the importance it has assumed. The absence of formal transposition of the ECHR by the EU legal system and its relevance only by the passage through the general principles, referred to in the current Article 6, par. 3, TEU, excludes that those internal effects may be recognized outside the EU cases falling within the scope of EU law (see CJEU, case C-571/10, *Kamberaj*).

Regardless, what pertains herein is the role of unwritten law (the general principles) in the field of protection of human rights, given that they fix the institutional framework of the EU. The only provision of the Treaties that mentions the general principles as sources of the EU law is article 6, par.3, TEU and the reference regards only the general principles concerning fundamental rights, as resulting from the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutional traditions of the Member States.

Indeed, the principles aimed at the protection of human rights sets up a further category of general principles of law. This latter has been included, as is known, only with the Lisbon revision, that has introduced their legal recognition within the EU regime. This is a relevant item in the reconstruction done hitherto, given that general principles of law are unwritten sources developed from the case law of the Court of Justice and, due to their complementary and autonomous function, they still play a key role in the protection of fundamental rights within the EU, despite the binding force of the Charter. No definition of such a category of sources or even less a list of them, more or less exhaustive, can be detected in the founding Treaties.

The notion of *"general principle"*, which are considered the nuclear core of the system of sources, is, in fact, a transversal concept and it is not typical of the legal system in question. Within the process of mutual influence between the international sources (*in primis* the ECHR) and national principles, drawn from the plural legal backgrounds of the Member States, the Court of Justice, whose role is to manoeuvre the in-

terpretation of the Treaties, has contributed to identify the existence of such general principles of law. It has defined them as structural elements of the Union and has marked their boundaries. Regarding fundamental rights, the European Court has also affirmed their constitutional status, and this leads to the recognition of their primary ranking, though formal.

Actually, by virtue of their primary ranking, the core of the category of general principles is represented by fundamental rights. However, nowadays, the general principles belonging to this category are of marginal importance, due to the entry into force of the Charter of Fundamental Rights of the European Union (see Article 6 TEU mentioned before) but remain applicable to situations that arose before the date of entry into force of the Charter (see, CJEUcase C-218/15, *Paoletti*). Nevertheless, the general principles in question still have a significant function within the EU legal system, even when they intervene only in an alternative role. Not surprisingly, where necessary, the Court of Justice will be able to refer to these principles to complement the fundamental rights protected by the Charter. On those premises, one can affirm that, on one hand, the general principles satisfy the need to confer more detailed protection on fundamental rights by the Union, for example, allowing the Court to create rules in areas not covered by the Treaties. On the other hand, it must be however stressed that the enter of such rights into the EU legal order has left the Court a broader, but presumably exorbitant, discretionary power in their identification.

This is the reason why the process mapped out by the case law was not outright, also taking into consideration that the approach of the Court of justice to the protection of fundamental rights has always been aimed to the satisfaction of the specific needs of the EU legal system.

Undoubtedly, the affirmation of the Court's jurisprudence, according to which fundamental rights are protected by the general principles binding on the institutions, cannot ignore the positions taken in the same years by the Italian and German Constitutional Courts.

Both courts have been persuaded that the constitutional norms, that enabled Italy and Germany to join the Union, do not allow for derogations from the protection of the fundamental rights at national level. The national discipline must, therefore, be respected even in the face of acts adopted by the institutions of the Union. Otherwise, the two Courts reserve the power to ensure the prevalence of constitutional norms, pre-

venting the European acts from being applied in the internal order. In this regard, the development of the counter-limit theory is remarkably relevant. There, the Italian Constitutional Court, excluding the possibility of carrying out its own control directly on the Community acts in question, alludes to the possibility of declaring the constitutional illegitimacy of the law authorizing the ratification and the execution order of the EC Treaty, when a Community act enters into the Italian legal system and breaches the fundamental principles or the fundamental human-rights.

For a different solution it has to be taken into account the orientation of the *Bundesverfassungsgericht* (see judgments *Solange I* and *Solange II*). In this case, the German Federal Court has referred to the possibility of a direct control on the Community act, by requiring the judge, who wanted to remit a question of constitutionality, to interrogate the Court of Justice in advance (see Article 267 TFEU). This solution is permanent, as long as the EU legal system equips itself with a catalogue of fundamental rights similar to that provided for by the German Basic Law. However, the Constitutional Courts' responses have risked leaving a Community act, which is deemed to be in contrast with the fundamental rights protected by the Italian or German-Federal Constitution, unexplored in the legal systems of the two Member States, while it remains applicable in the other Member States.

This is the legal ground on which, in the same years, the fertile interpretative elaboration of the Court of justice has grown the Court of Justice has drawn up a form of protection of fundamental rights: the general principles of law to be observed and whose respect is guaranteed by the Court of Justice (see CJEU, case C-4/73, *Nold*). However, it is evident that, while interpreting and implementing EU law, the Court's intervention must keep in consideration the peculiarities within each legal system. For instance, this approach is confirmed in the Opinion 2/13.

As follows from the above, then, the functions of this category of sources are several. That being said, the general principles concerning fundamental rights performs multiple functions. Above all, they confer unity to the legislative system of the Union, integrate the nature of the Treaties and fill their gaps. Secondly, they can be used as criteria of interpretation, ensuring a consistent surveillance on the exercise of the powers by the EU institutions in relation to the legal status of individuals. Thirdly, they constitute a parameter for the activation of the remedies provided for by

the Union. In fact, the violation of general principles may solicit an action for the assessment of the legality of acts by both the institutions and the Member States. And indeed, the violation of principles can trigger the annulment of secondary law (see the action for annulment or a reference for a preliminary ruling on the validity); the possible censure of State acts or omissions (see the infringement procedure or, indirectly, through a reference for a preliminary ruling on the interpretation), and ultimately, it can entail non-contractual liability of the institutions or of the Member States.

The only answer which is suspended concerns the verification of what rights can constitute part of EU law. The Court itself has attempted to give a response, by referring to the rights which arise from traditions common to Member States. However, at this regard, the reference has been made not to national law but to the principles of international law which are embodied in the National Constitutions. Thus, one can point to note that, if the problem of conflict between EU law and national law is to be avoided in all Member States, it is necessary that any human right, upheld in the Member States' Constitution, must be protected under EU law.

The following jurisprudence suggests that where certain rights are protected to differing degrees and in different ways in Member States, the Court will look for some common underlying principle to uphold as part of Union law. Even if a particular right protected in a Member State is not universally protected, in any case of conflict between that right and EU law, the Court will strive to interpret Union law so as to ensure that the substance of that right is not infringed.

In any event, it is undeniable that through the general principles the EU judge stimulates the increasing in the level of protection of certain rights at supranational as well as at national level.

Thus, by means of general principles, the protection of fundamental rights has driven the progression of the European integration process, given that it has added to the existing rules a clearer dimension, even not constituting a proper legal order.

Summary of par. 1.6:

In this section the normative reference is Article 6 TEU, which incorporates the sources on fundamental rights. The Charter of Fundamental right and the general

principles are the most important EU interpretative criteria in the field of protection of human rights. The latter are unwritten law deriving from the process of interaction between national (common traditions to the MSs) and international sources of law. They are developed by the Court of Justice. The Lisbon Treaty has conferred to them the substantive status of primary law in the EU legal order, thus integrating the means and the remedies by which the protection of human rights is ensured.

See for comparison: EUR-Lex - 12016M006 - EN - EUR-Lex (europa.eu)

1.7. The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union (the Charter) stands for internal scrutiny mechanism within the European Union aiming at ensuring the conformity of legislation and policies with fundamental rights. It sets out the rights and principles to be respected by the Union in the application of EU law; national legislations are, however, entrusted with the implementation of these principles. Lastly, it is the essential instrument used by the EU Court of justice for a preliminary and autonomous judicial check.

The timeline of the Charter of Fundamental Rights of the European Union starts with its solemn proclamation on 7 December 2000 in Nice. In a second time, an adapted version has been declared on 12 December 2007 in Strasbourg by Parliament, the Council and the Commission. It enshrines into primary EU law a wide range of fundamental rights or defines a group of rights and freedoms of exceptional importance which are addressed to EU citizens and residents.

With the entry into force of the Treaty of Lisbon, the Charter of Nice (published at [2000] OJ C364/1) has gained the same legal value as the Treaties, pursuant to art. 6 TUE. It is therefore fully binding on the European institutions and the Member States and, as the Treaties and protocols annexed to them, it is placed at the apex of the European Union's legal order. It responds to the need, which emerged at the Cologne European Council (3 and 4 June 1999), to produce a draft Union Charter as an alternative mechanism to ensure the protection of fundamental rights.

Howbeit, before Lisbon, the legal value of the Charter remained uncertain, so much so that it was unable to form an autonomous source of law. It was, however, used as a privileged interpretative instrument to

reconstruct the scope of fundamental rights protected under EU law. An indeed, until the adoption of the Charter, the protection of fundamental rights in the European Communities (later, European Union) was almost exclusively the output of the ECJ case law. The Treaty of Rome contained no reference to fundamental rights, with the exception of a generic mention in the preamble. However, the Court of Justice ruled that fundamental rights *"are part of the general principles of Community law, which the Court ensures"* (see, CJEU, case C-29/69, *Stauder*,), and later (see also case C-11/70, *Internationale Handelsgesellschaft*), it clarified that the protection of fundamental rights under Community law, which is inspired *"by the constitutional traditions common to the Member States"*, should have been guaranteed *"within the framework of the structure and aims of the Community"*. In the meantime, the first reference is made to the European Convention on Human Rights, which is intended to consolidate the frequent use of the Convention in the ECJ case law on fundamental rights (see CJEU, case C-44/79, *Hauer* C-44/79).

In the following years, on the strength of these principles and without any textual anchorage in the Treaties establishing the European Communities, the Court has developed its case law on fundamental rights, aiming at removing the control exercised by National Courts on the application of Community law in the area of fundamental rights. At the same time, the Court was setting the stage for the Nice Charter of Rights, which is largely a documentation and consolidation of its case law on fundamental rights. The Luxemburg judge has never skimped to make references to the Charter. The first one was the Court of First Instance (actually General Court), which referred several times to certain articles of the Charter (see case T-177/01, *Jégo Quéré*). Subsequently, the Court of Justice has, sometimes, referred to specific articles of the Charter, which are considered expressive of fundamental rights protected in the Community law as general principles. This has frequently been done in conjunction with the provisions of the ECHR relating to the same right or the Court referred only to the relevant article of the Charter, wherever these rights are not protected by the ECHR. (See, CJEU,cases C-402/05 P and C-415/05 P, *Kadi*). Then, there were cases in which the reference to certain rights has been contained in the preamble to the measure whose review of legality is referred to the Court: this has been used by the Court

to justify an interpretation of the acts and directives in accordance with the Charter. In such cases, the Charter becomes binding on the basis of the intention expressed in the preamble (see Joined cases C-175/08, C-176/08, *Abdulla*; see also Case C-540/03, *Parliament v Council*).

Conversely, at institutional level, the process that would have led to the recognition of the legal value of the Charter was to end with the inclusion of the Charter in the second part of the drafting for the European Constitution. The intention was that, when it was ratified, the Charter would also become binding. After the failure of ratification of the Constitution, a debate opened on whether the Charter should be included in the new Treaty. However, the United Kingdom and Poland obtained at the Intergovernmental Conference that they were excluded from the scope of the Charter. Even the Czech Republic, shortly before ratification, was granted for an opt-out from the Charter.

As mentioned above, in connection with the debate on the EU's accession to the ECHR, (Opinion No 2/13 of the Court of Justice of the European Union), which led to the impasse of the negotiation process, the Treaty of Lisbon has validated the legal value of the Charter defined in article 6, par. 1, TEU, which affirms the recognition of the rights by the Union as well as freedoms and principles enshrined in it and attributes to the Charter the *"same legal value of the Treaties"*. It should be noted that the text of the Charter to which the aforementioned article refers is not the one proclaimed on 7 December 2000 in Nice, but the amended one adopted in Strasbourg on 12 December 2007. Protocol No. 30 concerns the application of the Charter to Poland and the United Kingdom before Brexit, aimed at solely binding these States.

Lisbon, however, refers to the Charter rather than incorporating it. Although, article 6(1) TEU (as amended by Lisbon) recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights the same legal value as the Treaties, the scope of the rights granted is as limited as it was under the Charter. Further provisions clarify that the reference to the Charter does not throw in any new rights or extend the Union's competence. Despite some contention about the status and impact of the Charter, the Court of justice's judgments are actually pervaded by the importance and the role of the Charter as a whole in the European legal order, which defends fundamental rights.

Having clarified the origins and nature of the Charter of Fundamental Rights, it is necessary to detect some relevant aspects of the matter.

First of all, with respect to the hierarchy of sources, the Charter, as we have seen, is placed on the same level as the other binding sources of primary law, namely the TEU and the TFEU. In this regard, however, it is not clear whether the revision procedure referred to in Article 48, par. 1-5, is applicable to amend the Charter or whether its possible violation could give rise to an infringement procedure pursuant to Article 258 TFEU. On that premise, as will be detailed below, the interpretation, function and scope of the Charter can be better investigated, when considering that the Charter and fundamental principles have a close connection and influence each other.

A) As regards its interpretation, Article 6 para. 1(3) TEU *("The rights, freedoms and principles of the Charter shall be interpreted in accordance with the general provisions of Title VII of the Charter governing its interpretation and application and taking due account the explanations referred to in the Charter, which indicate the sources of these provisions"*) refers to the explanations, drawn up within the Presidium of the Convention which prepared the original version of the Charter. These explanations are taken up by the Court of Justice and by the judges of the Member States as sources of interpretation (see, CJEU, case C-129/14 PPU, *Spasic*).

B) As regards the function of the Charter, it is highlighted in the Preamble *("it is necessary to strengthen the protection of fundamental rights, in the light of the evolution of society, social progress and scientific and technological developments, by making these rights more visible in a Charter. this Charter reaffirms, in compliance with the competences and tasks of the Union and the principle of subsidiarity, the rights deriving in particular from the constitutional traditions and international obligations common to the Member States, from the European Convention for the Protection of Human Rights and Fundamental freedoms, from the social charters adopted by the Union and the Council of Europe, as well as from the jurisprudence of the Court of Justice of the European Union and that of the European Court of Human Rights").* From the reading of the aforementioned it seems that Charter has an eminently documentary character, given that it does not add new rights to the sources identified by the jurisprudence and are part, as such, of the general principles of law binding on the Un-

ion, namely: common constitutional traditions, international treaties, in particular, the ECHR. When the rights provided for by the Charter and those referable to the other sources mentioned in the preamble do not coincide, the solution to the specific case could be obtained from articles 52, par. 3, and 53 of the Charter.

In particular, article 52, par. 3, deals with the ECHR and conceives the so-called equivalence clause *("Where this Charter contains rights corresponding to those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope are the same as those conferred by the aforementioned convention. This provision does not preclude EU law from granting more extensive protection").* According to the aforementioned article, the level of protection guaranteed by the Charter must be at least equivalent to that is guaranteed by the ECHR to the same rights. This does not exclude that EU law provides for a higher level of protection or even protects rights not covered by the Convention (see, CJEU, case C-396/11, *Radu*; see joined cases C-404/15 and C-659 / 15 PPU, *Aranyosi and Caldararu*). That said, the Court of Justice will be able to provide for an autonomous interpretation of the fundamental rights of the Charter, in accordance with the explanations on the meaning of the equivalence clause (see, CJEU, case C-411/10 and C-493/10, *N.S and others*). As regards article 53 of the Charter, it expresses the so-called compatibility clause. That is, the application of the Charter does not prevent the intervention of the ECHR or the other sources as mentioned, to the extent that these yield a broader protection than that guaranteed by the Charter.

A more delicate profile of the question, elsewise, concerns the hypothesis in which the protection of fundamental rights provided for by the Constitutions of the Member States must be reconciled with the principles of uniform application and primacy of Union law. As a result of Article 53 of the Charter, where the guarantee offered by a national Constitution to a given fundamental right is particularly high, this should prevail over the common regime established by EU law (see, CJEU, case C-36/02, *Omega*, which contemplates the hypothesis in which this right is recognized if the Member State enjoys of discretion in the implementation of the provisions of Union law). However, according to the case-law, a Member State can apply national standards for the protection of

fundamental rights, when *"such application does not compromise the level of protection provided for by the Charter ... nor the primacy, unity and effectiveness of EU law"* (see, CJEU,case C-399/11, *Melloni*; see also case C-617/10, *Akerberg Fransson*). On the contrary, when a provision or an act of Union law achieves a balance with competing interests, once *"the consensus of the Member States as a whole is reached as to the scope to be attributed to the fundamental right in dispute*", the Court of Justice does not allow that a member can apply its internal level of protection (*Melloni* judgment cited).

To this end, the Taricco case has been particularly significant in terms of defining the scope of article 53 (see, CJEU, case C- 105/14, *Taricco*). Since the disapplication imposed by the Court of Justice in the first Taricco judgment has risked to jeopardise the fundamental principles enshrined in the Italian Constitution and the rights of the human person guaranteed by it, in the subsequent judgment known as Taricco II (see, CJEU, case C -42/17, *MAS*), the the Court has ended up admitting that a Member State's judges could assert the higher level of protection of constitutional principles, it being understood that they must disapply a national provision that is incompatible with the European one. This is explained by the fact that the Charter constitutes a minimum standard for the protection of fundamental rights, and, therefore, does not exclude the application of higher levels of protection presumably consecrated into other sources. Furthermore, though the Charter is not commonly applicable to all Member States, the latter, in any case, must undertake to respect the general principles, as confirmed by the post-Lisbon jurisprudence.

C) A final aspect concerns the role that the Charter plays within the system of sources. In general, it can be said that it affects the application of material standards deriving from other sources. First of all, it is used as an instrument for interpreting the norms contained in the Treaties and in the acts of the institutions. In other words, making a comparison among various possible solutions, the interpreter will choose the one which is the most consistent with fundamental rights (see joined cases C-402/05 P and C-415/05 P, *Kadi*;see joined cases C-411/10 and C -493/10, *NS and others*). Secondly, the Charter operates as a parameter of legitimacy for the acts of the institutions, which contrasts with the rights enshrined

in the Charter and can be annulled or declared invalid (see, CJEU, case C-181/84, *Man (Sugar)*); accordingly, the obligation of the institutions to ensure the respect for fundamental rights also concerns the external dimension and international cooperation of the Union with third States (see, CJEU, case C-362/14, *Schrems*). To conclude, the Charter operates directly as a parameter of legitimacy for the Member States' conducts, when they implement a provision of the Treaties or an act of the institutions that requires their adoption. In other words, Member States, which implement EU law, must uphold fundamental rights, whilst on the contrary, if they do not comply with the prescriptions, such conducts would be incompatible with the EU law and, therefore, the adopted rules should be disapplied (see, CJEU, case C-117/06, *Moellander*). Nevertheless, it is not excluded that a Member State invokes fundamental rights to justify its measures (see, CJEU, case C-131/12, *Google Spain SL and Google Inc.*). Anyway, the violation of one of the fundamental rights enshrined in the Charter is not conceivable when a State do not have implemented a provision of primary law or an act of the institutions or acted in one of the sectors falling within the scope of application of the Treaties. Otherwise, the obligation incumbent on the State to respect fundamental rights cannot be linked to EU law and the Court of Justice is not competent to guarantee the observance of these rights (see, CJEU, case C-159 / 90, *Grogan*).

After all, article 51, par. 1, of the Charter assumes a more restrictive scope. In fact, it confirms the duty of Member States to respect fundamental rights solely in the cases in which they act in the implementation of Union law. (Article 51, par. 1*: "The provisions of this Charter apply to the institutions, bodies, offices and agencies of the Union in compliance with the principle of subsidiarity, as well as to the Member States exclusively in the implementation of Union law. Therefore, the aforementioned subjects respect the rights, observe the principles and promote their application according to their respective competences and in compliance with the limits of the powers conferred on the Union in the treaties."*). At this proposal, it should be clarified that the guidelines of the Court of Justice, aimed at expanding the scope of application of the provisions of the Charter, are reflected in article 6 par. 3 TEU, which would tend to favor the maintenance of the less restrictive orientation. In other words, it cannot be

denied that the limit set by article 51 of the Charter precludes, in any case, that the violation of the fundamental rights protected by EU law has the effect of extending, by way of interpretation, the material scope of the secondary law which defines the scope of the former (cf. Daniele cit. p. 224). In any case, if the conduct of the Member States were not attributable to any sector governed by EU law, the State at stake can be subject to the control and sanction procedure provided for by Article 7 TEU, in the event of "*risk of serious violation*" or of "*serious and persistent violation*" of the values referred to in Article 2 TEU, including respect for human rights.

In the previous paragraph, it has been assessed that the general principles of EU law have been expanded through the Court of justice case-law ECJ in order to cover a wide variety of rights and principles developed from many sources. Instead, drawing up a list of the rights contained in the Charter, they can be classified into four categories: the common fundamental freedoms, which are present in the Constitutions of all the Member States, the rights reserved for citizens of the Union, economic and social rights, those that are attributable to labour law, modern rights, those deriving from certain technological developments, such as the protection of personal data or discrimination on disability and sexual orientation. Despite this, this list is not close. The seventh chapter (Art. 51-54) is represented by a series of general provisions specifying the articulation of the Charter with the European Convention on Human Rights (ECHR). And in particular, the Court has confirmed that the fundamental rights guaranteed by the Charter are involved whenever the EU law is applicable (Akerberg Fransson judgment, cited).

Summary of par. 1.7:

Binding the EU legal system, the Charter is a means to interpret the norms of the Treaties and of the institutional acts; it is a parameter of legitimacy of the institutions' act; it is a parameter of legitimacy of MSs' conducts. The scope of its application is limited by article 51 (1) of the Charter itself, which enshrines the duty of Member States to respect fundamental rights solely in the cases in which they act in the implementation of Union law. Otherwise, general principles of law do apply, including common constitutional traditions and international dispositions (e.g. ECHR) on the human rights protection.

About the story, content, scope and legal value of the document, see: European Charter of Fundamental Rights: five things you need to know | News | European Parliament (europa.eu)

1.8. The European Convention on Human Rights

The role of International Treaties on human rights is particularly significant for the purpose of human-rights protection. Indeed, the fundamental rights form an integral part of the general principles of law (*Nold* cit.) and the safeguard of these rights is based on constitutional traditions common to the Member States and on International Treaties. Indeed, the Court of justice has asserted its exclusive jurisdiction in the field of fundamental rights. In other words, the Court has argued that measures, which are incompatible with fundamental rights recognised and protected by national Constitutions and by the Treaties signed by the States in supplying guidelines in the application of EU law, cannot be applied.

In this context, the most important International Treaty concerned with the protection of human rights is the European Convention on Human Rights (formally, Convention of Human Rights and Fundamental Freedoms 1950 [ECHR]) to which the jurisprudence has on a number of occasions adhered. Apart from the Member States' unanimous signature, the other institutions has given their support the Court's approach (see joint Declaration, [1977] OJ Cl03/1).

Thus, on the question of whether any provision in the ECHR may be invoked in the context of a matter of EU law, the Court of First Instance (CFI) (after the Lisbon Treaty, known as General Court: hereunder GC) and the Court of justice hereunder ECJ are oriented to a divergent direction. The former has asserted that, although the ECHR defines the scope of fundamental rights recognised by the Community, since it reflects the constitutional traditions common to the Member States, the Court has no jurisdiction to apply the ECHR itself (see Case T-112/98, *Mannesmannrohren-Werke AG v Commission*). For instance, whereas the GC has been invoked in an annulment proceeding, its arguments are based directly on the application of the Convention

on other grounds. On the contrary, the ECJ has appeared more willing to refer directly to ECHR provisions, and even to the jurisprudence of the European Court of Human Rights itself (see, CJEU, case C-94/00, *Roquette Freres*; case C-482/01, *Orfanopoulos*).

The reasons for the inclusion of international principles and constitutional rights as part of EU law is essentially to avoid conflicts.

The centralisation of the European Court of Justice's powers of control over respect for human rights has raised doubts about the risk of gaps in the interpretation of the Convention. This has clearly stimulated the debate on the Union's accession to the ECHR. In general, the disputes on human rights, particularly those on the interpretation of the ECHR, could then be summoned before the European Court of Human Rights, which is specialised in these issues. From the standpoint of the ECJ, in the Opinion 2/94 (see CJEU 28th march of 1996, opinion 2/94) on the Accession by the Community to the European Convention on Human Rights it has, however, denied that the accession to the ECHR would be within the Community's powers without amending the Treaty. The Convention on the Future of Europe (2004) has also discussed that the Draft Treaty establishing a Constitution would have consecrated the accession to the European Convention of Human Rights and Fundamental Freedoms. Moreover, the draft accession agreement approved in 2013, as result of the negotiations between the EU and the Council of Europe, has also been found by the Court to be incompatible with the specific characteristics of the Union. Until a new agreement is negotiated, which takes account of the Court's findings, the Union may not become a contracting party to the ECHR and consequently be subject to review by the Strasbourg Court. Beyond the institutional impasse, the Lisbon Treaty, which has replaced the Constitution, continues the intention to accede to the ECHR at article 6(2) TEU, but it does not clarify the details of accession. At any rate, the accession would not affect the Union's competence as defined in the Treaties, taking into account also the progressive development of mechanisms in the protection of human rights within the Union.

The TEU had enforced respect for the ECHR within the Union structure [for a comparison see article 6, par. 2, TEU) and draws inspiration from the Constitutional provision to the effect that its wording has been reproduced by the Lisbon Treaty at article 6, par.3, TEU. This latter has

included fundamental rights in the Union regime, as enshrined in the Convention and as part of the general principles. And indeed, although the reference to the ECHR has been formalised in the primary law referred to in article 6 TEU, the Convention has not been formally transposed into EU law. This instrument acquires relevance in the Union legal order through the general principles referred to the aforementioned article of TEU. Accordingly, its internal effects cannot be recognised outside cases where EU law applies (see Kamberaj cit.).

As regards the ECHR status, the completion of the accession process provided for in article 6 TEU, par.2, will confer it the same binding force towards the Union, as already provided for by the Member States as contracting parties to the Convention. Consequently, the European Court of Human Rights will be able to rule on cases falling within the scope of EU law. The cases, in which the violation of the rights enshrined in the ECHR is contested and whose effects derive from acts or omissions of the institutions, are included among them (see, *Connolly v. 15 member states of the European Union*).

At the present time, the ECHR is a non-directly binding source in the EU law. Besides, the general principles of law applicable to the Union have been reconstructed through the ECHR rules. However, the absence of its legal value in the EU law implies that they do not directly bind the Court as well. Nevertheless, the ECHR has been the landmark used by the Court for its own control of respect for fundamental rights, and the European Court of Human Rights case-law has, sometimes, been included in the judgments of the Luxembourg Court with wide and precise references (for the first case, see, CJEUC-44/79, *Hauer*, which constituted the first case in which the Court of Justice has referred to the ECHR in order to examine whether an act of the institutions is contrary to a fundamental right; see also case C-368/95, *Familiapress*).

That being said, the non-accession of the Union to the ECHR has raised the question of the responsibility of the Member States with respect of the institutions' activities or with regard to the Member States 'actions in implementing the institutions' acts. About that, the European Court of Human Rights (see, ECtHR, *Bosphorus v. Ireland* appeal no. 45036/98) has envisaged an organic settlement to the matter.

First, it stated that States, which are party to the ECHR, retain resid-

ual obligations in respect of the rights protected by the Convention, even as regards areas of law making which had been transferred to the Union. Notwithstanding the transfer of power, Convention rights continue to be secured within the EU framework. The guarantees of the Convention cannot, in fact, be limited or excluded because of their peremptory and fully effective nature. In other words, even without the Convention being incorporated into domestic law, the Member States are bound by its dispositions and individuals have a right of appeal under the Convention to the European Court of Human Rights. The ECtHR, however, does not monitor any activity undertaken by a Member State in implementing the obligations arising from their membership of the EU. In this respect, it can be distinguished between: (1) cases in which Member States implement Union acts and (2) cases in which they benefit from discretionary power.

As regards the first hypothesis, it involves situations in which the principle of equivalent protection is operative. That is to say, in cases where the Member States do not have any margin of discretion, the Strasbourg Court excludes its jurisdiction, insofar as the Union protects fundamental rights in a manner equivalent to that of the Convention. Through this principle, which translates the so-called presumption of equivalent protection or Bosphorus presumption, the European Court of Human Rights has expressed its favourable attitude to the requirements of international cooperation. However, evidence to the contrary is admissible. In this latter, where the protection of the rights enshrined in the Convention is manifestly deficient, the responsibility might be blamed on the Member State and the European Court must be able to intervene. Indeed, in view of demonstrating that the protection afforded by the EU regime may be insufficient, parties, who complain that an EU act has violated their fundamental rights, may refer the National Courts to the Court of Justice for a preliminary ruling under article 267 TFEU on the validity of the measure. The subsequent case-law have essentially confirmed the *Bosphorus* guidelines. Additionally, the ECtHR has ascertained the substantive condition that national authorities do not have any margin of discretion in the implementation of EU law. Namely, a procedural condition is added, that is the control mechanisms provided for by EU law must be fully operational (see, ECtHR, *Avotins v. Latvia* appl. n.

17502/07). Evidently, this must be checked in the light of the specific circumstances of the case.

As regards the second hypothesis, the Court has held that a State, implementing EU law, could be held liable for the infringement of the ECHR, whereas it is an act which falls strictly within the scope of its international obligations (see *Bosphorus* and others, cited).

Lastly, if the infringement of fundamental rights stems directly from EU primary law, Member States may be held to account for infringements of rights guaranteed by the ECHR, since they do not need to have a margin of discretion in the application of the rules at stake (see *Matthews v. United Kingdom,* appl. n.24833/94).

It should be noted that the precepts delivered by the Court of Justice on the protection of fundamental rights have not been accepted by some Constitutional Courts, in particular the Italian and the German-Federal Courts. They reaffirmed the centrality of their national control systems. For instance, the Italian constitutional case-law have demonstrated that the National Court has jurisdiction with regard to the protection of the fundamental principles enshrined in the national legal system (see pronouncements n.183 *Frontini*; n.170 *Granital*; order n.24 *M.A.S*, known as *Taricco II*). In turn, the Bundesverfassungsgericht has considered actions or constitutional review concerning acts of secondary legislation to be admissible, whenever they could incur the violation of fundamental rights guaranteed by the Basic Law (see, *Maastricht Urteil* BverfGE 89, 155; see also *Lissabon Urteil*, BverfGE 123, 267; and *Solange II*). On the contrary, the conditions required for the admissibility of such a solution are restrictive. In particular, comparing the national level of protection of human rights with the European level, it must be found that the protection of fundamental rights is not achieved in general terms at European level and that the national protection system is more effective than the European one.

Summary of par. 1.8:

The ECHR is the basic international instrument applied by the Courts in the area of fundamental "human" rights. The Member States of Council of Europe, including the 27 EU countries, are already parties to the European Convention on Human Rights, except from the EU. This has a specific impact, that is: actions of the EU's in-

stitutions, agencies and other bodies cannot currently be challenged at the European Court of Human Rights in Strasbourg. Nevertheless, individuals can lodge complaints against EU member states at the European Court of Human Rights, when they implement EU law. However, the EU cannot be formally involved in those proceedings. Essentially, the EU's accession to the ECHR will mean that the EU will be subjected to the same rules and to the same processes provided for by the international system of protection of human rights as its 27 Member States and the 20 other Council of Europe members. Accession will make it possible for the EU to take part in judicial cases – and the implementation of the Strasbourg court's judgments (EtCHR) – alongside its Member States. See: European Convention on Human Rights (coe.int).

On the topic of accession to the ECHR. See: European Union accession to the European Convention on Human Rights - Questions and Answers (coe.int)

1.9. The relationship between the Charter and the ECHR

The Charter can be seen as composing the overarching framework on human rights in the EU in parallel with the Convention on Human Rights, which plays an important role, albeit a partial one. Drafting by the EU, it is interpreted by the Court of Justice of the European Union. It should not be confused with the European Convention on Human Rights, since, though containing overlapping human rights provisions, the two operate within separate legal frameworks. Before examining the complex problem of the overlap between the Charter and the ECHR, dealt with by article 52, par.3, of the Charter, this paragraph will focus on the determination of the areas of protection provided by the EU Charter in parallel with, or in addition to, the ECHR. Therefore, the scope of the ECHR and EU Charter will be discussed.

A) On the application: Although many of the rights in the ECHR superimpose with rights in the EU Charter, the scope of application of the ECHR is much wider. The Charter applies only within the realm and the scope of EU law. In other words, the Charter of Fundamental Rights is confined to matters within EU competence and therefore covers a much narrower range of issues than are subject of the European Convention on Human Rights. Under the European convention citizens benefit from higher standards of protection. Nevertheless, both systems are open systems, to the effect their respective rules (provisions, procedures and competencies of authorities and institutions) are inevitably interconnected. Coherently

with the idea of their coexistence, symmetrical relations have been established among them. In other words, each of them affords a protection system against violation and applies universally, while legal acts in force in one system produce effects in another system. Nevertheless, both regimes are not complete. This justifies why the mutual relationships between them are governed by the principle of subsidiary in the application of the respective norms (see article 5, par.3, TEU). The application of such principle avoids the conflicts, even if the level of protection of rights leads to obtaining different results. The most pragmatic results are, for instance, the following: on one hand, EU obligations under international law cannot lead to violation or limitation of rights guaranteed by the EU law in the field of application of the European law, on the other hand, the binding power of the Charter on the Member States does not compromise the binding power of ECHR with respect to such States in the EU legal systems. In return, there are internal control mechanisms which preventing the Convention from threating to the autonomy of the system.

At this point, a question arises spontaneously on whether the provisions of the EU Charter can be directly relied upon before national courts by individuals. Namely, it needs to satisfy the conditions to have direct effect and to produce autonomous legal effect within a national legal system. Article 51 of the EU Charter is the gateway to its application. It states that the EU Charter's provisions *"are addressed to the institutions, bodies, offices and agencies of the Union … and to the Member States only when they are implementing Union law".*

The real issue with EU law is what is meant by implementation of EU law hence. It could be clearly discerned from the ECJ case law. Some authors have argued that the ECJ's approach had been consistent with past practice in determining when the EU Charter would apply. The Luxembourg judge has confirmed that the expression implementing Union law is equivalent to acting within the scope of EU law (see, CJEU, C-617/70, case, *Akerberg Fransson*). In practical terms, implementation of EU law concerns a situation where EU legislation is implemented and applied by a Member State within its domestic legal system. When exercising powers provided for under that legislation, such a Member State will have to observe the dispositions of the EU Charter in addition to, or even instead of, its own fundamental rights regime.

Conversely, cases of derogation from EU law are also relatively admissible.

If a Member State's act falls within the scope of Union law, it can derogate from a fundamental freedom under the Treaties that, at any rate, must be respected.

There are some outcomes deriving from the massive case law analysis. On the top, the ECJ has, with a few exceptions, avoided trying to articulate generalised criteria to be applied when a national measure fell within the scope of EU law, since it depends on the interpretation of particular EU measures and particular national measures in the context of a specific dispute. Secondly, the scope of EU law is part of a dynamic system which includes new assumptions that were not previously contemplated. As a result, there is a minimal number of cases in which the Court has set out some standards to define the scope of EU law. One can argue that the EU Charter has been interpreted as a means of expanding the scope of EU law and the EU competences. That is ultimately an issue that depends on the extent to which the European Court of Justice has jurisdiction in particular areas. Anyway, there are limits to sectors of EU competence, even though it may sometimes not be yet clearly defined.

In summary, it can be concluded that the application of the EU Charter is narrower than that of the European Convention on Human Rights for two main reasons: not all of its provisions have direct effect, and thus individuals cannot directly rely on them before National Courts. They apply to Member States only when they are implementing Union law and the assessment for acting within the scope of EU law is case-specific.

B) On the scope: the story of ECHR demonstrates that the Convention has been ratified by more States than the EU Charter. All the 47 Member States of the Council of Europe are bound by the ECHR (with some exceptions regarding certain Protocols), whilst the 27 EU Member States are bound by both the Charter and the ECHR. Therefore, the ECHR's scope covers all the EEA States, while the EU Charter does not officially apply to the EEA-EFTA States. Any instrument is not binding upon EFTA, although even in these cases the principle of homogeneity speaks in favour of interpretation in accordance with EU law.

Having said that, art. 51, par.1, of the EU Charter and "TITLE I" of TFEU (cf. art. 1 TFEU), define what falls within the scope of EU law, but the boundaries are in practice not entirely clear. It seems that the

application of the Charter puts a limitation on the reach of the Charter rights only in cases regarding EU law. A corresponding limitation is not applicable to the ECHR rights, since those rights shall be guaranteed for all the contracting parties regardless of area of law. Consequently, outside the realm of Union law, Member States must invoke ECHR rather than the EU Charter when dealing with human rights. However, as mentioned above, it seems that the Court of Justice is more inclined to extend the limits of the mechanisms foreseen by EU law on human rights. An indeed, EU Charter protection of human rights is a high-standard guarantee for protection in the EU, even because the protection of fundamental rights in the EU is also addressed to the organization against its own conduct. Another difference between the EU Charter and the ECHR is that the Charter encloses a larger number of rights, including rights which are not protected by the ECHR. Social rights, which are increased in influence and importance within the scope of EU law, go beyond the boundaries of the ECHR, which guarantees mostly civil and political rights. As a result, Member States have an increased obligation to respect human rights in social areas within the scope of EU law. At least, as already mentioned before, it should not be overlooked that the interpretation of the EU Charter rights is limited by Art. 53, which states that the Charter is not allowed to restrict or affect human rights as recognised by EU law, national agreements to which the EU or all Member States are party or by national constitutions of the Member States, and by the ECHR. This means that the EU Charter rights may not provide for more limitations to rights that are guaranteed by the ECHR than are permitted for within the ECHR.

Summary of par. 1.9:

The EU Charter replicates the rights in the ECHR and adds in some new ones. By virtue of art 52 (3) the ECHR is the minimum standard, whilst the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms. Otherwise, the meaning and scope of those rights shall be not diverging from those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. Consequences: 1. The ECHR is the minimum standard (the articles of the Charter must be interpreted like the corresponding Convention Articles) 2. The case law of

European Court of Human Rights is of great importance. Conversely, the Charter may provide for greater protection. The main points of such a relationship between the legal orders are: a) the European Court of Human Rights will only accept applications where all domestic remedies have been exhausted, b) the direct access to the ECJ is extremely restricted (see art.263 TFUE: *"only where an EU act is addressed to an individual or it is of direct and individual concern to them").* Alternatively, the CJEU is involved via preliminary reference procedure and the request for reference is sent by national court to CJEU as part of domestic procedure. Two situations are possible: a) in case of purely domestic situation, where no EU law is involved, individuals apply to domestic courts. Having exhausted the legal remedies, they can apply to Strasbourg Court, b) where EU law is involved: 1. Where MSs' authorities have acted, individuals apply to domestic courts (with possible reference to CJEU by domestic courts). 2. Whether the domestic remedies are exhausted, the Strasbourg Court can be invoked. The only exceptions relate to the competition law.

1.9.1. *The problem of the overlap between the Charter and the EU Convention*

At present, the issue of the overlap between the Charter and the EU Convention (hereunder ECHR) is a topic for discussion, because the Charter (hereunder EUCFR) has legal status. Article 52, par.3, of the Charter deals with this complex issue. It specifies that those rights in the EUCFR which correspond with ECHR rights must be given the same meaning and scope as the ECHR rights. EU law may provide more generous protection, but not a lower level of protection than guaranteed under the ECHR and other international instruments (article 53). As seen, article 51 stems the tide, since it would mean that the EUCFR rights are not free-standing rights but are only relevant in matters of European law. The problem persists in those cases where EU law does not apply.

However, after the Lisbon Treaty came into force, on one hand, the range of rights to which the protection standards dictated by the Charter apply has widened, on the other, it has been necessary to determine to what extent the ECJ has jurisdiction to enforce the Charter. Then, in this regard, two kinds of problems have arisen. The first one is that on several occasions the ECJ has run the risk of competing with the European Court of Human Rights. The ECJ must interpret EUCFR rights in compliance with the ECHR, but it may happen that the ECJ interprets an ECHR-based right in a divergent way from the Court of Human Rights (hereunder ECtHR). The second one is that Member States may face

a conflict in complying with their obligations under European law and under the ECHR, respectively. It is submitted that in such a case, the ECHR should prevail. This seems to be the current position under the ECJ case law (see, CJEU, case C-94/00, *Roquette Freres*; see also case C-46/87, *Hoechst*).

The ECJ therefore appears to recognise that ECHR case law can have an impact on the scope of fundamental rights guaranteed by Union law. Interestingly, it has been noted the Court of Human Rights has likewise taken account of relevant ECJ case law. Accordingly, one can argue that in their respective jurisdictions the two courts aim at favouring the minimization of the conflict. Whilst this is a keystone, the risk of inconsistency remains. Currently, the EUCFR has not only declaratory status, but it is legally binding. Anyway, this gives a positive turn to the relationship between the ECHR and the EUCFR and confers a more substantial role to the ECJ in interpreting the fundamental rights contained in the EUCFR.

At the same time, the general principles of Union law have been expanded through the ECJ case law to cover a wide variety of rights and principles developed from many sources. This has certainly influenced the definition of the competences of the Court of Justice called upon to monitor the overall application of Union law. As dealt with in the former paragraph, the ECJ has been actively involved to ensure the application of the Convention in the EU law and the protection of human rights within it.

But it needs to be reiterated that the gap in the accession of the Union into the ECHR has greatly conditioned the relations between the ECHR and the Union legal system and its scope remains limited. The difficulties are illustrated by several decisions of the European Court of Human Rights which had often to seal lacunae in the protection offered to individual human rights within the Community legal order. This is essentially due to the fact that it has regarded EU as devising by Member States, which remain fundamentally responsible for the Community's actions and for those of the Union, especially in those cases where Community (or Union) acts fell outside the jurisdiction of the ECJ.

More specifically, the ECtHR's deductions imply that the international mechanisms of protection of human rights will be triggered only

in those circumstances where the EU has not effective means to secure human-rights protection (in fact, the ECJ has primary responsibility for controversies within the EU). Aside from *Bosphorus case*, the Strasbourg Court has highlighted the necessity to look at the level of protection in a general or formal way, rather than looking at the substance of a right in an individual case (Concurring Opinion of judge Ress, para 2), emphasising, where necessary, a potential weakness in the European system of protection awarded to individuals. Of course, this may all change when the EU accede to the ECHR. In this case, the problem of the hierarchical relationship between the sources belonging to the same legal order would arise, but this question won't be discussed herein. Anyway, it cannot be denied that accession could offer a solution to the problem of the normative harmonization and of the dialogue between Courts, whether at national or supranational level. Anyway, beyond the overexposed reasons, article 6 TEU points out that the provisions of the Charter shall not extend in any way the Union's competences as defined in the Treaties.

Nevertheless, the potential overlap is currently prevented by the binding power of the Strasbourg rulings (the Court's decisions of 8.07.2003 *Lyons v The United Kingdom*; and of 29 April 1998 *Belilos v. Switzerland*). Anyway, the Court's judgment will not apply *erga omnes*, but it should result in an analysis of circumstances which are the bases for issuing the judgment. This means that the autonomy of the EU legal order is not at any rate threatened. This is also confirmed by stronger procedural rights for applicants at EU level, for instance, the right to an effective remedy and an impartial judge enshrined in art. 47 of the EU Charter compared to Art. 6, par.1, ECHR.

In conclusion, the weight of evidence demonstrates that, regarding the level of protection for human rights in the EU, the EU Charter seems to have succeeded in affording a higher level of protection than the ECHR for certain fundamental rights. Suffice it to say that the context of the EU Charter being part of the EU has been elevated, since it is evident that the EU Charter guarantees protection for a wider range of rights, some of them are explicitly incorporated into it. Of course, this is within the limits applicable in accordance EU Charter, as predetermined at article 51, 52, 53.

On the contrary, a relevant argumentation cannot be overlooked regarding the fact that the EU Charter operates with "principles", which

are only to be "observed", in contrast to "rights", which are to be "respected". This may undermine the level of protection guaranteed by the Charter with respect to some rights which do not have a corresponding right within the ECHR. Another point that must be underlined relates to the derogation systems provided for by them. The possibility to derogate from rights within each framework is to a certain degree coinciding. However, the derogation clauses within each framework are substantially different. The EU Charter requires that national law can provide for the derogation. Nonetheless, since no derogation may violate the essence of the rights and freedoms recognised therein, the freedom to derogate is further restricted. The ECHR derogation clause protects the ECHR's core rights excluding those rights that cannot be derogated at the outset.

Several remarks derive from the discussion above. Firstly, it is understood that the EU Charter use more abstract terms in referring to fundamental rights covering more grounds: this implies that it could more dynamically be interpreted. Secondly, from the point of procedural view, the lack of individual application procedure under the EU Charter makes harder the assessment of his or her rights since the applicant is depending on the State at issue to choose to make a preliminary reference. On the contrary, decisions by the ECtHR take a greater amount of time before being pronounced. Thirdly, due to the structure of the EU, the ECJ has the power to control the validity of the act of an EU organ, whereas the ECtHR may simply decide on the violation of ECHR disposition. Otherwise, the test for respect for fundamental rights will be done by the EU Charter within the EU.

Summary of par. 1.9.1:

After the Lisbon Treaty, the ECJ has a more substantial role in interpreting fundamental rights. The ECJ has been actively involved to ensure the application of the Convention in the EU law and the protection of human rights within it. The ECJ has primary responsibility for controversies within the EU; then, the international mechanisms of protection of human rights, activated by the ECtHR, will be triggered only in those circumstances where the EU has not effective means to secure human-rights protection. Therefore, the test for respect for fundamental rights will be done by the EU Charter within the EU. At this aim, three considerations must be done. 1) Although the Charter does not extend the Union's competence in the pro-

tection of fundamental rights, the context of the EU Charter being part of the EU has been elevated, since it is evident that it guarantees protection for a wider range of rights.2) The lack of individual application procedure under the EU Charter makes harder the assessment of his or her rights, since the applicant is depending on the State at issue to choose to make a preliminary reference. 3) Due to the structure of the EU, the ECJ has the power to control the validity of the act of an EU organ and its adherence to the provisions on fundamental rights.

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Chapter II
THE SCOPE OF APPLICATION OF THE CHARTER: THEORY AND PRACTICE

2.1. Introduction

The scope of the Charter of Fundamental Rights of the European Union is defined in Article 51 thereof, pursuant to which:

> *"1. The provisions of [the] Charter 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 EU law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*
> *2. The Charter does not extend the field of application of EU law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."*

The Charter thus applies to two different sets of acts: EU acts and national acts.

All EU acts fall within the remit of the Charter, so that their compliance with the Charter is a condition of validity. The Court of Justice is thus empowered to annul acts enacted by the European institutions that infringe principles related to the protection of fundamental rights and enshrined in the Charter.

As regards national acts, the Charter applies **only to those "implementing EU law".**

According to the Explanations relating to the Charter of fundamental rights, which shall be taken in due consideration for its interpretation under Art. 6(1) TEU and 52(7) of the Charter, *"it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law".*

The Charter and the Explanations though refer to two slightly different notions: "implementation of EU law" and "scope of EU law".

While the first one would bound Member States to the fundamental rights contained in the Charter only when they adopt national measures which aim to apply a normative scheme put in place by the EU legislator, the second notion alludes to a wider field of application of the fundamental rights enshrined in the Charter.

Since both notions had been used by the Court even before the proclamation of the Charter, and in particular with reference to the field of application of general principles of EU law on the protection of fundamental rights, the interpretation of Art. 51 of the Charter cannot be complete without a deep understanding of the case-law of the Court of Justice developed prior to the entry into force of the Charter and explicitly cited – as we will better see later – by the Explanations relating to the Charter.

2.2. The field of application of general principles of law on the protection of fundamental rights

In the pre-Lisbon legal framework, the Court of Justice interpreted and drew the contours of the "scope of EU law" and so of the application of the principles on the protection of fundamental rights. It is therefore useful to recall some of the most important cases decided by the Court in this regard which, even if not able to clarify completely the notion at stake, can be nevertheless worthwhile to cite in order to better define and understand the field of application of the Charter of fundamental rights of the European Union.

2.2.1. The recognition of the application of general principles of law on the protection of fundamental rights to national measures implementing Community rules: the Wachauf case.

The landmark case concerning the application of general principles of EU law on the protection of fundamental rights is *Wachauf* (Judgment of 13 July 1989, Case 5/88).

Wachauf was a tenant farmer who, when his tenancy expired, requested compensation arising out of the loss of 'reference quantities' on the discontinuance of milk production. Since the compensation was refused by the German authorities, he claimed that the denial amounted to an infringement of his right to private property, protected under the German constitution. However, the German authorities claimed that the rules they applied were required by the Union Regulation.

The Court of Justice ruled that Member States, when implementing Community rules, must, as far as possible, apply those rules in accordance with the general principles of law on the protection of fundamental rights of the Community legal order. Therefore, Member States shall respect fundamental rights when they implement Community rules, no matter whether the implementation consists in national measures implementing a regulation (like in the *Wachauf* case itself), or national provisions transposing a directive, or a framework decision adopted in the framework of police and judicial cooperation in criminal matters or even other EU law acts.

The approach initially adopted by the Court was therefore essentially restrictive, so that the field of application of the general principles of law on the protection of fundamental rights was limited to that of a strict implementation of EU acts. In that light, national measures which, although establishing some forms of connection with the EU system, would not be qualified as implementing EU law in the proper sense and then would be excluded from the field of application of the protection of fundamental rights as guaranteed through general principles of EU law.

> *"19 … Since [the requirements of the protection of fundamental rights in the Community legal order] are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements."*

2.2.2. The recognition of the application of general principles of law on the protection of fundamental rights to national measures falling within the field of Union law by limiting one of the EU free movement rights: the ERT case

ERT (Judgment of 18 June 1991, Case C-260/89) is another seminal case on the scope of application of the protection of fundamental rights

through general principles of EU law, in which the Court adopted a different approach from the abovementioned *Wachauf* case.

The case concerned the compatibility of a monopoly in television broadcasting with the provisions of the Treaty relating to the free movement of goods, the provisions on freedom to provide services, the rules on competition, Art. 2 of the Treaty and Art. 10 of the European Convention on Human Rights. The case originated from proceedings between ERT, a Greek radio and television undertaking established by a Greek law, to which exclusive rights for carrying out its activities were granted, and a municipal information company (DEP), and the Mayor of Thessaloniki. Notwithstanding the exclusive rights enjoyed by ERT, DEP and the Mayor, in 1989, set up a television station which began to broadcast television programmes.

In the *ERT* case the Court affirmed that it could review a national rule able to restrict a fundamental freedom on grounds of public order, public security or public health, and that such a rule must be interpreted in the light of the general principles of law and in particular of fundamental rights. In other terms, when a Member State derogates from a substantive provision of EU law, it is still implementing EU law, given that the derogations must always meet the provisions imposed by EU law. This is so since the derogation is possible only insofar as it is allowed by an EU law provision.

> *"42 As the Court has held […], it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures, and which derive in particular from the European Convention on Human Rights.*
> *43 In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus, the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court".*

Therefore, before the entry into force of the Charter, the Court mainly distinguished two situations in which general principles of EU law on fundamental rights would apply to national authorities: i) when a Member State is implementing EU law, for instance by implementing a Directive, or giving effect to a Decision or Regulation; and ii) when a Member State is 'acting within the field' of Union law by limiting one of the EU free movement rights.

The justification for imposing EU fundamental rights standards in those cases is slightly different: in the case in which the Member State is implementing or giving effect to secondary legislation, the fundamental rights limit arises from the very existence of this secondary legislation. When a Member State is limiting one of the EU free movements rights, the rationale for imposing the observance of EU fundamental rights is that even if the derogation is the consequence of the application of national rules, it is possible only insofar as a provision of EU law allows such a derogation.

2.2.3. The exclusion of the application of general principles on the protection of fundamental rights

In its case-law the Court of Justice clarified also the circumstances in which the protection of fundamental rights trough general principles of EU law does not apply to national acts or measures.

To that extent, the Court made clear that in case of national measures which are not a means for a Member State to fulfil its obligations under EU law, general principles on fundamental rights do not apply to national authorities.

In particular, this was explained in the *Annibaldi* case (Judgment of 18 December 1997, Case C-309/96), concerning the refusal of the Italian authorities to grant Mr Annibaldi a permission to plan an orchard within the perimeters of a regional park on the basis of a regional law. The Court in that occasion clarified that, while the EU (then the Community) pursues objectives in the fields of the environment, culture and agriculture, the Regional Law at stake was not intended to implement a provision of EU law in those fields.

This means that when a national legislation only indirectly affects the

implementation of provisions of EU law, since its subject-matter has a loose connection with the objectives of the EU Treaties, the situation cannot be considered to fall within the scope of EU law and though Member States are not required to respect fundamental rights.

> *"21 Against that background, it is clear, first of all, that there is nothing in the present case to suggest that the Regional Law was intended to implement a provision of Community law either in the sphere of agriculture or in that of the environment or culture.*
> *22 Next, even if the Regional Law be capable of affecting indirectly the operation of a common organization of the agricultural markets, it is not in dispute that, the park having been created to protect and enhance the value of the environment and the cultural heritage of the area concerned, the Regional Law pursues objectives other than those covered by the common agricultural policy, or that the Law itself is general in character.*
> *23 Finally, given the absence of specific Community rules on expropriation and the fact that the measures relating to the common organization of the agricultural markets have no effect on systems of agricultural property ownership, it follows from the wording of Article 222 of the Treaty that the Regional Law concerns an area which falls within the purview of the Member States."*

2.3. The field of application of the Charter of fundamental principles of the European Union

After the proclamation of the Charter of fundamental rights, questions have arisen as to the interpretation of its Art. 51. In fact, as above said, while the article refers to the "implementation of EU law", the Explanations dealing with this Article refer to "the scope of EU law", providing that

> *"As regards the Member States, it follows unambiguously from the case law of the [ECJ] that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of [EU] law."*

The expression used in the Explanations is wider than the reference to "implementing EU law". At the same time, the reference to the previous case-law of the Court of Justice seems to allude to the fact that Art. 51 of the Charter simply intended to reaffirm the scope of application of EU fundamental rights as previously defined through the praetorian activity of the Court of Justice.

The first judgments delivered after the entry into force of the Charter did not add much clarification to the issue. However, some of them are worth to be cited.

For example, in the *N.S.* judgment (Judgment of 21 December 2011, Joined Cases C-411/10 and C-493/10) the Court ruled that "*a Member State which exercises [a] discretionary power must be considered as implementing Union law within the meaning of Article 51(1) of the Charter*" (para. 68). The discretionary power the Court referred to was to decide whether to examine an asylum claim which is not the responsibility of a Member State under the criteria set out in Chapter III of the Dublin Regulation. This means that a national decision adopted by a Member State which decides to make use of that power should comply with the Charter.

In the *Iida* case (Judgement of 8 November 2012, Case C-40/11, ECLI:EU:C:2012:691), the Court made a little step further, but then rapidly hid itself. The case concerned a national measure transposing an EU directive and, specifically, on the applicability of the Charter in a case touching upon family reunion. Here the Court ruled that to determine whether the national measure at stake felt within the implementation of EU law

> "*it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it*" (para. 79).

However, the lack of clarity in the enumeration of the criteria to be used to establish the applicability of EU fundamental rights to the Member States and the allusion to the existence of other (unspecified) elements to be taken into account to that purpose thwarted the willing of the Court to offer interpretative insights on the interpretation of Art. 51 of the Charter.

In general, during the first years after the entry into force of the Lisbon Treaty an attitude of self-restraint was kept by the Court, which decided on the applicability of the Charter without taking an explicit position as to the interpretation of its Art. 51.

2.3.1. The Åkerberg Fransson decision

It was only in 2013 that the Court of Justice intervened to clarify the interpretation of Art. 51 of the Charter.

In *Åkerberg Fransson* (Judgment of 26 February 2013, Case C-617/10) the issue at stake was whether the principle of *ne bis in idem* set out in Art. 50 of the Charter precludes criminal proceedings for tax fraud being brought against a defendant when he has already been subject to a tax penalty for the same facts of making false declarations.

The Court recalled that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations, so that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of EU law. However, if such legislation falls within the scope of EU law, the Court must provide all the guidance to determine whether that legislation is compatible with the EU fundamental rights.

In this case, the Court deduced that tax penalties and criminal proceedings, such as those to which Mr Åkerberg Fransson was subject as a result of the inaccuracies in the information provided as regards VAT, constituted an implementation of Arts 2, 250(1) and 273 of Directive 2006/112/EC and of Art. 325 TFEU and, therefore, of EU law, within the meaning of Art. 51(1) of the Charter.

Accordingly, it held that it had jurisdiction to answer the questions referred for a preliminary ruling and to provide guidance as to interpretation to determine whether the national legislation is compatible with the principle of *ne bis in idem* set out in Art. 50 of the Charter.

The relevance of the decision derives, first of all, from the clarification offered by the Court that Art. 51 of the Charter codifies the previous case-law (para. 18). Moreover, the Court affirmed that the mere fact that the legislation at issue in the main proceedings came within an area in which the European Union has powers does not render the Charter automatically applicable. In other terms, for the Charter to apply it is not the subjective element of state measures which should come into relief, but their objective contribution to the implementation of EU law.

> *"18 That article of the Charter thus confirms the Court's case law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.*

19 The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect, the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court observance of which the Court ensures.
(…)

21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction.

23 These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties".

2.3.2. The Siragusa judgment

In the judgment on the *Siragusa* case (Judgment of 6 March 2014, Case C-206/13) the Court clarified the need for "a certain degree of connection" between the situation in the main proceedings and EU law. The factors enabling a finding of the existence of a national measure of "implementing EU law" for the purposes of Art. 51 of the Charter are:

1. whether the national legislation is intended to implement a provision of EU law,
2. the nature of the legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law, and

3. whether there are specific rules of EU law on the matter or capable of affecting it.

"24. (…) the concept of 'implementing Union law', as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.

25. In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it".

2.3.3. The logical steps to follow to determine whether a national legislation involves the implementation of EU law under Art. 51 of the EU Charter of fundamental rights

The *Siragusa* judgment therefore indicated the logical steps to follow, depending on the case, in a cumulative or alternative manner, to determine whether a given national rule falls within the sphere of application of EU law.

First and foremost, the connection must be of a "certain consistency", in order to impose the application of EU law only in respect of those national rules which show a sufficiently qualified link with the EU competences. Such a consistency shall "*above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other*" (para. 24). The notion of "a certain consistency" thus requires an appreciable connection, whose concrete standard of adequacy must be assessed on a case-by-case basis, having in mind an upper maximum threshold - given by the contiguity of the subjects - and to the exclusion a minimum threshold - given by a merely indirect influence.

Therefore, **there will be a connection of a certain consistency** whether:

a) National legislation implements an EU law provision
b) the EU law legislation specifically regulates the subject matter covered by the State regulation
c) an EU law provision affects a national provision

To the contrary, **there will be not** a connection of a certain consistency if the objectives pursued by the national legislation are not the same as those pursued by EU law, even if national legislation is capable of indirectly affecting the latter.

As regards the hypothesis under let. a), Member States can be said to be clearly implementing EU law in case of an EU obligation in this sense and national provisions are aimed to **comply with that obligation.**

The example par excellence in this case is that of the transposition of a directive, or the adoption of measures aimed at giving effects to regulations or other EU law provisions. As concerns the latter hypothesis, it can be cited, just to make an example, the *Florescu* case (Judgment of 13 June 2017, Case C-258/14) , where the Court ascertained that a law adopted by Romania was aimed *"to comply with the commitments it made to the European Union, which are set out in the Memorandum of Understanding. In accordance with Article 2 of that Law, the measures adopted by it are in particular intended to 'fulfil the obligations arising under the Memorandum of Understanding between the European Community and Romania'"* (para. 45).

However, it should be also verified whether the factual situation is actually governed by EU law. It is in this sense that, for example, in the abovementioned Iida case the Court of Justice stated that *"[w]hile Paragraph 5 of the FreizügG/EU, which provides for the issue of a 'residence card of a family member of a Union citizen', is indeed intended to implement European Union law, it is none the less the case that the situation of the claimant in the main proceedings is not governed by European Union law, since he does not satisfy the conditions for the grant of that card […]. Moreover, in the absence of an application by him for the status of long-term resident in accordance with Directive 2003/109, his situation shows no connection with European Union law*", concluding that "*the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter*" (paras 80-81).

A national legislation can be said to be implementing an EU law provision even if it **aims only indirectly to implement EU law**. This means that there will be implementation not only if the aim of fulfilling the obligation is directly and explicitly stated in the domestic legislation, but also if the intention to fulfil the obligation can be inferred indirectly. It is in this sense that, in *Åkerberg Fransson*, the Court of Justice clarified that.

> *"The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union"* (para 28).

The *Åkerberg Fransson* judgment thus embraces a broad notion of "implementing purpose" such that it also includes national norms - e.g. instrumental norms, which do not have an autonomous preceptive content but which determine the modalities of application of substantive norms or assist their which are only indirectly or occasionally connected with the implementation of EU law.

Similarly, in *Berlioz Investment Fund* (Judgment of 16 May 2017, Case C- 682/15) the Court stated that

> *"The fact that Directive 2011/16 does not make express provision for penalties to be imposed does not mean that penalties cannot be regarded as involving the implementation of that directive and, consequently, falling within the scope of EU law"* and that *"it is irrelevant that the national provision serving as the basis for a penalty such as that imposed on Berlioz is included in a law that was not adopted in order to transpose Directive 2011/16, since the application of that national provision is intended to ensure that of the directive"* (paras 39 and 40).

Finally, there is implementation also in the case of an **authorisation**. In this case a national provision pursuing an aim covered by EU law as a result of prior authorisation falls within the notion of "implementation of EU law" under Article 51(1), of the Charter. When the authorization is accompanied by the corresponding internal rule for its exercise therefore represents implementation of EU law. To the contrary, when the State exercises a discretionary power that does not derive from EU law, but rather directly from national law, there will be no implementation under Art. 51 of the Charter. In this case, actually, the State discretionary power does not derive from EU law but from national law.

As regards the hypothesis under let. b), a state regulation enters within the scope of application of EU law when a European legislation specifically regulates the subject matter of the state regulation: it clearly follows that the national legislation at stake not only concerns a material area of competence of the European Union, but also that, in the context of

such a sector, a specific discipline can be identified. Therefore, a national legislation - which, although not implementing Union norms, concerns sectors regulated by the latter - is absorbed in its sphere of application.

Finally, under let. c), a national provision can fall within the scope of application of EU law if the latter affects it. The concept of incidence is, however, deeply ambiguous. The Court of Justice made explicitly use of this notion, as already seen, in *Annibaldi*, where it ruled that "*the absence of specific Community rules on expropriation and the fact that the measures relating to the common organization of the agricultural markets have no effect on systems of agricultural property ownership*" implied that the national legislation concerned an area falling within the purview of the Member States.

2.3.4. Cases of exclusion of the Charter's application

A national measure is not susceptible to be considered within the sphere of application of an EU norm, even if it indirectly affects it, if it pursues aims different from those pursued by EU law and has a general character.

The absence of a specific character and of specific aims of realizing the EU objectives are therefore elements which exclude a measure, even if it is capable of affecting on EU law, to fall within the Charter's scope of application.

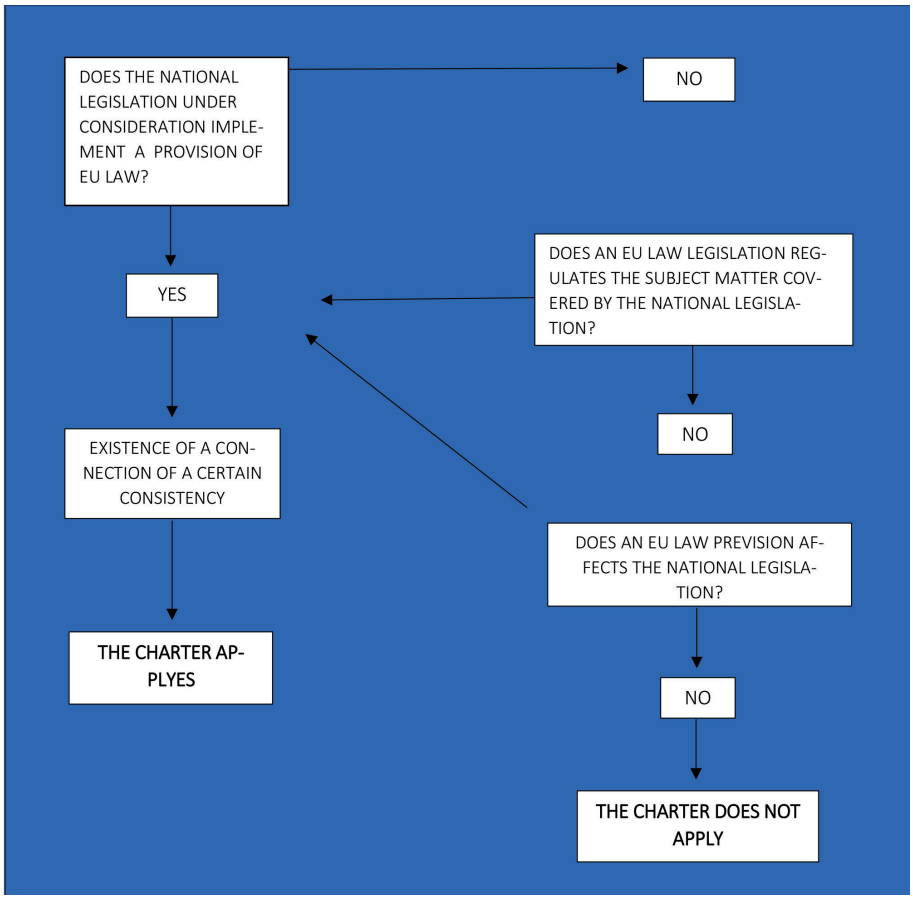
A mere interference with EU law, not accompanied by the objective of pursuing EU goals, would not be sufficient to make a national measure subject to EU law for the purposes of Art. 51 of the Charter.

The Court, for example, in *Annibaldi* recognized that:

> "*even if the regional law may indirectly affect the functioning of a common organization of agricultural markets, it is not disputed, first of all, that, since the park was established for the purpose of protecting and enhancing the environment and cultural heritage of the territory concerned, the regional law is directed to purposes other than those than those pursued by the common agricultural policy and, secondly, that the law itself is general*" (para. 22).

Under a contrary reasoning, a measure which, although aimed at achieving aims different from those of EU law, interferes directly with the latter, should fall within the field of application of the Charter.

2.3.5. Flowchart: How to determine the scope of application of the Charter



Author of paragraphs 2.1 to 2.3.2 and of the flowchart 2.3.5: G. D'Agnone - Research Fellow in EU Law

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Chapter III

Section I – The Protection of Fundamental Rights in the EU: The Right to Asylum

3.1. The Asylum Policy in the European Union: a story until the Dublin regulation system

In recent times, the right to asylum is conceived as a fundamental right granted to those who are fleeing persecution or serious harm. At the beginning, as prerogative of the Nation States, the right to asylum has been transformed into an international obligation that binds the signatory States under the 1951 Geneva Convention relating to the protection of refugees. Thanks to the Geneva Convention, the authority is subject to minimum rules and international standards. Actually, the level of state regulation is almost outdated, and the Member States of the European Union have adopted a common approach to asylum within the European political area, which is characterized by the absence of internal borders and in which movement is free. The idea under the creation of a common regulatory space is to dismantle any divergences that would have risked provoking secondary migratory movements by asylum seekers in search of the best legal conditions and, at the same time, to spread information between Member States in order to mitigate the *asylum shopping*, that is internal migrations which are complemented by multitudes of applications in the greatest possible number of Member States. To this end, the European Union has established a legal framework including all relevant aspects in the procedure for applying, evaluating and issuing the right to asylum, as well as reception, integration, detention and other aspects relating to the management of "political" migrants. This is the *Common European Asylum System* (acronym, CEAS), which establishes common minimum standards. A historic occasion that marked the turning point in this matter has been

the European Council of Tampere in 1999, when the work program of the European Union has been launched in the area of Freedom, Security and Justice (at the expiry of the set time limit the subsequent programs are being discussed in the European Councils of Hague in 2004 and Stockholm in 2010). The organizational reform in the Union of the right to asylum started in Tampere had other historical precedents, since the project has aimed to collect all the national laws on asylum in a single European order. In fact, the approach of the EU States to immigration and asylum has been modified with the signing of the 1990 Schengen Convention on free movement within the European Community, and the Dublin Convention on the determination of the country responsible to assess an application for international protection has been decisive. Subsequently, with the Maastricht Treaty, immigration has been integrated into the so-called third pillar; the implementation of the Dublin and Schengen Conventions have been the following steps. Then, immigration and the right to asylum have been integrated into the first pillar, and regulated by the community procedure, which has moved beyond the intergovernmental method suitable for the third pillar and has accommodated the celerity of procedures.

That said, there have been several stages in the construction of the Common European Asylum System. First, the new procedure has regulated the so-called temporary protection by means of Directive 2001/55 / EC. Secondly, a European Council decision has established a European Refugee Fund (RES), with the expectation that it would be renewed every five years. Finally, a variety of rules has been enacted and, once approved, has become a pillars of the Common European Asylum System. These are: a) *the Eurodac regulation* (2000), which was born as a protocol annexed to the Dublin Convention, but which, following the Treaty of Amsterdam, has aimed at modifying the structure of the new born Common European Asylum System, and consequently, it has been adapted into a European regulation b) *the Dublin II regulation* (2003), which has readjusted the Dublin Convention provisions, and, at the same time, has embedded the Convention, or any other international treaty, within the Community legal system through an European legislative instrument c) *the Reception Directive* (2003) on minimum standards which targeted at the reception of asylum seekers in the Member States d) *the Qualification Directive* (2004), which has inserted an additional instrument of

international protection, the so-called subsidiary protection, in the Community legal system and has given the first official definition of a refugee e) *the Asylum Procedures Directive* (2005) which, as a complement to the Common European Asylum System, is responsible for managing the procedures relating to the recognition and withdrawal of refugee status.

In the same years, Directive 2003/86 / EC on family reunification has been also approved, filling the gap in the European asylum system. To supervise this system, and the European borders, *Frontex* agency has been established: it has auxiliary competences with respect to the national border and maritime guards, and other complementary instruments have been approved (2005-2009). For instance: *the European Asylum Support Agency* (EASO, regulation 439/2010 / EU) has been established and *the Return Directive* has been approved. However, the CEAS structure, as established, has been featured deficient, and thus the Commission, highlighting the serious shortcomings, has aimed at a substantial modification. Coming to the current system, one important premise is that, during the third five-year program (2010 - 2014) in 2010, significant changes have built the pillars of the European asylum system. First of all, the Directive 2011/51 / EC has engendered the possibility for those who are applying for the international protection to access the status of long-term residents. Secondly, the decision 281/2012 / EU has set the basis for *the European Resettlement Program*. As a consequence, the European regulations, which have been modified in this period, constitute the cornerstones of the Common European Asylum System: a) the Qualifications Directive has been modified in June 2013. It is the turn of a package including the new Procedures and Reception directives b) the new Eurodac regulation has also been modified, and lastly the reform of the Dublin system is noteworthy. A few months later, after many years of discussions, the approval of the *Eurosur program*, which has been conceived as an auxiliary tool to the activity of the Frontex agency, has underwent two amendments between 2011 and 2014.

Conversely, a particular attention should be paid to *the Dublin III Regulation* (Regulation (EU) n. 604/2013), which is entered into force in July 2013. It contains solid procedures for the protection of asylum applicants and improves the systemic efficiency. A number of mechanisms are provided for by the system: a) a precautionary tool aimed at the crisis

management. It depends on dysfunctions within the national asylum systems or problems stemming from particular pressures b) provisions on protection of applicants: among them, guarantees for minors, such as the child's best interests, and extended possibilities of reunifying them with their relatives are the most relevant c) the suspension of the execution of the transfer in case of appeal, including the right for a person to remain on the territory, pending the decision on the suspension of the transfer for the period the appeal is underway before a Court d) legal assistance, e) detention in case of "flight risk" or the risk of absconding and strict limitation to the duration of detention e) the possibility for asylum seekers, who are considered irregular migrants and returned under the Return Directive, to receive the Dublin procedure treatment f) the right to appeal a transfer decision before a Court or Tribunal g) legal certainty of procedures on the part the Member States - e.g. exhaustive and clearer deadlines. The application of the Dublin procedure cannot last longer than 11 months, or 9 months to take the person who has been taken in charge back (except for absconding, or where the person is imprisoned).

In conclusion, regarding the country/ Member State responsible for asylum application under the Dublin Regulation, every single asylum application lodged within EU territory must be examined. Member States are responsible in the handling of an asylum request. In fact, the Dublin system, which covers the decision of transferring or of taking back of the asylum applicant, is based on the principle of competent Member State. It must be noted that the scope of the Dublin III Regulation is to accelerate the asylum procedures. This means that every single and clearly determined EU country is obliged to examine an application on several basis, primarily on the merits. Apart from the identification of the Member State responsible for the examination of the asylum application, the Regulation entails the criteria for establishing responsibility. Those are: family considerations, possession of visa or residence permit in a Member State, which must be recent and the regularity or irregularity in the applicant's entry to EU. Finally, each Member State may decide to activate the discretionary clause (Article 17 par.1), through which it examines the asylum request, even if is not the competent State.

On 23 September 2020, *the New Pact on Migration and Asylum* has been adopted by the European Commission after consultations with the

European Parliament, Member States and promotes a comprehensive approach to migration. In particular, it recognises that Member States' responsibility must be proportionate, and Member States' solidarity must represent a constant basis for action.

Summary of par. 3.1:

The right of asylum in the European Union has been granted by its Member States by means the application of the Geneva Convention of 28 July 1951 relating to the status of refugees. It evolved as a result of common policies appearing in 1990 in connection with the Schengen Convention. The EU has established a common asylum policy, so that asylum seekers cannot make more than one application in a EU country. This common policy started with the Dublin Convention in 1990 and has continued through implementation of the Eurodac Regulation and the Dublin II Regulation in 2003. It develops today with the Dublin III Regulation of June 2013 *"establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person"* (https://eur-lex.europa.eu/). It introduces sound procedures to protect asylum seekers and improves the systemic efficiency. On 23 September 2020, the New Pact on Migration and Asylum has been adopted by the European Commission at the aim to reformulate the regulatory regime of CEAS (Common European Asylum System). It follows that Member States promotes a comprehensive approach to migration. In particular, it recognises that Member States' responsibility must be proportionate, and Member States' solidarity must represent a constant basis for action.

3.2. The regime of sources between 1951 Refugee Convention and EU law: a focus on article 18 of the Charter of Fundamental Rights and on EU secondary law

The scope of the EU asylum policy is to offer an appropriate status to any third-country national who applies for international protection in one of the Member States, in compliance with the principle of non-refoulement. The Common European Asylum System, subsidiary protection and temporary protection finds its legal basis in Articles 67.2 and 78 and 80 of the Treaty on the Functioning of the European Union (TFEU) and in Article 18 of the Charter of Fundamental Rights of the European Union. Furthermore, the common policy in this area must comply with

the Geneva Convention relating to the Status of Refugees of 28 July 1951 and the relevant Protocol of 31 January 1967. Neither the TFEU nor the Charter provide any definition of the terms "asylum" and "refugee", but both refer expressly to the Geneva Convention and its protocol.

Starting from the examination of the Convention relating to the status of refugees, also known as 1951 Geneva Convention on refugees, it is the first source of inspiration for the regulation in this matter. It is a multilateral Treaty of the United Nations, it defines who is a refugee and the rights of individuals who have obtained asylum and also the responsibilities of the nations that guarantee asylum, and lastly clarifies who does not and cannot benefit from this status. The Convention is based on Article 14 of the 1948 Universal Declaration of Human Rights, which recognizes the right of individuals to seek asylum from persecution in other countries. In addition, a refugee can be entitled to rights and benefits in a country in addition to those provided by the Convention. The Treaty was approved in 1952, following the United Nations conference held in Geneva on July 28, 1951. Initially, the Convention was circumscribed to the protection of European refugees before January 1, 1951 (after World War II). Subsequently, in New York, in 1967, the "Protocol Relating to the Status of Refugees" was signed and applied the previous 1951 Convention without any geographical or time limitation. The signatory States relied on a certain margin of discretion in recognizing the geographical extent and application of the Convention. In this way, some States (such as Turkey) has recognized the refugee status of migrants coming only from the European territory, excluding, however, most of those who escape from the State they belong to and apply to obtain the refugee's rights.

As of 2013, there are 145 contracting parties to the Convention and 146 to the Protocol.

Numbers aside, as for the definition of a refugee, the 1951 Convention made an attempt to give a more objective definition (see Article 1.2 of the Convention, as amended by the 1967 Protocol, defines refugee as follows: *" As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not*

having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."). The final version of the Convention included specific aspects, relating to the issue of refugees in Africa of 1969, and the Cartagena Declaration of 1984, which also establishes regional regulations for refugees in Central America, Mexico and Panama. Regarding the responsibility of the contracting parties, it is necessary to clarify that there is a general principle of international law fallen on them, that is the obligation to respect the Treaties in force, since these latter bind the parties and must be carried out in good faith. Countries that have ratified the Refugee Convention are obliged to protect refugees on their territory, in accordance with the terms described in it and in the 1967 Protocol. These obligations can be summarized as follows:

A) (Article 35 of the Refugee Convention and Article II of the 1967 Protocol) Cooperation by States with the UNHCR, (acronym the United Nations High Commissioner for Refugees) in the exercise of its functions and in the implementation of the provisions in the Convention B) information on national legislations which comply with the Convention and grant its application C) non-application of reciprocity to refugees, since protection is not granted to refugees from their country of origin (i.e, the granting of a right to a alien is subject to the granting of similar/ corresponding treatment by his/her own country to one of the citizens on its territory).

There are other principles that govern the structure of the aforementioned Convention. First of all, Article 31.1 has to be mentioned: (*"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence*"). It states that a refugee may not be subjected to sanctions due to the illegality of his/her entry or presence in a country, if he/she is able to demonstrate that he acted in good faith, or if there is sufficient justification for his illegal entry or for his presence, such as to escape real threats to his life or freedom, and insofar as he immediately declares his/her presence.

The second principle is the prohibition of expulsion or return (*non-re-*

foulement) under Article 33 of the Convention ("*No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*".) Therefore, Member States are obliged under the Convention and under customary international law to respect the principle of non-refoulement. As part of customary international law, this principle must also be respected by States that have not acceded to the 1951 Refugee Convention. Where and when this principle is threatened, UNHCR can respond by intervening with the competent authorities and, if it deems it necessary, informing the public.

Turning instead to the European system, first of all, it is necessary to briefly outline the historical process that led to the development of the main instruments for regulating and implementing the asylum policy in the European Union, and in particular, progress in the context of the Amsterdam and Nice Treaties and of the primary law of the European Union.

Thanks to the Maastricht Treaty of 1993, the previous intergovernmental cooperation in the field of asylum has been introduced into the institutional framework of the EU. As a matter of fact, the main role has been played by the Council, which has to involve the Commission in its work and to inform Parliament of asylum initiatives, while the Court of Justice of the European Union had no jurisdiction in the area of asylum. In 1999, new competences to the EU institutions have flowed into the Treaty of Amsterdam, providing for a specific institutional mechanism in the legislative process: the right of initiative is shared between the Commission and the Member States followed by the unanimous decision in the Council, after consulting the Parliament. The Court of Justice has also obtained jurisdiction in specific cases. The Amsterdam Treaty has also set forth that, once the procedure is over, the Council could establish the application of the normal co-decision procedure (the current ordinary legislative procedure) and then take its decisions by qualified majority. As seen in the former paragraph, with the adoption of the Tampere program in October 1999, the European Council has decided that common minimum standards should be introduced as part of the implementation of a Common European Asylum System. They are to be followed by a

common short-term procedure, aimed at conferring a uniform status for those who has obtained asylum, and it is valid throughout the Union in the long term.

For the period between 1999 and 2004, the Common European Asylum System (CEAS), which has replaced the 1990 international / intergovernmental Dublin Convention, has preliminary established the criteria and mechanisms to determine the Member State responsible for the examination of asylum applications. Secondly, it has defined the common minimum standards which Member States are required to comply with in order to receive asylum seekers, to execute the procedures relating to international protection and the granting of refugee status, as well as the procedures for withdrawing that status. Further legislation concerns temporary protection, in the event of a mass influx. From 2004 to the end of 2010, the Hague Program has highlighted the EU's ambition to overwhelm the minimum standards and develop a single asylum procedure, including common guarantees and a uniform status for persons seeking protection. In the 2008 European Pact on Immigration and Asylum has extended the deadline to 2012.

The most important steps in this regard have occurred with the Lisbon Treaty, which has entered into force in December 2009. In fact, the asylum measures have been incorporated into a common system based on uniform procedures. The conditions of this common system are the following: a) a single status in the field of asylum b) a single status for subsidiary protection applicants c) a uniform system of temporary protection d) the loss of the single status in the field of asylum or subsidiary protection e) requirements and mechanisms for determining the Member State responsible for examining an asylum application f) rules concerning reception conditions, and finally, partnership and cooperation with third countries. Following the Lisbon amendments, Article 80 TFEU explicitly enshrines the principle of solidarity and fair sharing of responsibility, including financial loads between Member States. This implies that EU actions on asylum must contain appropriate measures to ensure that this principle is applied. Furthermore, the standard asylum decision-making procedure is the co-decision procedure. At the end, the judicial review carried out by the ECJ has been significantly improved. Actually, preliminary reference can be submitted by any jurisdiction of a

Member State, common and of last resort. Indeed, this has allowed the Court to develop more consistent case law on asylum.

The Stockholm program, adopted by the European Council (10 December 2009) for the period 2010-2014, has reaffirmed and intended to broaden *"the objective of establishing a common area of protection and solidarity based on a common asylum procedure [and] on solidarity between Member States"* The so-called second stage of the CEAS has been launched after the entry into force of the Lisbon Treaty, leading to a common asylum procedure based on a uniform protection status. In this regard, it should be made clear that the changes promoted by the Commission, already in 2008, are essentially aimed at solving long-standing problems in this area, such as the differences between Member States' legislations. Above all, the Commission's argumentations have been at the centre of the political debate for two reasons: the first is the asylum shopping, which has become a part of EU institutions' jargon, now. Anyway, the abovementioned differences between Member States have represented the main reason why refugees often choose their host country, taking into consideration that some States grant refugee status for the majority of applicants, while others grant it to less than 1%. Besides, by virtue of the Dublin II Regulation, a State is allowed to transfer an asylum seeker to the first Member State he passed through, according to the *"readmission procedure"*. This provision is put in place to make border to States responsible for controlling the EU's external borders. However, this has led to the influx of more asylum applications there (such as Italy, Greece, Slovakia, Poland or Malta have witnessed the mass arrival of migrants) as well as, in some cases, the transfer of asylum seekers to them. The second reason is Member States' restrictive legislation. By officially declaring that their domestic policies are directed to combat fraud, some of them have engaged in restrictive migration policies, such as the United Kingdom before Brexit (UK Borders Act of 2007), Netherlands, Italy, France. As a consequence, these measures have reduced the number of refugee status application.

That being said, and examining the main existing legal instruments, there is a conspicuous secondary legislation that guide the common European policy on asylum.

Making a short list, they are catalogued as follows: a) *Council Directive*

2001/55 / EC of 20 July 2001 on temporary protection, never actually applied b) *Directive 2011/95/EU* of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted c) *Asylum Procedures directive* (Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection) d) *Reception Conditions Directive*(Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013) on standards for the reception of applicants for international protection e) *Schengen Borders Code Regulation* (EU 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code) on the rules governing the movement of persons across borders f) *Dublin III Regulation* (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013) on the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person) g) *Regulation (EU) No 656/2014* of the European Parliament and of the Council of 15 May 2014 on the rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

With the exception of the Qualifications Directive, which is entered into force in January 2012, the other acts are entered into force only in July 2013 (the Eurodac Regulation; the Dublin III Regulation; the Reception Conditions Directive; and the Directive on reception procedures asylum), concluding the process in 2015. Transposition coincided with the height of the migration crisis. In 2014, the European Council has given absolute priority to the strategic guidelines of legislative and operational arrangement in the area of freedom, security and justice (Article 68 TFEU), underlining the urgency of full transposition and effective implementation of CEAS. In addition, the speeding up of the identification and registration procedures of arriving migrants has been accompanied by the implementation of emergency relocation mechanisms for

the international protection seekers. These mechanisms, proposed by the Commission, are endorsed by the ECJ, which has already asserted that relocation is a mechanism which gives effect to the principle of solidarity and fair sharing of responsibility, referred to in Article 80 TFEU. However, relocation quotas have warned lower than expected and relocations are implemented slowly hitherto.

The reform of CEAS is resulted in two packages of legislative proposals in 2016 and discussed by the Parliament and the Council until the end in May 2019. However, due to the deadlock in discussions within the institutions, no legislative act has been adopted. The series of legislative initiatives is intended to improve the CEAS, inter alia, by proposing directly applicable regulations, rather than directives (with the exception of reception conditions, which would continue to be covered by a directive, requiring enforcement by national law). It mainly concerns: *the Asylum procedures,* aimed at ensuring common guarantees for asylum seekers and ensuring stricter rules to defeat abuse and *the Qualification Directive*, addressed to the beneficiaries of international protection, (Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, which amends Council Directive 2004/83/EC of 29 April 2004). It lays down minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Then, *the Reception Conditions Directive* (Directive 2013/33 / EU of the European Parliament and of the Council of 2013, which has replaced the initial Council Directive 2003/9 / EC) fixes rules and minimum standards relating to the reception of applicants for international protection. Ultimately, *the Dublin Regulation* (cf. the nomenclature specified above) establishes the criteria for determining the Member State responsible for examining an application for international protection (at the beginning, the first country of entry), while maintaining the current criteria of the Dublin system. What is more, the role of the agencies responsible for the administrative implementation of institutional acts has been enhanced. Additionally, there is a European framework for resettlement, which includes common Union rules on the admission of third-country nationals in need of international protection and complements the existing ad hoc national and multilateral resettlement programs.

On 23 September 2020, the Commission has published *the new Pact on Migration and Asylum* to give new encouragement to the CEAS reform based on a balance between responsibility and solidarity. The goal is to integrate the asylum procedure into the overall management of migration, linking it to preliminary checks and repatriations. In summary, it provides for: a new border procedure, a pre-entry verification process, which should be applicable to all third-country nationals who are at the external borders, a common framework for regulation on asylum and migration management. It involves all Member States in the determination of responsibility for an asylum application; afterword, a new solidarity mechanism focusing on relocation and sponsorship of returns would be introduced. Moreover, a regulation on crisis and force majeure situations is envisaged: it deals with exceptional situations of massive influx of third-country nationals who arrive illegally, it modifies the mechanisms for managing databases and supporting the common framework in asylum, then, it foresees the resettlement of irregular migration, including return policies. Finally, it cannot be overlooked that the Union framework on asylum is adjusted accordingly with the purpose of humanitarian admission. In fact, Member States are encouraged to introduce and make greater use of other humanitarian admission tasks, such as family reunification and private or collective sponsorship programs private, as well as complementary pathways related to education and work.

Summary of par. 3.2:

Drawing inspiration from the Geneva Convention relating to the status of refugees of 1951, the actual EU secondary legislation might be summarized as follows: a)Council Directive 2001/55 / EC directive on temporary protection, never actually applied b) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, c) Directive 2013/32/EU (Asylum Procedures Directive) d) Directive 2013/33/EU (Reception Conditions Directive) e) Schengen Borders Code Regulation (EU) 2016/399),f) Regulation (EU) No 604/2013 (Dublin III Regulation)g) Regulation (EU) No 656/2014. Starting from July 2013, the general framework consists of the Eurodac Regulation; the Dublin III Regulation; the Reception Conditions Directive; and the Directive on reception procedures asylum.

3.3. A summary of the most relevant case law and the judicial dialogue between the European Court of Justice and Strasbourg Court

In this section, the rulings, that have most influenced the European legislative framework on migration and asylum, will be examined in chronological order. An important contribution has been offered by the Court of Justice, which, in continuity with the best jurisprudence on human rights, has offered solutions to the disputes that are submitted to it, but has also driven the systemic forces towards the creation of an area of law which is relatively recent formed. In this regard, priority will be given to the jurisprudence of the Court of Justice, and then attention will be given to some rulings of the Strasbourg Court in the context of a judicial dialogue that has supported the organic settlement of the issues raised in this domain.

The cardinal principle of the Area of Freedom, Security and Justice is mutual trust between Member State. The Court of Justice has reaffirmed that the EU legal structure is based on the abolition of internal borders and in this regard, the principle of mutual trust requires that each Member State, from the exception of certain circumstances, shall consider all the other Member State to be complying of EU law and fundamental rights recognised by EU law. In other words, when applying EU law, a Member State trusts in the alleged respect of fundamental rights by the other Member States (Opinion 2/13).

A) CJEU, judgement of 21st December 2011, case C-411/2010, *NS vs. Secretary of State for the Home Department*

The relevant Legislative Provisions are: In the field of International Law, 1951 Refugee Convention (Art 33), Council of Europe Instruments, Convention for the Protection of Human Rights and Fundamental Freedoms. In the field of European Union Law: Charter of Fundamental Rights of the European Union (Article 1, 4, 18, 19/ 19.2, 47), the Qualification Directive (Directive 2004/83/EC of 29 April 2004) (Recital 10, art 4-34), the Dublin II Regulation, (Council Regulation (EC) No 343/2003 of 18 February 2003) (Recital 15) (Article 13, 17,18,19), the Asylum Procedures Directive (Council Directive 2005/85/EC of 1 December 2005) (Article 36, 39)

In this case, the Court of Justice has conceived the exceptions to the principle of mutual trust on which the Common European Asylum System is based. In the Court's opinion, the presumption of compliance is rebuttable, since the Member State may decide to refuse an asylum seeker's transfer to the competent Member State, where there are *"substantial grounds"* to consider that there are systemic deficiencies in the State's responsible relating to the asylum procedure and reception conditions, among which *"inhuman or degrading treatment within the meaning of Article 4 of the Charter"* (par.86). Those grounds must be evidently assessed by the referring Court. As a consequence, the determining Member State shall continue to examine the criteria under which another Member State could be designated.

It should be reminded that this decision is part of the common policy in the field of asylum, which constitutes a fundamental element of the European Union's scope in progressively establishing an area of freedom, security and justice open to those who are entitled to seek protection in the Union. Pursuant to the Dublin II Regulation, the Member State competent to hear of an asylum application lodged in the Union is determined. It determines the criteria under which a single Member State is competent. If a third-country national seeks asylum in a Member State other than in the State which is competent under the Regulation, a procedure for the transfer of the asylum seeker to the competent Member State is foreseen. Promoting the concept of "safe country" within the Dublin system and the respect for the fundamental rights of asylum seekers, once it is impossible to transfer the asylum seeker to the responsible Member State subject to the sovereignty clause, the State can check whether another Member State is responsible by examining further criteria under the Regulation (Chapter III). This should not take an unreasonable period of time and, if necessary, the Member State concerned has to examine the asylum application. It is also important to note that Dublin III recast Regulation 604/2013 has incorporated the wording NS / ME in Article 3.2, according to which: *"Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment with-*

in the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible".

B) CJEU, judgement of 16th February 2017, case C-578/13*CK and o. vs Republika Slovenija*

The relevant Legislative Provisions are: in the field of International Law, 1951 Geneva Convention (article 33), the Council of Europe Instruments, the Convention for the Protection of Human Rights and Fundamental Freedoms (article 3). In the field of European Union Law: the Charter of Fundamental Rights of the European Union (Article 1, 4, 19, 52,52), the Treaty on the Functioning of the European Union (Article 78, 267.1, 2), the Dublin III Regulation (Council Regulation (EC) No. 604/2013 of 26 June 2013-recast Dublin II Regulation), Recitals (4, 5, 9, 32, 34: articles 3,12,17), the Reception Conditions Directive (Directive 2003/9/EC of 27 January 2003) (Article 17, 18,19).

In this case, the Court has shared the absolute nature of prohibition of inhuman or degrading treatment. In other words, the transfer of an asylum seeker can take place under Dublin III regulation only in conditions where there is not a real risk for the person concerned to suffer inhuman or degrading treatments. The risk of worsening the person at issue might encourage the requesting Member State to conduct its examination by using the discretionary clause, but this risk, which can be related to the state of health of the asylum seeker, may determine the suspension of the asylum procedure. Furthermore, the Court has ruled that, even where there are no substantive reasons to believe that there are systemic deficiencies in the responsible Member State, a transfer under the Dublin Regulation can only be made under conditions which exclude the possibility that such a transfer could result in a real and proven risk of being subjected to inhuman or degrading treatment pursuant to Article 4 of the Charter. It is for the Courts and authorities of the requesting Member State to take all necessary precautions. If this is not enough, it is up to the authorities of the Member State concerned to suspend the execution of the transfer for as long as the applicant's conditions make him unsuitable for the transfer.

Eventually, in circumstances where the transfer of an asylum seeker with a particularly serious mental or physical illness would entail a real and proven risk of a significant and permanent deterioration of the person's health, such transfer would constitute inhuman and degrading treatment within the meaning of that article.

C) CJEU, judgement of 19th March 2019, joined cases,C-163/17, *Ibrahim and Jawo*: C-297/17 *Jawo*; C-318/17 *Ibrahim*, C-319/17 *Sharqawi and o.;* C-438/17, *Magamadov*

The Relevant Legislative Provisions are: in the field of international law, Council of Europe Instruments, the Convention for the Protection of Human Rights and Fundamental Freedoms. In the field of European Union Law: the Charter of Fundamental Rights of the European Union, the Asylum Procedures Directive (Council Directive 2005/85/EC of 1 December 2005), the Recast Asylum Procedures Directive (2013/32/EU of the European Parliament and of the Council), the Dublin II Regulation (Council Regulation (EC) n. 343/2003 of 18 February 2003), the Dublin III Regulation (Council Regulation (EC) n. 604/2013 of 26 June 2013-recast Dublin II Regulation), the Qualification Directive (Directive 2004/83/EC of 29 April 2004), the Reception Conditions Directive (Directive 2003/9/EC of 27 January 2003), the Recast Reception Conditions Directive, (Directive 2013/33/EU of 26 June 2013)

In this case, additional exceptions to the principle of mutual trust emerge. As seen in the former cases, the Court has asserted the nature of prohibition of inhuman or degrading treatment for the asylum seeker. Here, the discourse has not taken turn. Thus, the transfer of the applicant to a Member State must be prevented in all those hypotheses which there are substantial grounds for believing that the applicant runs a risk during his transfer (par 87). The risk may concern the entire procedure of transfer. In addition, through this case law the Court of Justice has strengthened the test for the assessment. It is based on two alternative steps. The first one relates to the assessment of the systemic or generalised deficiencies. It pertains to the protection of fundamental rights guaranteed by EU law. The information, on which the examination must be carried out, are objective, reliable, specific and adequately updated. The transfer should be excluded where the mentioned de-

ficiencies attain *"a high level of severity"*. The second step concerns the individualized assessment. This latter considers the particular vulnerability of the applicant, who finds himself/herself in a situation of extreme material poverty irrespective of his/her individual choices. Besides, the Court has established a relevant burden of proof, especially, in those circumstances where there is a low level of cooperation between national authorities.

Taking into account that the threshold is considered attained only if these deficiencies have reached a particularly high level of severity beyond a high degree of insecurity or a significant deterioration in living conditions, and that the level of protection of fundamental rights must be consequently guaranteed, on the basis of the information received, National Courts are obliged to examine whether there is a real risk for the applicant of finding himself/herself in a situation of extreme material poverty. Furthermore, in that judgment the Court of Justice has held that a conduct under Dublin III can be defined as escape, when the applicant has left the accommodation assigned to them without informing the competent authorities, provided that they have been informed of this obligation, unless the applicant provides compelling reasons for not informing the authorities due to an intention to circumvent the pursuit of these authorities. Instead, as regards the fact that, before the expiry of the six-month transfer period, the requesting Member State informs the responsible Member State on the status of the person concerned, the Court has ruled that it is sufficient for one Member State to inform the other. In summary, it being understood that the shortcomings in the social system of the Member State concerned do not, on their own, allow for the conclusion of the existence of a risk of inhuman and degrading treatment, an asylum seeker can be transferred to the Member State that would normally be competent to deal with his/her application or that has already granted him/her subsidiary protection, unless it appears that foreseeable living conditions would expose him to a situation of extreme material deprivation. The application of the Charter of Fundamental Rights of the European Union ('the Charter') prevents the transfer of an applicant for international protection from being transferred, in application of the Dublin III Regulation, to the Member State which would normally be responsible for the treatment of the application in these

cases. A similar solution is offered by the Court of Justice in the Ibrahim and Others cases. They concern the possibility, provided for by the "Procedures Directive", to reject asylum applications where subsidiary protection has previously been granted in another Member State. In this context, the referring Court has essentially asked whether the right to reject an application as inadmissible ceases when the living conditions of the beneficiaries of subsidiary protection in the Member State, which has granted that protection, are to be regarded as inhuman or degrading treatment. In this regard, the Court has recalled that, within the common European system of asylum, it is presumed that the treatment accorded by a Member State to applicants for international protection and to persons who have obtained subsidiary protection complies with the requirements of the Charter, the Geneva Convention and the European Convention for the Protection of Human Rights. Such a presumption may be void when serious operational difficulties in a particular Member State leads to the risk that applicants for international protection will be treated in that Member State in a manner incompatible with their fundamental rights.

Consequently, when the judge is called upon to decide on a previous transfer decision or on a decision rejecting a new application for international protection and has elements proved by the applicant to demonstrate the existence of the risk of inhuman or degrading treatment in the other Member State, such a Court is required to assess the existence of systemic or generalized deficiencies. However, in this case, a particularly high threshold of severity must also be verified: it depends on the circumstance that the applicant for international protection finds himself / herself, regardless of by his will and his personal choices, in a situation of extreme deprivation material, incompatible with human dignity. It is clear that, in general, EU law does not prevent that an application for recognition of refugee status is rejected simply because it is inadmissible on the ground that the applicant has already obtained subsidiary protection from another Member State. Furthermore, the Court has added that the fact that the Member State has systematically granted subsidiary protection to an applicant for international protection, without an effective examination, does not imply that the recognition of refugee status prevents the other Member States from rejecting an inadmissible appli-

cation that the person concerned has addressed to it. In such a case, the Member State, which granted the protection subsidiary, must reactivate the procedure for granting refugee status. Only if, after an individual assessment, it is ascertained that an applicant for international protection does not satisfy the conditions for obtaining refugee status, it is in fact possible, if necessary, to grant him the subsidiary protection. In conclusion, the Court has pointed out that in order to extend the transfer deadline to a maximum of eighteen months, before the expiry of the transfer period of six month, it is sufficient for the requesting Member State to inform the Member State that the person in question has fled and at the same time indicate the new transfer deadline.

New cases are pending before the Court of Justice. About them, it is debated whether new exceptions to the principle of mutual trust are admissible. This is the case of the so-called indirect non refoulement. It concerns the hypothesis of the risk that, after the transfer to the competent Member, which has already denied the asylum request, the asylum seeker's situation is similar to a deportation to this country of origin and risks to suffer inhuman or degrading treatments, such as torture. The floor will be of the Court of Justice.

In this context, the role of the Strasbourg Court in determining the standard for cooperation under the Dublin system is highly impregnated with significance. The application of the European Convention on Human Rights and Fundamental Freedoms in this field has generated a lot of topics.

First of all, the question arising are related to the access to the territory to seek asylum there, to the entry into the territory of the respondent State, to the access to procedures by the enforcement of the reception conditions and freedom of movement (the asylum procedure or other procedures to prevent removal). This latter must be understood as referring to restrictions to freedom of movement and detention for purposes of removal: forced removal or *"assisted voluntary return"*.

Another possible ground for argumentation also refers to the substantive and procedural aspects of cases concerning expulsion, extradition, and the scenarios they yield (see Articles 2, 3, 8 of the Convention). These, however, represent the normative criteria the Court of Strasbourg has used in asylum-related removal cases.

A) ECtHR, application n. 30696/09 of 21st January 2021, *M.S.S. v Belgium and Greece*

The relevant provision are: in the field of International law, the 1951 Refugee Convention. In the field of European Union Law: the Charter of Fundamental Rights of the European Union (Articles 3,13), the Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005, the Dublin II Regulation, Council Regulation (EC) No 343/2003 of 18 February 2003, Recital (1, 2), the Qualification Directive, Directive 2004/83/EC of 29 April 2004.

In this case, the Strasbourg Court has examined the compatibility of the Dublin II Transfer Regulation with the European Convention on Human Rights. The Court has found the existence of several violations of the ECHR in relation to the conditions of detention of the applicant, because of the shortcomings in the asylum procedure and the risk of his expulsion without any serious examination of his asylum application and without any access to an effective remedy. On this premise, this is Court's leading ruling with innovative grounds. The Court has held that, in applying the Dublin rules, it cannot be presumed that the applicant would not receive a treatment in accordance with the obligations of the ECHR. On the contrary, it is up to the national authorities, before returning asylum seekers, to preliminary check the application by the intermediary country and the asylum legislation here implemented. This is also applied as a corollary whenever there is evidence that a Member State does not in practice treats asylum seekers in accordance with its ECHR obligations (p.342) Furthermore, the ruling strengthens the motivations for providing information on the Dublin procedure to asylum seekers and also guarantees the right to a personal interview.

In addition, it can be suggested that this is one of the few cases of a person's return to another participating State in the European asylum system where the Strasbourg Court has assessed a violation of the rights enshrined in the Convention. The judgment provides an extensive reading of the reception conditions in the Member States, since it is a real obligation of positive law incumbent on the Member States under the Reception Conditions Directive. In this regard, it has stressed the importance of verifying the particular vulnerability of asylum seekers, especially when subjected to detention, since he/her is the expression of the need

for special protection for this group. Regarding the length of the appeal proceedings, the Court has focused on the importance of action in the event of a potential violation of the ECHR. Finally, it has strengthened the procedural safeguards necessary for an effective remedy in deportation proceedings under Article 13 of the ECHR.

Not surprisingly, the case has been also invoked by the Grand Section of the CJEU in N.S. and BC-411/10.

Anyway, the judicial dialogue between the two Courts takes shape from the influence MSS case has had on the NS case before the Luxemburg Court. It is important to underline that in MSS case the Strasbourg Court has discussed about the conditions of detention and the subsistence of the asylum-seeker expelled under the Dublin Regulation. And indeed, it should not be forgotten that the ECHR has had an impact on the system as a whole bolstering trust between Member States and accelerating the challenge to the regulatory status of the entire asylum framework.

B) ECtHR, application n. 29217/12 of 4th November 2014, *Tarakhel vs. Switzerland*

The relevant provisions are: in the field of international law, 1951 International Refugee Convention Council instruments, Convention for the protection of human rights and fundamental freedoms (article 3, 8,13). In the field of the European Union law: the Charter of Fundamental Rights of the European Union (Articles 4,18,19), the Treaty on the Functioning of the European Union (Article 78), Treaty on European Union (Article 2, 6, 67), Dublin II Regulation, Regulation (EC) No. 343/2003 of the Council, of 18 February 2003, Conditions of reception, Qualifications Directive, Directive 2004/83 / EC of 29 April 2004.

In this case, relevant outcomes have been engendered. Apart from the interesting decision technique, the Court has asserted that the Dublin system relies upon the presumption that participating States are binded by the human rights obligations under the Convention. Such a presumption is not absolute, since it might be rebutted, and, if it happens, the States apply the Dublin sovereignty clause and suspend the transfer concerned (see MSS vs Belgium and Greece). Besides, although the Court has recalled the minimum level of severity threshold as reminded under article 3 of the Convention in its prior jurisprudence, the facts occurred

are not comparable, firstly, as regards to the lack of conducive conditions within States and, secondly, as regards to the level of vulnerability of the person concerned. The existence of systemic or not systemic deficiencies is the basis to consider the Convention has been breached.

This case has examined the compatibility of the Dublin II Transfer Regulation with the relevant European Convention on Human Rights. The Court has asserted that there is a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, since the competent State has refused entry without firstly obtaining from the authorities of the Member State, which the applicant would have been transferred to, individual guarantees that the applicants would be adequately cared for. Furthermore, it has held that the existence of a violation of Article 3 constitutes in itself sufficient satisfaction for any non-monetary damage suffered by the applicants. Critics of this ruling have argued that demonstrating operational or systemic failures in the receiving State is not necessary for the assessment of a violation by the removing State. Contemporarily, the presumption that Member States will respect their international obligations (see M.S.S case) may be sufficient, since it triggers a duty of investigation and not just refutes it. In any case, even if the above conditions would not constitute inhuman or degrading treatment in terms of type, degree or intensity, if prolonged for a long period, they may eventually give rise to a violation of Article 3.

To conclude, the cases, as examined above, have demonstrated that a beneficial manner to respond to the questions risen from the functioning of the European Asylum System might be the dialogue between governments, asking to provide information in a case in which they are not the respondent State. In fact, the Tarakhel standards are based on the presumption that a form of cooperation between authorities is highly requested and that mutual trust may be the better form in which a proper dialogue is engaged between them. As a result, it might be argued that the good administration of such mechanisms is the final ring of the channel, whose head is represented by the legislatives which are requested to make efforts in the direction of the application of the sources of law and modify them where urgent (see Decision 46595/19 of 23.3.2021 *MT vs Netherland*).

Moreover, it can be observed that the organisational impact of asylum / immigration cases develops toward the alignment of the two Courts

with respect to the questions submitted to them. The dialogue between Luxemburg and Strasbourg and also between them and national judges, still through the exchange of databases, is the outlook on the creation of a European community of judges, in parallel with the European legislative community in such subject matter.

As the expectations for the accession of the Union to the ECHR have been disregarded, the Common European Asylum System and the ECHR system are surely interconnected (see MSS/NS).

As stated above, the impact of MSS on the Dublin system is made evident by the determination of the prevention of expulsion and of indirect removal through an intermediary country, which does not respect the minimum standards to avoid expulsion, to the country where the alien runs the risk of inhuman and degrading treatment (see *Cruz Varas and o.v. Sweden* ,1991, *Saadi v Italy*, 2008).

It has likewise an impact on the reception conditions contained in the Directive 2003/9/EC, which entails the obligation to provide decent material conditions considering the particularly privileged status of asylum seekers (see *TI v The United Kingdom*, 2000).

Summary of par. 3.3:

The direct reference to the Treaties by the Court of Justice highlights the centrality assumed by the right of asylum in the context of the fundamental rights guaranteed in the European Union with the approval of the Lisbon Treaty. In fact, the jurisdiction in the field of asylum has been fully placed in the Treaty on the functioning of the European Union and in particular in Title V, entitled Area of freedom, security and justice. The matter, referred to in art. 3 par. 2 of the Treaty of the European Union and Article 4 paragraph 2 TFEU, represents one of the objectives of the European Union and the Court of Justice has risen to control the reception and application of the secondary law acts that supervise it . The jurisprudence on the right to asylum has taken on multilevel developments, given the interaction between the rulings of the Court of Justice and the Strasbourg Court of the right to asylum, and even before the sources of law that refer to it. The different legal frameworks initially led to different levels of protection (international, community and national), but above all different interpretations were reserved for it, in which legislation and jurisprudence were sometimes oriented in opposite directions. Here we analysed the rulings of the two European Courts that had the greatest impact on the level of the effective impact of the sources of law. From the point of view of the Court of Justice, it appears, first of all, clear that from the above judgments the Court has

taken note that with the entry into force of the Lisbon Treaty, and with the entry of the Charter among the sources of primary law, the right of asylum has acquired the status of fundamental right conferred on it by the Treaties. The existence of a right to asylum, and not the mere right to "ask for asylum" determines its binding nature and will become effective as an original rule. In the context of EU law it is, however, starting from the Dublin III Regulation that the Court, called upon to settle the disputes arising on the application and interpretation of the provisions of the derivative act, seems to favour the idea that, in line with in principle, there is, at present, a true subjective right to asylum, although it is not completely clear whether there is still a mere right to seek asylum, or a conditional right, which overlaps the subjective right to asylum (present in some legal systems of the Member States) and subordinates it to the discretionary choices of the States and to the European border protection system. What is certain is that, although the Charter of Fundamental Rights entails a more general asylum right (Article 18), the European framework on the matter remains substantially the same: the distinction between the right of asylum and refugee status remains firm and the Court of justice has intervened on the Member States, drawing attention to the existence of a common minimum framework of protection and to the need for an adequate articulation of law on a European level, taking into account that it constitutes one of the main common constitutional traditions of the continent and of human rights recognized by international law. Regarding the role played by the Charter of Fundamental Rights, the Charter is a criterion for interpreting the instruments for the protection of rights mentioned in art. 6.2. In this perspective, firstly, the Charter consecrates a right which is confirmed both in the constitutional traditions common to the Member States and in the provisions of the ECHR. Secondly, having recognized this right as a fundamental right protected by the European legal order, the Charter makes it possible to reconstruct its content, scope and scope to be attributed to it. Apart from the Nice Charter, which guarantees the right of asylum in compliance with the rules established by the Geneva Convention, it is thanks to the Court of Justice, which has transposed the guidelines first of all of international law on the matter and secondly of Strasbourg, which are its major interpreter, that also the regulatory interventions carried out in the European context have been placed in the direction of improvement and integration of the conventional dictate of Geneva, and, if nothing else, in line of continuity. The analysis of the above cases reconfirms the continuity of the Luxembourg Court with the contents of the Convention and the ECHR suggested by the Strasbourg Court, with a consequent result in the light of a balance between an asylum policy that respects international conventions and the other interests of the Union. As for the jurisprudence of the ECtHR, although it does not hinder the discipline of the right of asylum of the individual legal systems, the general orientation of the Court has been to require States to offer protection to aliens who may be victims of inhuman or degrading treatment (art. 3), if removed to the country of origin. This guarantee of protection goes beyond the right of entry and determines the right to remain in the country where asylum has been requested, in the sense that the applicant cannot be denied the granting of a humanitarian permit, until the reasons for the prohibition of repatriation or expulsion cease to exist.

3.4. Conclusions: how the EU handles migration flows?

The EU has adopted different regulations and frameworks to manage, on the one hand, the so-called legal migratory flows, which include the movements of highly skilled workers, students and researchers, seasonal workers and people who aspire to reunification of familiars. However, as regards other migratory flows, for instance, those concerning persons who apply for international protection, the EU has common rules for the processing them. It also signs readmission agreements to repatriate irregular migrants. More generally, the management of migration flows by the European Union focuses on the integration of third-country nationals. In response to the refugee and migrant crisis, the EU has adopted relocation and resettlement measures aimed at supporting Member States with less integration experience. In the previous paragraph, it has already been noted that, in particular, the attention of the European institutions in particular has been brought to the need of a reform of the Common European Asylum System (CEAS), which establishes minimum standards for the treatment of all asylum seekers and all asylum applications in the EU. However, although as part of a more general reform of EU rules on migration and asylum, the Commission's 2020 proposal included a new comprehensive common European framework for managing migration and asylum. In other words, the EU current regime includes common rules for the processing of asylum applications and readmission agreements for the repatriation of illegal migrants.

As for resettlement, it is an instrument that guarantees legal entry into the European Union for refugees, who are considered particularly vulnerable, when they are in search for protection. Since 2015, there have been two EU-sponsored resettlement programs, which have covered 86% of the total resettlement pledges: Member States will be able to continue to implement their commitments in 2020 and 2021. Furthermore, in mid-September 2020, a large number of applicants have been resettled under the 2016 EU-Turkey declaration. More generally, 2016 was a year characterized by active policies by the European institutions, and in particular by the Commission, which has proposed the establishment of a permanent EU framework for resettlement. Under this new framework, a unified procedure and common criteria across the EU would be pro-

vided to replace ad hoc resettlement schemes. Nevertheless, the need to better harmonize procedures and rules on asylum has been highlighted with the migration crisis. More precisely, in July 2019 on the occasion of the 9th Resettlement Forum, at the instance of the European Commission, Member States have undertaken to promote resettlement programs for 2020 in order to put into practice the EU agenda in this matter.

However, the coronavirus pandemic has steered resettlement operations in a two-year program, from 2020 to 2021. On one hand, starting from 2022 new resettlement programs should be implemented, taking into account the financial resources allocated by the Asylum and Migration Fund in the period 2021-2027 to support the Member States' commitments. And again, the Council is currently examining the legislative proposals presented by the European Commission in 2016 to reform the asylum system, plus five new legislative proposals presented in September 2020 under the Commission's new Pact on Migration and Asylum. On the other hand, with regard to return policy and readmission agreements, the secondary legislation on which they are based is the "Return" directive[1]. Indeed, the Return Directive is *"the main piece of European Union legislation",* governing clear, transparent and fair rules to be applied by Member States when returning irregularly staying-country third nationals, and a cornerstone of EU return policy.

As a basis for the implementation of the EU's return policy, the directive also provides for the conclusion of readmission agreements with third countries. They define the rules for the return to their respective countries of origin of persons residing illegally in the EU. Anyway, negotiations on readmission agreements with third countries are managed by the Union, through the European Commission on behalf of the Council. To date, the EU has concluded 18 readmission agreements. One example is the Cotonou Agreement (the EU framework for relations with 79 African, Caribbean and Pacific countries), which also regulates the return of irregular migrants to their countries of origin. In addition to readmission agreements, the EU has also concluded return agreements with some third countries with the same objective. The rationale behind these agreements is the need to strengthen and make the EU's return and read-

[1] See "Recasting the Return Directive" https://www.europarl.europa.eu/.

mission policy more effective, through the full implementation of existing readmission and return agreements and the conclusion of new ones. The European Union has also worked to reforming the common rules in the field of repatriation. On 7 June 2019, the Council has endorsed its position in new rules to implement the effectiveness of returns.

Summary of par. 3.4:

The European Union governs migratory flows through common rules intended to adjust the examination of asylum applications. More generally, the management of migration flows by the European Union aims at the integration of third-country nationals. Several instruments are provided to this effect. The most relevant which has been assessed herein are the so-called resettlement agreements, which are instruments that guarantees legal entry into the European Union for refugees, and the so-called readmission agreements to repatriate irregular migrants.

3.5. Future development on the right of an effective judicial protection for asylum seekers and refugees.

Actually, the aim of the Dublin system is the rapid processing of applications for international protection. As regards the objectives, it is to limit secondary movement of applicants for international protection between EU Member States on the basis of mutual trust among them.

In particular, the aims and objectives of the Regulation (Article 3.2) are that, where it is impossible to transfer an applicant to the Member States primarily designated as responsible because there are substantive grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman and degrading treatment within the meaning of Article 4 of the Charter, the determining MS shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible. The remedy is that where the transfer cannot be made pursuant to this paragraph, the determining Member State shall become the Member State responsible. The substantive elements of the new regime under Dublin III are completed by the provision of the right to effective judicial protection;

article 27 of the Dublin III Regulation explicitly stipulates the right to an effective legal remedy.

First of all, the architecture of this right is based on two levels of guarantees: the first one is substantial and is related to the suspensive effect of the procedure (Article 27. 3 and 4) and on the access to legal and linguistic assistance. The second one concerns the effective legal remedy in terms of law and practice. That is, Dublin III protection is founded on an option-based model, which provides for the request of suspension until decision on suspension, the automatic suspension until decision on suspension, and lastly automatic suspension until the end of the appeal. Secondly, it provides for the access to legal assistance or restrictions in the light of merits test and for the possibility to appeal denial of legal assistance.

The scope of the right is primarily the access to the asylum procedure and procedural rights. For example, it entails the correct determination procedure. By virtue of this, the asylum seekers might plead the incorrect application of criteria for determining responsibility laid down in Dublin III- Chapter III (art.27 1), but it also entitles the asylum seeker's of procedural rights, such as the right to be heard. Besides, another aspect of the abovementioned right is the non-application of the sovereignty clause (Article 17.1), which does not imply either an incoming or an outgoing request. It only concerns the case where a Member State decides in a sovereign manner to take responsibility, even if, for instance, it could send to another Member State a request based on an objective responsibility criterion. Put differently: if a MS decides to apply the sovereignty clause, that is to say to unilaterally take responsibility even if, for instance, another MS could be responsible for the application, this should be reported under the category "sovereignty clause". Its use is mandatory only under specific circumstances. (see Hruschka/Maiani in Hailbronner/Thym). After a first asylum application, the asylum seekers, who has provided evidence that he/she left the Member States where he/she has obtained the access since three months, makes a new asylum application in another Member State (art.19.2). By virtue of Article 27 he may invoke an infringement of the rule enshrined in article 19.2.

This essentially synthetizes the scope of application of EU law.

A Member State's decision to transfer an applicant, pursuant to Arti-

cle 29 of the Dublin III Regulation, to another Member State constitutes an element of CEAS (common European asylum system) and, accordingly, implements EU law for the purposes of Article 51.1 of the Charter.

And indeed, national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, particularly Article 1 and 4 thereof. Mutual trust is the main criterion to consider all the Member States to be complying with EU law and fundamental rights (see *Jawo*). The mentioned compliance concerns the provisions of the Dublin III Regulation, which must be interpreted and applied in a manner consistent with fundamental rights guaranteed by the Charter. One can assume as paradigm Article 4, which prohibits, without any possibility of derogation, inhuman or degrading treatment in all its forms. It is general and absolute in that it is closely linked to respect for human dignity, which is the subject of Article 1 of the Charter (see *CK*. 59; *Jawo* 78-cf. *Aranyosi and Caldararu*).

One can argue that, following the jurisprudence of the Court, EU secondary legislation and the Dublin system must be interpreted and applied as to ensure the right to an effective remedy by Member States (Article 19.2 TUE) and effective judicial protection (Article 47 of the CFEU) (see also, CJEU, case C-394/12, *Abdullahi*). The full protection for fundamental rights is underpinning the legality of the decision to transfer an asylum applicant under the Regulation within the Common European Asylum System. The first fundamental scope of this latter concerns the compatibility of the receiving Member State's asylum reception procedure with the applicant's human rights within the meaning of Article 4 of the Charter of Fundamental Rights, especially when the Regulation is applied in a situation of systemic deficiencies. Nevertheless, the principle of effectiveness of the right to asylum under Article 18 of the Charter implies that a Member State, which is responsible to assess an asylum seeker's request, takes also into account situations where the asylum applicant has irregularly crossed the external border of more than one Member State. Thus, the reception conditions of asylum seekers in that Member State are subjected to the examination of those circumstances in which the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 Charter.

Anyway, at this proposal the argumentations are made highly questionable, since the rules to which the Court is referred are the *"rules ap-*

plicable to asylum application having been accepted to a large extent, harmonised at EU level, most recently by Directives 2011/95 and 2013/32". This implies that, independently of the Member State responsible of their application, an asylum seeker's application must be broadly examined. In practical terms, the Common European Asylum System does not clarify the terms and conditions of recognition rates for international protection, asylum procedures and reception requirements.

The second scope, which is underlined herein, is the rapid processing of asylum applications in the light of the efficiency of the Dublin system. For example, the application of predetermined criteria by the Member State, which is responsible of assessing the take in charge request, addresses the need of the process of law: that is, it must take into account legal certainty and the procedural rights of the asylum seeker. And then on those grounds, the person concerned might contest this decision on the basis of the correct application of the criteria, eventually irrespective of the obligation for rapid processing of an asylum application (the appeal mechanism must be coherent with Article 47 and Article 41 of the Charter of Fundamental Rights.)

Last but not least, Member States are responsible under the Charter of Fundamental Rights and the European Convention on Human Rights. More specifically, Regulation 604/2013 (Dublin III Regulation) introduces a new provision in recast Article 27, which requires that the Dublin system shall ensure to all persons, who are subjected to the right to an effective remedy before a Court, the remedy of appeal or review, in fact and in law, against a transfer decision. After all, international law provides that an effective remedy against such States' decisions should include both the examination of the application of the Regulation and of the legal and factual situation in the Member State to which the application is transferred (see ECtHR decisions, Čonka *and VM and others*). It is advanced that, in the light of new Article 27, an asylum seeker could challenge a transfer decision in a manner that his/her right to an effective remedy is more accurately respected. In particular, in national appeal procedures States must respect their obligations under Articles 1, 18, 41 and 47 of the Charter. Firstly, by virtue of the principle of good administration under Article 41 Charter, Member States are obliged to examine both the facts and law before reaching a decision (cf.Advocate General

Van Gerven Opinion in case C-16/90, *Nölle / Hauptzollamt Bremen-Freihafen*). Secondly, in case of irregularities in examining an asylum seeker's request, the decision on it must be appealed not only in exceptional well delineated circumstances (cf. *N.S. and Others*), but also and, mainly, in case of risks of inhuman or degrading treatment under Article 4 Charter in individual circumstances. Beyond the sphere of systemic deficiencies in a Member State there are other human rights under primary EU law and ECHR, such as the right to dignity (Article 1 Charter; see also Article 8 ECHR), that must be respected. It follows that, since the right to an effective remedy is a fundamental principle of EU law, national courts must be able to review the merits of any decision, in order to avoid the risk to render practically impossible or excessively difficult the realisation of the rights conferred by EU law.

In addition, although EU secondary legislation in such matter is designated *"to maintain the prerogatives of the Member States in the exercise of the right to grant asylum",* it *"operates to confer rights on individuals and national courts have a duty to protect them".* This means that, when applying secondary legislation, fundamental rights, such as the principle of human dignity, family unity and the best interests of the child, must be observed (see, CJEU, cases, C-179/11 *CIMADE and GISTI*, C-245/11 *K* and C-648/11 *M.A. and Others*). What is clear is that the principal objective of guaranteeing individual asylum seekers the right to asylum under Article 18 of the Charter should be central to any system in assigning Member State responsibility for the examination of asylum applications.

Overall, beyond the reforms in the system of remedies introduced by the Dublin III Regulation, the access to an asylum procedure for the asylum seeker concerned must be effectively compliant with his/her fundamental rights, thus increasing the procedural safeguards and rights for asylum seekers falling under the scope of the Regulation. This approach reflects the individual guarantees as developed by the ECHR under the Tarakhel judgment. A consequence of this substantial evolution of the Dublin system is that the grounds, which can be invoked by an asylum applicant in his/ her challenge, are broader. As a matter of fact, potential violations of fundamental rights greatly depend on the circumstances of the case and the transfer can encounter an obstacle whereas the risk for the person concerned of being subjected to torture, inhuman or degrad-

ing treatment is evident and substantive. In summary, the new Dublin III Regulation demonstrates that the interconnection between its rules, the Charter dispositions, general principles of effectiveness and domestic jurisprudence, ensures new procedural safeguards for persons seeking international protection, and lately that the asylum applicants are true subjects of rights.

In conclusion, the migration crisis discloses in particular the weaknesses of the Dublin System, which establishes the Member State responsible for examining an asylum application based primarily on the first point of irregular entry. For these reasons, between 2016 and 2017, the European institutions have subscribed the revision and the replacement of the current asylum instruments in line with the approach set out in the European Agenda for Migration. The replacement of the criterion of first entry and the criterion of first application are at the focus of a new allocation system, based on a common approach among Member State. However, the negotiations have stalled. Based on the outcome of the discussions, the Commission is proposing to replace the Dublin III Regulation with a new Regulation on Asylum and Migration Management. The absolute novelty is that the common framework, that contributes to the comprehensive approach to migration management, relies on new forms of solidarity between all the Member States and also better integrated policy making in the field of asylum and migration matter. The principle of solidarity and the sharing of responsibility permeates the whole mechanism, as well as its financial regime, in the sense that the asylum applications should not have to be dealt with by individual Member States alone, but by the EU as a whole. Different forms of solidarity are listed in the regulation: relocation of asylum seekers from the country of first entry to taking over responsibility for returning individuals with no right to stay or various forms of operational support. Furthermore, the new common framework conceives a more structured and common European approach to the examination of applications for international protection, though respecting the national competence.

Among other elements, it protects asylum seekers' best interests, including those relating to his/her family conditions and realizes a system of governance and preparedness which restraints abuse by Member States, raising the level of responsibility.

Ultimately, the new system adds a Crisis and Force Majeure Regulation, addressing the Member States to manage situations of crisis and force majeure in the field of asylum and migration within the EU. It provides for a simplified procedure and shortened timeframes.

Summary of par. 3.5:

The scope of EU law in the asylum area is essentially to ensure the right to an Effective Remedy by Member States (art 19.2 TUE) and effective judicial protection (art.47 of the CFEU). Primarily, this right is transposed into the rapid processing of asylum applications in the light of the efficiency of the Dublin system. Secondly, accordingly with ECHR and the Charter of Fundamental rights, it ensures the individual right of an asylum applicant by means of appeal against a Member State's transfer decision before Courts or Tribunals. In other words, the access to an asylum procedure for the asylum seeker concerned must be effectively compliant with his/her fundamental rights, thus increasing the procedural safeguards and rights for asylum seekers falling under the scope of the Regulation. Due to the migration crisis of 2016-2017 the European institutions have moved towards a new common framework that contributes to the comprehensive approach to migration management is based on new forms of solidarity between all the Member States and also better integrated policy making in the field of asylum and migration matter.

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SECTION II – THE RIGHTS OF THE CHILD

3.6. Definition of "minors"

Children are very vulnerable to violations of their fundamental rights because of their age, dependency, or life circumstances.

At the international level, Art. 1 the Convention on the Rights of the Child of 20 November 1989 defines "child" "*every human being below the age of eighteen years*".

To the contrary, there is no single definition under both EU primary and secondary law, so that there are different definitions depending on the regulatory context.

For example, under Directive 94/33/EC on the protection of young people at work[2], a distinction is made between "young people" (used to define all persons under the age of 18 years), "adolescents" (any young person of at least 15 years of age, but less than 18 years of age, being no longer subject to compulsory full-time schooling) and "children" (young people under the age of 15, who are largely prohibited from undertaking formal employment).

Under Directive 2004/38/EC, which will be better analysed below[3], "children" are defined as the "direct descendants who are under the age of 21 or are dependent", and stepchildren are included according to the *Baumbast* judgment, which broadened the definition[4].

In other areas of EU law, the definition is left to Member States.

[2] Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work OJ L 216, 20.8.1994, p. 12–20.

[3] Directive 2004/38/EC of the European Parliament 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 amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.04.2004 and OJ L 158, 29.04.2004, Art. 2 (2) (c).

[4] Judgment of 17 September 2002, case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*.

3.7. Minors' rights in international law

Under international law, minors' rights have been recognised since the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 19 December 1966.

The United Nations Convention on the Rights of the Child (UNCRC) of 20 November 1989 is specifically and exclusively dedicated to the protection of children and has become the cornerstone instrument at the international level for the promotion of children's rights, laying down social, civil, economic, and political standards.

It is the most widely ratified human rights treaty and was the first international instrument to recognise children as human beings with innate rights, requiring States parties to realise every child's right to adequate living conditions, health and education, as well as their rights to a family life, to be protected from violence, not to be discriminated against, and to have their views heard.

Although the European Union is not a party to the UNCRC, since entities other than States are not allowed to accede to the Convention, all the EU Member States are parties to it and so the UNCRC owes important standing at the European level.

Moreover, Article 24 of the EU Charter of Fundamental Rights is directly inspired by UNCRC provisions, with particular reference to those considered to be the principles of the Convention, such as the best interests of the child principle (Art. 3), the child participation principle (Art. 12) and the child's right to live with and/or enjoy a relationship with his or her parents (Art. 9).

The 2011 Commission's Agenda for the Rights of the Child stressed in its introduction that "*the standards and principles of the UNCRC must continue to guide EU policies and actions that have an impact on the rights of the child*"[5].

In addition, the Court of Justice has highlighted the importance of the UN Convention, using it to interpret EU law. For example, in the *Dynamic Medien GmbH v. Avides Media AG* case the Court ruled that Ger-

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions An EU Agenda for the Rights of the Child COM/2011/0060 final.

man labelling restrictions on imported DVDs and videos constituted a lawful restriction of the EU's free movement of goods provisions because of their purpose of protecting children[6]. It stressed that *"the protection of the rights of the child is recognised by various international instruments which the Member States have cooperated on or acceded to, such as the International Covenant on Civil and Political Rights […] and the Convention on the Rights of the Child […] The Court has already had occasion to point out that those international instruments are among those concerning the protection of human rights of which it takes account in applying the general principles of Community law […]. In this context, it must be observed that, under Article 17 of the Convention on the Rights of the Child, the States Parties recognise the important function performed by the mass media and are required to ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. Article 17(e) provides that those States are to encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being"*[7].

3.8. The protection of minors within the framework of the European Union

It has been highlighted that, concerning the protection of the child, "[o]*ver the years, the EU has moved from a sectoral approach towards a more coherent policy line. Whereas to start with, children's rights were developed in relation to specific policy areas, such as the free movement of persons, since 2000 the EU been coordinating its action, on the basis of three building blocks: the Charter of Fundamental Rights, the EU Treaties and the two overarching Commission communications, namely the 2006*

[6] Requirements of proportionality apply, however, with regard to the examination procedures established to protect children, which should be readily accessible, and possible to complete within a reasonable period.

[7] Judgment of 14 February 2008, Case C-244/06, *Dynamic Medien GmbH v. Avides Media AG*, paras 49 and 40.

communication, Towards an EU Strategy on the rights of the child, and the 2011 EU Agenda for the rights of the child. Both documents confirm the EU's strong commitment to promoting and protecting children's rights in all relevant EU policies"[8].

3.9. Primary Law: The Treaties

The protection of the rights of the child has become an objective of the EU action after the entry into force of the Lisbon Treaty.

Art. 3 TEU, which enumerates the objectives of the Union, rules that the European Union

> "*shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child*" (Art. 3(3)(2) TEU).

Similarly, as regards the external dimension of the EU action, Art. 3(5) TEU provides that

> "*The Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to […] the protection of human rights, in particular the rights of the child …*".

However, the European Union has no general competence to legislate for the promotion of children's rights. Specific references to children are included within the TFEU, enabling the EU to enact legislative measures aimed at combating sexual exploitation and human trafficking (Art. 79 (2)(d) and Art. 83(1)).

Article 79 TFEU concerns immigration policy and empowers the Union to adopt measures aimed at combating trafficking in persons, with special attention to women and children.

Under Art. 83 TFEU, the European Union can establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to

[8] European Parliamentary Research Service, November 2019, Children's rights in the EU Marking 30 years of the UN Convention on the Rights of the Child https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/644175/EPRS_BRI(2019)644175_EN.pdf p. 2.

combat them on a common basis, amongst which is sexual exploitation of women and children.

Moreover, Art. 216 TFEU enables the EU to conclude international conventions in relation to children's rights.

3.9.1. Primary Law: The Charter

As regards the Charter of fundamental rights of the European Union, the Equality title contains a specific Article (Art. 24) dedicated to the rights of the child, under which:

> "*1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
>
> *2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
>
> *3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*"

As emerges from the Explanations to the Charter, Article 24 is based on the cited United Nations Convention on the Rights of the Child.

Art. 24(1) of the Charter, which reflects Art. 3(2) of the UN Convention, recognizes children' right to the care and protection necessary for his or her well-being. This right must be respected and protected by the EU bodies and by the Member States when implementing EU law and policy.

Art. 24(2) outlines that the best interests of the child should guide and be given priority in all actions concerning children in both the public and private sphere.

Art. 24(3) sets out the right of the child to have a personal relationship with his or her parents through regular and direct contact. However, this must be in the best interests of the child. In certain circumstances there may be reasons why it would not be in his or her best interests.

Many other fundamental rights listed in the Charter, insofar as they have an impact on children's rights, are relevant, such as the freedom of thought (Art. 10 of the Charter), conscience and religion, the freedom of expression (Art. 11 Charter) and information, and the child's right to be heard.

However, it shall be recalled that under Art. 6(1) TEU and Art. 51(2) of the Charter, the EU Charter of Fundamental Rights cannot extend the competences of the European Union beyond those provided for in the Treaties.

3.10. Secondary Law

As is well-known, the principle of conferral means that the European Union may adopt legal acts only if it has been given competence under the Treaties (Arts 2 to 4 of the TFEU).

To this regard, as previously said, the Treaties attribute to the European Union (and, specifically, to the European Parliament and the Council, acting in accordance with the ordinary legislative procedure) the competence to adopt measures aimed at combating trafficking in persons and minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension (Arts 79 and 83 TFEU).

Under those legal bases, two main legal instruments have been adopted:

- Directive 2011/36/EU on preventing and combating trafficking in human being and protecting its victims[9];

- Directive 2011/93/EU o on combating the sexual abuse and sexual exploitation of children and child pornography[10].

Apart from those legal acts, EU competence needs to be determined on a case-by-case basis since children's rights is a cross-sectorial field.

Given the impossibility of giving an account of all possible cases in which the rights of children come into play, family unity and family reunification, together with migration law, will be more in-depth addressed.

[9] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA OJ L 101, 15.4.2011, p. 1–11.

[10] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA OJ L 335, 17.12.2011, p. 1–14.

3.10.1. Children's rights under EU family unity and family reunification law

As regards the first sector of EU law, two are the main EU secondary law acts to be considered:

1) **Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States** (EU Citizenship Directive)[11];

2) **Directive 2003/86/EC on the right to family reunification** (Family Reunification Directive)[12].

Directive 2004/38/EC: The rights of citizens of the European Union and their family members to move and reside freely within the territory of the Member States derive from EU citizenship (Arts 20 and 21 TFEU).

The EU Citizenship Directive defines the conditions and the limits of the exercise of these rights.

As what is specifically of our concern, the Directive grants the rights to move and reside freely within the territory of the Member States to the "family members" of EU citizens, irrespective of their nationality, who have exercised movement rights under EU law ("*who move to or reside in a Member State other than that of which they are a national*", Art. 3(1)).

Therefore, free movement rights can be enjoyed by minors who are not EU citizens (and thus have no free movement rights under EU primary law) but are family members of EU citizens; and, at the same time, by those who are EU citizens.

The right to free movement and residence of EU citizens is subject to two main conditions:

i) it can only be invoked by EU citizens who leave their Member State and move to another Member State; ii) EU citizens can exercise their right of residence in another Member State for longer periods of time only if they are self-sufficient.

[11] Directive 2004/38/EC of the European Parliament 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC OJ L 158, 30.4.2004, p. 77–123.

[12] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003, p. 12–18.

Minors usually cannot satisfy the latter requirement by themselves; however, in the *Chen* judgment, the Court has clarified that the condition concerning the sufficiency of resources cannot be interpreted as meaning that the minor must possess those resources personally and may not use for that purpose those of a family member (in that case, the Chinese mother of a baby born with Irish nationality), otherwise it would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence[13].

In addition, Art. 3(a) of the Directive provides that the entry and residence of any other family members, irrespective of their nationality, not falling under the definition in point 2 of Art. 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen, shall be facilitated by host Member States.

In the *Ruiz Zambrano* judgment, the Court of Justice extended the scope of European Union law – and therefore of the Charter – and held that Art. 20 TFEU can grant, in exceptional circumstances, residence rights to EU citizens who do not satisfy the before mentioned two conditions[14].

The Court ruled that "*Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union*"[15]. Therefore, an EU citizen can derive family reunification rights from EU law where the denial of such rights would deprive him of the genuine enjoyment of his EU citizenship rights even without having previously made use of their rights to free movement and even where he is not economically active or self-sufficient, since the children would otherwise be forced to leave the territory of the EU and thus no longer able to make use of the rights granted by Union citizenship. The principle has been confirmed and clarified in the subsequent case-law of the Court.

In some cases, decided after the *Ruiz Zambrano* judgment the Court of Justice clarified that the protection under Art. 20 TFEU is applicable

[13] Judgment of 19 October 2004, Case C-200/02, *Zhu and Chen*.
[14] Judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*.
[15] Para. 42.

only to minors who reside with their third-country national parents in their home Member State[16].

Directive 2003/86/EC: Outside the scope of Directive 2004/38, Council Directive 2003/86/EC on the right to family reunification governs the conditions under which third-country nationals living legally in the European Union – but not being family members of EU citizens – are permitted to bring in their families to a Member State in order to preserve family unity. Both the sponsor and their family member need thus to be third-country nationals to fall under the scope of the Directive. According to recital 4 of the Directive, the objective is to protect the family unit and to facilitate the integration of nationals of non-member countries.

The Directive applies to third-country national sponsors who have a residence permit, valid for at least one year or more, issued by a Member State and "reasonable prospects" of obtaining the right of permanent residence (Art. 3(1)). In addition, Member States may require the sponsor to have stayed lawfully in the Member State for a period not exceeding two or three years before applying for their family members to join them (Art. 8); to provide evidence of having health insurance and adequate accommodations (Art. 7(1)); in addition, Member States may require third-country nationals to comply with integration measures (Art. 7(2)).

Article 4(1) of the Directive defines the categories of third-country nationals to whom the Member State of the sponsor shall authorise the entry and residence:

(a) the sponsor's spouse;
(b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;
(c) the minor children including adopted children of the sponsor where the sponsor has custody, and the children are dependent on him or

[16] See for example judgment of 13 September 2016, Case C-304/14, *CS*; Judgment of 13 September 2016, Case C-165/14, *Rendón Marín*.

her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;

(d) the minor children including adopted children of the spouse where the spouse has custody, and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement.

As clarified by the Court of Justice in the *Parliament v. Council* case, "*Article 4(1) of Directive 2003/86 on the right to family reunification imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them […] to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation*."[17]

Concerning the categories of children under the letters (b) and (c), Art. 4(1) provides that they "*must be below the age of majority set by the law of the Member State concerned and must not be married*." In this regard, the Court of Justice has clarified that let. (c) of the first subparagraph of Article 4(1) of Directive 2003/86 must be interpreted as meaning that the date which should be referred to for the purpose of determining whether an unmarried third-country national or refugee is a minor child, within the meaning of that provision, is that of the submission of the application for entry and residence for the purpose of family reunification for minor children, and not that of the decision on that application by the competent authorities of that Member State, as the case may be, after an action brought against a decision rejecting such an application.[18]

The minor age requirement distinguishes the discipline of the Family Reunification Directive from that of Directive 2004/38. Under the latter, descendants of an EU citizen or his/her spouse or registered partner are granted family reunification generally if they are below the age of 21 years, but this limit does not apply when the descendants are also dependent on their parents.

In addition, under the last sentence of Art. 4(1) of the Family Reuni-

[17] Judgment of 27 June 2006, Case C-540/03, *Parliament v. Council*, para. 60.

[18] Judgment of 16 July 2020, Joined Cases C-133/19, C-136/19 and C-137/19 *B. M. M., B. S., B. M* and *B. M. O. v État belge*.

fication Directive, "*where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation" in order "to reflect children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.*"[19]

The European Parliament challenged the compatibility of this provision with EU primary law, particularly the right to respect for family life; however, the Court of Justice ruled that it does not restrict the right to respect for family life in a manner inconsistent with Art. 8(2) ECHR[20].

Art. 4(5) states that the Member State may require the sponsor and his/her spouse to be of a minimum age, with a maximum of 21 years, before the spouse is able to join him/her, in order "*to ensure better integration and to prevent forced marriages in Member States*."

In addition to substantive requirements, the Directive contains also a number of procedural rules addressed to the person entitled to make the application for family reunification (under Art. 5(1) it is left to the discretion of the Member States to determine whether an application for entry and residence shall be submitted either by the sponsor or by the family member or members in order to exercise the right to family reunification). These include, just to name a few, those relating to the burden of proof of family relations, or to the location of the family member to be reunited.

As will be better explained, the Directive applies also to immigrants who have been granted refugee status.

To the contrary, it does not apply to third-country nationals applying for recognition of refugee status whose application is still pending (asylum seekers), people who have been granted a temporary form of protection or persons who have permission to remain in the State for a specified period of time.

A family member, in the same way as the sponsor, shall be entitled to access to vocational guidance, initial and further training and retrain-

[19] See recital 12 of the Directive.

[20] Case C-540/03, *Parliament v. Council*, cit. para. 62.

ing, and access to employment and self-employed activity (although the Member States may place certain limits on this).

He/she may be refused entry or residence on grounds of public policy, internal security or public health. These same grounds may justify the withdrawal or non-renewal of a permit that has already been granted. Persons whose permit is refused, withdrawn or not renewed do not currently have a right to appeal the refusal.

Family members are entitled to a residence permit of the same duration as that of the person they have joined and can access education, employment and vocational training on the same terms as that person.

After five years of residence (not later), the spouse or unmarried partner and any children who have turned 18 are entitled to a residence permit in their own right, the conditions of which are prescribed by national law.

Directive 2003/86/EC explicitly mentions the best interests of the child, which shall be taken into due account when Member States examine an application (Art. 5(5)). It has been observed that "*The Family Reunification Directive was the first instrument of EU law in which the Charter was referred to, despite that the Charter, at the time of the adoption of the Directive did not yet have binding force. In preamble 2 of the Directive it is stated that measures concerning family reunification should be adopted in conformity with the right to respect for private and family life as laid down in the ECHR and in the Charter*"[21].

The Court of Justice emphasized the best interests of the child in the *O and S.* judgment[22], concerning the interpretation of Art. 7 of the Directive (a so-called "optional clause" regarding situations falling within the scope of the Directive but for the regulation of which Member States are granted a wide margin of discretion), which provides that Member States may require the sponsor to have accommodation "*regarded as normal for a comparable family in the same region*," sickness insurance and "*stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned*".

[21] M. Klaassen, P. Rodrigues, *The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter*, in *European Journal of Migration and Law*, 2017,191 ss., 200.

[22] Case C-356/11 and C-357/11.

It ruled that the right to respect for private and family life under Art. 7 of the Charter must be read in accordance with the obligation to have regard to the child's best interests, recognised in Article 24(2) of the Charter, and with account of the need for a child to maintain on a regular basis a personal relationship with both parents expressed in Article 24(3)[23].

Therefore, Member States' discretion shall not make the exercise of fundamental rights excessively difficult.

3.10.2. Children's rights under EU migration and asylum law

As regards migration and asylum law, this part of the Section will focus exclusively on the rights of third-country nationals who are minor asylum seekers, refugees or migrants[24]. In particular, the focus will be on the protective regime for unaccompanied minors under

1) **the Family Reunification Directive**; and

2) **EU asylum law**.

Before analysing the secondary legislation, within the limits of an operating manual called to provide indications on a plurality of very different matters, it should be recalled that most of the provisions of the Charter of fundamental rights can be invoked by third-country nationals if their situation falls within the scope of EU law.

3.10.3. The Family Reunification Directive and the regime for refugees who are unaccompanied minors

Despite being an instrument primarily adopted to promote family reunification for third country nationals and stateless persons that reside lawfully in the territory of the Member States[25], the Directive enshrines a specific protective regime for refugees who are unaccompanied minors.

Scope of application: The Family Reunification Directive applies, as already specified, only to refugees and not to beneficiaries of subsidiary protection. As regards third-country nationals who are not refugees, the Directive allows the exercise of discretionary powers by Member States.

[23] Para. 76.

[24] For an analysis of EU migration law, in general, see Chapter Three, section one.

[25] See *supra*, par. 3.10.1.

It contains "optional clauses" regarding situations falling within the scope of the Directive but for the regulation of which Member States are granted a wide margin of discretion.

In a case concerning the family reunification of beneficiaries of subsidiary protection, which falls *beyond* the scope of the Directive, the Court has affirmed its jurisdiction to interpret Article 12(1) of Directive 2003/86 in a situation where a national court is called upon to rule on a beneficiary of subsidiary protection's right to family reunification, if that provision was made directly and unconditionally applicable to such a situation under national law[26].

Moreover, many Member States do apply the Directive also to beneficiaries of subsidiary protection[27].

Definition of unaccompanied minor: The definition of "unaccompanied minor" is found in Art. 2(f) of the Directive, referring to "*third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States*".

In the *A and S* case, the Court of Justice has ruled that Art. 2(f) of Directive 2003/86, read in conjunction with Art. 10(3)(a), must be interpreted as meaning that a third-country national or stateless person who is below the age of 18 at the time of his or her entry into the territory of a Member State and of the introduction of his or her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status must be regarded as a "minor" for the purposes of that provision[28].

The discipline of the Directive: Family reunification is an essential right for refugees who need to integrate in the host society. It is for that purpose that the Directive includes provisions aimed to facilitate this type of family reunification.

[26] Judgment of 7 November 2018, Case C-380/17, *K, B v Staatssecretaris van Veiligheid en Justitie*.

[27] COM (2008)610 and EMN synthesis report on Family Reunification of Third-Country Nationals in the EU, April 2016, p. 6.

[28] Judgment of 12 April 2018, Case C-550/16, *A and S*.

For reunification with one's spouse and/or the children of the sponsor and/or spouse, Member States shall not require that a refugee fulfils the requirements as to accommodation, sickness insurance, and stable and regular resources, if (i) family reunification is possible in a third country with which the sponsor and/or family member has special links, and (ii) the family reunification application is not submitted within three months after the granting of refugee status (Art. 12(1)).

As regards Art. 12(1) of the Directive, the Court of Justice has clarified that the rejection of a family reunification application lodged more than three months after the sponsor was granted refugee status, while there is the possibility of submitting a new application under the regular rules is allowed only if there are not particular circumstances rendering the delay "objectively excusable", and the persons concerned are fully informed on the way to exercise their rights to family reunification effectively. Moreover, the legislation must ensure that sponsors recognised as refugees continue to benefit from the more favourable conditions for refugees, specified in Articles 10, 11 and 12(2) of the EU Family Reunification Directive[29].

Integration measures may only be applied once the refugees, their spouse and children, have been granted family reunification (Art. 8(2)), and Member States shall not require the refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her (Art. 12(2)).

In *A and S* the Court ruled that "minors" who reach the age of 18 during the asylum procedure retain the right of family reunification, and that the provision of Directive 2003/86 about the family reunification of refugee unaccompanied children with their parents by means of visas (or residence permits) introduces a positive obligation for the host Member State[30].

3.10.4. Minors and EU Asylum law

"*Over the years, the EU has developed a substantial body of legal guarantees for unaccompanied minors, mainstreamed across the regulations and*

[29] *K, B v. Staatssecretaris van Veiligheid en Justitie* cit.
[30] *A and S* cit.

directives constituting the CEAS"[31], the Common European Asylum System. Protecting the best interests of the child, which includes awarding full respect for the principle of family unity, is a primary consideration of EU asylum legislation.

The definition of minor and unaccompanied minor: The Dublin III Regulation establishes the criteria and mechanisms for determining the Member State responsible for the examination of an asylum application, defines "minor" as a third-country national or stateless person below the age of eighteen and "unaccompanied minor" as a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her[32].

Art. 2(1)(l) of the so-called Qualifications Directive defines an "unaccompanied minor" as "*a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States*"[33].

a) The Dublin III Regulation: Art. 6 of the Dublin III Regulation embeds the principle of the best interests of the child and establishes a number of guarantees for minors, in order to ensure their best interests.

In particular, Member States shall ensure that with respect to all procedures an unaccompanied minor is represented or assisted by a representative (Art. 6(2)) and shall take due account of family reunification possibilities; the minor's well-being and social development; safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; the views of the minor, in accordance with his or her age and maturity (Art. 6(3)).

[31] K Mets, *The fundamental rights of unaccompanied minors in EU asylum law: a dubious trade-off between control and protection*, in *ERA Forum*, 2021, 625 ss., 626.

[32] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Art. 2(i) and (j).

[33] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

Moreover, as regards minors, Art. 8 of the Regulation establishes the criteria for determining the responsible Member State and, as a general rule, the latter is identified as that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor (Art. 8(1)).

As specifically concerns the protection of family life and family unity, the duty, pending procedures, to keep and bring dependent asylum seekers with their family is a binding criterion for the allocation of responsibility. Under Art. 16(1) Dublin III Regulation

> *"(1) Where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned express their desire in writing".*

In case *M.A. and Others* the Court of Justice clarified that the best interests of the child cannot be *per se* the legal source of duty of mandatory use of the discretionary clause under Art. 17(1) of the Regulation by the Member State in which the accompanied minor is present when that State is not competent to examine his/her asylum request under the Dublin Regulation. However, it held that there is a presumption that it is in the best interests of the child to treat the minor's situation as strictly related to that of his/her parents[34].

b) The Qualification Directive: The Qualification Directive provides that Member States must ensure that the family unit can be maintained (Art. 23)[35]. In particular, under Art. 31, after the granting of the asylum status Member States must as soon as possible provide unaccompanied minors with a legal guardian or representative, who is obligated to act in the best interests of the child.

[34] Judgment of 23 January 2019, Ccase C-661/17, paras 87-90.

[35] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) (Qualification Directive).

c) The Asylum Procedures Directive: Art. 25 of the Asylum Procedures Directive provides procedural guarantees for unaccompanied minors, in particular the appointment of a representative and medical examinations to determine the age of a minor and the conduction of personal interviews in a child-appropriate manner[36].

d) The Reception Conditions Directive: the Directive addresses minors and unaccompanied minors (identified as a vulnerable group) in Arts 11, 21, 22, 23, and 24[37].

National authorities shall make the health, including mental health, of minors in detention a primary concern and only detain them as a last resort, in exceptional circumstances, and in age-appropriate accommodations (Art. 11(1), (2) and (3)).

Art. 23 of the Directive recalls that the best interests of the child shall be a primary consideration for Member States when implementing its provisions involving minors.

e) The Return Directive: the Return Directive lays down common standards and procedures for returning illegal immigrants and, like previously seen concerning other Directives, it obligates Member States to maintain the family unit with family members present during the period for voluntary departure[38].

Art. 10 establishes that Member States must ensure that an unaccompanied minor will be returned to a member of his or her family, a guardian, or an adequate reception facility in the country of return.

Under Art. 17 Member States shall ensure that family unity is maintained and that minors have access to basic education for the duration of their detention.

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[36] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Asylum Procedures Directive), art. 15, para. 3(e).

[37] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Reception Conditions Directive).

[38] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Return Directive) art. 14, para. 1(a).

SECTION III – THE PROTECTION OF FUNDAMENTAL RIGHTS IN EU CRIMINAL LAW

3.11. The criminal matter in EU legal system

EU criminal law is the most contested fields of EU action, covering measures which have a significant impact both on the **protection of fundamental rights** and on the **relationship between the State and EU**.

From the first point of view, criminal law and fundamental rights are, indeed, intrinsically linked considering that the penal instrument has both the power to protect and to compress fundamental rights. Thus, it follows that in dealing with matters of criminal law, the EU must also take fundamental rights into account.

From the second point of view, the criminal law presents a challenge to state sovereignty. Indeed, when Union adopts criminal laws, significantly impacts on a matter that is an expression of state sovereignty. For this reason, the Treaty provisions which confer competence to EU in this matter includes specific sectors of EU intervention and mechanisms for the suspension of decision-making procedures ('brake clauses').

In light of these two implications of criminal law (impact on fundamental rights and state sovereignty), this section examines, firstly, the provision of Charter of Fundamental Rights of the European Union (CFREU or the Charter) that protect rights in criminal matters. For each article of the CFREU is examined the practical application and its interaction with EU criminal law through the case law of the CJEU.

Moving on, the section examines the specific Treaty provisions that confer to the EU competences in criminal matter and according to which the national legislator, in some cases, is under the obligation to adopt criminal provisions implementing choices of criminalization decided at the European level.

Finally, the main acts adopted by the European Union within the framework of its competence in the field of criminal law will be reported.

3.12. The content of CFREU in criminal matter

The most important limits of European criminal law harmonisation are stated in the Charter that is the main instrument of protection of fundamental rights in the EU legal system.

Indeed, the rights protected by the Charter are considered general principles of criminal law limiting the exercise of the competence attributed to the EU legislative bodies in this field. In particular, they represent reliable criteria by which to assess the necessity/need of criminal sanctions to be adopted in EU legislation.

Thus, any harmonisation of criminal law through EU secondary law must be compatible with the article of the Charter, otherwise the act would be contrary to EU law and it could be annulled by the CGEU.

Furthermore, the provisions of the Charter in criminal matter are addressed not only to EU Institution, but also to the Member States when they are implementing the Union Law. This means that the limits established by the CFREU provisions have to be employed by jurisdictional bodies when they apply the EU law in their judicial activity. For this reason, in the paragraphs that follow, the focus is on fundamental rights provisions in the Charter with relevance to EU criminal law.

In particular, the right to a fair trial, the presumption of innocence, the principles of proportionality and legality, and the principles of *ne bis in idem*.

3.12.1. The right to a fair trial (art. 47 CFREU)

The right to effective legal remedy and a fair trial is guaranteed by article 47 CFREU according to:

> *"1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
>
> *2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*
>
> *3.Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".*

Article 47 CFREU provides the right to an **effective legal remedy** to any defendant (EU citizens or not, conditional on their being subject to the jurisdiction of the EU) to access a court of law in the EU. In guaranteeing this right, Article 47 Charter offers a full scope to it, not merely within civil and criminal obligations. As regards **fair trial**, Article 47 Charter echoes the ECHR guarantees for an independent and impartial tribunal, including the right to be defended and represented. Article 47 Charter also provides for the right to **legal aid** for those in certain difficult economic conditions in order to make their access to the CJEU efficient.

These rights may, according to the EU Treaties, be given substance either by the **right to a direct action** [e.g., action for annulment for non-privileged applicants under Article 263(2) of the Treaty on the Functioning of the European Union (TFEU); action for failure to act under Article 265 TFEU; action for damage under Article 340 TFEU)] or by the **right to an indirect action**, through a preliminary reference referred by a national court to the CJEU under Article 267 TFEU.

The Court of Justice with its judgments has defined **the scope of the right** to a fair trial according to the article 47.

In particular, the CJEU has held in Transocean that "*a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known*"[39]. This seems to be a rather broad recognition of the right to access for claimants in any proceedings, including penalty procedures before the Commission.

In general, the Court increased the catalogue of rights connected to those enunciated in art. 47 CFREU. For example, the CJEU recognised the right to be heard, right to be present in a proceeding, effectiveness of judicial remedies.

In *A v. B and others*, the CJEU ruled that, as regards the right to defence under Article 47 CFREU: "*if a national court appoints … a representative in absentia for a defendant upon whom the documents instituting proceedings have not been served because his place of domicile is not known, the appearance entered by that representative does not amount to an appearance being entered by that defendant. This ruling marked signifi-*

[39] CJEU, Judgment of 23 October 1974, case C-17/74, *Transocean*, par. 49.

cant progress towards protecting persons from the effect of judicial proceedings if they have not been personally part of the proceedings"[40].

Another aspect, also defined by Article 47 Charter, was dealt with in *Kamino International Logistics BV*, where the CJEU accentuated a rather broad scope of the right to defence, establishing that:

> "*The principle of respect for the rights of the defence by the authorities and the resulting right of every person to be heard before the adoption of any decision liable adversely to affect his interests … may be relied on directly by individuals before national courts*"[41].

The Court also ensured that these rights are applied by national courts in line with the principle of effectiveness. Such an approach by the CJEU seems well-designed to ensure that every claimant will have the right to defence safeguarded before or during proceedings liable to produce a legal effect on his/her situation, with the claimant's defence counsel being considered the chance to defend the claimant's position effectively before the adoption of the decision concerned.

In *BMM and Others v. État belge*, the Court focuses again on the effectiveness of protection. Particularly, in this reference for preliminary ruling, the national court asks whether art. 18 of Directive 2003/86, read in the light of art. 47 of the Charter, must be interpreted as precluding an action brought against a decision rejecting an application for entry and residence for the purposes of family reunification for the benefit of a minor child from being dismissed as inadmissible on the sole ground that the child has reached majority in the course of the court proceedings.

The Court affirmed that *"While that provision thus affords Member States some discretion ... it is important to note that, notwithstanding such discretion, Member States are required, when implementing Directive 2003/86, to comply with Article 47 of the Charter, which enshrines the right to an effective remedy before a tribunal for everyone whose rights and freedoms guaranteed by EU law are infringed"*[42].

[40] CJEU, Judgment of 11 September 2014, case C-112/13, *A v. B and others*, par. 2.

[41] CJEU, Judgment of 3 July 2014, cases C-129/13 and C-130/13, *Kamino International Logistics BV, Datema Hellmann Worldwide Logistics BV v. Staatssecretaris van Financiën,* par. 1.

[42] CJEU, Judgment of 16 July 2020, case C-133/19, *BMM and Others v.* État *belge,* par. 40, 50, 53.

However, the article 18 of Directive 2003/86, read in the light of Article 47 of the Charter, requires that domestic actions enabling a sponsor and his or her family members to exercise their right to mount a legal challenge against decisions rejecting an application for family reunification be effective and real.

In the light of this considerations, "*the Article 18 of Directive 2003/86, read in the light of Article 47 of the Charter, must be interpreted as precluding an action against the rejection of an application for family reunification of a minor child from being dismissed as inadmissible on the sole ground that the child has reached majority during the court proceedings*"[43].

3.12.2. The presumption of innocence (art. 48 CFREU)

Article 48 CFREU protects the **presumption of innocence** by stating that:

> *"1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.*
>
> *2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed".*

According the letteral formulation of 48 CFREU the presumption of innocence applies only to criminal proceedings as well as in the corresponding art. 6 ECHR according to *"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".*

But, according the CJEU the presumption of innocence laid down in the art. 48 CFREU is a general principle that applies not only in criminal proceedings but also in other proceedings.

In the case *Hüls*[44], the claimant requested if the presumption of innocence is recognized (also on basis of the ECHR) in other areas different to criminal field as in administrative areas involving fines, such as competition law in the Union. In response, the CJEU first of all noted that the presumption of innocence, as also deriving from Article 6(2) ECHR, forms a fundamental right protected in the Union legal order.

[43] *Ibidem*, par. 65

[44] CJEU, Judgment of 8 July 1999, case C-199/92P, *Hüls AG v. Commission*.

In devising the scope of the presumption of innocence, the CJEU refers to the ECHR cases of *Öztürk and Lutz*.

The Court ruled that operability of Article 48 depends on the nature of the infringements and degree of severity of the ensuing penalties. In the *Hüls* case, the Court seems to establish two criteria that need to be tested against which the principle of the presumption of innocence applies.

The two criteria seem to be cumulative:

1) The first criterion tackles the nature of the infringement. The law must recognize a certain level of importance of the infringement at stake due to its significant interference with the public interest.

2) The second criterion tackles the nature and degree of rigorousness of the resulting penalties that the law foresees for the infringement concerned (resulting from the first criterion).

The second sentence of the article highlights a close link between the presumption of innocence and the right of defence. In fact, the presumption of innocence is not only a right of the individual, but it is a principle that must guide the judge in the assessment of evidence.

The case *Solvay v. Commission* concerned the presumption of evidence, rather than the proof of it, and as a result whether the claimant had violated the law for a certain period. The CJEU ruled that: "*[i]n the absence of other evidence, the Commission's contention [regarding the claimant's infringement] amounts to presuming that from a date fixed by the Commission the applicant and ICI began to infringe the provisions of the Treaty by implementing a concerted practice. Such presumption of evidence accepted by the Commission, the Court said, contravened the principle of presumption of innocence. Solvay clearly exhibits the intention of the CJEU to ensure that evidence must be processed on the basis of a standard requiring proof rather than presumption, otherwise any contention will fail to meet the required standard*"[45].

In the case *Oleksandr Viktorovych Klymenko v Council of the European Union*, the Court states:

> "*The effectiveness of the judicial review guaranteed by Article 47 of the Charter requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to include or to maintain a person's name on the list of*

[45] CJEU, Judgment of 29 June 1995, case T-30/91, *Solvay v. Commission*.

persons subject to restrictive measures, the Courts of the European Union are to ensure that that decision, which affects that person individually, is taken on a sufficiently solid factual basis. That entails a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency, in the abstract, of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, are substantiated"[46].

This means that the presumption of innocence, which is intrinsically linked to the rights of the defence, constitutes a rule of law also for restrictive measures adopted by the European Union.

As regards doubts arising in judicial activity, the Court states that it is unreasonable to base a judgment on presumptions if the judge has not reached full evidence. In the case *Eturas and Others v Lietuvos Respublikos konkurencijos taryba* the Court affirms:

"In so far as the referring court has doubts as to the possibility, in view of the presumption of innocence, of finding that the travel agencies were aware, or ought to have been aware, of the message at issue in the main proceedings, it must be recalled that the presumption of innocence constitutes a general principle of EU law, now enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union which the Member States are required to observe when they implement EU competition law"[47].

3.12.3. The proportionality and legality (art. 49 CFREU)

The **principle of legality and proportionality of criminal offences and penalties** is laid down in the article 49 CFREU. This article states that:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that shall be applicable.

[46] CJEU, Judgment of 25 June 2020, case T-295/19, *Oleksandr Viktorovych Klymenko v Council of the European Union,* par. 73.

[47] CJEU, Judgment of 21 January 2016, case C 74/14, *Eturas and Others v Lietuvos Respublikos konkurencijos taryba,* par. 55.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence".

The first and second paragraphs deal with the **legality principle**. In particular the provision is nearly identical to Article 7 ECHR, wherein para. 2 includes the Nuremberg exception that allows for criminal prosecution based on commonly accepted principles. This exemplifies that the sources of criminal liability in EU law are approached in a manner similar to the ECHR. The third paragraph is a reflection of the common Member States tradition of the **proportionality between the penalties and criminal offences**.

The principle of legality is a cornerstone of criminal justice systems around Europe. In addition to Article 49 CFREU, it is codified in international instruments, e.g. Article 7 ECHR and Article 22 of the Rome Statute of the International Criminal Court, national constitutions and criminal codes, such as Article 1 GCC, Article 16 of the Dutch Constitution and the Article 25 of Italian Constitution.

In general, the essence of this principle is that no person can be punished for an act that is not criminalised by law, in other words, "there is no crime without law" and that "no one shall be punished with a penalty more severe than that prescribed by law".

The legality principle outlines certain substantive requirements of what can be considered a legitimate criminal norm and how it should be applied and interpreted. In addition, in general, this provisions merely imports the well-known principle of **non-retroactivity** in the context of criminal law sanctions.

The European principle of legality is a principle distinct from the principle of legality of the individual Member States. Indeed, European Institutions and rules cannot be governed by principles that belong to a different constitutional legal order. The national interpretation of the legality principle as such is inappropriate in the context of the EU. EU legal system functions in conformity with EU norms, and their acts comply with European principles and rules.

The CJEU has developed its own jurisprudence on the subject of legality often with reference to Article 7 ECHR.

Below are the most important judgments on Article 49 and its corollaries.

On the **principle of non-retroactivity** the Court affirmed that the principle of the retroactive application of the more lenient criminal law, enshrined in the third sentence of Article 49 of the Charter of Fundamental Rights of the European Union, does not preclude a situation in which a person is convicted on the ground that he/she wrongfully obtained special export refunds provided for in Commission Regulation (EEC) No 1964/82, although, as a result of changes in those rules which occurred subsequent to the acts complained, the goods that were exported by that person have since become eligible for those refunds[48].

On the **principle of proportionality,** the Court stated that "*the requirement of proportionality in Article 9 of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, as amended by Directive 2011/76/EU of the European Parliament and of the Council of 27 September 2011, cannot be regarded as having direct effect.*

The national Court must, by virtue of its duty to take all appropriate measures, whether general or particular, to ensure the implementation of that provision, interpret national law in conformity with that provision or, if such an interpretation is not possible, disapply any national provision in so far as its application would, in the circumstances of the case, lead to a result contrary to EU law"[49].

On the **principle of legality of crimes and penalties and *lex mitior*** the Court affirmed that the article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of

[48] CJEU, Judgement of 7 August 2018, case C-115/17, *Clergeau e a.*

[49] CJEU, Judgement of 04 October 2018, case C-384/17, *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya..*

the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed[50].

3.12.4. The right not to be tried or punished twice in criminal proceedings for the same criminal offence (art.50 CFREU)

The right not to be prosecuted or punished twice for the same offence is a fundamental principle of criminal law and has a twofold rationale. On one side, it is a key guarantee for the individual against abuses of the *ius puniendi*, and, on the other side, a means to ensure legal certainty and the stability of the *res iudicata*.

At European level, this principle is enshrined in Art. 4 of Protocol No. 7 to the European Convention on Human Rights (ECHR), in Art. 54 of the Convention implementing the Schengen Agreement (CISA) and in Art. 50 of the EU Charter of Fundamental Rights.

In particular this last article states:

> *"1. No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".*

To apply this principle, 4 elements are required:

1) two sets of proceedings of criminal nature ([bis]),
2) concerning the same facts ([idem]),
3) against the same offender,
4) final decision.

The level of protection afforded by the Court of Justice in relation to the *ne bis in idem* principle changed its case law trend.

Indeed, until 2016, the case-law of the Court of Justice on the prohibition of double incrimination provided defendant-friendly approach can be observed in relation to the **notion of *idem***.

The Court of Justice of the European Union (CJEU) first in the case *Van Esbroeck*, soon followed by the European Court of Human Rights

[50] CJEU, Judgement of 5 December 2017, case C-42/17, *Criminal proceedings against M.A.S. and M.B.*

(ECHR), defined it as "*the same set of factual circumstances, regardless of the legal classification of the offence or the legal interest protected*"[51].

This convergence of the case law to the benefit of the individual has been widened to cover not only formally criminal proceedings, but also administrative punitive proceedings with a criminal nature.

The proliferation of administrative law penalties of a repressive nature explains why the ECHR has, since its judgment in *Engel and Others v. Netherlands*[52], developed specific and independent criteria in order to clarify the concept of "charged with a criminal offence". For this purpose, the ECHR has elaborated the criteria known as the "Engel criteria" which are: the legal classification of the offence under national law, the nature of the offence, and the nature and intensity or degree of severity of the penalty imposed on the offender. The last two criteria are alternatives, but the ECHR may, depending on the particular circumstances of the case, assess them cumulatively. As a result, in application of this criteria, also the imposition of an administrative penalty *à coloration pénale* triggers the prohibition of bis in idem.

In particular:
1. The first 'Engel' criterion concerns the classification of the offence under national law, which the ECHR considers to be merely a starting point for ascertaining whether a penalty is of a 'criminal nature'. It is not a decisive rule unless national law categorises both penalties as criminal, in which case, logically, the *ne bis in idem* principle will apply immediately. If, on the other hand, national law classifies the penalty as administrative, it will be necessary to analyse it in the light of the other two criteria, as a result of which it must be decided whether that penalty is nevertheless of a "criminal nature" for the purposes of Article 4 of Protocol No 7.
2. The second "Engel" criterion concerns the nature of the offence. According to the case-law of the ECHR, in order to determine whether a tax offence of an administrative nature is in fact of a criminal nature, regard is to be had to factors such as: (a) the addressee of the provision imposing the penalty, so that if that provision is directed at the general public and not at a well-defined group of persons, it will usually be of a 'criminal nature'; (b) the aim of that provision, since the offence will not be of a 'criminal nature' if the penalty provided for is intended only to compensate

[51] CJEU, Judgement of 9 March 2006, case C-436/04, *Van Esbroeck*.
[52] ECHR, Judgment of 8 June 1976, case N. 5100/71, *Engel et al. v. the Netherlands, et al.*

for pecuniary damage, and it will be of a 'criminal nature' if it is established for the purposes of punishment and deterrence; and (c) the legal interest protected by the national provision imposing the penalty, which will be criminal in nature if its aim is to protect legal interests whose protection is normally guaranteed by provisions of criminal law.
3. The third "Engel" criterion concerns the nature and degree of severity of the penalty. Penalties involving the loss of liberty are, in themselves, criminal in nature and the same applies to pecuniary penalties where non-compliance can result in imprisonment as a substitute, or which entail an entry in the criminal record.

However, the case law trend changed. The Court has now adopted a stricter approach, limiting automatism in the application of *ne bis in idem*.

Since 2013, the Court of Justice in the case *Fransson* specified that double-track systems could not be considered in violation of *ne bis in idem "as long as the remaining penalties are effective, proportionate and dissuasive"*[53].

Specifically, The Court affirmed that "*the ne bis in idem principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine".*

Nevertheless, the most remarkable illustration of this new trend is evident in three CJEU 2018 decisions (*Menci, Garlsson and Di Puma and Zecca*) all dealing with the so-called double-track enforcement regimes, a widespread reality in several Member States especially in the field of economic and financial crime. In these cases, the Court attempted to justify such practice, which allows a joint imposition of administrative and criminal sanctions in respect of the same conduct.

In substance, from 2018, the Court revisited its approach significantly reducing the protection afforded by the *ne bis in idem* principle.

The *Menci* case concerns coordination rules limiting the disadvantage

[53] CJEU, Judgment of 26 February 2013, case C-617/10, Åklagaren *v Hans* Åkerberg *Fransson*.

resulting from the duplication of proceedings to what is strictly necessary and provides for rules to ensure that the severity of all penalties imposed is limited to what is strictly necessary in relation to the gravity of the offence. According to the Court, *"it is for the national court to establish, having regard to all the circumstances of the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of proceedings and the penalties which that legislation authorises are not excessive in relation to the gravity of the offence committed*[54]*"*.

In the case *Garlsson*, the Court affirmed that "*the article 50 of the CFREU must be interpreted as precluding national legislation which permits the possibility of bringing administrative proceedings against a person in respect of unlawful conduct consisting in market manipulation for which the same person has already been finally convicted, in so far as that conviction is, considering the harm caused to the company by the offence committed, such as to punish that offence in an effective, proportionate and dissuasive manner*"[55].

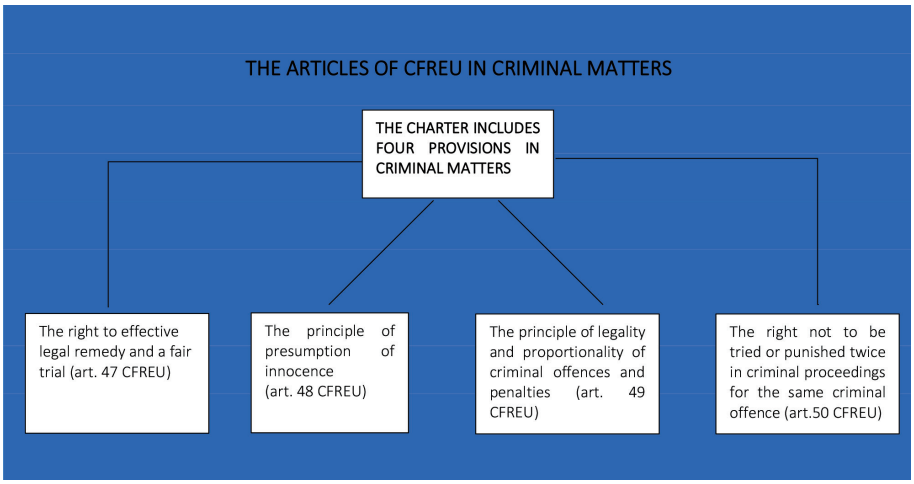
The *ne bis in idem principle* guaranteed by Article 50 of the Charter of Fundamental Rights of the European Union confers on individuals a right which is directly applicable in the context of a dispute such as that at issue in the main proceedings.

In conclusion, in the case *Di Puma and Zecca*, the Court stated that the "*Article 14(1) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), read in the light of Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding national legislation in accordance with which proceedings for an administrative fine of a criminal nature may not be brought following a final criminal judgment of acquittal ruling that the acts capable of constituting a violation of the legislation relating to insider dealing, on the basis of which those proceedings had also been initiated, were not established*" [56].

[54] CJEU, Judgment of 20 March 2018, case C-524/15, *Luca Menci*, par. 51.

[55] CJEU, Judgment of 20 March 2018, case C-537/16, *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob)*.

[56] CJEU, Judgment of 20 March 2018, joined cases C-596/16 and C-597/16, *Enzo Di*



3.13. The EU competences in criminal matter

The Lisbon Treaty confers competences to the EU in criminal matters, according to which the Member States, in some cases, are under the obligation to adopt criminal provisions implementing choices of criminalization decided at the supranational level.

The Treaty spells out **three specific competences** for criminal law:

1. The EU can adopt directives providing for minimum rules regarding the definition (constituent elements and criminal sanctions) of Euro offences. In this regard, the art. 83(1) TFEU is legal basis to adopt act in specific areas of crime.

Indeed, according to the art. 83 (1) TFEU *"The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish* ***minimum rules concerning the definition of criminal offences and sanctions*** *in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis".*

The Article expressly enumerates the areas of crime in which the EU is competent to enact criminal prohibitions. It concerns: "… *terrorism,*

Puma v Commissione Nazionale per le Società e la Borsa (Consob), Commissione Nazionale per le Società e la Borsa (Consob) v Antonio Zecca.

trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime".

Whereas at first reading, criminalization powers under Article 83(1) TFEU might seem restricted, its wording leaves wide interpretation margins. After all, the enumerated areas of crime potentially involve a very broad range of human actions. This applies to some areas of crime such as organized crime: individuals can think of many specific criminal offenses that could be characterized as being connected with the activities of an organized crime group. Something similar applies to computer crime, also mentioned as one of the areas of crime under Article 83(1) TFEU. This concept could cover criminal offenses that would not immediately be associated with computer crime, but could be characterized accordingly, just because of the involvement of a computer.

Beyond specific areas of crime, EU action has shown that while criminal prohibitions mainly cover completed crimes, they increasingly entail inchoate acts as well. And, in addition to criminalizing the actual commission of prohibited acts, it has become quite common to also criminalize aiding or abetting the commission of a crime.

In addition, to extend the area of intervention of the EU, Article 83 states that "o*n the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament".*

2. The EU can adopt directives, under Article 83(2), providing for minimum rules on the definition of offences and criminal sanctions if they are essential to **ensure the effectiveness of a harmonised EU policy.**

According to the art. 83 (2) TFEU "if *the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76".*

The introduction of Article 83(2) TFEU into the Lisbon Treaty has since led to many discussions on its potential scope. This is because the article, unlike art. 83(1), does not indicate the areas of intervention.

However, a first significant restriction on the exercise of EU powers could be read into the provision's requirement that in the area concerned, harmonization has previously taken place (harmonization requirement).

In addition to the aforementioned procedural limit of requiring previous harmonization, Article 83(2) TFEU contains two substantive limits on the exercise of EU powers. It not only requires that the approximating measure contributes to the effective implementation of a harmonized Union policy, it also demands that approximation is essential for that aim.

The condition appears difficult to prove, for this reason the Article 83(2) TFEU is likely to be interpreted as providing a broad competence to criminalize conduct EU-wide.

In these two hypotheses of criminal law competence, under art. 83(1,2) TFEU, the Union has an **indirect power** to impact in the legal systems of Member States. Art. 83 TFEU states that the Union can adopt directives. It implies that this source only creates an obligation of adaptation for the Member States but cannot introduce crimes. In particular:

Art. 83 (1) introduces an **autonomous indirect competence**. This competence can be exercised only in the areas indicated in the Treaty, which may be extended by a unanimous decision of the European Council, after approval by the European Parliament.

Art. 83 (2) introduces **accessory indirect competence**. This competence cannot be exercised for specific defined areas but must be exercised in areas already subject to harmonization measures.

EU, by exercising its competence in criminal matters, has the ability to affect areas that are the expression of the sovereignty of Member States. For this reason, art. 83(3) provides for a procedural mechanism called the **brake clause or emergency brake** according to:

Where a member of the Council considers that a draft directive [..] would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four

months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

3. The Art. 83(1) TFEU refers to a list of criminal areas that do not explicitly include the crime of fraud against the Union's financial interest. For this reason, it is necessary to refer to the "Financial Provisions" of the Treaty to find the regulation concerning the fight against fraud in Art. 325 TFEU. Specifically, the referential rule contained in Art. 310(6) TFUE refers to Art. 325, which establishes, in its first paragraph, the guidelines for building the legal architecture that will protect the EU's **financial interests**. Under this article, the Member States have to adopt the national measures with clear dissuasive effect. The effectiveness of the measures chosen should definitely place Member States in a position to offer the protection required by the Union.

The Art. 325 (2) TFEU, thus, demands that the Member States protect the Union's financial interests against fraud with the same diligence and the same measures they would apply to combating domestic fraud. For its part, paragraph 3 lays down the duty of the Member States to coordinate their actions and strategies through the Commission, which is the coordinating and monitoring body.

Furthermore, according to Article 325 (4) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's Institutions, Bodies, Offices and Agencies.

As mentioned above, art. 83 TFEU attributes to the Union an indirect criminal competence because it identifies the instrument of the directive to introduce offences and sanctions.

Instead, it remains unclear the type of competence attributed to the Union by art. 325 TFEU. This is because art. 325 does not indicate the type of source with which the Union may intervene, stating only that the Union may adopt "measures".

The adoption of regulations instead of directives would allow the Union to directly affect the legal systems of Member States. This means that

art. 325 TFEU could give to the EU a **direct competence** in criminal matters.

However, this interpretation of Art. 325 could rise compatibility problems with the fundamental principles of the legal systems of the Member States. For this reason, it is preferable to exclude the use of regulations and to consider that the Union has **indirect criminal competence** in this area as well.

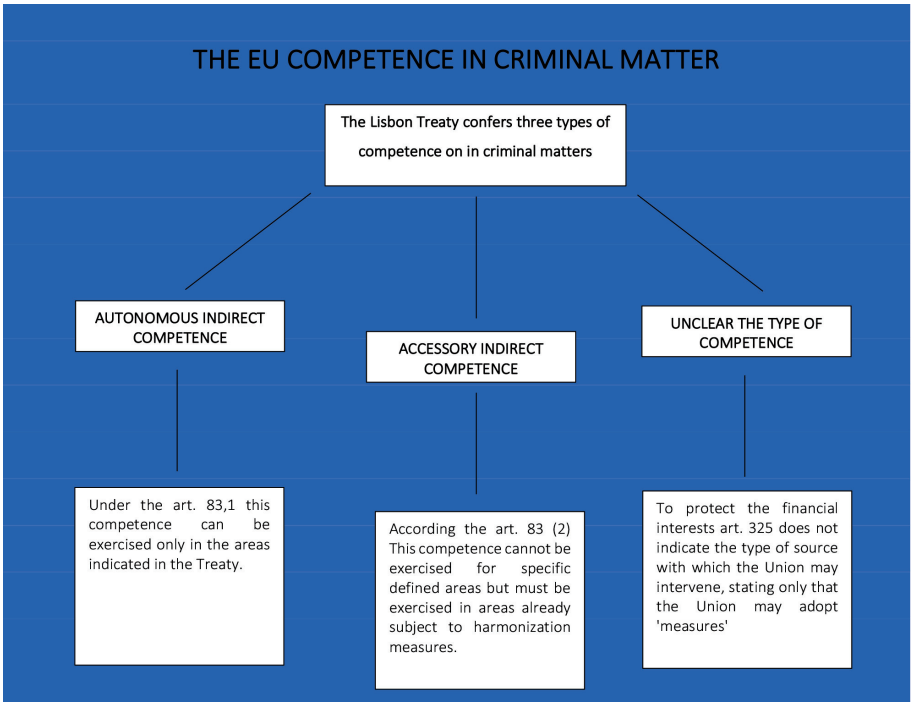
The application of Article 325 TFEU generated a very significant case law involving the Italian Constitutional Court and the Court of Justice of the European Union. The "Taricco" case arises from a request for a preliminary ruling made by an Italian Court to the Court of Justice in the context of criminal proceedings for setting up and organising an association with the aim to commit several VAT offences, with consequent prejudice to financial interests. In particular, the subject of the request was the conformity with EU law of the national rules on limitation periods, in relation to the part which establishes that in no case may the interruption of the limitation period led to an increase of more than a quarter of the time necessary to provide for the limitation period.

The Italian Court considered that, if it was possible to disapply those rules, the purpose of the Article 325 TFEU, would be more effectively protected. The Court of Luxembourg ruled that where the national rules on the extension of the limitation period are such to prevent the imposition of effective and dissuasive penalties in a significant number of cases of fraud affecting the financial interests of the European Union, "*the national court would be required to give effect to Article 325 TFEU by disapplying, where appropriate, national provisions which have the effect to prevent the Member State concerned from fulfilling its obligations under that provision"[CJEU, C-105/14, Criminal proceedings against Ivo Taricco and Others, Judgment of 8 September 2015 (Taricco 1)].*

This CJEU judgment caused mixed reactions at national level. The different reactions of the Italian judges led to preliminary ruling by the Italian Constitutional Court to the Court of Justice. In this request it was pointed out that the solution proposed in the Taricco judgment raises doubts with the supreme principles of the Italian constitutional order and with the respect of the inalienable rights of the person. In particular, the solution of CJEU could affect the principle of legality of criminal offences and penalties, which requires that criminal provisions be precisely determined and cannot be retroactive.

The Court of Justice, in its judgment decided to approve the Court's request, enunciating the principle of law according to which: "*Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation,*

forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed"[CJEU, C-42/17, Criminal proceedings against M.A.S. and M.B., Judgement of 5 December 2017 (Taricco 2)].
The result seems to have been reached with "Taricco 2" is that of a generic limit to the disapplication indicated directly by the European Court, to the concrete implementation of which the common judges would be called, without, at this point, any need to go back through the Constitutional Court, with the obvious risk of a non-univocal application or, at any rate, not uniform, of the parameters in question.



3.14. The secondary law in criminal law

Since the entry into force of the Treaty of Lisbon and the Charter of Fundamental Rights, the European Union has adopted several acts in

criminal matter that has been further developed the rights stated in primary law. Below are reported the most significant acts in this area which include new criminal prohibitions.

- **Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016** on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [https://eur-lex.europa.eu/eli/dir/2016/680/oj].
  The scope of this directive would be broader than that of the current Framework Decision since, in addition to "cross-border" data, domestic processing operations would also be covered.
- **Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016** on procedural safeguards for children who are suspects or accused persons in criminal proceedings [https://eur-lex.europa.eu/eli/dir/2016/800/oj].
  According to this directive, children who are suspects or accused persons in criminal proceedings should have the right to an individual assessment to identify their specific needs in terms of protection, education, training and social integration, to determine if and to what extent they would need special measures during the criminal proceedings, the extent of their criminal responsibility and the appropriateness of a particular penalty or educative measure.
- **Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014** on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [https://eur-lex.europa.eu/legalcontent/EN/TXT/?qid=1521668474957&uri=CELEX%3A32014L0042]..
  This European legislative act has been created for several reasons, some of which are expressly stated in its contents, of which the following are noteworthy: the aim to amend and expand the provisions of Framework Decisions 2001/500/JHA and 2005/212/JHA11, the aim to clarify the notions of proceeds and property, the need for a better level of national legislative harmonization with regard to extended confiscation, the need to confiscate goods which have been

transferred to third parties and also to offer adequate guarantees to the aforementioned.

- **Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016** on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceeding [https://eur-lex.europa.eu/eli/dir/2016/343/oj].
  The Directive aims to standardize the various national legislations on the subject of criminal procedural guarantees and to recover mutual trust in the jurisdiction of the Member States.
  The presumption of innocence, in particular, is articulated through a number of specific profiles that represent direct explanations and effectively affect the guarantees of the accused: the burden of proof, the right to silence and not to self-incrimination, the prohibition to present the accused as guilty in public, the right to attend the trial.
- **Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014** on criminal sanctions for market abuse (market abuse directive) [https://eur-lex.europa.eu/eli/dir/2014/57/oj]..
  The scope of this Directive is determined in such a way as to complement, and ensure the effective implementation of, Regulation (EU) No 596/2014. Whereas offences should be punishable under this Directive when committed intentionally and at least in serious cases, sanctions for breaches of Regulation (EU) No 596/2014 do not require that intent is proven or that they are qualified as serious. In the application of national law transposing this Directive, Member States should ensure that the imposition of criminal sanctions for offences in accordance with this Directive and of administrative sanctions in accordance with the Regulation (EU) No 596/2014, does not lead to a breach of the principle of *ne bis in idem*.
- **Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016** on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [https://eur-lex.europa.eu/eli/dir/2016/1919/oj].
  With this act the European Institutions aim to ensure the effectiveness of legal aid in criminal proceedings, requiring, in particular, Member States to provide for the right to use a lawyer paid by the State.

- **Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013** on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [https://eur-lex.europa.eu/eli/dir/2013/48/oj].

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SECTION IV – THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

3.15. The safeguarding of private and family life in EU legal system

The right to private and family life has a relatively recent history within the European Union legal system. Indeed, the system of protection of fundamental rights in the EU has evolved first, through the adoption of the Charter of Fundamental Rights, then, when it assumed the same value as the Treaties.

Before the entry into force of the CFRUE, within the European Union the protection of this right was guaranteed through art. 8 of the ECHR and through Member States' constitutional traditions. Currently, the Charter devotes a specific article to the protection of private and family life, but the safeguarding of this right is also realized in the legal order of the European Union through several principles and provisions of secondary law.

Primarily, this section will aim to explain art. 7 CFREU and its implications with other rights. To achieve this purpose, the most important CJEU judgments will be recalled. Finally, in order to have a complete overview, it will be listed the other sources of the European Union law that protect private and family life.

3.16. The respect for private and family life (art. 7 CFREU)

The respect for private and family life is proclaimed in the article 7 CFREU, that states as follows:

> "1. *Everyone has the right to respect for his or her private and family life, home and communications*".

The right enunciated in this article finds correspondence in article 8 ECHR according to:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

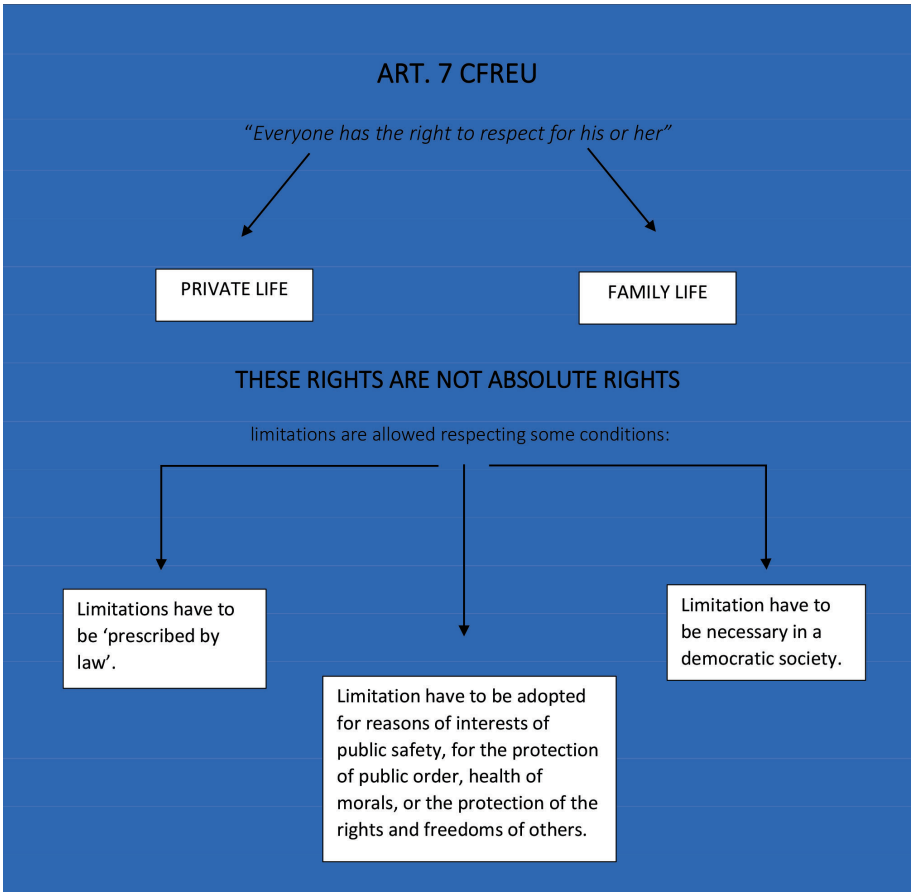
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The formulation of Article 7 CFREU differs from Article 8 ECHR for **two** main reasons:

1. In the first paragraph, the Charter takes into account developments of technology, thus the word "correspondence" has been replaced by " communications";
2. Article 8 of the ECHR is a qualified right, while the art. 7 CFREU does not specify limitation; in the art. 8 ECHR the rights included in the first paragraph may be justifiably interfered based on the limitations set out in the second paragraph.

Article 7 of the Charter does not include the equivalent of the **limitation clause** foreseen in Article 8(2) ECHR. However, the explanatory text to Article 7 of the Charter makes it clear that the rights it provides are intended to be subject to the limitations set out in Article 8(2) ECHR. The limits on the right to private and family life can, under the terms of Article 8(2) ECHR, be limited only if the limitations are "prescribed by law and they are necessary in a democratic society in the interests of public safety, for the protection of public order, health of morals, or the protection of the rights and freedoms of others".

Thus, the rights indicate in the **art. 7 CFREU are not absolute right**. These limitations allowed for a finding that the breach of family life has been justified under determinate condition.



3.16.1. The scope of application of art. 7 CFREU

The precise **scope of the application** of Article 7 CFRUE will essentially turn upon the interpretation of the concept of "private" and "family" life. The relation between these two dimensions is complex and sometimes ambivalent. On one side, there are cases in which private life has been kept distinct from family life; on other side, there are cases in which the two rights are considered inseparable.

The right to privacy closely related to the issue of the processing of personal data, which are also protected in Article 8 CFREU. In addition, issues related to reproductive and sexual life are considered in CJEU judgement as aspects of private life and not family life.

For example, the CJEU has stated that requiring asylum seekers on the ground of sexual orientation to go into details about their sexual life constitutes a violation not only of their dignity but also of their right to private life[57].

By contrast, in many other cases, private and family life are considered strictly interconnected and can hardly be distinguished. In this regard, the art. 7 CFREU may partially overlap with the right of children, the right to marry and the right to find a family stated in art. 9 CFREU. Concerning this aspect, it is important to underline that neither the Charter nor the ECHR contain a definition of family, while an empirical approach is frequently adopted in order to evaluate whether a concrete situation may fall into that notion.

This question has formed the subject of considerable discussions in the last few decades due to a number of significant changes to family forms and the changes in legal status that they have brought about. Families can now be found in a variety of forms, including the purely **biological**, the **adoptive**, the **foster** and the **step**; It is also changed the **definition of parenthood** which has moved beyond the purely biological towards recognition of the psychological bond between a child and her/his caregiver, who may sometimes be strong enough to trump the former.

Also, in the case law of the Court of Justice, it is possible detect different representations of the family life. Considering several paradigmatic examples there is, in the often-considered surprising *Carpenter judgment*[58], a representation of family life which consolidates the **traditional notion** of the *wife in the home*. In the judgement, the protection of EU law runs counter to the expulsion of the undocumented applicant because, in taking care of the children of her husband, she facilitates his free movement in the European Union.

In the judgment *Zhu and Chen* the, the Court recognized a temporary right of residence to the parent of an infant citizen of the EU. In this emblematic case, the Court of Justice openly departed from the political

[57] CJEU, Judgment of 2 December 2014, case C-148/13, *A and Others v Staatssecretaris van Veiligheid en Justitie*.

[58] CJEU, Judgment of 11 July 2002, case C-60/00, *Carpenter*.

will of the European legislators who had intended a restricted definition of the notion of "family"[59].

Finally, in the *Ruiz Zambrano* case, the Court legalise the stay of parents of vulnerable European citizens. This judgement can hardly be understood without an appreciation of family unity and of the link which indissolubly connects children to their parents[60].

Therefore, the Court, initially evaluated the concept of family referred to the traditional idea of the family; later, instead, the Court emphasized the concept of "family unity" to recognize and legalize the status of foreign citizens in the EU.

3.17. The cross-cutting nature of art. 7 CFREU

The reference to "private life" and "family life" in Article 7 CFREU does not limit a specific scope. The protection of private and family life has an indefinite scope that may include any situation within the EU's field of competence that has an impact on private and family life.

Indeed, these rights have a cross-cutting nature: there are several other provisions of the Charter that overlap and interact with the "private" and "family life". It is not possible to indicate all interactions here, but the most relevant ones, in light of the Court of Justice's case law, will be indicated below.

3.17.1. The interactions with private life

The right to private life is articulated in several forms. This right is primarily safeguarded through secondary sources but is explicitly stated in art. 7 CFREU. This right represents a limitation to the interference - on the person - that may result from the adoption of EU laws.

The right to private life, in EU legal system, is strictly linked to other rights such as: the right to the protection of personal data and right to respect the sexual orientation.

[59] CJEU, Judgment of 19 October 2004, case C-200/02, *Zhu and Chen*.
[60] CJEU, Judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*.

a) **RIGHT TO THE PROTECTION OF PERSONAL DATA**

The right to the protection of personal data is generally included in the right to the protection of private life. However, throughout time, the EU has adopted specific provisions dedicated to it. Now, in the system of the European Union, the protection of personal data is set out in Article 8 of the Charter, as well as in art. 16 TFEU. Despite the specific provisions, Article 8 CFREU in the CJEU rulings, is mentioned in conjunction with Article 7 of the Charter.

The following are the main judgement in which the Court has issued rulings mentioning both articles, almost as if they were inseparable.

On the **objective scope of application** of Articles 7 and 8 CFREU, the Court, in the judgment *Volker und Markus Schecke and Eifert*, had pointed out *"...on the one hand, that the respect for the right to privacy with regard to the processing of personal data, recognized by Articles 7 and 8 of the Charter, refers to any information relating to an identified or identifiable natural person (...) and, on the other hand, that the limitations that may legitimately be made to the right to the protection of personal data correspond to those tolerated in the context of Article 8 of the ECHR"*[61].

On the same topic, the Court in the judgment *A, B, P* stated that "*expect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual (judgment of 9 November 2010, Volker und Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662, paragraph 52)".*

Thus, firstly, fingerprints and the facial image of a natural person constitute personal data, as they objectively contain unique information about individuals which allows those individuals to be identified with precision (judgment of 17 October 2013, Schwarz, C-291/12, EU:C:2013:670, paragraph 27). Secondly, the activities comprising the collection, recording and retention of fingerprints and the facial image of third-country nationals in a filing system constitute the processing of personal data within the meaning of Article 8 of the Charter (see, to that effect, Opinion 1/15 (EU-Canada

[61] CJEU, C-92/09, Volker und Markus Schecke and Eifert, Judgment of 9 November 2010.

PNR Agreement) of 26 July 2017, EU:C:2017:592, point 123 and the case-law cited)"[62].

Articles 7 and 8 of the Charter are also cited jointly in *Data Protection Commissioner vs Facebook Ireland Limited and Maximillian Schrems*[63].

This judgment, which issued following a reference for a preliminary ruling, concerns the protection of personal data even if they are used in a non-EU Member States. In particular, the referring Court considers that the law of this third State does not provide for the necessary limitations and guarantees with respect to the interference authorized by its national legislation and does not ensure effective judicial protection against such interference.

The Court, beyond the central question, also in this hypothesis reiterates the nature of non-absolute right mentioning Articles 7 and 8 CFREU. The Court states that the communication of personal data to a third party, such as a public authority, constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, whatever the subsequent use of the information communicated. The same is valid for the retention of personal data and access to that data with a view to its use by public authorities, irrespective of whether the information in question relating to private life is sensitive or whether the persons concerned have been inconvenienced in any way on account of that interference. However, the rights enshrined in Articles 7 and 8 of the Charter are not absolute rights but must be considered in relation to their function in society.

In this framework, it should also be observed that, under Article 8(2) of the Charter, personal data must, inter alia, be processed *"for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law"*.

The various **limitations on the right to private life** have been mentioned in the previous judgments. However, in order to identify the limits that public authorities must respect when interfering in the private life of citizen, it is necessary to mention the *Schrems* case.

[62] CJEU, Judgment of 3 October 2019, case C-70/18, Staatssecretaris *van Justitie en Veiligheid v A, B, P.*, par. 76, 77, 83.

[63] CJEU, Judgment of 16 July 2020, case C-311/13

The *Schrems* judgment[64], issued in the context of a preliminary ruling procedure, was dealing with the subject of the sphere of protection of an individual's privacy regarding the processing of personal data.

Indeed, Mr. Schrems has complained to the Irish Data Protection Commissioner that his personal data has been breached because it has been exposed to indiscriminate access by the National Security Agency (NSA). According to the complainant, the generalised access to personal data by this body was in breach of the protection rules aimed at ensuring an adequate level of protection, which is a prerequisite for the transfer of such data outside the European Union.

In this judgment, the Court states that a law allowing public authorities blanket access to the content of electronic communications, affect the essence of the fundamental right to privacy guaranteed by Article 7 of the Charter.

In particular, the Court notes, the protection of the fundamental right to privacy at the EU level, requires that exceptions and restrictions to the protection of personal data operate within the limits of what is strictly necessary.

In this judgement the Court established the principle according to the interferences and restrictions on an individual's right to privacy may exceptionally be considered legitimate only when all the requirements of the Charter are satisfied, i.e.: they are prescribed by law, they are necessary and proportionate, and they are necessary and proportionate in relation to the aim pursued and are such as to justify the sacrifice imposed on the individual right.

b) THE RIGHT TO RESPECT FOR SEXUAL ORIENTATION

There is no doubt that interpersonal relationships fall within the notion of "private life". Indeed, EU citizens can legitimately invoke the right to privacy also with regard to the relationships of couples and their sexual orientation.

The Court of Justice, in its case law, states that the relationship that binds a homosexual couple falls within the notion of "private life"[65].

[64] CJEU, Judgement of 6 October 2015, case C-362/14, *Schrems*.
[65] CJEU, Judgement of 5 June 2018, case C-673/16, *Coman e al.*

In particular on the subject of interrogation, the Court has specified that the questions of the authorities concerning the details of the sexual practices of the applicant must be considered contrary to the fundamental rights guaranteed by the Charter and, specifically, to the right to respect for private life as enshrined in Article 7 CFREU.

According to CJEU, the same provision must be interpreted as also precluding the Accepting Authorities, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to "tests" with a view to establishing his homosexuality or, yet the production by him of films of such acts[66].

On the same topic, the Court of Justice has again pronounced in the judgment *F v. Bevándorlási és Állampolgársági Hivatal*[67]. The main proceeding concerned a Nigerian national whose asylum application was rejected at first instance by the Hungarian authorities on the basis of an expert's report prepared by a psychologist indicating that his homosexuality could not be confirmed via different tests. Interrogated during the appeal lawsuit, the Administrative and Labour Court of Szeged decided to stay the proceedings and to ask the CJEU's guidance regarding the possibility to rely on psychologists' expert opinions for assessing the credibility of asylum seekers fearing persecution due to their sexual orientation.

The CJEU ruled that expert reports enabling the national authorities to better assess an application for international protection must be consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, such as the right to respect for human dignity and the right to respect for private and family life. Accordingly, certain forms of expert reports may prove useful for the assessment of the facts and circumstances set out in the application and may be prepared without prejudicing the fundamental rights of the asylum seeker. However, a determining authority cannot base its decision solely on the conclusions of an expert's report and cannot be bound by the report's conclusion.

[66] CJEU, Judgement of 2 December 2014, joined cases C-148/13 a C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*.

[67] CJEU, Judgement of 25 January 2018, case C-473/16, *F v. Bevándorlási és Állampolgársági Hivatal.*

Moreover, even if the performance of such tests is formally conditional upon the consent of the person concerned, that consent is not necessarily given freely, since it is imposed under the pressure of the circumstances in which an asylum seeker finds himself. In those circumstances, recourse to a psychologist's expert report in order to determine the sexual orientation of the asylum seeker constitutes an interference with that person's right to respect for his private life that is disproportionate in relation to the objective it pursues. About this, the Court observed that such interference is particularly serious because it is intended to provide an insight into the most intimate aspects of the asylum seeker's life.

Finally, the CJEU concluded Article 4 of Directive 2011/95, read in the light of Article 7 of the Charter of Fundamental Rights, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant.

For more information on the right of asylum see the chapter three, section one.

3.17.2. The interactions with family life

There are several rights that interact with the right to family life.

It is not possible to indicate all the interactions here, but the most relevant ones will be indicated, including the right of children, the right to marry or found a family, the family reunification, the right of asylum, the right to family and professional life.

a) RIGHTS OF THE CHILDREN

The most obvious interaction with the right to "family life" is Article 24 CFREU[68], which concerns the **rights of children** who, as family members, will also have a separate claim to family life themselves.

[68] 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child"s best

The **concept of parent-child** and the relationship between them has changed and evolved from tradition. The example is the case *Baumbast* about the situation of a "blended" family. Assessing the entirety of the situation, the Court did not make a distinction between the children based on their biological relationship with the applicants. As a result, the natural daughter of Ms. Baumbast, a Colombian citizen, was treated in the same way as the biological daughter of the Baumbast couple, the natural daughter's half-sister, of both German and Colombian nationality. Otherwise, the right to free movement of the Union citizen and members of their family would have been infringed[69]. Therefore, the concept of the family is not limited to the biological family but also includes stepchildren as part of a second union.

Similarly, contrasting with the dominant biological approach to parenthood, EU law has provided an autonomous definition of who should be considered as "the child" of someone. In the *Depesme and Kerrou*[70] case, rendered again in the framework of a "blended" family, it was recognized that under EU law the child of a spouse is also considered to be the child of the other member of the couple, even though there is no biological or even legal basis of parenthood within the meaning of national law.

For more information on children's right, see chapter three, section two.

b) RIGHT TO MARRY AND RIGHT TO FOUND A FAMILY

The right to family life in Article 7 CFREU emerges in the judgments concerning the subject of **marriage, in the notion of spouse, and in other types of unions**.

The Regulation 1612/68[71] as regards workers moving in the European Union defines the family members of the European citizen, begins

interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

[69] CJEU, Judgment of 17 September 2002, case C-413/99, *Baumbast and R.*

[70] CJEU, Judgment of 15 December 2016, joined cases C-401/15 to C-403/15, *Depesme and Kerrou*.

[71] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

with the "spouse". This last word invites us to identify what constitutes a "conjugal" relationship, with particular reference to its traditional form of existence in married life.

Initially, the European approach remained relatively guarded and traditional. According to the *Reed* judgment, the concept of "spouse" is limited in principle, and "in the absence of any indication of a general social development" specifies that it "refers to a marital relationship only"[72].

The marital bond, thus, plays a decisive role in the legal discourse, even prevailing on other conflicting interests. Notably, as the case-law will later make clear, once married it does not matter whether the spouse is documented or not to claim the protection of family ties under Union law[73].

At first, thus, the Court provided a traditional definition of a marital bond that did not take into account bonds other than marriage.

Then, the Directive 2004/38/EC[74] on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States extended the concept of spouse to "partner", meaning "unmarried", but on the condition that the partnership is recognized in the host State as equivalent to marriage.

Due to societal changes, the Court ruled on **non-traditional legal questions**.

The most sensitive issues the Court has dealt with relate to the recognition of rights of **same-sex couples**.

Initially, the Court of Justice favoured traditional family.

Two judgments in particular are cited by commentators as proof of this preference. In *Grant v South West Trains* the Court's refusal to extend the scope of Article 141 EC and the Equal Pay Directive to cover discrimination on the grounds of sexual orientation this meant that same-sex couples could not qualify for the payment of employees' family benefits[75], and in *D and Sweden v Council* the CJEU held that same-sex relationships, even if legally registered under national laws, remained

[72] CJEU, Judgment of 17 April 1985, case C-59/85, *Reed*.

[73] CJEU, Judgment of 25 July 2008, case C-127/08, *Metock*.

[74] Directive 2004/38/EC of the European Parliament 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

[75] CJEU, Judgment of 17 February 1998, case C-249/96, *Grant v South West Trains*.

distinct from marriage and could not be treated in the same way as marriage[76].

Thus, in general, the Court of Justice first considered on the basis of a comparative approach that a homosexual partnership lawfully registered in a Member State could not be equivalent to a marriage within the meaning of EU law, finding incidentally that "*according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex*"[77].

However, in the *Coman and Others judgement*, the CJEU returned to the notion of "spouse" within the meaning of EU law, finding that the notion was to be understood as regardless of gender, "*a person joined to another person by the bonds of marriage*" further stating that "*the term 'spouse' within the meaning of Directive 2004/38 is genderneutral and may therefore cover the same-sex spouse of the Union citizen concerned*"[78].

c) **THE FAMILY REUNIFICATION AND ASYLUM.**

Under the principle of family unity, the other rights overlapping family life concerns freedom of movement, residence permits, immigration, family reunification and asylum.

In general, in the CJEU case law, family life issues are often in connection with the right to freedom of movement and, in particular, with the concession (or denial) of residence permits. In this perspective, the **unity of the family** has been given particular importance in some cases.

In the judgement *Baumbast and R v Secretary of State for the Home Department*, the CJEU adjudged that the children of a citizen of the European Union who resided in a Member State on the basis of their parent's rights of residence as a migrant worker in that Member State were entitled to continue that residence regardless of the fact that the parents of the children had meanwhile divorced and the fact that only one parent was a citizen of the European Union[79].

[76] CJEU, Judgment of 31 May 2001, joined cases C-122/99 and C-125/99, *D. and Sweden*.

[77] *Ibidem*, par. 54.

[78] CJEU, Judgment of 5 June 2018, case C-673/16, *Coman and Others*.

[79] CJEU, Judgment of 17 September 2002, case C-413/99, *Baumbast and R v Secretary of State for the Home Department*.

In the judgement *Rhimou Chakroun v Minister van Buitenlandse Zaken* the Court stated that "*the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification*". In particular, the Court specified that the phrase 'recourse to the social assistance system' in Article 7(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family[80].

In the end, the Court with the judgement *Tb v. Bevándorlási és Menekültügyi Hivatal*, returns again to the interpretation of the right to **family reunification** guaranteed by directive 2003/86[81].

The legal case begins when the Hungarian Immigration and Asylum Office refused to grant a residence permit for the purpose of family reunification for the applicant's sister, who suffered from depression and required medical supervision, on the grounds that she had failed to demonstrate that she was unable to provide her own needs on account of her health condition. The Court was asked to determine whether Article 10(2) Directive 2003/86 precludes a State from making family reunification of a refugee's sister subject to conditions other than those in Article 10(2) if they are dependent on the applicant. It was also asked to clarify the scope of the meaning of 'dependant' in this context.

The Court first noted that the objective of Directive 2003/96 is, *inter alia*, to determine the conditions for the exercise of the right to family reunification. Indeed, Article 4 Directive 2003/86 specifically lists the family members on whom this right may be conferred, and Article 10(2) allows States to confer this right on members of a refugee's family not listed providing they are dependent on the refugee. Referring to previous rulings, the Court reiterated that dependence is a result of a factual situation of material support

[80] CJEU, Judgment of 04 March 2010, case C 578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken*.

[81] CJEU, Judgment of 12 December 2019, case C-519/18, *Tb v. Bevándorlási* és *Menekültügyi Hivatal*

coming from the family member with a right of residence. On this issue, the Court noted, inter alia, that the family member not listed under Article 4 must be genuinely dependent in that they cannot support themselves in their country of origin and that material support is provided by the refugee who also appears to be the most able family member to provide support. Moreover, it noted that while discretion afforded to States under Article 10 (2) should not be used to undermine the objective of the Directive, which must be interpreted in light of the right to family life under Article 7 of the Charter of Fundamental Rights of the European Union.

The Court, therefore, concluded that Article 10(2) must be interpreted as not precluding States from authorising the family reunification of refugee's sister only if she is unable to provide for her needs on account of her state of health. However, a case-by-case examination of all relevant factors, including the special situation of refugees, is to be carried out by the authorities and it must be ascertained that the material support is provided by the refugee who has been deemed the family member most able to provide that support.

For more information on family reunification see Chapter three, section two.

d) **FAMILY AND PROFESSIONAL LIFE**

There is another article in the Charter that explicitly protects family life. The Article 33 CFREU states:

"1. The family shall enjoy legal, economic and social protection.

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child".

There are two different elements in the article 33 CFREU:

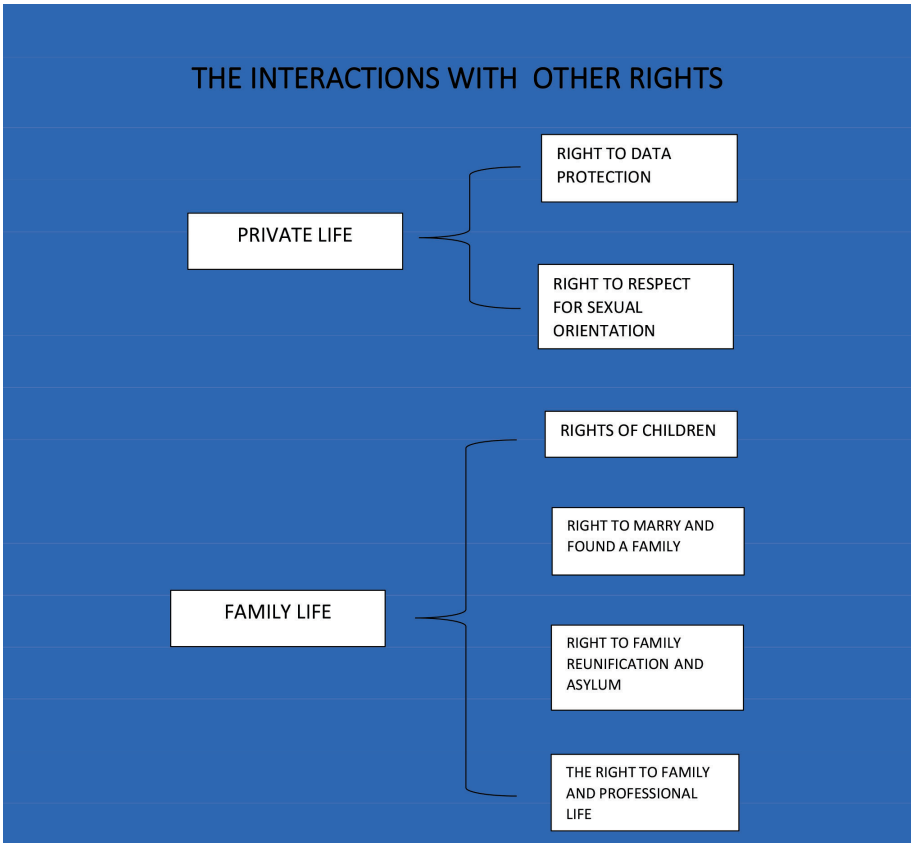
1. The first sentence sets out a positive obligation to afford the family legal, economic and social protection. This far- reaching obligation could apply virtually any aspect of EU activity. Indeed, it refers not only to legal protection, but also to economic and social protection, which suggest it is a true cross-cutting obligation, to be mainstreamed into all areas, its significance in migration law, family law and across all of EU equality and labour law.

2. The second sentence, on the reconciliation of family and professional life, clearly entails individual rights. Indeed, The article 33 (2) expressly includes three distinct right: the right to protection against dismissal on grinds of pregnancy, the right to paid maternity[82] leave and parental leave following the birth or adoption of a child.

Unlike Article 7 CFREU, which emphasizes a prohibition on unjustified interference in the private and family life of all persons; the Article 33 CFREU safeguards family life in a manner that is instrumental to professional life. In fact, the article takes into broad consideration the situation of pregnant women and family leave. The article draws on Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC. It is also based on Article 8 (protection of maternity) of the European Social Charter and draws on Article 27 (right of workers with family responsibilities to equal opportunities and equal treatment) of the revised Social Charter.

The explicit provision of these hypotheses derives from the need to safeguard working women who were not protected from the professional point of view during the period of gestation and breastfeeding. The article makes it possible to safeguard working women from discrimination due to their status.

[82] The 'Maternity' covers the period from conception to weaning.



3.18. The secondary law

In the absence of a sufficiently homogenous social base, EU law lacks a basis for expressing a shared European conception of the family. That is why there can be no real European family law. The ambition of European integration is limited to that of providing instruments for coordinating national orders in family matters with a functional perspective of resolving differences in legislation.

With the intention to create a European civil and judicial area of free movement of persons and acts relating to their state, Union law technically organizes the recognition of matrimonial, parental, conjugal, inheritance and estate decisions. For example:

- Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of

judgments in matrimonial matters and the matters of parental responsibility [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003R2201];

- Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009R0004] ;
- Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R1259];
- Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0650]..

The protection of the right to private and family life in the legal system of the European Union is also realized through a series of acts that do not make express reference to the right to private and family life. The protection of this right has a **cross-cutting character** and is very often realized through the protection of other rights interconnected to it. Below are reported the most important acts adopted by the European Institutions which only indirectly protect the private and family life.

- DIRECTIVE (EU) 2016/800 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0800].
- DIRECTIVE 2013/33/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [https://eur-lex.europa.eu/legal-content/EN/ TXT/?uri=celex%3A32013L0033].

- DIRECTIVE 2014/66/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32014L0066]. .
- DIRECTIVE 2010/41/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 7 july 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0041].

3.19. Conclusion

Based on the above, the right to private and family life becomes relevant when it comes into contact with other Charter rights. In particular, the right to private and family life is a cross-cutting right that the Court refers to when interpreting, balancing, and limiting other rights in the EU system.

In the above-mentioned judgments, it emerges that, in order to ensure the respect of private life, in the various forms in which it can be declined and expressed, the person is recognized a series of rights aimed at preventing unjustified interference by public authorities or third parties in the sphere of individual privacy.

Among these, the most relevant and topical - as regards remedies - is undoubtedly the right to the protection of personal data. Personal data, indeed, are particularly exposed, more than other components inherent to the privacy of the individual, to illegitimate attacks by unauthorized third parties.

The protection of this right is so important as can be seen from the "constitutionalization" of this principle within the legal order of the European Union through the inclusion of specific provisions both in the Charter and in the TFEU (art. 8 CFREU and art. 16 TFEU).

In relation to the protection of family life, instead, it emerges in the mentioned judgments that the Court interprets this right to allow the

realization of the principle of family unity. From this point of view, the right to family life appears indissolubly linked to the right to asylum and the protection of the rights of minors.

Secondary legislation is also influenced by the cross-cutting nature of the right to private and family life. In fact, there are not any directives, regulations or decisions that expressly mention this right. Rather, it is protected by regulating the individual components of which it is composed.

Although the progressive coordination of national legislation on family law by European secondary legislation is undeniable, the possibility of adopting European norms regulating a unitary model of family organization seems far away. In conclusion, it is possible to affirm that the right to respect for private and family life represents a "transversal" right, which does not enjoy its own autonomy but rather is intrinsically linked to heterogeneous rights.

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SECTION V – CONSUMER PROTECTION

3.20. The notion of "consumer"

EU Law does not provide a consistent and uniform definition of "consumer". In fact, each EU legal instrument adopts its own notion of consumer. However, common elements can be found.

The majority of current EU directives define the consumer negatively, as a natural person who is acting for the purposes which are outside his trade, business and profession.

Moreover, the notion of consumer in EU law usually does not apply to legal persons, even if they have a non-business character.

3.21. Consumer protection under EU primary Law

Inaugurated by the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy[83], with the Single European Act of 1987 the interests of consumers become a prerequisite for European legislative action. The new text of art. 100 A of the Treaty, stated that "*the Commission, in its proposals [...] in the field of safety, environmental protection and consumer protection, is based on a high level of protection*".

This constraint has been the prerequisite for all subsequent legislative interventions, and the Maastricht and Amsterdam Treaties have therefore consolidated the choice according to which consumer policy must be present in all the policies of the Union. The Treaty of Maastricht included Chapter XI, dedicated to consumer protection, in the Treaty establishing the European Community; later Art. 153 of the Treaty of

[83] Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C/92, 25.4.1975, p. 1.

Amsterdam, further qualified and expanded the Community objectives inherent in the protection of consumer rights and interests.

Today, consumer protection has become *"one of the most transversal EU policies, covering product safety, digital market, financial services, food safety and labelling, energy, travel and transport"*, so that "*in recent years it has shifted from the technical harmonisation of standards to the recognition of consumer protection as part of the effort to establish a 'Europe for citizens'*"[84].

Consumer protection is the object of a specific right enshrined in the Charter under the Title V dedicated to "solidarity". Art. 38 of the Charter of fundamental rights of the European Union provides that "*Union policies shall ensure a high level of consumer protection*". The need to protect consumers follows from the existing imbalance between consumers and professionals and the awareness that consumers deserve specific legal protection.

This need is recognized also by the EU Treaties, since Art. 169 TFEU (which, together with Art. 114 TFEU, provides the legal basis of the policy) establishes that:

"*In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests*".

The combined lecture of Arts 114 and 169 TFEU implies that the European Commission, in its proposals concerning health, safety, environmental protection and consumer protection will take as a base a high level of protection.

At the same time, para. 4 of Art. 169 TFEU provides that any Member State is allowed to introduce or maintain more stringent protective measures.[85]

As established by Art. 4 TFEU, consumer protection is an area in which the European Union and the Member States share competence.

[84] European Parliament, In-depth analysis Consumer protection in the EU September 2015 — PE 565.904.

[85] Such measures must be compatible with the Treaties. The Commission shall be notified of them.

3.22. Secondary Law

In 1975 was adopted the first special programme for consumer protection and information policy[86]: it defined five fundamental consumer rights,

i) the right to protection of health and safety,

ii) the right to protection of economic interests,

iii) the right to claim for damages,

iv) the right to an education and the right to legal representation.

Since then, an ever-growing *corpus* of directives – and, more rarely, regulations - have been adopted by the European legislator in the area of consumer protection, which has a horizontal character.

However, it has been highlighted that "*The greater part of EU consumer law remains of a minimum harmonisation level. As a result, the corresponding national legislation (either pre-existing or adopted later to transpose a directive) can go even further than the relevant directive*"[87].

Due to the high number of legal acts adopted in the sector, above will be cited some of the most important ones having a general scope.

a) General Data Protection Regulation: Among the measures of more general scope and application, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons regarding the processing of personal data and on the free movement of such data (General Data Protection Regulation, GDPR) can be cited[88].

The aim of the GDPR is to protect natural persons in relation to the processing of data.

The Regulation applies to those within the EU/European Economic Area (EEA), which may hold such data, but also to those outside the EU/EEA which may offer goods or services to natural persons within that

[86] Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C 92, 25 April 1975.

[87] European Parliament, In-depth analysis cit. p. 5.

[88] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, p. 1-88.

area or send personal data to organisations within the EU/EEA or send personal data to recipients within the EU/EEA.

As summarized, in the perspective of citizens' rights, "*The GDPR strengthens existing rights, provides for new rights and gives citizens more control over their personal data. These include: easier access to their data – including providing more information on how that data is processed and ensuring that that information is available in a clear and understandable way; a new right to data portability – making it easier to transmit personal data between service providers; a clearer right to erasure ('right to be forgotten') – when an individual no longer wants their data processed and there is no legitimate reason to keep it, the data will be deleted; a right to know when their personal data has been hacked– companies and organisations will have to inform individuals promptly of serious data breaches. They will also have to notify the relevant data protection supervisory authority*".[89]

b) Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection

Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws lays down a cooperation framework to allow national authorities from all countries in the EEA to jointly address breaches of consumer rules in case the trader and the consumer are established in different countries[90].

The European Commission coordinates the cooperation between these authorities to ensure that consumer rights legislation is applied and enforced in a consistent manner across the Single Market[91].

c) Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees

One of the most important pieces of EU consumer legislation is Directive 1999/44/EC on certain aspects of the sale of consumer goods

[89] https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex%3A32016R0679.

[90] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 OJ L 345, 27.12.2017, p. 1-26.

[91] See more at https://ec.europa.eu/info/law/law-topic/consumers/consumer-protection-cooperation-regulation_en#:~:text=Regulation%20(EU)%202017%2F2394,European%20Economic%20Area%20to%20jointly.

and associated guarantees[92], which harmonises those parts of consumer contract law on the sale of goods that cover legal guarantees.

It establishes that, in order to conform with the sales contract, goods must comply with the sales description; be fit for the purpose for which the good was intended; and demonstrate the quality and performance that can reasonably be expected. If not so, traders selling consumer goods in the European Union are obliged to remedy defects (products that do not look or work as advertised) which existed at the time of delivery and which become apparent within 2 years.

d) The EU's Services Directive: Another general legislative act in the area of consumer protection is Directive 2006/123/EC on services in the internal market[93], which aims to aims to remove barriers to trade in services in the EU, simplifying administrative procedures for service providers; enhancing the rights of consumers and businesses receiving services; and fostering cooperation among EU countries. The scope of application of the Directive is wide, since it covers retail and wholesale trade in goods and services; the activities of most regulated professions such as legal and tax advisers, architects and engineers; construction services; business-related services such as office maintenance, management consultancy and event organisation; and tourism and leisure services.

e) The Consumer Rights Directive: Directive 2011/83/EU on consumer rights[94] has been partly amended by Directive (EU) 2019/2161[95], which will be analysed below.

The aim of the Consumer Rights Directive is to increase consumer protection by harmonising several key aspects of national legislation on

[92] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees OJ L 171, 7.7.1999, p. 12-16.

[93] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27.12.2006, p. 36-68.

[94] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council OJ L 304, 22.11.2011, p. 64-88.

[95] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules OJ L 328, 18.12.2019, p. 7-28.

contracts between customers and sellers. In particular, it ensures transparency of information, particularly to pre-contractual information for distance and off-premises contracts; ensures there is express consent from the consumer for any additional payments; ensures cancellations rights for distance and off-premises contracts; prohibits excessive phone charges for consumers contacting traders about existing contracts.

f) Injunctions Directive and its reform: In terms of possible remedies in the event of (possible) violations of consumer rights, it is worth citing Directive 2009/22/EC (also known as Injunctions Directive)[96] which, as of 25 June 2023, will be repealed and replaced by Directive (EU) 2020/1828[97] seeks to introduce uniform rules to ensure that injunctions are effective enough to terminate infringements harmful to the collective interests of consumers[98].

The Injunctions Directive aims at approximating the laws, regulations and administrative provisions of the Member States relating to actions for an injunction aimed at the protection of the collective interests of consumers, with a view to ensuring the smooth functioning of the internal market.

Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers is aimed at improving the effectiveness of the injunction procedure and contributing to the elimination of the consequences of the infringements of EU law, which affect the collective interests of consumers.

g) Directive on Consumer ADR: Directive 2013/11/EU of on alternative dispute resolution for consumer disputes (Directive on consumer ADR)[99] should also be cited amongst the legal acts having a general scope. In fact, it ensures access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes, which arise from sales or service contracts.

[96] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests OJ L 110, 1.5.2009, p. 30-36.

[97] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC OJ L 409, 4.12.2020, p. 1-27.

[98] See also https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aco0007.

[99] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) OJ L 165, 18.6.2013, p. 63-79.

The discipline is completed by Regulation (EU) No 524/2013[100], which aims to provide consumers and traders with a simple, fast and low-cost tool for resolving out-of-court disputes arising from online purchases.

h) The New Deal for Consumers: Before concluding the list of EU secondary acts on consumer protection, it should be recalled that in 2018 the Commission adopted the "**New Deal for Consumers**", through which the Commission intended to address the gaps and inconsistencies in the *acquis communautaire* that emerged as a result of the extensive process of consumer legislation completed in 2017, while ensuring that the current rules are responding effectively meet the challenges of the digital economy.

In particular, the initiative aimed at strengthening enforcement of EU consumer law in light of a growing risk of EU-wide infringements and at modernising EU consumer protection rules in view of market developments[101].

The initiative consisted of two proposals for Directives and a Communication. These brought to the adoption of two Directives.

On 27 November 2019 has been adopted the already mentioned Directive 2019/2161 on better enforcement and modernisation of EU consumer protection (also known as *Omnibus directive*) applying from 28 May 2022, which seeks to strengthen enforcement of EU consumer law in light of a growing risk of EU-wide infringements and to modernise EU consumer protection rules in view of market developments. In particular, the Directive establishes that Member States shall ensure that penalties can be imposed via administrative or judicial procedures, and that the maximum number of fines is at least 4% of the annual revenue of the infringing trader in the Member State in question.

On 25 November 2020 has been adopted the Directive on Representative Actions[102], which, in particular, requires each Member State to designate at least one "qualified entity" to bring actions on behalf of consumers.

[100] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) OJ L 165, 18.6.2013, p. 1-12.

[101] https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en#new-deal-for-consumers.

[102] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC OJ L 409, 4.12.2020, p. 1-27.

3.23. Soft Law

As previously said, consumer policy is underpinned by an increasingly comprehensive legal framework, but it is also based on five-year action plans that are commonly referred to as the "Consumer Agenda".

In 2012, the Commission presented its EU Consumer Agenda, in which it outlined its strategic approach to consumer protection for the coming years.

More recently, in November 2020, was adopted the New Consumer Agenda. It presents a vision for EU consumer policy from 2020 to 2025 and "*puts forward priorities and key action points to be taken in the next 5 years together with Member States at European and national levels. This will, among other things, include a new legal proposal aiming to provide better information on sustainability to consumers, adapting existing legislation to the digital transformation as well as an action plan on product safety with China*"[103]. It aims to boost trust among consumers, in order to stimulate economic recovery following the COVID-19 pandemic through a holistic approach to covering EU policies that are relevant to consumers, and at the same time complementing EU initiatives in the areas of sustainability and digitalisation.

3.24. Case-law of the Court of Justice of the European Union on Art. 38 of the Charter

Despite the fact that there are many European directives concerning consumers, and despite the intense activity of the Court of Justice of the European Union aimed at protecting consumer rights[104], the case-law on

[103] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2069.

[104] See for example, amongst some recent cases, the *Teekanne* case (Judgment of 4 June 2015, Case C-195/14, *Teekanne*), where the Court held that consumers may be misled despite the list of ingredients being displayed on the packaging of a foodstuff; the *Faber* case (Judgment of 4 June 2015, Case C-497/13, *Faber*), in which the Court ruled that if a defect arises within six months of delivery of the goods, it is presumed that the goods were defective, presumption that may be discounted only if the seller proves to the requisite legal standard that the cause or origin of that lack of conformity lies in circumstances which arose after the delivery of the goods; the *TofuTown.com* case (Judgment of 14 June 2017, Case C-422/16,

consumer protection where consumers rights under the Charter of fundamental rights have been directly invoked is not abundant.

a) One of the first cases in which the Court of Justice made reference to Art. 38 of the Charter is the case *Martín Martín*, decided on 17 December 2009[105]. The case originated from the refusal of Ms Martín Martín to respect the commitments undertaken at the signing of a contract agreed, at her home, with a representative of the EDP Editores SL. The Salamanca Regional High Court submitted a reference for preliminary ruling asking whether Council Directive 85/577/EEC on contracts negotiated away from business premises[106] and Art. 38 of the Charter allowed the judge to declare *ex officio* void a contract which falls within the scope of the Directive because the defendant had not been informed of the right of cancellation, even though the consumer at no stage pleaded that the contract was void before the competent national courts.

The Court of Justice, after recalling that, as a general rule, a national court is able to act of its own motion only in exceptional cases where the public interest requires its intervention[107], ruled that "*the system of protection established by the Directive assumes not only that the consumer, as the weaker party, has the right to cancel the contract, but also that he is made aware of his rights by being specifically informed of them in writing*"[108], so that "*the obligation to give notice of the right of cancellation laid down in Article 4 of the Directive plays a central role in the overall scheme of that directive […] for the effectiveness of consumer protection sought by the Community legislature*"[109]. Therefore, it concluded that the interests of consumers protected by the Directive amounted to such a public interest allowing a positive intervention by the national court in order to

TofuTown.com) where the Court of Justice ruled that plant-based products cannot be described by designations used to describe animal-based products. See the list of judgments of the Court of Justice of the European Union on Consumer Rights – 2020 at the following link: https://cecluxembourg.lu/judgments-of-the-court-of-justice-of-the-european-union-on-consumer-rights-2020/.

[105] Judgment of 17 December 2009, case C-227/08, *Martín Martín*.

[106] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises OJ L 372, 31.12.1985, p. 31-33.

[107] Para. 20 of the judgment.

[108] Para. 26.

[109] Para. 27.

compensate the imbalance between the consumer and the trader in the context of contracts concluded away from business premises.

b) Art. 38 of the Charter has been invoked also in the *Pohotovost'* case decided on 27 February 2014[110]. The judgment arose from a request for a preliminary ruling concerning the interpretation of Arts 6 to 8 of the Directive on unfair terms in consumer contracts[111], in conjunction with Arts 38 and 47 of the Charter of Fundamental Rights of the European Union. The question was whether the mentioned provisions precluded a national legislation not allowing a consumer protection association to intervene in support of a consumer in proceedings for enforcement, against the latter, of an arbitration award.

As regards Art. 38 of the Charter, the Court of Justice recalled that it "*provides that European Union policies must ensure a high level of consumer protection. That requirement also applies to the implementation of Directive 93/13. However, since Directive 93/13 does not expressly provide for a right for consumer protection associations to intervene in individual disputes involving consumers, Article 38 of the Charter cannot, by itself, impose an interpretation of that directive which would encompass such a right*"[112]. Therefore, also in the light of that consideration, the Court concluded that the national legislation at issue in the main proceedings did not breach the principle of effectiveness and that, therefore, EU law does not preclude it.

c) In the case *Overgas Mrezhi and Balgarska gazova asotsiatsia*[113] the Supreme Administrative Court of Bulgaria requested to the Court of Justice of the European Union to interpret Arts 36 and 38 of the Charter and Art. 3 of Directive 2009/73/EC[114]. The request arose from proceedings between a public limited company incorporated under Bulgarian law and a non-profit making organisation, on the one hand, and the Bul-

[110] Judgment of 27 February 2014, case C-270/12, *Pohotovosť*.

[111] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993, p. 29-34.

[112] Para. 53 of the judgment.

[113] Judgment of 30 April 2020, case C-5/19, *Overgas Mrezhi and Balgarska gazova asotsiatsia*.

[114] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC OJ L 211, 14.8.2009, p. 94-136.

garian Energy and Water Regulatory Commission, on the other, concerning the legality of regulations adopted by the latter according to which the entire financial burden associated with the public service obligations imposed on the energy companies is to be borne by customers, who may be private individuals.

As far as we are concerned the Court, after recalling that under Art. 3(3) of the Directive at issue Member States shall take appropriate measures to protect final customers and to ensure that there are adequate safeguards to protect vulnerable customers and ensure high levels of consumer protection, recalled that the latter is also referred to in Art. 38 of the Charter.

d) The interpretation of the Consumer Rights Directive (Directive 2011/83/EU) was the object of the case *NK v MS and AS*[115]. One of the parties of the main proceedings sustained that a contract concluded between an architect and a consumer, such as that at issue in the main proceedings, under which the former undertakes solely to carry out, for the benefit of the latter, the design of a new single-family house and, in that context, to carry out certain projects, would constitute a contract for the construction of a new building, which is excluded from the scope of the Directive under its Art. 3(3)(f).

The Court, to the contrary, recalling that the Directive aims at ensuring a high level of consumer protection and that, in the policies of the Union, the protection of consumers is enshrined in Art. 169 TFEU and Art. 38 of the Charter, concluded that Art. 3(3)(f) of the Directive, in so far as it excludes from the scope of application of that directive contracts for the construction of new buildings, must be interpreted restrictively[116], so that the subject matter of such contracts must necessarily be the construction of a new building.

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[115] Case C-208/19, *NK v MS and AS*.
[116] Para. 41 of the judgment.

Chapter IV
THE ROLE OF LAY JUDGES IN THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS

4.1. The preliminary ruling

The preliminary ruling procedure allows national courts to ask questions about EU law to the Court of Justice of the European Union (CJEU).

The importance of the CJEU in the preliminary ruling procedure becomes immediately apparent if we take into account that the EU has more than 500 million citizens, but there are only 84 judges in the EU Court in Luxembourg. Consequently, national judges have to apply EU law in every Member State. Because of their central role, it is essential that all these national courts apply EU law correctly and consistently.

The application of EU law, however, may be prejudiced by the national courts because the uniform application of EU law is not automatic.

Each judge is shaped by his own national legal system and culture and will inevitably approach EU law from this national perspective, although often unwittingly. Without guidance, therefore, it is likely that a judge with a common law background and judge with a civil law background will arrive at different interpretations of the same EU law concepts, even though these concepts have their own independent EU meaning and should not be influenced by national law. Therefore, to protect the unity and effectiveness of EU law, it is essential that the Court of Justice provides guidance on the correct interpretation of EU law and be able to assist national judges who are faced with certain doubts about the correct interpretation of EU law and its validity.

The preliminary ruling mechanism is one of the key tools that allows the CJEU to provide this guidance and to cooperate with national courts. Indeed, many of the most fundamental judgments on EU law, including

Van Gend & Loos and Costa v. E.N.E.L., have been issued in preliminary ruling procedures.

4.1.1. Objective conditions and purposes of the preliminary ruling procedure

According to the article 267 TFEU, the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

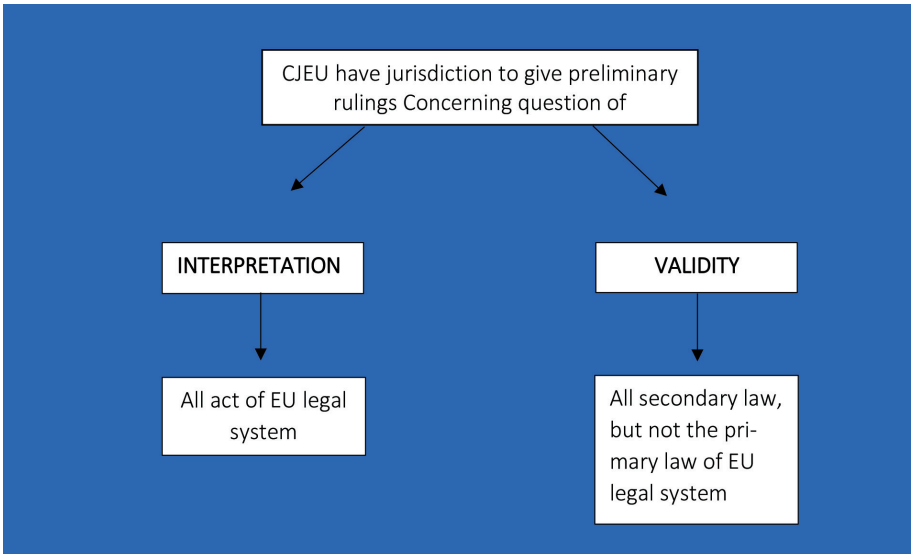
1. the interpretation of the Treaties;
2. the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Thus, national courts can refer two different kinds of question to the CJEU.

1. The first type of question concerns the interpretation of EU law and asks how a certain rule of EU law should be interpreted. The acts that may be subject of reference for a judgment of interpretation are:

- TFEU and TEU and their Protocols and Annexes
- Charter of Fundamental Rights of the European Union
- Legal principles of law
- International agreements
- All secondary legal acts of the Union or better regulations and decisions, recommendations and opinions

2. The second type of question concerns validity of EU law. With this question, the national judge asks the Court of Justice whether a certain rule of EU law is invalid because it conflicts with a hierarchically superior rule of EU law. In particular, the article 267 TFEU concerns how a rule of Union law is applied. A reference for a ruling on validity is to be considered if the judge has any doubts about the validity, and thus the legality, of a Union-law provision to be applied by him to a specific case. The doubts can relate to formal or substantive aspects of legality. "The actions of the institutions, bodies, or other offices or agencies of the Union" are the object of reference for a judgment of validity. Thus, secondary law, in its entirety, but not the primary law of the Union, may be the subject of a validity reference. Primary law, being higher-ranking law, it is rather the standard for testing the validity of the provision of the secondary Union law about which a doubt has been expressed.



Thus, the preliminary ruling procedure has **three** particularly important purposes:

a) It is an instrument to secure **legal unity**

As mentioned above, the Union law is applied in a decentralised mode through the judges of the Member States: The national judge is the ordinary judge of Union law. This decentralisation implies the risk of divergent judgements. The CJEU has duty to guarantee the respect of the EU laws during their interpretation and application. The Court exercise this duty deciding on the question about

- uniform interpretation and
- uniform application of EU law

b) It is an instrument to **further develop the law**

It allows the CJEU to further develop the law. In its recommendations to national courts regarding the starting of a preliminary ruling procedure, the CJEU expressly states that a reference could be particularly useful when:

- a question of interpretation before the national court or tribunal is new and of general interest for the uniform application of EU law
- the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts

c) It is an **instrument to protect individual rights**

The cases in which an individual can directly obtain protection from the Court of Justice are subject to strict limitations. Despite the right for individuals or legal persons to institute proceedings pursuant to Article 263, 1 TFEU (annulment action), individuals cannot directly institute proceedings at the CJEU against generally applicable legal acts within the meaning of Article 289 TFEU.

Generally, parties only indirectly affected by legal acts of Union law can only seek recourse with the national courts. With the preliminary ruling procedure, it is possible that the referring court submits the decision relevant issues pertaining to Union law to the CJEU for preliminary ruling.

Thus, the preliminary ruling procedure is assigned the role of indirect legal proceedings.

4.1.2. Subjective condition

Article 267 TFEU states that a preliminary question may be asked by 'any court or tribunal of a Member State'. The CJEU by now has clarified that to qualify as a court or tribunal, a body must meet all, or at least most, of the following criteria to a high degree:

- It has to be established by law;
- It has to be permanent;
- It must have compulsory jurisdiction;
- It must deal with procedures inter partes;
- It must apply rules of law;
- It must be independent.

In some of the Member States of the European Union, lay and honorary judges are considered competent bodies to refer questions to the Court of Justice for a preliminary ruling. In some Member States, these types of judges are equated with magistrates.

These lay and honorary judges in fact exercise a real judicial function. In a dispute between two parties, they are impartial and decide applying the laws of their state and the European Union law (for more information about the status of the lay and honorary judges according the CJEU, see paragraph 2, 2 of this chapter).

They, therefore, are legal practitioners and are responsible for the correct application and interpretation of EU law.

Precisely for this reason, in some cases, lay and honorary judges have no discretion, but the duty to propose the question to the Court of Justice for a preliminary ruling.

Whether a specific body qualifies as Court or Tribunals allowed referring a preliminary ruling has to be assessed on a case-by-case basis.

The CJEU, however, has maintained to its position that normally arbitral tribunals do not qualify as a court or tribunal under Article 267 TFEU, unless there is a very close link between the arbitration and the ordinary judicial system of a Member State.

This might be understandable as many arbitral proceedings fail to meet many of the criteria given and many arbiters might not even want to ask a reference, taking into account the year and a half it takes on average to get an answer.

However, the CJEU has stated that arbitrators are required to comply with EU law, such as EU competition law, in their awards. Failure to comply with EU law therefore means that national courts are obliged to set aside an arbitral award and refuse enforcement. Arbitrators, therefore, are bound by EU law, but may not seek guidance in this regard.

It is reasonable to assume that over time these criteria may be further developed or modified by the Court of justice.

4.1.3. Discretion or duty to refer

The Article 267, (2) - (3) TFEU states:

"Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court".

A national court can be granted **discretion** with regard to submitting a reference for a preliminary ruling, but it can also be under the **obligation** to make a reference for a preliminary ruling.

When is a national court under the obligation and when is it at its discretion to bring the question before the CJEU? The article 267 TFEU identifies two categories of judges:

- Court or Tribunal whose decisions there is **no judicial remedy** (Court of final instance)
- Court or Tribunal whose decisions there is **judicial remedy** (Court of non-final instance)

According to Article 267, the first category, **Courts of final instance**, are obliged to refer the question to the CJEU for a preliminary ruling.

The court of last instance is obliged to refer because decisions issued cannot be appealed. If the court of last instance does not refer for a preliminary ruling, its judgments could crystallize a decision that does not comply with European Union law.

Instead, the second category, **Court of non-final instance**, have the option of making a preliminary reference and not the obligation. In this case, the risk that national case law not complying with EU law may develop is lower because the court's decision can be overturned and the appellate court can make a decision that is "correct and in conformity with Union law".

The CJEU started developing exceptions from the principle of the duty and the discretion to refer for a preliminary ruling.

The Court of final instance, which according to the article 267 TFEU has the duty to refer for a preliminary ruling, has the discretion:

1. **For questions of interpretation in three cases:**

a) There is settled case-law of the CJEU which has already dealt with the point in law in question; i.e. the CJEU has already ruled on the point of law in question in a identical previous case;

b) The question raised was the subject of a preliminary ruling in a "similar case" and CJEU has previously ruled on the question

c) The Court has not yet interpreted the question, but the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

2. **For question of validity**

If the judge hearing the main action has no doubts concerning the validity of the applicable law, he is under no obligation to raise the question of relevance. The presumption of validity is embedded in Union law. A

duty to make a reference for a preliminary ruling does not only arise due to the fact that a party in a legal dispute puts forward the argument that the applicable Union-law provision is invalid and demands that reference for a preliminary ruling is made.

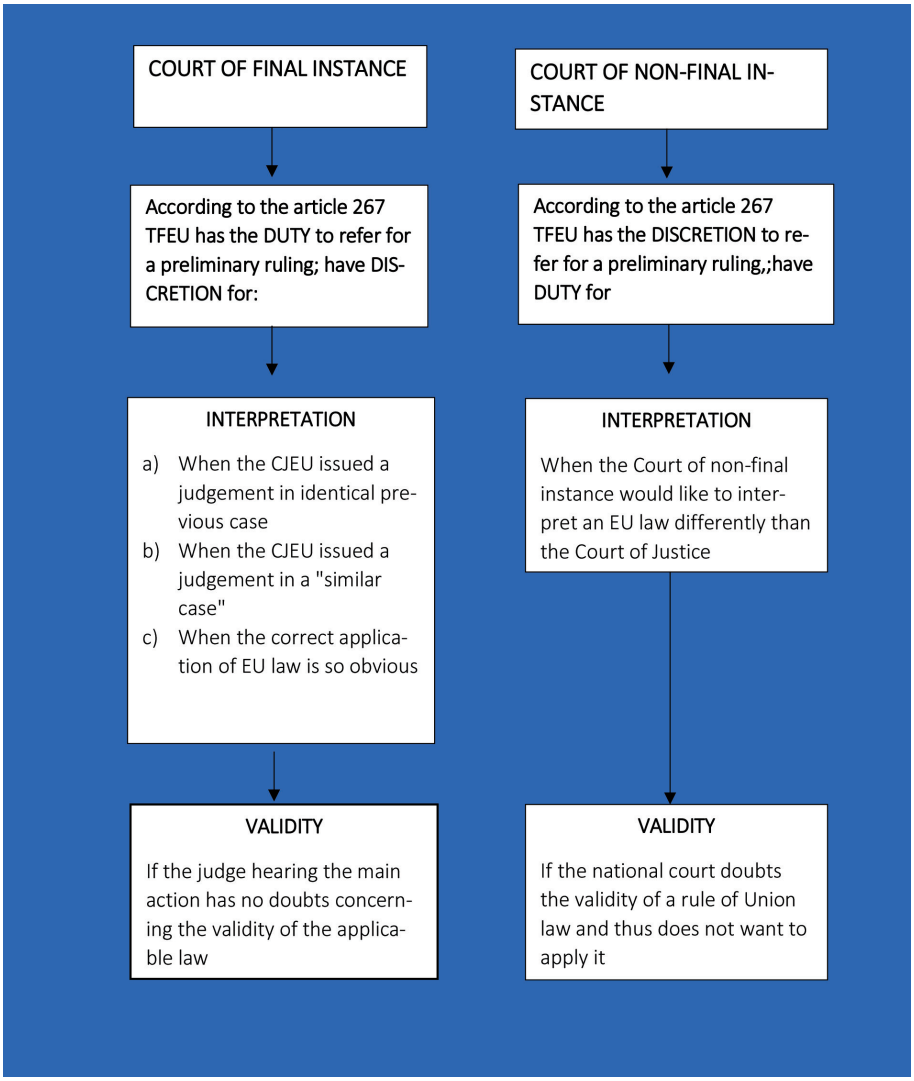
The Court of non-final instance, which according to the article 267 TFEU has the discretion to refer for a preliminary ruling, has the duty:

1. **For questions of interpretation**

When the Court of non-final instance would like to interpret an EU law differently than the Court of Justice. In this hypothesis the Court of non-final instance has duty to refer a question of interpretation before the Court of Justice.

2. **For questions of validity**

If the national court doubts the validity of a rule of Union law and thus does not want to apply it, then it must refer for a preliminary ruling. The CJEU claims for itself a dismissal monopoly for Union law. The exclusive jurisdiction of the CJEU to declare Union law invalid follows from the wording of Article 267 (1) TFEU as well as from the supervisory function with regard to the review of acts by Union institutions. Legal unity and legal certainty in the Union would be put at risk if the Member State courts can determine the invalidity of Union law themselves.



4.1.4. The preliminary ruling proceedings in short

A request for preliminary ruling can no longer be made if the proceedings before the national court have been completed. The proceedings must (still) be pending.

However, it is at the national judge's discretion to decide at what stage of the proceedings such a request should be made.

It is to be considered that the reference for a preliminary ruling must make all information available to the CJEU that enables it to assess the applicability of Union law to the initial legal dispute. The CJEU thus expressly deems it desirable that the national judge only decides to make a request for a preliminary ruling when he/she is able to define, in sufficient detail, the legal and factual context of the case in the main proceedings, and the legal issues, which it raises.

The rules for proceedings before the Court of Justice are laid down in the Protocol no. 3 on the Statute of the Court of Justice and the Rules of Procedure of the Court of Justice.

The procedure is divided into 3 steps:

a) **Request**

The proceedings start with a request from a national court, which submits to the Court of Justice the decision to which the preliminary question relates and a copy or summary of the file for the proceedings. This is done in the language of the national court. The decision to refer (summarised if necessary) is translated into all other official languages of the Union, but the proceedings file is not. It is then transmitted to the parties in the main action, the Member States and the Commission. The Court of Justice may ask the referring court to provide further clarification.

b) **Hearing of the case**

The parties, the Member States, the Commission and, where appropriate, the European Parliament and the Council have only one opportunity to submit written observations.

After the judge-rapporteur has delivered his or her report for the hearing, the parties and the authorities and institutions mentioned above may ask the Court to handle the case orally so that they can elucidate their viewpoint at the hearing.

A few weeks or months after the hearing, the Advocate-General will deliver his or her conclusions. The parties cannot give their reaction to these.

According to the final paragraph of Article 20 of the Statute of the Court of Justice, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.

c) **Judgment**

A few weeks or months after the Advocate-General has delivered his or her conclusions, the Court of Justice will issue judgment in open court. The Court informs the parties concerned of its judgment beforehand. The judgment is then announced to all parties and to the court that referred the preliminary question.

In a preliminary ruling, the CJEU may only rule on the validity of EU law or provide the correct interpretation of a rule of EU law. The CJEU is not allowed to interpret national law, or to settle the underlying dispute between parties. It remains up to the national court to apply the interpretation given by the CJEU to the case at hand. What the CJEU can do, however, is to provide an interpretation of EU law that is so specific and is so closely linked to the facts of the case, that it de facto determines the decision the national court should take.

In other cases, the CJEU may only provide a more general interpretation of EU law, and thereby leave a broad discretion to the national court, for example to determine the proportionality of a measure.

A preliminary answer is legally binding on the national court that referred the question to the CJEU.

In addition, a preliminary ruling is also binding on all other national courts, as it provides the authoritative interpretation of EU law. Preliminary rulings, therefore, have an *erga omnes* binding effect, and function as legal precedents. Normally, the interpretation provided by the CJEU also has retroactive effect, meaning it determines how the provision should always have been interpreted, also in the past (*ex tunc*).

In exceptional cases, however, the CJEU may limit the effect of a preliminary ruling in time, for example because legal certainty requires so or the practical implications of *ex tunc* application would be too severe.

4.1.5. The urgent preliminary reference

The volume of cases before the European Court of Justice, including references for preliminary rulings, meant that there was often a long delay between the submission of a request to the Court and the delivery of a judgment. The proceedings in the national court are stayed during the preliminary reference procedure in the European Court of Justice, so

cases in the national system were being delayed for long periods whilst the national court waiting for a ruling on the meaning of European law.

In some proceedings, the passage of time could affect the rights of litigants.

For this reason, the urgent preliminary ruling procedure was introduced.

The urgent preliminary ruling procedure is applicable only in the areas covered by Title V of Part Three of the TFEU, which concerns the area of freedom, security and justice.

The Court of Justice shall decide whether that procedure should be applied. Such a decision is generally taken only at the reasoned request of the referring court. Exceptionally, the Court may decide of its own motion of its own motion to deal with a reference under the urgent preliminary ruling procedure, if this appears to be necessary.

Although it is not possible to provide an exhaustive list of situations - because of the varied and evolving nature of the rules of Union law governing the area of freedom, security and justice - a national court might, for example, consider making a request for the application of the urgent preliminary ruling procedure when a person is in custody or deprived of his liberty and In family law cases.

Indeed, the passage of time is problematic, particularly in relation to family law cases involving children, and the passage of time significantly affects the welfare of the child and the standing of the parties.

Not all family law cases will be handled under the emergency preliminary proceeding.

Included in this type of proceeding are:

1. child custody disputes;
2. international child abduction cases;
3. cases in which a child is at risk of harm are likely to be considered eligible for the emergency procedure because of the problems for the child associated with a delayed judgment.

4.1.6. The request for application of the urgent preliminary ruling procedure

In order to enable the Court to make a rapid decision on the application of the urgent preliminary ruling procedure, the request must set

out the factual and legal elements demonstrating the urgency and, in particular, the risks that would be involved in using the ordinary preliminary ruling procedure.

The ECJ rules states that:

- The request must set out the factual and legal elements establishing the urgency and the risks involved in following the ordinary procedure
- To the extent that it is able to do so, the referring court should rule on the answer to the questions referred, making it easier for the parties involved to state their positions because this will facilitate the Court's decision
- The urgency of the referral should be clearly identified in the documentation submitted to the ECJ Registry.

The request for an urgent preliminary ruling procedure must be made in an unambiguous form that allows the Registry of the Court to establish immediately that the file must be dealt with in a particular way.

Consequently, the referring judge is requested to accompany his or her request with a reference to Rule 104b of the Rules of Procedure and to place that reference in a clearly identifiable place in his or her reference (e.g., at the top of the page or in a separate court document). Where appropriate, a cover letter from the referring court may usefully refer to such a request.

With regard to the referral decision itself, it is particularly important that it be succinct when dealing with an urgent matter, as this will help to ensure the speed of the proceedings.

4.2. The status of lay and honorary judges

The Member States of the European Union adopt different systems that allow the judicial function to be carried out by no-professional judges also called lay or honorary judges.

The participation of lay and honorary judges in the exercise of judicial activity means direct participation of the people in the exercise of justice. This popular involvement is an element of civil emancipation and a fundamental principle in any democratic society. It helps to increase the comprehensibility of proceedings and judgments and thus improves confidence in the legal system.

Lay and honorary judges bring to judicial proceedings, not only their professionalism, but also their valuable life experience and familiarity. This system of lay and honorary justice is a means of improving the efficiency of justice; lightening the workload on ordinary justice; and increasing public understanding of decisions.

Lay judges and arbitrators enhance the citizen's ability to seek justice by relieving or substituting for salaried judges in certain matters and thereby ensuring more effective and better justice in terms of time and costs.

In general, lay or honorary judges are placed in a panel with the regular judges and are endowed with specialized knowledge, acquired through experience, in such fields as commerce, technology, economics, medicine and education, can improve, in those particular judicial proceedings, the quality of justice.

These judges exercise their duties in a variety of forms. In summary the characteristics of their function:

- Prior training in the law or because they are recognized as having the ability to judge;
- Based on their particular actual specialized knowledge or as advocates;
- They judge alone or in a collegial body (popular juries);
- They collaborate with and on an equal footing with regular judges in judicial decisions made in a panel formed with regular judges;
- They judge or reconcile disputes
- They are subject to the same codes of conduct and disciplinary procedures.

4.2.1. Lay and honorary judges in different Member States

A significant number of EU countries use lay and honorary judges: Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Luxembourg, Slovakia, Slovenia, Spain and Sweden.

However, each system has its own peculiarities with regard to the recruitment procedure, the subject matter and degree of complexity of the proceedings.

The common characteristic of this category of judges in the States is the temporary nature of their office.

By way of example, we describe the functions of lay and honorary judges in 6 Member States:

- **Austria**

In Austria, honorary and lay judges, in criminal matters, participate in trials as representatives of the people. In this State, no special legal knowledge is required to serve as a non-professional judge. These judges do not have to have special knowledge as well as general life experience. In Austria, honorary and lay judges also perform their functions in commercial, financial, administrative and labour matters. In this case they must have special (non-legal) skills and experience.

Lay assessors and lay expert judges participate in court proceedings and decisions, juryman only in main (oral) hearings and in the decision (guilty or not guilty).

Honorary judges are instituted by the Ministry of justice for a period of normally 5 years and a subsequent appointment is permitted. All lay judges in Austria have the same status as the professional judges but are not paid for their office and have another profession.

- **Belgium**

In this state, a law degree is not required to serve as a lay judge. The lay judge in Belgium primarily practices another job. Precisely for this reason, judges are not paid a salary but are reimbursed for expenses. There are no pension, maternity or sickness benefits. In essence, when a lay judge is appointed by the court, an employment relationship does not arise.

- **Poland**

A law degree is not required to become a lay judge. Each lay judge has, another employment relationship. The appointment lasts about 4 years and the commitment required, by law, provides that he may be called to the court to provide his contribution up to a maximum of 12 times in a year.

- **Denmark**

It is not necessary to have a degree in law to hold the position. In some criminal trials, the Danish judicial system uses lay and sworn judges. In

criminal trials, lay judges and jurors are part of the legal judges. Lay judges and jurors are appointed for a period of four years, after which they can be reappointed for another four years.

When you serve as a lay judge or juror, you are not considered an employee of the Danish courts. In Denmark, being a lay judge or a juror in criminal trials is a civic duty. Lay judges perform a different process.

- **Germany**

Lay judges take part in main hearings or oral hearings. In Germany, the category is heterogeneous. Lay judges who, as representatives of the people, do not have to meet any technical requirements other than general life experience (lay judges in criminal matters in cases against adults, honorary judges in administrative courts). Judges who must have special (non-legal) skills and experience (commercial judges, junior judges, honorary judges in labour, social, financial, and agricultural litigation); judges who, representing a specific professional branch, participate in court proceedings and decisions concerning their profession.

In Germany, there are several ways to become an honorary judge in the different jurisdictions. Honorary judges are elected for a period of 5 years and a subsequent election or appointment is permitted.

All lay and honorary judges are not paid for their office and have another profession.

- **Italy**

In this state, both ordinary and non-professional judges exercise judicial function. These no-professional judges, therefore, exercise a true judicial function. For this reason, the honorary judges are chosen as a result of a competition for qualifications for which it is necessary the requirement of a degree in law. They participate in the hearings and write the sentences. The honorary judge is assigned the protection of individuals and legal entities in certain civil and criminal matters and / or up to a certain value.

Honorary judges in Italy are a different figure than the lay judges in the rest of Europe. Honorary judges can work in the courts even 4 or 5 days a week. This commitment in practice does not allow the performance of other jobs even if in the abstract this is possible.

4.2.2. The status of the Italian honorary judges according the CJEU

In the judgment *UX,*[1] the Court of Justice of the European Union clarifies the *status* of Italian non-professional judges. In particular, the Court issued a judgment on the status of "giudici di pace" (italian lay judge).

The case originated when the applicant in the main proceedings - giudice di pace - applied to the Giudice di pace di Bologna (magistrate) to issue a payment order against the Governo della Repubblica italiana (Government of the Italian Republic) in the amount of EUR 4 500.00.

This payment, according to the applicant, corresponded to the salary for the month of August 2018, period in which the applicant, having performed no work, was not paid unlike ordinary magistrates.

Indeed, in Italian legal system, the payments received by magistrates are linked to the work carried out and are calculated regarding the number of judgments issued. Consequently, during the annual dispensation in August, the applicant in the main proceedings did not receive any compensation, whereas ordinary judges are entitled to 30 days' paid leave.

The Giudice di pace di Bologna, 'the referring judge', considers, contrary to the highest Italian courts, that magistrates, despite the honorary nature of their service, must be regarded as 'workers' in accordance with the provisions of Directive 2003/88 and the Framework Agreement and therefore, receive the same legal protections as ordinary magistrates.

In those circumstances, the Giudice di pace di Bologna decided to stay the proceedings and to make **two requests** for a preliminary ruling to the CJEU.

1. Does a *giudice di pace* [magistrate], when making a request for a preliminary ruling, meet the definition of an ordinary European court having jurisdiction to make a request for a preliminary ruling pursuant to Article 267 TFEU, even though, under national law, the honorary magistrates do not, because of their job insecurity, enjoy working conditions equivalent to those of professional judges, even though they perform the same judicial functions and are included in the national judicial system?

[1] CJEU, Judgement of 6 July 2020, case C-658/18, *UX.*

2. Is the work carried out by the applicant *giudice di pace* [magistrate] covered by the term "fixed-term worker" for the purpose of Article 1(3) and Article 7 of Directive 2003/88, read in conjunction with clause 2 of [the Framework Agreement] and Article 31(2) of the Charter? Can the working conditions of non-career magistrates be equated with those of career magistrates?

The Court rules on the request as described below:

1. The first question seeks to establish whether the justice of the peace falls within the concept of "jurisdiction of one of the Member States" within the meaning of Article 267 TFEU.

The Court of Justice states that, according to settled case-law, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent[2].

The Court, in particular, focuses on the last requirement, that of "independence." According to the Court, this requirement can be divided into two components (external and internal);

a) *The first component of external order*

It requires *the body in question to exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, being thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions*[3].

According to the Court, this external order component is guaranteed by the **immovability** of the members of the body. The non-removability constitutes an inherent guarantee of the independence of judges, as it aims to protect the person of those who have the task of judging.

The principle of immovability is not absolute, but it is derogable.

The derogations are determined by specific rules, by means of express

[2] CJEU, Judgment of 21 January 2020, case C-274/14, *Banco de Santander*, par. 51.
[3] *Ibidem*, par. 57.

legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal[4].

In order to secure this principle, the Italian legal system contains specific rules for the *Giudici di pace*, establishing by law the duration of their assignment and the reasons of dismissal.

b) *The second component of internal order*

This second aspect is linked to 'impartiality' and seeks to ensure a level playing field for the parties to the proceedings and their respective interests regarding the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.

Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it[5].

As regards the dismissal of magistrates, it is apparent from the file that express national legislative provisions determine dismissals and the specific procedures related thereto.

For these reasons, the "*Giudice di pace*", as an Italian judicial body, can be considered as a judge of reference within the meaning of Article 267 TFEU.

2) In reply to the second question, the Court of Justice has ruled that Italian *Giudici di pace* (magistrates) must be considered as **fixed-term workers** and for this reason, the legal protections provided by the 1989 Framework Agreement on the Protection of Fixed-Term Work apply to them.

It is ultimately for the national court to apply that concept of "worker" in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circum-

[4] *Ibidem*, par. 60.
[5] *Ibidem*, par. 60

stances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved[6].

The Court may, however, mention to the referring court the principles and criteria which it must take into account in the course of its examination.

It must, therefore, be recalled, on the one hand, that any person who pursues real and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a "worker"[7].

On the other hand, according to settled case-law, the essential feature of an employment relationship is that *"for a certain period of time a person performs services for and under the direction of another person in return for which he or she receives remuneration"*[8].

The court, assessing the documentation contained in the case file, established that the justice of the peace is a worker.

The justice of the peace, in fact, in the context of his duties, carries out judicial activity. He therefore performs real and effective services, which are neither purely marginal nor incidental, for which he receives remuneration.

Moreover, the Court states that the Italian justice of the peace falls within the concept of 'worker for a fixed term', according to clause 2(1) of the framework agreement, since the relationship linking justices of the peace to the Ministry of Justice is of fixed duration.

Therefore, the framework agreement must apply.

The agreement applies to all workers who provide remunerated services under a fixed-term employment relationship linking them to their employer, if they are bound by a contract of employment or an employment relationship under national law.

Thus, the definition of "honorarium" does not therefore preclude the qualification as a worker since it does not mean that the financial benefits received by a Giudice di pace must be considered to be without remuneration and "neither the limited level of that remuneration nor the

[6] CJEU, Judgment of 14 October 2010, case C -428/09, *Union syndicale Solidaires Isère*, par. 29

[7] CJEU, Judgment of 26 March 2015, case C-316/13, Fenoll, par. 27).

[8] CJEU, Judgment of 20 November 2018, case C -147/17, Sindicatul Familia Constan□a e a., par.41.

origin of the resources for it can have any effect on the status of 'worker' within the meaning of EU law".

The "*Giudici di pace*" must therefore be considered workers.

This is not the first time that the Court has intervened on this specific aspect. Already in 2012 the Court of Justice recognized the "Recorders" in the United Kingdom as being subject to the principles and protections of the Framework Agreement on fixed-term work (ECJ, Judgment 1 March 2012, Case C-393/2010, O'Brien). As is well known, English Recorders are part-time judges, usually appointed for a period of at least five years, who have a similar jurisdiction to the Circuit Judge (the travelling judges), but who generally deal with less complex or serious disputes arising in civil, criminal and family law matters.
In the judgment 16-7-2020, Case C 658/18, The CJEU ruled that Recorders could be equated with employees if, on the basis of domestic law, it could be shown that the relationship binding such judges to the Minister of Justice is not, by its very nature, substantially different from that which binds their employers to employees, according to the characteristics established by national law.
On this occasion the Court of Luxembourg did not agree with the assumption of the British Government that under English law judges could not be considered workers because they were not employed under a contract of employment, but by formal royal appointment. For the British government, therefore, the category of judges, in general, did not fall within the scope of Directive 97/81, a view that was obviously not accepted by the Court of Justice. The figure of the Recorders has similarities with the Italian "*giudici di pace*". For this reason, the Judgment of July 16, 2020 recalls in several points the 2012 judgment on the case of O'Brien, named after the English Recorder who, at the time of his retirement, brought the case to ask for the recognition of vacations and his rights as a worker.

The Court of Justice then goes on to consider the applicability of the Framework Agreement stating unequivocally that*"the mere fact that an occupational activity, the pursuit of which provides a material benefit, is classified as 'honorary' under national law is irrelevant for the purposes of the applicability of the framework agreement, failing which the effectiveness of Directive 1999/70 and the framework agreement and their uniform application in the Member States would be seriously called into question, by reserving to the Member States the possibility of excluding, at their discretion, certain categories of persons from the benefit of the protection sought by those instruments" [...].*

Indeed, without any exclusion, 'Directive 1999/70 and the framework agreement apply to all workers who provide remunerated services under

a fixed-term employment relationship linking them to their employer' (paragraphs 117 to 118 of the judgment).

It follows that the principle of non-discrimination must be applied because justices of the peace perform essentially the same functions as those performed by members of the judiciary and it is not possible for them to be subjected to an unjustified difference in economic, social security and welfare treatment.

In the Court's view, however, this does not mean that honorary judges and members of the judiciary must necessarily have the same economic treatment: there may be legitimate objective reasons that amply justify higher remuneration for professional judges. On the contrary, on this specific point the Court states that it is for the national court to assess whether different treatment is justified.

In conclusion and summarizing the salient points of the judgment, the Court of Justice of the European Union, with regard to the legal and economic status of Italian "*Giudici di pace*", has ruled that:

- Italian "*Giudici di pace*" are considered judges within the meaning of art. 267 of the Treaty on the Functioning of the Union.
- Italian "*Giudici di pace*" are fixed-term workers who must be granted both paid leave and adequate economic and social security treatment.

This judgment will have important repercussions on all honorary judges in the European Union and on the role of the so-called "non-professional" or "honorary" judges in Europe.

4.2.3. Lay and honorary judges and preliminary ruling

With the judgment *UX*[9] , for the first time the CJEU recognized the "worker *status*" under European law of Italian non-carrer judges.

This recognition is very important because, in the systems of the Member States, the non-professional judge is not considered a worker. On the contrary, in most Member States, the function of a non-carrer judge is combined with another job.

This implies that, although they perform the same functions as profes-

[9] CJEU, Judgment of July 6, 2020, case C 658/18, *UX*.

sional judges (deciding disputes between private parties and with public entities; acting as public prosecutor on behalf of the state), they do not receive adequate legal training even if they have to apply EU law

The lack of training has a strong impact on the number, object, and result of references for preliminary rulings to the CJEU.

In particular, a systematic analysis of the requests for preliminary rulings submitted by lay and honorary judges to the Court of Justice shows a **low number of referral** orders.

It must be considered that from 2004 to the present, about 20 references for preliminary rulings have been proposed by this category of judges.

There are two reasons for this low number. One, as mentioned, caused by the lack of adequate training; the second one caused by the fact that it is not always easy to recognize whether a non-carrer judge can be included in the notion of referring judge according to art. 267 TFEU.

The Court of Justice, for the first time in July 2020, stated that the Italian non-professional judge is considered to be a competent court to make a reference for a preliminary ruling.

The **object** of the preliminary rulings also appears limited.

The subject matter of the references also appears to be limited. At the end of the examination, it is clear that the references for a preliminary ruling that have been made concern mainly the recognition of the rights of non-professional judges and their status under European law.

The reason is, as stated above, the difficulty to define the figure of non-professional judges. If the notion and the qualification of non-professional judges in the various Member States are still uncertain, future rulings will concern probability the status of the judge before and questions of validity and interpretation of EU sources then.

However, there are references for a preliminary ruling that have a different subject than the classification of professional status.

Just to mention one case, the request for a preliminary ruling issued on 19 June 2020 by the Giudice di pace di Massa (IT), Case C-274/20 concerning the principle of non–discrimination [https://curia.europa.eu/juris/showPdf.jsf?text=giudice%2Bdi%2Bpace%2Bdi%2Bmassa&docid=230124&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5009589].

Not only the number and subject matter of references for a preliminary ruling are limited, but also the cases **in which the Court has ruled** on request raised by lay or honorary judges are limited.

In the large part of cases the Court ruled that the questions were inadmissible. The main reason for such a high number of inadmissibility judgments has to be attributed to the problems that Italian non-professional judges have when drafting requests of preliminary ruling.

See in this regard, the orders of inadmissibility issued by the Court of Justice:

- **Order, 17 December 2019, Case C 618/18**, concerning a request for a preliminary ruling under the article 267 TFEU, from the *Giudice di pace di L'Aquila* (Italy), made by order of 19 September 2018, received at the Court on 1 October 2018.
  The Court declares the question manifestly inadmissible pursuant to Article 53(2) of the Rules of Procedure of the Court, recalling its previous order of 6 September 2018, Case 472/17.
  According to settled case law of the Court, the procedure established by Article 267 TFEU constitutes an instrument of cooperation between the Court and national courts , by means of which the former provides the latter with the elements of interpretation of EU law which are theirs necessary for the resolution of the disputes they are called upon to settle (see, to that effect, judgment of 16 July 1992, Meilicke, C-83/91, EU: C: 1992: 332, paragraph 22, as well as orders of 8 September 1992 2016, Caixabank and Abanca Corporación Bancaria, C -91/16 and C -120/16, not published, EU: C: 2016: 673, point 13, and of 6 September 2018, Di Girolamo, C -472/17, not published, EU: C: 2018: 684, paragraph 22).
  However, an application submitted by a national court must be rejected if it appears clearly that the required interpretation of EU law has no bearing on the actual reality or the subject matter of the dispute in the main proceedings, or if the problem is of a hypothetical nature, or even when the Court does not have the elements of fact or law necessary to usefully answer the questions referred to it[10].

[10] CJEU, Judgment of 10 December 2018, case C- 621/18, *Wightman*, pt. 27 and case law cited therein.

In that regard, it should be recalled that the referring court had clearly indicated, in the context of that first preliminary ruling, that it was not competent to rule on such an application for compensation for paid annual leave, stating that depending on the qualification that must be given, under national law, to the employment relationship between the applicant in the proceedings principal and his employer, falls within the jurisdiction of the labour or administrative judge[11].

Under these conditions, the Court held that the request for a preliminary ruling then submitted for its examination was manifestly inadmissible.

[https://curia.europa.eu/juris/document/document.jsf?docid=221960&text=giudici%2Bonorari&dir=&doclang=IT&part=1&occ=first&mode=DOC&pageIndex=0&cid=5258619#ctx1]

- **Order, 17 January 2019, Case C 626/17**, concerning a request for a preliminary ruling submitted to the Court, pursuant to article 267 TFEU, from the *Giudice di pace di Roma* (Italy), with an order dated 17 October 2017, received at the Court Registry on 3 November 2017. Again, the Court of Justice applied Article 53(2) of the Court's Rules of Procedure. The Court declared the order inadmissible because the question, although similar to the one raised in UX, is formulated in a hypothetical manner.

  The Court states that *"the justification for a question referred does not consist in the formulation of such opinions, but in the need to concretely settle a dispute"*[12].

  [https://curia.europa.eu/juris/document/document.jsf?docid=210201&text=&doclang=IT&pageIndex=0&cid=5256952]

  For the same grounds of inadmissibility, see:

- **Order, 17 January 2019, Case C 600/17** concerning the request for a preliminary ruling under Article 267 TFEU from the *Giudice di*

[11] CJEU, Order of September 6, 2018, case C- 472/17, *Di Girolamo*, par. 30.

[12] CJEU, Judgment of 8 September 2010, case C- 409/06, *Winner Wetten*, par. 38; Judgment of 16 June 2016, case C-351/14, *Rodríguez Sánchez*, par. 56; Order of September 6, 2018, case C-472/17, *Di Girolamo*, par. 26.

pace di Roma (Italy), made by order of 25 August 2017, received at the Court on 16 October 2017.
[https://curia.europa.eu/uris/document/document.jsf?text=giudici%2Bonorari&docid=210202&pageIndex=0&doclang=it&mode=req&dir=&occ=first&part=1&cid=4963761#ctx1];

- **Order, 10 December 2020, Case C-220/20** concerning the request for a preliminary ruling from the *Giudice di pace di Lanciano* (Italy), by order of 18 May 2020, is manifestly inadmissible
[https://curia.europa.eu/juris/document/document.jsf?docid=238609&text=giudice%2Bdi%2Bpace&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=5251371#ctx1];
- **Order, 11 February 2004 in joined cases C-438/03, C-439/03, C-509/03 and C-2/04** concerning references to the Court under Article 234 EC from the *Giudice di pace di Bitonto* (Italy) for a preliminary ruling
[https://curia.europa.eu/juris/showPdf.jsf;jsessionid=48B76C282B5581E31C9596432B58BCB7?text=&docid=48968&pageIndex=0&doclang=IT&mode=lst&dir=&occ=first&part=1&cid=1227908]

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