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2013 Report on the Application of the EU Charter of Fundamental Rights

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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE
COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE
COMMITTEE OF THE REGIONS**

2013 Report on the Application of the EU Charter of Fundamental Rights

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1. INTRODUCTION

The Charter of Fundamental Rights of the European Union (the Charter) is addressed, first and foremost, to the EU institutions. It complements national systems and does not replace them. Member States are subject to their own constitutional systems and to the fundamental rights set out in these. Member States need only have regard to the Charter when their national measures implement EU law, as stipulated in Article 51 of the Charter.

This report highlights the role of the Court of Justice of the European Union (the Court) in implementing the Charter, especially as regards the most recent development of its case law on the Charter's applicability in Member States.

The report also gives an account of how the EU institutions have respected and promoted fundamental rights, under the scrutiny of the Court, in all their initiatives, including developing new legislation and policies, and enforcement actions.

Finally, the report draws attention to the importance of the European Convention on Human Rights (ECHR) and to the progress made on the EU's accession to this instrument.

Detailed information on the application of the Charter, illustrating concrete problems faced by individuals, is provided by the Staff Working Document annexed to this report (Annex 1). Progress on implementing the 2010-2015 Strategy for equality between women and men is presented in a separate annex (Annex 2).

2. APPLICABILITY OF THE CHARTER TO THE MEMBER STATES

National judges are increasingly aware of the Charter's impact, and they seek guidance from the Court¹ on its application and interpretation under the preliminary rulings procedure².

To determine whether a situation falls within the scope of the Charter, as defined in its Article 51, the Court examines, in particular, whether the relevant national legislation is intended to implement a provision of EU law, the nature of the legislation, whether it pursues objectives other than those covered by EU law, and also whether there are specific rules of EU law on the matter or which may affect it³.

Three recent cases are good examples of situations where the Court held that the Member States were **not implementing EU law**, and thus where the Charter did not apply.

First, in *Pringle*⁴, the Court held that when Member States established a permanent crisis resolution mechanism for the Eurozone countries, they were not implementing EU law. The Treaties do not confer any specific competence on the EU to establish

¹ For an overview of the applications for preliminary rulings submitted to the Court in 2013 which refer to the Charter, see appendix II..

² See Article 267 TFEU.

³ CJEU, C-309/96 *Annibaldi* 18.12.1997, §§ 21 to 23, and C-40/11 *Iida*, 8.11.2012, § 79.

⁴ CJEU, C-370/12, *Thomas Pringle*, 27.11.2012.

such a mechanism. Consequently, Member States were not implementing EU law within the meaning of Article 51, and the Charter did not apply.

Second, in *Fierro and Marmorale*⁵, the Court examined Italian legislation which requires a deed of sale of real estate to be annulled if the real estate was modified without regard to town planning laws. Such automatic annulment hampers the exercise of the right to property (Article 17⁶). The Court declared the case inadmissible as there was no link between national laws on town planning and EU law.

Third, in *Cholakova*⁷, the Court examined a situation where the Bulgarian police had arrested Mrs Cholakova because she had refused to present her identity card during a police check. The Court held that, as Mrs Cholakova had not shown an intention to leave Bulgarian territory, the case was of a purely national nature. The Court held that it was not competent to deal with the case and declared it inadmissible.

There are currently three situations in which it is **clear that the application of the Charter is triggered**.

First, ‘implementing EU law’ covers a Member State’s **legislative activity and judicial and administrative practices when fulfilling obligations under EU law**. This is the case, for instance, when Member States ensure effective judicial protection for safeguarding rights which individuals derive from EU law, as they are obliged to do under Article 19 (1) TEU. The Free Movement Directive⁸ permits Member States to restrict the freedom of movement of EU citizens on grounds of public policy, public security or public health. The Court held in the *ZZ* case that the basis for such a refusal must be disclosed to the person concerned.⁹ In this case, the grounds for a decision refusing entry into the UK were not disclosed for reasons of national security. The Court confirmed that a person has the right to be informed of the basis for a decision to refuse entry, as the protection of national security cannot deny the right to a fair hearing, rendering the right to redress ineffective (Article 47).

Second, the Court established that the Charter applies **when a Member State authority exercises a discretion that is vested in it by virtue of EU law**. In *Kaveh Puid*¹⁰ the Court confirmed its previously established case-law¹¹ and held that a Member State must not transfer an asylum seeker to the Member State initially identified as responsible if there are substantial grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment, in violation of Article 4 of the Charter.

Finally, national measures linked to the disbursement of EU funds under shared management may constitute implementation of EU law. In *Blanka Soukupová*¹², the Court held that in implementing Council Regulation 1257/1999 on support for rural

⁵ CJEU, C-106/13, *Francesco Fierro and Fabiana Marmorale v Edoardo Ronchi and Cosimo Scoozza*, 30.5.2013.

⁶ Subsequent articles referred to in brackets are Charter articles.

⁷ CJEU, C-14/13, *Gena Ivanova Cholakova*, 6.6.2013.

⁸ Directive 2004/38/EC, OJ 2004 L 158, p. 77.

⁹ CJEU, C-300/11 *ZZ v Secretary of State for the Home Department*, 4.6.2013.

¹⁰ CJEU, C-4/11 *Bundesrepublik Deutschland v Kaveh Puid*, 14.11.2013.

¹¹ CJEU, joined cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department*, 21.12.2011.

¹² CJEU, C-401/11 *Blanka Soukupová*, 11.04.2013.

development from the European Agricultural Guidance and Guarantee Fund Member States are required to respect the principles of equal treatment and non-discrimination, enshrined in Articles 20, 21(1) and 23 of the Charter. When providing early retirement support for elderly farmers, Member States are required to ensure equal treatment between women and men, and to prohibit any discrimination on grounds of gender.

A much debated judgment in 2013 on the **applicability of the Charter** was the **Åkerberg Fransson judgment**¹³. This ruling is an important step in the on-going process to clarify the interpretation of Article 51 of the Charter.

The Court was asked to clarify whether cases of national law which meet objectives laid down in EU law also amount to situations where EU law is being ‘implemented’ within the meaning of Article 51 of the Charter. The case was referred to the Court for a preliminary ruling by a District Court in Sweden, which was uncertain whether criminal proceedings for tax evasion in the context of VAT declarations could be brought against a defendant if an administrative tax penalty had already been imposed upon him for the same act of providing false information. Such proceedings were to be examined in relation to the *ne bis in idem* principle (the principle that a person should not be punished twice for the same offence), enshrined in Article 50 of the Charter, even though the underlying national legislation for these administrative penalties and criminal proceedings had not been adopted to transpose EU law.

The Court pointed to the fact that under EU law, the Member States have an obligation to ensure the collection of all the VAT due, to counter illegal activities affecting the financial interests of the EU, and to take the same measures to counter fraud affecting the financial interests of the EU as they take to counter fraud affecting their own interests.¹⁴

The EU’s own resources include revenue from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules. There is therefore a direct link between the collection of VAT revenue in compliance with the relevant EU law, and the availability to the EU budget of the corresponding VAT resources. Any lacuna in the collection of VAT revenue at a national level potentially impacts on the EU budget. The Court held that, *‘[s]ince the fundamental rights guaranteed by the Charter must (...) 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’*¹⁵. According to the Court, the national law in this context was *‘designed to penalise an infringement of [the] directive and [was] therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for a conduct prejudicial to the financial interests of the European Union.’*¹⁶

As to the outcome of the case, the Court observed that the principle of preventing a person from being punished twice for the same offence does not preclude a Member

¹³ CJEU, C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26.2.2013.

¹⁴ *Ibid.*, § 26.

¹⁵ *Ibid.*, § 21.

¹⁶ *Ibid.*, § 28.

State from imposing, for the same acts, a combination of tax penalties and criminal penalties, as long as the tax penalty is not criminal in nature.

3. ACTIONS TO PROMOTE THE EFFECTIVE IMPLEMENTATION OF THE CHARTER

Fundamental rights are promoted through all EU policies. Where the EU has competence to act, the Commission proposes EU legislation that gives concrete effect to the rights and principles enshrined in the Charter. The Commission also takes active measures to promote the Charter and enforces the respect of EU law through infringement procedures against Member States.

The respect of the Charter by the institutions themselves is scrutinised by the Court, which checks the compliance of EU acts with the Charter.

3.1. EU legislation

The Commission ensures and thoroughly checks that all **legislative proposals** respect and promote fundamental rights. It follows this approach throughout the legislative process, from the proposal itself, to its discussion during negotiations between the EU institutions and its final adoption.

3.1.1. *Legislative proposals*

In the field of criminal law, **the Commission proposed five legal measures to further promote the Procedural Rights Agenda** and strengthen the foundation for European criminal justice policy. These measures include three proposals for Directives on:

- strengthening certain aspects of the presumption of innocence and of the right to be present at trial during criminal proceedings (Articles 48 and 47);
- special safeguards for children suspected or accused in criminal proceedings (Articles 24 and 49);
- provisional legal aid for suspects or people accused of crimes who have been deprived of liberty and legal aid in European arrest warrant proceedings (Article 47(3)).

The measures also include two Recommendations, on procedural safeguards for vulnerable people suspected or accused in criminal proceedings and on the right to legal aid for suspects or people accused of a crime during criminal proceedings (Article 47)¹⁷.

The need for criminal law measures to be grounded in strong EU-wide standards for procedural rights and victims' rights, in line with the Charter, is central to strengthening the principle of mutual trust on which judicial cooperation is based.

The Commission has also ensured effective protection for professional legal privilege within the EU's money laundering legislation. The proposed **Anti-Money Laundering Directive** of February 2013 imposes an obligation to report suspicions

¹⁷ COM(2013) 821, 822 and 824, 27.11.2013, and COM(2013) 8178 and 8179, 27.11.2013.

of money laundering or terrorist financing to the authorities in a number of professional activities. However, considering the crucial importance of the right of defence (Article 48), the proposed Directive requires Member States not to apply this obligation to lawyers under certain circumstances, for instance in relation to information received in the course of ascertaining the legal position of a client.¹⁸

Furthermore, the Commission has ensured a means of redress for **workers when exercising their right of free movement in the EU**. This legislative proposal¹⁹ aims, *inter alia*, to introduce a legal obligation for Member States to provide EU mobile workers with appropriate means of redress at national level (Article 47).

In September 2013, the Commission proposed a Regulation on indices used as **benchmarks in financial instruments and financial contracts**.²⁰ Thereby it aimed to subject benchmarks, provided by market players in the financial sector, to clearer standards and supervision. It envisaged giving competent authorities checking and enforcement powers, including access to data transfers upon request. The Commission assessed the impact of the proposal on several rights protected by the Charter: protection of personal data (Article 8), right to freedom of expression and information (Article 11) and freedom to conduct a business (Article 16).

In its proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex²¹, adopted in April 2013, the Commission ensured that any measures taken during surveillance operations coordinated by Frontex must be in full respect of fundamental rights and the principle of *non-refoulement*, which entails that no refugee should be returned to any country where he or she is likely to face the death penalty, torture or other inhuman or degrading treatment or punishment (Article 19(2)). Before disembarkation in a third country, Member States must take into account the general situation in that country to ensure that it is not engaged in practices in violation of the principle of *non-refoulement*, the persons intercepted or rescued must be identified, and their personal circumstances must be assessed.

3.1.2. *Inter-institutional negotiations with important fundamental rights aspects*

2013 has been an important year for the right to protection of personal data. In light of this year's revelations about global surveillance programmes potentially monitoring all citizens' communication, the EU institutions needed to make progress on their negotiations on a new data protection standard.²² In October 2013, the European Parliament's LIBE Committee supported the Commission's proposal.²³ The aim of the reform is to put individuals back in control of their data by updating their rights (Article 8). Explicit consent, the right to be forgotten, the right to data portability and the right to be informed of personal data breaches are key elements. They will help to close the growing rift between citizens and the companies with which they share their data, willingly or otherwise.

¹⁸ CJEU, C-305/05 *Ordre des barreaux francophones et germanophone*, 26.6.2007.

¹⁹ COM(2013) 236 final, 26.4.2013.

²⁰ COM(2013) 641 final, 18.09.2013.

²¹ COM(2013) 197 final, 12.04.2013.

²² COM(2012) 11 final, 25.01.2012 and COM(2012) 10 final, 25.01.2012.

²³ European Parliament, Document no. A7-0403/2013.

In order to promote the freedom to conduct a business, enshrined in Article 16 of the Charter, the Commission made a proposal in 2012 to modernise the rules on **cross-border insolvency**.²⁴ During the negotiations, which made real progress in 2013, the impact of this proposal on minority creditors' rights to an effective remedy (Article 47) and to property (Article 17) was thoroughly considered.

3.1.3. *Implementation of the Charter through measures adopted by the EU legislative and by the Commission*

In the field of procedural rights, **the Directive on the right of access to a lawyer** and the right to have a third party informed upon deprivation of liberty was adopted²⁵. With this landmark legislation, all suspects are guaranteed the right to be advised by a lawyer from the earliest stages of proceedings until their conclusion (Articles 47 and 48).

The European Parliament and the Council adopted the recast **Dublin Regulation**²⁶ which guarantees effective remedy to applicants on appeals against transfer decisions, thus ensuring full effect of the right of an asylum seeker to remain on the territory and reducing the risk of 'chain *refoulement*' (Article 19(2)). It also incorporates the Court's case law providing for an asylum seeker not to be sent to a Member State where there is a serious risk of violation of his/her fundamental rights. In such a case, another Member State is to assume responsibility without delay, in order not to jeopardise the asylum seeker's quick access to justice.

The European Parliament and the Council also adopted the **Asylum Procedures Directive**²⁷ and the **Reception Conditions Directive**²⁸. The former reinforces guarantees safeguarding the fundamental right to asylum, in particular, by strengthening the right to access asylum procedures (Articles 18 and 19), whereas the latter includes improved and clearer standards to more effectively safeguard the fundamental right to dignity, especially as regards vulnerable asylum seekers and further harmonises the rules on detention, laying down clear and restrictive grounds, conditions for detention, and guarantees for detainees (Articles 1, 4, 6, 7, 18, 21, 24, and 47).

As regards **victims' rights**, a **Regulation on mutual recognition of protection measures in civil matters**²⁹ establishes a simple and rapid mechanism to recognise protection measures ordered in a Member State in civil matters. People protected by such measures (mostly women who have restraining orders against someone) can thus be assured that the order obtained in their home country will have the same standing wherever they are in the EU.

The 2014 **European elections** will be the first to be held under the Lisbon Treaty, which has strengthened the powers of the European Parliament. In its recommendation of March 2013³⁰, the Commission invited political parties to endorse a candidate for European Commission President in the next European

²⁴ COM(2012) 744 final, 12.12.2012.

²⁵ Directive 2013/48/EU, OJ L 294.

²⁶ Regulation 604/2013, OJ L 180, p. 31.

²⁷ Directive 2013/32/EU, OJ L 180.

²⁸ Directive 2013/33/EU, OJ L 180, 29.6.2013, p. 96.

²⁹ Regulation 606/2013, OJ L 181.

³⁰ Recommendation 2013/142/EU, OJ L 79, p. 29.

elections, and to display their European political party affiliation. The recommendation aims to promote the right to vote, enshrined in Article 39 of the Charter, by informing voters about the issues at stake in these elections, encouraging a Europe-wide debate, and ultimately improving voter turnout.

3.2. Measures promoting fundamental rights

Large companies across the EU continue to be predominantly led by men. In order to achieve substantive equality between women and men on corporate boards, in accordance with Article 23 of the Charter, the Commission proposed a Directive last year to improve the gender balance of non-executive directors of companies listed on stock exchanges³¹. The European Parliament passed its resolution on the proposed Directive³² at first reading, in November 2013, confirming a broad consensus on increasing women's representation on corporate boards and largely endorsing the Commission's approach to redressing the current imbalance.

Another area where the EU continues to reinforce protection of equality rights and promote the adoption of positive measures is that of **Roma integration**. Major progress was achieved in 2013 on an EU-wide approach to tackle the exclusion of Roma. A Council Recommendation³³ was adopted unanimously in December 2013. Member States committed to improving the economic and social integration of Roma communities. Throughout the process, Roma themselves were included in discussions at the highest decision-making levels.

3.3. EU enforcement action

The Commission exercised its role as guardian of the Treaties and took action to ensure that Member States enforce EU legislation that gives concrete effect to the Charter.

Following analysis of national implementation of the **Visa Code**³⁴ on the right to appeal against a visa refusal/annulment/revocation, the Commission raised a number of questions on the compatibility of national legislation with the provisions of the Visa Code and of the Charter. It concluded that the right to an effective remedy, enshrined in Article 47 of the Charter, requires that an appeal against a visa refusal, annulment or revocation, includes access to a judicial body, as only or last instance of appeal. Letters of Formal Notice were sent to several Member States.

In 2012³⁵ the Court ruled that the sudden, radical lowering of the retirement age for judges, prosecutors and notaries in Hungary did not comply with Directive 2000/78, which ensures that the principle of non-discrimination recognised in Article 21 of the Charter is fully respected in the field of employment. Following a fruitful dialogue with the Commission, Hungary adopted a law in March 2013, which provides solutions to all issues raised and correctly and completely implements the Court's judgment.

³¹ COM(2012) 614 final, 14.11.2012

³² European Parliament, Document no A7-0340/2013.

³³ Council recommendation on effective Roma integration measures in the member states, 9.12.2013.

³⁴ Regulation 810/2009, OJ L 243.

³⁵ CJEU, C-286/12, *Commission v Hungary*, 6.11.2012.

Finally, as regards **data protection**, the Commission monitored Austria's implementation of the Court's 2012 ruling³⁶ on the lack of independence of the data protection supervisory authority. Austria amended its data protection legislation and ensured that the member of the authority who manages its day-to-day business is only subject to supervision by its Chair, and that the authority is no longer part of the Federal Chancellery but has its own budget and staff.

3.4. Control of the Court over the EU institutions

The EU institutions' regard to the Charter is scrutinised by the Court, which delivered several judgments to ensure that the EU institutions act in line with the Charter. These judgments also related to how well EU legislation and decisions addressed to individuals comply with the Charter.

The EU can issue penalties or restrictive measures which might impact on the fundamental rights of the person to whom these are issued. In the *Kadi II*³⁷ appeal judgment, the Court clarified certain procedural rights of persons suspected of association with terrorism, including the right to good administration, the right to an effective remedy and the right to a fair trial (Articles 41 and 47). The Court **ensured the protection of fundamental rights and freedoms whilst recognising the imperative need to combat international terrorism**. Mr Kadi's assets had been frozen by the Commission, implementing a decision by the UN Sanctions Committee, as part of a UN Security Council resolution. The Court stated that, since no information or evidence had been produced by the Commission to substantiate the allegations that Mr Kadi was involved in activities linked to international terrorism (allegations he strongly denied), those allegations did not justify the adoption, at EU level, of restrictive measures against him.

The EU institutions in a number of cases, irrespective of the existence of UN Security Council resolutions, have adopted decisions and regulations freezing the funds of persons and bodies who the EU institutions have identified as being involved in nuclear proliferation. Some of the persons and bodies concerned brought actions seeking to annul these decisions. In a series of judgments³⁸, the General Court annulled actions by the EU institutions towards several of the applicants. It found that the EU institutions had not produced enough evidence to justify the measures taken, and that, in certain cases, the EU institutions had breached the obligation to give reasons and disclose evidence.

In *Besselink*³⁹, the General Court gave effect to the **right of access to documents**, enshrined in Article 42 of the Charter, and it annulled in part the Council decision refusing access to a document on the EU's accession to the ECHR. The Court held that the Council made an error of assessment in refusing access to one of the negotiating directives it had adopted. The position reflected in this document had

³⁶ CJEU, C-614/10 *Commission v Austria*, 16.10.2012.

³⁷ CJEU, C-584/10 P *Commission and Others v Kadi (Kadi II)*, Appeal Case against T-85/09 *Kadi v Commission (Kadi I)*, 18.7.2013.

³⁸ General Court, joined cases T-35/10 and T-7/11 *Bank Melli Iran*; Case T-493/10 *Persia International Bank plc*; joined cases T-4/11 and T-5/11 *Export Development Bank of Iran*; T-12/11 *Iran Insurance Company*; T-13/11 *Post Bank Iran*; T-24/11 *Bank Refah Kargaran*; T-434/11 *Europäisch-Iranische Handelsbank AG*; joined cases T-42/12 and T-181/12 *Naser Batani*; T-57/12 *Good Luck Shipping*, and case T-110/12 *Iranian Offshore Engineering & Construction Co. v Council*, 6.9.2013.

³⁹ General Court, T-331/11 *Besselink v Council*, 12.9.2013.

already been communicated to the negotiating parties. Therefore its disclosure could not jeopardise the climate of confidence between the negotiating parties.

While these decisions were addressed to individuals, legislative acts of the EU addressed to the Member States are also scrutinised by the Court.

The Court reviewed **the compatibility of the Framework Decision on the European Arrest Warrant⁴⁰ (EAW) with Articles 47 and 48 of the Charter**. The Court was asked if a Member State could make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid any adverse effects on the right to a fair trial and the rights of the defence as guaranteed by the constitution of the Member State surrendering the person in question⁴¹. The Court held that the Framework Decision on the EAW was fully compatible with the Charter. To make the surrender of a person subject to a condition not provided for under the Framework Decision would undermine the principles of mutual trust and recognition that that decision purports to uphold, and would compromise its effectiveness.

4. ROLE OF THE ECHR

The mere fact that the Charter only applies when Member States are implementing EU law does not mean that there is a gap in the protection of fundamental rights. Individuals have recourse to national remedies and, after having exhausted these, they can lodge an application to the European Court of Human Rights, in line with the ECHR, to which all EU Member States are a party.

The Treaty of Lisbon imposed an obligation on the EU to accede to the ECHR. In April 2013, the draft agreement on the EU's accession to the ECHR was finalised, which is a milestone in the accession process. As a next step, the Commission has asked the Court to give its opinion on the draft agreement.

5. CONCLUSION

In 2013 the Court dealt with a large number of cases concerning the Charter's applicability at national level. This highlights the Charter's increasing interaction with national legal systems. In this context, the *Åkerberg Fransson* judgment plays an important role in further defining the Charter's application in the Member States by national judges, even though the case law in this respect is still evolving and likely to be continuously refined.

National judges are key actors in giving concrete effect to the rights and freedoms enshrined in the Charter, as they directly ensure that individuals obtain full redress in cases where fundamental rights within the scope of EU law have not been respected.

EU institutions have made significant efforts to ensure the consistent application of the Charter's provisions since it gained legally binding force as primary EU law. Any impact on fundamental rights needs to be carefully considered during legislative

⁴⁰ Framework Decision 2002/584/JHA as amended by Framework Decision 2009/299/JHA, OJ 2009 L 81, p. 24.

⁴¹ CJEU, C-399/11 *Stefano Melloni v Ministerio fiscal*, 26.2.2013.

procedures, especially at the stage of elaborating final compromise solutions. A strong inter-institutional commitment is required to achieve this goal.

EU legal acts can also be challenged before the Court for any infringements of fundamental rights. The Court's scrutiny extends to Member States as well, but only where they implement EU law. Outside that area, Member States apply their own national fundamental rights systems. This is a clear and deliberate choice made by the Member States when designing the Charter and the Treaty.

The EU institutions must go further than merely respecting the legal requirements following from the Charter. They must continue fulfilling the political task of promoting a fundamental rights culture for all, citizens, economic actors and public authorities alike. The fact that the Commission has received more than 3 000 letters from the general public regarding the respect of fundamental rights indicates that individuals are aware of their rights and demand respect for them. The Commission supports their endeavours.