Université Paris-Panthéon-Assas
école doctorale de droit international, droit européen, relations internationales et droit comparé

en cotutelle internationale avec

Charles University, Faculty of Law
Dissertation in Theoretical Legal Sciences – European Law

Thèse de doctorat en Droit européen
soutenue le 14 décembre 2022

Thèse de Doctorat / décembre 2022

The Application of the Charter of Fundamental Rights of the European Union by Administrative Courts in France and in the Czech Republic: Comparative Analysis

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The Application of the Charter of Fundamental Rights of the European Union by Administrative Courts in France and in the Czech Republic: Comparative Analysis

Dissertation

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Programme of study: Theoretical Legal Sciences – European Law

Date of dissertation (closure of manuscript): 1 November 2022

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Acknowledgements

I wish to express my sincere gratitude to my supervisors, Prof. Richard KRÁL and Prof. Francesco MARTUCCI, for accompanying me in my doctoral research. I also wish to thank Prof. KRÁL for his mentoring and encouragement ever since 2013.

I thank Prof. Stéphane DE LA ROSA, Prof. Michal TOMÁŠEK and Associate Prof. David SEHNÁLEK for agreeing to assess my work.

Martina POHANKOVÁ made many helpful comments on the final version of the manuscript.

I am grateful to the French Government for financing my research through a double degree scholarship. My sincere thanks go to the French Embassy in Prague and its team for making that possible. The help of Dr. David KOHOUT, M. Gianni GORTAN and Ms Adéla ŠEJDLOVÁ was indispensable in making this work.

The research for this thesis was supported by the Charles University, Project GA UK No 540219, conducted at the Faculty of Law, Charles University. I would like to thank Ms Kateřina DOLEJŠÍ and Ms Ivana HULMÁKOVÁ for their help with administering this and other projects.

My final thanks are to my parents, who encouraged me in all sorts of ways throughout my studies.

Lastly, I would like to stress that all the views expressed in this thesis are my own, and all the data used comes from publicly available sources. The sections on the case law of the Czech Supreme Administrative Court had been written before my time there as a law clerk.

Petr Mádr

Titre et Résumé :

L'application de la Charte des droits fondamentaux de l'Union européenne par les juridictions administratives : étude comparée franco-tchèque

Cette thèse contribue à combler le manque de connaissances empiriques sur l'application de la Charte des droits fondamentaux de l'UE au niveau national en dressant un état des lieux complet du traitement de la Charte par le juge administratif tchèque et français. Elle s'articule autour de trois axes de réflexion. Tout d'abord, il s'agit de s'interroger sur la manière dont les juges prennent en compte l'applicabilité matérielle limitée de la Charte. Ensuite, le rôle de la Charte dans les raisonnements juridiques et l'influence de celle-ci sur les solutions des litiges font l'objet d'une étude approfondie. Enfin, l'analyse porte sur les interactions entre la Charte et d'autres règles de droit, qu'il s'agisse du droit dérivé de l'UE, de la CEDH ou des règles constitutionnelles internes. L'idée est de rassembler toutes les décisions citant la Charte, puis de les présenter sous forme d'études de cas et de les évaluer selon les trois perspectives mentionnées. L'évaluation se fait sous deux angles complémentaires. D'une part, elle examine dans quelle mesure les juges nationaux se conforment aux obligations découlant de la Charte. D'autre part, elle identifie et explique les manières dont ces juges traitent la Charte, dans le but d'établir une typologie des effets juridiques de la Charte au niveau national. La thèse montre que, dans les deux pays, la jurisprudence portant sur la Charte est plus diverse que ne le suggèrent les études existantes. Parmi les thèmes qui traversent cette jurisprudence, l'on retrouve notamment le pragmatisme du juge et le rôle déterminant des parties au litige, mais aussi la volonté du juge de respecter le niveau de protection garanti par la Charte.

Descripteurs : Droit européen, Charte des droits fondamentaux de l'Union européenne, Champ d'application de la Charte, Effets juridiques de la Charte, Droit administratif (droit européen), Droit européen et droit interne, Droit administratif -- France -- Jurisprudence, Droit administratif -- République tchèque -- Jurisprudence, Droit public (droit européen) -- Jurisprudence, Juge national et la Charte, Modalités d'invocation de la Charte, Pragmatisme du juge

Title and Abstract:

The Application of the Charter of Fundamental Rights of the European Union by Administrative Courts in France and in the Czech Republic: Comparative Analysis

This thesis contributes to filling the gap in empirical research on the application of the EU Charter of Fundamental Rights by ordinary national courts, choosing Czech and French administrative courts as its focus. It builds on and goes beyond the existing literature by developing a coherent narrative centred around three key themes in the decision-making of Czech and French administrative courts: the Charter's applicability, its role in the reasoning and its interactions with other legal rules, such as EU secondary legislation, the ECHR and national constitutions. The primary aim is to gather data on when and how these courts give effect to the Charter in their decision-making and to evaluate this data from the three perspectives mentioned. The evaluation is made from two complementary angles. First, and unsurprisingly, it will concern itself with the extent to which national courts comply with the obligations imposed on them by the Charter and EU law. Secondly, and more originally, it will identify patterns in the Charter's treatment by national courts and offer explanations for such patterns. More specifically, it will propose a typology of the Charter's legal effects and of its interactions with other legal sources. By contextualising the empirical data in this way, the thesis will present a comprehensive picture of the Charter's treatment by Czech and French administrative courts. The Charter-based case law of these courts is more diverse than the existing empirical studies would suggest. Practicality and pragmatism are some of the unifying factors, but so is the pursuit of material compliance with fundamental rights, including the Charter. The thesis will also demonstrate that EU regulations and directives that contain fundamental rights guarantees severely reduce the Charter's potential to bring added value to the reasoning. It is in fact often possible to reach Charter-compliant solutions by the sole application of EU secondary law, without citing the Charter. Nevertheless, this also means that the reach of EU fundamental rights on the national level is greater than it would appear from the corpus of decisions containing a Charter reference.

Keywords: European Law, Charter of Fundamental Rights of the European Union, Scope of Application of the Charter, Legal Effects of the Charter, Administrative Law (European Law), European Law and National Law, Administrative Law -- France -- Case Law, Administrative Law -- Czech Republic -- Case Law, Public Law (European Law) -- Case Law, National Judge and the Charter, Types of Charter-based Reasoning, Judicial Pragmatism

Název a abstrakt:

Aplikace Listiny základních práv Evropské unie správními soudy ve Francii a v České republice: srovnávací analýza

Disertační práce přispívá k zaplnění mezery v empirickém výzkumu ohledně uplatňování Listiny základních práv EU (dále „Listina“) jinými než ústavními soudy členských států. Zaměřuje se na české a francouzské správní soudy. V návaznosti na již existující literaturu nabízí ucelený pohled na roli Listiny v rozhodovací činnosti českých a francouzských správních soudů, a to s důrazem na tři témata: působnost Listiny, role Listiny v odůvodnění soudních rozhodnutí a vzájemné vztahy Listiny a jiných právních norem. Hlavním cílem práce je shromáždit údaje o tom, kdy a jak soudy Listinu uplatňují při svém rozhodování, a tyto údaje analyzovat ze tří právě zmíněných hledisek. Jedná se o analýzu ve dvou rovinách. Zaprvé (a nepříliš překvapivě) jde o to, do jaké míry vnitrostátní soudy plní povinnosti, které pro ně vyplývají z Listiny a unijního práva. Zadruhé (a s větší přidanou hodnotou) jde o popis a vysvětlení opakujících se vzorců v odůvodnění soudních rozhodnutí, pokud jde o zacházení s Listinou. Na základě výsledků případových studií práce nabízí typologii právních účinků Listiny a jejích interakcí s jinými právními normami. Práce dokládá, že judikatura českých a francouzských správních soudů týkající se Listiny je rozvinutější a rozmanitější, než vyplývá z dosud provedených empirických studií. Tuto rozmanitost lze vysvětlit velkým množstvím faktorů, které ovlivňují konkrétní podobu vnitrostátních soudních rozhodnutí, jakož i tím, že neexistují ustálené metody pro práci s Listinou. Sjednocujícími faktory jsou důraz na praktičnost a soudní pragmatismus, ale i snaha o dodržování materiálního standardu základních práv, včetně toho zakotveného Listinou. Práce rovněž poukazuje na to, že přidaná hodnota Listiny je v soudní praxi značně omezena tím, že mnoho unijních základních práv je podrobněji upraveno v unijních nařízeních a směrnicích, takže souladu s unijními základními právy lze nezřídka dosáhnout použitím sekundárního práva bez odkazu na Listinu. To však také znamená, že přítomnost unijních základních práv v judikatuře českých a francouzských správních soudů je významnější, než by se zdálo z korpusu rozhodnutí citujících Listinu.

Klíčová slova: Právo Evropské unie, Listina základních práv Evropské unie, Oblast působnosti Listiny, Právní účinky Listiny, Správní právo (Právo Evropské unie), Právo Evropské unie a vnitrostátní právo, Správní právo -- Francie -- Judikatura, Správní právo -- Česká republika -- Judikatura, Veřejné právo (Právo Evropské unie) -- Judikatura, Aplikace Listiny vnitrostátními soudy, Způsoby uplatňování Listiny, Soudní pragmatismus

List of Abbreviations

AG	Advocate-General
CAA	*Cour administrative d'appel*
CE	*Conseil d'État*
CESEDA	*Code de l'entrée et du séjour des étrangers et du droit d'asile*
CJEU	Court of Justice of the EU
CNIL	*Commission nationale de l'informatique et des libertés*
CUP	Cambridge University Press
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FRA	EU Fundamental Rights Agency
GDPR	General Data Protection Regulation
MC	Municipal Court
NSS	*Nejvyšší správní soud* [Czech Supreme Administrative Court]
OQTF	*Obligation de quitter le territoire français*
OFPRA	*Office français de protection des réfugiés et apatrides*
OUP	Oxford University Press
QPC	*Question prioritaire de constitutionnalité*
RC	Regional Court
TA	*Tribunal administratif*
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

Contents

General Introduction

1. BACKGROUND

As part of the EU's judicial system, national courts must give full effect to the Charter of Fundamental Rights of the European Union ('the Charter').[1] Since 1 December 2009, when the Charter became legally binding as part of EU primary law, national courts must 'respect' Charter rights and 'observe' and 'promote' Charter principles whenever they are implementing Union law.[2] When giving effect to the Charter, judges find themselves in a complex landscape of overlapping legal orders and multi-level protection of fundamental rights. Fundamental rights recognised by the Charter are at the heart of the EU's constitutional structure.[3] Even the seemingly technical Articles 51 to 53 of the Charter – which contain general provisions governing the interpretation and application of the Charter – are laden with constitutional significance. While these provisions attempt to draw the boundaries, in the sphere of fundamental rights, between EU law, the European Convention on Human Rights (ECHR) and national constitutional law, each of those systems has distinct rules on how the three legal orders are to interact. National courts may be required to simultaneously follow the case law of the Court of Justice of the EU (CJEU), the European Court of Human Rights (ECtHR) and a constitutional court, with each of these institutions considering itself as the ultimate interpreter of the respective set of fundamental rights provisions.[4] National courts may be required to, or may choose to, submit themselves to the jurisdictions of these courts through constitutional preliminary rulings, CJEU preliminary

[1] [2012] C326/391. For more on national judges as EU judges, see O Dubos, *Les juridictions nationales, juge communautaire. Contribution à l'étude des transformations de la fonction juridictionnelle dans les États membres de l'Union européenne* (Dalloz 2001).
[2] Art 51 of the Charter; and Art 19(1) of the Treaty on European Union [2016] OJ C 202/15 (TEU).
[3] Opinion 2/13 *Adhésion de l'Union à la CEDH*, EU:C:2014:2454, paras 165–169; and Opinion of AG Saugmandsgaard Øe in Case C-235/17 *Commission v Hungary*, EU:C:2018:971, para 68. The area of fundamental rights is one in which the complexities of legal pluralism typically manifest themselves: see eg P Deumier, 'Repenser les outils des conflits de normes entre systèmes' in B Bonnet (ed), *Traité des rapports entre ordres juridiques* (LGDJ 2016) 497.
[4] See eg S O'Leary, 'Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU' (2016) 56 *Irish Jurist* 4 at 4–10.

rulings or (non-binding) ECtHR advisory opinions.[5] This is the context in which national judges operate, wittingly or otherwise, when they give effect to the Charter in cases before them.

Because the constitutional stakes are high, it is not surprising that the scholarly debate on the Charter has long been dominated by questions such as the relationship between the Charter and national constitutions or the relationship between the CJEU and national constitutional courts. Researchers have understandably focused on the case law of the CJEU, the Charter's chief interpreter. To a significant degree, however, these debates have overshadowed the day-to-day reality of the Charter's role in proceedings before national courts. When this issue is tackled, the focus is frequently on constitutional courts. The impact of the Charter on the decision-making of 'ordinary' national judges, the Charter's chief enforcers, remains a comparatively under-researched topic.

Nevertheless, national empirical data of this kind is essential. What first comes to mind is the need to assess how Member State courts comply with their obligations stemming from the Charter, in the same way as we would assess how they apply EU law in general. Also, such empirical data can provide valuable input to the scholarly debate on issues such as the multi-level fundamental rights protection in Europe[6] or fundamental rights litigation before national courts. A focus on lower-level issues is likely to reveal patterns that will enrich and orient doctrinal discussions on these topics. The gathered empirical evidence can also stimulate horizontal dialogues between national courts on the issue of fundamental rights.

The scholarship on the national application of the Charter has been growing at a steady pace. First, several empirical studies addressed the issue, often taking the form of questionnaire-based country reports that were brought together for an international

[5] On the predicaments national courts face in this multi-level context, see G Martinico, 'Judging in the Multilevel Legal Order: Exploring the Techniques of "Hidden Dialogue"' (2010) *King's Law Journal* 257; and M Claes and Š Imamović, 'Caught in the Middle or Leading the Way? National Courts in the New European Fundamental Rights Landscape' (2013) *Journal européen des droits de l'homme* 625.

[6] For the term 'multi-level constitutionalism', see I Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 *Common Market Law Review* 703 at 707. See also F Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (OUP 2014) ch 1; W Voermans, 'Protection of European Human Rights by Highest Courts in Europe: The Art of Triangulation' in P Popelier, C van de Heyning and P Van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts* (Intersentia 2011) 365; and E Dubout and S Touzé, 'La fonction des droits fondamentaux dans les rapports entre ordres et systèmes juridiques' in E Dubout and S Touzé (eds), *Les droits fondamentaux: charnières entre ordres et systèmes juridiques* (Pedone 2010) 11.

conference or seminar.[7] Using the same method, an ambitious comparative project resulted in a comprehensive collection of twenty-two national reports.[8] Similarly ambitious was a recent collection giving an account of the Charter's application in 16 Member States.[9] Studies focused on a particular Member State have also been published.[10] Another vital source of information is the periodic reporting of the EU Fundamental Rights Agency and the EU Commission.[11] These reports on the implementation of the Charter offer a good overview and synthesis but are essentially policy-driven and thus lacking in critical analysis. In the past few years, several scholarly works were published which attempted to provide a fuller picture of the situation in a particular Member State, alongside shorter articles or reports confined to specific aspects, courts or areas of law.[12] All these sources have made it possible to identify the issues that deserve a more targeted analysis, which this thesis seeks to offer by concentrating on Czech and French administrative courts.

2. AIMS AND RESEARCH QUESTIONS

This thesis contributes to filling the gap in empirical research on the Charter's application by ordinary national courts, choosing Czech and French administrative courts as its focus. It builds on and goes beyond the existing literature by developing a coherent narrative centred around three key themes in the decision-making of Czech and French administrative courts: the Charter's applicability, the Charter's role in the reasoning and the Charter's interaction with other legal rules. The primary aim is to gather data on when and how these courts give effect to the Charter and – in the next step – to evaluate this data from the three perspectives mentioned. The evaluation will be made from two complementary angles. First, and unsurprisingly, it will concern itself with the extent to which national courts

[7] Association of Councils of State and Supreme Administrative Jurisdictions of the European Union, 23rd colloquium in Madrid from 25 to 26 June 2012, available at: www.aca-europe.eu/index.php/en/colloques-top-en/246-23rd-colloquium-in-madrid-from-25-to-26-june-2012; XXV FIDE Congress, Tallinn, Estonia, 2012: see J Laffranque (ed), *Reports of the XXV FIDE Congress Tallinn 2012. Vol. 1. The protection of fundamental rights post-Lisbon: The interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and national constitutions* (Tartu University Press 2012). All the on-line sources were last accessed on 1 July 2022.

[8] L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of Fundamental Rights as Apprehended by Judges in Europe* (Pedone 2017). See also an EU-wide database listing national courts' decisions citing the Charter: www.europeanrights.eu.

[9] M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020).

[10] J Mazák et al., *The Charter of Fundamental Rights of the European Union in Proceedings before Courts of the Slovak Republic* (Pavol Jozef Šafárik University 2016).

[11] Available at: ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en#objective-of-the-reports.

[12] These sources are cited throughout the text of the thesis.

comply with the obligations imposed on them by the Charter and EU law. Secondly, and more originally, it will identify patterns in the Charter's treatment by national courts and offer explanations for such patterns. By contextualising the empirical data in this way, the thesis will present a comprehensive picture of the Charter's treatment by Czech and French administrative courts.

The first theme to be studied is how national courts have dealt with the limited applicability of the Charter. According to the all-important rule in Article 51 of the Charter, the Charter is applicable in a case before a national court only when the Member State is implementing Union law. We will evaluate the extent to which national courts have complied with this provision, as interpreted by the CJEU. In parallel, we will identify and explain the patterns in the courts' approaches to applicability assessments: when and how they assess if the Charter is applicable in a case before them.

The second theme is the role the Charter plays in the courts' reasoning and the intensity of the Charter's influence on the solution of the case. Under the substantive limb of Article 51 of the Charter, national courts must '*respect* the rights, *observe* the principles and *promote* the application thereof' when the case before them is within the scope of the Charter. Other rules to be followed by national courts are laid down in the rest of the Charter's general provisions (Articles 52 to 54); general requirements on the national application of EU law also need to be respected. As well as evaluating how national courts meet these EU-law expectations, we will identify patterns in the courts' use of the Charter, constructing a typology of the Charter's legal effects. In this way, the extent of the Charter's impact on the national judicial practice – and the real benefits of the Charter for individuals – will be apparent.

The third theme, which is inextricably linked to the second one, is the interaction of the Charter with other legal rules. This theme partly corresponds to the standard scholarly preoccupation with the Charter's relationship to other catalogues of fundamental rights, be it the ECHR or national constitutional catalogues. The Charter's general provisions again offer the necessary guidance. Article 52(3) provides for the ECHR-consistent interpretation of those Charter rights that correspond to the rights enshrined in the ECHR. Article 53 – which needs to be read together with the CJEU's *Melloni* case law – sets out the rules for ascertaining the level of fundamental protection to be upheld when standards differ between

the various instruments.[13] The Charter's general provisions are silent on the Charter's interaction with EU secondary law rules, as is much of the scholarly debate. However, this has emerged to be an essential issue in the national judicial practice, given that many EU regulations and directives themselves contain fundamental rights guarantees. The thesis seeks to determine and evaluate how national courts make the Charter interact with EU secondary law, the ECHR and national constitutions. Again, the aim is to measure national courts' compliance with the Charter's general provisions and other EU-law expectations. At the same time, we will identify and explain the judicial techniques used by national courts to navigate this multi-level landscape. The analysis should provide some answers to the question that has been asked since the Charter's beginnings: what has been its added value in the context of the multi-level fundamental rights protection?

These three themes are interrelated and can be drawn together to formulate the central hypothesis to be tested in this thesis. We based this hypothesis on the dominant narrative which has emerged from the reports and studies mentioned above. National courts often do not respect the limited applicability of the Charter, treating it as just another catalogue of fundamental rights on a par with the ECHR and national catalogues. As for the Charter's role in the courts' reasoning, it is mostly limited to a simple ornament or at best a non-necessary supporting argument without a substantial impact on the solution of the case. As regards the Charter's authority in the face of other fundamental rights instruments, the Charter is mostly not used as an autonomous instrument and is cited alongside the more established fundamental rights catalogues, such as the ECHR or the national constitution. The thesis sets out to find out whether the practice of Czech and French administrative courts is as dire as this hypothesis suggests.

The choice of the two countries also needs explanation. The focus on (only) Czech and French courts results from the need to identify a manageable quantity of case law that can be studied in detail while also allowing for comparative findings. A confrontation between an old and a new Member State has obvious appeal, not least because we would expect the French courts to be much more at ease with EU fundamental rights than the Czech ones. Another potentially significant difference is that the current system of Czech administrative justice dates to 2003, when the *Nejvyšší správní soud* (NSS; Supreme Administrative Court) was established and since filled with not only career judges, but also

[13] Case C-399/11 *Melloni*, EU:C:2013:107.

academics and other legal practitioners. This contrasts with the longevity of the French system. Furthermore, the different reasoning styles of Czech and French courts promise to make for interesting comparisons.

The focus on ordinary courts, as opposed to constitutional ones, is justified by the following reasons. It must first be noted that while in some countries, the Charter is part of the 'bloc of constitutionality' against which constitutional courts review acts ranking below the constitution, this is not the case in the Czech Republic or France.[14] The French *Conseil constitutionnel* almost never refers to the Charter, so there is no point in including its case law in our analysis.[15] In contrast, the Czech Constitutional Court has been much more willing to engage with the Charter meaningfully but remained cautious about its direct application.[16] Nevertheless, the treatment of the Charter by the Constitutional Court gives rise to specific issues stemming from the special role of that Court that differs from the role of ordinary courts. As these issues have been widely discussed by the scholarship,[17] we will leave aside the case law of the Czech Constitutional Court too. More generally, the focus on the daily operational context of ordinary courts, rather than constitutional ones, is consonant with the requirement that individuals should not be forced to reach the top of the judicial hierarchy to have their EU fundamental rights claims enforced.

The focus on administrative courts, as opposed to civil or criminal ones, is partly explained by the necessity to keep the analysis manageable and coherent. In addition, even though EU law is progressively expanding to all areas of law, administrative law represents a branch that has been impacted to the greatest extent by EU rules. Immigration and asylum law is of particular interest given the density of EU regulation in that field and the fundamental rights risks involved. For these reasons, an analysis of administrative case law can be expected to yield rich results.

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[14] See Section II.5.3.

[15] See C Madelaine, 'L'application de la Charte des droits fondamentaux de l'UE par les juridictions nationales' (2020) *Revue de l'Union européenne* 567, referring to the only exception in Conseil constitutionnel, n° 2018-768 DC, 26 July 2018.

[16] See eg Pl. ÚS 10/17, 3 November 2020, and the Concurring Opinion of Judge Zemánek, who deplored the hesitant approach of the Constitutional Court and argued for giving full effect to the Charter in that case.

[17] eg O Hamuľák, 'Penetration of the Charter of Fundamental Rights of the European Union into the Constitutional Order of the Czech Republic – Basic Scenarios' (2020) 7 *European studies – The Review of European Law, Economics and Politics* 108; M Svobodová, 'Působnost Listiny základních práv EU v kontextu judkatury Ústavního soudu ČR' [The scope of application of the EU Charter of Fundamental Rights in the context of the case law of the Constitutional Court of the CR] (2018) *Acta Universitatis Carolinae – Iuridica* 53; and L Burgorgue-Larsen, 'La mobilisation de la Charte des droits fondamentaux de l'Union européenne par les juridictions constitutionnelles' (2019) *Titre VII*, no 2 at 31, available at: www.cairn.info/revue-titre-vii-2019-1-page-31.htm.

3. METHOD AND APPROACH

The thesis rests on a combination of empirical, analytical, theoretical and comparative approaches designed to provide a complete picture of the Charter's national judicial treatment in the Czech Republic and France.[18]

The empirical part consists in assembling data on when and how Czech and French courts give effect to the Charter in their reasoning. As for Czech case law, the data comes from a corpus of all published decisions of administrative courts containing a reference (of any kind) to the Charter; this corpus was compiled using a full-text search in the online database of the *Nejvyšší správní soud* (NSS; Supreme Administrative Court), which includes decisions of the NSS and some decisions of regional administrative courts.[19] As for the French case law, we conducted a full-text search on *Légifrance*, an official database containing decisions of the *Conseil d'État* (CE) and appellate administrative courts.[20] As the research into French case law would not be complete without taking into account the *travaux préparatoires*, namely the opinions (*conclusions*) of public rapporteurs (*rapporteurs publics*), a full-text search of those documents was conducted in a dedicated database of the CE and in commercial legal databases.[21]

We are aware of the limitations of this approach. First, complete empirical data on the use of the Charter on the national plane is hard to collect. Both in the Czech Republic and France, decisions of lower-level administrative courts are not systematically published. Therefore, our analysis cannot lay claim to completeness.[22] Also, to get a full picture, it would be necessary to identify cases where the Charter was not, but should have been, cited.[23] Hidden, implied references to the Charter will also remain, for the most part,

[18] We sought inspiration from the methodological approaches used in D Kosař et al., *Domestic Judicial Treatment of European Court of Human Rights Case Law: Beyond Compliance* (Routledge 2020).
[19] Available on the website of the NSS: www.nssoud.cz. This corpus includes all decisions published until October 2021, as well as some other important decisions published since then.
[20] www.legifrance.gouv.fr. As for the scope of the corpus, the remark made in (n 19) applies.
[21] Some but not all opinions of public rapporteurs serving at the *Conseil d'État* are published in a dedicated database of the CE available at: www.conseil-etat.fr/ressources/decisions-contentieuses/arianeweb. Some opinions of public rapporteurs serving at other administrative courts are published in commercial legal databases.
[22] For example, we know from the text of the NSS's judgment in 6 As 130/2017-23, 25 April 2018, that the contested judgment of the Regional Court in Brno cited the Charter, but the text of that judgment is not in the database.
[23] One way to go about this would be to examine decisions in which courts refer to the ECHR, and not the Charter, particularly in the fields where the Charter has otherwise been present, such as in asylum cases.

uncovered. Notwithstanding these issues, the study of available case law citing the Charter is a crucial part of the overall picture, and it can therefore stand on its own.

The assembled empirical data will be analysed and systematised using an inductive approach: different types of judicial treatment of the Charter will be grouped into categories based on the patterns in the case law. In each of the two Parts of the thesis, those categories will reflect the three themes identified above: under the first theme, the presence or absence of applicability assessments and their formal and substantive quality; under the second theme, the types of legal effects given to the Charter and the Charter's role in the reasoning; and under the third theme, the judicial techniques used in relation to the interaction of sources. Within this systemisation, a few analytically important cases will be chosen for a more thorough analysis in the form of short case studies.

The courts' judicial treatment of the Charter will be evaluated against the relevant normative EU-law standards: the Charter's substantive and general provisions and EU law in general. In addition, other normative considerations guiding the evaluation will be set out for each of the three themes. The discussion will identify and analyse the patterns emerging from the courts' approaches.

Existing theoretical frameworks and relevant scholarly literature on the Charter and its national application will be integrated into the analysis where relevant for ascertaining the correct interpretation of the Charter, explaining and categorising the judicial patterns and contextualising national case studies. Due to the amount of scholarly writing on the Charter, we will only refer to the scholarship to the extent necessary for developing a coherent analysis under each of the three themes identified for study. We will not approach the issues using the concept of 'judicial dialogues', but we will focus instead on the legal effects of the Charter in the reasoning and its influence on the outcome of individual cases.[24]

The empirical data will be presented and analysed separately for the Czech Republic and France in the form of case studies. Given the different patterns of the Charter's use in each of those countries, it is best to present the case law within a country-specific analytical framework. The case law of the apex courts (the Czech *Nejvyšší správní soud* and the French *Conseil d'État*) and the lower administrative courts will be discussed consecutively. This

[24] On judicial dialogues, see A Meuwese and M Snel, 'Constitutional Dialogue: An Overview' (2013) 9 *Utrecht Law Review* 123; A Müller (ed), *Judicial Dialogue and Human Rights* (CUP 2017); and J Petrov, 'Vnitrostátní soudy a způsoby argumentace judikaturou ESLP' [Domestic Courts and Methods of Argumentation with the ECtHR's Case Law] (2019) 158 *Právník* 163 at 169.

approach corresponds to the (informal) leading role of apex courts in EU law matters. Comparisons between the Czech and French experiences will be highlighted in a concluding evaluation section. Also, cross-references will be made to other Member States' practices where this is useful to confirm the general patterns.

This thesis is about judicial reasoning and the nature of Charter references. It does not offer a quantitative analysis of the kind that has recently been done in both the Czech Republic and France.[25] Nor is it primarily a socio-legal study of the extra-legal factors influencing or even determining the choices of national judges in the context of giving effect to the Charter, even if it touches upon these issues where the context demands it.[26] This is because pragmatic considerations can offer good explanations for the ways in which judges give effect to the Charter.

Lastly, an important remark on the scope of our research is due. The post-Lisbon period saw a surge in the interest in the national application of EU fundamental rights. However, the Charter came into the picture when fundamental rights had already been protected by the CJEU's case law as general principles of EU law. Indeed, it is customary to preface every piece of writing on EU fundamental rights with the story of how fundamental rights progressively emerged in the EU legal order, culminating with the adoption of the Charter as a binding instrument.[27] The Charter only made the issues of national application of EU fundamental rights more noticeable. In doing so, it succeeded in what it had set out to do in its Preamble: to increase the visibility of EU fundamental rights by consolidating them into one document as a way to strengthen their protection.[28] By the same token, it highlighted the existing problems regarding the scope of application of EU fundamental rights and the

[25] A Blisa, P Molek and K Šipulová, 'Czech Republic and Slovakia: Another international human rights treaty?' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 127; and L Burgorgue-Larsen (ed), 'Master 2 – Indifférencié, Droit de l'Homme et Union Européenne, Université Paris 1 Panthéon-Sorbonne, Année universitaire 2018–2019', IREDIES Conference Paper No 2/2019, at 41–95, available at: hal.archives-ouvertes.fr/hal-02299120/.

[26] For a socio-legal approach relying on the analytical techniques of legal realism in the context of the application of EU law by national judges, see eg B de Witte et al. (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar 2016).

[27] Putting aside some notable twists in that story – including the mismanaged Constitution of Europe, which proposed to integrate the catalogue of fundamental rights in the Constitutional Treaty – there is a linear progression from having no protection at all to placing fundamental rights at the apex of the Union's legal order. On this development, see G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd edn (OUP 2011) 465.

[28] Recital 4 of the Charter's Preamble. For more on this argument, see J Snell, 'Fundamental Rights Review of National Measures: Nothing New under the Charter?' (2015) 21 *European Public Law* 285 at 300.

relationship of EU and national fundamental rights standards.[29] In conducting research into the national application of the Charter, it would therefore be unscientific to disregard the national application of fundamental rights enshrined as general principles of Union law. In France in particular, judges have been giving effect to general principles of Union law for several decades now. Notwithstanding these remarks, and given the recent research on the issue, [30] we will not devote a separate step of the analysis to how national courts have given effect to general principles of Union law.

4. OUTLINE

In keeping with the aims and methods defined in the previous sections, the structure of the thesis is built around the three key themes identified above. As it would be artificial to separate the discussion of the Charter's legal effects in national courts' reasoning and the Charter's interaction with other legal sources within that reasoning, the second and third themes will be discussed jointly. Thus, the thesis has two Parts, one focusing on the Charter's *applicability* and one on its *application*. This approach is in line with the order in which national courts should set about applying the Charter. It seemed a better choice to focus on each theme comprehensively, discussing the normative, empirical and analytical aspects in one block. Within each Part, the discussion broadly follows the logic of 'law on the books' (the Charter and CJEU case law interpreting it) versus 'law on the ground' (the treatment of the Charter by Czech and French courts), with a joint final analysis and evaluation for both Member States. We hope that this approach makes for a more dynamic and coherent discussion. The two Parts are symmetrical in their structure, but not their length: the substantive aspects simply require more place than the issue of applicability.

Part I of the thesis deals with the first theme: the applicability of the Charter. After a short Introduction (Section 1), it examines *when* national courts have the duty under EU law to give effect to the Charter, discussing the CJEU's case law and the difficulties that national judges face when assessing the applicability of the Charter (Section 2). Second, it looks at the national judicial practice, focusing on how Czech and French administrative courts have dealt with the issue of applicability, evaluating this practice against EU-law

[29] For a similar argument, see eg B Schima, 'EU Fundamental Rights and Member State Action After Lisbon: Putting the ECJ's Case Law in Its Context' (2014) 38 *Fordham International Law Journal* 1097 at 1101.
[30] L Xenou, *Les principes généraux du droit de l'Union européenne et la jurisprudence administrative française* (Bruylant 2014). See also C Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar 2018).

obligations and searching for patterns in national courts' approaches to applicability assessments (Sections 3 and 4). All empirical and analytical findings are drawn together in Section 5, which evaluates, compares and contextualises the empirical data in both countries. Part I finishes with a short Conclusion (Section 6).

Part II of the thesis deals with the second and third themes: the Charter's legal effects (role in the reasoning) and its interaction with other sources of law, namely EU secondary law and co-applicable fundamental rights catalogues: the ECHR and national constitutions. In terms of structure, it is identical to Part I. After an Introduction (Section 1), it examines *how* national courts must give effect to the Charter, as required by the Charter itself and EU law in general; it identifies the difficulties national courts face in this respect (Section 2). It then looks at the Czech and French judicial practice and describes and analyses how administrative courts utilise the Charter in their reasoning and how they make it interact with co-applicable provisions of EU secondary law, the ECHR and national constitutions (Sections 3 and 4). The empirical and analytical findings from both Member States are further discussed and evaluated in Section 5, which brings in the existing scholarly literature, as well as experiences from other Member States. Section 6 contains concluding remarks for Part II.[31]

[31] Some parts of this thesis have already been published as required by the Czech rules on doctoral studies: P Mádr, 'Article 51 of the EU Charter of Fundamental Rights from the Perspective of the National Judge' (2020) 13 *Review of European Administrative Law* 53; and R Král and P Mádr, 'On the (In)Applicability of the EU Charter of Fundamental Rights to National Measures Exceeding the Requirements of Minimum Harmonisation Directives' (2021) 46 *European Law Review* 80.

Part I:
The Charter's applicability

1. INTRODUCTION

The essence of the national courts' obligation to give effect to the Charter is captured in Article 51 of the Charter, one of the four articles contained in Title VII of the Charter under the heading of 'General provisions governing the interpretation and application of the Charter'.[32] It reads as follows:

> 1. The provisions of this 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 Union 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 Union 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.

Article 51 of the Charter is almost always discussed in connection with the Charter's applicability *ratione materiae*. However, read as a whole, that provision contains both a hypothesis (when the Member States are *implementing* Union law and only then) and a disposition (they shall *respect* the rights, *observe* the principles and *promote* the application thereof).[33] It is immediately clear from the hypothesis that the applicability of the Charter to Member State action is limited. It is not immediately clear in what way.

From the constitutional viewpoint, this provision reflects the EU's lack of general fundamental rights competence and the corresponding limited scope of EU fundamental

[32] For an explicit mention of 'judicial authorities' in this context, see Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, EU:C:2016:198, para 84. For an interpretation of the term 'Member States' used in Art 51(1) of the Charter, see F Picod, 'Article 51: Champ d'application' in F Picod and S van Drooghenbroeck (eds), *Charte des droits fondamentaux de l'Union européenne: Commentaire article par article* (Bruylant 2017) 1059.

[33] This thesis does not concern itself with the Charter's (mostly uncontroversial) applicability to the EU institutions.

rights law. The EU legal order is not 'all-embracing'[34] but mirrors the limited extent of competences conferred upon the EU. Article 51's wording bears testimony to the constitutional significance of that provision: the drafters of the Charter were keen to exclude any extension of the scope of EU fundamental rights law. At the same time, however, the autonomy of EU law demands that the Charter's scope is broad enough 'to ensure that [fundamental rights] are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States', which appears to be the *ratio legis* of Article 51, according to the Court of Justice.[35] As mentioned in the Introduction, the rules laid down in this provision are at the core of the delicate relationship between EU law and national constitutional law. Whenever national courts deal with Article 51 and give effect (or not) to the Charter in concrete cases, they participate in coordinating different systems of fundamental rights protection and – by extension – in fleshing out the exact contours of the EU fundamental rights sphere. Thus, for example, an expansive reading of the Charter's scope, which national courts might be tempted to adopt to ensure effective fundamental rights protection, can easily disrupt the balance between the EU and national legal orders.[36] In this constitutionally tense context, it is essential to delimit the scope of application of the Charter and ensure that all national actors, including national judges, respect it.

The abstract and vague formulation of Article 51 generated a lot of case law, which has interpreted the notion of 'implementation' broadly, with *Fransson* still being the foundational case. While the core of that case law is clear and stable, some uncertainties remain around the edges. A common claim is that the uncertainty surrounding the Charter's

[34] Opinion of AG La Pergola in Case C-299/95 *Kremzow*, EU:C:1997:58, para 7. See also S Platon, 'L'applicabilité de la Charte des droits fondamentaux de l'Union européenne aux Etats membres. Retour sur l'arrêt *Fransson* de la Cour de justice du 26 février 2013' in *Entre les ordres juridiques. Mélanges en l'honneur du Doyen François Hervouët* (Presses universitaires juridiques de Poitiers 2015) 388 at 399.

[35] Case C-206/13 *Siragusa*, EU:C:2014:126, para 31. However, the Court continued to state, more contentiously, that the 'reason for pursuing that objective is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved *in such a way as to undermine the unity, primacy and effectiveness of EU law*' (para 32; emphasis added). For a criticism of this instrumentalist rationale, see the discussion below on the *Siragusa* judgment. For a discussion on the need to legitimise the existence of EU fundamental rights, see M Dougan, 'Judicial review of Member State action under the general principles and the Charter: Defining the "scope of Union law"' (2015) 52 *Common Market Law Review* 1201 at 1229; F Fontanelli, '*Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog' (2013) 9 *European Constitutional Law Review* 315 (note) at 319; and E Dubout, 'Le défi de la délimitation du champ de la protection des droits fondamentaux par la Cour de justice de l'Union européenne' (2013) 6 *European Journal of Legal Studies* 3, who presents and critiques various arguments to justify a broader scope of application of EU fundamental rights.

[36] The limit imposed in Art 51 of the Charter is addressed not only to Union courts but also national courts: see eg L Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*' (2012) 49 *Common Market Law Review* 1841 at 1872.

scope of application has been an obstacle for national courts in fully engaging with the Charter.[37] Indeed, some national courts reportedly struggle with assessing the Charter's applicability or ignore the issue of the Charter's limited applicability altogether, treating it as yet another generally applicable catalogue of fundamental rights.[38] How have the Czech and French administrative courts handled these issues? To answer this question, the obvious place to start is the EU side of things: Section 2 will discuss the conditions under which national courts have an EU-law duty to give effect to the Charter under its Article 51, that is, when they are considered to be implementing Union law within the meaning of that provision. It will argue that judges face considerable difficulties in this respect, which are nevertheless surmountable. All this will set the ground for the presentation and analysis of the case law of the Czech *Nejvyšší správní soud*, Czech regional courts, the French *Conseil d'État* and French lower administrative courts (Sections 3 and 4). Throughout the discussion, we will confront the national practice with the EU-law requirements and identify patterns in the courts' reasoning. Section 5 will pull together the empirical and analytical findings for both Member States and evaluate them against the unoptimistic hypothesis set out in Section 2 of the Introduction.

2. WHEN NATIONAL COURTS MUST GIVE EFFECT TO THE CHARTER: ARTICLE 51 OF THE CHARTER

2.1 Introduction

Under Article 51(1) of the Charter, the obligation of national courts to give effect to the Charter *only* arises in matters in which the Member States are *implementing* EU law. From the viewpoint of a national judge, Article 51 is the principal point of reference for ascertaining if the Charter is applicable in a case before them. The second point of reference are the Explanations to Article 51, which summarise the pre-Charter case law of the CJEU

[37] F Fontanelli, 'Implementation of EU law through domestic measures after Fransson: The Court of Justice buys time and "non-preclusion" troubles loom large' (2014) 39 *European Law Review* 682 at 682–683; and FRA, 'Challenges and opportunities for the implementation of the Charter of Fundamental Rights', FRA Opinion 4/2018, 2019, at 43, available at: fra.europa.eu/en/publication/2018/challenges-and-opportunities-implementation-charter-fundamental-rights. The same observation is made concerning legal practitioners: see eg G Toggenburg, 'The Charter of Fundamental Rights: An Illusionary Giant? Seven Brief Points on the Relevance of a Still New EU Instrument' in A Crescenzi, R Forastiero and G Palmisano (eds), *Asylum and the EU Charter of Fundamental Rights* (editoriale scientifica 2018) 13 at 15.

[38] See the sources in n 7–10.

as to when EU fundamental rights apply to the Member States.[39] It is clear from the CJEU's post-Charter judgments that Article 51 brings no change to that case law. However, it is equally clear that the conditions of the Charter's national applicability resist attempts to encapsulate them in abstract formulas and straightforward tests.[40] The term *implementation* is a shorthand for a long line of case law spanning decades, and laments about its uncertainties have been voiced for much of that time.[41] Where does this leave national judges, who are meant to give effect to the Charter as a matter of judicial routine in fulfilling their EU-law mandate?

This section aims to set out the current (but constantly evolving) state of the law as to when the Charter is applicable in proceedings before national courts and analyse the problems these courts face. The analysis is written from the point of view of the national judge; it reflects the practical issues arising when giving effect to the Charter in individual cases. There is little value for our purposes in providing a detailed chronological overview of the CJEU's case law. Nor is it indispensable to provide a full retrospect of the interpretation issues that surfaced with the entry into force of the Charter.[42] We will not deal in detail with the CJEU's sometimes controversial handling of individual cases. We also leave aside policy proposals which argue for a reversal of the CJEU's case law in favour of either a more restricted or a broader scope of EU fundamental rights review.[43]

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[39] Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17. Despite the Explanations' self-avowed lack of legal status (see their introductory paragraph), the CJEU and national courts are under an obligation to give them 'due regard': see Art 6(1) TEU and Art 52(7) of the Charter.

[40] In an Opinion from September 2017, AG Bobek devoted a significant part of his analysis to the issue of the Charter's applicability, admitting he could not find a clear test in the case law: Opinion of AG Bobek in Case C-298/16 *Ispas*, EU:C:2017:650.

[41] Temple Lang called for more clarity on this issue as early as in 1991: see J Temple Lang, 'The Sphere in Which Member States Are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles' (1991) 18 *Legal Issues of European Integration* 23 at 34.

[42] Some of those issues are largely academic or have now been resolved in the case law, for example, the relationship between the scope of the Charter and the scope of general principles of Union law or the so-called 'opt-outs' from the Charter.

[43] See eg A von Bogdandy et al., 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489; MJ van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39 *Legal Issues of Economic Integration* 273 (the inclusion of EU fundamental rights in the 'substance' of EU citizenship rights); and A Torres Pérez, 'Rights and Powers in the European Union: Towards a Charter That Is Fully Applicable to the Member States?' (2020) 22 *Cambridge Yearbook of European Legal Studies* 279. For propositions of the Court's AGs, see Opinion of AG Maduro in Case C-380/05 *Centro Europa 7*, EU:C:2007:505, para 22; Opinion of AG Jacobs in Case C-168/91 *Konstantinidis*, EU:C:1992:504, para 46; and Opinion of AG Sharpston in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi*, EU:C:2010:560, paras 163–177. For a discussion of various policy arguments, see Schima, 'EU Fundamental Rights and Member State Action After Lisbon', supra n 29 at 1110–1118. For an overview of possible parallels with the US constitutional history, see Platon, 'L'applicabilité de la Charte des droits fondamentaux de l'Union européenne aux Etats membres', supra n 34 at 396.

The CJEU's case law will be analysed from the practical point of view of determining whether or not a particular dispute before a national court falls within the scope of the Charter. This will be done first with reference to the CJEU's basic formulas and general guidance (Section 2.2), then by assembling a typology of situations in which the Charter applies (Section 2.3). In this way, we will be able to assess what challenges national courts generally face when called to apply Article 51 of the Charter (Section 2.4).

The discussion focuses on the Charter's applicability *ratione materiae*, the most problematic aspect. Regarding the applicability *ratione temporis*, the Charter is applicable only to events that arose or continued to exist after the entry into force of the Treaty of Lisbon on 1 December 2009. The CJEU confirmed this in *Fenoll*.[44] However, the CJEU's case law also provides support for the existence of an obligation to apply the Charter to facts that arose before it became binding.[45] Even though these decisions can easily confuse national judges,[46] the issue is less important in practice given that before the entry into force of the Charter, fundamental rights were already protected as general principles of Union law.[47]

2.2 Basic formulas, general guidance and the search for a workable test

The CJEU's judgment in *Fransson* is cited as the leading reference, both by the doctrine and by the Court.[48] There, the CJEU provided what it described as a 'definition' of the field of application of EU fundamental rights.[49] We will cite the relevant passage in full, as it contains the Court's basic formulas on the material scope of the Charter, as well as demonstrating the kind of terminological plurality that permeates the Court's case law:

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[44] Case C-316/13 *Fenoll*, EU:C:2015:200, paras 44–47.

[45] See Case C-555/07 Kücükdeveci, EU:C:2010:21. O Hamuľák, M Sulyok and LN Kiss, 'Measuring the "EU"clidean Distance between EU Law and the Hungarian Constitutional Court – Focusing on the Position of the EU Charter of Fundamental Rights' (2019) 10 *CYIL* 130 at 138. For a criticism based on the argument that the Charter is inapplicable *ratione temporis* in such cases, see Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights*, supra n 30 at 125–126. See also L Pailler, *Le respect de la Charte des droits fondamentaux de l'Union européenne dans l'espace judiciaire européen en matière civile et commerciale* (Pedone 2017) at 56–60; and LM Díez-Picazo and M Fraile Ortiz, 'Application of the Charter of Fundamental Rights of the European Union by national courts: The experience of administrative courts, Final report', XXIIIrd Colloquium of the Association of Councils of State and the Supreme Administrative Jurisdictions of the European Union, 2012, at 21–22, available at: www.aca-europe.eu/colloquia/2012/General_report.pdf.

[46] For example, the French *Cour de cassation* applied the Charter to facts pre-dating the entry into force of the Lisbon treaty, citing Case C-279/09 DEB, EU:C:2010:811, in support of that finding. See Cour de cassation, Rapport annuel 2013, at 149, available at: www.courdecassation.fr/IMG/pdf/cour_de_cassation_rapport_2013.pdf.

[47] See Case C-218/15 *Paoletti and Others*, EU:C:2016:748, paras 25–26.

[48] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105.

[49] *Fransson*, para 20. Importantly, as confirmed in *Fransson*, the scope of application of the Charter and of the general principles is the same.

> 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.[50]

After references to previous cases and the Explanations to the Charter, the CJEU continued:

> 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.
>
> 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 (…).[51]

Far from providing an exact definition of the Charter's scope of application, the Court set out the tenets of its long-established case law on the scope of EU fundamental rights. It follows from the Court's reasoning that 'a situation governed by EU law', 'a situation within the scope of EU law' and 'a situation to which EU law is applicable' all denote the same concept of EU law: the same autonomous concept which is condensed into the term *implementation* – and its equivalents in other language versions – of Article 51.[52] That term had been traditionally used with a stricter meaning to denote cases when the Member States act as agents of the EU and adopt measures to comply with EU legislation (the so-called *Wachauf*-scenario), as opposed to cases when the Member States act in derogation of EU law (the *ERT*-scenario).[53] For this reason, some had considered that the wording of Article 51 was more restrictive than previous CJEU case law.[54] In constructing the basic formulas, the *Fransson* judgment put to rest this much-discussed question in favour of the broader view.

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[50] *Fransson*, para 19 (emphasis added).
[51] *Fransson*, paras 21–22 (emphasis added).
[52] The terms used in different language versions of Article 51 are not semantic equivalents. Most remarkably, the Finnish, Swedish and Spanish versions translate to English as 'apply': H Kaila, 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States' in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Bloomsbury 2012) 291 at 304.
[53] See the discussion in Section I.2.3.
[54] For the doctrinal debate on Article 51 prior to *Fransson*, see eg V Kronenberger, 'Quand "mise en œuvre" rime avec "champ d'application": la Cour précise les situations qui relèvent de la Charte des droits fondamentaux de l'Union européenne dans le contexte de l'application du *ne bis in idem*' (2013/1) *Revue des affaires européennes* 147.

We could rephrase the general statement that the applicability of EU law entails the applicability of the Charter in more vivid terms: if there is at least one rule of EU law other than the Charter that is applicable to a legal situation (the triggering rule), the Charter is also applicable to that situation.[55] The Charter is the 'shadow' of EU law.[56] Expressed negatively in another of the Court's by now well-established formulas, the Charter is *not* applicable when 'the objective of the [national proceedings] does not concern the interpretation or application of a rule of Union law other than those set out in the Charter'.[57] Hence, the main focus is the identification of – or the search for – the triggering rule capable of activating the Charter's provisions.

The *Fransson* equivalence formula is conceptually problematic in that it equates, for the purposes of determining the applicability of the Charter, national acts implementing EU law within the meaning of Article 51 of the Charter and national acts falling within the scope of EU law. There can be situations where national measures do not implement Union law within the meaning of Article 51 and thus do not fall within the scope of the Charter but can still fall within the scope of EU law. For example, national acts that exceed the minimum requirements of EU minimum harmonisation directives fall outside the scope of the Charter but can still fall within the scope of EU law insofar as they are incompatible with any provision of EU law *other than* the Charter, such as a directly effective Treaty provision.[58] In such an (infringement) scenario, it is not the incompatible national legislation that is subject to the application of the Charter: the incompatible legislation is not implementing EU law. What is subject to the application of the Charter in such a case is the direct application of the infringed (directly effective) provision of EU law. Of course, when national courts are applying such an EU-law provision, they are implementing that provision within the meaning of Article 51(1) of the Charter. Therefore, they must respect all Charter rights and principles relevant in this context (such as the right to an effective remedy and a fair trial under Article 47 of the Charter). However, this does not and cannot mean that the incompatible national legislation concerned can, as such, be treated as implementing EU law

[55] See eg A Rosas, 'Five Years of Charter Case Law: Some Observations' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart 2015) 11 at 17.
[56] K Lenaerts and JA Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1559 at 1568.
[57] Case C-265/13 *Torralbo Marcos*, EU:C:2014:187, para 33. See also S Platon, 'Applicabilité et inapplicabilité de la Charte des droits fondamentaux aux Etats: La ligne jurisprudentielle sinueuse de la Cour', *Journal d'Actualité des Droits Européens*, 7 May 2014, available at: revue-jade.eu/article/view/596.
[58] See the discussion below (text accompanying nn 120–124).

and – on that basis – be fully reviewable under the Charter. Thus, the terms 'national act implementing EU law' and 'national act falling within the scope of EU law' are not fully interchangeable.[59] In other words, and as rightly pointed out by Dougan, falling within the scope of EU law for the purposes of assessing the compatibility of a national act with EU law is not the same as falling within the scope of EU law for the purposes of determining the applicability of the Charter to a national act.[60] For this reason, the Fransson equivalence formula needs to be nuanced, taking into account the observations made above.

Taken in isolation, the Court's basic formulas can be of use for national judges when they have no doubt about the case falling within or outside the scope of the Charter. In these cases, a simple reference to one of the formulas can be sufficient to deal with the Charter's applicability or non-applicability quickly;[61] after all, the CJEU itself uses this approach.[62] At the same time, however, exclusive reliance on the formulas carries some risks. As we saw in the preceding paragraphs, the wording of the formulas might itself lead judges to interpret the scope of the Charter too narrowly. Equally, since no area of national law is ever completely immune from the influence of EU law – and there will often be a norm of EU law more or less related to the case before the national judge – there is a danger of false positives at odds with the limits set by Article 51 of the Charter. Therefore, whilst constituting a useful shorthand, the basic formulas cannot, due to their abstract nature, capture the scope of the Charter in all its variety.

In practice, the issue turns on the degree of connection between the triggering norm and the case before the national judge, or – from a slightly different but essentially equivalent perspective – between the triggering norm and the norms of national law that govern the case before the national judge. How 'EU-heavy' must the case be to come within the scope of the Charter?[63]

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[59] For a more developed argument, see Král and Mádr, 'On the (In)Applicability of the EU Charter of Fundamental Rights to National Measures Exceeding the Requirements of Minimum Harmonisation Directives', supra n 31 at 89–90.

[60] Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter', supra n 35 at 1224.

[61] De Witte observed that the *Fransson* formula 'is adequate for excluding the application of the Charter in cases where national laws have really no connection with EU law obligations': B de Witte, 'The scope of application of the EU Charter of Fundamental Rights' in M Gonzáles Pascual and A Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2017) 29 at 32–33.

[62] Fontanelli, 'Implementation of EU law through domestic measures after Fransson', supra n 37 at 694, referring to Case C-390/12 *Pfleger and Others*, EU:C:2014:281.

[63] Expression borrowed from A Ward, 'Article 51' in S Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1413 at 1452. For a discussion of the 'degree of connection', see eg

There is some further general guidance in the case law of the CJEU designed to provide answers to that question. First and foremost, the triggering norm must impose a specific *obligation* on the Member States with regard to the matter before the national judge.[64] In principle, such an obligation is capable of triggering the applicability of the Charter ever since the entry into force of the EU-law provision containing it.[65] Moreover, it is immaterial whether the Member States have discretion in executing that obligation.[66] The Court further recognised that 'a certain degree of connection' to the matter is required 'above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'.[67] The Court also indicated that a look at EU competences is not conclusive: 'the mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable'.[68] On the other hand, the mere fact that a national measure was not explicitly enacted with a view to implementing a specific EU-law obligation does not automatically render the Charter inapplicable: no intention to implement

E Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: Å*kerberg Fransson*' (2013) 50 *Common Market Law Review* 1411 (note) at 1421–1425; and Fontanelli, '*Hic Sunt Nationes*', supra n 35 at 325–327.

[64] Case C-32/20 *TJ*, EU:C:2020:441, para 27; Case C-177/17 *Demarchi Gino*, EU:C:2017:656, para 25; and Case C-467/19 PPU *QR*, EU:C:2019:776, para 41. The concept of obligation is emphasised in the doctrine: see eg Lenaerts and Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice', supra n 56 at 1566; Kronenberger, 'Quand "mise en œuvre" rime avec "champ d'application" ', supra n 54 at 153; M Markakis and P Dermine, 'Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter: *Florescu*' (2018) 55 *Common Market Law Review* 643 (note) at 666–667; Ladenburger, 'European Union Institutional Report' in Laffranque (ed), *Reports of the XXV FIDE Congress Tallinn 2012. Vol. 1.*, supra n 7, 102 at 161: 'a *sufficiently specific link* between the national act at issue and a *concrete* norm of EU law applied' (emphases in original); O Hamuľák and J Mazák, 'The Charter of Fundamental Rights of the European Union vis-à-vis the Member States – Scope of its Application in the View of the CJEU' (2017) 8 *Czech Yearbook of Public & Private International Law* 161 at 169–170; and T Lock, 'Åkerberg Fransson and its progeny', University of Edinburgh School of Law Research Paper 2018/23, 7 June 2018, available at: ssrn.com/abstract=3192803: 'the applicability of a legal rule of EU law other than the Charter must have a *tangible and objectively ascertainable connection* with the merits of the case (the dispute)' (emphasis added). Cf. F Fontanelli, 'The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights' (2014) 20 *Columbian Journal of European Law* 194 at 210, who argues that a test based on the obligation requirement is incomplete.

[65] For EU directives, the situation is more complex: see B Pirker, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology' (2018) 3 *European Papers* 133 www.europeanpapers.eu/sites/default/files/EP_eJ_2018_1.pdf, at 151–152.

[66] For various types of discretion, see Lock, 'Åkerberg Fransson and its progeny', supra n 64.

[67] Case C-206/13 *Siragusa*, EU:C:2014:126, para 24.

[68] Case C-198/13 *Julian Hernández and Others*, EU:C:2014:2055, para 36. This also works the other way round: the absence of EU legislative competence does not in itself prevent the Charter from being applicable.

is required.[69] In a handful of cases, the Court laid down some criteria to be taken into account, namely:

> 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.[70]

Several scholars have, however, identified various problems with these criteria, which limit their practical usefulness.[71] In any case, the criteria can only be indicative, not definitive.[72] A recent attempt to operationalise the degree-of-connection requirement was made by Advocate General Bobek. In his view, the necessary degree of connection is present whenever a national measure is 'instrumental to the effective realisation of an EU law-based obligation on the national level […] *unless* the adoption and operation of that national rule is not reasonably necessary in order to enforce the relevant EU law'.[73]

Whether or not the CJEU adds this new formula to its repertoire, we can conclude as follows: while the CJEU's general guidance usefully complements the Court's basic formulas and brings some clarifications for national judges, it does not constitute a complete analytical framework. It is not possible for national judges to decide, on the sole basis of the general guidance, whether the Charter is applicable in every conceivable case and with absolute certainty. After all, the preceding discussion has demonstrated that the approach is necessarily contextual and quite a lot of 'contexts' are to be considered, countering the possibility of assembling a definitive clear-cut test.

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[69] Fontanelli, '*Hic Sunt Nationes*', supra n 63 at 315. Consequently, a Member State can be implementing EU law even when it is inactive: see C Nivard, 'Les conditions d'application de la Charte des droits fondamentaux' in A Biad and V Parisot (eds), *La Charte des droits fondamentaux de l'Union européenne: Bilan d'application* (Anthemis 2018) 31 at 41. See also Opinion of AG Wathelet in Case C-682/15 *Berlioz Investment Fund*, EU:C:2017:2, para 44.

[70] Case C-40/11 *Iida*, EU:C:2012:691, para 79, citing Case C-309/96 *Annibaldi*, EU:C:1997:631, paras 21–23. See also Case C-206/13 *Siragusa*, EU:C:2014:126, para 25. The CJEU mainly uses them only as exclusionary criteria, that is, to show that a certain situation is not sufficiently connected to an EU-law obligation.

[71] For a comprehensive critique, see Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter', supra n 35 at 1230–1235.

[72] See Opinion of AG Bobek in Case C-298/16 *Ispas*, EU:C:2017:650, para 47: 'those criteria are neither cumulative, nor exhaustive. They merely constitute indicative criteria aimed at providing guidance to national courts.'

[73] Ibid. para 56. Bobek calls this a 'rule of (reasonably foreseeable) functional necessity'.

The absence of a workable and clear-cut test based on a legitimate rationale that would demarcate the scope of the Charter has been criticised in the scholarship.[74] Others have emphasised the conceptual difficulty inherent in creating such a test: clear-cut tests can only work in clear-cut cases, and the scope of the Charter is simply too complex.[75] It is one thing to demand that the CJEU's general guidance be logically consistent and theoretically solid. It is another thing to demand the CJEU to create a perfect one-size-fits-all test that would be neither underinclusive nor sweeping. Here is not the place to enter this debate. It suffices to say, from the perspective of our research, that the criteria must be workable; they must be such that national courts can apply them with ease. With that aim in mind, it is hard to imagine, for example, how national courts could successfully apply a teleological criterion of the kind suggested by Advocate General Cruz Villalón in *Fransson*. In his Opinion, he proposed that EU fundamental rights should apply only in the presence of 'a specific interest of the Union in ensuring that that exercise of public authority accords with the interpretation of the fundamental rights by the Union'.[76] Can national courts be required to assess the EU's specific interest in every case concerning EU fundamental rights? Equally impractical – but also problematic as a matter of principle – would be a teleological criterion which the CJEU alluded to in *Siragusa*. In that judgment, the CJEU seemed to be saying that EU fundamental rights apply whenever there is a risk of varying levels of protection in the Member States that undermines the unity, primacy and effectiveness of EU law.[77] If this were to become the

[74] See eg Lock, 'Åkerberg Fransson and its progeny', supra n 64 at 6; Dubout, 'Le défi de la délimitation du champ de la protection des droits fondamentaux', supra n 35; N Lazzerini, 'The Scope and Effects of the Charter of Fundamental Rights in the Case Law of the European Court of Justice' in G Palmisano (ed), *Making the Charter of Fundamental Rights a Living Instrument* (Brill/Nijhoff 2014) 30 at 42; and Hancox, 'The meaning of "implementing" EU law', supra n 63 at 1418–1427.

[75] See eg B van Bockel and P Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Akerberg Fransson' (2013) 38 *European Law Review* 866 at 873; A Rosas, '"Implementing" EU Law in the Member States: Some Observations on the Applicability of the Charter of Fundamental Rights' in L Weitzel (ed), *L'Europe des droits fondamentaux: mélanges en hommage à Albert Weitzel* (Pedone 2013) 185 at 200; and F Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights – Does *curia*.eu Know *iura*.eu?' (2014) 14 *Human Rights Law Review* 231 at 234–235.

[76] Opinion of AG Cruz Villalón in Case C-617/10 *Fransson*, EU:C:2012:340, paras 40–41.

[77] Case C-206/13 *Siragusa*, EU:C:2014:126, para 32. See also Case C-198/13 *Julian Hernández and Others*, EU:C:2014:2055, para 47. This criterion was formulated in Case C-399/11 *Melloni*, EU:C:2013:107, as part of the analysis under Article 53 of the Charter. For a discussion of the use of this criterion for the purposes of Article 51(1), see C Rizcallah, 'La protection des droits fondamentaux dans l'Union européenne: L'immuable poids des origines? Examen critique de l'existence et du fonctionnement d'un critère téléologique dans la détermination de l'applicabilité de la protection européenne des droits fondamentaux' (2016) 2015(2/3) *Cahiers de droit européen* 399. For a principled criticism of the functionalist/instrumentalist rationale, see E Spaventa, 'The interpretation of Article 51 of the EU Charter of Fundamental Rights: The dilemma of stricter or broader application of the Charter to national measures. Study for the PETI Committee', 2016, at 21, available at: www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf; and von Bogdandy et al., 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States',

main criterion for determining the applicability of the Charter, national courts would struggle as a result of not being equipped to perform such analysis. It is essential to bear in mind that the primary addressees of Article 51 are national bodies, not the EU institutions.

A very helpful supplement to basic formulas and abstract guidance is a list of all the types of situations that the CJEU identified as falling within the scope of the Charter. It is tempting to try to define the Charter's scope not by devising general formulas and abstract guidance but by enumerating the individual scenarios when the Charter applies. There is no shortage of scholarly attempts to categorise the various scenarios in which the Charter is applicable. As we will see in Section 2.3, this approach is far from being trouble-free, but it is likely to be more useful for national judges – just because it operates at a lower level of abstraction. In any case, the Fransson formula needs to be read together with the casuistic case law, pre- and post-*Fransson*, on which the scholarly categorisations are based.

2.3 Typology of situations: Something Cloudy, Something Clear

Traditionally, the discussion is framed with reference to two broad categories of cases: when national legal acts execute, directly apply or implement EU-law obligations (originally identified in the *Wachauf* case, but since extended to other situations by case law);[78] and when national legal acts derogate from EU-law obligations (originally identified in the *ERT* case in the context of free movement provisions, but since extended to other derogations)[79].

Under the *ERT* category, the Charter applies if a national legal act 'makes use of the derogations or justifications to restrictions allowed by EU law'.[80] For example, in *Pfleger and Others*, an Austrian legislative act prohibited the operation of gaming machines without a licence.[81] This act had not been passed with a view to implementing an EU-law obligation

supra n 43 at 495. On the relationship between the principle of effectiveness and the scope of application of EU law, see E Dubout, 'Être ou ne pas être (du droit)? Effectivité et champ d'application du droit de l'Union européenne' in A Bouveresse and D Ritleng (eds), *L'effectivité du droit de l'Union européenne* (Bruylant 2018) 98. As Clément-Wilz pointed out, such a novel, utilitarian reading of Article 51 would have more legitimacy had it been adopted by a formation composed of more than three judges: see L Clément-Wilz, F Martucci and C Mayeur-Carpentier, 'Chronique de droit administratif et droit de l'Union européenne' (2014) *RFDA* 985. For several arguments from several perspectives, see N Półtorak, 'The Application of the Rights and Principles of the Charter of Fundamental Rights', EUI Working Paper RSC 2021/34, March 2021, at 17–18, available at: ssrn.com/abstract=3821682.

[78] Case 5/88 *Wachauf*, EU:C:1989:321; and cases cited infra in nn 91–102.

[79] Case C-260/89 *ERT*, EU:C:1991:254, para 43; confirmed post-*Fransson* in Case C-390/12 *Pfleger and Others*, EU:C:2014:281, para 35; and Case C-98/14 *Berlington Hungary and Others*, EU:C:2015:386, para 74.

[80] Opinion of AG Bobek in Case C-298/16 *Ispas*, EU:C:2017:650, para 32. See also Opinion of AG Sharpston in Case C-390/12 *Pfleger and Others*, EU:C:2013:747, paras 43–46.

[81] Case C-390/12 *Pfleger and Others*, EU:C:2014:281.

but constituted a restriction to the free movement of services under Article 56 of the Treaty on the Functioning of the European Union (TFEU). The Austrian government sought to justify the restriction by overriding requirements, namely the protection of gamblers and the fight against crime. The Austrian act could benefit from these exceptions only if it complied with the Charter. Therefore, under the *ERT* category, national courts must apply the Charter whenever a Member State uses 'exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty'.[82] This category includes horizontal cases where the restriction of fundamental freedoms has its origin in private acts.[83] Although there are scholars who criticise its conceptual basis,[84] this category is now a standard part of most typologies, and its interpretation is well-established in case law.

The real difficulty here is not Charter-specific but relates to ascertaining the scope of the triggering norm itself, particularly when the latter is a highly abstract and open-ended market freedom provision. Consider Article 56 of the TFEU, which applies to any, even non-discriminatory, Member State measure liable to impede or render less advantageous the exercise of the free movement of services.[85] The Member States can lawfully maintain such a measure only if they can rely on one of the Treaty derogations or mandatory requirements. However, in doing so, the Member States cannot infringe the fundamental rights of service providers or recipients. In *ERT*-type cases, therefore, virtually any national norm in any area of law – even an area in which the Member States have fully retained their competences[86] – can potentially be brought into the scope of the Charter if the Member State seeks to justify in under EU law. The scope of application of the Charter thus suffers from the uncertainties regarding the scope of application of free movement provisions.[87] Therefore, in these cases, national judges need to be familiar with the intricacies of the case law on free movement before they can correctly deal with the Charter-based claim.

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[82] Ibid. para 36.
[83] X Groussot, L Pech and GT Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon' in S de Vries, U Bernitz and S Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart 2013) 97 at 113.
[84] For a review of the debate, see AP van der Mei, 'The Scope of Application of the EU Charter of Fundamental Rights: "*ERT* Implementation"' (2015) 22 *Maastricht Journal of European and Comparative Law* 432 (note); and Snell, 'Fundamental Rights Review of National Measures', supra n 28.
[85] See eg Case C-58/98 *Corsten*, EU:C:2000:527, para 33.
[86] For an impressive list of such areas with references to case law, see N Cariat and P Dermine, 'La détermination de l'applicabilité du droit de l'Union européenne à une situation particulière' in N Cariat and JT Nowak (eds), *Le droit de l'Union européenne et le juge belge* (Bruylant 2015) 85 at 109–110.
[87] See F Fontanelli and A Arena, 'The Charter of Fundamental Rights and the Reach of Free Movement Law' in M Andenas, T Bekkedal and L Pantaleo (eds), *The Reach of Free Movement* (T.M.C. Asser Press 2017) 293.

More problematic from a conceptual point of view is the *Wachauf* category, and this is also where typologies proposed by scholars diverge.[88] For our purposes, it suffices to say that if the traditional dichotomy of implementation–derogation is to be preserved,[89] the concept of 'implementation' needs to be – sometimes rather artificially – extended to accommodate all the diverse situations in which the Charter was held to be applicable by the CJEU. Within the *Wachauf* category, it is much more useful to provide a list of the most typical situations in which the Charter was held applicable, even if those situations may conceptually overlap and may be grouped or divided into different categories on the basis of different criteria.

Thus, the Charter is applicable whenever the national judge:[90]

1. directly applies a norm of EU primary law;[91]
2. directly applies a norm of EU secondary law, typically a regulation;[92]
3. applies a national norm expressly intended to implement an EU-law obligation (transpose a directive,[93] transpose a framework decision,[94] implement a regulation,[95]

[88] For some of the categorisations, see, see Groussot, Pech and Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon', supra n 83 at 113; Nivard, 'Les conditions d'application de la Charte des droits fondamentaux', supra n 69 at 45–55; Hancox, 'The meaning of "implementing" EU law', supra n 63 at 1418–1421; M de Mol, 'Article 51 of the Charter in the Legislative Processes of the Member States' (2016) 23 *Maastricht Journal of European and Comparative Law* 640; A Bailleux and E Bribosia, 'La Charte des droits fondamentaux de l'Union européenne' in S van Drooghenbroeck and P Wautelet (eds), *Droits fondamentaux en mouvement: Questions choisies d'actualité* (Anthemis 2012) 73 at 108–114; and D Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe' (2013) 50 *Common Market Law Review* 1267 at 1279–1287.

[89] For example, de Mol, ibid. at 648, insists on two categories only, while others propose more: see eg Opinion of AG Sharpston in Case C-427/06 *Bartsch*, EU:C:2008:297, para 69.

[90] The typology is based on C Gauthier, S Platon and D Szymczak, *Droit européen des droits de l'Homme* (Sirey-Dalloz 2016) para 146; Nivard, 'Les conditions d'application de la Charte des droits fondamentaux', supra n 69 at 45; Bailleux and Bribosia, 'La Charte des droits fondamentaux de l'Union européenne', supra n 88 at 108–114; and Groussot, Pech and Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon', supra n 83 at 113. We consider only those cases of the Charter's national application which are directly relevant for the national judge (for example, the application of national acts transposing an EU directive), and not those only relevant for the national legislator (for example, the adoption of national acts transposing an EU directive).

[91] Case C-74/14 *Eturas and Others*, EU:C:2016:42, para 38.

[92] Case C-559/14 *Meroni*, EU:C:2016:349, para 44.

[93] Case C-176/12 *Association de médiation sociale*, EU:C:2014:2, paras 42–43; and Case C-314/12 *UPC Telekabel Wien*, EU:C:2014:192, para 46.

[94] Case C-168/13 PPU *Jeremy F*, EU:C:2013:358, paras 40–41; and Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, EU:C:2016:198, para 84.

[95] Case C-292/97 *Karlsson and Others*, EU:C:2000:202, para 37.

a Treaty provision,[96] an external agreement,[97] or a memorandum of understanding between the EU and a Member State[98]);

4. applies a national norm which was not expressly intended to implement a norm of EU law and interprets this norm using the method of remedial EU-consistent interpretation to ensure compliance of that norm with an EU-law obligation;
5. applies a national norm which was not expressly intended to implement a norm of EU law, but objectively 'serves to implement' an EU-law obligation.[99] This includes cases when the national judge:
    5.1. applies a concept of national law referred to in a norm of EU law and does so within an EU normative scheme (that is, in connection with applying a norm of EU law or a national norm intended to implement a norm of EU law);[100]
    5.2. applies a norm of national law that serves to guarantee the execution of an EU obligation or to sanction its non-execution;[101]
    5.3. applies a general norm of national law which provides remedies or establishes procedures and does so in relation to a claim based on EU law;[102]
6. applies a national norm that constitutes a derogation or justification to restrictions allowed by EU law (*ERT*);[103]

[96] Case C-300/04 *Eman and Sevinger*, EU:C:2006:545, paras 56–61.
[97] Case C-7/98 *Krombach*, EU:C:2000:164; and Case C-66/18 *Commission v Hungary (Enseignement supérieur)*, EU:C:2020:792, para 213. Cf. Case C-370/12 *Pringle*, EU:C:2012:756.
[98] Case C-258/14 *Florescu*, EU:C:2017:448, para 48.
[99] Opinion of AG Kokott in Case C-489/10 *Bonda*, EU:C:2011:845, para 20; and Nivard, 'Les conditions d'application de la Charte des droits fondamentaux', supra n 69 at 46: 'acte interne mis au service d'une réglementation ou d'une politique européenne'. See also M Safjan, 'Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of conflict?', EUI Working Paper LAW 2012/22, 2012, at 5, available at: cadmus.eui.eu//handle/1814/23294 ('[national acts] not being an act of strictly understood implementation they are, however, important for the realization and correct application of the European norm').
[100] Case C-401/11 *Soukupová*, EU:C:2013:223, paras 25–28.
[101] Case C-617/10 *Fransson*, EU:C:2013:105, para 27; and Case C-405/10 *Criminal proceedings against Özlem Garenfeld*, EU:C:2011:722, para 48.
[102] Case C-279/09 *DEB*, EU:C:2010:811, paras 28–30; and Case C-349/07 *Sopropé*, EU:C:2008:746, paras 33–37.
[103] Case C-260/89 *ERT*, EU:C:1991:254, para 43; and Case C-235/17 *Commission v Hungary (Usufruct Over Agricultural Land)*, EU:C:2019:432, paras 64–66. It results from a couple of CJEU judgments, whose implications are not yet fully clear, that the Charter is applicable where a national court applies a norm of national law that has the effect of depriving Union citizens of the genuine enjoyment of the substance of the EU citizenship rights, namely, when an EU citizen is forced to leave the territory of the EU: Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124; Case C-434/09 *McCarthy*, EU:C:2011:277; Case C-256/11 *Dereci and Others*, EU:C:2011:734. For a detailed discussion, see D Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe' (2011) *Columbia Journal of European Law* 55.

7. applies a national norm which falls within the exact scope of an unimplemented EU directive that gives expression to the principle of non-discrimination (*Kücükdeveci*).[104]

Some items of this typology have clearer scope than others. While in some of these scenarios, like the direct application of an EU-law norm (Categories 1 and 2), the applicability of the Charter is rather obvious and clearly defined, in other scenarios, it can be vague and borderline. The latter is most palpable regarding Category 7, which dates to the landmark *Kücükdeveci* case. This case concerned a provision of the German Civil Code which fixed different notice periods for dismissal of employees depending on the length of employment; in calculating that length, periods prior to the completion of the employee's 25th year of age were not considered.[105] Given that this rule constituted a difference of treatment on the grounds of age, it could never have been considered as serving to implement the anti-discrimination Directive 2000/78/EC, as was the case in the related *Mangold* case.[106] According to the CJEU, this provision fell within the scope of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.[107] When the period for its transposition ended, that Directive had the effect of bringing within the scope of EU law the Civil Code provision, 'which *concern[ed] a matter governed by that directive*, in this case the conditions of dismissal'.[108] Here, the uncertainty relates to the extent to which a mere overlap of subject matter between national rules and EU rules is sufficient to trigger the applicability of the Charter.[109] Contrary to fears expressed at the time of that decision, however, the solution reached in *Kücükdeveci* does not mean that the Charter applies 'whenever the exercise of [the Member States'] own regulatory competences happens to *touch upon a matter* also subject to some form of legislative intervention by the Union itself'.[110] Directive 2000/78/EC contains a specific prohibition of discrimination on the basis of age in a concretely specified area of 'employment and working conditions, including

[104] Case C-555/07 *Kücükdeveci*, EU:C:2010:21, paras 28–30. See also Case C-81/05 *Anacleto Cordero Alonso*, EU:C:2006:529, where the Court held that national provisions which were adopted before the entry into force of an EU directive but are capable of ensuring that national law is consistent with that directive, come within the scope of the directive.
[105] Case C-555/07 *Kücükdeveci*, EU:C:2010:21, para 11.
[106] See eg G Thusing and S Horler, 'Case C-555/07, Seda Kucukdeveci v. Swedex, Judgment of the Court (Grand Chamber) of 19 January 2010, Not Yet Reported Case Law: A. Court of Justice' (2010) 47 *Common Market Law Review* 1161 at 1170.
[107] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
[108] Case C-555/07 *Kücükdeveci*, EU:C:2010:21, para 25 (emphasis added).
[109] T Lock, 'Article 51 CFR' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A commentary* (OUP 2019) 2241 at 2246.
[110] Editorial Comments, 'Scope of Application of the General Principles of Union Law: An Ever Expanding Union' (2010) 47 *Common Market Law Review* 1589 at 1594 (emphasis added).

dismissals and pay'.[111] In *Kücükdeveci*, therefore, the connection between the Directive and the disputed provision clearly went above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.

Some further conditions need to be added to the categories above. In cases of direct application (Categories 1 and 2), the EU-law norm in question must be truly applicable *ratione personae*, *ratione materiae* and *ratione temporis* in the case before the national judge.[112] The same goes for the cases of express implementation of EU law (Category 3): not all norms that are part of a national implementation measure constitute measures truly required by an EU-law obligation. For example, insofar as a national measure transposing a directive on the labelling, presentation and advertising of foodstuffs contains provisions on the *sale* of foodstuffs – an area not governed by that directive – it does not constitute a transposition measure.[113] In other words, for the Charter to be applicable, the national norm expressly intended to implement an EU-law obligation must also objectively 'serve to implement' that obligation. It follows that in cases coming within Categories 3 to 5, there always needs to be a sufficient degree of connection between the national norm and a specific EU-law obligation, as explained above.[114] Ultimately, the typology of situations is not to be disconnected from the Court's basic formulas and general guidance, with the key criterion being the 'sufficient degree of connection'.

2.4 A thought for national judges

Throughout this section, we have hinted at many practical difficulties involved in determining the scope of application of the Charter. To make sense of the CJEU's basic formulas and general guidance, national courts need to read them together with the Court's casuistic case law, which has grown increasingly complex. There are two principal factors which have been fuelling this complexity.

The first one stems from the character of EU law and its national implementation as such: EU law covers vast and diverse areas of regulation; it is dependent on a decentralised system of enforcement in the Member States; and its relationship with national law is highly nuanced, depending on the area in question. As discussed above, the Charter applies

[111] Article 3(1)(c) of Directive 2000/78/EC.
[112] Importantly, if the referring court does not justify the applicability of the triggering norm, the CJEU can refuse to rule on the applicability of the Charter for lack of relevant facts: see eg Case C-23/12 *Zakaria*, EU:C:2013:24, para 39.
[113] Case C-144/95 *Maurin*, EU:C:1996:235, paras 11–12.
[114] See Section I.2.2.

whenever a triggering norm of EU law is applicable – that is, whenever a Member State measure enters into a framework or normative scheme laid down by EU law.[115] The applicability of some norms of EU law is notoriously difficult to pinpoint, and the boundaries of some EU-law normative schemes are notoriously difficult to draw.[116] That difficulty is particularly acute where such a normative scheme interacts with discretionary choices of the Member States: for instance, does the Charter apply to more stringent national measures that go beyond the minimum standards prescribed by an EU legal act?[117]

Consider these examples that illustrate the difficulty of knowing whether or not a certain Member State measure falls into an EU normative scheme. In *N. S. and Others*, the CJEU was asked to interpret the derogation clause in Article 3(2) of Regulation (EC) No 343/2003 ('the Dublin II Regulation'), which allowed a Member State to examine an asylum application if it so wished, even if that Member State was not normally responsible for such examination under the criteria in the Regulation.[118] The question was whether a Member State which makes the discretionary choice to derogate under this provision remains within the scope of Union law when doing so. According to the CJEU, it does because

> the discretionary power conferred on the Member States by Article 3(2) of [the Dublin II Regulation] forms part of the mechanisms for determining the Member State responsible for an

[115] Notably, such a scheme can be made up of more acts of secondary law: see Case C-195/12 *Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne*, EU:C:2013:598, para 49.

[116] In the words of Rosas, 'the real problem is not so much the applicability of the Charter as such but rather the applicability of another norm of Union law': A Rosas, 'When is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19 *Jurisprudence* 1269 at 1270. See above the discussion of *ERT*. See eg Joined Cases C-446/12 to C-449/12 *Willems and Others*, EU:C:2015:238, paras 49–50. See also Case C-101/01 *Lindqvist*, where AG Tizzano (EU:C:2002:513, para 44) and the Court (EU:C:2003:596, paras 47–48) reached opposite conclusions concerning the applicability of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31. See also Case C-64/16 *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, para 29, where the CJEU held that the material scope of Article 19(1)(2) TEU is larger than that of Article 51(1) of the Charter (confirmed in Case C-192/18 *Commission v Poland*, EU:C:2019:924). For a slightly atypical case, see Case C-638/16 *X and X*, EU:C:2017:173, paras 39–45.

[117] See de Mol, 'Article 51 of the Charter in the Legislative Processes of the Member States', supra n 88 at 655–658; and M Bartl and C Leone, 'Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review' (2015) 11 *European Constitutional Law Review* 140 (note). For a more general debate, see Cariat and Dermine, 'La détermination de l'applicabilité du droit de l'Union européenne à une situation particulière', supra n 86.

[118] Joined Cases C-411/10 and C-493/10 *N. S. and Others*, EU:C:2011:865. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

asylum application provided for under that Regulation and, therefore, merely an element of the Common European Asylum System.[119]

Things are different when it comes to a discretionary choice of the Member States to go above the requirements of minimum harmonisation EU directives. In *TSN and AKT*, the CJEU was asked whether the Charter was applicable to Finnish rules which went beyond Article 7(1) of the Working Time Directive, according to which 'every worker is entitled to paid annual leave of *at least* four weeks'.[120] Under the national rules, the workers were entitled to a period of annual leave exceeding four weeks, namely to seven weeks in *TSN* and five weeks in *AKT*. The Working Time Directive is based on minimum harmonisation, as reflected in the more-favourable-provisions clause in its Article 15: 'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers…'. The CJEU held that those Member State measures that go beyond the minimum requirements laid down in EU directives – that is, national toppings to minimum harmonisation directives – 'fall within the exercise of the powers retained by the Member States, without being governed by that directive or falling within its scope'.[121] By enacting them, the Member States are not implementing any specific EU-law obligation imposed on them in the area concerned. Accordingly, such national measures are not 'implementing' EU law under Article 51(1) of the Charter and fall outside the scope of the Charter.[122]

Whilst in *N. S. and Others*, the Dublin II Regulation *granted* 'the Member States an option of legislating by virtue of EU law', in *TSN and ATK*, the Working Time Directive merely *recognised* 'the power which [the Member States] have to provide for […] more favourable provisions in national law, outside the framework of the regime established by that directive'.[123] There is thus an important distinction to be made between power-recognising and power-granting clauses in EU directives. As clarified in *TSN and ATK*, the

[119] Ibid. para 68. Cf. Case C-638/16 PPU *X and X*, EU:C:2017:173, criticised as an unjustified deviation from the approach established in *N. S. and Others*: see M Ovádek, '"Un-Chartered" Territory and Formal Links in EU Law: The Sudden Discovery of the Limits of the EU Charter of Fundamental Rights through Humanitarian Visa' (2017) *European Yearbook on Human Rights* 213.
[120] Joined Cases C-609/17 and C-610/17 *TSN and* AKT, EU:C:2019:981. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.
[121] *TSN* and *AKT*, para 52.
[122] Ibid. para 53. See also para 35: 'the rights to paid annual leave thus granted beyond the minimum required by Article 7(1) of Directive 2003/88 are governed not by that directive, but by national law'.
[123] Ibid. paras 48–49.

more-favourable-provisions clauses in EU minimum harmonisation directives are power-recognising in nature.

To make matters more complex though, the Charter can still apply to national toppings to minimum harmonisation directives (that is, to national measures adopted in accordance with a power-recognising clause in such directives) in two scenarios. First, the Charter applies when the general minimum harmonisation clause is coupled with a special obligation to ensure compliance of national toppings with the Charter or general principles of EU law.[124] If the general minimum harmonisation clause is coupled with such a special obligation, then when enacting national toppings, the Member States are in fact also implementing this EU-law obligation; consequently, they are implementing EU law within the meaning of Article 51(1) of the Charter. Secondly, the Charter applies when the national topping in question also qualifies as an admissible derogation from the EU-law prohibition to restrict free movement. In such a case, the national topping represents the use by a Member State of an exception provided for by EU law from the prohibition to restrict free movement. As described above, according to the *ERT* line of case law, such use of an EU-law exception must comply with the Charter because it must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter.

The examples above illustrate that the determination of the Charter's applicability is highly context-based and requires a careful reading of the relevant applicable primary or secondary law as well as a careful consideration of the scope of the rules which can potentially trigger the applicability of the Charter. In broader terms, the *functional* logic of the Charter's scope of application – as opposed to purely formal and technical logic associated with the 'intentional' implementation of EU law – will sometimes be far removed from the daily reality of national courts.[125] A good understanding of structural principles of

[124] This is eg the case of Art 4(1) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L 95/1, read in conjunction with its Recital 41. Recital 41 states that 'Member States should be able to apply more detailed or stricter rules in the fields coordinated by this Directive to media service providers under their jurisdiction, while ensuring that those rules are consistent with general principles of Union law'. See also Case C-234/12 *Sky Italia*, EU:C:2013:49; and de Mol, 'Article 51 of the Charter in the Legislative Processes of the Member States', supra n 88 at 657.

[125] See eg P Jeney, 'The Scope of the EU Charter and its Application by the Hungarian Courts' (2016) 57 *Hungarian Journal of Legal Studies* 59 at 71–74, who reports several judgments in which Hungarian courts gave a narrow reading to Article 51 of the Charter, limiting 'implementation' to acts specifically adopted to transpose EU law. See also M Bobek, 'Kam až sahá právo EU? K věcnému aplikačnímu rámci unijního práva v členských státech' [How Far Does EU Law Reach? On the Material Framework of Application of Union

Union law (like the principle of effectiveness or decentralised enforcement) is required, together with a knowledge of mechanisms governing the coexistence of Union law and national law (like the concept of minimum harmonisation or Member State discretion). For all these reasons, the 'curse of legal uncertainty' over the Charter's scope is – in part – due to the fundamental characteristics of EU law as a supranational legal order operating within the limits of the powers conferred on the EU.[126] Therefore, the Charter's impact on national judicial decision-making will ultimately depend on the extent to which national judges are ready and willing to assume their role as Union judges. However, it will also depend on the extent to which the CJEU facilitates – or frustrates – national courts' tasks.

This last remark leads us to the second source of complexity of the CJEU case law: the approach the Court has adopted in delineating the scope of the Charter is not conducive to legal certainty for a variety of reasons.

As discussed above, the case law is chronically casuistic. The CJEU's basic formulas and its attempts to formulate general guidance have been criticised for being too vague and inconsistent.[127] Some decisions reached by the CJEU in individual cases were also subject to critique, as was the fact that the CJEU did not address certain existing tensions in the case law.[128] Often, the criticism concerns the Court's analysis of the sufficient degree of connection. While in some cases, the degree of connection was arguably stronger than the Court admitted, in other cases, the link relied on by the Court seemed a little forced.[129] There are also cases where the CJEU considered the matter to be so clearly within the scope of the Charter that it did not deem it necessary to identify the triggering norms with absolute

Law in the Member States] (2013) 18 *Právní rozhledy* 611. The functional logic also implies that in some cases, the legal regime can be split depending on the facts of the case: Lock, 'Åkerberg Fransson and its progeny', supra n 64 at 7.

[126] M Ovádek, 'Le champ d'application de la Charte des droits fondamentaux de l'Union européenne et les États membres: la malédiction du critère matériel' [2017(10)] *Journal de droit européen ex Journal des Tribunaux Droit européen* 386 at 390.

[127] For example, Dougan, 'Judicial review of Member State action under the general principles and the Charter', supra n 35.

[128] See eg Nivard, 'Les conditions d'application de la Charte des droits fondamentaux', supra n 69 at 54; and Snell, 'Fundamental Rights Review of National Measures', supra n 28 at 299.

[129] L Azoulai, 'The Case of Fundamental Rights: A State of Ambivalence' in HW Micklitz and B de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 207. See also S Morano-Foadi and S Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights' (2011) 17 *European Law Journal* 595, who cite a comment of an anonymous member of the Court that some cases required 'a rather intellectual effort to be able to single out the human rights element' (at 602).

precision.[130] Furthermore, when it comes to some individual elements of the Court's reasoning, it is at times unclear whether they only related to the case under consideration or whether they can (and should) be generalised. This observation applies, for instance, to the *Kücükdeveci* case: were the Court's pronouncements limited to the special context of the anti-discrimination Directive 2000/78/EC, which 'merely gives expression to, but does not lay down'[131] the principle of equal treatment contained in the Charter?

Another area of uncertainty that only recently emerged in the Court's case law deserves to be flagged. In a couple of cases concerning the independence of Polish and Portuguese judges, the CJEU relied on Article 19(1) of the Treaty on European Union (TEU) to review certain national measures against the principle of the effective judicial protection of individuals' rights under EU law. In *Associação Sindical dos Juízes Portugueses*, a preliminary ruling handed down in proceedings between the Trade Union of Portuguese Judges and the Portuguese Court of Auditors, the CJEU was asked whether Article 19(1) of the TEU and Article 47 of the Charter precluded general salary-reduction measures introduced by Portugal as part of budgetary cuts, from being applied to the members of the Portuguese Court of Auditors.[132] The CJEU found Article 19 of the TEU applicable but held that the measures at issue were not precluded by it. As for Article 47 of the Charter, that provision stayed on the margins, and the question of its applicability was not addressed. The CJEU only stated that 'as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to "the fields covered by Union law", irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter'.[133]

The Court followed that approach in the ground-breaking infringement case *Commission v Poland*, in which the Commission initially claimed that Poland violated 'the combined provisions' of Article 19(1)(2) of the TEU and Article 47 of the Charter by retroactively lowering the retirement age of the judges appointed to the Polish Supreme Court and by granting the President of Poland the discretion to extend the period of judicial activity of Supreme Court judges beyond the newly fixed retirement age.[134] Significantly,

[130] See eg Case C-208/09 *Ilonka Sayn-Wittgenstein*, EU:C:2010:806, paras 37–40. See also Cariat and Dermine, 'La détermination de l'applicabilité du droit de l'Union européenne à une situation particulière', supra n 86 at 93.
[131] Case C-555/07 *Kücükdeveci*, EU:C:2010:21, para 50.
[132] Case C-64/16 *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.
[133] Ibid. para 29.
[134] Case C-619/18 *Commission v Poland*, EU:C:2019:531, para 1.

the Commission clarified at the hearing that it sought a declaration that 'the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, has been infringed', arguing that 'the concept of effective legal protection referred to in the second subparagraph of Article 19(1) TEU must be interpreted having regard to the content of Article 47 of the Charter and, in particular, the guarantees essential to the right to an effective remedy laid down in that Charter provision'.[135] Just as in *Associação Sindical dos Juízes Portugueses*, the Court found that Article 19(1) was applicable and Poland violated it. Regarding the applicability issue, the CJEU stated that the Supreme Court 'may be called upon to rule on questions concerning the application or interpretation of EU law and that, as a "court or tribunal", within the meaning of EU law, it comes within the Polish judicial system in the "fields covered by Union law" within the meaning of the second subparagraph of Article 19(1) TEU, so that that court must meet the requirements of effective judicial protection'.[136] The applicability of Article 47 was not discussed, nor was that provision directly relied on by the CJEU. However, its material content was imported into Article 19(1) of the TEU,[137] as confirmed by later case law, according to which Article 47 'must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU'.[138]

Even though the Court's approach may be compelling from a policy-based point of view, it creates tension regarding the issue of (in)applicability of the Charter. Was the Charter appliable in either of the two cases discussed above? There is a good argument to be made that it indeed was, based on the Fransson formula according to which 'the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter'. Since Article 19(1) lays down an EU-law obligation on the Member States, it should be capable of triggering the Charter's applicability.[139] The Court did not address the issue, instead conveniently relying on the autonomous scope of Article 19(1). From the point of view of the limited applicability of the Charter under its Article 51, in case the Charter

[135] Ibid. para 32.
[136] Ibid. para 56.
[137] Ibid. para 54: 'It follows from all of the foregoing that the second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, *within the meaning in particular of Article 47 of the Charter*, in the fields covered by EU law […]'.
[138] Case C-824/18 *A.B. and Others (Nomination des juges à la Cour suprême – Recours)*, EU:C:2021:153, para 143; and Case C-896/19 *Repubblika*, EU:C:2021:311, para 45. Cf. Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, paras 78–81.
[139] For the same argument, see A Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence' (2020) 27(1) *Maastricht Journal of European and Comparative Law* 105 at 116.

was thought to be inapplicable, it is hard not to agree with the view that the Court's approach amounts to indirectly extending the Charter's scope.[140] From the viewpoint of the national judge, whose priority is usually not to dwell on the issues of EU constitutional law, this is another loose end that gives rise to a similar difficulty to the one resulting from *Kücükdeveci*. Is 19(1) of the TEU an independent source of all Article 47 guarantees, or only those representing the *essence* of that fundamental right?[141] Is the Court's approach to Article 19(1) limited to the specific circumstances of the cases concerned and to Article 47 of the Charter, or could it extend to other Charter rights as well? What is the nature and extent of the national courts' (Charter-infused) obligation to give effect to Article 19(1) of the TEU?

The Court has also been criticised for excessive judicial minimalism in its handling of Charter-focused references for a preliminary ruling. To explain the stakes here, it is useful to go back to the rationale of the preliminary ruling mechanism and the division of labour between the CJEU and national courts. The fundamentals are neatly summarised in the CJEU's Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings:

> the [CJEU's] role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings. That is the task of the national court or tribunal and it is not, therefore, for the Court either to decide issues of fact raised in the main proceedings or to resolve any differences of opinion on the interpretation or application of rules of national law.[142]

The determination of the Charter's applicability is clearly a joint task since it involves the interpretation of Article 51 of the Charter and the relevant triggering norms (the task of the CJEU) and the interpretation of national law as applied to the facts of the case (the task of national courts).[143] In practice, this delicate task and the paradox underlying it (the national judge asks the CJEU precisely because they are not certain about the applicability of the

[140] A Berramdane, 'Le champ d'application de la Charte' (2020) *Revue de l'Union européenne* 548.
[141] A Bailleux, 'Les contours du champ d'application de la Charte. Une tentative de recadrage' in A Iliopoulou-Penot and L Xenou (eds), *La charte des droits fondamentaux, source de renouveau constitutionnel européen?* (Bruylant 2020) 201 at 218. According to AG Bobek, 'recent case-law shows that the content of the second subparagraph of Article 19(1) TEU coincides with the guarantees required by the second paragraph of Article 47 of the Charter, at least expressly as far as the elements of independence and impartiality of the judiciary are concerned': Opinion of AG Bobek in Case C-83/19 *Asociaţia "Forumul Judecătorilor din România"*, EU:C:2020:746, para 213.
[142] [2012] OJ C 338/1.
[143] Fontanelli, 'Implementation of EU law through domestic measures after Fransson', supra n 37 at 686; and M Safjan, D Düsterhaus and A Guérin, 'La Charte des droits fondamentaux de l'Union européenne et les ordres juridiques nationaux, de la mise en œuvre à la mise en balance' (2016) 52 *Revue trimestrielle de droit européen* 219 text accompanying fn 118.

Charter to a specific national measure) is generally tackled in this manner: the referring court presents to the CJEU the factual circumstances of the case together with the applicable national norms; the CJEU, in turn, interprets the relevant triggering norms of EU law and reaches an abstract decision on whether the Charter applies to a situation or a national rule *such as those concerned in the proceedings before the referring court*.

However, a trend has been emerging whereby the CJEU provides only limited guidance and leaves the national courts to their own devices when determining the applicability of the Charter; arguably, this trend is part of a broader strategy to increase efficacy in the context of the growing number of preliminary references.[144] This practice raises fears of a potential chilling effect on national courts' readiness to refer questions for a preliminary ruling or even to apply the Charter in the first place.[145] Also, references for a preliminary ruling are often disposed of by a reasoned order, published only in French and in the language of proceedings, which simply states that the order for reference does not contain any specific information to show that the national decision in question would be within the scope of EU law.[146] This can raise the question of whether the Charter could have been found applicable or otherwise, if the national court formulated the order for reference in a different way.[147]

While this section presents a formidable set of difficulties for national courts, it is still possible to conclude on an optimistic note by keeping things in proportion and highlighting the tools available to national courts. In most cases, it will be manifestly clear to any national judge acquainted with the basic tenets of the CJEU's *Fransson* case law, whether the Charter is or is not applicable. Furthermore, an increasing number of situations are now 'actes éclairés' – that is, the CJEU has concretely judged them to fall within or outside the scope of the Charter. An illustration of this point is found in EU VAT law. Since

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[144] See Pech, 'Between Judicial Minimalism and Avoidance', supra n 36. For a concrete example, see Case C-256/11 *Dereci and Others*, EU:C:2011:734, para 72, which left perplexed AG Kokott in her Opinion in Case C-489/10 *Bonda*, EU:C:2011:845, at fn 18. See also de Witte, 'The scope of application of the EU Charter of Fundamental Rights', supra n 61 at 35; Safjan, Düsterhaus and Guérin, 'La Charte des droits fondamentaux de l'Union européenne et les ordres juridiques nationaux', ibid. at section 'L'évacuation de la Charte du champ d'analyse'; and Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights', supra n 75 at 233, 236 and 245. See more generally N Wahl and L Prete, 'The gatekeepers of Article 267 TFEU: On jurisdiction and admissibility of references for preliminary rulings' (2018) 55 *Common Market Law Review* 511.

[145] For a similar argument, see Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights', supra n 75 at 263.

[146] See eg Case C-339/10 *Asparuhov Estov and Others*, EU:C:2010:680, para 14; and Case C-459/13 *Široká*, EU:C:2014:2120, paras 23–26**.** See Picod, 'Article 51', supra n 32 at 1069.

[147] O'Leary, 'Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU', supra n 4 at 11.

Fransson, which concerned national criminal proceedings for VAT-related offences, the Court had the opportunity to rule on the Charter's applicability in the context of: a VAT adjustment after an abusive practice;[148] taxpayers' procedural rights in the administrative tax procedure;[149] or the income tax assessment based on evidence that was obtained during a pre-trial investigation initiated due to suspicion of VAT fraud.[150] Nevertheless, Member State courts do run into difficulties even where the CJEU case law on the matter is clear, as evidenced by some CJEU orders declaring a preliminary reference inadmissible for lack of connection with EU law.[151]

Most importantly, though, national judges can rely on certain presumptions of relevance that can alert them to the possibility of the Charter being applicable. Besides cases requiring a norm of EU law to be applied directly, one of the most obvious presumptions is the explicit intention to implement. This intention can be apparent in various ways: a footnote reference to EU rules implemented by the national measure in question; a provision of the measure listing all the implemented EU legislation; or information in the explanatory memorandum.[152] Other, weaker presumptions include the fact that the case falls within a highly harmonised area or has intra-EU cross-border elements. Of course, all these presumptions can be rebutted. Because only those national provisions which can be traced to a specific EU law obligation can be objectively considered as implementing provisions, the Charter does not, for instance, apply as such to national provisions that voluntarily extend the rules of the implemented EU act to cover situations which are outside the scope of that EU act[153] or which voluntarily go beyond the minimum requirements of the implemented EU act as in *TSN and ATK* discussed above. Next, even in highly harmonised areas, the

[148] Case C-419/14 *WebMindLicenses*, EU:C:2015:832.
[149] Case C-298/16 *Ispas*, EU:C:2017:843.
[150] Case C-469/18 *Belgische Staat*, EU:C:2019:895. For an overview of the interactions between VAT law and the Charter, see K Kim Egholm Elgaard, 'The impact of the Charter of Fundamental Rights of the European Union on VAT law' (2016) 5 *World Journal of VAT/GST Law* 63.
[151] See eg Case C-14/13 *Cholakova*, EU:C:2013:374 (administrative detention in a purely internal situation); and Case C-321/16 *Pardue*, EU:C:2016:871 (criminal proceedings for trespass and possession of a screwdriver at the time of an altercation). References for a preliminary are one of the useful indicators of how national judges deal with the applicability of the Charter. See S Iglesias Sánchez, 'Article 51: The Scope of Application of the Charter', in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 401 at 403–404.
[152] For example, § 363 of the Czech Labour Code lists all the provisions of the Labour Code which implement EU law. In the Czech Republic, footnotes referring to the implemented EU legal acts are obligatory under Article 48 of the Rules for Legislative Drafting of the Czech Government.
[153] On this and other examples of gold-plating, see R Král, 'On the Gold-Plating in the Czech Transposition Context' (2015) 5 *The Lawyer Quarterly* 300.

Charter is never applicable in matters expressly excluded from the scope of EU law.[154] The presumption based on cross-border elements is the easiest to rebut. This is because certainly not all intra-EU cross-border situations are currently regulated by EU law: when EU citizens travel to another Member State, they are *not* entitled to say '*civis europeus sum*' and invoke that status in order to oppose any violation of their EU fundamental rights.[155] In general terms, the role of these presumptions as 'EU-law alarm bells' is, however, undisputed.

Finally, in cases of uncertainty, national judges can refer the case to the CJEU for a preliminary ruling and explicitly raise the question of the Charter's applicability (or the applicability of the triggering norm that the referring judge had identified). In practice, the question of applicability will often be raised indirectly, for instance, when the referring court asks whether the Charter precludes a certain national rule. Considering the Court's handling of some requests for a preliminary ruling described above, national courts are nevertheless advised to address the question of applicability directly and identify potential triggering norms with reference to the facts of the case before them.

There are a few other secondary aspects which allow for a more positive outlook. In some areas of regulation, EU law is applied as a matter of routine, which means that the application of the Charter might also become a matter of routine, for example, in Dublin transfer cases or administrative expulsion cases. Moreover, the specialisation of national judges in a particular, 'EU-heavy' area means that they are more likely to become familiar with the rules of the Charter's applicability. Administrative judges will thus generally be better acquainted with the application of the Charter than civil or criminal judges, even though this is likely to change with the gradual expansion of EU law to other areas of regulation. In parallel with the development of the CJEU's case law in certain areas, it is reasonable to expect that the national case law on Article 51 has also been growing steadily. As national apex courts interpret the conditions of the Charter's applicability, the door opens for a more effortless and systematic application of the Charter by lower courts.

As part of evaluating the case law of national courts, it is important to try to ascertain whether the difficulties that national judges face stem from the first or the second type of

[154] For examples of exclusionary clauses in EU secondary legislation, see Sarmiento, 'Who's afraid of the Charter?', supra n 88 at 1285.
[155] An echo to Opinion of AG Jacobs in Case C-168/91 *Konstantinidis*, EU:C:1992:504, para 46. However, see Case C-182/15 *Petruhhin*, EU:C:2016:630; and its interpretation in Bailleux, 'Les contours du champ d'application de la Charte', supra n 141 at 215.

problem, or rather a lack of capacity or willingness of national judges to fulfil their EU-law mandate. This analysis should form the basis of any attempts to find solutions to the supposedly unsatisfactory application of the Charter on the national level and investigate the claim that the uncertainty about the Charter's scope is the principal factor behind the Charter's limited role in national court proceedings.

Finally, it is important to acknowledge the role of litigants and their counsel, who are equally exposed to the Charter-related difficulties identified above. Submissions of the parties regarding the applicability of the Charter can be a convenient starting point for a court's analysis. Reports from the Member States suggest, however, that in most cases the parties do not submit a detailed analysis of the Charter's applicability. In fact, they tend to ignore the Charter's limited material scope and often 'throw the Charter into the mix' in a cavalier fashion without any substantiation.[156] While the exact extent of a party's burden of argument will depend on the legal parameters of the national procedure in question,[157] the activity or otherwise of the parties when invoking the Charter is an important contextual factor to consider in examining national case law.

3. THE PRACTICE OF CZECH ADMINISTRATIVE COURTS

3.1 Introduction

This section will examine whether Czech administrative courts declare the Charter (in)applicable in cases where the parties invoke it or where courts give effect to it of their own motion. Where such an applicability assessment is present, we will evaluate whether it was made in compliance with Article 51 and the CJEU's case law.

A few remarks are due on the Czech institutional and procedural context. Administrative justice in the Czech Republic is a two-layer system, with the *Nejvyšší správní soud* (Supreme Administrative Court, NSS) at the top end, and specialised administrative chambers or single-judges at eight regional courts at the bottom end. The NSS is the highest judicial authority in matters within the jurisdiction of courts of administrative justice, and it guarantees the unity and legality of decision-making by ruling on cassation complaints

[156] See eg Mazák et al., supra n 10 at 185 and 250 (mere citations of Charter articles, confirming a 'general failure to exploit the potential of the Charter'); and Bailleux and Bribosia, supra n 88, at 122–123 (tendency of judges and counsel to see the Charter as another fundamental rights catalogue of general application).
[157] For a comparative discussion as to which national courts apply the Charter *ex officio* and which do not, see Díez-Picazo and Fraile Ortiz, 'Application of the Charter of Fundamental Rights of the European Union by national courts', supra n 45.

against decisions of regional courts.[158] Given the guiding role of the NSS vis-à-vis regional courts, we will first discuss the case law of that court (Section 3.2) before turning to the practice of regional administrative courts, which has so far been largely based on NSS case law (Section 3.3).

3.2 The practice of the *Nejvyšší správní soud*

This section will argue that despite some methodological hesitations and the lack of clear distinction between non-violation and non-applicability in some judgments (Section 3.2.1), the NSS has proven capable of making correct and increasingly robust applicability assessments (Section 3.2.2).

3.2.1 No standard methodology (yet)

The overall impression is one of a variety of approaches. Right from the very beginning, in the pre-Lisbon days, the NSS would sometimes dismiss a Charter-based claim due to the lack of binding force of the Charter;[159] at other times, it would simply look the other way without expressly dealing with such a claim.[160] A succinct declaration of inapplicability appeared, for instance, in *V. N. v Financial Directorate of Plzeň*, in which the NSS showed an early awareness of the Charter's limited scope of application:

> As a subsidiary point, the NSS adds that [the Charter] is not – despite its undeniable authority – yet a formally binding source of law in the European Union, and it is even less so for EU Member States in areas that are not within the scope of activity of the European Community or the European Union (see Article 51 of the Charter).[161]

The chosen approach seems to depend on how much didactic instruction the judges are willing to provide. Both approaches persist in the post-Lisbon era: when the parties invoke the Charter, there does not seem to be a standard practice whereby the NSS would always either declare the Charter inapplicable or declare it applicable before examining the merits of the claim. In some cases, the silence of the NSS could be explained by the fact that the complaint was decided on other grounds, for instance, on the basis of the Czech Charter of

[158] Section 12(1) Act No 150/2002 Coll. It also has competence to rule on certain other matters in the first instance, such as electoral matters or anti-covid measures.
[159] NSS, 7 Afs 114/2006-78, 31 May 2007; NSS, 8 Afs 119/2005-118, 27 July 2007; and NSS, 2 As 20/2008-73, 22 July 2008.
[160] NSS, 8 Afs 59/2005-83, 20 July 2007; and NSS, 5 Afs 42/2004-61, 31 May 2006.
[161] NSS, 8 Afs 27/2005-88, 18 September 2007. This and all the other translations of the NSS's judgments are our own. Cf. a slightly anomalous case NSS, 5 Afs 114/2006-56, 20 December 2007, where the NSS did not point out the lack of Charter's binding force, but instead held that Article 41 of the Charter was respected.

Fundamental Rights and Freedoms[162] or solely on procedural grounds.[163] Another reason could be that the Charter was invoked in a case clearly without any EU-law link, and the judges simply did not feel the need to signal that.[164] In a significant number of cases, however, it was arguably because the Charter-based argument was so marginal and under-substantiated that the NSS did not find it necessary to explicitly react to it in the text of the decision.[165] In sum, the analysis of the NSS's case law did not reveal any systematic method for addressing the applicability or otherwise of the Charter in response to a Charter-based claim.

In a few cases, the NSS declared there was no breach of the Charter in situations outside the scope of EU law. In other words, the NSS made a declaration of non-violation instead of a declaration of non-applicability. For instance, *Š. N. v Liberec Regional Authority* concerned a procedure conducted by a local authority authorising the closure of roads for an automobile race under the Road Act.[166] The applicant, an owner of land adjoining the roads in question, challenged the fact that he did not have standing in the authorisation proceedings, in which he saw a violation of Article 41(2) of the Charter. The NSS held that

> [t]he parties to the proceedings in question are directly defined in law, which does not permit to grant standing in the administrative proceedings to owners of the land adjoining the roads at issue. Such an interpretation cannot be derived from the principle of transparency of public administration, the principle of fair trial, or the case law of the [CJEU], or Article 41(2) of the [Charter]. It does not follow from any of these that the owners of the adjoining land should be granted standing.[167]

[162] See eg NSS, 4 Ads 134/2014-29, 30 October 2014 (the Court found that the respondent authority violated a provision of the Social Services Act, read in the light of the Czech Charter and some other international fundamental rights instruments); and NSS, 6 As 123/2013-37, 3 April 2014 (the Court found that the respondent authority violated a provision of the Act on the Right of Assembly read in the light of the Czech Charter and the European Convention on Human Rights).
[163] See eg NSS, 1 As 113/2018-29, 16 May 2018; and NSS, 8 Azs 14/2017-34, 28 March 2017 (the cassation complaint was rejected as not allowed (*nepřijatelná*) under § 104a Code of Administrative Justice).
[164] See eg NSS, 6 Ads 117/2011-48, 20 October 2011 (concerning old-age pensions): the NSS dismissed the applicant's reference to the Charter as inoperative due to the Charter being inapplicable, and it did so only by way of *obiter dictum*, 'only as a marginal note'. This suggests that the NSS did not consider itself obliged to make such declarations of non-applicability.
[165] See eg NSS, 4 Ads 108/2010-39, 27 January 2011; and NSS, 7 As 234/2018-15, 26 July 2018.
[166] NSS, 7 As 344/2018-35, 6 December 2018.
[167] Ibid. para 15.

We found a handful of other cases where the distinction between non-violation and non-applicability was ignored or blurred.[168]

While the lack of proper distinction between non-violation and non-applicability was materially insignificant in all these cases (the outcome is the same in both scenarios), such an approach is formally imprecise and problematic in that it can cause or perpetuate the confusion about the Charter's scope. Nevertheless, cases of this kind are not frequent in the NSS's practice.

Where the NSS does explicitly address the applicability of the Charter, it does so in various degrees of detail. In a few cases, the NSS simply held that the Charter did not apply without further explanation.[169] In three clusters of cases, the NSS – very much conscious of the limited applicability of the Charter – carried out more serious analysis.

3.2.2 Examples of good practice (with some caveats)

The first cluster of cases concerned the Czech levy on photovoltaic power plants (the 'solar levy') adopted in 2010 to attenuate the economic effects of a highly beneficial support scheme that had been introduced to promote solar energy. The potential links to EU law were Directives 2001/77/EC and 2009/28/EC, which lay down an obligation for the Member States to ensure that the share of energy from renewable sources equals or exceeds the specified targets.[170] Several producers argued that the solar levy violated these Directives and the Charter. In *BS Park II. v Appellate Financial Directorate*, the NSS's reaction to that

[168] NSS, 2 Ads 266/2017-20, 26 October 2017, para 21; and NSS, 5 Ads 211/2017-39, 14 November 2017, para 23. See also NSS, 1 Ans 3/2012-34, 11 July 2012, para 27 (declaration of non-applicability: 'there is no doubt in the present case that this is not a dispute in which Union law is implemented – the applicant is seeking the initiation of administrative criminal proceedings against Mr J. V. [regarding an alleged assault]') and para 29 (declaration of non-violation). It is interesting to note that the NSS also referred to the Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union [2016] OJ C 202/355, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. For an illustration of the blurry line between non-applicability and non-violation, see eg NSS, 2 Ads 266/2017-20, 26 October 2017, para 21; and NSS, 5 Ads 211/2017-39, 14 November 2017, para 23. For the same reasoning, see also NSS, 1 Ads 270/2017-35, 31 January 2018; and NSS, 6 Ads 238/2017-33, 14 February 2018. For declarations of compatibility outside the scope of EU law, see eg NSS, 3 Ads 178/2011-72, 15 February 2012; NSS, 6 Afs 2/2014-25, 23 April 2014; and NSS, 6 Ads 170/2015-53, 6 April 2016. In NSS, 6 As 130/2017-23, 25 April 2018, the contested judgment of the Regional Court in Brno contained a declaration of non-violation in a case outside the scope of EU law. See also NSS, 2 Afs 73/2014-36, 21 May 2014; or NSS, 2 Afs 121/2014-46, 25 September 2014, where the NSS held there was no violation despite previously hinting at the fact that the case was outside the scope of EU law.

[169] See eg NSS, 4 Ads 169/2011-86, 28 March 2012.

[170] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L 283/33; and Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16.

challenge was still rather tentative.[171] Having summarised the content of the Directive and drawn attention to the large margin of discretion left to the Member States, it held that Directive 2009/28/EC was not sufficiently precise and unconditional to have direct effect, and thus the applicant could not invoke it. The NSS concluded that

> [t]he applicable legislation concerning the solar power levy is not modelled on any norm of EU law, nor does any such norm prevent the introduction of this levy. (…) the introduction of the levy certainly does not compromise the objective of Directive 2009/28/EC (…).[172]

The first sentence arguably echoes the two *Wachauf* and *ERT* implementation scenarios and hints at the case not being within the scope of EU law, but this remark was made in the section concerning the refusal to make a preliminary ruling reference, and the NSS did not explicitly declare the Charter inapplicable. The NSS's reasoning blurs the distinction between the inapplicability of the Directive *ratione materiae* (and consequently the inapplicability of the Charter) and the invocability of the Directive due to it being insufficiently clear and precise.[173]

In *BEAS SUN v Appellate Financial Directorate*, the NSS developed its reasoning a little further, paraphrasing the wording of Article 51 of the Charter:

> [The Charter] relates to the protection of fundamental rights of persons against steps taken by the EU institutions and Member State authorities when implementing EU law. Nevertheless, the only element with a Union dimension in this case is the obligation to ensure an increase in the share of energy produced from renewable sources by a certain date. How this is to be achieved is then a question of national law. […] In this case, there is no direct application of Union law, but there is a certain systemic interconnectedness between Czech law and EU law.[174]

The NSS's remark that a mere 'systemic interconnectedness' is not sufficient to trigger the applicability of EU law is reminiscent of the requirement identified by the CJEU for there to be 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. If the NSS did indeed consciously model this concept on the CJEU's case law, one could ask why it did not refer explicitly to the degree of connection criterion as formulated in *Siragusa*.[175]

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[171] NSS, 1 Afs 22/2013-47, 11 July 2013.
[172] Ibid. para 35. This reasoning appeared previously in NSS, 1 Afs 22/2013-47, 11 July 2013, para 35.
[173] See ibid. paras 33–34. See also NSS, 7 Afs 17/2013-46, 23 May 2013, which contains a similar reasoning.
[174] NSS, 2 Afs 106/2013-35, 16 April 2014. Here, the applicant referred explicitly to Article 51 of the Charter. See also NSS, 9 Afs 141/2013-39, 14 August 2014, where the NSS followed the same reasoning and added that '[t]he solar levy […] is a tax that is not regulated on the European Union level' (para 37).
[175] See supra text accompanying n 67.

Finally, in *BEAS SOLAR v Appellate Financial Directorate*, the NSS followed the same logic but approached the issue through the prism of Article 51 and substantiated its reasoning by ample reference to the CJEU's case law, arguably because the applicant referred explicitly to Article 51.[176] The NSS first cited Article 51 in its entirety; it then referred to the CJEU's judgment in *Fransson* and its formula that 'the fundamental rights guaranteed in the legal order of the Union are applicable in all situations governed by Union law, but not outside such situations'. It also cited *Currà and Others* ('the provisions of the Charter relied upon cannot, in themselves, form the basis for any new power')[177] and enumerated in full the criteria first established in *Iida*.[178] Applying the CJEU's guidance to the case in hand, the NSS relied on its previous assessment of the obligations of the Member States laid down in Directive 2009/28/EC and concluded that

> [i]n the light of the wording of Article 51 of the Charter, the Charter therefore does not apply to the present case, and the Court of Justice is not competent to decide on the questions for a preliminary ruling proposed by the applicant.[179]

In all the cases cited above, the NSS reached the correct conclusion that the Charter was not applicable, but only in the last case was its assessment transparent and methodologically satisfactory. Interestingly, the NSS's conclusion was confirmed in no uncertain terms by the Czech Constitutional Court.[180]

In the second cluster of cases, several Czech companies challenged administrative decisions by which the competent authorities withdrew their gambling licences, contending that the withdrawal infringed their freedom to conduct a business and the right to property, enshrined in Articles 16 and 17 of the Charter respectively. In the leading case *SYNOT TIP v Ministry of Finance*, the NSS dismissed the applicant's argument alleging a violation of

[176] NSS, 5 Afs 152/2015-35, 27 November 2015.
[177] Case C-466/11 *Currá and Others*, EU:C:2012:465, para 26.
[178] Case C-40/11 *Iida*, EU:C:2012:691, para 79, citing Case C-309/96 *Annibaldi*, EU:C:1997:631, paras 21–23. See also Case C-206/13 *Siragusa*, EU:C:2014:126, para 25.
[179] NSS, 5 Afs 152/2015-35, 27 November 2015, para 32.
[180] Czech Constitutional Court, II. ÚS 2071/14, 3 October 2014. The Court held that Directive 2001/77/EC does not regulate the taxation of electricity produced from renewable sources, and the tax regulation at issue therefore does not constitute 'implementation of Union law' within the meaning of Article 51(1) of the Charter (para 9). It added that '[t]his view … is also supported by the judgment of the [CJEU in C-198/13 *Hernández*], which observed with reference to previous case law that "the concept of 'implementing Union law', as referred to in Article 51 of the Charter, presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other" (para 34)'. See also Case C-215/16 *Elecdey Carcelen*, EU:C:2017:705, para 37.

the Czech Charter of Fundamental Rights and Freedoms, and addressed the EU Charter-based claim 'only for the sake of completeness':

> Only for the sake of completeness, the [NSS] observes that the applicant cannot invoke the [Charter] in this case because it is not (or at least does not claim to be) an entity exercising the free movement of persons, goods or services in the present case. Therefore, its situation is not covered by European Union law, including the EU Charter.[181]

In support of this conclusion, the NSS then cited both paragraphs of Article 51 of the Charter, the Explanations to the Charter and several CJEU judgments, including a quote of the Fransson formula and the 'certain degree of connection' requirement.[182] The NSS concluded that

> [i]n the present case it must be observed that the national decision does not contain any specific element based on which it could be considered that Union law is being applied in the case. Directive (…) 2006/123/EC on services in the internal market (…) explicitly excludes from its material scope gambling activities which involve wagering a stake with pecuniary value in games of chance (…). The areas of gambling concerned are not regulated by Union law, and the provisions of the Gambling Act at issue do not aim to implement provisions of Union law. (…) The Supreme Administrative Court concluded that the present case does not fall into the scope of Union law, and the conditions for the EU Charter to apply are therefore not fulfilled.[183]

The NSS's recapitulation of the Charter's applicability criteria was exemplary. However, their application to the case in hand was slightly misleading, for it suggested that gambling is outside the scope of EU law due to it not being covered by the Services Directive 2006/123/EC, when gambling activities can be caught by the TFEU provisions on the free movement of goods and services.[184] The NSS, however, soon had an opportunity to return to this point.

In *BONVER WIN v Ministry of Finance*, the applicant disagreed with the NSS's assessment that the Charter was not applicable; it argued that its business activities were caught by the Treaty provisions on the free movement of services since some of its clients were nationals of other EU Member States.[185] It cited *Berlington Hungary and Others*, in

[181] NSS, 6 As 285/2014-32, 24 February 2015, para 40.
[182] Ibid. The NSS cited Case C-617/10 *Fransson*, EU:C:2013:105; Case C-459/13 *Milica Široká*, EU:C:2014:2120; Case C-418/11 *Texdata Software*, EU:C:2013:588; and Case C-198/13 *Julian Hernández and Others*, EU:C:2014:2055.
[183] NSS, 6 As 285/2014-32, 24 February 2015, para 41.
[184] See C Barnard, *The Substantive Law of the EU: The Four Freedoms* (OUP 2019) at 436.
[185] NSS, 1 As 297/2015-77, 20 January 2016, para 24. See also an earlier judgment in which this reasoning appeared for the first time: NSS, 10 As 62/2015-170, 22 July 2015, paras 9–21.

which the CJEU reviewed the Hungarian gambling legislation against Article 56 of the TFEU and the Charter; the cross-border element based on which the CJEU established its jurisdiction was that 'a number of the customers of the applicants in the main proceedings were European Union citizens holidaying in Hungary'.[186] Nevertheless, the NSS was not persuaded by the applicant's arguments. Although it admitted that Article 56 could apply to activities excluded from the scope of the Services Directive, the NSS saw no connecting factor with EU law in the case. As for the argument based on *Berlington Hungary*, the NSS stated that

> [t]he applicability of EU law must be distinguished from the admissibility of the reference for a preliminary ruling in such a case. (…) The passages of the *Berlington Hungary* decision cited by the applicant deal with the admissibility of the preliminary reference, not with the applicability of EU law in a purely internal case. (…) As stated above, in the present case, there is no connection with trade between the Member States.[187]

Whilst in certain limited circumstances, the CJEU chooses to issue a preliminary ruling even in cases lacking a cross-border element, that is, it holds the reference admissible even if EU law is not applicable in the national dispute at hand,[188] *Berlington Hungary* was not such a case. It follows from paragraphs 23 to 28 of the judgment that the CJEU considered EU law applicable due to the fact that (i) a number of customers of the applicants in the main proceedings were EU citizens, and (ii) 'it is far from inconceivable that operators established in Member States other than Hungary have been or are interested in opening amusement arcades in Hungary'.[189] However, the NSS pushed through its own assessment, failing to deal with the applicant's argument and distinguish the case from *Berlington Hungary*.

It is important to note that the real issue here is the applicability of the triggering norm (Article 56 of the TFEU), not the applicability criteria of the Charter. Interestingly, due to doubts expressed by some NSS judges, the Extended Chamber of the NSS subsequently made a reference for a preliminary ruling to seek clarification on *Berlington Hungary*. The Extended Chamber asked the CJEU whether Article 56 of the TFEU could be

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[186] Case C-98/14 *Berlington Hungary and Others*, EU:C:2015:386, para 25. At para 26, the Court repeated the principle formulated in previous case law that '[s]ervices which a provider carries out without moving from the Member State in which he is established for recipients established in other Member States constitute the provision of cross-border services for the purposes of Article 56 TFEU'.

[187] NSS, 1 As 297/2015-77, 20 January 2016, para 30. For a similar approach, see also eg NSS, 5 As 255/2015-58, 26 May 2016.

[188] K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (OUP 2014) at 91–92; and Case C-28/95 *Leur-Bloem*, EU:C:1997:369.

[189] Case C-98/14 *Berlington Hungary and Others*, EU:C:2015:386, para 27.

held applicable solely because a service primarily provided to Czech nationals can also be used, or is being used, by a number of nationals from other EU Member States.[190] The CJEU rejected the application of a *de minimis* rule in the context of Article 56 of the TFEU and held that that provision was applicable to a company established in one Member State, 'where some of its customers come from a Member State other than the Member State in which it is established'.[191] In fact, *BONVER WIN v Ministry of Finance* can be taken as a perfect illustration of the difficulties national judges face in *ERT*-type cases when assessing the applicability of free movement Treaty provisions. The difficulties could only be resolved by a reference for a preliminary ruling.

The last cluster of cases in which the NSS dealt with the applicability of the Charter at length concerned disputes regarding housing benefits in non-cross-border scenarios. In *J. Z. v Ministry of Labour and Social Affairs*, the applicant took issue with the calculation of housing benefit; he argued that as a self-employed person he had been discriminated against, claiming violation of the Charter.[192] Once again, the NSS first set out the rules: it cited Article 51, referred to *Fransson*, *Nagy*,[193] and quoted a long passage from *Siragusa*.[194] Applying these rules to the facts of the case, the NSS considered two potential triggering norms – Regulation (EC) No 883/2004 on the coordination of social security systems[195] and 'the anti-discrimination directives based on Article 19 of the TEU' – but it held that they could not trigger the application of the Charter:

> The Regulation or any other acts of Union secondary law, however, do not regulate the substantive eligibility conditions for, and the extent of, the said benefit. When the Member States lay down the conditions for granting a housing benefit and determine the extent to which such benefit is granted, they are not implementing Union law (see, by analogy, [Case C-333/13 *Dano*, at paras 89–91]).
>
> This question is not covered by the provisions of the EU anti-discrimination directives adopted on the legal basis of Article 19 [TEU], the scope of which is limited to an exhaustive list of grounds of discrimination [which do not apply to the case of the applicant] [see, by analogy, Case C-354/13 *Fag og Arbejde (FOA)*, at paras 36–39].[196]

[190] NSS, 5 As 177/2016-61, 21 March 2019.
[191] Case C-311/19 *BONVER WIN*, EU:C:2020:981, para 35. See NSS, 5 As 177/2016-139, 10 February 2021.
[192] NSS, 5 Ads 181/2014-21, 11 August 2016.
[193] Joined Cases C-488/12 to C-491/12 and C-526/12 *Nagy and Others*, EU:C:2013:703, para 15.
[194] NSS, 5 Ads 181/2014-21, paras 27–28.
[195] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.
[196] NSS, 5 Ads 181/2014-21, paras 29–30.

This assessment of the Charter's applicability, which the NSS repeated in at least two other cases,[197] was exemplary: it was thorough, logical and firmly anchored in CJEU's case law. However, we could ask why the NSS shied away from such detailed analysis in other similar cases.[198]

The three clusters of cases discussed had one important thing in common: they all fell outside the scope of Union law, and the Charter was held inapplicable. In contrast, when the Charter *is* applicable, there is sometimes no need to undertake such a detailed analysis – especially when the applicable national rule was clearly intended to implement an EU-law obligation or when the court directly applies an EU-law norm. A relatively simple but entirely sufficient assessment can look like this:

> The general provisions governing the interpretation and application of the [Charter] in Article 51(1) provide that the provisions of this Charter are addressed not only to the institutions, bodies, offices and agencies of the Union but also to the Member States when they are implementing Union law [Case C-617/10 *Fransson*]. This condition is fulfilled in the present case because the applicant was detained under national legislation (§ 123b et seq. of the Act on the Residence of Foreign Nationals) implementing Articles 15 to 18 of [Directive 2008/115/EC].[199]

A slightly more complex interpretation of the implemented secondary law was required in *M. K. v Appeal Commission on the Residence of Foreign Nationals* for the Charter to be found applicable.[200] Here, the NSS referred to Article 51 of the Charter and emphasised the need to verify the Charter's applicability in a separate argumentative step,[201] but it did not consider it necessary to refer to any of the CJEU's general formulas or guidance.[202] It is important to note that in both these judgments, the NSS relied on the direct effect of the

[197] See NSS, 1 Ads 94/2016-20, 27 September 2016; and 5 Ads 89/2018-20, 29 March 2019.
[198] See eg 6 Ads 238/2017-33, 14 February 2018.
[199] NSS, 6 Azs 320/2017-20, 29 November 2017, para 51. 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 [2008] OJ L 348/98. See also NSS, 10 Azs 112/2018-50, 18 September 2019, para 11: 'Since the Member States, when assessing the grounds for dismissing a visa application, rely on the provisions of the Code on Visas (they implement Union law), they must also take into consideration the provisions of the [Charter].'
[200] NSS, 6 Azs 253/2016-49, 4 January 2018.
[201] Ibid. para 33.
[202] Ibid. paras 31–35. In this case the applicant challenged the refusal of his application for a long-term student visa. The NSS held that even though the conditions for issuing long-term visas (that is, visas issued for a period exceeding three months), are not as such subject to EU-wide regulation and are therefore a matter for Member States, under the Czech law, a long-term visa is coterminous with a residence permit within the meaning of Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12 (para 35). This meant, according to the NSS, that the case in hand was within the scope of EU law.

Charter (and of the Directive in question) to disapply a conflicting national rule. In some other decisions of the NSS – including those in which the Charter played a major part in the reasoning – there is no express reference to the Charter's limited applicability, Article 51 or the concept of 'implementing Union law'. However, the applicability of the Charter is (heavily) implied in the text of the decision, and the triggering norms are evident from the context.[203] This approach is typical in Dublin transfer cases, which are clearly within the scope of EU law; Article 3(2) of Regulation (EU) No 604/2013 ('the Dublin III Regulation') even explicitly lays down an obligation to conduct a Charter-based review.[204] Where the Charter guarantee is at the core of the NSS's reasoning, it is justified to insist on an express applicability assessment, even if the applicability of the Charter is heavily implied by the reasoning.[205]

Thus, all in all – as with declarations of non-applicability – there is no standard practice or established method whereby the NSS would first explicitly declare the Charter applicable before referring to it or giving it effect in its reasoning.

Finally, there are frequent NSS decisions which cite a Charter provision (i) as part of a general and purely descriptive statement with the sole purpose of saying that such and such right or principle is enshrined in the Charter, or (ii) to outline the fundamental rights background of the case. By way of illustration, in *M. D. and N. S. v Foreign Police Directorate*, the NSS stated that a person could not be extradited if this could disproportionately interfere with the right to private or family life, given that

[203] See eg NSS, 1 As 186/2017-46, 26 April 2018, para 33: 'Due to the fact that the underlying facts of the offence consist in a violation of EU law, Article 49 of the [Charter] is also relevant in this context […]'. See also NSS, 5 Afs 104/2016-31, 17 July 2018, para 46: 'Although the judgment in [Case C-524/15 *Menci*, EU:C:2018:197] concerns the value added tax, its conclusions can be generalised and applied in the field of excise tax as well. Both of these taxes are indirect taxes harmonised by EU legislation, and certain principles and rules are common to both taxes'; NSS, 1 Azs 246/2019-31, 21 October 2019, para 22: 'The decision on administrative expulsion must also comply with the requirements of [Directive 2008/115/EC] and therefore also with the EU Charter of Fundamental Rights…'; NSS, 1 Azs 412/2017-47, 7 February 2019, para 23: 'Detention of applicants for international protection is regulated by the law of the European Union, namely by [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) [2013] OJ L 180/96] and it must therefore comply also with the requirements of the [Charter]'; and NSS, 3 Azs 237/2016-37, 26 April 2017 (Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12); RC in Prague, 53 A 20/2019-55, 14 January 2020, para 9 ('Given that EU law was applied when adopting the contested decision, the present case is covered by Article 47 of the [Charter]').

[204] See eg NSS, 1 Azs 82/2016-26, 14 September 2016. 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 [2013] OJ L 180/31.

[205] See eg NSS, 5 Afs 104/2016-31, 17 July 2018, discussed in Section II.3.1.2.2.

> [t]his sphere is protected by the fundamental right to respect for private and family life within the meaning of Article 8 of the [ECHR] and Article 10(2) of the [Czech] Charter of Fundamental Rights and Freedoms and – when applied in a situation that is covered by EU rules – Article 7 of the Charter of Fundamental Rights of the European Union.[206]

Here, the NSS was careful not to create the impression that the Charter was applicable, but on other occasions, the parenthetical disclaimer was missing.[207] These kinds of statements – typically regrouping all the equivalent provisions of different fundamental rights instruments – are of such a level of generality that we can hardly speak of the Charter being 'applied' or 'given effect'. If they appear in cases outside the scope of EU law,[208] they are, therefore, not problematic from the competence-creep point of view (we could even see them as comparative arguments, albeit rudimentary ones[209]). However, they could create or add to the confusion about the scope of the Charter when the issue of the Charter's (in)applicability is passed over.

The NSS appears to be open to applying the Charter in situations in which the Czech legislator decided to voluntarily extend the rules of the implemented EU act to cover situations outside the scope of that EU act.[210] For instance, the Czech legislator chose to extend the rules on family members of EU citizens to family members of (stationary, non-EU-moving) Czech citizens to prevent reverse discrimination.[211] In at least two cases of this kind, analysed in detail in Section II.3.1.1.2, the NSS interpreted the provisions of the Act on the Residence of Foreign Nationals – without further explanation – in the light of Directive 2004/38/EC and the Charter.[212] This is debatable. In these types of cases, Union law applies 'through the operation of the national legislation' within the meaning of the

[206] NSS, 6 Azs 20/2016-36, 3 March 2013, para 29. For a similar disclaimer in a case that clearly was outside the scope of EU law (eligibility to serve as a judge), see NSS, 13 Kss 12/2013-78, 18 June 2014. See also NSS, 9 Azs 118/2019-21, 11 July 2019, para 7 (detention with a view to expulsion).
[207] See eg NSS, 1 As 207/2017-61, 13 December 2017, para 58.
[208] See eg NSS, 4 As 7/2012-82, 20 December 2013, para 20; and NSS, 3 As 28/2018-49, 15 April 2020, para 21.
[209] See Section II.3.1.3.
[210] On this and other examples of gold-plating, see Král, 'On the Gold-Plating in the Czech Transposition Context', supra n 153.
[211] According to the NSS, in this case of gold-plating, the relevant provisions of the Act on the Residence of Foreign nationals must be interpreted in conformity with the EU Directive: see 3 As 4/2010-151, 26 July 2011, para 47.
[212] NSS, 6 As 30/2013-42, 25 September 2013; and NSS, 4 Azs 230/2016-54, 27 April 2017. 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 [2004] OJ L 158/77.

CJEU's *Dzodzi* judgment.[213] Under this case law, the CJEU accepts jurisdiction to issue preliminary rulings in national proceedings which concern purely internal situations and in which EU law is made applicable through national legislation. However, this case law says nothing about the status of the Charter in such cases. The Charter is not formally applicable by virtue of Union law, and it is arguable that it is not applicable by virtue of national law either unless the legislator expressly provided for that consequence. Thus, the NSS should not rely on (and should not create the impression of relying on) the normative force of the Charter in these kinds of purely national situations. Notably, French courts have *not* found general principles of EU law applicable in such situations.[214] Notwithstanding these observations, it is of course possible and even advisable to rely on the Charter as a non-mandatory comparative argument.

3.3 The practice of Czech regional administrative courts

Using the limited data set of Charter references in the case law of regional courts, which is not systematically published, this section will demonstrate the importance of the NSS's interpretative guidance regarding the Charter's scope of application (Section 3.3.1). Some regional courts' judges ventured into extensive – and correct – applicability assessments even without being able to rely on explicit NSS guidance. However, some methodological problems, similar to the ones in NSS case law, have also emerged (Section 3.3.2).

3.3.1 Regional courts guided by the *Nejvyšší správní soud*

Czech regional administrative courts have tended to follow the NSS's guidance concerning applicability assessments in certain groups of cases. One of the three clusters identified above, namely the one regrouping the cases related to the revocation of gambling licences, is strongly represented in first-instance case law. It was the Municipal Court in Prague and the Regional Court in Hradec Králové that dealt with these cases. They adopted the NSS's authoritative interpretation and systematically held that the Charter was inapplicable. It is important to emphasise that the courts followed the NSS's approach in

[213] Joined Cases C-297/88 and C-197/89 *Dzodzi*, EU:C:1990:360, para 42.
[214] See CE, 276848, 27 June 2008. For an analysis, see Xenou, supra n 30 at 156–159. See also J Sirinelli, *La transformation du droit administratif par le droit de l'Union européenne: Une contribution à l'étude du droit administratif européen* (LGDJ 2011) at 350–351. In contrast, the Dutch Council of State appears to have the same approach as the NSS: it applies the Charter in this type of situations (for example, when the Dutch legislator extended the rules of the Family Reunification Directive 2003/86/EC to cover applications for a family reunification made by Dutch nationals): see Iglesias Sánchez, 'Article 51', supra n 151 at 412.

full, with both its strong points and deficiencies. We saw above that the NSS, in its earliest takes on this issue, remarked that the Charter was not applicable on the grounds that gambling was outside the scope of EU law due to it not being covered by the Services Directive. By doing so, the NSS obscured the fact that the generally applicable Treaty provisions could themselves constitute the triggering norms. The same interpretative obscurity then made its way into certain decisions of regional courts.[215] However, in keeping with the developments in NSS case law, later decisions of the Municipal Court in Prague explicitly recognised that Treaty provisions could apply to hazard games, even if they still placed a misleading emphasis on the limited scope of the Services Directive.[216]

Interesting insights into the importance of the NSS's interpretative guidance when it comes to assessing the Charter's applicability are offered by the case law of regional courts concerning the solar levy. We saw above that while the NSS reached a substantively correct solution that the Charter did not apply in such cases, it took some time until that solution was reached in a methodologically transparent manner.[217] The initial methodological hesitation of the NSS could be partly responsible for the inadequacy of some regional courts' decisions on the matter. For example, the Regional Court in Ústí nad Labem adopted the reasoning of one of the earlier NSS judgments, in which the NSS held that the solar levy did not breach Directive 2009/28/EC, that the obligation laid down by this Directive for the Member States was not sufficiently precise to have direct effect, and that there was thus no need to refer a question for a preliminary ruling.[218] The Regional Court repeated all this and added – rather incongruously – that

> As for the alleged violation of Articles 16, 17 and 52(1) of the [Charter], it must be referred to their content, since they merely generally, on the constitutional level, deal with the freedom to conduct a business, the right to property and the principle of proportionality when interpreting rights and freedoms. As far as those constitutional values are concerned, the solar levy

[215] See also RC in Hradec Králové (Pardubice), 52 Af 41/2014-38, 24 September 2015; and Municipal Court in Prague, 11 Af 24/2015-46, 7 March 2017.
[216] See eg MC in Prague, 8 Af 45/2016-78, 30 October 2018, esp. paras 42 and 47; and MC in Prague, 3 Af 14/2016-108, 14 March 2018, esp. paras 49–50. See also MC in Prague, 8 Af 75/2015-114, 17 May 2019, where the Court – in response to the applicant's plea that the defendant public authority was obliged to apply EU law as a whole – cited *Fransson*, but curiously not the judgment, only the Opinion of AG Cruz Villalón. The Court summarised the CJEU case law by identifying three typical situations in which EU law applies (direct application; implementation of a Union obligation; act of a national authority in violation of EU law) and referred to paras 25 to 39 of that Opinion. However, the wording used by the Municipal Court very strongly suggests that the real source of this typology was very probably a scholarly article of M Bobek cited supra n 125.
[217] See Section I.3.2.2.
[218] NSS, 1 Afs 80/2012-40, 20 December 2012 (the relevant passages are the same as in NSS, 1 Afs 22/2013-47, 11 July 2013).

> regulation was already reviewed by the Constitutional Court in Pl. ÚS 17/11, and [the present] Court does not feel it necessary to ask the [CJEU] since there is no clear indication that the interpretation by national courts up to now is contrary to European law.[219]

This can be taken as a veiled declaration of compatibility of the solar levy with the Charter rights in a case which rather demanded a declaration of the Charter's non-applicability. The same approach appeared in decisions of the Municipal Court in Prague, in which that Court made something resembling a declaration of non-violation (supported merely by the assumption that the Charter's standard of protection is the same as the one under the Czech Constitution), instead of a clear declaration of non-applicability.[220] Had the Municipal Court taken into account the developments in the NSS case law, it would have found a NSS decision referred to above, in which the non-applicability of the Charter in the field of solar levies was methodologically examined under its Article 51.

3.3.2 Some other applicability assessments by regional courts

At times, regional courts conducted explicit applicability assessments under Article 51 of the Charter without directly relying on NSS guidance.

In *A. B. and R. D. v Regional Authority of the Liberec Region*, the applicability of the Charter was addressed in detail by both the applicants and the defendant in their submissions.[221] The applicants were two children challenging a decision by which they were refused a place in a nursery school on the grounds that they had not undergone the compulsory vaccination. Their submissions were not particularly concrete as to which provisions of the Charter were supposedly violated; in contrast, they were remarkably concrete on why the Charter was applicable:

> According to the applicants, the [Charter] also applies to their case given that the rules in § 46(1) and § 50 of the Act on the Protection of Public Health restrict the free movement of non-immunised persons and the free movement of pre-school services in the EU. The [Charter] is applicable also because any use of authorised medicinal products falls into the scope of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use.[222]

[219] RC in Ústí nad Labem, 15 Af 436/2012-60, 18 February 2015. See also RC in Brno, 30 Af 100/2013-81, 8 October 2015 (remarking that the Constitutional Court 'considered' the alleged violation of Articles 16 and 17 of the Charter, and it 'did not find' they were violated; in fact, the Constitutional Court did not address the Charter-based argument at all in the cited Pl. ÚS 17/11, 15 May 2012).
[220] MC in Prague, 9 Af 14/2014-58, 27 February 2018, paras 17–33 (esp. paras 24–25).
[221] RC in Hradec Králové, 30 A 99/2015-130, 10 May 2016.
[222] Ibid. para 4.

The defendant authority took an opposite view: it stated that the Charter did not apply under its Article 51 and referred to a paragraph of the CJEU judgment in *Uecker and Jacquet*, which dealt with the inapplicability of free movement law to purely internal situations.[223] The Regional Court in Hradec Králové's applicability assessment was straightforward and persuasive, and it deserves to be quoted in full:

> According to Article 51(1) of the [Charter], the provisions of this 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 Union law.' In the present case, European Union law is not being implemented in any way. Directive 2001/83/EC of the European Parliament and of the Council on the Community code relating to medicinal products for human use, to which the applicants have referred in this context, does not contain any rules which would be directly implemented in the present case. The applicant's claim that the application of § 46(1) and § 50 of the Act on the Protection of Public Health restricts the freedom of movement of non-immunised persons and the free movement of pre-school services in the EU is entirely hypothetical and without any relation to the present case. The said legal rules clearly do not prevent the applicants – Czech nationals who applied for a place in a Czech nursery school – from moving within the EU. The Regional Court also refers to the order of the [CJEU] of 17 July 2014 in Case C-459/13, which rejected as inadmissible a question for a preliminary ruling by the Supreme Court of the Slovak Republic concerning the possible effects of EU law on the Slovak legal rules on compulsory immunisation.[224]

It is surely not a coincidence that the Court engaged in such a rigorous assessment in a case where the applicants themselves presented concrete arguments to justify the Charter's applicability. The methodological rigour of the Regional Court in Hradec Králové is all the more remarkable when compared to a judgment of the Regional Court in Plzeň in a similar case, which contained no applicability assessment, only a declaration of non-violation of all the fundamental rights instruments invoked by the applicant, including the Charter.[225] This treatment shows that the distinction between non-applicability and non-violation was blurred not only in a few NSS cases but also in judgments of regional courts.

[223] Ibid. para 15. See Joined Cases C-64/96 and C-65/96 *Land Nordrhein-Westfalen v Uecker and Jacquet / Land Nordrhein-Westfalen*, EU:C:1997:285, para 16.
[224] Ibid. para 24. For the same reasoning, see RC in Hradec Králové, 30 A 61/2014-288, 10 May 2016, para 26.
[225] RC in Plzeň, 57 A 75/2016-60, 17 January 2017.

In another case, in which the applicant claimed violation of Article 21 of the Charter (non-discrimination) by a decision rejecting his application for a subsistence allowance, the Regional Court in Ostrava based its assessment on the Explanations to the Charter.[226]

> The anti-discrimination rules resulting from Article 21 of the [Charter] do not create any power for the institutions of the European Union to enact anti-discrimination laws in areas of Member State or private action, nor do they lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, this provision only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by the Member States only when they are implementing Union law. This results from Article 52(7) of the [Charter], which lays down that the explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and the Member States. The [Explanations] explicitly contain exactly this interpretation regarding Article 21(1).[227]

We have found cases where the Charter was correctly found inapplicable, but the applicability assessment was kept to a bare minimum. For example, in a case concerning the income tax (that is, a case outside the scope of EU law), the Regional Court in Prague simply stated:

> As for the alleged violation of the right to the protection of family life under Article 33(1) of the [Charter], it must be held that the [Charter] provisions only apply when Union law is being implemented, which is not the case here.[228]

A similarly brief – but formally enhanced – applicability assessment appeared in another judgment of the same Court in a case concerning the deliverance of a construction permit (that is, a case outside the scope of EU law in which the Charter was not applicable), where the applicant invoked Article 41 of the Charter (right to good administration):

> In this respect, the Court refers to Article 51(1) of the [Charter], which states that the Member States of the European Union are bound by its provisions only where they apply [sic] Union law, which did not occur in the present case.[229]

Finally, in a case concerning the Czech legislation which allowed membership in political parties only to Czech citizens, the Municipal Court in Prague had no doubts that the Charter did not apply, but provided limited grounds in support of that conclusion:

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[226] RC in Ostrava (Olomouc), 73 Ad 11/2012-95, 5 January 2015.
[227] Ibid. para 38.
[228] RC in Prague, 45 Af 7/2016-43, 2 February 2017.
[229] RC in Praha, 46 A 85/2015-39, 20 October 2017, para 37.

> The Court notes that, although the TFEU and the [Charter] prohibit any discrimination based on nationality, the prohibition of discrimination applies only 'within the scope of application of the Treaties', that is, within the scope of application of Union citizenship. However, membership in political parties, although partly related to [the right to stand in elections], is outside the said scope of application and does not fall within any Union requirements.[230]

While this interpretation seems to be generally accepted in the Czech case law and scholarship (and the NSS confirmed it[231]), there is some scope for arguing that EU law has something to say about preventing EU citizens from being members of political parties in other Member States than that of which they are nationals, since this prohibition could make more difficult the exercise of their right to stand in European Parliament or local elections.[232]

An interesting applicability assessment was made in a 2020 judgment of the Regional Court in Prague, in which the Court was dealing with an action of a Ukrainian national against a decision cancelling her right of permanent residence on the basis of § 87l(1)(c) of the Act on the Residence of Foreign Nationals, that is, on the grounds that she had circumvented the law so as to obtain a residence permit).[233] The applicant had family ties in the Czech Republic: she was in a registered partnership with a Czech national, and her daughter, who was a minor at the material time and dependent on her mother, had a permanent residence permit in the Czech Republic. The Court referred to Article 7 of the Charter and justified its applicability in the following terms:

> European Union law has a double impact on the instant case. The provision in § 87l(1)(c) of the Act on the Residence of Foreign Nationals needs to be interpreted in the light of Directive 2004/38/EC and the right of EU citizens and their family members to move and reside freely within the territory of the Member States, given the so-called domestic equalisation of the situation of Czech nationals and their family members with the situation of nationals of other Member States and their family members (see§ 15a(3) of the Act on the Residence of Foreign Nationals and [Case C-32/11 *Allianz Hungária Biztosító and Others*, para 20]). In addition, there are situations in which a family member of a Czech national can invoke a derived residence right directly on the basis of Article 20 of the [TFEU] (see [Case C-82/16 *K. A. and Others*, paras 51–53]).[234]

[230] MC in Prague, 3A 125/2014-20, 30 January 2017.
[231] NSS, 6 As 84/2017-27, 10 January 2018.
[232] T Skalka, 'O členství občanů jiných členských států Evropské unie v českých politických stranách' [On the Membership of Citizens of Other Member States of the European Union in Czech Political Parties] (2018) XXVI *Časopis pro právní vědu a praxi* 283.
[233] RC in Prague, 46 A 159/2017-35, 29 April 2020.
[234] Ibid. para 23.

As for the first of the two 'impacts' of EU law, the Regional Court noted by reference to *Allianz Hungária Biztosító and Others* that the Charter and the CJEU case law interpreting it are of relevance 'in situations where the facts of the cases being considered by the national courts were outside the direct scope of European Union law but where those provisions had been rendered applicable by domestic law, which adopted, for internal situations, the same approach as that provided for under European Union law'.[235] The Regional Court can be commended for being explicit about the Charter's relevance, which contrasts with less transparent NSS judgments on similar issues.[236] However, as explained above, the Charter is not formally applicable in purely internal situations such as this one, and the courts should not rely on its normative force without further explanation.[237] As for the second 'impact', the timid reference to the *Zambrano* line of case law is more perplexing, given that it was not accompanied by any reasoning as to the 'very specific conditions' in which that line of case law can be applicable. It is not clear who would be the Union citizen-family member of the applicant that would be obliged in practice to leave the territory of the EU, thus depriving him or her of the genuine enjoyment of the substance of the rights conferred by that status.[238]

Recently, judges of the Municipal Court in Prague have demonstrated a good awareness of the CJEU's case law when they referred to Article 47 of the Charter in a case concerning disciplinary sanctions imposed on a criminal judge for having grossly misapplied the law.[239] The Court was methodologically careful not to declare the Charter applicable, noting instead that the criminal proceedings concerned were not within the scope of Union law. Nevertheless, the Court continued that

> This fact has no bearing on the applicability of Article 19(1) of the TEU and the guarantees enshrined by it, given that this provision applies to any judge who could rule on matters concerning the implementation or interpretation of Union law [Case C-619/18 *Commission v Poland*, at para 51].

The Municipal Court then effectively used the Charter as a confirmatory argument, citing the interpretation of Articles 47 and 48 of the Charter by the CJEU in a European Arrest Warrant Case, but did so in a methodologically correct way, via Article 19(1) of the TEU. It is remarkable that this controversial line of CJEU case law elaborated in the context of rule-

[235] Case C-32/11 *Allianz Hungária Biztosító and Others*, EU:C:2013:160, para 20.
[236] See NSS, 6 As 30/2013-42, 25 September 2013.
[237] See the discussion in text accompanying nn 210–214.
[238] Case C-82/16 *K. A. and Others*, EU:C:2018:308, para 51. For a similarly under-developed reference to the *Zambrano* line of case law, see RC in Prague, 54 A 11/2018-54, 10 July 2020.
[239] MC in Prague, 10 A 191/2019-76, 29 October 2020.

of-law backsliding[240] smoothly made its way into Czech disciplinary proceedings concerning a district judge's application of Czech law in a criminal case.

Finally, it should be mentioned that most decisions of regional courts citing the Charter are decisions in Dublin transfer cases. Here, the courts tend not to make explicit applicability assessments since the applicability of the Charter is made evident by the direct reference to it in Article 3(2) of the Dublin III Regulation, which the courts tend to cite in full. These are generally 'clone' references of little analytical interest.

4. THE PRACTICE OF FRENCH ADMINISTRATIVE COURTS

4.1 Introduction

Are the patterns identified in the case law of Czech administrative courts – such as the contrast between material compliance with the Charter's limited scope of application and formal shortcomings as to applicability assessments – also present in the case law of French administrative courts? This section will answer that question. Before that, just a few contextual remarks on the French system of administrative justice, which is more complex than the Czech one. Administrative justice in France is administered within a three-tier system. At first instance, cases are decided by 42 administrative tribunals (*tribunaux administratifs*, TAs). Appeals are decided, as a rule, by administrative courts of appeal (*cours administratives d'appel*, CAAs). The *Conseil d'État* (CE) performs the role of a supreme administrative court[241] in that it hears cassation complaints against second-instance decisions of the CAAs and specialised administrative courts, as well as judgments of TAs in certain matters.[242] It also rules in the first and final instance on actions against decrees (*décrets*), reglementary acts (*actes réglementaires*) and some other acts issued by ministers and other central authorities, and on actions against decisions of independent administrative authorities.[243] The CE also rules on appeals against certain decisions taken by TAs, notably on petitions on urgent injunctions for the protection of fundamental rights (*référé-liberté*).[244] The discussion will not cover the non-judicial functions of the CE. An important role in the judicial proceedings is the one held by the public rapporteur (*rapporteur public*), previously called *commissaire du gouvernement*, whose task is to give an independent opinion

[240] See Section I.2.4.
[241] Article L. 111-1 of the code de justice administrative.
[242] Article L. 331-1 of the code de justice administrative.
[243] Article CJA, R. 311-1 of the code de justice administrative.
[244] Article L. 523-1, alinéa 2 of the code de justice administrative.

(*conclusions*) on the factual and legal questions raised by the case and to propose a solution. These opinions are sometimes published and are crucial for understanding courts' decisions, which tend to be very succinct.

With these aspects in mind, the discussion will first turn to the practice of the CE (Section 4.2) before looking at the decision-making of the CAAs (Section 4.3). Given that the case law of first-instance TAs is rarely published, it will not be treated in a separate section.

4.2 The practice of the *Conseil d'État*

The diversity of approaches by the CE to the Charter's applicability will be analysed in three steps. After the Charter came into force, the initial applicability assessments were formulaic and only gradually took on board Article 51 of the Charter and its terminology (Section 4.2.1). The applicability of the Charter was analysed in greater detail in a handful of hard cases, often based on a robust analysis made by public rapporteurs (Section 4.2.2). Nevertheless, the lack of methodological rigour, principally guided by pragmatism, has sometimes led to a confusion about the Charter's material scope (Section 4.2.3).

4.2.1 Hesitant beginnings and the contours of a robust methodology

In a few early cases, the CE did not explicitly declare the Charter inapplicable on account of its lack of binding force but dismissed the Charter-based argument as inoperative (*inopérant*) on a different ground. It is notable that in all these cases, the CE accompanied the dismissal of the Charter-based plea by the formula *en tout état de cause* (in any event), which made it possible for the CE to evade the question of the Charter's invocability. Thus, in *SNPHAR* – where the Charter made a modest, historically first appearance in the reasoning of the CE[245] – the CE dismissed the plea alleging a breach of the Working Time Directive 93/104/EC as inoperative given that the contested national provisions did not govern obligations related to working time. Consequently, on the same ground and in any event, the

[245] Even before that, a government commissioner (*commissaire du gouvernement*) referred to the Charter in his Opinion as a confirmatory argument to support a conclusion reached on the basis of national case law. The conclusion was that 'the right to employment is clearly not a right that could be claimed directly before an ordinary court' and the confirmatory argument was the distinction in the Charter between rights and principles: see P Fombeur, 'Conclusions sur Conseil d'Etat, Section, 28 février 2001, *Casanovas*' (2001) *RFDA* 399; and L Burgorgue-Larsen, 'La "force de l'évocation" ou le fabuleux destin de la Charte des droits fondamentaux de l'Union européenne' in *L'équilibre des pouvoirs et l'esprit des institutions. Mélanges en l'honneur de Pierre Pactet* (Dalloz 2003) 77.

Charter-based plea was held inoperative too.[246] This scenario repeated itself in a few other cases decided before the Charter came into force. Thus, the CE dismissed a plea alleging a violation of Article 3 of the ECHR and Article 19 of the Charter on the grounds that the applicant did not present any evidence of the risks he claimed he would face upon his expulsion to Haiti.[247] In another case, the applicants challenged the legality of an amendment to the Code of Administrative Justice that imposed certain formal requirements whose inobservance led to the rejection of the action.[248] The CE held that under the procedural rules in question, the applicant would always be informed of the formalities to be followed; consequently, the contested provisions

> do not infringe the principles of the right to a remedy and of the adversarial process and do not breach Articles 6(1) and 13 of the [ECHR] or Articles 2(3) and 14(1) of the International Covenant on Civil and Political Rights or, *in any event*, Article 47 of the [Charter].[249]

From January 2005, the CE's method changed. In one case, the applicants contended that Article 3 of Decree No 2003-293 on road safety, which classified a violation of the obligation to wear a safety belt as a more serious offence with stricter sanctions, violated the principle of equality before the law as enshrined in Article 20 of the Charter and the principle of proportionality of criminal penalties in Article 49(3) of the Charter.[250] The CE held that the Charter lacked, as the law then stood, binding legal force and was not an act of EU law which could be invoked before national courts.[251]

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[246] CE, 240139, 25 April 2003: 'l'arrêté attaqué, qui détermine les modalités du repos de sécurité […], ainsi que les obligations des praticiens hospitaliers s'agissant des gardes, n'a pas pour objet de définir l'ensemble des obligations de service qui leur incombent à titre individuel'. For a comment, see P Cassia, 'La Charte des droits fondamentaux de l'Union européenne sera-t-elle appliquée par le juge administratif français ?' (2003) *Europe* Comm 209.

[247] CE, 250554, 5 May 2003. See also two expulsion cases, in which the CE declared there was no violation of the fundamental rights instruments invoked, as the applicant did not state any concrete reasons proving that he would be exposed to risks in the country to which he was being expelled: CE, 267736, 10 December 2004 (Art 19 Charter, *en tout état de cause*, before the entry into force); CE, 259239, 27 February 2004 (it was not shown that the expulsion would have negative consequences on the applicant's health and treatment, so the contested decision was not, *en tout état de cause*, contrary to Article 3(1) of the Charter.

[248] CE, 247376, 30 July 2003. See also CE, 258738, 25 February 2004.

[249] Ibid.

[250] CE, 257341, 5 January 2005.

[251] Ibid. For the same formula, see CE, 282028, 2 October 2006 (in this case concerning the powers of the *bâtonnier*, the head of the profession of advocate, the Charter-based plea was dismissed owing to the lack of the Charter's binding force, while the pleas alleging a breach of general principles of Union law were dismissed as inapplicable *ratione materiae*); CE, 284951, 21 March 2007; CE, 270064, 9 January 2009; CE, 291850, 9 January 2008; and CE, 282028, 2 October 2006. On this early case law, see also Burgorgue-Larsen L, 'Les juges face à la charte. De la prudence à l'audace' in L Burgorgue-Larsen (ed), *La France face à la Charte des droits fondamentaux de l'Union européenne* (Bruylant 2005) 3 at 13–15.

This more transparent approach was followed in subsequent cases, sometimes with a more succinct reasoning, stating that the Charter was not introduced into the domestic legal order[252] or that the Charter lacked binding force.[253] The previous *en tout état de cause* approach, however, made a reappearance on at least one occasion.[254] It is also notable that the above-mentioned formula regarding the lack of binding force of the Charter was kept in life even after December 2009. This is because when the applicant alleges a misuse of authority (*excès de pouvoir*), the legality of the contested act is reviewed against the rules applicable at the time of its adoption.[255]

Not long after the elevation of the Charter to the rank of binding primary law, the CE made its first declaration of non-applicability *ratione materiae*. In *Union nationale des footballeurs professionnels and Others*, the applicant challenged an Order that laid down conditions for doping checks and the corresponding obligations of athletes.[256] The CE held that the Order at issue '[was] not implementing Union law', and the plea alleging a violation of Article 15 of the Charter therefore had to be dismissed.[257] Another such declaration of non-applicability (in the same succinct style) was made in *Fédération nationale des syndicats des salariés des mines et de l'énergie CGT*, in which the applicant challenged a Decree on the organisation of social security in the mines. According to the CE, that Decree 'was not, in any event, implementing the law of the European Union'.[258] The same approach was used in other cases.[259] While there was no express reference to Article 51 of the Charter, the wording chosen by the CE reflects the wording of that provision.

An explicit reference to Article 51 of the Charter first appeared in *Confédération française pour la promotion sociale des aveugles et des amblyopes*.[260] The applicant argued that the conditions for granting a disability allowance were discriminatory on the grounds of age, invoking, among other sources of fundamental rights, the general principle of EU law

[252] See eg CE, 243326, 23 February 2005 ('la Charte … n'a pas été introduit dans l'ordre juridique interne'); and CE, 283471, 19 Octobre 2005.
[253] CE, 253728, 8 July 2005 ('la Charte … est dépourvue de valeur contraignante'); CE, 275057, 16 January 2006; CE, 296845, 10 April 2008; and CE, 312928, 21 October 2009 ('la Charte…, dépourvue d'effet de droit').
[254] See CE, 257593, 16 March 2005.
[255] See CE, 325660, 5 July 2010; CE, 339398, 27 April 2011; and CE, 339398, 27 April 2011. See also CE, 347545, 22 June 2012.
[256] CE, 340122, 24 February 2011.
[257] Ibid.
[258] CE, 341821, 30 September 2011.
[259] See eg a cluster of cases in which labour unions challenged various Decrees concerning the internal organisation of regional health agencies: CE, 347101, 15 May 2012; CE, 339833, 15 May 2012; CE, 340106, 15 May 2012; and CE, 350393, 15 May 2012.
[260] CE, 341533, 4 July 2012.

of non-discrimination on the grounds of age and Article 21 of the Charter. Regarding the general principle, the CE recalled that general principles of Union law 'are only applicable in the domestic legal order when the legal situation to be considered by an administrative court is governed by European Union law'.[261] As the disability allowance at issue was not governed by EU law, the plea alleging a breach of the general principle of non-discrimination on the grounds of age was dismissed. Next, regarding the Charter, the CE first cited the wording of Article 51, then applied it to the disability allowance in question: 'the plea alleging an infringement of Article 21 of [the Charter] cannot be upheld, given that the contested Decree and the legislative provisions for the application of which it was adopted are not implementing Union law'.[262] The same argumentative sequence was used in subsequent cases.[263] Interestingly, in one case, the CE expressly substituted the declaration of inapplicability for the declaration of non-violation that the CAA of Nancy made in the contested decision.[264] Sometimes, the CE dismissed the plea with reference to the act concerned using the terminology of 'not implementing EU law' without citing Article 51.[265]

We also found a similar sequence with a slight (but potentially significant) twist: instead of saying that the contested act is not implementing Union law, the CE said that the act does not aim at implementing Union law or that it was not adopted so at to implement Union law.[266] The danger of that twist is that the Charter actually applies not only to national measures adopted specifically with the aim of implementing EU law but also to those measures that objectively implement EU law. This may lead to the criterion being applied in

[261] Ibid.
[262] Ibid. For a comment, see H Pauliat, 'L'attribution aux aveugles et amblyopes d'une prestation sous condition d'âge: une loi sourde aux revendications de l'égalité?' (2013) *La Semaine Juridique Administrations et Collectivités territoriales* 2064; and D Ritleng, 'De la portée des droits fondamentaux de l'Union à l'égard des mesures nationales' (2013) *RTD Eur.* 877.
[263] CE, 356835, 15 February 2013, para 6; CE, 365237, 11 June 2014, para 7 (the inapplicability of the Charter was remarked upon by the public rapporteur in her Opinion); CE, 375724, 25 February 2015, para 6 (the inapplicability was remarked upon by the public rapporteur with reference to Article 51 of the Charter); CE, 374401, 25 March 2015, para 13 (Code of Penal Procedure); CE, 371723, 11 December 2015, para 14; and CE, 421333, 13 June 2018, para 8. See also CE, 421004, 18 December 2019, para 8; and CE, 421336, 18 December 2019, para 8 (both citing Article 51, but not quoting its wording).
[264] CE, 375887, 10 July 2015, para 9 (CAA Nancy, 13NC00279, para 12).
[265] CE, 384302, 13 February 2015, para 11; CE, 361995, 25 February 2015, para 8; and CE, 423044, 1 July 2020, para 9 (the Charter's provisions 's'appliquent aux Etats membres lorsqu'ils mettent en œuvre le droit de l'Union européenne et non aux situations seulement régies par le droit interne').
[266] CE, 358349, 23 July 2014, para 11; and CE, 373469, 23 December 2014, para 20. See also CE, 385929, 10 February 2016, para 4 ('la décision attaquée n'a pas été prise pour la mise en œuvre du droit de l'Union' the public rapporteur recommended this solution citing Article 51 of the Charter); and CE, 408364, 2 Octobre 2017, para 4.

an under-inclusive way.[267] Another variation of the formula, which *is* in line with the approach of the CJEU, appeared in a case in which the CE considered that the applicant could not validly invoke Article 41 of the Charter as regards a decision 'that [was] not inside the scope of Union law'.[268] It is noteworthy that this formulaic variety existed already in pre-Charter case law regarding general principles of Union law.[269] A few times, the CE dismissed the Charter-based plea with a general reference to the scope of the invoked articles, without mentioning Article 51 or any of the formulas.[270] In at least one post-*Fransson* case, the CE used, within a single paragraph, the language of 'implementing' as regards the Charter and the language of 'governed by EU law' as regards the general principles of EU law, implying that there is a conceptual difference between the two.[271]

It must be said that these minor deviations from the standard methodology did not affect the correctness of the applicability assessment in any of those cases. However, we also found a case where the CE made such a formulaic assessment but reached a wrong conclusion. In *ANAFÉ*, the applicant challenged a Decree laying down procedural rules before the *Cour nationale du droit d'asile* regarding the action for annulment against a refusal of entry to the territory on the grounds of asylum – that is, when the decision on the asylum application is taken at the border.[272] More specifically, the contested Article 3 of the Decree provides that the judge shall pass judgment directly at the hearing, with the operative part being communicated to the parties, who acknowledge receipt.[273] The applicant claimed violation of Article 47 of the Charter and Article 13 of the ECHR. The CE dismissed the Charter-based argument based on the inapplicability of the Charter, using the same summary

[267] Sirinelli, *La transformation du droit administratif par le droit de l'Union européenne*, supra n 214 at 350–352. It is not problematic when the formula is used with a positive result, that is, to say that a certain national rule was taken to implement Union law. In that sense, the formula is simply more specific in relation to the general formula: see Xenou, supra n 30 at 142.
[268] CE, 385865, 6 May 2015, para 10.
[269] M Gautier and F Melleray, 'Le champ d'application matériel, limite à la primauté du droit communautaire' (2003–2004) *Revue des Affaires Européennes* 27 at 31–32; D Ritleng, 'Jurisprudence administrative française intéressant le droit communautaire' (2003) *RTD Eur.* 661 (hesitation between the formulations 'situations régies par le droit communautaire' and 'mise en œuvre du droit communautaire'); and Xenou, supra n 30 at 142–143.
[270] CE, 364384, 22 October 2014, para 19 ('les requérants ne peuvent utilement invoquer […] ni l'article 50 de la Charte des droits fondamentaux de l'Union européenne, ni les articles 54 à 58 de la convention d'application de l'accord de Schengen, eu égard à leur champ d'application'; the public rapporteur, Alexandre Lallet, observed in his Opinion that the contested measures did not come within the scope of the Charter and the Schengen Convention).
[271] CE, 368069, 18 December 2014, para 17.
[272] CE, 357848, 29 April 2013.
[273] Décret n° 2012-89 du 25 janvier 2012 relatif au jugement des recours devant la Cour nationale du droit d'asile et aux contentieux des mesures d'éloignement et des refus d'entrée sur le territoire français au titre de l'asile, JORF n°0023 du 27 janvier 2012 page 1521 texte n° 5.

formula in the sense that Article 3 '[was] not implementing EU law'.[274] However, this assessment was incorrect. Procedures before Member State courts that relate to granting and withdrawing refugee status do come within the scope of EU law, namely – at the relevant time – within the scope of the Procedures Directive 2005/85/EC.[275] This Directive made it clear in its Article 3 that it applied to 'all applications for asylum made in the territory, including at the border or in the transit zones of the Member States'. Furthermore, according to Article 39 of the Directive, the Member States were to ensure that 'applicants for asylum have the right to an effective remedy before a court or tribunal, against […] a decision taken on their application for asylum, including a decision […] taken at the border or in the transit zones of a Member State'. Therefore, Article 3 of the contested Decree was implementing Union law within the meaning of Article 51 of the Charter. Indeed, the Decree's Article 3 is a classic example of a national rule which provides remedies or establishes procedures and does so in relation to a claim based on EU law.[276] The CE's applicability assessment calls for several remarks. First, as the CE's judgment was handed down on 29 April 2013, the judges had the opportunity to draw on the CJEU's reasoning in *Fransson*, but they did not do so. Secondly, it illustrates the basic problem inherent in employing a formulaic applicability assessment in such a categorical but unsubstantiated manner: no possibility to immediately verify whether it is correct. Finally, the consequences of the incorrect finding as to the inapplicability of the Charter were mitigated, in terms of fundamental rights protection, by the fact that the CE reviewed the contested national provision against the ECHR.[277]

4.2.2 More detailed applicability assessments

One of the first more complex applicability assessment was conducted in *Cherence*, in which the applicant contested two Decrees that prescribed the age at which employment contracts of workers in the gas and electricity industry were automatically terminated

[274] CE, 357848, 29 April 2013, para 3.
[275] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13. See also Opinion of Public Rapporteur C Brami in CE, 357848, 29 April 2013, available in: C Brami, 'Consécration du caractère effectif du recours contre le refus d'admission sur le territoire au titre de l'asile' (2013) *AJDA* 1696. On the compatibility of this interpretation with later CE's case law, see G Marti, 'Droit d'être entendu dans le cadre d'une mesure d'éloignement: un pas en avant, deux pas en arrière' (2014) *La Semaine Juridique –Administrations et Collectivités territoriales* 2355 at 4.
[276] See Section I.2.3. See also Ritleng,'De la portée des droits fondamentaux de l'Union à l'égard des mesures nationales', supra n 262.
[277] CE, 357848, 29 April 2013, para 4.

(between 65 to 67 years of age, depending, progressively, on the date of birth).[278] The applicant first submitted that the procedure leading to the adoption of the contested Decrees was contrary to Articles 12 (freedom of assembly and of association) and 28 (right of collective bargaining and action) of the Charter in that labour organisations were not properly consulted. Secondly, the applicant complained that the Decrees, insofar as they laid down the age limit, were discriminatory on the grounds of age and therefore contrary to Article 6(1) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and Article 21(1) of the Charter.[279] To the extent that the case concerned the EU-compatibility review in relation to the Directive and the Charter, the CE adopted the solutions proposed by the public rapporteur, Madame Vialettes. In her Opinion, she first dealt with the alleged violation of the procedure (*légalité externe*), starting with a detailed analysis of the applicability of the Charter. She cited Article 51 and interpreted the concept of 'implementing Union law' as describing a situation when the Member States 'act in the scope of Union law', in reference to the Explanations and the Opinion of Advocate General Trstenjak in *N. S.*[280] She then recalled the CE's case law regarding the scope of application of general principles of EU law, according to which these principles can only be successfully invoked 'in cases where the legal situation to be considered by a French administrative court is governed by [Union] law'.[281] The public rapporteur continued:

> If we transpose this case law to the Charter […], it follows that when the contested act is, in one way or another, within the scope of Union law without actually applying it or being adopted pursuant to it, the invocation of the *principles* laid down by the Charter is inoperative. In the present case, insofar as the Decrees at issue modify the status of workers in the electricity and gas industries, *they are not implementing Union law and, therefore, the argument that they violate the Charter is inoperative*.[282]

It is important to note that the public rapporteur made this statement in the section concerning the applicability of the Charter to the procedure leading to the adoption of the contested act (*légalité externe*). To that extent, the conclusion of the rapporteur public is materially

[278] CE, 352393, 13 March 2013.
[279] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
[280] Opinion of Public Rapporteur M Vialettes in CE, 352393, available in (2013) *Revue juridique de l'économie publique*, no 713, comm. 48. Opinion of AG Trstenjak in Joined Cases C-411/10 and C-493/10 *N. S. and Others*, EU:C:2011:611.
[281] Opinion of Public Rapporteur M Vialettes, referring to CE, 288460, *KPMG*, 24 March 2006.
[282] Ibid. (emphases added).

defendable,[283] but the reasoning is not very clear insofar as it seems to introduce a requirement that for the Charter to apply, the national norm must 'apply' EU law or 'be adopted pursuant to' it.

In the section assessing the plea alleging a breach of the anti-discrimination Directive 2000/78/EC and the prohibition of non-discrimination in Article 21(1) of the Charter by one of the contested Decrees (*légalité interne*), the public rapporteur considered that both the Directive and Article 21(1) of the Charter *could* be validly invoked. The Directive was invokable given that the Decree – by fixing the age at which employment is automatically terminated – was within the scope of the Directive, which according to its Article 3(1) applies to employment and working conditions, including dismissals and pay. As for the Charter, Madame Vialettes took an interesting approach, citing Article 51 of the Charter, but only its first limb (concerning the applicability of the Charter to EU institutions), not the second limb (concerning the applicability of the Charter to the Member States):

> Article 51 of the Charter also states that 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union'; therefore, they must respect it […]. Consequently, there is nothing to prevent the Directive from being interpreted in the light of a principle enshrined in primary law…[284]

While the Charter could not be 'invoked alone', 'it [could] be invoked to interpret an invocable directive'.[285]

This construction raises a few interesting issues calling for further reflection. First, what comes to mind is the CJEU's recurrent formula that it is for the Member States to ensure that they do not rely on an interpretation of an act of secondary law which would be in conflict with the fundamental rights protected by the Union legal order.[286] However, when Member State bodies engage in such systematic interpretation of secondary law in the light of the Charter, they do so within the second limb of Article 51 of the Charter, not the first limb. Secondly, the public rapporteur was right to highlight that the Charter could not be applied on its own in the absence of a triggering norm that is itself applicable (and thus

[283] Some have opined that this approach to the definition of the Charter's scope is restrictive: see E Dubout, P Simon and L Xenou, 'France' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 327 at 339 and 340.
[284] Opinion of Public Rapporteur M Vialettes.
[285] Ibid.
[286] See eg Case C-101/01 *Lindqvist*, EU:C:2003:596, para 87; and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others*, EU:C:2007:383, para 28.

invocable) in the case in hand. Where such triggering norm exists, however, the applicability of the Charter under the second limb of Article 51 is automatically established. Thirdly, the public rapporteur's reasoning implies a conceptual distinction between a situation when a national court applies the Charter and a situation when it merely refers to the Charter to interpret secondary law in the light of it. However, this distinction is not borne out by CJEU case law. In *Fransson* (the judgment was issued after the Opinion of the public rapporteur, but a few days before the CE decision), the CJEU made it clear that '[s]ince the fundamental rights guaranteed by the Charter must […] be complied with where national legislation falls within the scope of [EU] law, situations cannot exist which are covered in that way by [EU] law without those fundamental rights being applicable'.[287] There is decidedly a tension between this holding and the public rapporteur's assessment that the Decrees were not considered to be implementing EU law within the meaning of Article 51 of the Charter, but, at the same time, some of the provisions of one of the Decrees were within the scope of the anti-discrimination Directive 2000/78/EC.

The CE followed the lead of Madame Vialettes but added some nuances. Crucially, regarding the Charter-based plea made in the context of the procedure for adopting the contested Decrees (*légalité externe*), the CE held – after citing Article 51 of the Charter – that 'since it [was] *not the aim of* the contested Decrees to implement Union law, the applicant [could not] reasonably claim that the procedure leading to their adoption violated the provisions of Articles 12 and 28 of the Charter'.[288] Regarding the content of the contested measure, the CE held that Article 21(1) of the Charter '[could] be invoked before the court for the purposes of interpreting the acts adopted by the Union institutions that implement the principles that [the Charter] contains'.[289] It is easier to understand this reasoning when reading it together with the Opinion of the public rapporteur: the CE was keen on introducing a conceptual distinction between (i) the non-applicability of the Charter in the review of the procedure for adopting the contested act and (ii) the applicability of the Charter in the review of its content. However, the prosaic quality of the CE's reasoning gives rise to uncertainty as to the conceptual approach chosen. Particularly confusing is the reference to 'principles',

[287] Case C-617/10 *Fransson*, EU:C:2013:105, para 21.
[288] CE, 352393, 13 March 2013, para 2 (emphasis added). In subsequent decisions, the formulation 'does not aim to implement', instead of 'is not implementing' was used to dismiss pleas made by organisations representing members of a certain profession, alleging a breach of the Charter (in a panoramic fashion) on account of the lack of consultation in the procedure leading up to the adoption of the contested act: see eg CE, 344595, 3 June 2013, para 3; and CE, 353703, 27 November 2013, para 9.
[289] CE, 352393, para 7.

given that Article 21(1) of the Charter does not contain a Charter principle but a Charter right.

Another example of a semi-correct applicability assessment occurred in *Halifa*, a cassation complaint against a judgment of the CAA of Lyon. This litigation demonstrates well the dynamics of both direct and indirect communication between courts at different levels when giving effect to the Charter.[290] The case concerned the provisions of the Code on the Entry and Stay of Foreign Nationals and the Right of Asylum (CESEDA) with regard to the decision imposing an obligation on a third-country national to leave the French territory (the so-called OQTF, *obligation de quitter le territoire français*), taken concomitantly with a decision rejecting that national's application for a residence permit. Those provisions meant that the third-country national concerned was not given an opportunity to submit written or oral observations *specifically* against the OQTF decision. Was this regime compatible with the right of every person to be heard guaranteed as a component of the right to good administration under Article 41(2)(a) of the Charter? This question had already been addressed by lower courts, with varying approaches. Whereas the TA of Montreuil found the Charter inapplicable (the OQTF decision 'cannot be considered as an act taken in a legal situation entirely governed by community law'[291]), most lower courts considered the Charter-based plea to be operative, including the CAA of Lyon in the judgment contested before the CE, *Halifa*.[292] Additionally, two TAs felt it necessary to make a reference for a preliminary ruling.[293]

The public rapporteur, Mr Domino, carefully examined the applicability of the Charter and specifically its Article 41 to the OQTF proceedings at issue.[294] In a counter-intuitive order, he first assessed the applicability of Article 41 of the Charter, noting that this provision was only addressed to institutions and bodies of the Union, and only then the applicability of the Charter as such under its Article 51. Regarding the first sub-question, Mr Domino referred to the CJEU judgment in *M. M.* to support his view that Article 41 was

[290] CE, 370515, 4 June 2014.
[291] TA Montreuil, 1210341, 13 March 2013. See also CAA Lyon, 11LY03002 and 11LY03003, 11 October 2012, para 8; and CAA Douai, 12DA00478, 4 December 2012.
[292] See eg CAA Lyon, 12LY02704, 14 March 2013 (a judgment in *Halifa* contested before the CE); CAA Lyon, 12LY02737, 14 March 2013; followed by other courts, eg CAA Marseille, 12MA04450, 18 June 2013. For other examples, see Opinion of Public Rapporteur Domino in CE, 370515.
[293] TA Melun, 1301686/12, 8 March 2013 (Case C-166/13 *Mukarubega*, EU:C:2014:2336); and TA Pau, 1300264, 30 April 2013 (Case C-249/13 *Boudjlida*, EU:C:2014:2431).
[294] Opinion of Public Rapporteur X Domino in CE, 370515, available in X Domino, 'Droit d'être entendu et OQTF: un exemple du dialogue entre les jurisprudences' (2014) *AJDA* 1501.

applicable to national proceedings if those proceedings are within the scope of the Charter.[295] It is true that in *M. M.* the CJEU held that this provision was of general application,[296] only to reverse this conclusion in a later judgment which clarified that Article 41 was solely addressed to the EU institutions.[297] Thus, the public rapporteur's incorrect conclusion is attributable to the CJEU itself. In any event, the public rapporteur correctly remarked – with reference to the CJEU judgment in *Sopropé*[298] – that the right to be heard needed to be respected as a general principle of Union law by Member State administrative authorities when they adopt decisions within the scope of Union law. It is interesting to note the way in which the CAA of Lyon chose to frame the issue in *Halifa*: it referred to 'the right to be heard in the sense of the general principle of European Union law, as it is expressed, in particular, in Article 41(2) of the [Charter]'.[299] This can be viewed as a moderately successful workaround of the problem of Article 41's (then) unclear scope.

Regarding the applicability assessment of the Charter as a whole, Mr Domino chose as his point of departure the CE decision in *Confédération française pour la promotion sociale des aveugles et des amblyopes*, which he arguably saw as confirming two distinct applicability criteria: (i) general principles are applicable when the legal situation in question 'is governed' by Union law; and (ii) the Charter is applicable to national provisions 'implementing' Union law. Applying those criteria to the facts of the case, Mr Domino had no doubt that OQTF decisions are taken in a legal situation governed by Union law, namely by the Returns Directive 2008/115/EC.[300] Neither had he any doubt that OQTF decisions

> can be considered as implementing Union law: the provisions of the CESEDA concerning the OQTFs (in particular Article L. 511-1) result from the transposition of the 2008 Returns Directive […] effectuated by Act No 2011-672 of 16 June 2011 on Immigration, Integration and Nationality. It is possible to find an argument *a fortiori* in the CJEU case law: it is clear from [Case C-617/10 *Fransson*] that the CJEU does not see the notion of implementing and the

[295] Case C-277/11 *M. M.*, EU:C:2012:744.
[296] Ibid. paras 81–84.
[297] Case C-604/12 *H. N.*, EU:C:2014:302, paras 49–50. For a comment and further references, see AH Türk, 'Administrative law and fundamental rights' in S Douglas-Scott and N Hatzis, *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017) 120 at 128–129.
[298] Case C-349/07 *Sopropé*, EU:C:2008:746.
[299] CAA Lyon, 12LY02704, 14 March 2013, para 9 *in fine*.
[300] 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 [2008] L 348/98.

> notion of transposition of Union law as equivalent, the former covering a larger perimeter than the latter.[301]

Looking at the fragment cited, it is not entirely clear whether the public rapporteur saw the scope of the Charter and that of general principles as distinct. Given that he was clearly aware of the broad understanding of the notion of 'implementing' by the CJEU, it is not necessarily the case that he considered the scope of the Charter to be less broad than the scope of general principles. That said, his (clearly conscious) choice to conduct a separate assessment does introduce some doubt in this respect.[302] It was in *Fransson* itself that the CJEU confirmed that the material scopes of the Charter and general principles were entirely coincident.

The CE stated, after quoting both Article 41 and Article 51 of the Charter, that Article L 511-1 of the CESEDA resulted from the provisions of Act No 2011-672 adopted to transpose the Returns Directive 2008/115/EC.[303] There was no mention of general principles of EU law and no comments on the issues highlighted by the public rapporteur; the applicability of Article 41 of the Charter was not discussed, but it would seem to have been accepted implicitly.[304] The CE's assessment of the Charter's applicability was fit for purpose and entirely sufficient, as it usually is in cases where the national rules concerned were clearly adopted to transpose an EU directive. As for the extension of the scope of Article 41, against which the national rules at issue were implicitly reviewed, the consequences were not significant from the material point of view: as indicated above, equivalent rights are protected as a general principle of Union law.

In any case, the CE aligned its case law with that of the CJEU after the Luxembourg Court clarified in *Mukarubega*,[305] in response to a request for a preliminary ruling made by the TA of Melun, that Article 41 of the Charter was solely addressed to EU institutions, but the right to good administration was inherent in the respect for the rights of the defence,

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[301] Opinion of Public Rapporteur X Domino in CE, 370515, supra n 294.
[302] As was already pointed out above, this two-pronged assessment of the Charter and the general principles later appeared in CE, 368069, 18 December 2014, para 17. It was also taken up in full in some decisions of the CAAs: see eg CAA Versailles, 13VE03141, 3 December 2015, para 11.
[303] CE, 370515, 4 June 2014. See also later judgments dealing with the same issue, in which the applicability assessment only quoted Article 51, and the Directive was only mentioned in the 'visas': CE, 375373, 19 January 2015, para 7; and CE, 377318, 1 April 2015, para 5, where the Directive was not mentioned at all.
[304] See also J-M Sauvé, 'La Charte des droits fondamentaux de l'Union européenne: évaluer et répondre aux besoins de formation des juristes et des autorités publiques', Colloque organisé par la Commission européenne, 17 December 2014, available at: www.conseil-etat.fr/actualites/discours-et-interventions/l-application-de-la-charte-des-droits-fondamentaux-de-l-union-europeenne-par-les-juristes, fn 11.
[305] Case C-166/13 *Mukarubega*, EU:C:2014:2336, paras 44–45.

which is a general principle of EU law.[306] It was pointed out that the CE could have stayed the proceedings and waited for the result of the preliminary ruling procedure started by the TA of Melun in a similar case.[307] In cases where the CE (correctly) dismisses a plea alleging a breach of (the inapplicable) Article 41 of the Charter, we can ask if the CE should not, of its own motion, transpose that plea into a plea based on the right to good administration as guaranteed by the (potentially applicable) general principle of EU law.

A full applicability assessment, with extensive reliance on CJEU case law, was made in a case concerning national measures going above the minimum requirements of an EU directive. The applicant contested the rules applicable to the employees of the SNCF concerning the reduction of paid annual leave due to absence from work.[308] Under the contested rules, the guaranteed annual leave of 28 days was reduced where the employee was absent from work for a total of 30 days or more in the reference year: two days were to be taken off on the 30th day of absence, and 1 day for each subsequent period of 15 days. Under the same rules, a distinction was made between two situations: (i) when an employee was absent due to illness, his or her paid annual leave could not be reduced below the minimum of 20 days for the reference year; (ii) when an employee was absent for reasons enumerated in the national measure concerned other than illness, there was no such guarantee. The applicant argued before the CE that these rules violated Article 7 of the Working Time Directive 2003/88/EC[309] (according to which every worker is entitled to paid annual leave of at least four weeks) and Article 31 of the Charter.[310]

Drawing on the CJEU judgment in *TSN and AKT*, the CE correctly dealt with the Charter-based plea in two separate steps. In *TSN and AKT*, which also concerned the right to paid annual leave, the CJEU held that national measures that exceed the requirements of minimum harmonisation EU directives, insofar as they exceed those minimum requirements,

[306] CE, 381171, 9 November 2015, paras 7–8. See also CE, 373101, 11 February 2015, para 3; and CE, 392182, 27 July 2016, para 6. See also CE, 397199, 9 October 2017, para 6; and CE, 405793, 24 April 2019, para 21. See also CE, 408822, 21 June 2018, para 8, where the CE dismissed the plea based on Article 41 not on account of its inapplicability, but on account of the inapplicability of the Charter as such, which is the correct approach from the methodological point of view. The CE dismissed the plea on both these grounds in CE, 416369, 6 May 2019, para 3. However, in CE, 375373, 19 January 2015, para 7, the CE copied again the solution reached in *Halifa*. For a methodologically slightly obscure approach, see also CE, 415818, 30 January 2019, para 5.
[307] D Simon, 'Reconduite à la frontière: un subtil mélange de dialogue des jurisprudences et de théorie de l'acte clair' (2014) *Europe* août-septembre 2014.
[308] CE, 430113, 18 November 2020.
[309] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.
[310] Article 31(2) lays down the right of every worker 'to an annual period of paid leave'.

do not fall within the scope of the EU Charter.[311] The CE was thus aware of the hybrid nature of the contested provisions: to the extent that they laid down the right to paid annual leave of 20 days, corresponding to the minimum required by the Working Time Directive, the contested rules are within the scope of the Directive and therefore within the scope of the Charter under its Article 51. To the extent that the contested provisions go beyond this minimum requirement, they fall outside the scope of the Directive and consequently outside the scope of the Charter. Applying this distinction to the case before it, the CE held that, as regards the entitlement to paid annual leave of 21 to 28 days, the applicant could not invoke the Directive nor the Charter to contest the provisions that reduce the leave entitlement of an employee who was absent from work due to illness, given that EU law was not applicable.[312] In the next step, the CE recognised that as regards the entitlement to paid annual leave of 20 days, the rules at issue were fully reviewable against Directive 2003/88/EC and the Charter. The CE again followed the CJEU law in conducting that review. The purpose of the right to paid annual leave is to enable the workers both to rest from carrying out the work they are required to do under their contract of employment and to enjoy a period of relaxation and leisure, this purpose being based on the premise that the workers actually worked during the reference period.[313] This means that employees absent from work cannot be treated in the same way as those who have in fact worked during the relevant period (with the exception of cases where the absence is due to a certified sick leave or maternity leave).[314] Accordingly, the contested national rules, which allow reducing the annual leave entitlement of 20 days due to absence from work on other grounds than illness, are not contrary to the Working Time Directive or the Charter.[315]

The CE's exemplary reasoning demonstrates the importance of distinguishing between declarations of non-applicability and declarations of non-violation. While in the case in hand, there was not a practical difference between the two outcomes, it is easy to imagine a situation where this would not be the case, for example, if the national rules made it possible to reduce the annual leave entitlement below 20 days for any absence of an employee including an absence due to illness.

[311] Joined Cases C-609/17 and C-610/17 *TSN and AKT*, EU:C:2019:981.
[312] CE, 430113, 18 November 2020, para 5.
[313] Case C-12/17 *Dicu*, EU:C:2018:799, paras 27 and 28.
[314] Ibid. paras 29–30.
[315] CE, 430113, 18 November 2020, para 6.

Comparatively interesting are applicability assessments of the CE and the NSS in the context of national measures in the domain of renewable energy, with the parties invoking the Charter via Directives 2001/77/EC and 2009/28/EC, which lay down an obligation for the Member States to ensure that the share of energy from renewable sources equals or exceeds specified targets. As discussed, the NSS held that the Czech rules on solar levy were not within the scope of those Directives on the ground that 'the only element with a Union dimension in [that] case [was] the obligation to ensure an increase in the share of energy produced from renewable sources by a certain date. How this [was] to be achieved [was] then a question of national law.'[316] On the French side, a similar approach was initially taken concerning an Order fixing feed-in tariffs for electricity produced from renewable sources. The CE held that the national rules concerned were not governed by Community law, given that Directive 2001/77/EC did not regulate the terms and conditions for feed-in tariffs for electricity produced from renewable sources.[317] However, in a later case, the CE found that a Decree suspending the obligation to purchase electricity from renewable resources was within the scope of Directive 2009/28/EC.[318] Although it did not provide any reasons for that conclusion, it appears from the Opinion of the public rapporteur that the connecting factor was the fact that the suspension in question had consequences for the realisation of the objective pursued by the new Directive 2009/28/EC.[319] This indeed seems to be the only manner in which national measures could enter the scope of Directives 2001/77/EC and 2009/28/EC. As was the case with the NSS, the CE showed awareness of the fact that a mere tangential link or a certain normative overlap was not sufficient to trigger the application of the Charter.

Another assessment which suggests that the criteria developed by the CJEU case law are increasingly making their way into the reasoning of the CE was made in a recent case concerning the applicability of the Working Time Directive and the Charter to the work of prisoners. The CE observed that:

> It results from the case law of the [CJEU] that where provisions of Union law in a certain field do not regulate any aspect and do not impose any *specific obligation* on the Member States as regards a certain situation, the national legislation passed by a Member State in relation to such

[316] NSS, 2 Afs 106/2013-35, 16 April 2014.
[317] CE, 291026, 26 December 2008.
[318] CE, 344972, 16 November 2011.
[319] Xenou, supra n 30 at 151–153.

> a matter is outside the scope of application of the [Charter], and the situation concerned cannot be assessed under its provisions.[320]

The CE concluded that work in prison is outside the scope of the Working Time Directive 2003/88/EC:[321] prisoners could not be regarded as working for the benefit of another person and under that person's directions; the characteristics of an employment relationship were not present.[322] The reliance on the language of 'specific obligations' reflects the CJEU case law and scholarly consensus, even though the application of that notion in the case in hand is not necessarily persuasive overall. The public rapporteur in this case concluded that prison workers could come within the scope of the Directive and proposed to refer the case for a preliminary ruling. This case illustrates an important aspect of the problem that was already identified in the study of Czech case law: the essential difficulty for the national judge often lies in assessing the applicability of the triggering rule, not the Charter itself.

4.2.3 The methodological issues: Non-violation versus non-applicability

There does not seem to be a rule as to whether an applicability assessment is or is not made in a particular case. For example, in *Marc-Antoine*, the CE held that the applicant could not validly invoke Article 47 of the Charter against Article R. 311-1 of the Code of Administrative Justice (a general provision specifying the matters in which the CE has jurisdiction), given that 'Article 51 of the Charter provides that it is only applicable to the Member States when they are implementing Union law, and Union law does not govern the division of competences within administrative courts'.[323] Contrast this with a later judgment in which the same plea was dealt with differently.[324] The CE simply held that Article 7 of the Charter, as well as the other fundamental rights provisions invoked, were not violated; no mention of Article 51 or of the Charter being inapplicable.[325]

The absence of express applicability assessment can sometimes be explained by the fact that the applicability of the Charter is clear from the context, for example, from the logical flow of the CE's reasoning[326] or when it is expressly stated or made clear that the

[320] CE, 431775, 30 November 2020, para 11 (emphasis added).
[321] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.
[322] CE, 431775, para 12.
[323] CE, 339260, 23 October 2013, para 4.
[324] CE, 359716, 21 February 2014.
[325] Ibid. para 9 (the declaration was not accompanied by the *en tout état de cause* formula).
[326] CE, 406987, 21 February 2018, paras 8–9.

contested national provisions were adopted to implement a specific EU rule.[327] The question is, however, to what extent the applicability of the Charter would be clear to someone who does not know what to look for. For example, in *DOPA and Others*, the CE held that a provision banning disposable plastic cups and plates except those that can be composted at home and made of bio-based materials was a measure having equivalent effect to quantitative restrictions under Article 34 of the TFEU, but it was justified by the imperative requirement of environmental protection.[328] The CE then reviewed the contested provisions against the principle of equal treatment enshrined in Articles 20 and 21 of the Charter, which it did not find to have been violated either. Those familiar with the *ERT* line of case law would be able to make an educated guess that the CE considered the Charter applicable by virtue of that case law; someone without a trained eye may not be able to fill in that gap in the CE's reasoning. More generally, in less straightforward cases, while it may be manifestly clear from the reasoning as a whole that the matter is (to a bigger or smaller extent) governed by EU law, it may not be equally clear that the particular national measure in question indeed implements EU law within the meaning of Article 51 of the Charter. When reading these decisions, one can easily be in doubt whether the applicability assessment had been performed internally and whether (and why) the Charter was considered applicable.[329]

An illuminating insight into why the CE chooses this approach is offered by the Opinion of the public rapporteur in the data protection case *Société Orange*.[330] There, the matter concerned Article 34bis of Act No 78-17 on information technology, data files and civil liberties, under which the provider of publicly available electronic communications has an obligation to notify without delay a personal data breach to the *Commission nationale de l'informatique et des libertés* (CNIL). In 2014 Orange made such a notification in relation to a hacker data raid that compromised the personal data of 1,3 million existing and potential clients. The CNIL subsequently conducted an investigation *in situ* and sanctioned the company for breaching its obligation to safeguard data security. Orange argued that the

[327] See eg CE, 387796, 20 June 2016; CE, 401536, 10 May 2017, para 14; CE, 400580, 28 December 2017, paras 2–5 (see also Case C-528/13 *Geoffrey Léger*, EU:C:2015:288, para 47); and CE, 408805, 18 July 2018, paras 8–9. See also CE, 430008, 15 May 2019, concerning EP elections.
[328] CE, 404792, 30 August 2020, paras 8–11.
[329] See eg CE, 371190, 30 December 2015, para 11 (a reduction of the tariff paid by the state to lawyers providing legal aid before Cour nationale du droit d'asile not contrary to Article 47 of the Charter); and CE, 385019, 30 December 2015. For the same assessment of those two cases, see L Clément-Wilz, F Martucci and C Mayeur-Carpentier, 'Chronique de droit administratif et droit de l'Union européenne' (2016) *RFDA* 577. See also CE, 370989, 17 February 2016, para 9.
[330] Opinion of Public Rapporteur E Bokdam-Tognetti in CE, 385019.

sanction imposed was in breach of the privilege against self-incrimination, invoking Article 6 of the ECHR and Articles 47 and 48 of the Charter.

Regarding the two Charter articles, the public rapporteur made an explicit applicability assessment: Articles 47 and 48 of the Charter appear to be applicable in the matter, since the contested decision of the CNIL imposing the sanction was adopted in application of Articles 34 and 34bis of Act No 78-17, which 'transpose and implement Union law'.[331] Then came the illuminating sentence:

> However, you will not be obliged to take a view on this point explicitly, given that the privilege against self-incrimination can, in any case, be invoked in the present case insofar as it is guaranteed by the [ECHR].[332]

The CE followed the advice. Without any applicability assessment, the CE found that the object of the contested national provisions was not to impose on the providers the obligation to disclose violation for which they bear responsibility, nor did those provisions have such an effect; the sanction imposed by the CNIL was based on the findings of the investigation conducted by that authority.[333] Therefore, concluded the CE, Orange could not reasonably claim that the contested provisions violated Article 6(1) of the ECHR and Articles 47 and 48 of the Charter.[334] Given that the declaration of non-violation of the Charter was not accompanied by the *en tout état de cause* formula, we may reasonably assume that the CE considered the Charter applicable, which is the correct assessment.

To illustrate the uncertainties that may be caused by a missing applicability assessment within more complex EU regulatory schemes, where the applicability of the Charter is not manifestly clear from the context of the case, let us have a look at three more cases.

The first one concerned police checks conducted near the Schengen border. The applicants argued, inter alia, that they suffered discrimination based on their origin and physical appearance due to being targeted by repeated checks of law enforcement authorities. What follows is a necessary preamble summarising the applicable national rules. The checks in question were conducted under an Order on identity checks in ports, airports and railway

[331] Ibid.
[332] Ibid.
[333] CE, 385019, 30 December 2015, para 7. For a view that such distinction is not persuasive, see N Metallinos, 'Notification des violations de données à la CNIL: tendre le bâton pour se faire battre ?' (2016) *Dalloz IP/IT* 144.
[334] Ibid.

and bus stations open to international traffic and on international trains. This Order designated the areas in which it was possible to conduct identity checks laid down in Article 78-2 of the Code of Criminal Procedure. This provision permits police authorities, subject to several conditions, to check the identity of any person, within an area of 20 kilometres from the land border of France with the Schengen States, in order to ascertain whether he or she fulfils the obligations laid down by law to hold, carry and produce papers and documents.

Identity checks under Article 78-2 of the Code of Criminal Procedure were previously assessed by the CJEU for compliance with the Schengen Borders Code. That Code abolishes border checks on internal borders. Article 23 of the Code stipulates that the absence of such border checks '*shall not affect*: (a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas.'[335] The rest of Article 23 specifies when police checks are not to be considered as equivalent to border checks. In *Melki and Abdeli*, the CJEU found the identity checks under Article 78-2 of the Code of Criminal Procedure to be equivalent to border checks. It relied on the fact that they were carried out irrespective of the person's behaviour and of specific circumstances giving rise to a risk of breach of public order, and the applicable legislation did not provide the necessary framework to guarantee that the practical exercise of those checks could not have an effect equivalent to border checks.[336] To comply with the CJEU's judgment, Article 78-2 of the Code of Criminal Procedure was amended: it now says that the identity checks cannot be carried out for more than six hours in the same spot and cannot consist in systematic checks of the persons present.

The issue here is that internal border checks and police checks equivalent to border checks are within the scope of, and prohibited by, the Schengen Borders Code. When it comes to police checks in the territory (including those carried out in border areas) that are not considered as equivalent to border checks within the meaning of Article 23 of the Schengen Borders Code, these are unaffected by the Code. They are an exercise of the responsibilities reserved to the Member States regarding the maintenance of law and order and the safeguarding of internal security (Article 72 of the TFEU).[337] Such identity checks

[335] Emphasis added.
[336] Joined Cases C-188/10 and C-189/10 *Melki and Abdeli*, EU:C:2010:363.
[337] See Case C-278/12 PPU *Adil*, EU:C:2012:508, paras 52–53.

are therefore outside the scope of the Schengen Borders Code and, consequently, outside the scope of the Charter.

Now let us go back to the applicants who challenged the identity checks conducted against them together with the applicable legislation. They did not argue that those checks were equivalent to border checks; they argued that the checks were conducted in a manner contrary to the Charter. The public rapporteur had doubts about the applicability of the Charter: it was not evident that the identity checks implemented the Schengen Borders Code by the mere fact of not violating it.[338] However, the CE did not investigate this doubt further, instead choosing to make a panoramic declaration of non-violation.[339]

The second case is *Adrien and Others*, in which a group of French officials, seconded as law clerks to the CJEU, challenged the provisions of the French Civil and Military Retirement Pensions Code concerning the regime of officials seconded to an EU institution who chose to continue to contribute to the French pension scheme and who – at the same time – remain affiliated to the EU pension scheme.[340] Under those rules, the amount of pension the official will receive under the French scheme can supplement the EU pension only to the extent of the French pension he or she would have acquired under the national scheme if there had been no secondment. In consequence, since the applicants' EU pension was greater than the (French) one they would have received had there been no secondment, they would not be entitled to any French pension. The applicants argued that the French rules were contrary, inter alia, to Articles 45 of the TFEU (free movement of workers) and Article 17 of the Charter (right to property). As for the Charter-based plea, which was made jointly with a plea based on Article 1 of Protocol 1 to the ECHR, the CE found that neither of those provisions was violated: the rules in question enabled the officials concerned to make a free choice based on rules fixed in advance, and they guaranteed these officials a pension at least equal to the one which they would have received had there been no secondment.[341] As for the free movement of workers, the CE doubted whether the rules at issue were contrary to Article 45 of the TFEU, and it made a request for a preliminary ruling to the CJEU. The CJEU held that the rules in question were precluded by EU law.[342]

[338] Opinion of Public Rapporteur A Bretonneau in CE, 372721.
[339] CE, 372721, 13 June 2016, para 10.
[340] CE, 360821, 8 April 2015.
[341] Ibid. para 5. See also CE, 393921, 31 March 2017, paras 9–10.
[342] Case C-466/15 *Jean-Michel Adrien and Others*, EU:C:2016:749.

Returning to how the CE treated the Charter in this case, was the Charter applicable to the French rules in question, or were those rules outside the Charter's scope? There is a clear EU-element in the case, given that the national rules were within the scope of EU law, namely Article 45 of the TFEU. However, just because a national provision breaches a provision of EU law (and falls within the scope of that provision), that national provision is not reviewable against all the fundamental rights enshrined in the Charter. The Charter is indeed applicable in the so-called derogation scenario based on *ERT*, where a Member State relies on overriding requirements in the public interest to justify national rules liable to obstruct the exercise of a fundamental freedom: those national rules in question 'can fall under the exceptions provided for only if they are compatible with the fundamental rights'.[343] But in this scenario, the national measures are reviewed against the Charter only to ascertain whether or not the Member State can rely on the derogation in question, which was not the case here.[344]

The third case is *JT International SA and Others*, in which the applicants challenged national provisions which introduced mandatory plain packaging, invoking, inter alia, the Charter.[345] Two preliminary comments are needed. First, insofar as the rules on plain packaging restrict the free movement of goods in the internal market, they come within the scope of Article 34 of the TFEU, since they constitute product requirements amounting to measures of equivalent effect to quantitative restrictions. Secondly, 'certain aspects of the labelling and packaging of tobacco products including the health warnings to appear on unit packets of tobacco products and any outside packaging' are harmonised by the Tobacco Products Directive 2014/40/EU.[346] The Directive states in Article 24(2) that

> [t]his Directive shall not affect the right of a Member State to maintain or introduce further requirements, applicable to all products placed on its market, in relation to the standardisation

[343] Case C-260/89 *ERT*, EU:C:1991:254, para 43; and Case C-390/12 *Pfleger and Others*, EU:C:2014:281, para 35.
[344] Interestingly, the public rapporteur proposed to dismiss both the Charter- and the ECHR-plea *en tout état de cause*. He relied on the case law of the ECtHR, according to which Article 1 of Protocol No 1 does not guarantee a right to a specified amount of pension. He extended this finding to Article 17 of the Charter by virtue of Article 52 of the Charter, observing that the former provision has the same scope as Article 1 of Protocol No 1: see Opinion of Public Rapporteur A Lallet in CE, 360821.
[345] CE, 399117, 23 December 2016.
[346] Article 1(b) of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] OJ L 127/1.

> of the packaging of tobacco products, where it is justified on grounds of public health, taking into account the high level of protection of human health achieved through this Directive.[347]

These two aspects correspond to two ways in which the applicability of the Charter can be envisaged. First, and quite uncontroversially, when a Member State attempts to derogate from Article 34 of the TFEU and justify plain packaging (that is, the restriction of free movement of goods) on the grounds of human health under Article 36 of the TFEU, it must do so in compliance with the Charter, as is clear from *ERT*.[348] Secondly, and with much less certainty, if plain packaging is to be considered as a measure implementing the Tobacco Products Directive, the national rules in question come within the scope of the Charter as implementing measures in the sense of *Wachauf*.[349] Here, what is key is the conceptual understanding to be given to Article 24(2) of the Directive. Is this provision a power-granting clause which *authorises* the Member States to maintain or introduce further requirements in relation to the standardisation of the packaging of tobacco products, or is it a power-recognising clause, which merely *recognises* (in a declaratory manner) the power to adopt such measures which the Member States retained? Under the first scenario, national measures adopted by virtue of the power-granting clause (that is, adopted within the discretion granted to the Member States by the relevant directive) continue to be within the scope of the implemented directive and are therefore within the scope of the Charter. Under the second scenario, national measures adopted in accordance with the power-recognising clause are not within the scope of the directive and are therefore – on that basis – not within the scope of the Charter, even if they may come within the scope of the Charter on another basis.[350]

According to one author, plain packaging rules 'fall within a discretion explicitly provided for' in Article 24(2).[351] However, in our opinion, it is clear from the overall regulatory scheme of the Directive that it only aims at partial harmonisation of 'certain' aspects of the labelling and packaging of tobacco products, and the 'further requirements' in relation to the standardisation of the packaging of tobacco products refer to aspects that were not harmonised by the Directive and are therefore outside its scope. This interpretation of

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[347] 'Such measures shall be proportionate and may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Those measures shall be notified to the Commission together with the grounds for maintaining or introducing them.'
[348] See Section I.2.3.
[349] Ibid.
[350] See the discussion on the *TSN and ATK* case in Section I.2.4.
[351] J Griffiths, '"On the back of a cigarette packet": standardised packaging legislation and the tobacco industry's fundamental right to (intellectual) property' (2015) *Intellectual Property Quarterly* 343 at 349.

the clause in Article 24(2) has authority in the CJEU's judgment in *Philip Morris*.[352] It is true that Article 24(2) lays down some conditions under which the Member States can maintain or introduce further product requirements, but these conditions merely reproduce and restate the general conditions for derogating directly on the basis of the TFEU.

In *JT International SA and Others*, without any applicability assessment, the CE swiftly dealt with the Charter-based pleas, finding no violation, *in any event*, of Articles 11, 16, 17, 20, 52 of the Charter. Interestingly, when it came to Articles 11, 17 and 52, it simply stated they needed to be, in any case, dismissed on the same grounds as those indicated in the section of the decision dealing with ECHR-based submissions.[353] As well as judicial pragmatism, this approach demonstrates that at least in this case, the ECHR and the Charter standards were – in the view of the CE – materially equivalent.

This interpretation of the CE's *modus operandi* is corroborated by the Opinion of the public rapporteur in this case, which is remarkably illuminating on the CE's approach. Ms Marie-Astrid de Barmon recalled that the Charter is only applicable to the Member States when they are implementing EU law.[354] She pointed out that in adopting the plain packaging rules, France made use of the option left to the Member States in Article 24(2) of Directive 2014/40/EU to go beyond the requirements of the Directive. And she continued: 'it is not evident that the Member States "are implementing" Union law […] when they adopt such legislation in an area left open by a permissive provision of a partial harmonisation directive'. She proposed to address this uncertainty by assessing the Charter-based pleas with the *en tout état de cause* formula until the CJEU clarifies the issue.[355] She concluded this section on a reassuring note: the assessment of the compatibility with the Charter will, in any case, be 'analogous' to the assessment with regard to the ECHR. In this way, judicial pragmatism is made possible (or encouraged?) by the perceived equivalence between the Charter and the ECHR. Indeed, the *en tout état de cause* approach proposed by the public rapporteur made its way into the CE's reasoning.

Let us look more closely at this evasion technique which the CE sometimes uses to dismiss a Charter-based plea on the ground that the Charter's provision invoked was not, *in*

[352] Case C-547/14 *Philip Morris Brands and Others*, EU:C:2016:325, paras 66–83.
[353] CE, 399117, paras 32–34. See also Case C-288/17 *Fédération des fabricants de cigares and Others*, EU:C:2018:767; and Case C-517/18 *Fédération des fabricants de cigars*, EU:C:2019:780 (both removed from the register given that the reference for a preliminary ruling had been withdrawn).
[354] Opinion of Public Rapporteur M-A de Barmon in CE, 399117.
[355] Ibid. at Section 3.1.

any event, violated in terms of its substance, that is, regardless of whether the Charter was applicable or not. Using this technique, the CE can skip the applicability stage altogether, without exposing itself to criticisms on account of the formal quality of reasoning. However, what it gains in terms of efficacy and formal correctness, it may lose in terms of transparency and clarity.

The formula appeared, for instance, in a case that concerned the charter of professional conduct of administrative judges adopted by the Vice-President of the CE in 2017. The CE held that the competence of the Vice-President to adopt this charter was not incompatible with 'the principle of impartiality of courts and the right to an effective judicial remedy, resulting from Article 6 of the [ECHR]'. Likewise, the applicant could not invoke, in any event, Article 47 of the Charter.[356] Indeed, this was a case outside the scope of the Charter, as explicitly observed by the public rapporteur.

The use of this formula is frequent.[357] But its use is not systematic in all cases outside the scope of EU law: some declarations of non-violation made without any applicability assessment outside the scope of EU law are not accompanied by the *en tout état de cause* formula.[358] Also, the absence of applicability assessments is not limited to cases outside the Charter's scope; rather, this is a general approach which the CE uses independently of whether the Charter applies or not.[359] It must also be said that the CE sometimes uses the formula in a different context, to convey the idea that the contested rules do not have any bearing on (are completely irrelevant for) the sphere of protection guaranteed by the invoked Charter provision. In other words, that they are not capable of entering into the protective scope of the particular fundamental rights provision invoked.[360] Also, the formula is used in cases which are outside the Charter's scope not necessarily *ratione materiae* but *ratione*

[356] CE, 411070, 25 March 2020, para 11.
[357] For other examples, see CE, 359963, 20 March 2013, para 5; CE, 367807, 10 October 2014, para 5; CE, 418543, 15 July 2020, para 8; CE, 340287, 29 June 2011 (outside the scope of the Charter); CE, 343943, 27 October 2011 (invocation of both the Charter and the general principle of Union law of non-discrimination on the grounds of age); CE, 423060, 4 December 2019, para 14 (outside the scope of the Charter); and CE, 416674, 22 October 2018, para 7.
[358] See eg CE, 373861, 27 March 2015, para 5 (outside the scope of EU law; lawyers' legal aid fees which do not cover all of their costs); CE, 402042, 12 July 2017, para 11; and CE, 423815, 15 June 2020, para 6 (review procedure of certain surveillance techniques).
[359] See cases in Section I.4.2.3.
[360] See eg CE, 356490, 4 March 2013, paras 9–10; the same reasoning in CE, 375474, 10 October 2014, paras 9–10; CE, 386532, 30 December 2015, para 3; and CE, 323246, 9 April 2010.

temporis.[361] Thus, while the formula makes the CE's reasoning irreproachable from the formal point of view, it inevitably introduces a certain degree of obscurity as to whether or not the Charter applies.

The reason for preferring declarations of non-violation over declarations of non-applicability can be safely subsumed under the heading of judicial pragmatism. It will often be easier for the judge, from the analytical perspective, to dismiss the argument on the merits (that is, to review the case under the substantive provisions of the Charter) than to assess the Charter's applicability under its Article 51. Moreover, it is standard practice of litigants and their counsel to invoke a group of materially equivalent fundamental rights provisions in what could be called a panoramic manner.[362] Panoramic fundamental rights pleas tend to result in panoramic declarations of non-violation.[363] When the Charter is invoked together with the ECHR or several other fundamental rights instruments, such privileging of substance over form may simply be a drafting shortcut. The CE's decision in *Association SOS Racisme – Touche pas à mon pote* is an example of such intensely panoramic treatment.[364] This was a challenge against two *circulaires* of the Minister of the Interior concerning the dismantlement of unlawful campsites. The earlier one explicitly mentioned the dismantlement of unlawful campsites occupied by the Roma; the later one referred to *any* campsite without distinction. While the earlier one was annulled for violating the principle of equality enshrined in Article 1 of the French Constitution,[365] the later one passed the legality check: according to the CE, it did not contain any provision that was contrary to Article 6 of the 1789 Declaration, Article 1 of the Constitution, Articles 20 and 21 of the Charter, general principles of law regarding non-discrimination and equality or, in any event, Articles 1 and 7 of the Universal Declaration of Human Rights. Interestingly, the *en tout état de cause* formula was used in relation to the non-binding Universal Declaration of Human Rights, which would suggest that the CE considered the Charter appliable (it is not clear on what ground though). Again, such panoramic treatment will usually correspond to the way

[361] CE, 343595, *Amnesty International Section française and Groupe d'information et de soutien des immigrés*, 7 April 2011: the CE was called to review the lawfulness of the inclusion of Mali on the list of safe countries of origin only as regards men, not women – a difference in treatment based on the fact that there was a widespread practice of female genital mutilation in Mali. The contested provision was issued on 20 November 2009, that is, before the entry into force of the Charter. See also CE, 317182, 19 July 2010.
[362] See Section I.5.3.
[363] Even if it is possible that the invoked instruments each receive individual and concrete treatment: see eg CE, 341533, 4 July 2012.
[364] CE, 343387, 7 April 2011.
[365] The public rapporteur was of the view that a reference to the Constitution was sufficient to annul the *circulaire*: see P Cassia and S von Coester, 'L'application de la Charte des droits fondamentaux de l'Union européenne par le juge national' (2012) *La Semaine Juridique Edition Générale* 503 at 507.

in which the litigants invoked the provisions concerned; this contextual element, which is not always evident from the decision itself, is key to evaluating the approach of the CE to the Charter's applicability.

4.3 The practice of French lower administrative courts

The references to the Charter in the decisions of administrative courts of appeal (*cours administratives d'appel*) are in the thousands.[366] Within this rich data set, the approaches of the CAAs to assessing the applicability of the Charter are varied, without a standard methodology (Section 4.3.1). The case law regarding the material scope of Article 41 of the Charter is illustrative of the methodological struggles of CAAs (Section 4.3.2).

4.3.1 Methodological diversity with mixed results

It will not come as a surprise that pre-Lisbon, CAAs used to declare the Charter inapplicable *ratione temporis* at the time when the contested decision was taken.[367] In making this declaration, some CAAs used the same formulation as the CE did in its early case law.[368]

The first scenario to consider is when the court makes a simple declaration of non-applicability, unaccompanied by any arguments or references: the court only states that the national provisions at issue 'are not implementing Union law'.[369] For example, the CAA of Paris made a declaration of this kind in a civil service case in which a police officer challenged a reprimand given to him by the Minister of the Interior. The applicant claimed violation of the respect for his correspondence, referring – incorrectly – to Article 11 of the Charter (freedom of expression and information).[370] The CAA of Paris succinctly stated that

[366] The references to the Charter by first-instance administrative tribunals (*tribunaux administratifs*) are not possible to quantify given the public unavailability of the case law.
[367] CAA Paris, 06PA01972, 23 October 2007; CAA Paris, 12PA03458, 4 October 2013; CAA Paris, 12PA03747, 7 November 2013; CAA Paris, 12PA03823, 7 November 2013; CAA Versailles, 02VE00963, 17 March 2005; CAA Versailles, 06VE00920, 3 July 2007; CAA Versailles, 10VE01608, 28 February 2012; CAA Nantes, 05NT01020, 20 September 2005; and CAA Marseille, 08MA02412, 1 June 2010. There are cases where the CAA preferred to make a declaration of non-violation *en tout état de cause*: see eg CAA Nantes, 07NT00604, 7 December 2007. See also CAA Marseille, 11MA03836, 30 July 2013, para 6, where the inapplicability of the Charter resulted from the inapplicability *ratione temporis* of the triggering norm, Directive 2008/115/EC.
[368] CE, 257341, 5 January 2005.
[369] See eg CAA Paris, 14PA04872, 2 March 2015, para 3; CAA Paris, 14PA00494, 22 January 2016, para 14; CAA Paris, 16PA01872, 12 June 2018, para 6; CAA Paris, 17PA02197, 12 March 2019, para 10; and CAA Paris, 18PA02651, 24 October 2019, para 14. See also CAA Paris, 18PA00020, 15 June 2020, para 9; CAA Versailles, 11VE03680, 3 July 2012; CAA Versailles, 12VE02857, 2 July 2013, para 16; CAA Versailles, 17VE02016, 7 February 2019, para 18; CAA Marseille, 17MA01413, 30 January 2018, para 3; and CAA Douai, 18DA02555, 26 September 2019.
[370] CAA Paris, 10PA05470, 4 July 2013.

the decision to reprimand the police officer '[was] not implementing Union law'.[371] Interestingly, in contrast to the usual scenario involving panoramic or ECHR–Charter pleas, the Charter was the only instrument that the applicant chose to invoke in this context. This is arguably what led the CAA of Paris to add that, 'in any event', the applicant's right to the confidentiality of correspondence was respected.[372]

In some decisions, the CAAs supplemented this simple declaration of non-applicability by a reference to Article 51 of the Charter.[373] Rare are decisions which venture into detailed and methodologically exhaustive applicability assessments.[374]

It is interesting to note that in making these statements, the CAAs occasionally employ such terms as a situation being 'governed by Union law'[375] or a decision being 'not within the scope of application of Union law'.[376] We also found the slightly problematic formula according to which the contested national provision was not 'adopted with a view to implementing EU law', which obfuscates the fact that the applicability test is an objective one.[377] The problem with succinct and categorical declarations of non-applicability is that they are not verifiable (and reviewable). For example, in December 2013, the CAA of Versailles held that the Charter was not applicable in a case which concerned family reunification under Directive 2008/115/EC and which was therefore within the scope of Union law.[378]

A different approach used by CAAs is to refrain from making an objective declaration of non-applicability and instead deal with the Charter reference in the framework

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[371] Ibid. para 15. See also para 16.
[372] Ibid. para 15. See also para 16.
[373] CAA Paris, 13PA02862, 26 September 2013; CAA Paris, 13PA01978, 17 October 2013, para 5; CAA Paris, 12PA04659, 7 November 2013 (income tax); CAA Paris, 17PA02648, 18 May 2018, para 7 (granting of residence permit); CAA Nantes, 15NT01369, 31 March 2017, para 12; CAA of Nantes, 16NT00923, 16 June 2017, para 7; CAA Nantes, 17NT01517, 11 June 2018, para 3; CAA Nancy, 18NC01428, 2 July 2019, paras 11–12; and CAA Marseille, 16MA04775, 20 December 2018, para 4. A significant number of cases concerned the rejection of citizenship applications: see eg CAA Nantes, 16NT00284, 28 December 2016, para 7.
[374] See eg CAA Nancy, 12NC01771, 1 August 2013, paras 5–6; and CAA Nancy, 13NC01293, 13 February 2014.
[375] CAA Paris, 13PA00014, 26 November 2013, para 3; CAA Versailles, 12VE01800, 20 June 2013, para 6; and CAA Nancy, 18NC00835, 3 October 2019, para 14.
[376] CAA Paris, 14PA00952, 21 October 2014, para 7; and CAA Paris, 16PA01846, 7 March 2017, para 6. See also CAA Paris, 13PA02876, 24 November 2014, para 5; CAA Paris, 18PA02955, 18 November 2020, para 7; and CAA Versailles, 14VE01309, 18 December 2014, para 8.
[377] See eg CAA Paris, 14PA00783, 8 December 2014, para 4. See also CAA Paris, 15PA04256, 13 January 2017, para 7. On the contrary, to say that a national provision 'has neither as its object nor as its effect the implementation of Union law' is unproblematic: see CAA of Nancy, 15NC00362, 10 December 2015, para 6.
[378] CAA Versailles, 13VE01865, 3 December 2013.

of the applicant's procedural duties. For example, in a 2014 case before the CAA of Paris, the applicant – an inmate of the Melun detention centre – challenged a decision refusing him access to an external psychologist, arguing that the decision was contrary, inter alia, to Articles 41 and 47 of the Charter. The CAA of Paris held that the applicant *had not demonstrated* that the decision at issue could be regarded as resulting from the implementation of EU law.[379]

Typically, there is no applicability assessment in cases of direct application of EU regulations, such as the Dublin Regulation.[380] There are cases in which the court makes a declaration of non-violation without any express applicability assessment, but where it is clear from the reasoning as a whole that the case is entirely governed by EU law.[381] For example, in a case concerning the right of residence of family members of a free-moving EU citizen, the court may state that the national provisions upon which the contested measure is based transpose the Free Movement Directive 2004/38/EC. In the subsequent analysis of whether the provisions comply with the right to respect for family life (Article 7 of the Charter), the court will not assess the Charter's applicability separately.[382] When the applicable normative scheme is more complex, the Court may be required to carry out a more nuanced analysis. For example, the CAA of Nantes was correct in holding in a case concerning both VAT and corporate income tax that the Charter was only applicable to the VAT limb of the case.[383]

French administrative courts have repeatedly assessed the Charter's applicability in cases concerning the obligation to leave the French territory (OQTF) pursuant to Article L 611-1 of the CESEDA (previously Article L 511-1 of the CESEDA). Some of the early decisions wrongly concluded that the Charter did not apply to such decisions. The CAA of Lyon held in October 2012 that in adopting the contested OQTF decision, the authority 'was not implementing Union law, but the provisions of the [CESEDA], even though some of

[379] CAA Paris, 13PA04134, 31 July 2014.
[380] CAA Paris, 13PA04220, 18 November 2014, para 6; CAA Paris, 14PA04565, 16 July 2015; and CAA Paris, 16PA01826, 29 November 2016. See also CAA Paris, 13PA04865, 22 June 2015, which concerned Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 [2010] OJ L 281/1. See Section II.4.2.4. A quote of Article 3 of the Dublin Regulation (which mentions Article 4 of the Charter) will make matters clear: see eg CAA Paris, 17PA00764, 20 June 2017.
[381] See eg CAA Paris, 14PA01799, 6 May 2015, paras 2–7. A confirmation of the Charter's applicability may also be derived from a court's statement that the Charter plea is relevant and can be usefully invoked: see eg CAA Bordeaux, 14BX03290, 2 June 2015.
[382] See eg CAA Paris, 15PA03285, 9 June 2016.
[383] CAA Nancy, 13NC00929, 24 March 2015, para 12.

these provisions transposed Community directives'.[384] Some described this reasoning as 'absurd', and it is difficult to argue with such an assessment.[385] Similarly striking (again for the wrong reasons) is the approach of the CAA of Douai in a decision of December 2012:

> since the prefect only applied provisions of national law that result from the transposition of [Directive 2008/115/EC], it cannot be considered that he was applying Union law within the meaning of Article 51 of the [Charter] when this Article, which was inspired by the principle of subsidiarity, must be interpreted strictly as to its scope of application…[386]

The TA of Montreuil wrongly held that an OQTF decision '[could not] be regarded as an act adopted in a legal situation entirely governed by Community law'.[387] While these decisions predated the CJEU's clarifying judgment in *Fransson* or were adopted shortly afterwards, the courts' reasoning was incorrect even by pre-*Fransson* standards. The transposition of EU directives was held to constitute implementation of EU law already in *Wachauf*.

It did not take long before the CAA of Lyon correctly held, in March 2013, that the CEDESA provisions on the OQTF were adopted to transpose the Returns Directive 2008/115/EC and that their application constituted 'implementation' of EU law.[388] This solution was then followed by other CAAs[389] and confirmed on cassation by the CE and finally by the CJEU in *Mukarubega*, a preliminary ruling requested by the TA of Melun.[390]

Administrative courts have consistently held that while the Charter applies to decisions imposing an obligation on irregularly staying foreign nationals to leave the territory, it is not applicable, as such, to the decision rejecting a residence application.[391] This

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[384] CAA Lyon, 11LY03002 and 11LY03003, 11 October 2012, para 8.
[385] M-L Basilien-Gainche and T Racho, 'Quand le souci d'efficacité de l'éloignement l'emporte sur l'application effective des droits fondamentaux. Droit d'être entendu (Directive 2008/115/CE et PGDUE)' (2004) *La Revue des droits de l'homme / Actualités Droits-Libertés*.
[386] CAA Douai, 12DA00478, 4 December 2012, para 11.
[387] TA Montreuil, 14 March 2013, 1210341-1210332. See G Marti, 'Étrangers – Respect des droits de la défense et obligation de quitter le territoire – Veille' (2013) *La Semaine Juridique Administrations et Collectivités territoriales* 297.
[388] CAA Lyon, 12LY02704, 14 March 2013 (a judgment in *Halifa* contested before the CE); and CAA Lyon, 12LY02737, 14 March 2013. See also, for the same approach, TA Lyon, 28 February 2013, 1208057.
[389] See eg CAA Marseille, 12MA04450, 18 June 2013. For other examples, see Opinion of Public Rapporteur X Domino in CE, 370515 supra n 294.
[390] Case C-166/13 *Mukarubega*, EU:C:2014:2336
[391] See eg CAA Paris, 17PA02648, 18 May 2018, para 7 (granting of residence permit); CAA Versailles, 12VE01800, 20 June 2013, paras 4–6 (reference to Case C-329/11 *Achughbabian*, EU:C:2011:807, para 28); CAA Paris, 13VE02062, 16 December 2014, paras 18–19; CAA Versailles, 15VE01779, 19 November 2015, para 11; CAA Versailles, 17VE03112, 27 September 2018, paras 12–13. Such distinction was not explicitly made in some earlier judgments: see eg CAA Lyon, 11LY03028, 10 July 2012. Cf. CAA Lyon, 16LY00437, 9 March 2017, para 9, where the Court did not explicitly make the distinction and simply held that the Charter was not, *en tout état de cause*, violated.

seems a correct assessment given that these are two distinct procedures.[392] The public rapporteur Henri Stillmunkes argued in the opposite direction before the TA of Lyon.[393] He admitted that a residence permit rejection is not based solely and specifically on provisions regarding asylum and subsidiary protection but also any other 'non-communitarised' provisions of the CESEDA concerning the right of residence. However, he thought that the 'partially communitarised' character was enough to bring the decision within the scope of EU law, together with the fact that the residence permit refusal serves as the direct basis for the return decision, and the decisions are taken simultaneously and form a single whole.[394] The TA of Lyon did not follow his opinion. According to the tribunal,

> neither the […] Directive 2005/85/EC, whose purpose is only to establish minimum standards on procedures in Member States of the European Union for granting and withdrawing refugee status, nor the above-mentioned Directive 2008/115/EC on the returns of illegally staying third-country nationals, are designed to harmonise in their entirety national rules on the stay of foreign nationals;[395]

The last sentence is clearly taken from the CJEU's judgment in *Achughbabian*, in which the Court recalled that 'Directive 2008/115 concerns only the return of illegally staying third-country nationals in a Member State and is thus not designed to harmonise in their entirety the national rules on the stay of foreign nationals'.[396]

Curiously, in April 2013, the CAA of Versailles held that an entry ban of three months accompanying a decision imposing an obligation to leave the French territory did not qualify as 'implementation' within the meaning of Article 51(1) of the Charter.[397] According to the Court, 'the application of national legislation concerning foreign nationals law – even though it must be compatible with […] the relevant European Union directives and regulations – does not constitute direct implementation of Union law'.[398] It is not entirely clear what the Court meant by 'direct implementation', but it likely favoured a narrower

[392] For that argument, see Opinion of Public Rapporteur J-C Jobart in TA Toulouse, 1203705, available in J-C Jobart, 'De l'opérance de certaines garanties procédurales des demandeurs d'asile' (2013) *La Semaine Juridique – Administrations et Collectivités territoriales n° 31-35*.
[393] Opinion of Public Rapporteur H Stillmunkes in TA Lyon, 1208055 and 1208057, available in H Stillmunkes, 'L'article 41 de la Charte des droits fondamentaux de l'Union européenne, le droit d'être entendu et la police des étrangers' (2013) *RFDA* 839. See also for the same assessment Ritleng,'De la portée des droits fondamentaux de l'Union à l'égard des mesures nationales', supra n 262.
[394] Ibid.
[395] TA Lyon, 28 February 2013, 1208055 and 1208057, para 4.
[396] Case C-329/11 *Achughbabian*, EU:C:2011:807, para 28.
[397] CAA Versailles, 12VE00838, 9 April 2013, para 13.
[398] Ibid.

reading of 'implementation' within the meaning of Article 51(1) of the Charter. The CJEU's ruling in *Fransson* – which confirmed a broader reading of that provision – had only been issued a few weeks before the judgment of the CAA of Versailles. In any case, the Returns Directive contains a separate provision concerning entry bans (Article 11); there is thus little doubt that the entry ban decision comes within the scope of Union law. We also found cases in which an erroneous applicability assessment was corrected on appeal.[399]

A frequent approach of the courts is to make a declaration of non-violation with no applicability assessment, usually in a 'panoramic context' with no Charter-specific argumentation. This happens in cases both within[400] and outside[401] the scope of Union law. From a pragmatic viewpoint, this is an easy way for the court to deal swiftly with unfounded panoramic pleas.[402] Such declarations of non-violation without an applicability assessment are also made in non-panoramic contexts, both within the scope of EU law[403] and outside of it[404]. In such decisions, there does not appear to be any rule as to when the courts add the *en tout état de cause* formula.

4.3.2 Article 41 of the Charter: Case study of methodological hesitations

As demonstrated in the preceding section, the decisional practice of CAAs is characterised by a remarkable methodological diversity when it comes to applicability

[399] CAA Marseille, 13MA04275, 26 May 2014; CAA Marseille, 13MA04790, 4 December 2014; CAA Marseille, 13MA05031, 23 December 2014; and CAA Marseille, 13MA05032, 23 December 2014.
[400] CAA Nancy, 09NC00753, 21 January 2010; CAA Nantes, 12NT02124, 19 July 2013, para 3; CAA Paris, 14PA03295, 19 February 2015, para 19; CAA Paris, 15PA01650, 15 June 2016, para 10; CAA Paris, 15PA03494, 2 March 2017, paras 15, 23 and 32; CAA Paris, 17PA03474, 12 April 2018, paras 2–3; CAA Paris, 15PA00456, 3 May 2018, para 26; CAA Versailles, 12VE02023, 12 May 2015, para 15; CAA Marseille, 12MA00715, 31 May 2012. On the VAT procedure from the point of view of the applicability of the Charter, see also Opinion of AG Bobek in Case C-298/16 *Ispas*, EU:C:2017:650.
[401] CAA Nancy, 10NC01320, 21 March 2011; CAA Paris, 13PA04833, 3 February 2015, para 4; CAA Paris, 16PA01524, 17 May 2018, para 22; CAA Paris, 18PA02330, 18PA02617 and 18PA02716, 25 September 2020, para 16; CAA Paris, 13PA02044, 24 November 2014, para 5; CAA Paris, 16VE00358, 25 April 2017, para 5; CAA Versailles, 15VE03582, 19 December 2017, para 10; CAA Nantes, 14NT01313, 12 November 2015, para 3; CAA Nantes, 15NT01154, 20 May 2016, para 10; and CAA Bordeaux, 10BX01899, 22 February 2011.
[402] For examples of such panoramic pleas, see CAA Paris, 16PA00425, 8 July 2016, para 8; and CAA Paris, 16PA00174, 21 December 2017; CAA Versailles, 18VE03969, 16 June 2020; CAA Marseille, 08MA01147, 14 January 2010. However, there are decisions in which the judges did not succumb to this pragmatism and instead made a separate declaration of inapplicability: see eg CAA Nantes, 15NT03350, 18 January 2017, para 9.
[403] See CAA Paris, 14PA02716, 26 November 2014 (*en tout état de cause*); CAA Paris, 16PA03897, 19 November 2018, para 3 (without *en tout état de cause*); CAA Versailles, 10VE00192, 13 March 2012 (*en tout état de cause*); CAA Nantes, 11NT03030, 31 October 2012; CAA Lyon, 09LY00799, 28 September 2010; and CAA Douai, 16DA01934, 5 February 2019, paras 4 and 9.
[404] CAA Nantes, 13NT00822, 27 September 2013; CAA Paris, 18PA01891, 9 April 2019, para 11; and CAA Paris, 18PA03875, 6 November 2019, para 3; CAA Versailles, 15VE03431, 1 December 2016, para 6; and CAA Nancy, 13NC00279, 28 October 2013, para 12.

assessments. A study of the 2013–2018 case law of the CAA of Paris will illustrate this point in more detail. In this period, most decisions referring to the Charter concerned the right to be heard in proceedings leading to a decision imposing an obligation on a third-country national to leave the territory (OQTF) as a direct result of a decision rejecting his or her residence application. One of the arguments popular with litigants was to claim violation of Article 41 of the Charter, more specifically Article 41(2)(a):

> 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
>
> 2. This right includes:
>
> (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken […][405]

The case law of the CAA of Paris on Article 41 of the Charter did not get off to a good start when the Second Chamber of that Court, in a judgment of 31 July 2013 in *Tometey*, showed some limitations in understanding the scope of the Charter in the context of its Article 41.[406] The applicant, Ms Tometey, argued that the police prefect violated her right to good administration in Article 41(2) of the Charter in the context described above, that is, by not giving her the opportunity to be heard before he took the decision obliging her to leave France. The CAA of Paris rejected Ms Tometey's Charter-based plea on questionable grounds. The Court first conducted a substantive review and considered that the guarantees in Article 41(2) were, 'in any event', respected in the procedure at issue.[407] The Court thought Article 41 to be a principle (as opposed to a right) within the meaning of Article 52(5) of the Charter. This incorrect pre-understanding led the Court to conclude that

> even if it was to be admitted that the fact that [the national legislation concerned] aimed to transpose into national law the provisions of [Directive 2008/115/EC] suffices to regard the individual extradition decision at issue as resulting from the implementation of Union law by a representative of the French State within the meaning of Article 52 of the Charter […] and that

[405] Article 41 was invoked in other contexts as well: see eg CAA Paris, 14PA00783, 8 December 2014, para 4 (both Article 41 and the corresponding general principle were invoked). Notable is the invocation of the right to be heard in the context of Dublin transfer proceedings: see eg CAA Paris, 14PA00605, 6 February 2015; CAA Paris, 14PA00605, 6 February 2015; and CAA Versailles, 16VE03425, 21 December 2017, paras 8–9.
[406] CAA Paris, 12PA02040, 31 July 2013. On this judgment, see D Ritleng, 'Chronique jurisprudence administrative française intéressant le droit de l'Union – Portée de la Charte des droits fondamentaux de l'Union européenne' (2014) *RTD Eur.* 952.
[407] Ibid. para 15.

> the [Charter-based plea] can be effectively invoked against that measure, this plea must be rejected as unfounded […][408]

We can point to at least three problems with the approach of the CAA of Paris.[409] First, Article 41 of the Charter only applies to EU institutions. Next, the right to good administration is a right, not a principle: therefore, no place for Article 52(5) in the Court's analysis.[410] Finally, the Court's hesitance to consider the French legislation in question as implementing Directive 2008/115/EC is hard to understand, given that the case was a clear example of explicit implementation of EU law.

Nevertheless, this reasoning caught on and was repeated many times throughout 2013 and 2014.[411] It appeared in the case law of other CAAs too.[412] In the same period, other judgments of the same CAA of Paris treated the question differently. In a judgment of 2 October 2013, the Second Chamber of the CAA of Paris did not refer to Article 52 of the Charter, but stated that the contested provision aimed to transpose Directive 2008/115/EC.[413] A judgment of 27 February 2014 followed the approach in *Tometey*, but removed the reluctant statement on the (possibly) implementing nature of the national provision.[414] In another case, the Court followed the reasoning scheme of *Tometey*, but included a quote of Article 51 of the Charter, alongside Article 52.[415] In yet another case, the Court replaced all the references to Article 52 with references to Article 51, but still stuck to the reluctant applicability statement in *Tometey*.[416] We also found judgments which contain only a substantive assessment (no material violation of Article 41), usually accompanied by the

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[408] Ibid. para 16.
[409] For similar observations, see Ritleng, 'Chronique jurisprudence administrative française intéressant le droit de l'Union – Portée de la Charte des droits fondamentaux de l'Union européenne', supra n 406.
[410] The CCA de Paris made the same erroneous reference to Article 52(5) with regard to Article 47 of the Charter: see CAA Paris, 12PA04379, 31 July 2013. In this judgment, however, the Court also (correctly) referred to Article 51 of the Charter. For the same reference to Article 52, see CAA Douai, 11DA00357, 22 September 2011.
[411] CAA Paris, 13PA00815, 31 July 2013; 13PA01441, 3 October 2013; 16 October 2013, 13PA01690 (here, the applicant also invoked violation of the general principle of good administration); 13PA01619, 21 October 2013; 13PA00779, 7 November 2013; 13PA00224, 20 December 2013; 13PA01988, 31 December 2013; 13PA01485, 5 February 2014; 13PA03904, 20 March 2014; 13PA03815, 31 March 2014; 13PA03816, 31 March 2014; 13PA03818, 31 March 2014; 13PA03876, 7 April 2014; 13PA04445, 15 April 2014 (added a quote of Article 51 of the Charter); 13PA01268, 29 April 2014; and 13PA03779, 29 April 2014.
[412] A few months after *Tometey*, the CAA of Versailles also referred to Article 52 of the Charter in this context: see 13VE00677, 12 November 2013, para 15. For other later examples, see CAA Versailles, 13VE02341, 19 December 2013; CAA Versailles, 13VE02454, 21 January 2014, para 12; CAA Versailles, 13VE03816, 3 June 2014, para 10; and CAA Versailles, 13VE03683, 12 June 2014, paras 13 and 15.
[413] CAA Paris, 12PA02647, 2 October 2013 (followed by a declaration of non-violation 'in any event').
[414] CAA Paris, 13PA03097, 27 February 2014.
[415] CAA Paris, 13PA04445, 15 April 2014.
[416] CAA Paris, 13PA04572, 9 May 2014, paras 9–12. See also CAA Paris, 13PA02951, 17 March 2014, para 14; and CAA Paris, 13PA03835, 5 February 2014.

convenient *en tout état de cause* formula, without any applicability assessment and without any reference to Article 51 of the Charter or to the fact that the Charter's material scope of application is limited.[417] In some judgements, the Court made a substantive assessment only, the only indication of the limited applicability of the Charter being an isolated quote of its Article 51.[418]

Of course, all these decisions are incorrect insofar as they treat Article 41 of the Charter as a provision applicable to national bodies when they are implementing Union law. This contrasts with the approach of the CAA of Lyon, which pointed to the limited applicability of Article 41 of the Charter already in September 2011.[419] Other CAAs also picked up on that point.[420] In a few decisions, the CAA of Paris was careful to apply primarily the general principle of good administration, 'a principle taken up in Article 41 of the Charter'.[421] It should be said, however, that this could be because the applicant explicitly invoked the general principle of good administration alongside Article 41 of the Charter.[422] In a judgment of 24 May 2016, the CAA of Paris rejected the Article 41 claim as inoperative on the ground that its provisions are only addressed to EU institutions.[423] It is significant that the CAA of Paris did not consider the corresponding general principle of Union law, unlike other CAAs that had done so.[424] In a later judgment, the CAA of Paris dismissed the plea alleging a violation of Article 41 as inoperative due to its scope being limited to EU institutions, but continued:

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[417] CAA Paris, 13PA01683, 10 December 2013; 13PA01410, 20 December 2013; 13PA02702, 13 March 2014; 13PA00943, 10 April 2014; 13PA01405, 10 April 2014; 13PA03871, 6 May 2014; 13PA03102, 6 May 2014; and 13PA04118, 20 May 2014. For an example without the *en tout état de cause* reservation, see CAA Paris, 13PA01852, 5 November 2013, para 3.

[418] 13PA00309, 23 January 2014; 13PA01469, 18 February 2014; 13PA03731 and 13PA03778, 12 May 2014; and 13PA03873, 6 June 2014 (specifically concerned the general principle).

[419] CAA Lyon, 11LY00727, 15 September 2011. See also Opinion of Public Rapporteur H Stillmunkes in TA Lyon, 1208055 and 1208057, supra n 393.

[420] CAA Bordeaux, 3 April 2012,11BX02847; CAA Nancy, 23 April 2012, 11NC01074; and CAA Douai, 5 July 2012, 12DA00509.

[421] CAA Paris, 13PA04237, 12 June 2014. See also CAA Paris, 13PA04051, 24 June 2014; 14PA03430, 22 January 2015, para 6; CAA Nantes, 13NT01000, 17 October 2013; CAA Paris, 14PA02931, 4 February 2015, para 7; CAA Paris, 14PA03468, 16 March 2015, para 9; CAA Paris, 14PA01195, 20 February 2015, para 19; CAA Paris, 14PA02574, 27 March 2015, para 8 (Article 41 and the general principle cited alongside each other); and CAA Paris, 17PA03589, 5 April 2018, para 10.

[422] See eg CAA Paris, 13PA03864, 6 June 2014; CAA Paris, 17PA01154, 27 March 2018, para 9. See also CAA Versailles, 13VE02541, 21 November 2013, para 11; and CAA Versailles, 15VE01207, 7 July 2015.

[423] CAA Paris, 15PA04014, 24 May 2016, para 2.

[424] Interestingly, the CAA of Versailles once rejected the Article-41 plea on this basis and expressly refused to apply the general principle instead, since the applicant had not invoked it: see 12VE02023, 12 May 2015, para 12. The CAA of Versailles has since not been consistent on this point: compare CAA Versailles, 15VE02293, 17 December 2015, para 2; and CAA Versailles, 16VE03850, 16 March 2017. For another example of non-substitution, see eg CAA Lyon, 12LY00191, 4 October 2012.

> however, it also results from the case law of the Court of Justice that the right to be heard forms an integral part of the protection of the rights of defence, which is a general principle of Union law.[425]

In a judgment of 6 June 2014, the CAA of Paris decided to follow verbatim the approach of CAA of Lyon, which the latter Court applied ever since its judgment in *Halifa*.[426] The approach consists in a clear declaration of applicability of the Charter, a reference to the CJEU case law on the rights to be heard and a declaration of non-violation of 'the general principle of Union law to be heard, as it is expressed particularly in Article 41 of the [Charter]'.[427] There is little to fault in this approach; however, an explicit reference to Article 51 of the Charter would have been welcome. Furthermore, as described above, on 4 June 2014, the CE handed down its own ruling in *Halifa*, which confirmed the approach of the CAA of Lyon, but was less explicit about applying the general principle of Union law instead of Article 41 of the Charter.[428]

Unfortunately, these judicial developments have not had a lasting impact on the decisional practice of the CAA of Paris. In some cases, the Court revisited the methodologically flawed approach of *Tometey*.[429] In other cases, the applicability assessment could be described at best as implicit[430] or is completely missing.[431]

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[425] CAA Paris 16PA02761, 28 June 2017, paras 7–8 (it appears that the applicant did not invoke the general principle). For the same reasoning, see CAA Paris 17PA03589, 5 April 2018, paras 9–10 (the applicant invoked both Article 41 and the corresponding general principle). See also CAA Paris, 17PA00812, 28 June 2018, para 6; CAA Paris, 17PA03259, 6 July 2018, para 5; CAA of Paris, 18PA02058, 17 January 2019, para 4; CAA Paris, 18PA03274,18PA03275, 12 March 2019, paras 7–8; CAA Paris, 18PA02014, 3 October 2019, para 3; and CAA Paris, 19PA01462, 5 November 2019, para 9. Cf. CAA Paris, 17PA03228, 17 October 2019, para 4; CAA Paris, 18PA02547, 26 November 2019, para 4; CAA Paris, 18PA02126, 6 February 2020, para 7; and CAA Paris, 19PA03062, 10 July 2020, para 8.

[426] CAA Lyon, 12LY02704, 14 March 2013; judgment confirmed by the CE in 370515, 4 June 2014. See also CAA Nancy following the same approach: CAA Nancy, 13NC00057, 1 July 2013, paras 5–7.

[427] CAA Paris, 13PA02922, 6 June 2014. For a similar reasoning, see eg CAA Paris, 15PA02785, 2 June 2016, para 18. See also CAA Paris, 13PA02972, 6 June 2014.

[428] CE, 370515, 4 June 2014.

[429] CAA Paris, 13PA04499, 10 June 2014; 13PA04625, 10 June 2014; 13PA04625, 10 June 2014; and 14PA01769, 18 September 2014.

[430] CAA Paris, 14PA00026, 18 September 2014, paras 9–11; CAA Paris, 14PA02608, 2 February 2015, para 7; and CAA Paris, 14PA02931, 4 February 2015, para 7. A sole reference to Article 51 of the Charter without explicitly applying it to the case in hand could be included in this category: see eg CAA Paris, 14PA00641, 27 January 2015; CAA Paris, 14PA03479, 10 April 2015, para 4; CAA Paris, 14PA05184, 6 May 2015, para 6; CAA Paris, 14PA04741, 28 May 2015, para 10; CAA Paris, 14PA05297, 19 June 2015, para 6; CAA Paris, 14PA04330, 30 June 2015, para 8; CAA Paris, 15PA04756, 30 September 2016, para 5; and CAA Paris, 16PA00726, 24 November 2016, para 3. A reference to the relevant administrative procedure being within the framework of Directive 2008/115/EC: CAA Paris, 14PA04680, 9 July 2015, para 6; CAA Paris, 14PA04675, 19 November 2015, para 5; CAA Paris, 16PA00779, 7 July 2016, para 7; and CAA Paris, 16PA02809, 30 June 2017, para 6.

[431] CAA Paris, 13PA04051, 24 June 2014; and 13PA04213, 18 September 2014 (only a quote of Article 51); 14PA01259, 30 September 2014, para 6; 14PA01523, 16 October 2014, paras 16–18 [only a quote of Article

Methodologically correct and complete applicability assessments do appear in some subsequent cases treating the same question.[432] Strikingly, however, there is no clear tendency towards a single methodologically correct and complete applicability assessment: in the period from 2013 to 2018, most of the above-mentioned methodological approaches repeatedly occurred, not only regarding the applicability of the Charter but also specifically its Article 41. The number of case references in the footnotes accompanying the preceding discussion serves to illustrate this point. Even as late as November 2018, the CAA of Paris, in some of its decisions, treated Article 41 of the Charter as applicable to national proceedings.[433] As mentioned above, the practical implications of this approach are limited owing to the existence of the general principle of Union law offering the same material standard of protection. Leaving aside the short-lived *Tometey* experiment, the methodological variety as to the presence and quality of applicability assessments did not lead to incorrect decisions on the Charter's applicability. However, it is hard to understand why the CAA of Paris – when recycling argumentative solutions used in previous decisions – does not adopt those that are methodologically correct.

Lastly, it should be said that the same methodological variety is present – to a lesser or larger degree – in the case law of other CAAs. For instance, the CAA of Versailles, in November 2012, dismissed a plea based on Article 41 on the ground that this provision only applies to EU institutions, without referring *priprio motu* to the corresponding general principle of EU law.[434] However, not all subsequent decisions were equally clear on the matter.[435] In later case law, the CAA of Versailles would sometimes refer *proprio motu* to

52 (sic) of the Charter]; 14PA01556, 10 December 2014, para 3; 14PA01063, 21 January 2015; 14PA01748, 3 February 2015; 14PA03813, 9 June 2015, para 10; 15PA00065, 30 June 2015; 15PA01076, 16 December 2015, para 3; AA of Paris, 16PA00185, 29 November 2016, para 5; CAA of Paris, 16PA01263, 4 January 2017, para 5; 16PA03920, 30 May 2017, para 9; 17PA02365, 22 March 2018, para 7; and 18PA00629, 10 July 2018, para 14.

[432] CAA Paris, 14PA02359, 20 February 2015, paras 10–11; 14PA03025, 20 February 2015, paras 5–6; 14PA03207, 3 March 2015, paras 13–18; 14PA01087, 18 June 2015, paras 7–8; 14PA02361, 10 July 2015, paras 9–13; 14PA03665, 16 July 2015, paras 3–8; 15PA00030, 23 October 2015, paras 5–7; 15PA01657, 18 November 2015, paras 4–5 ; and 14PA05091, 7 December 2015, paras 9–10. In some decisions, the only thing missing is a reference or a quote of Article 51 of the Charter: see eg CAA Paris, 15PA03891, 27 March 2017, paras 6–7; 17PA00337, 20 June 2017, para 5; 17PA00339, 4 July 2017, para 6; 18PA00146, 31 December 2018, para 7; and 18PA01737, 31 January 2019, para 8.

[433] CAA Paris, 18PA00409, 20 November 2018, para 10; and 18PA01928, 27 November 2018, para 2. See also CAA Paris, 18PA00629, 10 July 2018, para 16; and 17PA02935, 2 February 2018, para 3.

[434] CAA Versailles, 12VE00710, 20 November 2012; 12VE00603, 12 March 2013; and 12VE00883, 9 April 2013, para 18. Other decisions simply contain a declaration of non-violation without mentioning the limited applicability of Article 41: see eg CAA Nancy, 12NC01147, 28 March 2013;

[435] CAA Versailles, 12VE01270, 12 September 2013, para 6. Cf. for a correct assessment, CAA Versailles, 12VE01732, 5 December 2013; 13VE00856, 28 January 2014; and 13VE02287, 13 March 2014.

the corresponding general principle.[436] At other times, it would not.[437] This raises the important issue of *ex officio* application of the Charter. In this context, a recent decision of the CAA of Versailles is worthy of attention. Here, the appellate court quashed the contested judgment of the TA of Montreuil on the ground that the first-instance court omitted to deal with the applicant's plea alleging a breach of Article 41 of the Charter in the proceedings leading to an OQTF decision, despite the plea being operative.[438] This contrasts with cases in which the Article 41 plea was held to be inoperative (and was sometimes substituted with the corresponding general principle plea).[439] It is at least arguable that the substitution happened implicitly in this case.

5. EVALUATION

Article 51 of the Charter and the CJEU's case law interpreting it – with its general formulas, abstract guidance and implementation categories – is the principal benchmark against which we should evaluate national courts' performance when it comes to assessing the Charter's applicability. However, the research pointed to the importance of bearing in mind other considerations, which are set out in Section 5.1. Drawing together the findings made above, Section 5.2 evaluates how courts have dealt with the Charter's limited applicability from the material and formal points of view. Section 5.3 draws attention to the role of litigants, which is essential for explaining the patterns in the case law.

5.1 Perspectives for evaluation

When evaluating national courts' applicability assessments, it is not only about reaching the correct result but also about the way it is achieved. Applicability assessments should not only comply with Article 51, but also respect the general requirements on the quality of judicial reasoning, as they are set down in both EU and national procedural law. The duty to give reasons is embedded in the right to a fair trial under Article 47 of the Charter and is fundamental to the EU being a Union of law.[440] The same duty is imposed by national constitutions and procedural rules, even though the exact extent of this duty (and the courts' reasoning style) will inevitably vary among the Member States. For instance, the NSS is

[436] CAA Versailles, 17VE01763, 21 December 2017, para 5; 17VE03061, 6 March 2018, para 2; and 19VE01659, 21 January 2020, paras 6–7.
[437] CAA Versailles, 17VE03329, 8 February 2018, paras 3–5.
[438] CAA Versailles, 19VE01624, 10 November 2020, paras 2–3.
[439] See eg a later decision of CAA Versailles, 18VE01254, 17 November 2020, para 9.
[440] See eg Case C-300/11 *ZZ*, EU:C:2013:363, paras 53–55.

required, inter alia, to give its opinion on both facts and law of the case clearly and succinctly and ensure that the justification of its judgment is persuasive.[441] The need for legal certainty and argumentative rigour takes on an added resonance when it comes to apex courts, the role of which is not limited to administering justice in individual cases. One of their key tasks is to ensure uniform application of law and provide interpretive guidance to lower courts; in the context of the Charter, this task entails making the CJEU's guidance more accessible to these courts.[442] When it comes to the national judicial application of EU law in general, supreme and constitutional courts play a crucial guiding role in integrating EU law into national law.[443] Thus, the role of apex courts in providing comprehensive and clear Charter guidance should go beyond the strict legal requirements of the duty to provide reasons in the interests of ensuring the effectiveness of the Charter across all levels of the judiciary.

Next, from a more pragmatic standpoint, it would be unreasonable to expect national courts' applicability assessments to go into the same level of detail in every decision mentioning the Charter. These assessments should be tailored to the particulars of each case. The level of detail should first reflect the role of the Charter in the court's principal line of reasoning and its impact on the solution of the case. Where the Charter plays a significant role or even determines the outcome of the case – for instance, when a court relies on the direct effect of a Charter provision to set aside conflicting national legislation – the court should be exhaustive in laying out its applicability assessment. Next, the level of detail should be directly proportional to the level of detail of the parties' submissions.[444] Finally, a distinction can be made between easy and hard cases, the latter requiring a more comprehensive applicability assessment.[445] However, it should be emphasised that while

[441] § 157(2) of the Czech Code of Civil Procedure in conjunction with § 64 of the Czech Code of Administrative Justice. See also Z Kühn, 'The Quality of Justice and of Judicial Reasoning in the Czech Republic' in M Bencze and G Yein Ng (eds), *How to Measure the Quality of Judicial Reasoning* (Springer 2018) 173 at 179–180.
[442] For a more developed argument in the context of the application by supreme courts of the European Convention on Human Rights, see P Lemmens, 'Guidance by Supreme Courts to Lower Courts on the Requirements of the European Convention on Human Rights', Regional conference organised by the Directorate General of Human Rights and Legal Affairs and the Supreme Court of Serbia in the framework of Serbia's Chairmanship of the Committee of Ministers of the Council of Europe, Belgrade, 20–21 September 2007, at 36–51, available at: rm.coe.int/16806f1519.
[443] See eg JA Mayoral and M Wind, 'Introduction. National courts vis-à-vis EU law: New issues, theories and methods' in B de Witte et al. (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar 2016) 1 at 9.
[444] For more details on this aspect, see Section I.5.3.
[445] An example of an easy case, where even a very brief applicability assessment would suffice, is where the applicability of the Charter is triggered by direct application of an EU regulation.

these considerations can provide valuable input into the evaluation exercise, they are only relevant as long as the legal requirements on the quality of reasoning are respected.

The argument made in the preceding paragraph is based on the premise that national courts should, as a rule, explicitly assess the applicability of the Charter before giving effect to it. Including applicability assessments in the reasoning is arguably not a strict, generally applicable legal requirement. However, it could become one where the effectiveness of the Charter's protection is at stake. Under French rules, the CE is technically not obliged to justify that a Charter-based plea is operative (*opérant*), that is, that the Charter is applicable.[446] Indeed, the CE tends to be imprecise about the applicable law.[447] Similarly, there does not appear to be any national rules which would oblige Czech administrative courts to explicitly assess the Charter's applicability before giving effect to it unless the parties dispute the issue. Of course, when a court applies a legal rule, it implicitly confirms its applicability. That said, as is clear from the gathered empirical evidence, we are not at a stage where we can rely on that assumption: Czech and French courts refer to the Charter in cases both within and outside the scope of EU law. If for this reason only, it seems legitimate to require Member State courts to systematically include applicability assessments in the decisions that give effect to the Charter. The CJEU does so too.

It follows that in evaluating the performance of national courts as regards the applicability of the Charter, we should adopt two perspectives. First, whether and how national courts *formally* address the (in)applicability of the Charter in the text of their decisions. Secondly, whether and to what extent national courts' assessment of the Charter's (in)applicability *materially* corresponds to the conditions laid down in Article 51 and the CJEU's case law.

5.2 Two-pronged evaluation: Substantive compliance, formal shortcomings

The two perspectives within the framework for evaluation established in Section 5.1 call for a differentiated assessment.

[446] Xenou, supra n 30 at 145.
[447] R Abraham, 'Les normes du droit communautaire et du droit international devant le juge administratif français' in *Droit international et droit communautaire – Perspectives actuelles* (Pedone 2000) 283.

From the material viewpoint, the NSS has well understood that the Charter's scope of application is limited; it has adhered to the applicability criteria set down in Article 51 of the Charter and developed in the CJEU case law. The interpretation of the triggering norms did prove difficult, especially in the derogation scenario. However, the NSS demonstrated that when it decides to include an applicability assessment in the text of the decision, it is perfectly capable of making an exemplary one. There is no indication in the NSS's case law of extending or reducing the binding effect of the Charter in a way that would be at odds with Article 51.

From the formal viewpoint, the NSS's record leaves something to be desired in terms of consistency and sometimes clarity. There have been a few isolated incidents of (early) bad practice, and there is no clear general method as to when explicit applicability assessments should be made and how they should look. Admittedly, it would be misplaced to demand that a national court like the NSS, whose judgments tend to be discursive and allow some scope for individual reasoning styles,[448] use the same formulaic and immutable approach as the CJEU. It is also true that, to a large extent, the variety of techniques reflects the specific features of individual cases: whilst the NSS was careful to include explicit applicability assessments in cases where it relied on the exclusionary direct effect of the Charter, it was less consistent at other times. However, considering that the NSS is an apex court with all that entails, it should work towards establishing a consistent and robust methodology across the board.

The patterns identified in the NSS case law are also apparent in the case law of Czech regional administrative courts. Here, the problem is that the case law of regional administrative courts is not published in its entirety, which means that the available empirical data is not necessarily representative, and there is little of it. Our study did not reveal anything beyond what has emerged from the NSS's case law. Nevertheless, the published case law suggests that regional courts are aware of the limited applicability of the Charter; in some cases, they demonstrated being capable of nuanced analysis. The case law also demonstrates the importance of clear and correct interpretative guidance from the NSS (regional courts sometimes followed it with its methodological flaws). Where such guidance is available, it is important that regional courts follow it faithfully unless they have a good reason not to (and if they explain that choice). Just as with NSS decisions, the problem is not

[448] For more on the reasoning style of Czech courts, see Kühn, supra n 441.

so much that the courts' applicability assessments are materially wrong but that such assessments are missing altogether or are methodologically loose.

Moving to the CE, it at times struggled, upon the Charter's adoption, with interpreting the notion of 'implementing Union law', which was unclear at the time. Despite the hesitant methodological beginnings, the CE quickly rallied behind the CJEU's interpretation of the Charter's scope and demonstrated it is capable of nuanced applicability assessments, in spite of the intricacies of some Union normative schemes.[449] However, there have been a few cases in which the applicability assessment did not seem to be in line with the CJEU's case law.[450] Some public rapporteurs' opinions show that the determination of the Charter's applicability can be an exercise demanding intellectual rigour and one that cannot be easily automated. It needs to be mentioned that the CE has a rich experience with assessing the applicability of general principles of EC/EU law; it is well versed in refusing to give effect to general principles of EU law outside the scope of EU law.[451] However, this experience cannot fully compensate for the difficulties in assessing the applicability of EU secondary law triggering the applicability of the Charter, which has sometimes caused problems.

From the formal viewpoint, the reasoning of the CE is (generally) quite formulaic and terse; as a result, applicability assessments are usually not elaborate, let alone discursive. The CE does not set out the reasons for finding the Charter inapplicable.[452] There is no standard methodology on when and how to make applicability assessments. The widely employed *en tout état de cause* formula allows the CE to sidestep the applicability assessment without making its reasoning formally defective. It is interesting to note that this technique has been used also in relation to general principles of EU/EC law for some time now.[453] Given that the CE relies on the formula for various purposes and not in each case that is outside the Charter's scope (the CE sometimes declares that the Charter was not breached in cases outside the Charter's scope but without the *en tout état de cause* formula), its use can give rise to uncertainty. The boundary between non-applicability and non-

[449] See eg CE, 430113, 18 November 2020, discussed in Section I.4.2.2.
[450] See eg CE, 352393, 13 March 2013, discussed in Section I.4.2:2; or CE, 357848, 29 April 2013, discussed in Section I.4.2.1.
[451] L Dubouis, 'Sur l'application des principes généraux du droit communautaire en droit français (1)' (2002) *RFDA* 43; and Ritleng, 'Jurisprudence administrative française intéressant le droit communautaire', supra n 269.
[452] Dubout, Simon and Xenou, 'France', supra n 283 at 339.
[453] Xenou, supra n 30 at 79.

violation will be blurred. A possible hypothesis would be that the CE judges feel safer to declare the Charter inapplicable in very clear cases, while opting for the *en tout état de cause* formula in less straightforward ones. However, cases that use diverging approaches while being substantially similar are difficult to explain using this logic.[454] Since it will often be analytically easier to make a substantive declaration of non-violation than to assess the applicability of the Charter, the CE prefers to focus on the substance. This pragmatism reaches its peak in the way the CE deals with panoramic references: when litigants refer to provisions of several fundamental rights catalogues containing the same right, the CE will focus on whether that right has been violated, with the applicability of the individual instruments being a secondary consideration.

As for French CAAs, they quickly resolved the early divergences concerning the Charter's scope. It should be observed that the vast majority of the 7000+ judgments of CAAs citing the Charter were issued in 'clone' cases, mainly in the field of asylum and immigration, using the same formulaic reasoning. This makes the case law less interesting for our study. Nevertheless, it is notable that the formal shortcomings identified in the case law of the CE, such as the blurry line between the non-applicability and non-violation in some cases, is also apparent in the case law of the CAAs. What the CAAs struggled with was the limited applicability of Article 41 of the Charter, as did courts in other Member States.[455] Given the wrong signals sent by the CJEU in *M. M.* and their retransmission by the CE in *Halifa*, it is not surprising that CAAs had difficulties in this domain. However, it is surprising how inconsistently the CAAs reacted to the subsequent developments in the CJEU's and CE's case law. The CAAs' case law offers a stunning example of how copy-pasting incorrect reasoning from previous judgments can perpetuate the confusion about Article 41's scope, at a time when that scope had already been well established in national and CJEU case law. Finally, it needs to be pointed out that it is impossible to get an exact picture of what is happening at the administrative tribunal level since the decisions of first-instance tribunals are only rarely published.

The patterns identified in Czech and French case law are also present in other Member States. The Charter plea is often examined without a preliminary applicability

[454] Compare eg CE, 408261, 14 June 2018, para 12; with CE, 408265, 14 June 2018, para 6.

[455] K Kalaitzaki and S Laulhe Shaelou, 'Cyprus' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 212 at 237; and P-V Aastresses, 'Belgique' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 125 at 147–148.

assessment, sometimes leading to its application outside its scope.[456] The French 'in any event' approach has been reported in other Member States, like Austria.[457] A different approach adopted by the Belgian Constitutional Court which enables it to skip the discussion of the Charter's applicability is to 'dematerialise' the invoked equivalent fundamental rights provisions and examine the plea *in globo*, without it being possible to identify how the specific instruments invoked (the Charter, the ECHR and the national constitution) were applied.[458] Similarly pragmatic is the method used by some Italian courts which consists in verifying, in the first place, whether the Charter prescribes a right (or a substantive obligation of the State), in the absence of which there is no interest in considering the question of the Charter's applicability.[459] Bulgarian and Dutch courts do not refer to Article 51 of the Charter when it is manifest that EU law applies, for instance in asylum cases, just as the Czech courts do in such cases.[460]

Notwithstanding all these issues, the gathered empirical data does not allow to entirely validate the research hypothesis, which states that 'National courts often do not respect the limited applicability of the Charter, treating it as just another catalogue of fundamental rights on a par with the ECHR and national catalogues'. We have not found cases in which the courts gave effect to the Charter on the wrong supposition that the Charter was applicable in a way that would have a normative impact on the decision.[461] Nor have we found a decision in which the courts would demonstrate a principled misunderstanding of, or a manifest disrespect towards, the CJEU case law interpreting the conditions of the Charter's applicability. The courts are aware of the Charter's limited applicability. They are generally capable of making robust (and, in the case of Czech courts, discursive and

[456] Kalaitzaki and Laulhe Shaelou, 'Cyprus', ibid.; N Półtorak, 'Poland' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 569 at 571–572; Aastresses, 'Belgique', ibid. at 134 and 136–137; J Van Meerbeeck, 'Le point de vue du juge du fond: *nemo censetur ignorare Cartam*?' (2021) *Cahiers de droit européen* 141 at 159–161; and A Bailleux, 'Human Rights in Network / Les Droits de l'homme En Réseau' (2014) *Journal européen des droits de l'homme / European Journal of Human Rights* 293 at 304.
[457] JA Hofbauer and C Binder, 'Austria' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 99.
[458] Aastresses, 'Belgique', ibid. at 134–135.
[459] E Stoppioni, 'Italie' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 475 at 486.
[460] A Kornezov, 'Bulgaria: Rays of Light in a Cloudy Sky' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 109 at 119; and C Wissels and A Pahladsingh, 'The Netherlands: The New Kid on the Block, Growing Pains or Growing Gains?' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 257 at 269.
[461] See the discussion of an Italian case in Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights', supra n 75 at 241–246.

elaborate) applicability assessments, even if their formal quality is variable and the outcome was occasionally incorrect.

That said, the parallel, panoramic treatment of the various equivalent fundamental rights provisions, without a separate treatment reserved for the Charter, demonstrates a certain disregard for the issue of applicability, with a focus on substance only. This approach – present in both Czech and French case law but more pervasive in French decisions – does not come from a lack of knowledge about the Charter's material scope of application but is simply guided by practicality. By focusing on the substance and limiting the reasoning to what is strictly necessary to adjudicate the applicant's pleas, the court can deal with the case more efficiently, using a more succinct reasoning. This universalist approach works owing to, and is encouraged by, the broad material equivalence between the instruments involved. As we have tried to show, the practical impact of these kinds of references should not be dramatised, given that they usually come as purely expository or informational statements (the Czech Republic) or summary declarations of non-violation (France). Moreover, in both the Czech Republic and (to a greater extent) France, the courts' panoramic treatment of fundamental rights provisions, without a special place for the Charter, corresponds to the way the litigants have pleaded the case. Litigants (and their lawyers) appear to have an essential role in how the courts treat the Charter in their reasoning.

The Charter's judicial fate should not, however, be solely in the hands of litigants. While it is easy to see the attractivity of the courts' pragmatic approaches to Charter applicability assessments, both the NSS and the CE need to act in line with their public mission, which extends to ensuring consistency of the case law of lower courts.[462] Both the NSS and the CE should generally work towards eliminating the uncertainty about the scope of application of the Charter and lead the way with methodologically robust and formally correct applicability assessments.[463] Both have a research department specialised, inter alia, in EU law matters,[464] which should, in theory, be able to provide assistance in hard cases.

5.3 Role of litigants and their lawyers in the multi-level landscape

[462] See § 12(1) Czech Code of Administrative Justice.
[463] For the same observation on the dialectical value of a more substantiated reasoning on Article 51, see M Ličková, 'Tchèquie' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 539 at 547.
[464] See www.nssoud.cz/Cinnost-oddeleni/art/499?menu=191.

The CJEU emphasised the role of private litigants already in 1963, when it stated in *Van Gend en Loos* that 'the vigilance of individuals concerned to protect their rights' plays an important part in ensuring the effectiveness of Union law.[465] Fundamental rights offer enormous argumentative possibilities given their all-pervading influence across all legal fields and the willingness of some courts to interpret them in an evolutive manner. The Charter is particularly attractive since its invocation entails significant procedural advantages compared to national constitutional catalogues or, in some Member States, international treaties like the ECHR.[466] In theory, a relatively innovative content, for which the Charter has been praised since its beginnings, also contributes to the attractivity of the Charter in national proceedings. Bobek, writing extrajudicially, stressed the Charter's practical potential from the point of view of private litigants, arguing that it will sometimes be contentious whether a situation falls within the scope of EU law or not, in which case the result of the applicability assessment will depend solely on the parties' imagination and the quality of their submissions.[467] Of course, there may be a very thin line between creative use and creative abuse. In any case, the attractiveness of the Charter in the eyes of the parties (and their lawyers) is one of the factors to consider when evaluating the Charter's effectiveness on the national plane.[468]

Our study of Czech and French case law suggests that it is quite frequent for parties to claim violation of Charter rights, but these claims are often superficial and lacking in precision. Typically, the Charter is thrown in as a makeweight, alongside similar or equivalent provisions of other fundamental rights instruments.

Before Czech courts, the practice of making such references is widespread in cases both outside[469] and within[470] the scope of EU law, with applicants rarely tackling the question of the Charter's applicability or developing a fully-fledged Charter argument. A good illustration of such a chain of claims occurred in *S. A. H. v Foreign Police*

[465] Case 26/62 *Van Gend en Loos v Administratie der Belastingen*, EU:C:1963:1.
[466] See Section II.5.3.
[467] Bobek, 'Kam až sahá právo EU?', supra n 125. See also Cariat and Dermine, 'La détermination de l'applicabilité du droit de l'Union européenne à une situation particulière', supra n 86 at 112.
[468] Nivard, 'Les conditions d'application de la Charte des droits fondamentaux', supra n 69.
[469] See eg NSS, 6 As 149/2014-21, 30 October 2014 (administrative offence against social cohesion); NSS, Nao 151/2017-52, 12 April 2017 (land register); and RC in Hradec Králové, 31 A 4/2018-93, 30 April 2020, para 10 (driving offence).
[470] See eg NSS, 5 Azs 89/2016-25, 22 July 2016; and NSS, 1 As 113/2018-29, 16 May 2018.

Directorate, where the applicant contended that the Foreign Police Directorate did not accept his intention to file a claim for international protection and by doing so it

> violated its obligation to act in conformity with international and constitutional commitments (…). In his application, the applicant specifically referred to Article 33 of the Convention Relating to the Status of Refugees, Article 3 of the [ECHR], Article 3 of the Convention against Torture, Article 7 paragraph 2 of the [Czech] Charter of Fundamental Rights and Freedoms, Article 37 paragraphs 2 and 3 of the [Czech] Charter of Fundamental Rights and Freedoms, Article 43 of the [Czech] Charter of Fundamental Rights and Freedoms, Article 18 of the Charter of Fundamental Rights of the European Union.[471]

Panoramic fundamental rights pleas are also standard practice in proceedings before French administrative courts.[472] Like in Czech cases, parties rarely explain why they think the Charter is applicable.[473] The ECHR and the Charter are frequently invoked in tandem;[474] the 1789 Declaration is often included too.[475] There have been decisions in which the CE dismissed Charter-based pleas for not being sufficiently detailed,[476] and this typically happened in the context of long panoramic fundamental rights pleas.[477] Cases in which the parties invoke the Charter separately from other instruments relying on a substantiated Charter-based reasoning are less frequent. [478]

The behaviour described in this section is not limited to Czech and French applicants and lawyers. The (indiscriminate) combination of legal bases in parties' submissions appears

[471] NSS, 5 Azs 89/2016-25, 22 July 2016, para 2. See also RC in Hradec Králové, 31 Af 43/2017-147, 7 February 2018, para 13.
[472] CE, 252159, 28 May 2004 (all rejected for lack of precision); CE, 257593, 16 March 2005 (all rejected, the Charter plea rejected *en tout état de cause*); CE, 301131, 12 February 2007; CE, 394447, 15 January 2016, para 10; CE, 416945, 6 July 2018, para 6; and CE, 440166, 6 May 2020, para 11. For an extreme example, see CE, 435429, 19 May 2021, para 8.
[473] See also Van Meerbeeck, 'Le point de vue du juge du fond', supra n 456 at 159.
[474] See eg CE, 339833, 15 May 2012; CE, 356490, 4 March 2013, para 10; CE, 357848, 29 April 2013; CE, 372622, 12 November 2013; CE, 410769, 30 May 2017 (pleas); CE, 433069, 16 October 2019, para 13; CAA Paris, 15PA03285, 9 June 2016; CAA Paris, 15PA01650, 15 June 2016; CAA Paris, 16PA02603, 2 November 2016; CAA Paris, 17PA00126, 12 December 2017, paras 2–3; CAA Paris, 16PA01789, 24 January 2018; CAA Paris, 17PA02684, 14 March 2019; CAA Paris, 19PA02604, 10 July 2020; CAA Versailles, 9 May 2017, para 6.
[475] See eg CE, 371190, 30 December 2015, para 11. The European Social Charter and the International Covenant on Civil and Political Rights are also sometimes invoked: see CE, 360821, 8 April 2015; and CE, 354635, 12 December 2012.
[476] CE, 252159, 28 May 2004 (before the Charter's entry into force); CE, 359467, 3 June 2013, para 3; CE, 362978, 17 July 2013, para 3; CE, 360905, 26 February 2014, para 6; CE, 386436, 7 October 2015, para 8; CE, 381171, 9 November 2015, para 10; and CE, 391440, 22 July 2016, para 4.
[477] See eg CE, 372588, 19 June 2015, para 28.
[478] See eg CE, 450928, 10 April 2021, para 5 (the applicant submitted that the obligation to take a PCR test in anticipation of his Dublin transfer was contrary to Article 7 of the Charter).

to be an EU-wide phenomenon.[479] In contrast, the research has not identified cases in which the courts would respond favourably, like they sometimes did in other Member States,[480] to the instrumentalisation of the Charter in cases outside its scope, creating, or arguing by means of, artificial links to EU law. We do not mean here the frequent instances where the Charter is referred to, in different guises, in cases outside of its scope, typically in a panoramic manner where different fundamental rights instruments are stacked up in a series. We mean cases where the Charter would have an ascertainable *normative impact* on the solution of a case outside its scope of application.

The way the case is pleaded (including the way in which references to legal instruments are put together) will often have an impact on how those sources are made to interact in the court's decision.[481] It is clear from the Czech case law that the more detailed the Charter-based plea, the more chances of it being taken seriously. A general reference to the Charter without pointing to a specific provision risks not being dealt with by the court at all.[482] In a few cases, the NSS mildly reproached the applicants for the lack of detail in their Charter-based claims and eventually rejected these claims on that ground.[483] When dismissing a Charter-based argument, the NSS tends to highlight that the argument lacks precision as a way of reinforcing its reasoning.[484] In *J. Š. v General Financial Directorate*, where the applicant invoked the Charter in a very crude manner, the NSS observed that it

[479] See Bailleux and Bribosia, 'La Charte des droits fondamentaux de l'Union européenne', supra n 88 at 122; V Ndior, 'Suède' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 651 at 669; Półtorak, 'Poland', supra n 456 at 583; and Aastresses, 'Belgique', supra n 455 at 139. Rigaux criticised this approach of the parties, their counsel (and national judges) in very strong terms, in relation to Charter-based questions for a preliminary ruling which were clearly outside the scope of EU law and had to be declared manifestly inadmissible by the CJEU: see A Rigaux, 'Recevabilité: De quelques suggestions de nature à résorber l'inflation des ordonnances d'irrecevabilité manifeste des questions préjudicielles fondées sur une appréciation erronée par le juge de renvoi de la Charte des droits fondamentaux de l'Union' (2013) *Europe* Commentaire 337; and A Rigaux, 'Entre méconnaissance du champ d'application de la Charte des droits fondamentaux et questions purement hypothétiques, nouveaux rejets de questions préjudicielles pour incompétence manifeste de la Cour' (2013) *Europe* Commentaire 204.

[480] Fontanelli, 'The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights', supra n 64 at 194–196. See also Iglesias Sánchez, 'Article 51', supra n 151 at 405.

[481] E Lagrange and A-M Thevenot-Werner, 'Allemagne' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 35 at 67. See eg NSS, 8 Azs 126/2019-87, 9 October 2019, paras 5–6 and 15, where the applicant cited two CJEU judgments which both appeared in the NSS's reasoning. See also NSS, 4 Azs 35/2019-69, 28 May 2019, paras 13, 39.

[482] See eg NSS, 4 Ads 108/2010-39, 27 January 2011; and NSS, 7 As 234/2018-15, 26 July 2018.

[483] See eg NSS, 10 Azs 51/2015-38, 15 April 2015; and NSS, 1 Ads 64/2015-35, 17 September 2015.

[484] NSS, 1 Afs 22/2013-47, 11 July 2013, para 35; NSS, 6 As 285/2014, 24 February 2015, para 41 (the applicant did not highlight any link to EU law); NSS, 7 Afs 17/2013-46, 23 May 2013 (the applicant did not specify precisely in what way its Charter rights were violated); RC in Brno, 29 Af 88/2012-149, 25 November 2014, para 78; and MC in Prague, 9 Ad 24/2015-73, 24 November 2017.

can, in general, only deal with complaints relating to a violation of fundamental rights at the abstraction level corresponding to that of the complaint.[485] The NSS added that should it go beyond the arguments of the applicants and search for circumstances in their favour, it would lose its status as impartial arbitrator of the dispute.[486] The Regional Court in Prague has an equally uncompromising approach: a mere enumeration of fundamental rights provisions without any accompanying argumentation cannot be considered as a valid plea.[487] This approach is in line with the general requirement that the plea in law must be sufficiently precise and individualised; that is, it must be clear how exactly the plea relates to the contested administrative decision.[488] According to the Czech Constitutional Court, a court is not obliged to give a detailed response to every single complaint raised, as long as it develops its own logical and coherent line of argumentation that sufficiently supports its conclusions.[489] The NSS considers this approach particularly relevant when the individual complaints are arranged unsystematically or overlap,[490] a scenario often arising when litigants invoke the Charter's provisions alongside the provisions of other instruments. In large measure, the quality of the applicants' Charter-based pleas will thus determine the depth of the NSS's analysis. In this respect, it is interesting to note that in many of the cases described above as examples of good practice, the applicants did indeed submit substantiated Charter-based arguments.[491] In the French case law, the treatment of Charter-based pleas seems more formalised, but the judicial patterns are similar. The courts will often dismiss Charter-based pleas on the ground that they are not specific enough to be adjudicated.[492] From the court's perspective, if it fails to deal with a validly invoked Charter-based plea, at least implicitly by mentioning it in the 'visas', its judgment can be annulled on that sole ground. In France, the activity of litigants is determinative especially given that the courts

[485] NSS, 6 Afs 2/2014-25, 23 April 2014.
[486] Ibid.
[487] RC in Prague, 46 Af 1/2016-85, 15 May 2018, para 37; RC in Prague, 54 Af 33/2018-89, 11 June 2019, para 25; and RC in Prague, 48 Ad 24/2017-7, 23 June 2017.
[488] NSS, 10 Ads 215/2017-62, 30 May 2018, para 12. This was an extreme case where the applicant simply stated in its submissions that the contested decision violated several articles of the Czech Charter and the EU Charter. More generally on the extent of the duty to provide reasons in the context of a party's submissions, see NSS, 2 As 155/2015-84, 16 March 2016, para 30.
[489] Czech Constitutional Court, III. ÚS 989/08, 12 February 2009, para 68. Similarly, according to the ECtHR, '[w]ithout requiring a detailed answer to every argument put forward by a applicant, [the obligation to state reasons] nevertheless presupposes that the injured party can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question': *Antonescu v. Romania* Application No 5450/02, Admissibility, 8 February 2011, para 33.
[490] NSS, 8 Afs 41/2012-55, 29 March 2013, para 21.
[491] See eg NSS, 5 Afs 152/2015-35, 27 November 2015; and NSS, 6 Azs 253/2016-49, 4 January 2018 paras 8–10.
[492] See eg CE, 431350, 27 March 2020; CE, 391440, 22 July 2016.

do not raise EU-law arguments of their own motion, a rule which seems to be applied much more loosely in the Czech system.

In the light of the above, one of the major takeaways from the empirical research is that the role of litigants and their lawyers is essential in how national courts put the Charter into operation. More generally, the way the applicants invoke the Charter (and other co-applicable sources of fundamental rights) is often the decisive factor in shaping the courts' reasoning, as will be seen in Part II of the thesis. The Charter will never consolidate as an emancipated fundamental rights catalogue unless the applicants and their lawyers learn to use it without abusing it.

6. CONCLUSION

As we have seen throughout Part I of the thesis, the apparent simplicity of the Fransson formula stands in sharp contrast to the huge variety of constellations that can arise in cases before national judges. Even though the applicability of the Charter will be obvious in most cases, the Fransson formula is of limited use in the borderline ones. The complexity of the CJEU's case law on Article 51 of the Charter – as reflected in the typology of situations set out in Section 2.3 – is largely due to the intrinsic characteristics of the EU legal order, and it is further compounded by the lack of clarity of some CJEU decisions. The determination of the Charter's applicability is highly context-based and may require a careful reading of the relevant applicable primary or secondary law as well as a good understanding of the CJEU's applicability guidance and its concrete application. Nevertheless, the analysis of the case law of Czech and French administrative courts revealed that this complexity does not necessarily translate into a general lack of understanding of the Charter's applicability criteria. In fact, the courts have managed to make sense of the CJEU's case law and reach materially correct conclusions on the Charter's applicability. Save for a few decisions mostly dating back to the Charter's beginnings, and putting aside panoramic ornamental references, the courts neither over-apply nor under-apply the Charter.

That said, the rule in Article 51 is not the only benchmark against which we should evaluate national courts' engagement with the Charter, the other being whether their decisions contain an explicit applicability assessment and what the formal quality is of that assessment. What emerges from the case law is a considerable variety of approaches to applicability assessments. From the macroscopic viewpoint, Czech courts, especially the NSS, do not hesitate to draw explicitly on certain aspects of the CJEU's Article 51 guidance

and make exhaustive applicability assessments. In contrast, French courts keep applicability assessment very brief, in line with their traditional drafting style. The case studies revealed that Czech and French courts have not yet established a clear method as to when the applicability assessment is required, let alone what it should look like. To an extent, this variety is acceptable insofar as the level of detail of applicability assessments reflects the particulars of each case. When we evaluate the presence and format of applicability assessments, we always need to look at the intensity of the Charter's role in the reasoning. Nevertheless, the lack of a clear method has led to the occasional incorrect (or confusing) outcome. It is safe to assume that the methodological variety is symptomatic of the primary preoccupation of every judge: to solve a case. A more pragmatic and results-based approach, combined with the fact that judicial resources are limited, means that the court will only deal with the Charter (and its applicability) to the extent necessary to solve the case and discharge its duty to provide reasons. Member State courts should, however, be careful not to succumb to such pragmatism in a way that would run counter to legal certainty. This requirement is heightened for apex courts, which play an essential role in promoting the full and correct national application of the Charter. As well as respecting the material scope of the Charter, apex courts should be careful not to create or perpetuate confusion about that scope on the part of lower courts and, crucially, the beneficiaries of the Charter rights and principles. From this angle, there appears to be room for a more consistent approach in the NSS's and CE's practice.

Part II:
The Charter's legal effects

1. INTRODUCTION

Article 51 of the Charter is a useful starting point for discussing the legal effects that the Charter is meant to produce. This provision is entitled 'Field of application', which corresponds to Article 51(1) first sentence and to Article 51(2). It is indeed from this perspective that this provision is mostly viewed. However, Article 51(1) second sentence does not talk about *when* the Charter is applicable, but rather *how* it must be applied. The whole provision contains both a hypothesis (when the Member States are *implementing* Union law and only then) and a disposition (they shall 'respect the rights, observe the principles and promote the application thereof').[493] All the other provisions grouped under Title VII of the Charter can be seen as giving further substance to the disposition contained in Article 51(1): they specify the general conditions under which national courts must 'respect the rights' and 'observe' and 'promote' the principles enshrined in Titles I to VI of the Charter.

The notion of 'giving effect' is understood to be an aggregate of the tripartite obligation mentioned in Article 51(1) of the Charter: to *respect* the rights, *observe* the principles and *promote* the application thereof. Compatibly, it is understood to cover the variety of legal effects produced by a binding piece of EU primary law, such as the Charter, which national courts are obliged to recognise and uphold. From the viewpoint of the Charter's primary addressees – the individuals – this covers the various ways in which they can invoke the Charter and rely on its various effects: substitutive, exclusionary, interpretative or compensatory. The notion of 'giving effect' encompasses all the formulas

[493] Some Charter provisions further define (limit) their scope: see Ward, 'Article 51', supra n 63 at 1215; S Platon, 'Le périmètre de l'obligation de respecter les droits fondamentaux en droit de l'Union européenne' in R Tinière and C Vial (eds), *Protection des droits fondamentaux dans l'Union européenne: entre évolution et permanence* (Bruylant 2015) 67 at 81–82 ; and D Curtin and R van Ooik, 'The Sting is Always in the Tail. The Personal Scope of Application of the EU Charter of Fundamental Rights' (2001) 8 *Maastricht Journal of European and Comparative Law* 102.

resulting from the verbal and conceptual creativity of national courts, covering terms like 'apply', 'take into account', 'interpret in the light of', 'read together with', and so on.[494]

The discussion starts with Section 2, which analyses the complex set of rules that specify how national courts must give effect to the Charter. It also highlights the challenges that come with some of those rules. Sections 3 and 4 discuss how Czech and French courts use the Charter in their reasoning and how they make it interact with EU secondary law and other fundamental rights catalogues, with a separate analysis for the Czech NSS, Czech regional administrative courts, the French CE and French lower administrative courts. Each of these four sections uses a different structure to best reflect the patterns identified in the case law of the courts concerned. The classic categories of 'direct effect' and 'indirect effect' would not capture the methodological variety of the Charter's treatment by Czech and French administrative courts. Section 5 pulls together the analytical and empirical findings and creates a typology of the legal effects of the Charter and of its interactions with other legal sources.

2. HOW NATIONAL COURTS MUST GIVE EFFECT TO THE CHARTER

Under Article 19(1)(1) of the TEU, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[495] As expressed by the CJEU before the provision cited was introduced into primary law by the Treaty of Lisbon, '[i]t is for the Member States to ensure effective judicial scrutiny of the observance of the applicable provisions of [Union] law'.[496] This section sets out the EU-law requirements and expectations as to the effective application of the Charter by national judges. After setting out the general EU-law context in which the Charter operates (Section 2.1), we will focus on three inter-related areas: the distinction between Charter rights and Charter principles and

[494] The use of this varied vocabulary and other judicial techniques can sometimes obscure the actual effect of the Charter on the reasoning and the outcome of the case. For example, the phrase 'take into account' implies a less intense role in the reasoning than the word 'apply' but remains largely unclear: the former President of the Belgian Constitutional Court, P Martens, expressed the following view when talking about the fact that the Belgian Constitutional Court, when interpreting fundamental rights in the Constitution, takes into account (*tient en compte*) international provisions containing analogous rights: 'la Cour ne va pas jusqu'à dire qu'elle applique, pas plus qu'elle ne se borne à affirmer qu'elle "prend acte"': cited in X Delgrange, 'De l'ensemble indissociable à l'interprétation conciliante' in S van Drooghenbroeck (ed), *Le droit international et européen des droits de l'homme devant le juge national* (Larcier 2014) 145 at 152.

[495] Also, under Art 4(3)(2) TEU, '[t]he Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'.

[496] Case C-467/01 *Eribrand*, EU:C:2003:364, para 61. For more case law and discussion, see U Jaremba, *National Judges As EU Law Judges: The Polish Civil Law System* (Martinus Nijhoff 2013) at 58–63.

their respective justiciability (Section 2.2), the effects of the Charter from the EU-law point of view, including direct and indirect effect (Section 2.3) and the EU rules for the Charter's interaction with other sources (Section 2.4).

2.1 General context

The Charter is an integral part of EU primary law and has primacy over national law.[497] As such, it is binding on national courts 'whenever they are required to apply EU law'.[498] When the Charter applies to a dispute before the national judge within the meaning of Article 51(1) of the Charter, the judge must 'ensure, within its jurisdiction, the judicial protection for individuals flowing from [the Charter provisions] and to guarantee the *full effectiveness* thereof'.[499]

For our analysis, it is crucial to set out what exactly this means for the way national judges approach cases deemed to be within the scope of EU law and for the way they give reasons in their decisions. First, in such cases, the courts must take the Charter into account, even if that is the only Charter-related thing they do. They must ensure that the reasoning relied on (particularly the interpretation of EU secondary law) is not at odds with the Charter, as interpreted by the CJEU. When the parties do raise a specific Charter-based claim, which the judge considers to be irrelevant or unfounded, the extent of obligatory engagement with the Charter will depend on national procedural rules (and on the way the Charter-based plea is presented), subject to the EU requirements of equivalence and effectiveness.[500]

Ensuring compliance with the Charter of the outcome of the case, and of the reasoning employed to reach it, may require interpreting the relevant national rules in a manner consistent with the Charter (indirect effect) or, if need be, disapplying those national rules (direct effect).[501] These requirements are an expression of the two key functions of the Charter.[502] First, the Charter can serve as an aid to interpretation of EU secondary legislation

[497] Article 6(1) TEU. See LS Rossi, '"Same Legal Value as the Treaties"? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights' (2017) 18 *German Law Journal* 771. No national rules or procedures are allowed to hinder that status and its consequences in any way: see Case C-112/13 *A v B*, EU:C:2014:2195.
[498] Case C-457/09 *Chartry*, EU:C:2011:101, para 22.
[499] Joined Cases C-569/16 and C-570/16 *Bauer*, EU:C:2018:871, para 91 (emphasis added).
[500] See Section I.5.3.
[501] Joined Cases C-569/16 and C-570/16 *Bauer*, EU:C:2018:871, para 91.
[502] K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375 at 376. Lenaerts talks about the triple function of the Charter: it (i) serves as an aid to interpretation, (ii) provides grounds for judicial review, and (iii) operates as a source of authority for the discovery of general principles of Union law. The third function is mainly relevant for the CJEU. For the analogous functions of general principles Union law, see AS Hartkamp, 'The General Principles of EU Law

and national rules implementing EU law: it can fill the gaps and play a corrective function to ensure fundamental rights compliance.[503] Secondly, it can act as a standard of judicial review, be it in the context of reviewing the validity of EU secondary law or assessing the compliance of national rules with EU law.[504] From the viewpoint of individuals, these requirements correspond to the possibility they have to invoke the Charter's provisions, relying on their direct or indirect effects.[505] For completeness, it should be added that a violation of the Charter may give rise to Francovich-type Member State liability for violation of EU law.[506] Regardless of the way national courts deal with the Charter, they must follow the established methods of interpretation of EU law.[507] General remedial rules prescribed by EU law to ensure effective judicial protection of the individual's rights under Union law fully apply as regards the Charter.[508] The Charter is also subject to general requirements regarding the *ex officio* application of EU law,[509] but there is an extra dimension stemming from the Charter's character as a collection of second-order rules: 'once EU law has been introduced in the proceedings according to the national procedural regime, there is no requirement that the application of fundamental rights is specifically included in the parties' pleas. The judge can autonomously consider their application since it might be relevant to a genuine question on the validity or interpretation of the substantive rules of EU law invoked.'[510] When national courts apply EU secondary legislation, they must 'make sure

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and Private Law' (2011) 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 241 at 242.

[503] Opinion of AG Trstenjak in Case C-101/08 *Audiolux and Others*, EU:C:2009:410, para 68 (in the context of general principles of Union law).

[504] See also Opinion 2/13 *Adhésion de l'Union à la CEDH*, EU:C:2014:2454, para 169: 'respect for [the Charter is] a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU'.

[505] Gauthier, Platon and Szymczak, *Droit européen des droits de l'Homme*, supra n 90 at 341–343. For a distinction between 'applicabilité' and 'invocabilité', see Nivard, 'Les conditions d'application de la Charte des droits fondamentaux', supra n 69 at 34. This covers the modes of invocation that the French doctrine classifies as *invocabilité de substitution*, *invocabilité d'éviction* and *invocabilité d'interprétation*: see E Dubout and B Nabli, *Droit français de l'intégration européenne* (LGDJ 2015) at 125–142.

[506] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy*, EU:C:1991:428. For a discussion of the Francovich-type liability for a breach of a general principle of Union law and the Charter, see M Dougan, 'Addressing Issues of Protective Scope within the Francovich Right to Reparation' (2017) 13 *European Constitutional Law Review* 124 at 141–143; and A Ward, 'Damages under the EU Charter of Fundamental Rights' (2012) 12 *ERA Forum* 589.

[507] K Lenaerts and JA Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20 *Colombia Journal of European Law* 3.

[508] Thus, for example, a national court must be in a position to grant interim relief in order to ensure the full effectiveness of Charter rights. See Case C-213/89 *Factortame and Others*, EU:C:1990:257, para 21; and Case C-432/05 *Unibet*, EU:C:2007:163, para 67. See A Barav, *Judicial Enforcement and Implementation of European Union Law* (Bruylant 2017) at 169–205.

[509] Case C-161/15 *Bensada Benallal*, EU:C:2016:175.

[510] F Cafaggi et al., 'ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter Module 1 – The EU Charter of Fundamental Rights: Scope of Application, Relationship with

they do not rely on an interpretation of wording of secondary legislation which would be in conflict with [the Charter]'.[511] In sum, in every case in which EU law is applied, the national judge must ensure, at a minimum, that the solution of the case complies with the Charter, when necessary by giving the Charter full effect.

In addition to the principles mentioned above, which apply to all EU law, Articles 52 to 54 of the Charter set out the specific rules for interpreting and applying the Charter. As will be made clear below, however, these provisions are only a starting point for national judges: it is necessary to read them together with the non-binding but authoritative Explanations to the Charter[512] and, most importantly, with the CJEU's case law that interprets and develops the said provisions. The instructions in Articles 52 to 54 of the Charter do not all have an equally prominent place within that case law, which reduces their importance in practice.[513]

We will not discuss Article 52(1), which sets out the conditions for limiting the exercise of Charter rights and principles. It will be remembered that such limitations are permissible under the Charter if they (i) are provided for by law; (ii) respect the essence of those rights and freedoms; (iii) genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others; and (iv) are proportionate, that is, suitable, necessary and proportionate *stricto sensu*.[514] An area of uncertainty, where national courts will again need to refer to casuistic (and not yet fully developed) CJEU case

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the ECHR and National Standards, Effects', 2017, available at: www.eui.eu/Projects/CentreForJudicialCooperation/Documents/D1.1.a-Module-1.pdf.

[511] Case C-528/13 *Léger*, EU:C:2015:288, para 41; C-305/05 *Ordre des barreaux francophones and germanophone and Others*, EU:C:2007:383, para 28.

[512] On the formal and authoritative status of the Explanations, see A Bailleux, 'Article 52-2: Portée et interprétation des droits et principes' in F Picod and S van Drooghenbroeck (eds), *Charte des droits fondamentaux de l'Union européenne: Commentaire article par article* (Bruylant 2020) 1287 at 1317–1319. See also K Lenaerts, 'The EU Charter of Fundamental Rights: Scope of Application and Methods of Interpretation' in V Kronenberger, MT D'Alessio and V Placco (eds), *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins. Mélanges en l'honneur de Paolo Mengozzi* (Bruylant 2013) 107 at 142.

[513] This is true of Article 52(2), according to which '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'; and Articles 52(4) and 52(6), which provide that '[i]n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions' and '[f]ull account shall be taken of national laws and practices as specified in this Charter', respectively. For that reason, we will not discuss them in detail. For more on Article 52(4), see C Rauchegger, 'The Interplay Between the Charter and National Constitutions after Åkerberg Fransson and Melloni Has the CJEU Embraced the Challenges of Multilevel Fundamental Rights Protection?' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Bloomsbury 2015) 93 at 121–128.

[514] S Van Drooghenbroeck, 'Article 52-1. Limitations aux droits garantis' in F Picod and S van Drooghenbroeck (eds), *Charte des droits fondamentaux de l'Union européenne: Commentaire article par article* (Bruylant 2020) 1249.

law, is how to interpret the 'essence' of individual Charter rights and principles. Even though this concept will not be totally unfamiliar to national judges (for instance, the Czech Charter prescribes that when limiting rights and freedoms, their essence must be preserved[515]), they cannot automatically transpose national solutions to the Charter.[516]

In the rest of Section 2, we will deal with Article 51 (its disposition part) and Articles 52(3), 52(5) and 53 of the Charter.

2.2 Justiciability of Charter provisions: Rights versus principles

The Charter's provisions are not all capable of producing legal effects of the same intensity. The Charter makes a distinction between 'rights' and 'principles'. Whilst 'rights' are automatically and fully justiciable, the justiciability of 'principles' is conditional and limited. The distinction was introduced as part of a political compromise concerning the inclusion of economic, social and cultural rights in the Charter.[517] This solution generated considerable uncertainty about the nature and consequences of the rights–principles divide, exacerbated by the fact that the Charter's provisions are not explicitly identified as either rights or principles. The Explanations to the Charter provide only a few illustrative examples, and the CJEU has not developed general guidance.[518] In some judgments, it steered well clear of the rights–principles divide, choosing not to qualify some Charter provisions as containing a principle, even though this was arguably the case.[519] Furthermore, the Explanations also 'clarify' that 'an Article of the Charter may contain both elements of a

[515] Article 4(4) of the Czech Charter. For other Member States, see T Tridimas and G Gentile, 'The Essence of Rights: An Unreliable Boundary?' (2019) 20 *German Law Journal* 794 at 795–801.

[516] For more on the limitation clause in Article 52(1) of the Charter, see SU Colella, *La restriction des droits fondamentaux dans l'Union européenne: notions, cadre et régime* (Bruylant 2018); M Brkan, 'In Search of the Concept of Essence of EU Fundamental Rights Through the Prism of Data Privacy', 2017, Maastricht Faculty of Law Working Paper No 2017-01, available at: ssrn.com/abstract=2900281; T Ojanen, 'Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter ECJ 6 October 2015, Case C-362/14, Case Note' (2016) 12 *European Constitutional Law Review* 318; and R Tinière, 'Le contenu essentiel des droits fondamentaux dans la jurisprudence de la Cour de justice de l'Union européenne' (2020) *Cahiers droit européen* 417.

[517] Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights', supra n 502 at 399; and T Van Danwitz and K Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights European Union Law Issue: Essay' (2011) 35 *Fordham International Law Journal* 1396 at 1410–1414.

[518] 'For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37.' For a comprehensive classification, see Picod, 'Article 51', supra n 32 at 1241–1246.

[519] Case C-176/12 *Association de médiation sociale*, EU:C:2014:2. On the reluctance of the Court to explicitly identify Charter principles (which contrasts with the approach of some AGs treating the question explicitly), see N Cariat, *La Charte des droits fondamentaux et l'équilibre constitutionnel entre l'Union européenne et les États membres* (Bruylant 2016) at 489–492.

right and a principle'.[520] This is a source of legal uncertainty which complicates the task of national judges. Furthermore, there is a risk that this uncertainty leads national courts to err on the side of caution by not giving full effect to certain Charter 'rights', for example, to the rights included in the Charter's Title IV, 'Solidarity', which generally tend to be associated with 'principles'.[521]

Aside from the fact that under Article 51(1) of the Charter, rights are 'respected' and principles are 'observed' (and 'promoted') – without there being an obvious difference between the two verbs –, the specific nature of principles is laid down in Article 51(5) of the Charter. According to that provision:

> The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be *judicially cognisable only in the interpretation of such acts and in the ruling on their legality*.[522]

The CJEU interpreted this provision in the sense that 'principles' cannot as such give rise to subjective rights;[523] a 'principle' has an objective role limited to the interpretation and review of acts that were specifically adopted to implement that principle, be it at the Union level or, as part of implementing Union law, at the national level.[524] This means that Charter provisions containing 'principles', unlike those containing 'rights', do not have substitutionary direct effect, vertical or horizontal.[525] In proceedings before national courts,

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[520] 'In some cases, an Article of the Charter may contain both elements of a right and of a principle, eg Articles 23, 33 and 34.'

[521] See eg Opinion of AG Cruz Villalón in Case C-176/12 *Association de médiation sociale*, EU:C:2013:491, para 55.

[522] Emphasis added. In the Explanations to the Charter, we read that 'Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities.' In the words of the CJEU, a principle 'does not require the EU legislature to adopt any specific measure': Case C-356/12 *Glatzel*, EU:C:2014:350, para 78.

[523] Case C-356/12 *Glatzel*, EU:C:2014:350, para 78 (Article 26: Integration of persons with disabilities).

[524] See Opinion of AG Cruz Villalón in Case C-176/12 *Association de médiation sociale*, EU:C:2013:491, paras 50–56. See T Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 *Common Market Law Review* 1201 at 1214–1216. Półtorak succinctly points out that 'the principles may not be a direct and autonomous basis for judicial decisions but need to be implemented by further acts and are used for the purpose of deciding on the interpretation or validity of these acts': Półtorak, 'The Application of the Rights and Principles of the Charter of Fundamental Rights', supra n 77.

[525] A Charter principle, unlike a general principle of Union law, cannot produce horizontal direct effects when invoked with an EU directive which implements the said Charter principle: compare Case C-555/07 *Kücükdeveci*, EU:C:2010:21 and Case C-176/12 *Association de médiation sociale*, EU:C:2014:2. For a commentary, see Safjan, Düsterhaus and Guérin, 'La Charte des droits fondamentaux de l'Union européenne et les ordres juridiques nationaux', supra n 114.

a Charter principle can be invoked only in certain circumstances and only to a limited extent. First, it appears from the CJEU case law that a Charter principle can only be invoked in relation to those legislative or executive acts adopted by the Union or a Member State which have been adopted to *implement* that same Charter principle.[526] It cannot be invoked in relation to any other acts. Of course, this significantly limits the normative value of Charter principles. Even though this limitation sits well with the wording of the second sentence of Article 51(5) of the Charter, some have argued for a broader interpretation of the term 'such acts' used in that provision.[527] In any event, the CJEU has so far interpreted 'implementing acts' within the meaning of Article 51(5) of the Charter very broadly.[528] A Charter principle can only be invoked to interpret the said implementing acts or review their legality. This means that although Charter principles cannot as such create standing before national courts, litigants who have standing on another ground should be able to invoke a Charter principle to have the implementing act interpreted in the light of that Charter principle or have the implementing act struck down for being contrary to that Charter principle.[529] Nevertheless, regarding the latter option, the emerging CJEU case law suggests that it is difficult to imagine any significant role for Charter principles as standards of judicial review.

A central question which has emerged in the CJEU's case law regarding the extent to which Charter principles are justiciable is whether the Charter principle also needs to be – in addition to the conditions specified above – *concretised* in another piece of EU law (different from the *implementing act* in relation to which the principle can be invoked in the sense specified above). Advocate-General Cruz Villalón, in his Opinion in *AMS*, distinguishes between two types of 'implementing acts' within the meaning of Article 52(5) of the Charter: (i) a narrower category of 'particular provisions which can be *said to give specific substantive and direct expression to the content of the "principle"*'; and (ii) a broader category of other acts which do not have such characteristics but remain

[526] Case C-356/12 *Glatzel*, EU:C:2014:350, para 74.
[527] The prevailing scholarly view favours a broader interpretation of the words 'such acts' used in Article 52(5) of the Charter. See eg J Krommendijk, 'Principled Silence or Mere Silence on Principles: The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11 *European Constitutional Law Review* 321 at 335–339; J-P Jacqué, 'La Charte et la Cour de justice de l'Union – un premier bilan sur l'interprétation des dispositions horizontales de la Charte' in G Cohen-Jonathan et al. (eds), *L'homme et le droit: en hommage au professeur Jean-François Flauss* (Pedone 2014) 403 at 419–422.
[528] Case C-356/12 *Glatzel*, EU:C:2014:350, paras 74–76. See also Lock, 'Rights and Principles in the EU Charter of Fundamental Rights', supra n 524 at 1222–1223.
[529] Krommendijk, 'Principled Silence or Mere Silence on Principles: The Role of the EU Charter's Principles in the Case Law of the Court of Justice', supra n 527 at 334–339; and G Braibant, *Charte des droits fondamentaux de l'Union européenne* (Points 2001) at 252–253.

implementing acts for the purposes of Article 52(5).[530] Under this scheme, the criterion against which the validity of acts implementing a Charter principle (acts falling under the second category) is comprised of the wording of the 'principle' together with the acts giving specific substantive and direct expression to it (acts falling under the first category).[531] The CJEU's pronouncement in *Glatzel* (not a Grand Chamber case) appears to go in the direction of the distinction established by Advocate-General Cruz Villalón.[532] Under that interpretation, all sorts of difficulties arise, starting with how to distinguish between implementing and concretising acts. If that interpretation were correct, it would mean that the role of Charter principles in judicial review of Union acts is mostly theoretical.[533] As for the judicial review of national acts specifically, the CJEU clearly held in *Poplawski II* that 'the national court is not required, solely on the basis of EU law, to disapply a provision of national law which is incompatible with a provision of the [Charter] which, like Article 27, does not have direct effect'.[534]

It is yet to be seen how all these conditions will be fleshed out in practice by the CJEU, whose future approach will determine the actual degree of justiciability (and added value) of Charter principles. The complex scheme described above, which is only gradually being put into operation by the CJEU, has everything to confuse national judges. As observed above, judges will struggle to find clear guidance in the CJEU's case law on how to identify Charter provisions containing principles and the conditions under which Charter principles can be used as standards of judicial review.[535] The Explications to the Charter are only of limited assistance in that regard. Furthermore, the potentially confusing terminology

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[530] Opinion of AG Cruz Villalón in Case C-176/12 *Association de médiation sociale*, EU:C:2013:491: 'That differentiation is essential, since, otherwise, in areas as extensive as social policy, the environment or consumer protection, the "implementation" of a "principle" would consist of nothing less than an entire branch of the legal system, such as the whole of social law, environmental law and consumer law. That result would render nugatory and disruptive the function which the Charter confers on "principles" as a criterion for interpreting and reviewing the validity of acts, since it would be impossible to carry out that function' (para 63).
[531] Ibid. para 71.
[532] Case C-356/12 *Glatzel*, EU:C:2014:350. In this judgment, the Court confirmed that Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast) [2006] OJ L 403/18 is an EU legislative act implementing the principle in Article 26 of the Charter (Integration of persons with disabilities). However, the Court did not proceed to review the compatibility of the Directive with Article 26 and made the following statement by way of justification: 'the principle enshrined by [Article 26 of the Charter] does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such […]' (para 78). See Bailleux, 'Article 52-2', supra n 512 at 1312.
[533] See ibid.; and Nivard, 'Les conditions d'application de la Charte des droits fondamentaux', supra n 69 at 31.
[534] Case C-573/17 *Popławski*, EU:C:2019:530, para 63.
[535] This observation can be extended to all legal practitioners: see eg Toggenburg, 'The Charter of Fundamental Rights: An Illusionary Giant?', supra n 37 at 17.

does not help. For instance, the CJEU defines the *right* to paid annual leave under Article 31(2) of the Charter as an *essential principle of EU social law*.[536] Also, *general principles* of Union law (which can be directly effective) are different from *Charter principles* within the meaning of Article 52(5) of the Charter. Lastly, national judges should refrain from directly transposing solutions that exist under national law when it comes to the limited justiciability of certain fundamental rights.[537]

2.3 Legal effects of the Charter: From Charter-consistent interpretation to direct effect

Under the well-established principle of EU-consistent interpretation, dating back to *Von Colson*, the national court is required, to the greatest extent possible, to interpret all national law in conformity with the Charter, subject to certain limits identified by the CJEU.[538] More specifically, if a particular fundamental right is reaffirmed in a provision of EU secondary legislation, that provision must be interpreted and applied in a manner consistent with the fundamental rights enshrined in the Charter.[539] The obligation of consistent interpretation concerns both Charter rights and Charter principles. When it comes to analysing national courts' judicial treatment of the Charter, it is helpful to point out that the notion of 'consistent interpretation' covers legal effects of varying intensity, from very weak to very strong.[540]

The direct effect of Charter rights is more conceptually interesting. In theory, and applying the general analytical framework under EU law, directly effective are those

[536] Joined Cases C-569/16 and C-570/16 *Bauer*, EU:C:2018:871, para 39.
[537] See Article 41(1) of the Czech Charter of Fundamental Rights and Freedoms which lists several provisions containing rights that 'may be claimed only within the confines of the laws implementing these provisions'. For a very similar provision to the same effect, see Article 53(3) of the Spanish Constitution. In France, the corresponding legal concept is the 'principles of constitutional value'.
[538] Case 14/83 *von Colson*, EU:C:1984:153; and Case C-106/89 *Marleasing*, EU:C:1990:395.
[539] See eg Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, para 163 ('In applying Directive 2000/78, the Member States are required to comply with Article 47 of the Charter and the characteristics of the remedy provided for in Article 9(1) of the directive must be determined in a manner that is consistent with Article 47 of the Charter'). However, see, in the opposite sense, Case C-118/13 *Bollacke*, EU:C:2014:1755, para 15: 'the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law from which there may be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Council Directive 93/104/EC […] concerning certain aspects of the organisation of working time […] itself, that directive having been codified by Directive 2003/88'.
[540] See M Bobek, 'The Effects of EU Law in the National Legal Systems' in C Barnard and S Peers (eds), *European Union Law* (OUP 2017) 143, who differentiates between *weak indirect effect* (confirming argument, EU law as an additional and subsidiary authority), *medium indirect effect* (EU law determining the choice between several interpretative options) and *strong indirect effect* (where national law 'starts to be twisted and bent in order to achieve conformity with an EU law provision').

provisions of the Charter that are sufficiently clear, precise and unconditional.[541] In the context of the Charter (similarly to some other provisions of EU primary law), these conditions lose most of their relevance given the abstract and general wording of the Charter's provisions.[542] Indeed, as Bobek notes, the CJEU generally refrains from using the terminology of 'direct effect' in the context of Charter provisions.[543] Terminological issues aside, the CJEU recognised in relation to several Charter provisions that they confer rights on individuals which they can rely on as such before national courts.[544] The national court is required to ensure within its jurisdiction the judicial protection for individuals arising from those Charter provisions, and 'to guarantee the full effectiveness of those articles by *disapplying if need be* any contrary provision of national law'.[545] The activation of direct effect can manifest itself not only in the disapplication of conflicting national law (exclusionary direct effect), but it can also lead to the creation or recognition of a positive subjective right (substitutive direct effect).[546]

Crucially, the Court has recognised that at least some Charter provisions are directly effective also in horizontal situations, that is, in disputes between private parties.[547] This is not the place to rehearse the arguments for and against the horizontality of EU fundamental

[541] Gauthier, Platon and Szymczak, *Droit européen des droits de l'Homme*, supra n 90 at 340–343.
[542] M Bobek, 'Institutional Report: National Courts and the Enforcement of EU Law' in M Botman and J Rijpma (eds), *National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order. The XXIX FIDE Congress Publications, Vol. 1* (Eleven International Publishing 2020) 61 at 67.
[543] Ibid. at 66.
[544] This concerned non-discrimination on the grounds of age under Article 21(1) of the Charter: Case C-176/12 *Association de médiation sociale*, EU:C:2014:2, para 47; non-discrimination on the grounds of religion or belief under Article 21(1) of the Charter: Case C-414/16 *Egenberger*, EU:C:2018:257; Case C-193/17 *Cresco Investigation*, EU:C:2019:43; and Case C-68/17 *IR*, EU:C:2018:696; the right to paid annual leave under Article 31(2) of the Charter: Joined Cases C-569/16 and C-570/16 *Bauer*, EU:C:2018:871; Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, EU:C:2018:874; the right to an effective remedy under Article 47 of the Charter: Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982; Case C-556/17 *Torubarov*, EU:C:2019:626, para 56; and the *ne bis in idem* principle under Article 50: Case C-537/16 *Garlsson Real Estate and Others*, EU:C:2018:193.
[545] Case C-414/16 *Egenberger*, EU:C:2018:257, para 79 (emphasis added). The Court pointed out that '[t]hat conclusion is not called into question by the fact that a court may, in a dispute between individuals, be called on to balance competing fundamental rights which the parties to the dispute derive from the provisions of the FEU Treaty or the Charter, and may even be obliged, in the review that it must carry out, to make sure that the principle of proportionality is complied with. Such an obligation to strike a balance between the various interests involved has no effect on the possibility of relying on the rights in question in such a dispute' (para 80).
[546] Case C-193/17 *Cresco Investigation*, EU:C:2019:43. That being so, the direct effect may not be able to provide an effective remedy in cases where it is necessary to lay down positive entitlements in national law.
[547] See Case C-414/16 *Egenberger*, EU:C:2018:257; Case C-68/17 *IR*, EU:C:2018:696; Joined Cases C-569/16 and C-570/16 *Bauer*, EU:C:2018:871; and Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, EU:C:2018:874.

rights, an issue that has received enormous scholarly attention.[548] It suffices to say that even though the CJEU's recent judgments clarified that the horizontal direct effect of Charter provisions is in principle possible, it is not clear what the actual test is for ascertaining which Charter provisions have such effect.[549]

As explained above, under the CJEU's case law, the direct effect of the Charter's provisions containing 'principles' is ruled out (unless they have been concretised in the sense explained above).[550] Those provisions cannot 'confer on individuals a subjective right which they may invoke as such', that is, an actionable, directly effective right.[551]

The direct effect has significant procedural advantages for the person invoking it: relying on the Charter's direct effect means that national courts can disapply the conflicting national provision without having to 'request or await the prior setting aside of such provision by legislative or other constitutional means'.[552] In contrast, if the national court were to choose the national constitutional route and frame the issue as a conflict between the national infra-constitutional provision and the constitution, it would have to, in most Member States, defer the matter to the constitutional court.[553] The advantage is less apparent when compared to the ECHR, given that both Czech and French courts can rely on the ECHR's direct effect to disapply conflicting national provisions.[554]

2.4 How is the Charter meant to interact with other sources?

Article 52(3) of the Charter establishes the material equivalence, either full or partial, between several Charter rights and corresponding ECHR rights, with the important proviso that the Charter (its interpretation by the CJEU) can provide more extensive protection. Pursuant to this provision, 'in so far as [the] Charter contains rights which correspond to

[548] See eg recently E Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (OUP 2019).
[549] See eg J Rondu, 'L'effet direct horizontal de la Charte des droits fondamentaux de l'Union européenne' in A Iliopoulou-Penot and L Xenou (eds), *La charte des droits fondamentaux, source de renouveau constitutionnel européen?* (Bruylant 2020) 255.
[550] Case C-573/17 *Popławski*, EU:C:2019:530, para 63; and LS Rossi, '"Same Legal Value as the Treaties"? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights' (2017) 18 *German Law Journal* 771 at 792.
[551] See Case C-176/12 *Association de médiation sociale*, EU:C:2014:2, paras 45 and 48 (Article 27: Workers' right to information and consultation within the undertaking); and Case C-356/12 *Glatzel*, EU:C:2014:350, para 78 (Article 26: Integration of persons with disabilities).
[552] Case 106/77 *Simmenthal*, EU:C:1978:49, para 24; and Case C-112/13 *A v B and Others*, EU:C:2014:2195, para 40.
[553] See eg J Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9 *European Constitutional Law Review* 420 at 428.
[554] D Szymczak, 'Convention européenne des droits de l'homme: application interne', *Répertoire de droit européen Dalloz*, 2017, paras 54–56.

rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]. This provision shall not prevent Union law providing more extensive protection.' Under this so-called homogeneity clause, 'the meaning and scope of the guaranteed rights are determined not only by the text of the ECHR, but also, in particular, by the case-law of the [ECtHR]'.[555] Helpfully for national judges, the Explanations to the Charter contain a list of Charter provisions that correspond to their ECHR equivalents fully (that is, with regard to both their meaning and scope) and a list of Charter provisions that correspond to their ECHR equivalents only partially (that is, with regard to their meaning only, the scope of Charter provisions being wider). When seeking guidance from those two lists, national judges should, however, systematically draw assistance from the CJEU case law and make a reference for a preliminary ruling in case of uncertainty. This is because: (i) the material equivalence of the listed provisions is only the default position, in the absence of more protective EU legislation and CJEU case law;[556] (ii) the default position can also be overridden where the material equivalence would be at odds with the autonomy of EU law and that of the CJEU;[557] (iii) the list of equivalent provisions in the Explanations does not preclude new additions based on subsequent legal developments;[558] (iv) several Charter rights that are not on the list are in fact protected under the ECtHR's case law;[559] and (v) interpretative recourse to the ECHR is not limited to

[555] Case C-205/1 *Toma*, EU:C:2016:499, para 41.

[556] See L Coutron, 'L'hypothèse du dépassement du standard conventionnel' in L Coutron and C Picheral, *Charte des droits fondamentaux de l'Union européenne et Convention européenne des droits de l'homme* (Bruylant 2012) 21. Although there are cases where EU legislation goes beyond the ECHR standard as defined by the ECtHR, there does not appear to be CJEU cases which would do the same: see Bailleux, 'Article 52-2', supra n 512 at 1304. Cf. Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights*, supra n 30 at 72–76.

[557] Case C-601/15 PPU *N.*, EU:C:2016:84, para 47; and Case C-18/16 *K.*, EU:C:2017:680, para 50. See also Case C-550/07 P *Akzo Nobel*, EU:C:2010:512. Cf. Lenaerts and Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice', supra n 56 at 1581, according to whom 'the autonomy of EU law may only be grounded in the principle "of the more extensive protection", ie the level of protection guaranteed under EU law may never be lower than that guaranteed by the ECHR (as interpreted by the ECtHR)'. For the same position with arguments in its support, see also D Ritleng, 'De l'articulation des systèmes de protection des droits fondamentaux dans l'Union' (2013) *RTD Eur.* 267. See recently Opnion of AG Pikamäe in Joined Cases C-924/19 PPU and C-925/19 PPU *Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, EU:C:2020:294, paras 148–149.

[558] The Explanations to Article 52(3) of the Charter state that 'The list of rights which may at the present stage, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR within the meaning of the present paragraph is given hereafter.'

[559] See eg Article 5(3) of the Charter (the prohibition of trafficking in human beings) not mentioned in the list as corresponding to Article 4 of the ECHR, but trafficking in human beings falls within the scope of the latter provision (see *Rantsev v Cyprus and Russia*, Application No 25965/04, Merits and Just Satisfaction, para 282). For other examples, see R Tinière, 'La charte des droits fondamentaux de l'Union européenne', *JurisClasseur Europe Traité*, Fasc. 160, paras 50, 69, 97 and 128; and F Sudre, *Droit européen et international des droits de l'homme* (Puf 2016) at 159–160. Regarding Article 8 of the Charter and Article 8 of the ECHR, see Joined Cases C-92/09 *Volker und Markus Schecke and Eifert*, EU:C:2010:662, paras 51–52.

equivalent rights within the meaning of Article 52(3) of the Charter.[560] For all these reasons, national judges must refrain from automatically extending solutions based on the ECHR to the Charter as regards the rights deemed to be (partially) equivalent, just as they must refrain from automatically not doing so as regards the rights that are deemed *prima facie* non-equivalent, without due regard to all the nuances listed above.

Importantly, even where the Convention's material standard is imported into EU law via Article 52(3) of the Charter, this does not imply that the Convention is *formally* binding on national courts by way of EU law.[561] This means that when EU secondary legislation is reviewed for compatibility with fundamental rights, the Charter is the only formal point of reference. In cases not involving a question of validity of EU secondary law, the CJEU's approach to Article 52(3) and to the respective role given to the Charter and the ECHR is uneven.[562] Some judgments emphasise the autonomy of EU law and the fact that the Charter is the sole point of reference, with the ECHR mentioned as a confirmatory argument at best.[563] Other judgments are premised on the equivalence and take ECHR case law as a point of departure.[564] The uneven approach has the potential to confuse national judges as to the respective role that the Charter and the ECHR – both binding on national judges – should play in cases that are within the scope of EU law.

Pursuant to Article 53 of the Charter, titled 'Level of protection', 'Nothing in [the] Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions.' Uncontroversially, this provision stipulates that the Charter guarantees must be interpreted in line with more protective provisions of EU law and international law, as far as the latter

[560] See eg Case C-249/11 *Byankov*, EU:C:2012:608, para 47 (Article 2 of Protocol No 4 to the Convention: Freedom of movement).
[561] Case C-601/15 PPU *N.*, EU:C:2016:84, paras 45–46.
[562] For a recent analysis, see S O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 37 at 42–45.
[563] See eg Joined Cases C-217/15 and C-350/15 *Orsi*, EU:C:2017:264, para 15 (concerning *ne bis in idem*).
[564] See eg Case C-400/10 PPU *McB*, EU:C:2010:582, paras 53–57 (concerning Article 8 of the ECHR and Article 8 of the Charter).

provisions are binding EU-wide.[565] The reference to 'Member States' constitutions' is more controversial.

On an isolated reading of this provision, national judges might very well reach the logically defensible conclusion that in every case before them, the material standard of the Charter can be wholly replaced by a higher standard of protection provided for by the national constitution. However, such a reading would not sit well with the principle of primacy of EU law. The CJEU clarified the interpretation to be given to Article 53 of the Charter in *Melloni*. It held that 'Article 53 of the Charter confirms that […] national authorities and courts remain free to apply national standards of protection of fundamental rights, *provided that* the level of protection provided for by the Charter, as interpreted by the Court, and *the primacy, unity and effectiveness of EU law are not thereby compromised*.'[566] On the facts, this meant that the Spanish court in *Melloni* could not refuse to execute a European arrest warrant in order to protect the fundamental rights of the person concerned guaranteed by the Spanish constitution, given that the grounds for non-execution of the European arrest warrant are exhaustively listed in EU secondary law.[567]

Even though the CJEU case law on Article 53 is scarce, it is safe to say that when a national judge deals with a case falling within the scope of EU law, he or she can only apply stricter national fundamental rights guarantees after verifying (through a preliminary ruling, if necessary) that this would not compromise the primacy, unity and effectiveness of EU law. This condition will never be fulfilled if an act of secondary law sets a uniform level of protection without allowing the Member States to deviate from that level in a more stringent direction. In other words, the national judge must examine that the margin of manoeuvre left to the Member States by the EU secondary act in question is such that it allows for the application of more stringent national constitutional law; the judge must examine *in concreto* whether the application of the national fundamental rights standard (or any other domestic rule for that matter) is compatible with the wording and scheme of the

[565] N Cariat, 'Article 53 – Niveau de Protection' in S Van Drooghenbroeck and F Picod (eds), *Charte des droits fondamentaux de l'Union européenne – Commentaire article par article* (2nd edn, Bruylant 2019) 1321 at 1324.
[566] Case C-399/11 *Melloni*, EU:C:2013:107, para 60. For an analysis of the Court's reasoning, see eg LFM Besselink, 'The Parameters of Constitutional Conflict after Melloni' (2014) 39 *European Law Review* 531; Sarmiento, 'Who's Afraid of the Charter?', supra n 88 at 1287–1301; and E Dubout, 'Le niveau de protection des droits fondamentaux dans l'Union européenne: unitarisme constitutif versus pluralisme constitutionnel – Réflexions autour de l'arrêt Melloni' (2013) *Cahiers de droit européen* 293. For another example of a *Melloni*-type scenario, see Case C-566/17 *Związek Gmin Zagłębia Miedziowego*, EU:C:2019:390.
[567] Ibid. paras 61–63.

EU secondary act in question.[568] When the EU secondary law at issue allows for a margin of appreciation regarding the specific question concerned, the national judge must then verify, moving beyond the specific regulatory scheme in that secondary legislation, whether the application of stricter national fundamental rights guarantees does not compromise the primacy, unity and effectiveness of EU law, in general.[569]

As is the case with issues arising in the context of assessing the Charter's applicability under its Article 51(1), the application of Article 53 will primarily depend on the circumstances of the case; any CJEU case law on that provision will necessarily be casuistic. A further challenge is to know what situations are to be considered as 'entirely determined' by EU law for the purposes of Article 53.[570] The CJEU clarified that a situation is not entirely determined by EU law where EU-law provisions 'do not effect full harmonisation'.[571] The degree of harmonisation (and thus the margin of appreciation left to the Member States) will not always be clear from the EU act concerned, which may necessitate a reference for a preliminary ruling.[572] Also, just as the examination of the Charter's applicability, the examination of the possibility to apply more stringent national constitutional law requires the national judge to correctly interpret and apply EU primary and secondary law. It is not yet clear if there is any scope for national identity considerations

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[568] Cariat, *La Charte des droits fondamentaux et l'équilibre constitutionnel entre l'Union européenne et les États membres*, supra n 519 at 479 and 484. Cf. Lenaerts and Gutiérrez-Fons, supra n 56 at 1587–1591. See Case C-516/17 *Spiegel Online*, EU:C:2019:625, paras 20–22; and Case C-469/17 *Funke Medien NRW*, EU:C:2019:623, paras 31–33.

[569] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105, para 29; Case C-168/13 PPU *Jeremy F*, EU:C:2013:358, para 53; Case C-612/15 *Kolev and Others*, EU:C:2018:392; and Case C-310/16 *Dzivev and Others*, EU:C:2019:30. For an overview of how these cases fit into the scheme set down by Article 53 of the Charter, see K Lenaerts, 'The Role of the EU Charter in the Member States' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 19 at 30–32. For a commentary on *Jeremy F*, see AB Capik, 'Five Decades Since Van Gend and Costa Came to Town: Primacy and Indirect Effect Revisited' in A Łazowski and S Blockmans (eds), *Research Handbook on EU Institutional Law* (Edward Elgar 2016) 379 at 415–418; and Case C-42/17 *M.A.S. and M.B.*, EU:C:2017:936, paras 44–45. For an illustration of these rules in the case of the European Arrest Warrant, see AT Pérez, 'A Predicament for Domestic Courts: Caught between the European Arrest Warrant and Fundamental Rights' in B de Witte et al. (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar 2016) 191.

[570] See F-X Millet, 'À la lumière de la Charte' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 9 at 20 and 21.

[571] See Case C-476/17 *Pelham and Others*, EU:C:2019:624, paras 80–81; Case C-469/17 *Funke Medien NRW*, EU:C:2019:623, paras 32–33; and Case C-516/17 *Spiegel Online*, EU:C:2019:625, paras 21–22. See also F-X Millet, 'Why Article 53 of the Charter Should Ground the Application of National Fundamental Rights in Fully Harmonised Areas' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 441 at 451.

[572] J-M Sauvé, 'La Charte des droits fondamentaux de l'Union européenne: évaluer et répondre aux besoins de formation des juristes et des autorités publiques', Colloque organisé par la Commission européenne, 17 December 2014, available at: www.conseil-etat.fr/actualites/discours-et-interventions/l-application-de-la-charte-des-droits-fondamentaux-de-l-union-europeenne-par-les-juristes.

under Article 4(2) TEU to come into the equation.[573] The challenges for national judges are evident and add to the challenges that already exist as regards Article 51 of the Charter. National judges should also be aware that they can derive important assistance from CJEU judgments which dealt with more stringent national fundamental rights guarantees, but not explicitly from the standpoint of Article 53.[574]

The above analysis of the CJEU's interpretation of Article 53 should be read in conjunction with the statements of that Court in the so-called *Taricco II* judgment, from which it followed that the effectiveness of EU law provisions would, in some cases, have to give way to fundamental rights guarantees enshrined in national law.[575] In *Taricco II*, the CJEU ruled that the Italian courts did not have an obligation to disapply national rules on statutory limitation that give expression to the principle of legality protected by the Italian Constitution, even if it meant that serious VAT fraud would be left unpunished, thereby depriving a directly effective provision of primary law, Article 325 TFEU, of its *effet utile*. It is not possible to know the broader implications of this ruling on the *Melloni* line of case law, which is in part due to the cryptic reasoning of the CJEU.[576]

The CJEU's interpretation of Article 53 is also a key element in answering the question of whether national courts have a duty to effectively put the Charter to judicial use in a given case.[577] This is a different question to the question of the Charter's applicability under its Article 51. As explained above, in cases where the standard of fundamental rights

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[573] For a discussion, see Safjan, Düsterhaus and Guérin, supra n 114; M de Visser, 'Case Notes: Dealing with Divergences in Fundamental Rights Standards: Case C-399/11 Stefano Melloni v. Ministerio Fiscal' (2013) 20 *Maastricht journal of European and comparative law* 576 at 582–586; D Ritleng, 'Les constitutions nationales et la Charte des droits fondamentaux de l'Union européenne' in F Berrod et al., *Europe(s), droit(s) européen(s): une passion d'universitaire: liber amicorum en l'honneur du professeur Vlad Constantinesco* (Bruylant 2015) 491; NN Shuibhne, 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law' (2009) 34 *European Law Review* 230; and LFM Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 *Utrecht Law Review* 36.

[574] See eg Case C-168/13 PPU *F.*, EU:C:2013:358. For other examples, see Cariat, *La Charte des droits fondamentaux et l'équilibre constitutionnel entre l'Union européenne et les États membres*, supra n 519 at 471–483.

[575] Case C-42/17 *M.A.S. and M.B.*, EU:C:2017:936, paras 51–61. For an analysis, see eg Millet, 'Why Article 53 of the Charter Should Ground the Application of National Fundamental Rights in Fully Harmonised Areas', supra n 571 at 452–455.

[576] For an analysis of this judgment, see C Rauchegger, 'National Constitutional Rights and the Primacy of EU Law: *M.A.S.*' (2018) 55 *Common Market Law Review* 1521; VH Labayle, 'Du dialogue des juges à la diplomatie judiciaire entre juridictions constitutionnelles: la saga Taricco devant la Cour de justice' (2018) *RFDA* 521; E Dubout, 'La primauté du droit de l'Union et le passage au pluralisme constitutionnel' (2018) *RTD Eur.* 563; and R Mehdi, 'Retour sur l'arrêt Melloni: quelques réflexions sur des usages contradictoires du principe de primauté', 29 March 2013, available at: www.gdr-elsj.eu/2013/03/29/cooperation-judiciaire-penale/retour-sur-larret-melloni-quelques-reflexions-sur-des-usages-contradictoires-du-principe-de-primaute/.

[577] When the national standard is different, the *Melloni* rules explained above apply.

protection has been fully harmonised at the level of EU secondary law, without any margin of appreciation left to the Member States (and Member State courts) in that specific respect, the Charter should be *the sole legal basis* on which judicial solutions are to be adopted. The Charter has an absolute claim of authority,[578] pre-empting other sources of fundamental rights from being applied.[579] National judges should not use domestic catalogues, nor the ECHR, as a formal point of reference in such cases. This, of course, does not exclude making a reference to national fundamental rights, but this should not be done in a way that would obscure the fact that the Charter is the only standard that can be validly relied on.[580] Even more importantly, it cannot be excluded to rely on the ECHR, but this should be done only in the material sense, that is, to *interpret* the Charter, and not by applying the ECHR in the formal sense, that is, as a legal basis.[581]

In 'composite' cases where the standard of fundamental rights protection regarding a specific point has *not* been fully harmonised at the level of EU secondary law, but which are nevertheless within the scope of EU law,[582] Member State courts have an obligation to ensure that the outcome and reasoning of the case are compatible with the Charter, that much is clear. It is not entirely clear whether national courts must also explicitly put the Charter into operation in cases which raise a genuine fundamental rights issue or whether they can rely solely on equivalent national standards. Under one view, national courts are not obliged to put the Charter into operation if the Charter and national standards are equivalent; they can rely in their reasoning on the national standard or the ECHR (depending on the national rules in that area) as the main standard and even a sole legal basis, with the Charter only being there to confirm, reinforce or complement.[583] We contend that the Charter should not be completely left out of the reasoning in a case that comes within the scope of EU law and raises a genuine fundamental rights issue. The Charter should be present in the reasoning if only to make a transparent and reviewable conclusion that the minimum level of protection guaranteed by the Charter is respected. The Charter's claim of authority in this type of case

[578] We borrow this term from E Spaventa, 'Should We "Harmonize" Fundamental Rights in the EU? Some Reflections about Minimum Standards and Fundamental Rights Protection in the EU Composite Constitutional System' (2018) 55 *Common Market Law Review* 997 at 1005.
[579] Millet, 'À la lumière de la Charte', supra n 570 at 18.
[580] National standards could be used to reinforce solutions based on the Charter.
[581] There is a gradual tendency in recent CJEU decisions to only frame the reasoning in terms of the CJEU Charter case-law, with only cursory references to the ECHR and no references to the jurisprudence of the ECtHR: see S Platon, 'L'articulation entre la Charte, les droits fondamentaux nationaux et le droit de la Convention européenne des droits de l'homme' (2020) *Revue de l'Union européenne* 553.
[582] *Fransson*, para 29.
[583] Półtorak, supra n 77 at 19.

may not be absolute, but Member State courts are still under a general and systemic obligation to read the applicable EU rules in the light of the Charter, not in the light of national constitutions. In any event, the equivalence between the Charter and national constitutions in terms of protecting specific rights in specific circumstances, as per CJEU and national case law, should not be presumed automatically and implicitly. In cases raising a genuine fundamental rights issue, the equivalence should be addressed explicitly, and the Charter should thus be put into operation at least alongside the national catalogue.

3. THE ROLE OF THE CHARTER IN THE REASONING OF CZECH ADMINISTRATIVE COURTS

This section first looks at the ways in which the Czech *Nejvyšší správní soud* (NSS) gives effect to the Charter in its reasoning. It constructs a typology of legal effects of the Charter based on the patterns emerging in the case law (Section 3.1). The discussion then turns to regional administrative courts and their engagement with the Charter (Section 3.2). For a brief description of the Czech administrative justice system, we refer the reader to the brief remarks made above.[584]

3.1 The practice of the *Nejvyšší správní soud*

Having reviewed the case law of the NSS, it seemed most appropriate, for analytical purposes, to group the various modes of utilisation of the Charter into two large categories, even though those categories are not juridically discrete and can overlap. Under the first broad category, we have regrouped cases which are not *primarily* about reviewing national law or EU secondary law against the Charter (that is, where the NSS does not *primarily* deal with the question of whether a certain national measure is compatible with the Charter), but where the Charter is still present, to varying degrees, in the fundamental rights background of a case (Section 3.1.1). Under the second broad category, the Charter is used – in various configurations and with varying intensity – within a reasoning specifically targeted at verifying whether a national measure is compatible with the Charter (Section 3.1.2). To complete the picture, this section also discusses the use of the Charter as a comparative argument (Section 3.1.3).

[584] See Section I.3.1.

Outside of the broad categories just mentioned, many NSS decisions contain various descriptive and incidental Charter cross-references that cannot be considered as instances of 'giving effect' to the Charter. Frequently, a reference to the applicant's Charter-based plea or argument will be the only reference to the Charter in a court decision. A Charter reference will sometimes appear in the section summarising previous decisions in the case, for example, the regional court's decision contested before the NSS[585] or the decision of the administrative authority.[586] The Charter has appeared in various *in eventum* statements and *obiter dicta*, which are hard to classify but, in any event, not of importance for the outcome of the case.[587] The Charter can also 'accidentally' appear in the text of the judgments through direct quotes.[588] While these types of references are uninteresting from the material point of view, it is important to note that they make up for a significant part of the analysed data set: when looking at Charter references from a quantitative perspective,[589] the mass of insubstantial references must be taken into account.

3.1.1 Charter as part of the fundamental rights background of a case: From ornaments to indirect effect in all shapes and sizes

The types of the Charter's legal effects under this broad category largely coincide with EU-consistent interpretation of national law (and EU secondary law) with the Charter. However, as will be made clear below, some references to the Charter are so insignificant for the solution of the case that it is hard to speak of any, let alone indirect, legal effect being given to the Charter. The degree of prominence given to the Charter in the NSS's reasoning thus varies: it can be merely ornamental and thus negligible (Section 3.1.1.1), it can be more prominent but still weaker than the effect given to a provision of EU secondary law (Section 3.1.1.2) or it can be very significant, if not decisive (Section 3.1.1.3).

[585] See eg NSS, 2 Afs 50/2009-102, 12 May 2010; NSS, 1 As 5/2017-76, 13 July 2017; NSS, 6 Azs 242/2016-25, 13 December 2016; and NSS, 6 As 130/2017-23, 25 April 2018.
[586] See eg NSS, 4 Azs 32/2018-56, 20 April 2018.
[587] NSS, 5 Afs 62/2012-36, 29 April 2013; NSS, 4 Afs 56/2014-35, 21 August 2014; NSS, 3 Ads 37/2012-30, 1 April 2014, para 73; NSS, 5 Azs 134/2017-24, 25 September 2017, para 25 (remark on the possible relevance of Directive 2004/38/EC, and the right of free movement under Art 21 TFEU and Art 45 of the Charter, if it is ascertained that the applicant also has British nationality); NSS, 6 Azs 324/2016-38, 15 February 2017, para 17 (remark on the possibility to challenge before a court a decision by which a Member State to which an applicant for international protection was transferred under the Dublin III Regulation rejects his/her application, as guaranteed in Art 47 of the Charter).
[588] NSS, 9 As 121/2011-111, 23 October 2012 (citation of the preamble of a Directive).
[589] See Blisa, Molek and Šipulová, 'Czech Republic and Slovakia', supra 25.

3.1.1.1 Ornamental, mostly panoramic references

This category includes references to the Charter as part of a general and purely descriptive statement that such and such right or principle is enshrined in the Charter or other fundamental rights catalogues. In such expository outlines, the Charter reference has no ascertainable added value and is not an indispensable part of the court's reasoning, let alone the central line of argument, at least to the extent the court's reasoning was externalised in the text of the decision. The NSS will sometimes complement a reference to the applicable provision of the Czech Charter by remarking that the same right is also enshrined in the Charter.[590] The Court sometimes offers a panoramic view of the different fundamental rights standards by assembling – *ad abundantiam* – a chain of materially equivalent fundamental rights provisions. For example, in *P. K. v Nejvyšší správní soud*, which concerned the anonymisation of court decisions involving a natural person acting in a professional capacity, the NSS observed that

> the publication of court decisions must naturally be restricted where a publication of the entire decision would interfere with the right to privacy under Article 10 of the [Czech Charter] and Article 8 of the [ECHR], namely the right to information self-determination […], or the protection of personal data within the meaning of the [General Data Protection Regulation] and Article 8(1) of the EU Charter of Fundamental Rights.[591]

This was the only mention of the Charter or EU law in the decision, and the case was decided on the authority of previous case law of the NSS and the Constitutional Court, which was in turn based on the Czech Charter and the ECHR.

In *H. P. v Regional Directorate of the Plzeň Region, Foreign Police Section*, a detention case concerning the absence of a reasonable prospect of removal, the NSS opened its analysis by an overview of the fundamental rights background of the case and

[590] NSS, 7 As 65/2017-30, 22 June 2017, para 21.

[591] NSS, 9 As 429/2018-35, 6 February 2019, para 16. See also eg NSS, 6 As 21/2007-109, 14 May 2008; and NSS, 5 As 15/2011-116, 29 March 2012 (violation of the Broadcasting act). See also two cases in which the NSS applied the provisions of the Advertising Regulation Act No 40/1995 Coll. that ban advertisements dangerous for children and implement Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 298/23 (now repealed). The NSS completed the exposition of applicable law by saying: 'The necessity of increased protection of children and minors also stems from human rights and freedoms catalogues. Under Article 32(1) second sentence of the [Czech] Charter of Fundamental Rights and Freedoms, "special protection is guaranteed to children and adolescents". It can also be referred to the Charter of Fundamental Rights of the European Union, according to which children have the right to such protection and care as is necessary for their well-being, and to the analogous Convention on the Rights of the Child and others': NSS, 7 As 65/2017-30, 22 June 2017, para 21; and NSS, 5 As 51/2017-28, 30 August 2017, para 12.

included a reference to Article 6 of the Charter (right to liberty and security), albeit in a rather unflattering position in a bracket and after a reference to the International Covenant on Civil and Political Rights.[592] The case was decided on the basis of the ECHR and the Returns Directive 2008/115/EC. In subsequent cases concerning the same issue, the NSS repeated the following formula:

> The condition of the so-called reasonable prospect of achieving the aim of detention is not explicitly laid down in the Act on the Residence of Foreign Nationals, but it results from Article 15(4) of Directive 2008/115/EC […]. By this provision, the Directive stresses the importance of the prohibition of arbitrary deprivation or limitation of liberty [see Article 5(1)(f) of the Convention on the Protection of Human Rights and Fundamental Freedoms, Article 6 of the Charter of Fundamental Rights of the European Union or Article 8(2) of the Charter of Fundamental Rights and Freedoms].[593]

There, the Charter reference was part of the description of the fundamental rights rationale underlying an act of secondary law, without any independent role or ascertainable impact.[594]

In another detention–extradition case, *S. A. H. v Regional Police Directorate of Prague*, the NSS referred to the principle of *non-refoulement* as enshrined in Article 3 of the ECHR, Articles 4 (prohibition of torture and inhuman or degrading treatment or punishment) and 19 of the Charter (protection in the event of removal, expulsion or extradition) and Directive 2008/115/EC.[595] Again, the reference to the Charter only served to provide background to the explicit non-refoulement rule in § 179(1) and (2) of the Act on the

[592] NSS, 7 As 79/2010-150, 23 November 2011, paras 21–24, subsequently applied in NSS, 7 As 79/2010-164, 23 December 2011 and in many similar cases: see eg NSS, 5 Azs 182/2015-34, 22 March 2016; and NSS, 7 Azs 11/2016-30, 24 March 2016.

[593] NSS, 10 Azs 101/2017-28, 8 July 2017, para 11; NSS, 10 Azs 152/2017-31, 27 July 2017, para 11; NSS, 3 Azs 115/2017-39, 28 June 2018, para 14; NSS, 3 Azs 73/2018-27, 20 February 2019, para 16; NSS, 1 Azs 272/2018-27, 21 February 2019, para 22; and NSS, 1 Azs 208/2019-25, 21 October 2019, para 14. For a similar panoramic reference in the context of the realistic prospect of a transfer to Hungary under the Dublin III Regulation, see NSS, 10 Azs 256/2015-55, 6 May 2016, para 20. Referred to in NSS, 2 Azs 288/2015-43, 25 May 2016, para 16.

[594] See also RC in Hradec Králové, 43 A 6/2020-43, 21 December 2020, para 17. For another such reference to the Charter, see NSS, 9 As 58/2010-119, 16 November 2011 (Directive 2003/86/EC on the right to family reunification 'is based on the principle of protecting the family, respect for family life and respect for the fundamental rights and principles recognised in particular in Article 8 [of the ECHR] and in the EU Charter of Fundamental Rights'. In this decision, the NSS included a pedagogical paragraph about EU fundamental rights protected through general principles of Union law. For a slightly stronger reference to Article 6 of the Charter in a detention case which the NSS made little short of 10 years later, see NSS, 9 Azs 166/2020-27, 21 October 2020. Similar is a 'see also' cross-citation to the Charter when referring to EU secondary law provisions containing fundamental rights guarantees: see eg NSS, 6 Azs 236/2019-73, 12 May 2021, para 36: a reference to Article 10(1) of the Charter in relation to Article 10(1)(b) of the 2011/95/EU Qualification Directive.

[595] NSS, 5 Azs 7/2016-22, 25 February 2016. The relevant passage of the reasoning was quoted in 7 Azs 321/2015-29, 10 March 2016. For an identical reasoning, see also NSS, 9 Azs 3/2016-66, 7 April 2016, para 32; NSS, 9 Azs 2/2016-71, 14 April 2016, para 26; and NSS, 9 Azs 28/2016-31, 14 April 2016, para 25. For the same references, see also NSS, 8 Azs 156/2015-44, 30 June 2016, para 23.

Residence of Foreign Nationals. Interestingly, with effect from July 2019, § 179(2) now contains an explicit reference to Article 3 of the ECHR.[596]

The NSS mentioned the Charter in a similarly panoramic manner when making a general point about the distribution of the burden of proof between the administrative body and a third-country national who applied for temporary residence on one of the grounds in the Act on the Residence of Foreign Nationals, under which he needed to prove that he was in a permanent non-marital relationship with an EU citizen with whom he lived in the same household.[597] According to the NSS, it is for the applicant to present statements and proofs to show that these conditions, which concern the private and family life of the applicant and other persons, are fulfilled because

> [t]he possibility for an administrative authority to ascertain those facts through investigation is very restricted, given that they constitute the applicant's private sphere protected by the fundamental right to respect for private and family life within the meaning of Article 8 of the [ECHR], Article 10(2) of the [Czech Charter] and – *when applied to a situation within the scope of Union regulation* – Article 7 of [the Charter].[598]

The solution of the case turned not on fundamental rights but on the facts, that is, on the appreciation of whether the statements and proofs presented by the applicant together with the information known to the administrative authority were sufficient. The NSS held they were. As evidenced by the '*in eventum*' reference to the Charter – which strongly implies a lack of interest in whether the Charter was even applicable[599] – the NSS only wished to mention that the fundamental right in question was also contained in the Charter, to make the expository reference complete.

The same general reference to the Charter in the context of the applicant's procedural obligations and the corresponding limitation of administrative authorities' investigative powers appeared in two cases concerning § 119a(2) of the Act on the Residence of Foreign

[596] As amended by Act 179/2019 Coll.
[597] NSS, 6 As 30/2013-42, 25 September 2013. See § 15a(4)(b) of the Act on Foreign Nationals.
[598] Ibid. para 25 (emphasis added). For the same wording, see also NSS, 6 As 95/2013-41, 6 November 2013, para 24.
[599] The case was outside the scope of EU law since the EU citizen sponsor was, in fact, a Czech citizen; therefore, Directive 2004/38/EC did not apply nor did any other triggering norm, at least not by virtue of EU law. Admittedly, the Czech legislator chose to extend the rules on family members of EU citizens to family members of (stationary, non-EU-moving) Czech citizens to prevent reverse discrimination. According to the NSS, in this case of gold-plating, the relevant provisions of the Act on the Residence of Foreign nationals must be interpreted in conformity with the EU Directive: see 3 As 4/2010-151, 26 July 2011, para 47. Therefore, the Directive arguably applied (merely) 'through the operation of the national legislation' (Joined Cases C-297/88 and C-197/89 *Dzodzi*, EU:C:1990:360, para 42), as did arguably the Charter.

Nationals, which provides that a foreign national cannot be expelled if this would result in a disproportionate impact on his or her private or family life.[600] By a curious paradox, the reference to the Charter was part of an argument which was contrary to the applicant's interests in those particular disputes. Finally, a few other extradition judgments contain the same general reference to the Charter – including the (non)applicability disclaimer – in the introduction to the substantive assessment under § 119a(2) of the Act on the Residence of Foreign Nationals.[601] It was, however, the ECHR and the ECtHR's case law that the NSS applied in each of those cases to assess the potential disproportionate impact on private or family life, without any other role given to the Charter, even though the Charter was applicable.

As we saw in the many examples cited above, the Charter is often mentioned in passing, as a marginal point, quite often as only one of many fundamental rights instruments. It is this kind of Charter use that has been widely criticised by commentators as superficial and of no added value. In the cases analysed next, the added value of the Charter in the reasoning is more easily ascertainable.

3.1.1.2 Indirect effect of EU secondary law with the Charter as a reinforcer

The provisions of EU secondary law and national implementing provisions frequently contain or refer to fundamental rights guarantees. Some secondary law acts provide for a concrete legal framework to implement such guarantees.[602] Logically, it is possible to reach a Charter-compliant solution solely based on such secondary-law provisions.[603] In this context, it is hardly surprising that the NSS will consider the applicable secondary-law acts (and their fundamental rights provisions) as its primary point of reference. However, it will often interpret such secondary-law acts in the light of the Charter to reinforce the reasoning and highlight the fundamental rights dimension of the case. The following are some examples of where this happened.

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[600] NSS, 6 As 143/2013-20, 6 February 2014, para 11; and NSS, 6 Azs 90/2015-32, 25 June 2015, para 18. See also NSS, 6 Azs 182/2015-20, 18 November 2015, paras 18 and 23.

[601] NSS, 6 Azs 41/2016-28, 4 May 2016, paras 26–41 (violation of the ECHR found in para 36); NSS, 6 Azs 20/2016-36, 3 March 2016; NSS, 6 Azs 191/2016-45, 5 October 2016; NSS, Azs 72/2016-31, 18 May 2016, para 29; and NSS, 6 Azs 276/2016-22, 25 January 2017, para 27.

[602] This is the case eg of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

[603] For example, NSS, 4 Azs 193/2017-75, 21 December 2018. For comparison, see also Case C-63/15 *Ghezelbash*, EU:C:2016:409, where the CJEU interpreted Article 27 of the Dublin III Regulation ('The applicant […] shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.') without an explicit reference to Article 47 of the Charter.

In *V. T. P. v Appeal Commission on the Residence of Foreign Nationals*, the applicant was refused a temporary residence permit with a view to family reunification on the ground that there was 'a substantiated risk that [he] might endanger the security of the Czech Republic or might materially violate the public order'.[604] The applicant challenged the administration's finding, confirmed by the Municipal Court in Prague, that he presented a risk to public order. The NSS found merit in that challenge, and it called on EU law to find it. The Court emphasised the need to interpret the notion of material violation of the public order with due regard to the Family Reunification Directive 2003/86/EC and especially its purpose and objective as specified in its Recital 2, which refers to Articles 8 of the ECHR and the Charter. 'It is the family life that is the basic value upon which the Family Reunification Directive is based and whose protection is inherent in the Directive.'[605] The NSS then referred to two provisions of the Directive, according to which the Member States must have due regard to the best interests of minor children and to the nature and solidity of the applicant's family relationships and the duration of his or her residence in the Member State. In support of the restrictive interpretation of 'a substantiated risk of material violation of the public order', the NSS cited two CJEU judgments, one concerning family reunification and the other free movement and residence of EU citizens. This interpretation applied to the facts led the NSS to conclude that neither the illegal stay on the territory nor the offences of low gravity committed by the applicant constituted a sufficiently serious risk to public order that would justify rejecting his application.[606] This case illustrates well that when a specific fundamental right is integrated into secondary legislation, and even more so when the principal purpose of a piece of secondary legislation is to provide detailed provisions to implement a specific fundamental right, the court will typically rely on the indirect effect of the secondary-law provisions, with the Charter's indirect effect being only very residual. However, even in these circumstances, the Charter may still facilitate a *pro-liberate*

[604] § 87d(1)(b) Act on the Residence of Foreign Nationals; and NSS, 7 As 6/2012-29, 19 April 2012.
[605] Ibid.
[606] Ibid. See also NSS, 3 Azs 237/2016-37, 26 April 2017, in which the NSS relied on the same interpretation in another extradition case, referring to the need to 'take into consideration' the Family Reunification Directive. The NSS cited passages from two CJEU judgments recalling the links of that Directive to the protection of fundamental rights (ibid.). The indirect effect of the Directive (the NSS cited Case 14/83 v*on Colson*, EU:C:1984:153) and the very indirect effect of the Charter (as a fundamental rights background of the Directive) was one of the elements that led the NSS to conclude that the extradition decision was unlawful. In NSS, 9 As 58/2010-119, 16 November 2011, the NSS primarily based this part of its analysis on the ECHR.

interpretation of secondary-law provisions, as arguably happened in this case, where a vague legal notion needed to be applied in a fundamental rights-conform way.[607]

Another temporary residence case in which a strong indirect effect of a directive was combined with a weaker, confirmatory indirect effect of the Charter was *M. R. v Appeal Commission on the Residence of Foreign Nationals*.[608] A question arose how to interpret the notion of 'family members' of EU citizens under § 15a(3) of the Act on the Residence of Foreign Nationals. The Regional Court in Prague interpreted the notion restrictively, only to cover 'a relationship between persons based on consanguinity or adoption' within the meaning of § 771 of the Czech Civil Code, which defines the 'family relationship'.[609] On cassation, the NSS held that since the provision implements Article 3(2)(a) of Directive 2004/38/EC, it must be interpreted in conformity with the content and aim of that Directive.[610] The NSS pinpointed a passage in the CJEU judgment in *Rahman and Others*, in which the CJEU interpreted the objective of Article 3(2) of the Directive to be the facilitation of entry and residence for persons who 'maintain close and stable family ties with a Union citizen on account of specific factual circumstances'.[611] The NSS opined that it was possible to infer from that passage that the existence of a family relationship within the meaning of Article 3(2) of the Directive '[could] be derived from the existence of a factual dependence, and not solely from consanguineous ties or other formalised family relationships'.[612] The NSS continued that '[t]his conclusion is supported by the Opinion of Advocate General, according to which the margin of discretion accorded to the Member States is limited by the obligation to respect the right to private and family life enshrined in Article 7 of the [Charter]'.[613] The NSS was explicit about relying on the Charter to reinforce its interpretation of the Directive and – consequently – the national provision in question.

[607] It is worth noting that the NSS employed the same reasoning based on the Family Reunification Directive in *M. S. v Appeal Commission on the Residence of Foreign Nationals*: NSS, 7 As 152/2012-51, 29 August 2013. Here, the applicant, a father of a Czech national with whom he lived in the same household and who he looked after and provided for, had previously resided in the territory unlawfully and had been convicted for counterfeiting and falsifying authentic acts. The one fundamental flaw of that reasoning was that the Family Reunification Directive only applies to family members of non-EU nationals residing lawfully on the territory of the EU, which was not the case here as the applicant was a family member of an EU national. For a criticism in this sense, see P Pořízek, 'Výklad výhrady veřejného pořádku v jednotlivých ustanoveních zákona o pobytu cizinců (část I. Občané EU a jejich rodinní příslušníci)' in D Jílek and Pořízek, *Ročenka uprchlického a cizineckého práva 2016*, 2nd extended edition (Kancelář veřejného ochránce práv 2018) 108 at 132 and 185. For the same problem, see NSS, 6 Azs 96/2015-30, 25 August 2015.
[608] NSS, 4 Azs 230/2016-54, 27 April 2017.
[609] RC in Prague, 45 A 24/2015-51, 13 October 2016.
[610] NSS, 4 Azs 230/2016-54, para 19.
[611] Case C-83/11 *Rahman and Others*, EU:C:2012:519, para 32.
[612] NSS, 4 Azs 230/2016-54, para 24.
[613] Ibid. para 25.

Notably, in this case the EU citizen sponsor was a Czech citizen; therefore, Directive 2004/38/EC (and the Charter) only applied 'through the operation of the national legislation' within the meaning of the CJEU's *Dzodzi* case.[614]

In *FTV Prima v Council for Radio and Television Broadcasting* the NSS was interpreting the conditions for imposing sanctions for failure to comply with advertising rules under the Broadcasting Act, namely a provision according to which a broadcaster must first be given an official warning and an opportunity to take corrective action before a sanction can be imposed.[615] The case concerned the obligation to keep advertising distinct from other broadcasts, and the question was whether an official warning given under the said provision in one particular case for one particular infraction is also valid for subsequent infractions of the same kind. The Sixth Chamber of the NSS disagreed with a previous decision of the NSS (which required a new warning for each infraction) and decided to refer the matter to the Extended Chamber. Its referring decision was based on EU-law arguments: the section on applicable law referred to the obligation to ensure the separation of advertising laid down in the audio-visual media directives and to Article 38 of the Charter ('Union policies shall ensure a high level of consumer protection'). The main argument of the Sixth Chamber was as follows:

> […] it is clear from unequivocal Union rules that each Member State has an obligation to protect consumers and recipients of audio-visual media services by punishing any breach of the obligation to clearly separate advertising from other broadcasts. Consumer protection is one of the constitutional values of the Union, and the right of the European consumer to be protected is one of the fundamental rights of the EU citizen. […] For this reason, an interpretation which would mean that the prohibited activity is not always effectively sanctioned, or even that the first violation in each individual case is always unpunishable, cannot be accepted.[616]

There, the Sixth Chamber based its interpretation on the duty to ensure effective national enforcement of EU directives, bolstered by a reference to effective consumer protection enshrined in the Charter. This approach clearly bears the characteristics of EU consistent interpretation of national law (indirect effect of EU law). However, the Extended Chamber correctly pointed out the problem with such an interpretative approach in its response to the referred question. While it agreed with the Sixth Chamber that a warning given in one particular case stays valid for subsequent infractions of the same kind, it reached that

[614] See text accompanying nn 210–214.
[615] NSS, 6 As 26/2010-66, 17 March 2011.
[616] Ibid. para 28.

conclusion solely on the basis of a purposive interpretation of the Broadcasting Act, pointing out that the duty of consistent interpretation of EU law cannot result in aggravating liability for an administrative infraction.[617] Even though the Charter reference in the Sixth Chamber decision was merely a contextual element meant to reinforce the interpretation of the relevant EU directives and even though the case was finally decided on other grounds, the two cases bear testimony to the NSS's readiness to give effect to the Charter.

Another situation in which fundamental rights provisions of EU secondary law took *de facto* precedence over the Charter was an administrative detention case, in which the Charter was nevertheless a significant part of the fundamental rights background.[618] The case concerned the application of § 124(1) of the Act on the Residence of Foreign Nationals, which sets out the conditions in which foreign nationals can be detained. The NSS recalled that the provision transposes Article 15 of the Returns Directive 2008/115/EC and continued:

> Detention under the Returns Directive constitutes an interference with personal liberty protected by Article 8 of the [Czech] Charter of Fundamental Rights and Freedoms, Article 5 of the [ECHR] and Article 6 of the [EU Charter]. It results in a very appreciable interference with one of the most significant fundamental rights of the individual and can therefore be admissible only under strict conditions defined not only by the Act on the Residence of Foreign Nationals, but most importantly by the constitutional order of the Czech Republic [reference to 7 As 79/2010-150].
>
> Pursuant to Article 6 in conjunction with Article 52(1) second sentence of the [Charter], the interference with the right to personal liberty is permissible only if it is necessary. This fundamental rule is elaborated in Article 15(1) *in fine* of the Returns Directive: *Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence*. Pursuant to Article 15(4) of the Returns Directive, *when it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately*.[619]

On the facts, the NSS concluded that the grounds for detention ceased to exist after 14 days of detention, which was set at 60 days. The Court relied on Article 15(1) of the Returns Directive but showed awareness of the European fundamental rights rationale of that provision. Given the eminently European dimension of the case, it is regrettable that the

[617] NSS, 6 As 26/2010-101, 3 April 2012, para 29. The limits of the indirect effect of EU law proved decisive for the solution of the case NSS, 1 As 79/2016-43, 9 March 2017 (see text accompanying nn 675–677).
[618] NSS, 9 Azs 166/2020-27, 21 October 2020.
[619] Ibid. paras 15 and 16.

Charter was not cited in a restatement of the fundamental rights guarantees in the obiter at the end of the judgment, which only referred to the Czech Charter and the ECHR.[620] This points to a lack of specific Charter methodology: whether the Charter is included in the reasoning will sometimes be a matter of accident.

An interesting interaction between the Charter and a directive happened in *ŠKO-ENERGO v Appellate Financial Directorate*, which concerned the gift tax imposed upon the free-of-charge acquisition of greenhouse gas emission allowances.[621] At issue was the compatibility of this tax with Article 10 of Directive 2003/87/EC, according to which '[f]or the five-year period beginning 1 January 2008, Member States shall allocate at least 90% of the allowances free of charge'.[622] After seeking interpretative guidance from the CJEU,[623] the NSS annulled the contested decisions and instructed the Appellate Financial Directorate to verify whether the ceiling of 10 per cent was respected in practice. Any taxation going beyond that ceiling would have to be set aside based on the directly effective Article 10 of the Directive.[624] The Court then emphasised that when directly applying the Directive, 'it is […] necessary to respect the principle of equality, which is a general principle of law on both the national and Union levels (see Chapter III of the [Charter])'.[625] This would mean that the compliance with the 10% ceiling would have to be assessed separately and individually in relation to the total of allowances allocated to each entity concerned. The principle of equality is contained in the Directive itself,[626] as the NSS admitted, so the reference to the Charter was not indispensable, but it was certainly very well placed, highlighting the fundamental character of the guarantee in question.

H. N. v Ministry of the Interior is an example of a Charter-reinforced interpretation of a directly applicable EU-law norm, namely the Schengen Borders Code.[627] Mr H. N. was refused entry to the Czech Republic on the ground that he did not fulfil all the entry conditions in Article 5(1) of the 2006 Schengen Borders Code.[628] He then applied for

[620] Ibid. para 26.
[621] NSS, 1 Afs 6/2013-184, 9 July 2015.
[622] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32.
[623] Case C-43/14 *ŠKO-ENERGO*, EU:C:2015:120.
[624] NSS, 1 Afs 6/2013-184, para 82.
[625] Ibid. para 83. The same reasoning was reproduced in NSS, 7 Afs 103/2012-91, 27 November 2015.
[626] Annex III, para 5 of the Directive.
[627] NSS, 4 Azs 200/2014-33, 5 December 2014.
[628] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1 (now repealed).

asylum, but his application was considered purely speculative and was refused on the ground that he posed a threat to public order under § 73(4)(c) of the Asylum Act. The Municipal Court in Prague annulled the decision, holding that the alleged threat to public order had not been properly substantiated.[629] The Ministry of the Interior initiated cassation proceedings, arguing, inter alia, that allowing Mr H. N. to enter the territory would amount to a violation of Article 5(1)(b) of the 2006 Schengen Borders Code, which requires that the third-country national concerned is in possession of a valid visa. However, the NSS held that the applicable regime was that of the Asylum Act and that

> when arguing on the basis of the Schengen Borders Code, the [Ministry of the Interior] should also have taken account of this Code's Article 5(4)(c), according to which third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory, inter alia, because of international obligations, and also Recital 20 of the same Code, according to which *this Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union*.[630]

This demonstrates that declaratory fundamental rights Recitals, whose added value has been called into question,[631] have a meaning.[632] They serve as a useful reminder to all bodies called to apply the given piece of legislation (and also to litigants[633]) that it is important to take account of the possible fundamental rights aspects of the cases before them.

Let us conclude this section by an example of a confirmatory Charter reference, which offers a glimpse of the Charter's potential to go beyond EU secondary law guarantees. *X. Y. v Ministry of the Interior* was an asylum case that turned on procedural guarantees in assessing the credibility of an asylum claim, namely the applicant's conversion to

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[629] MC in Prague, 1 A 46/2014-12, 23 September 2014.
[630] NSS, 4 Azs 200/2014-33, para 34 (emphasis in original). An identical argumentation appeared in NSS, 3 Azs 175/2014-50.
[631] R Král, *Směrnice EU z pohledu jejich transpozice a vnitrostátních účinků* [*EU Directives from the Point of View of their Transposition and National Effects*] (Beck 2014) at 29. For a discussion of those recitals, see R Tinière, 'Les droits fondamentaux dans les actes de droit dérivé de l'Union européenne: le discours sans la méthode' (2013) *RDLF* Chron. No 14, available at: www.revuedlf.com/droit-ue/les-droits-fondamentaux-dans-les-actes-de-droit-derive-de-lunion-europeenne-le-discours-sans-la-methode-article/.
[632] For another example of a court citing the fundamental rights Recital of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ L 243/1, see MC in Prague, 8A 22/2017-47, 29 August 2017. The CAA of Lyon referred to the Charter Recital of Directive 2004/38/EC as a supporting argument when dismissing a Charter-based claim: since the provisions of the Directive were respected in the case in hand and since the Directive complies with the Charter (as stated in the Recital), there was no violation of the Charter in the case: 11LY00993, 5 January 2012.
[633] See eg NSS, 2 Azs 241/2020-29, 19 August 2020, para 7.

Christianity.[634] There, the Ministry of the Interior examined a witness – a protopriest who baptised the applicant – without giving the applicant the opportunity to be present at that hearing, which the NSS considered to violate the provisions of the Code of Administrative Procedure.[635] The NSS continued:

> In addition to the fact that [the right of the claimant to be present during the examination of witnesses] follows from […] the Code of Administrative Procedure, it is not possible to leave aside the principles of a fair trial […] under Article 36(1) of the [Czech Charter], and the right to good administration in Article 41 of the [Charter], which are applicable in any administrative procedure in which the competent national authority examines an application for international protection pursuant to the rules adopted in the framework of the Common European Asylum System (see [Case C-277/11 *M. M.*], at paras 75–95), *potentially even beyond the explicit rules laid down in the so-called Procedures Directive* […].[636]

The Court's confusion over the scope of Article 41 stems directly from the CJEU's judgment that it cited, in which the CJEU indeed held that this provision was of general application.[637] The CJEU later clarified that Article 41 is solely addressed, as its wording makes clear, to the institutions, bodies, offices and agencies of the Union, but the requirements pertaining to the right to good administration are applicable in national proceedings as a general principle of Union law.[638] This applicability issue notwithstanding, the NSS's remark *in fine* of the cited segment, in which the Court recognised the potential added value of the Charter beyond the guarantees in secondary law,[639] is remarkable as it contrasts well with the typical constellation re-emerging throughout the case law on procedural fundamental rights: the directives have a leading role within the EU-consistent interpretation, and the Charter's place is on the margins. The following section analyses cases in which the Charter's indirect effect was emancipated from the provisions of EU secondary law.

[634] NSS, 5 Azs 2/2013-26, 29 May 2014.
[635] Ibid.
[636] Ibid. (emphasis added).
[637] Case C-277/11 *M. M.*, EU:C:2012:744, paras 81–84.
[638] Case C-604/12 *H. N.*, EU:C:2014:302, paras 49–50.
[639] The NSS was arguably inspired by the CJEU judgment in *M. M.*, in which the CJEU held that the observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement: Case C-277/11 *M. M*, para 86.

3.1.1.3 Less frequent cases of a stronger indirect effect of the Charter

The indirect effect of the Charter is not always merely complementary, confirmatory or contextual. In some cases, it was a significant, if not decisive, argument which tilted the NSS's reasoning in a particular sense, determining the outcome of the case.

A stronger indirect effect of the Charter was apparent in *F. U. v Regional Police Directorate of the Plzeň Region*. The NSS was asked to pronounce itself on the relationship between two detention regimes of foreign nationals, under the Asylum Act and the Act on the Residence of Foreign Nationals.[640] The applicant was first detained under § 124(1)(b) of the Foreign Nationals Act, then re-detained (after he filed for international protection) under § 46a(1)(e) of the Asylum Act[641] and finally re-detained again under § 124(4) of the Foreign Nationals Act. The case turned on the interaction between the two last-mentioned provisions. Under § 124(4) of the Foreign Nationals Act:

> The Police shall issue a new detention decision, *where the Ministry did not issue a decision under the Asylum Act*, as regards a foreigner detained on the basis of the present Act who applied for international protection, if there are reasonable grounds to believe that he or she applied for international protection with the intention of avoiding or delaying impending deportation […], despite the fact that he or she could have applied for international protection sooner.[642]

The Regional Police Directorate interpreted the phrase 'where the Ministry did not issue a decision under the Asylum Act' to mean that it impeded parallel detention under both § 46a(1)(e) of the Asylum Act and § 124(4) of the Foreign Nationals Act. On the contrary, where the detention under § 46a(1)(e) of the Asylum Act has come to an end (that is, the Ministry of the Interior has not issued another decision on further detention under that provision), the person concerned could be detained under § 124(4) of the Foreign Nationals Act.[643]

The NSS recognised that such interpretation of the above-mentioned phrase could be, theoretically, entertained but could not be accepted given the fundamental rights

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[640] NSS, 1 Azs 412/2017-47, 7 February 2019. See also the discussion below on NSS, 6 As 146/2013-44, 2 April 2014.
[641] 'If necessary, the Ministry [of the Interior] may decide to detain an applicant for international protection […] if his/her application for international protection was made at a facility for the detention of foreign nationals and there is reason to believe that his/her application […] was made solely with the intention of avoiding or delaying impending deportation […], despite the fact that he/she could have applied for international protection sooner.'
[642] Emphasis added.
[643] NSS, 1 Azs 412/2017-47, para 29.

dimension of the case. 'If a legal norm allows for two conflicting interpretations, priority must be given to the interpretation which is more favourable to fundamental rights.'[644] In a paragraph preceding that statement, summarising the fundamental rights background of the case, the Court put the Charter first, noting that '[d]etaining a foreigner amounts to limiting the exercise of the fundamental right to liberty enshrined in Article 6 of the EU Charter'.[645] After citing the rule in Article 52(1) of the Charter on the limitation of rights, the NSS pointed to – via Article 52(3) of the Charter – the ECtHR's established case law under which 'all deprivation of liberty must not only be lawful in the sense that it must have a legal basis in domestic law, but this lawfulness also relates to the quality of the law and implies that the national law authorising a deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness'.[646] The NSS held that both detention regimes were mutually exclusive and that § 124(4) of the Foreign Nationals Act did not allow detaining a foreigner who was previously detained under § 46a(1)(e) of the Asylum Act and still enjoys the status of asylum seeker. As a result, the Court annulled the contested decision for lack of legal basis.[647] The indirect effect of the Charter was used to interpret a national provision that potentially lent itself to more interpretations, of which not all would comply with the Charter.[648]

Telefónica Czech Republic v Office for the Protection of Competition involved the extent of the power of the Czech Competition Authority to conduct a preliminary examination of a potential abuse of dominant position by Telefónica.[649] The NSS held that this power had to be exercised within the limits set by the Czech Constitution and international human rights treaties and – since the examination concerned, inter alia,

[644] Ibid. para 29.
[645] Ibid. para 23.
[646] Ibid. For the citation of the full passage, see NSS, 1 Azs 146/2019-23, para 26.
[647] Interestingly, in 4 Azs 193/2017-75, 21 December 2018, a different NSS chamber dealt with the same issue a few weeks earlier and came to the same conclusion, but on different grounds, without any reference to fundamental rights. It held that the absolute mutual exclusivity of the two regimes follows directly from the wording of § 124(4) of the Act on the Residence of Foreign Nationals, this interpretation being the only logically possible one (para 20). Nevertheless, it still corroborated (para 21) its conclusion with reference to a previous NSS judgment, *H. M. v Regional Police Directorate in Prague* (6 As 146/2013-44, 2 April 2014), which recognised the mutual exclusivity of the two detention regimes under earlier rules, namely with regard to § 124a of the Act on the Residence of Foreign Nationals, before § 124(4) of the same Act was added with effect from 18 December 2015 (by Act No 314/2015 Coll.). For cases from the same saga, see Section II.3.1.2.2.
[648] See also NSS, 9 Azs 4/2021-39, 1 April 2021, para 12, where the NSS noted that when deciding about detaining a foreign national under the Dublin III Regulation, the administration must respect the provisions of Directive 2013/33/EU and also 'take into account Article 6 of the [Charter], given that Article 28(2) of the Dublin III Regulation provides for a limitation of the exercise of the fundamental right to liberty and security'.
[649] NSS, 5 Aps 4/2011-326, 22 September 2011.

a potential violation of Article 102 of the TFEU – the EU Charter and general principles of Union law. After observing that Regulation (EC) No 1/2003 contains rules on the delimitation of competence of national competition authorities, but not detailed procedural provisions on their investigative powers, the NSS stated that it was 'highly appropriate' to look at the limits of the analogous power of the Commission to conduct investigations before formally initiating the proceedings, these limits being defined in the case law of Union courts mainly by the fundamental rights of the persons concerned and the principle of proportionality.[650] Interestingly, the Court added that Union rules and case law would be relevant even in purely national competition cases because the Czech Competition Act was largely modelled – also as regards these purely national cases – on substantive and procedural rules of EU competition law. This suggests a certain interpretative and comparative spill-over of EU law (and EU fundamental rights) in purely internal situations.[651] The NSS concluded that in the case at hand the preliminary examination conducted against Telefónica was unlawful since it went beyond what was necessary to achieve the legally authorised objectives of that examination. The Court's interpretation of the provision of the Czech Competition Act granting the power to conduct a preliminary examination was thus informed by fundamental rights safeguards, including those guaranteed in the Charter.

In *K. N. v Ministry of Justice*, the applicant challenged a decision by which the Ministry of Justice rejected his application to be included in the Register of Arbitrators authorised to settle consumer disputes.[652] The reason for the refusal was that his Slovakian law degree was not considered equivalent to a Czech one because it did not cover Czech law. The NSS heavily relied – to the point of reprinting a significant part of the reasoning – on a judgement of the Czech Constitutional Court in a similar case, according to which such an interpretation was too restrictive.[653] Besides arguments based on the TFEU free movement provisions and CJEU case law on the recognition of diplomas, the Court's reasoning drew on Article 26 of the Czech Charter and Article 15 of the EU Charter (freedom to choose an occupation) together with Article 52 of the EU Charter (any restriction to that freedom must be proportionate). The EU- and Czech Constitution-compliant interpretation

[650] Ibid. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.
[651] See Section II.3.1.3.
[652] NSS, 9 As 140/2016-46, 8 December 2016.
[653] Ibid. paras 40–42. Czech Constitutional Court, II. ÚS 443/16, 25 October 2016.

based on a combination of all these elements – including the Charter right to freedom to choose an occupation – meant that the provision of the Arbitration Act in question needed to be interpreted in such a way that the professional experience of the applicant would be considered.

In *Orion Corporation v State Institute for Drug Control*, the NSS – drawing heavily on CJEU case law – relied on the Charter to recognise that the holder of a marketing authorisation (MA) for a medicinal product used as the reference product in an application of another manufacturer for a MA for a generic product has the right to a judicial remedy to challenge the decision granting a MA for the generic product.[654] Appropriating the CJEU's reasoning in *Olainfarm* and *Astellas*,[655] the NSS held:

> Therefore, although neither Directive 2001/83 nor the Act on Pharmaceuticals provides that the holder of the MA for a medicinal product used as the reference product for the purposes of granting a MA for a generic product is to be – in addition to the applicant – a party to the procedure for the granting of a MA for that generic product, it is not permissible – with reference to Article 47 of the [Charter] – to deprive such holder of the right to challenge a decision granting a MA for such generic product.[656]

It is notable that while the CJEU derived the right to judicial review from Article 10 of Directive 2001/83/EC[657] 'in conjunction with' Article 47 of the Charter (right to an effective remedy), the NSS relied solely on the indirect effect of the Charter, emancipating the effects of the Charter from the co-applicable EU secondary law.

In *SOLUS v Office for Personal Data Protection*, the NSS was confronted with the question of whether the applicant, which maintained a database for assessing the creditworthiness of consumers, could lawfully process customers' personal data without

[654] NSS, 7 As 310/2018-47, 13 January 2020. See also NSS, 9 As 267/2020-150, 4 February 2021.
[655] Case C-104/13 *Olainfarm*, EU:C:2014:2316, para 39; and Case C-557/16 *Astellas Pharma GmbH*, EU:C:2018:181, para 36.
[656] NSS, 7 As 310/2018-47, para 40. For the same reasoning, see NSS, 7 As 297/2019-32, 13 February 2020, para 33.
[657] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L 311/67. Contrary to other cases where courts relied on Article 47 of the Charter in conjunction with a provision of secondary law containing a specific guarantee of judicial review, Article 10 of Directive 2001/83/EC is not a 'judicial-review provision'. It is a provision laying down the conditions under which the holder of a MA for a medicinal product is required to accept that the manufacturer of another medicinal product is entitled to refer to the results of pre-clinical tests and clinical trials contained in the dossier relating to the application for the MA for the former product.

their consent.[658] The question had to be addressed within the scheme of § 5(2)(e) of the Act on the Protection of Personal Data (now repealed), under which data could be processed without consent if it was 'necessary for the protection of rights or legally protected interests of the controller, recipient or other person concerned; however, such processing of personal data may not be at variance with the right of the data subject to protection of his or her private and personal life'.[659] As part of the applicable legal framework, the NSS referred to Article 10(3) of the Czech Charter (protection of personal data), Directive 95/46/EC, and Articles 8 (protection of personal data) and 52(1) (limitation of Rights) of the Charter. The Court announced having recourse to indirect effect, explaining that

> it must take account in its assessment of all the aforementioned dimensions of the protection of personal data and interpret § 5(2)(e) of the Act on the Protection of Personal Data in a manner consistent not only with the Constitution but also with EU law.[660]

As the provision in question clearly called for a proportionality assessment, the NSS further stated that '[m]ultilevel legal provisions concerning the protection of personal data lead to an intersection of different forms of the proportionality test'.[661] The analysis was done in two steps: on the general level, the Court compared the algorithms used by the ECtHR, the Czech Constitutional Court and the CJEU, and on the specific level, it applied these algorithms – as a convergent bulk – to the facts of the case. The NSS remarked that while the Strasbourg test differs from the one employed by the Constitutional Court (in that it works with the requirement of 'necessity in a democratic society' instead of the traditional German-inspired tripartite test of appropriateness – necessity – proportionality *stricto sensu*), the proportionality test employed by the CJEU 'in principle corresponded' to the one used by the Constitutional Court.[662] Importantly, the Court was not referring to a general test that would be conducted under Article 52(1), but to a test conducted in the specific framework of the Data Protection Directive 95/46/EC, namely its Article 7(f), whose content was transposed into the § 5(2)(e) of the Act on the Protection of Personal Data. From the CJEU's rich data protection case law, the Court picked several judgments which interpreted

[658] NSS, 2 As 107/2017-72, 19 April 2018. The amendment in § 20z(1) *in fine* of the Consumer Protection Act No 634/1992 Coll., which provides that consumer consent is not required, was not applicable *ratione temporis* to the case. See also the rejected constitutional complaint against that provision: Pl. ÚS 10/17, 3 November 2020.
[659] Act No 101/2000 Coll. (translation taken from www.uoou.cz/en/assets/File.ashx?id_org=200156&id_dokumenty=1837).
[660] NSS, 2 As 107/2017-72, para 43.
[661] Ibid. para 47.
[662] Ibid. paras 47–49 and 53.

Article 7(f) of the Directive when it comes to the balancing to be performed under that provision. It is interesting to note that the proportionality assessment performed in those judgments was also carried out within the scheme of that provision, that is, within the bounds of secondary law, with the Charter being mentioned only in passing or not at all.[663] Finally, it was – again – not so much the Charter, but Directive 95/46/EC that the NSS was giving indirect effect to, as we have now come to expect in cases where the secondary legislation has a strong fundamental rights rationale.

Proportionality assessment was also at the core of the judgment in *J. T. v Regional Authority of the Zlín Region*, in which the NSS was explicit about using confirmatory Charter-consistent interpretation. The case concerned the release of salary information of public sector workers under the Freedom of Information Act and raised – once again – a complex point of law of constitutional significance, namely how to reconcile the freedom of information with the protection of privacy and personal data of public sector workers.[664] At issue was § 8b of the Freedom of Information Act, which provides that '[t]he legally bound person shall communicate basic personal data about the person it has provided with public funds'.[665] The Extended Chamber was effectively asked to draw together two lines of case law within the NSS: one considered it necessary to find a balance between the two conflicting values by performing the test of proportionality in each case, while the other considered that the proportionality test had already been performed by the legislator, who expressed in the contested § 8b an automatic and general preference of the public interest over the individual private sphere of the persons concerned. The Extended Chamber opted for the latter solution and reached it purely based on a textual, systematic and purposive interpretation of the Freedom of Information Act and on the constitutional principle of proportionality.[666] It then switched to a different reference framework in a section titled 'Euro-conformity'. The Court said that 'the requirement of interpretive correction of § 8b of the [Freedom of Information Act] is based not only on constitutional grounds but also on the

[663] Case C-13/16 *Rīgas satiksme*, EU:C:2017:336 (no Charter reference); Case C-582/14 *Breyer*, EU:C:2016:779 (no reference); and Case C-468/10 *ASNEF*, EU:C:2011:777, para 40: 'the person or the institution which carries out the balancing must take account of the significance of the data subject's rights arising from Articles 7 and 8 of the Charter of Fundamental Rights of the European Union'. In Joined Cases C-92/09 *Volker und Markus Schecke and Eifert*, EU:C:2010:662, the Charter's role was naturally very prominent since the Court was reviewing the legality of secondary legislation with primary law.

[664] NSS, 8 As 55/2012-62, 22 October 2014. For a commentary on this case, see Ličková, 'Tchèquie', supra n 463 at 556–557.

[665] Act No 106/1999 Coll. Translation taken from www.mvcr.cz/soubor/act-on-free-access-to-information-1999-pdf.

[666] NSS, 8 As 55/2012-62, paras 47–86. For the same approach, see also NSS, 1 As 142/2012-32, 30 October 2012, paras 31–46.

obligation of the Czech Republic as a Member State of the European Union to use and interpret national law in accordance with European Union law',[667] in this case with Articles 7 and 8 of the Charter, which the Court found applicable.[668] The NSS argued that the proportionality assessment performed by the legislator was materially compatible with the test employed by the CJEU in *Österreichischer Rundfunk*,[669] and it attempted to distinguish (for some, not very persuasively[670]) the case at hand from *Schecke and Eifert*, in which the CJEU annulled the provisions of an EU regulation under which personal data of beneficiaries of agricultural aid were made public.[671] However, the NSS's interpretation was not shared by the Czech Constitutional Court, which in a later decision held that proportionality had to be assessed on a case-by-case basis.[672] In addition, there is a strong argument that an individualised proportionality assessment is required under EU law too.[673] It is intriguing that the Constitutional Court did not explicitly mention the Charter but instead relied on seven CJEU data protection cases.[674] It is reasonable to expect more developments, but a conflict between the national constitutional protection and the Charter does not seem likely. The NSS's judgment is interesting for being methodologically clear about the role given to the Charter, as well as for the high degree of the Charter's emancipation from EU secondary data protection law.

The decisions analysed above demonstrate that the NSS uses the Charter as a useful tool where EU secondary law does not go far enough in providing fundamental rights safeguards. Admittedly, these cases of strong indirect effect are less frequent in the case law than weaker forms of indirect effect, but this does not necessarily point to any sort of reluctance on the part of the NSS. The fact that fundamental rights guarantees are explicitly contained in EU secondary legislation means that there is lesser scope for strong indirect effect of the Charter. Besides, the judgment in *Orion Corporation v State Institute for Drug*

[667] Ibid. para 87.
[668] Ibid. para 88.
[669] Case C-465/00 *Österreichischer Rundfunk and Others*, EU:C:2003:294.
[670] V Foldová and F Nonnemann, 'Zveřejňování platů zaměstnanců veřejné sféry ve světle aktuálního rozsudku Nejvyššího správního soudu' [Publication of public workers' salaries in light of the recent judgment of the Supreme Administrative Court] (2015) *Právní rozhledy* no 2, 63, text accompanying fn 31.
[671] Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, EU:C:2010:662. In para 85, the CJEU stated that '[n]o automatic priority can be conferred on the objective of transparency over the right to protection of personal data'.
[672] Czech Constutional Court, IV. ÚS 1378/16, 17 October 2017. See also Czech Constitutional Court, IV. ÚS 1200/16, 3 April 2018. For the NSS's reaction, in which it followed the Constitutional Court, see NSS, 7 As 366/2017-54, 4 September 2018. See also NSS, 2 As 313/2017-56, 17 May 2018.
[673] See eg FRA, *Handbook on European data protection law: 2018 edition* (EU Publications Office 2018) at 65.
[674] Czech Constitutional Court, IV. ÚS 1378/16, paras 77–83.

Control demonstrated that the choice between various parts of a given EU normative scheme (that is, privileging either the Charter or a piece of secondary law) can simply be a matter of judicial technique, without any ascertainable impact on the solution of the case.

3.1.2 Charter-based review

Unlike in the decisions analysed in the preceding section, where the NSS relied on the Charter as part of the fundamental rights background of the case in ways ranging from merely ornamental references to strong indirect effect, the cases analysed below can be framed as instances of explicit and targeted Charter-based review. There, the specific question arose whether a national provision (or a rule of EU secondary law) was compatible with the Charter, and the NSS's reasoning was specifically tailored to resolve that issue. As already indicated, this distinction is helpful for analytical purposes, but it does not correspond to juridically discrete categories. For example, it cannot be excluded that the NSS uses the technique of indirect effect when called to review the compatibility of a national provision with the Charter. That said, the analytical merits of the distinction lie in the fact that the NSS's typical engagement with the Charter in the Charter-based review scenario is different from the Charter treatment in cases analysed in Section 3.1.1.

The theme running throughout the subsequent analysis is how the Charter interacts (or does not) with other legal sources. The discussion starts with cases where the Charter constituted an integral part of a composite standard of review, alongside equivalent fundamental rights provisions from other sources applied in a mutually reinforcing manner (Section 3.1.2.1). The focus then shifts to cases in which the relationship between the co-applicable standards and/or the relative weight given to each of the co-applicable instruments was a distinct issue (Section 3.1.2.2). The special category of Charter-informed Dublin review is analysed next (Section 3.1.2.3). The discussion closes with the most powerful category of the Charter's effects: the exclusionary direct effect entailing the disapplication of conflicting national law (Section 3.1.2.4).

3.1.2.1 Charter as an integral part of a composite standard of review

It was already pointed out above in the discussion about panoramic references that the Charter is often invoked by the parties and used as a standard of review by the NSS as one of several fundamental rights catalogues, usually alongside the Czech Charter of Fundamental Rights and Freedoms and the ECHR. This often leads the Court to make a

'global' declaration of (non)violation of all those instruments deemed to be, or explicitly described to be, equivalent.

For example, *GARLAND distributor v Czech Trade Inspection Authority* concerned a sanction imposed on a manufacturer of snow-blowers for violating the obligation under the EU Machinery Directive to include certain information in the instruction for use.[675] The NSS faced the problem that the Czech wording of the Directive – and the identical wording of the transposing Government Regulation – did not correspond to other language versions of the Directive. While the Czech version stipulates that '[e]ach instruction manual must contain, *if possible*, at least the following information…', the English one states – same as a few other language versions – that '[e]ach instruction manual must contain, *where applicable*, at least the following information…'.[676] A comparison of the different language versions and the Directive's purpose and general scheme led the NSS to interpret the provision in the sense that the manual must contain all the enumerated information *if they are relevant*. However, the Court admitted that the wording of the Czech transposition measures could create confusion as to the extent of manufacturers' obligations.[677] After referring to classic CJEU case law under which indirect effect cannot result in aggravating criminal liability, and observing that the same principle applies by analogy to administrative infractions, the NSS set out the fundamental rights dimension of the case:

> In the field of administrative penal law, the basic principle of *nullum crimen sine lege certa*, according to which the offence must be defined in a sufficiently clear, precise and unequivocal manner, must also be upheld (see Article 39 of the [Czech] Charter, Article 49 of the EU Charter of Fundamental Rights, Article 7 of the [ECHR], judgments of the [ECtHR] of 18 July 2014, *Ashlarba v Georgia*, complaint No 45554/08, para 33, and of 25 May 1993, *Kokkinakis v Greece*, complaint No 14307/88, para 52).[678]

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[675] NSS, 1 As 79/2016-43, 9 March 2017.

[676] Section 1.7.4.2. of Annex I to Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (recast), OJ L 157/24; Section 1.7.4.2. point (c) Annex No I of Governmental Order No 176/2008 Coll. (emphases added). The latter provision was since amended by Governmental Order No 320/2017 Coll. to say that the information must be included 'when it is relevant given the characteristics of the machinery'.

[677] NSS, 1 As 79/2016-43, paras 33 and 38. For a similar case, see NSS, 1 As 207/2017-61, 13 December 2017, paras 58–59.

[678] Ibid. para 39. The same limit to consistent interpretation (indirect effect) was recognised by the Dutch Council of State: see M Verhoeven and R Widdershoven, 'National Legality and European Obligations' in LFM Besselink, F Pennings and S Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Kluwer Law International, 2011) 55 at 62. For the slightly more varied application of this principle in the domain of French administrative sanctions, see J Bétaille et al., 'Les sanctions administratives dans les secteurs techniques', Rapport de recherche, Mission de recherche Droit & Justice, 2017, 91–94, available at: hal.archives-ouvertes.fr/hal-01448559/document.

As the contested provision of the Government Regulation was judged not to be sufficiently clear and precise, the sanction imposed on the applicant was not lawful. It was the principle of legality of administrative offences – derived from the three cited fundamental rights instruments, which were all applicable in the matter, including the Charter – that served as the legal basis for the NSS's decision. Notably, the Court put emphasis on the substance of the fundamental right in question (the principle of *nullum crimen sine lege certa*), which it dissociated from its individual textual expressions in the provisions of the co-applicable catalogues.[679] Lastly, it is worth noting that the Municipal Court, in its first-instance decision, completely passed over the applicable EU law and the fundamental rights law element of the case.[680]

As opposed to what could be considered an implicit declaration of violation of, inter alia, the Charter in *GARLAND distributor*, the NSS was more forthright in identifying the legal bases for its decision in *MRAZÍRNY PLZEŇ – DÝŠINA a. s. v State Veterinary Administration*.[681] There, the applicant was fined, inter alia, for violating several articles of Regulation (EU) No 1169/2011 on the provision of food information to consumers.[682] However, as the NSS noted, the Regulation was not yet applicable at the time of the alleged infringement. After recalling that the principle of legality is guaranteed in Article 39 of the Czech Charter and Article 7 of the EHCR, it observed that

> [d]ue to the fact that the underlying facts of the offence consist in a violation of EU law, Article 49 of the [Charter], according to which '[n]o 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', is also relevant in this context.[683]

The NSS referred to three ECtHR judgments interpreting Article 7 of the ECHR and to the Opinion of AG Bobek in Case C-574/15 *Mauro Scialdone* interpreting Article 49 of the

[679] On a theorisation of this concept, see G Rosoux, 'Les droits fondamentaux, au cœur de la pluralité des sources et de la pluralité des juges: vers une "dématérialisation" des droits fondamentaux ? Résumé de thèse' (2016) *Revue de la faculté de droit de l'Université de Liège* 5.
[680] MC in Prague, 11 A 169/2015-78, 10 March 2016.
[681] NSS, 1 As 186/2017-46, 26 April 2018.
[682] Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 [2011] OJ L 304/18.
[683] NSS, 1 As 186/2017-46, para 33. The Court referred to, inter alia, Opinion of AG Bobek in Case C-574/15 *Mauro Scialdone*, EU:C:2017:553, paras 147–149.

Charter.[684] According to the NSS, given that the principles governing administrative liability are analogous to principles governing criminal liability, the contested administrative sanction was unlawful and 'in breach of Article 39 of the [Czech] Charter, Article 7 of the [ECHR] and Article 49 of the EU Charter of Fundamental Rights'.[685] It is interesting to note that the declaration of violation of these three provisions, including the Charter, was made *ex officio*, without the applicant alleging it.

Another explicit declaration of violation of, inter alia, the Charter was made in *N.E.E. v Ministry of the Interior*.[686] At issue was the use of 'phallometric testing', that is, a mechanical technique of measuring sexual arousal while watching pornographic material, to examine the credibility of asylum claims based on persecution due to sexual orientation. The use of this practice by the Czech authorities came to light subsequent to a 2009 judgment of the German Administrative Court in Schleswig Holstein, which ordered a stay of the transfer proceedings under the Dublin Regulation on the grounds that the applicant could be subjected to phallometric testing in the Czech Republic.[687] Notwithstanding the criticism from many quarters,[688] phallometric testing was again used as evidence in 2015 by the Regional Court in Ostrava. Interestingly, the first-instance judge was aware that the method had been 'criticised in the past few years by EU Member States', but it justified having recourse to it by the applicant's express consent.[689] Following a cassation complaint of Mr N.E.E., the NSS quashed the judgment of the Regional Administrative Court on the grounds that

> a phallometric examination attains, by its very nature, such a level of severity of degradation of the applicant that it constitutes a degrading treatment, which is forbidden, inter alia, by Article 3 of the [ECHR], Article 7 of the International Covenant on Civil and Political Rights and Article 4 of the EU Charter of Fundamental Rights.[690]

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[684] Ibid. paras 34 and 35. See Opinion of AG Bobek in C-574/15 *Mauro Scialdone*, EU:C:2017:553.
[685] Ibid. para 44.
[686] NSS, 5 Azs 53/2016-26, 11 August 2016.
[687] FRA, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: 2010 Update* (EU Publications Office 2010) at 59. For an in-depth analysis, see A Mrazova, 'Legal Requirements to Prove Asylum Claims Based on Sexual Orientation: A Comparison Between the CJEU and ECtHR Case Law' in A Güler, M Shevtsova and D Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (Springer 2019) 185.
[688] See eg UN High Commissioner for Refugees (UNHCR), UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation, April 2011, available at: www.refworld.org/docid/4daeb07b2.html; FRA, ibid.; European Parliament, Parliamentary questions, Answer given by Ms Malmström on behalf of the Commission, 21 February 2011.
[689] RC in Ostrava, 61Az 9/2014-113, 18 February 2016.
[690] NSS, 5 Azs 53/2016-26. The NSS also found a violation of the right to privacy under Article 8 of the ECHR.

The NSS clarified that it based its analysis on UNHCR's Comments, ECtHR case law and 'principally' on Case C-148/13 *A and Others*, in which the CJEU held that the submission of the applicants to possible 'tests' in order to demonstrate their homosexuality infringed human dignity protected by Article 1 of the Charter.[691] It is worrying that the CJEU judgment was issued in December 2014, that is, more than a year before the judgment of the Regional Court. Also notable is the fact that the Czech Charter was not mentioned once in the decision of the NSS, the whole analysis being based on the ECHR–EU Charter tandem.

The ECHR–EU Charter tandem was at the core of the NSS's reasoning also in *O. K. v Ministry of the Interior*, which involved a complaint of an asylum seeker who was detained based on § 46a(1)(c) of the Asylum Act. Under this provision, a person can be detained if there is reason to believe that he or she could pose a threat to public order.[692] The applicant was arguing that since the Asylum Act contained no legal definition of 'public order', the said (at that time newly-introduced) provision was not sufficiently clear to be considered as 'prescribed by law' as required by Article 5 of the ECHR and by Union law. After a very detailed analysis of the applicable EU directives and CJEU and ECtHR case law, the NSS held that the notion of 'public order' was sufficiently defined in its own case law and in that of the CJEU, which led it to conclude that:

> In the light of, inter alia, the existing case law of the Court of Justice and the [NSS] upon which the interpretation and application of [the provision in question] must be based, [this provision] fulfils the condition that the restriction or deprivation of liberty is lawful under Article 5(1) of the [ECHR] or Article 6 of the EU Charter of Fundamental Rights, which – according to Article 52(3) of the EU Charter of Fundamental Rights – has the same meaning and scope as Article 5 of the [ECHR].[693]

Unlike in *N.E.E.* discussed above, the Court expressly recognised the equivalence of Article 6 of the Charter and Article 5 of the ECHR with reference to Article 52(3) of the Charter.

This also happened in an extradition case in which the applicant challenged a decision to extradite him to Russia on health grounds. There, the NSS reviewed the decision against the Returns Directive, the Charter and the ECHR.[694] The Court recalled that the

[691] EU:C:2014:2406, para 65.
[692] NSS, 5 Azs 13/2013-30, 17 September 2013.
[693] Ibid. For a similar case, see NSS, 2 Azs 10/2013-62, 16 January 2014. For judgments citing *O. K. v Ministry of the Interior*, see NSS, 6 Azs 33/2014-45, 21 May 2014; NSS, 9 Azs 201/2014-48, 25 September 2014; NSS, 5 Azs 57/2015-18, 8 April 2015; and NSS, 1 Azs 98/2015-27, 15 July 2015.
[694] NSS, 1 Azs 246/2019-31, 21 October 2019.

administrative extradition decision had to comply with the requirements of Directive 2008/115/EC, 'and thus also with the [Charter], in particular Articles 4, 7 and 19(2) of the Charter, which materially correspond to Articles 3 and 8 of the ECHR'.[695] The Court then quoted from *Abdida*, in which the CJEU held that extradition of a seriously ill person could under certain conditions violate Article 5 of the Returns Directive interpreted in the light of Article 19(2) of the Charter.[696] This was followed by a short summary of the case law of the ECtHR on the same matter (possible violation of Article 3 of the ECHR).[697] On the facts, the NSS did not find any of these norms to have been violated given that the applicant's state of health was not serious enough to block extradition.[698]

All the NSS judgments analysed in this section relied on the mutually reinforcing effect of the Charter, the ECHR and, sometimes, the Czech Charter. More specifically, they relied on the mutually reinforcing effect of the case law interpreting those instruments. What we have here is a meaningful interaction of equivalent provisions of separate instruments, which make up a composite standard of review, within a reasoning concluded by a global declaration of (non)violation of that composite standard of review. The equivalence between the provisions making up the standard of review was either assumed or explicitly acknowledged with reference to Article 52(3) of the Charter. However, the relationship between the various sources was not the core issue, unlike in the decisions analysed next.

3.1.2.2 The varied picture of the Charter's interaction with the ECHR and the Czech Charter within the equivalence framework

The rules for the Charter's interaction with other fundamental rights catalogues, set out in Section 2.4 above, present national judges with both opportunities and challenges. We saw in the cases analysed under the previous category that the judges relied on the combined, mutually reinforcing effect of equivalent fundamental rights provisions while applying all of them within a composite standard of review. In the cases analysed next, the relationship

[695] Ibid. para 22.
[696] Ibid. Case C-562/13 *Abdida*, EU:C:2014:2453, para 48.
[697] Ibid. para 26.
[698] See also NSS, 7 Azs 435/2018-32, 30 May 2019: the NSS annulled the contested decision, which rejected the applicant's application for subsidiary protection on the grounds of health. The ground for annulation was that the Ministry of the Interior did not gather enough information that would safely demonstrate that there was no risk of significant and irreversible consequences for the applicant's health after her transfer to Russia, amounting to inhuman or degrading treatment. The NSS relied principally on the ECHR but also cited CJEU's judgment in *C. K. and Others* and summarised its reasoning, with an emphasis on the equivalence between Article 4 of the Charter and Article 3 of the ECHR (para 19). The NSS admitted that the CJEU's judgment concerned a Dublin transfer but that a possible violation of Article 3 ECHR is even more relevant when it comes to extradition to a non-EU country.

between the co-applicable standards and/or the relative weight given to each co-applicable instrument was a distinct issue.

Let us begin with a standout case. In *M. Š. v General Directorate of Customs*, the NSS assessed whether a consecutive imposition of administrative and criminal punitive measures for the same offence was compatible with the principle of *ne bis in idem*.[699] Mr M. Š. was criminally convicted of tax evasion and sanctioned for the same offence under the Excise Duties Act by having his car – together with cigarettes and bottles of alcohol – confiscated. The Regional Court in Ostrava held, on the authority of the ECtHR judgment in *Zolotukhin v Russia*, that Mr M. Š. was punished in violation of Article 4(1) of Protocol No 7 to the ECHR.[700] On cassation, the NSS agreed with the Regional Court's assessment that there was both a *bis* and an *idem*, which made it necessary to assess compatibility under the ECHR and Article 50 of the Charter.[701] The Court referred to ECtHR's judgments in *A and B v Norway* and *Jóhannesson and Others v Iceland* – which 'summarise the general foundations for assessing the possible violation of the *ne bis in idem* principle'[702] – but noted that the CJEU's judgment in *Menci* marked a certain shift away from that case law.[703] The Court was extremely diplomatic in drawing attention to the fact that the CJEU has not followed the ECtHR in relaxing its traditional approach. In the judgments cited above, the ECtHR controversially excluded from the scope of protection under Article 4(1) of Protocol No 7 dual administrative and criminal proceedings which are 'sufficiently closely connected in substance and in time', that is, combined in an integrated manner to form a 'coherent whole', allowing State authorities to formulate complementary legal responses to a single unlawful act.[704] The NSS referred to the criteria formulated by the ECtHR for determining whether there was a sufficiently close connection in substance.[705] It then referred to the

[699] NSS, 5 Afs 104/2016-31, 17 July 2018.
[700] RC in Ostrava, 65 Af 36/2014-38, 18 April 2016. *Sergey Zolotukhin v Russia*, Application No 14939/03, Merits and Just Satisfaction, 10 February 2009.
[701] NSS, 5 Afs 104/2016-31, paras 38–39.
[702] Ibid. para 41. *A and B v Norway*, Applications Nos 24130/11 and 29758/11, Merits and Just Satisfaction, 15 November 2016; and *Jóhannesson and Others v Iceland*, Application No 22007/11, Merits and Just Satisfaction, 18 May 2017.
[703] Ibid. para 42. C-524/15 *Menci*, EU:C:2018:197.
[704] *A and B v Norway*, para 130. For criticism, see Dissenting Opinion of Judge Pinto de Albuquerque in *A and B v Norway*; G Lasagni and S Mirandola, 'The European *ne bis in idem* at the Crossroads of Administrative and Criminal Law' (2019/2) *eucrim* 126, available at: eucrim.eu/media/issue/pdf/eucrim_issue_2019-02.pdf. See also Opinion of AG Campos Sánchez-Bordona in Case C-524/15 *Menci*, EU:C:2017:667, who carefully analysed the ECtHR's case law, commented on its deferential attitude towards Contracting Parties' arguments (para 71) and urged that the CJEU not to follow it (paras 69 and 72). Interestingly, the Czech Republic submitted third-party comments in *A and B v Norway* (see para 9).
[705] NSS, 5 Afs 104/2016-31, para 43.

conditions that the CJEU set out in *Menci* for limiting the right not to be punished twice in Article 50 of the Charter under Article 52(1) of the Charter.[706] After a brief remark on the relevance of the *Menci* judgment (which concerned sanctions for a failure to pay the VAT due) for the case at hand (but no mention of the applicability of the Charter or of its Article 51),[707] the NSS chose to leave the ECtHR case law aside and follow – in meticulous detail – the analytical framework set out in *Menci*. Having concluded that all the conditions were met, the Court held that the consecutive imposition of administrative and criminal sanctions against Mr M. Š. did not violate Article 50 of the Charter. In the final paragraph of its analysis, based on a rather cursory examination of the criteria set out in *A and B v Norway* and *Jóhannesson and Others v Iceland*, it added that there was neither a violation of Article 4(1) of Protocol No 7.[708] The NSS's reasoning is striking on two counts. First, there was a clear preference for the Charter (not so much explicit, but clear from the emphasis on *Menci*). Secondly, the reasoning is characterised by a confident engagement with both the ECHR and the Charter. The Court conducted a separate analysis under each of those instruments as it was aware of the emerging differences in the standard of review, the Charter offering stronger protection.[709] This makes this case stand out in the context of the general equivalence between the Charter and the ECHR.

Nevertheless, even in cases in which the Charter and the ECHR provides, in principle, the same standard of protection, the relative weight given to the Charter in the NSS's reasoning compared to the ECHR varies significantly from case to case. Consider for example *C. N. O. v Regional Police Directorate of the South Bohemian Region, Foreign Police Section*, in which the NSS based its reasoning on the ECHR and used the Charter, in an intriguing way, to justify the ECHR's leading role and strengthen the ECHR-based arguments.[710] This was a re-detention case based on § 127(1)(b) of the Act on the Residence of Foreign Nationals, pursuant to which the detention of a foreign national must be terminated without undue delay if a court so decides and *unless the police adopt a new decision within three days* after the court's decision became final. In the case at hand, the police detention order against C. N. O. was annulled by the regional court for violating the

[706] Ibid. para 44. Case C-524/15 *Menci*, para 63.
[707] Ibid. para 46.
[708] Ibid. para 59.
[709] For more on how the CJEU (mis)treats the ECtHR's case law on *ne bis in idem*, see G Lo Schiavo, 'The principle of *ne bis in idem* and the application of criminal sanctions: Of scope and restrictions' (2018) 14 *European Constitutional Law Review* 644.
[710] NSS, 9 As 111/2012-34, 1 November 2012.

duty to provide reasons, but the police then issued a new detention order (this time duly reasoned) one day after the court's judgment, which meant that the applicant was kept in detention. The applicant argued that the three-day period in which the police could adopt a new decision without releasing the applicant was contrary to Article 5(4) of the ECHR[711] and Article 15(2) of the Returns Directive 2008/115/EC, according to which '[t]he third-country national concerned shall be released immediately if the detention is not lawful'. Whereas the regional court saw no problem with the three-day period, the NSS agreed with the applicant: when a detention order is annulled, for whatever reason, the foreign national must be released immediately. To arrive at this conclusion, the Court conducted a review against the ECHR and only then brought in the Directive, which had to be interpreted 'in the same sense'. The following paragraphs set out the role of the ECHR within EU law and its relationship with the Charter, starting with a quote of Article 6(3) TEU, the Preamble of the Charter and Article 52(3) of the Charter, and continuing:

> In that way, the [ECHR] provisions were, in effect, integrated into the [Charter] and into EU law generally, with the aim of eliminating divergent scopes and interpretations of fundamental rights. One of those rights is undoubtedly also the right to liberty and security of person laid down in Article 6 of the [Charter], which is to have the same meaning and scope as the corresponding Article 5 of the [ECHR]. This is confirmed in the [Explanations to the Charter] […]
>
> Therefore, it is entirely appropriate to use the [ECHR] and the relevant case law of the [ECtHR] as the main source of interpretation of fundamental rights in the framework of EU law, including the Returns Directive.[712]

Article 15(2) of the Returns Directive and Article 5(4) of the ECHR were thus given a 'unified' reading. Before criticising the NSS for relegating the Charter to a secondary rank, a few remarks are warranted. To begin with, the NSS's approach was heavily influenced by the fact that the Czech Republic was already found to have violated Article 5(4) by the ECtHR,[713] and it is therefore only natural that the NSS preferred an ECHR-based analysis. Also, the case was decided in the early days of the Charter's existence as a binding

[711] 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'
[712] NSS, 9 As 111/2012-34.
[713] *Buishvili v the Czech Republic*, Application No 30241/11, Merits and Just Satisfaction, 25 October 2012, Merits and Just Satisfaction. See also M Moraru and G Renaudière, 'European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive – Pre-Removal Detention', Migration Policy Centre, REDIAL Research Report, 2016/05, available at: hdl.handle.net/1814/45185.

instrument when CJEU Charter case law was still scarce. More importantly, since 'the limitations which may legitimately be imposed on [the rights in Article 6 of the Charter] may not exceed those permitted by the ECHR',[714] the emphasis of the Court on the ECHR could not possibly lead to a substantively wrong conclusion. Finally, the NSS's analysis is worthy of a good EU law textbook and shows a willingness to tackle the challenges of multi-level fundamental rights protection transparently. These contextual considerations notwithstanding, the relative weight given to the Charter did not reflect the fact that the case was fully governed by EU secondary law.

Another candidate for a more intensive Charter-based review was the judgment in *H. M. v Regional Police Directorate in Prague*, where the NSS dealt with the interrelationship between two legal regimes of detention of foreign nationals: pre-expulsion detention under the Act on the Residence of Foreign Nationals and detention of asylum seekers under the Asylum Act.[715] In this case, Mr H. M. was first detained under § 124 of the Act on the Residence of Foreign Nationals with a view to his expulsion. Then, he was re-detained (as required by law) under § 46a of the Asylum Act after he filed an asylum claim. Finally, after the maximum period of detention under the Asylum Act passed, he was re-detained back in the regime of the Act on the Residence of Foreign Nationals, namely its § 124a. Under this provision, '[u]nless other special measures for the purpose of removal can be applied effectively, the Police is entitled, for the purpose of administrative removal, to detain a foreigner who applied for international protection if the removal decision has been taken and became final, or if the removal procedure was commenced on [one of the enumerated grounds]'. The question arose whether Mr H. M. could lawfully be detained under § 124a of the Act on the Residence of Foreign Nationals even if his asylum claim was still pending, that is, whether such detention was compatible with his status as an asylum seeker. The EU-law dimension of this case is evident: the two detention regimes reflect two sets of rules in EU secondary law, the Returns Directive[716] on the one hand, and the Asylum

[714] Explanation on Article 6 — Right to liberty and security.
[715] NSS, 6 As 146/2013-44, 2 April 2014.
[716] 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 [2008] OJ L 348/98.

Procedures[717] and the Reception Conditions[718] Directives on the other.[719] The NSS relied on the authority of Case C-534/11 *Arslan*. There, the CJEU said that a third-country national who was detained under the Returns Directive on the ground that there was a risk of absconding could be *kept* in detention even after making an asylum application if this application seemed to have been made with the sole intention of delaying or even jeopardising the enforcement of the return decision taken against him.[720] The NSS held that the re-detention of Mr H. M. under § 124a of the Act on the Residence of Foreign Nationals was not permissible under EU law given that the provision was too general and non-specific to comply with the CJEU's dicta in *Arslan*.[721] However, it went on to state that this restrictive interpretation of § 124a was based not only on the indirect effect of EU law but *primarily* on 'the obligation to maximally protect the essence and meaning of the fundamental right to personal liberty, which can be limited only on the basis of law […] (Article 8(2) read together with Article 4(4) of the [Czech Charter of Fundamental Rights])'.[722] Since the possibility to re-detain a foreign national in those circumstances was not concretely provided for by law, the detention of Mr H. M. was unlawful for the lack of legal basis. As for the Charter, its Article 6 was mentioned in passing and only in connection with the ECHR (via the link in Article 52(3) of the Charter) in the introductory part of the judgment, where the NSS mainly set out the condition of 'prescribed by law' under the ECHR.[723] Thus, while EU secondary law was analysed exhaustively, the reasoning concerning fundamental rights was almost exclusively based on the ECHR and the Czech Charter. Considering the eminent EU dimension of the case, it is regrettable that the Charter was virtually absent from the NSS's reasoning.

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[717] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L L 326/13; now repealed by 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 [2013] OJ L 180/60.

[718] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18; now repealed by 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 [2013] OJ L 180/96.

[719] Case C-357/09 PPU *Kadzoev*, EU:C:2013:343, para 45.

[720] EU:C:2013:343, para 57. The judgment in *Arslan* was issued in preliminary ruling proceedings introduced by the NSS in 1 As 90/2011-59, 22 September 2011 (the Charter was not mentioned in the reference nor the final NSS's decision). For a comment on *Arslan* in the context of other CJEU case law, see G Cornelisse, 'Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for Its Management?' in MJ Guia, R Koulish and V Mitsilegas, *Immigration Detention, Risk and Human Rights: Studies on Immigration and Crime* (Springer 2016) 73 at 83–87.

[721] NSS, 6 As 146/2013-44, para 32.

[722] Ibid. para 33.

[723] Ibid. para 15.

A few years later, in 2019, the NSS again dealt with § 124a in *X. D. N. v Reception Centre in Zastávka*, in a different context and under different EU rules.[724] Following the CJEU's decision in *Arslan* cited above, the new Reception Directive laid down conditions under which asylum seekers can be detained. According to its Article 8(3)(e),

> an applicant may be detained only: when he or she is detained subject to [the Returns Directive], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision […] The grounds for detention shall be laid down in national law.

This provision was transposed into the Asylum Act but was not in any way reflected in § 124a of the Act on the Residence of Foreign Nationals. This was not a problem for the Regional Court in Brno deciding in the first instance, which held that the detention decision did not explicitly state that the conditions in Article 8(3) had been fulfilled, but this could be deduced from the circumstances of the case.[725] On cassation, the NSS reminded the first-instance court about the limits of vertical indirect effect of directives to the detriment of individuals: indirect effect could not remedy the fact the Czech Republic did not amend § 124a as required by Article 8(3) of the Reception Directive.[726] As in its judgment in *H. M. v Regional Police Directorate in Prague*, whose decisive part was directly quoted, the NSS held that § 124a did not provide a sufficient legal basis for detaining a foreigner – applicant for international protection. As in *H. M. v Regional Police Directorate in Prague*, the Court began its appreciation by an opening statement summarising the fundamental rights background, but this time with the Charter as the primary point of reference:

> Detaining a foreigner amounts to limiting the exercise of the fundamental right to liberty enshrined in Article 6 of the [Charter]. It follows from Article 52(1) of the EU Charter that any limitation on the exercise of that right must be provided for by law and respect the essence of that right and the principle of proportionality. Also, considering Article 52(3) of the EU Charter, it is necessary for the purposes of interpreting Article 6 of the EU Charter to take account of Article 5 of the [ECHR] as the minimal standard of protection. According to the ECtHR, all deprivation of liberty must not only be lawful in the sense that it must have a legal basis in domestic law, but the lawfulness also relates to the quality of the law and implies that the

[724] NSS, 1 Azs 146/2019-23, 28 August 2019.
[725] RC in Brno, 32 A 17/2019-14, 12 March 2019, para 11.
[726] NSS, 1 Azs 146/2019-23, para 26.

> national law authorising a deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness […].[727]

The role of the Charter in the fundamental rights review is strikingly different to its role in a previous NSS judgment in *H. M. v Regional Police Directorate in Prague*, which dealt with the same question of the relationship between the two detention regimes. As is clear from the segment of *X. D. N. v Reception Centre in Zastávka* quoted above, the roles were reversed: the Charter was the leading instrument, and it was the ECHR that was introduced via Article 52(3) of the Charter. This may have mattered little from the point of view of the solution of the case, but the leading role of the Charter as a primary point of reference in such an EU-heavy area is justified.

It is hard to draw any general conclusions from the judgments discussed above concerning the relative weight given to the Charter in cases (densely) governed by EU law. It appears that the NSS does not bend over backwards to give prominence to the Charter in the fields densely governed by EU law where the ECHR and the Charter are considered equivalent. The common feature of all these judgments is the mutually reinforcing treatment of the equivalent norms, there being no clear pattern as to the relative weight given to each of the norms. Article 52(3) serves as a bidirectional tool which the NSS uses either within a reasoning primarily focused on the Charter or within a reasoning primarily focused on the ECHR. Section 3.2.3 further below will show how the NSS dealt with the methodologically dubious use of equivalence-based reasoning in some decisions of regional courts.

3.1.2.3 The routine review: Dublin cases

A substantial portion of cases in which the NSS conducted a Charter-based review concern the transfers of asylum seekers to other Member States under the Dublin III Regulation. This Regulation lays down 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. The criteria for the allocation of responsibility can, however, be overridden by Article 3(2) second sentence of the Dublin III Regulation, which provides:

> 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,

[727] Ibid. para 14.

> *resulting in a risk of inhuman or degrading treatment* within the meaning of Article 4 of the [Charter], 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.[728]

This rule was introduced in the Dublin III Regulation after it had been recognised in the case law of the ECtHR and subsequently of the CJEU in the landmark rulings in *M. S. S. v Belgium and Greece*[729] and *N. S. and Others*.[730] Significantly, Article 4 of the Charter offers wider protection than the above-cited Article 3(2) of the Dublin III Regulation in that it excludes Dublin transfers in other circumstances than in the presence of systemic flaws. As the CJEU clarified in *C. K. and Others*, a transfer cannot take place if there is a possibility that it 'might result in a *real and proven risk* of the person concerned suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter'.[731] In this judgment, the CJEU realigned itself with the developments in the ECtHR case law regarding the individual assessment (*Tarakhel v Switzerland*).[732]

This provision and case law have been a fertile source of litigation ever since, including before the NSS. In the early cases, Czech administrative courts clarified the procedural and substantive obligations incumbent on the administrative authorities under Article 3(2) of the Dublin III Regulation. First, the statement of reasons for the transfer decision must contain an explicit assessment of whether the transfer to the Member State responsible is compatible with Article 3(2).[733] Secondly, that assessment must be sufficiently concrete and individualised; a merely generic statement, such as that the Member State in question is generally considered to be a safe country, is not sufficient.[734] Moreover, the

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[728] Emphasis added.
[729] Application No 30696/09, Merits and Just Satisfaction, 21 January 2011.
[730] Joined Cases C-411/10 and C-493/10, EU:C:2011:865.
[731] Case C-578/16 PPU, EU:C:2017:127, para 96 (emphasis added). More specifically, 'in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment, within the meaning of that article' (ibid.).
[732] Application No 29217/12, Merits and Just Satisfaction, 4 November 2014. See also G Ciliberto, 'Non-refoulement in the Eyes of the Strasbourg and Luxembourg Courts: What Room for Its Absoluteness?' in T Natoli and A Riccardi, *Borders, Legal Spaces and Territories in Contemporary International Law: Within and Beyond* (Springer 2019) 59.
[733] NSS, 1 Azs 248/2014-27, 25 February 2015 (Switzerland), para 27. The NSS fully endorsed previous case law of the Regional Court in Prague, which came to the same conclusion: see eg RC in Prague, 45 Az 14/2014-31, 22 May 2014: the Regional Court founded its analysis inter alia on the right to an effective remedy in Article 47 of the Charter, as cited in Recital 19 of the Dublin III Regulation.
[734] NSS, 10 Azs 12/2017-70, 4 May 2017 (Italy), paras 14–16; NSS, 2 Azs 304/2016 -24, 30 November 2016, para 16 (Italy, the assessment was formalistic and mechanical); and NSS, 1 Azs 246/2016-27, 9 November 2016, para 39 (Hungary, the assessment was too general, and the arguments bore no relation to the real situation regarding the Hungarian asylum procedures).

factual sources on which the assessment is based must be included in the file so that the administration's factual findings can be challenged and reviewed.[735] Insufficient assessment and reasoning will lead to an annulation of the contested decision.[736] The NSS can also complete the insufficient reasoning of the first-instance court by its own findings as to why the threshold of inhuman or degrading treatment was not met.[737]

First-instance decisions of regional courts do not escape the NSS's strict review.[738] Importantly, when administrative courts review the Article 3(2) assessment performed by administrative authorities, they must consider the facts as they are now, not as they were at the date of the contested decision.[739] The NSS explained that this was 'the only way to ensure the observance of the *non-refoulement* principle within the meaning of either Articles 4 and 19 of the [EU Charter] and Article 3 of the [ECHR], or (in a slightly different form) under Article 33 of the Geneva Convention'.[740]

When it comes to the substantive assessment, the NSS noted with reference to the *N. S. and Others* case that the Dublin system is based on the presumption of compliance by the other EU Member States with fundamental rights. A presumption which can be rebutted only if the conditions in Article 3(2) are met; a single infringement of fundamental rights by a Member State does not suffice.[741] In many cases in which the NSS reviewed the Article 3(2) assessment of the administration (and the regional court), it found the assessment complete and correct.[742] It was with regard to the asylum system in Hungary that the NSS

[735] NSS, 5 Azs 229/2016-44, 12 January 2017 (reference to Article 27(1) of the Dublin III Regulation and to Case C-63/15 *Ghezelbash*, EU:C:2016:409, but not to Article 47 of the Charter). See also NSS, 5 Azs 29/2018-29, 14 March 2019, para 33–36 (the Municipal Court in Prague considered the asylum system in Romania, but it did not include the report on which it relied in the file, therefore violating the evidentiary rules).
[736] RC in Brno, 41Az 10/2014-40, 4 February 2015 (no assessment of the applicant's claims regarding systemic deficiencies in Malta; the Regional Court relied heavily on a Czech Constitutional Court decision in an equivalent case).
[737] NSS, 1 Azs 192/2020-27, 24 September 2020, paras 32–36.
[738] NSS, 4 Azs 70/2016-28, 27 April 2016, paras 14–16 (the Regional Court in Hradec Králové failed to properly consider the evidence introduced by the applicant); and NSS, 2 Azs 132/2017-45, 21 August 2018, para 19 (the Regional Court in Plzeň's assessment was borderline sufficient). See also NSS, 5 Azs 252/2019-41, 16 September 2019, as an illustration that if the applicant introduces concrete relevant arguments, formulaic and general considerations regarding the asylum system in question will be harder to justify.
[739] NSS, 5 Azs 195/2016-22, 12 September 2016. See also RC in Brno, 41Az 6/2021-116, 12 April 2021, paras 21–22 (referring also to Article 27 of the Dublin III Regulation read together with Article 47 of the Charter, as interpreted in this sense by AG Rantos in Case C-194/19 *Belgian State (Éléments postérieurs à la décision de transfert)*, EU:C:2021:270).
[740] NSS, 5 Azs 195/2016-22. For the same argument, see 2 Azs 304/2016-24, 30 November 2016, para 19.
[741] NSS, 9 Azs 27/2016-37, 22 March 2016, paras 20–22; and Joined Cases C-411/10 and C-493/10 *N. S. and Others*, EU:C:2011:865.
[742] See eg NSS, 9 Azs 27/2016-37 (Poland); NSS, 2 Azs 113/2016-26, 26 May 2016 (Poland); NSS, 1 Azs 136/2016-31, 13 July 2016 (Poland); NSS, 4 Azs 15/2017-25, 23 February 2017 (Lithuania); and NSS 5 Azs 128/2018-45, 12 July 2018 (Germany).

found that a transfer to this Member State would be contrary to the prohibition in Article 3(2) of the Dublin III Regulation.[743] The Court took issue, inter alia, with the fact that asylum seekers who had entered Hungary from Serbia were quasi automatically returned by Hungarian authorities where they faced the risk of the so-called chain *refoulement* to their country of origin. Coupled with the newly adopted Hungarian procedural rules that severely limited the asylum seekers' access to effective judicial review, there was a risk that the applicant would eventually be returned to the country of origin (or other unsafe third countries) without having his application for asylum properly considered.[744]

At the request of the applicant, the NSS will suspend the execution of the transfer decision before a decision on the merits is issued since not doing so would

> constitute a violation of international and Union obligations of the [Czech Republic] to grant effective judicial protection against a possible violation of the principle of non-refoulement, as enshrined in Article 13 in conjunction with Article 3 of the [ECHR], in Article 47 in conjunction with Articles 4 and 19(2) of the EU Charter of Fundamental Rights, and – on the level of EU secondary law – in Article 27 in conjunction with Article 3(2)(2) of the Dublin III Regulation.[745]

When it comes to obstacles to a Dublin transfer other than those stemming from systemic deficiencies within the meaning of Article 3(2), these are addressed in the framework of the so-called sovereignty clause in Article 17 of the Dublin III Regulation, according to which 'each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation'. As regards the duty of the administration to provide reasons for the use or otherwise of the discretionary option in Article 17, this duty only exists if it transpires during the procedure that there are special circumstances that could justify its use, typically when the applicant has links to the Czech Republic (including family links) or when the transfer could have serious consequences for the applicant different to those covered by the serious deficiencies

[743] NSS, 5 Azs 195/2016-22, 12 September 2016.
[744] Ibid. Interestingly, the NSS referred to court decisions of other Member States that came to the same conclusion regarding the asylum system in Hungary. See also NSS, 1 Azs 91/2016-27, 11 August 2016.
[745] NSS, 5 Azs 229/2016-20, 12 October 2016. See also Czech Constitutional Court, III. ÚS 2331/14, 18 September 2014, setting aside a decision of the Regional Court in Brno, in which the latter Court refused to grant suspensory effect to the administrative action solely on the basis of the argument that the transfer is to be made to another EU Member State, which has an obligation under the Dublin III Regulation to process the applicant's claim objectively and impartially and in conformity with the basic principles of asylum law: RC in Brno, 41 Az 5/2014-51, 4 March 2015.

under Article 3(2) of the Dublin III Regulation.[746] In *R. M. v Ministry of the Interior*, the applicant argued – based on the *C. K. and Others* case law – that a transfer to Poland would deteriorate his mental health, namely his mixed anxiety–depressive disorder.[747] After a detailed review of the evidence, the NSS dismissed the argument, holding that it could not be concluded that the applicant had a severe mental illness and that his transfer to Poland would result in a real and proven risk of a significant and permanent deterioration in the state of his health.[748] Here the Court meticulously followed the analytical steps deployed by the CJEU in *C. K. and Others*. In *N. I. v Ministry of the Interior*, the NSS dismissed the complaint but reminded the defendant, the Ministry of the Interior, that before it implements the transfer decision adopted on the basis of the Dublin III Regulation, it needs to make sure that the safeguards identified in the CJEU's case law cited by the applicant, including an assessment of his state of health, are respected.[749] The lack of individualised vulnerability assessment within the meaning of *C. K. and Others* and *Tarakhel v Switzerland* led to some decisions being stuck down for violation of the Charter.[750]

In the logic of the Dublin proceedings, the Article 3(2) assessment occurs primarily in the proceedings concerning a transfer of a third-country national. However, such assessment must also take place in the proceedings leading to a decision by which the person is detained for the purposes of transfer. If there is no realistic prospect that the transfer can happen – for example, because systemic deficiencies within the meaning of Article 3(2) would prevent such transfer – the detention is unlawful. The NSS thus requires the administrative authorities always to conduct a preliminary assessment of the possible systemic deficiencies, *ex officio* and explicitly, in the decision on detention.[751] In some cases of this kind, the NSS recalled the rationale of this procedural obligation through a panoramic

[746] NSS, 2 Azs 222/2016-24, 5 January 2017, paras 30–33 (special circumstances consisting in the claimed security risks for the applicant in Italy based due to threats by the Colombian army were insufficiently considered); and NSS, 6 Azs 16/2017-61, 28 March 2017 (the non-use of the discretionary clause in the context of the rights to family life under Article 8 ECHR was not expressly considered).
[747] NSS, 7 Azs 38/2017-73, 25 May 2017.
[748] Ibid. para 18. See also NSS, 14 November 2017, 5 Azs 223/2017-27 (health and detention under the Dublin III Regulation); and NSS, 1 Azs 398/2017-25, 7 December 2017, para 25 (while the applicant was in a bad state of health, it was not clear from the medical report that his transfer would result in a significant and permanent deterioration of his health).
[749] NSS, 8 Azs 126/2019-87, 9 October 2019, para 15.
[750] See NSS, 5 Azs 198/2018-57, 8 January 2021; and NSS, 5 Azs 114/2018-63, 8 January 2021.
[751] Assessment was too generic and insufficient, Hungary: NSS, 1 Azs 91/2016-27, 11 August 2016, para 21; NSS, 2 Azs 149/2016-41, 8 September 2016; and NSS, 1 Azs 194/2016-24, 19 October 2016, para 23. No consideration whatsoever, Germany, Norway: NSS, 2 Azs 6/2017-19, 26 January 2017, para 13. Assessment detailed and sufficient, including individual risks due to health reasons, Italy: NSS, 8 Azs 29/2018-72, 27 February 2019.

reference including the Charter.[752] In the Extended Chamber judgment in *I. Y. H. v Regional Police Directorate in Prague*, the NSS relativised the requirement for an explicit assessment. Such an assessment is not required if 1) an objection as to such deficiencies was not raised before the administrative authority and 2) after having considered this question, the administrative authority concluded that there were no systemic flaws in the Member State responsible or that there was no reasonable doubt about the non-existence of such systemic flaws.[753]

Another question concerning detention under the Dublin III Regulation turned into a reference for a preliminary ruling which the NSS made in *Al Chodor and Others v Regional Police Directorate of the Ústí Region*.[754] According to Article 28 of the Dublin Regulation, a person can be detained only 'when there is a significant risk of absconding'. Under Article 2(n) of the same Regulation, the 'risk of absconding' means 'the existence of reasons in an individual case, which are based on *objective criteria defined by law*, to believe that [the person concerned] may abscond'. At the time, the Act on the Residence of Foreign Nationals did not lay down any such objective criteria. However, the NSS felt that such criteria were clearly and predictably specified in the case law of administrative courts; it checked with the CJEU whether that was sufficient, relying on the ECtHR's non-formalistic interpretation of the notion 'prescribed by law' in Article 5(1) of the ECHR.[755] Unlike the NSS, whose order for reference did not make any mention of the Charter, the CJEU read the Dublin III Regulation in the context of its fundamental rights rationale and placed it within the framework of the Charter. The CJEU concluded that only a provision of general application could meet the requirements of clarity, predictability, accessibility and, in

[752] NSS, 9 Azs 98/2016-45, 2 September 2016, para 26: 'The condition of the so-called reasonable prospect of detention [*sic*] is not explicitly mentioned in the Act on the Residence of Foreign Nationals or the Dublin III Regulation, but it results directly from the prohibition of arbitrary deprivation or limitation of liberty enshrined in Article 8(2) of the [Czech] Charter of Fundamental Rights and Freedoms, Article 5(1)(f) of the [ECHR] and also Article 6 of the Charter of Fundamental Rights of the European Union'. Similarly in NSS, 9 Azs 98/2016-45, 2 September 2016, para 26.

[753] NSS, 4 Azs 73/2017-29, 17 April 2018, paras 20–21. See EASO, *Detention of applicants for international protection in the context of the Common European Asylum System* (EU Publications Office 2019) at 30. The situation where the Police were not obliged to include an explicit assessment in the light of the Extended Chamber judgment arose in NSS, 1 Azs 4/2018-22, 23 January 2019, para 23. See also NSS, 2 Azs 4/2018-19, 21 March 2018, para 13 (in detention proceedings, the Police cannot be reasonably expected to conduct a *thorough* investigation with the aim of *ascertaining in detail* the situation in the Member States responsible; this obligation is incumbent on the Ministry of the Interior). The same reasoning appeared in 4 Azs 141/2018-21, 11 September 2018, para 18 (the reasoning concerning the asylum system in Romania was brief but sufficient). For an express recognition of the change in the standard of review in the case law, see NSS, 5 Azs 296/2017-32, 31 January 2019, para 8; and NSS, 1 Azs 226/2019-26, 14 November 2019, para 18.

[754] NSS, 10 Azs 122/2015-88, 24 September 2015.

[755] Ibid. para 17. See *Mooren v Germany*, Application No 11364/03, Merits and Just Satisfaction, 9 July 2009.

particular, the protection against arbitrary deprivation of liberty.[756] The criteria were explicitly added to § 129(4) of the Act on the Residence of Foreign Nationals with effect from 18 December 2015.[757] Administrative courts annulled the detention decisions taken before this legislative change as unlawful on the authority of the *Al Chodor* judgment, sometimes with a reference to the CJEU's Charter-based reasoning.[758]

The Charter's presence in the Dublin cases analysed above is specific given that the cases mostly turn on the facts or the procedural requirements related to the establishment and assessment of those facts. Since this is an area governed by directly applicable EU legislation, which explicitly incorporates the Charter standard into one of its key provisions, the Charter's application in these cases does not give rise to any contentious issues that would be interesting from the analytical point of view. That said, this is also an area where the presence of the Charter in the NSS's reasoning is most normalised. The judgments analysed above also illustrate well that the NSS is mostly aware of the ECtHR and CJEU (Charter-infused) case law and even takes account of its recent developments,[759] such as when the European courts adopted the explicit distinction between systemic and individual risks.[760]

3.1.2.4 The Charter and the review of validity of EU secondary legislation

In contrast to the French case law analysed below,[761] it is rare for the NSS to refer to the Charter in the context of reviewing the validity of EU secondary legislation. The only noteworthy but especially significant example is *M. v Ministry of the Interior*, in which the Charter was referred to in the question for a preliminary ruling on validity.[762] There, the NSS asked the CJEU whether Article 14(4) and (6) of Directive 2011/95/EU was compatible with, inter alia, Article 18 of the Charter (right to asylum). Under Article 14(4) of the Directive, the Member States may revoke, end or refuse to renew the status granted to a refugee by the competent body when there are reasonable grounds for regarding him or her as a danger to

[756] Case C-528/15 *Al Chodor and Others*, EU:C:2017:213, para 43.
[757] Act No 314/2015 Coll.
[758] NSS, 10 Azs 122/2015-150, 20 April 2017; NSS, 1 Azs 269/2015-40, 12 April 2017; and NSS, 8 Azs 124/2015-37, 25 May 2017.
[759] See eg 1 Azs 226/2019-26, 14 November 2019; and NSS, 1 Azs 192/2020-27, 24 September 2020, paras 32–36 (citing the CJEU judgment of 19 March 2019 in Case C-163/17 *Jawo*, EU:C:2019:218).
[760] For example, 1 Azs 248/2014-27, 25 February 2015; and 5 Azs 195/2016-22, 12 September 2016.
[761] See Sections II.4.1.5 and II.4.2.3.
[762] NSS, 5 Azs 189/2015-36, 16 June 2016. For other references in orders for a preliminary ruling, see eg NSS, 10 Azs 252/2017-43, 23 November 2017; and NSS, *Soukupová v Ministry of Agriculture* NSS, 8 As 8/2010-94, 12 April 2011. For a discussion, see M Madej, 'The Charter of Fundamental Rights of the EU in the Czech Judicial Decision: Falling Short of Expectations?' (2019) 9 *The Lawyer Quarterly* 228 at 241–242.

the security of the Member State in question; or when he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State. Under Article 14(6), if those persons remain in the Member State, they are however entitled to rights set out in, or similar to those set out in, Articles 3, 4, 16, 22, 31, 32 and 33 of the 1951 Geneva Convention relating to the Status of Refugees. The NSS shared the doubts previously expressed by the UN High Commissioner for Refugees and the Czech Public Defender of Rights that the grounds in Article 14(4) of the Directive go beyond those exhaustively enumerated in the so-called cessation clause in Article 1(C) of the Geneva Convention, thereby violating this Convention.[763] The reasoning of the NSS was naturally rife with Charter cross-citations, even though its Article 18 served as little more than a point of entry for the Geneva Convention, the main substantive point of reference.[764] The CJEU interpreted the system set up by Directive 2011/95/EU in a manner compliant with the Geneva Convention, relying on the distinction between the 'refugee status' (which can be revoked or ended under Article 14(4) of the Directive) and 'being a refugee' within the meaning of the Geneva Convention (which is an objective quality that cannot be altered by any provision of the Directive).[765] A remarkable effect of the NSS reference and the CJEU's subsequent preliminary ruling was that the Ministry of the Interior proposed amendments to the Asylum Act provisions that transpose Article 14(4)–(6) of the Directive.[766] Strikingly, the NSS participated in the inter-departmental comment procedure and gave its view on the compatibility of the proposed amendments with EU law, including the Charter.[767] This demonstrates that Charter references can appear in other contexts than administering justice in individual cases.

3.1.2.5 The Charter at its most powerful: Exclusionary direct effect and the disapplication of national law

It was an amendment of the Act on the Residence of Foreign Nationals and the Asylum Act which led to the most striking use of the Charter by the NSS. The litigation

[763] NSS, 5 Azs 189/2015-36.
[764] The NSS also cited Articles 4 and 19(2) of the Charter in the context of *non-refoulement*, as it generally does.
[765] Joined Cases C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra* and *X. and X. v Commissaire général aux réfugiés et aux apatrides*, EU:C:2019:403, para 110.
[766] Draft Act MV- 45817-7/OBP-2019, available at: apps.odok.cz/veklep-detail?p_p_id=material_WAR_odokkpl&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=3&_material_WAR_odokkpl_pid=KORNBGL9LWDI&tab=detail. See the Explanatory Memorandum, at 24.
[767] Available on the link above, under the reference No Sleg 238/2019-16. See also NSS, 5 Azs 189/2015-127, 23 April 2020, where the NSS revisited this issue (paras 20–26).

triggered by this amendment demonstrated the procedural advantages the Charter can have for applicants and how various levels of fundamental rights protection interact. The CJEU, the NSS and the Czech Constitutional Court all had their say on the issue. The case of *N. L. v Regional Police Directorate in Prague* concerned the conditions for judicial review of administrative decisions by which a foreign national is detained under the Act on the Residence of Foreign Nationals. The contentious provision in § 172(6) of that Act stated that where a foreign national is released before the delivery of the court's decision on an application challenging a detention decision, that court must automatically discontinue the proceedings pending before it. The Czech legislator introduced this provision in 2017 despite criticisms in the Senate that the application of the new procedural rule would unduly restrict access to judicial review of lawfulness of detention.[768] The restrictive nature of this amendment takes on particular salience in a scenario where the detainee is not actually released but simply re-detained under a different legal regime, namely pursuant to the Asylum Act.

This was precisely the situation in which the applicant in *N. L. v Regional Police Directorate in Prague* found himself. The NSS – after analysing the implications of the contested provision on the right to judicial protection – held that that provision was *inapplicable* as it violated Article 15 of the Returns Directive 2008/115/EC and Articles 6 and 47 of the Charter read together with Article 5(4) and (5) of the ECHR in that it denied access to first-instance judicial review.[769] The Court followed this holding by a comprehensive, almost textbook-like, substantiation of – first – why the contested provision was in breach of EU law and – secondly – why it had to be set aside.

Regarding the first point, the NSS stated that § 172(6) of the Act on the Residence of Foreign Nationals transposed the Returns Directive, and therefore the Charter applied by virtue of its Article 51(1). The Court then set out the general operational framework of the Charter, including Article 52(3) of the Charter, which interlinks the Charter with the ECHR. It contextualised it by reference to the Explanations to the Charter, according to which Article 6 of the Charter on the right to liberty and security has the same meaning and scope as Article 5 of the ECHR, which specifically provides for the right to contest the lawfulness of detention before a court and the right to compensation for unlawful detention.[770] The bulk

[768] L Kuncová and B Homolková, 'Omezení soudního přezkumu zajištění cizinců' [The limitation of judicial review of the detention of foreign nationals] (2018) 26 *Právní rozhledy* 134.
[769] NSS, 6 Azs 320/2017-20, 29 November 2017, para 50.
[770] Ibid. para 51.

of the Court's ensuing substantive analysis was based on the ECHR and the ECtHR's case law, to the extent that it could even be argued that the NSS materially decided the case mainly by reference to the ECHR. It is important to note, however, that the ECHR was not applied directly; rather, the material standard contained therein entered the Court's reasoning via the Charter. Notwithstanding the fact that the reasoning was developed in a section titled 'Incompatibility of the legislation with EU law, the [Charter] *and the European Convention'*,[771] the NSS never really deviated from the Charter axis: ECHR-based arguments were systematically imported into the normative framework of the Charter.[772] The Court's reasoning arguably reflects a conscious choice to rely on the exclusionary direct effect of EU law (the Charter and the Directive), a choice which the NSS carried over to subsequent decisions on similar facts.[773]

This last remark brings us to the second point where the NSS had a choice between relying on different legal provisions with different procedural and institutional implications. While the applicant invoked the Czech Charter alongside the ECHR and proposed that a question of constitutionality be referred to the Constitutional Court, the NSS explained that 'due to the obligation to provide rapid and effective judicial review of detention, [the Court] found that in the present case it is more appropriate to proceed differently',[774] namely by setting aside the contested provision for being contrary to EU law. The Court justified its choice with reference to the case law of the Constitutional Court from which it deduced that it was for ordinary courts 'to deal primarily with the incompatibility of the applied national legal provision with [EU law] and not to apply the contested provision'.[775]

It is important to note that according to established (but still controversial) case law of the Constitutional Court, international human rights treaties are part of the constitutional order, that is, the constitutional frame of reference within the jurisdiction of the Constitutional Court.[776] This means – again in terms of the case law of the Constitutional Court – that should an ordinary court come to the conclusion that a statute which is to be

[771] Ibid. (emphasis added).
[772] See ibid. eg para 63: 'If everyone who was unlawfully detained has – under Article 5(5) of the European Convention – a guaranteed right to compensation, then this right – due to the same content of Article 6 of the [Charter] – also arises directly from Union law.'
[773] For these repeated cases, see eg NSS, 10 Azs 317/2017-31, 21 December 2017; NSS, 1 Azs 442/2017-17, 11 January 2018; NSS, 6 Azs 381/2017-14, 17 January 2018; and NSS, 9 Azs 401/2017-24, 7 February 2018.
[774] NSS, 6 Azs 320/2017-20, para 69. Cf. NSS, 3 Azs 243/2017-24, 25 September 2017, where the NSS, in an *obiter dictum*, privileged the constitutional review and did not consider EU law at all (see para 14).
[775] Ibid. para 72, with reference to Czech Constitutional Court, Pl. ÚS 12/08, 2 December 2008.
[776] Czech Constitutional Court, Pl. ÚS 36/01, 25 June 2002; 403/2002 Sb.

applied in the proceedings is in conflict with the constitutional order (including the ECHR), it shall submit the matter to the Constitutional Court under Article 95(2) of the Constitution. The emphasis on the Directive and the Charter (read together with the ECHR) allowed the NSS to elegantly avoid the obligation to refer the case to the Constitutional Court.[777] Given the overlap (and the relationship of mutual reinforcement) between the Charter and the ECHR, it is difficult to see how the mechanisms of obligatory constitutional preliminary reference (as concerns the Czech Charter or the ECHR) and obligatory disapplication of national law (and the 'prohibition' to present EU-law arguments to the Constitutional Court) can co-exist, without creating an artificial divide between the two broadly equivalent instruments. In this complex situation, the NSS must be praised for being transparent about the reasons why it opted for the Charter route. It is noteworthy that in the end, the Constitutional Court had a chance to make its own assessment; it annulled the contested provision for being contrary to the Czech Charter of Fundamental Rights and the ECHR (but not EU law).[778]

The NSS later relied on the same reasoning in a case that concerned the same legal issue but under a different legal provision.[779] There, the applicant was initially detained under the Act on the Residence of Foreign Nationals and was subsequently re-detained pursuant to § 46a of the Asylum Act following his application for international protection. Under § 125(6) of the Act on the Residence of Foreign Nationals, 'the existing detention decision issued pursuant to [the Act on the Residence of Foreign Nationals] is annulled as of the communication of the detention decision issued under § 46a of the Asylum Act'. When it came to the procedural consequences of that *ex lege* annulation for ongoing judicial proceedings concerning the annulled act, the NSS pointed out two conflicting lines of case law. Under the first one, the annulation of the contested act means that the proceedings have become devoid of purpose, and there is no need to adjudicate on the matter. Under the second line of case law, judicial review remains possible. In the context of the case, the NSS felt that the choice between the two lines of case law was moot: if it chose to apply § 125(6) of the Act on the Residence of Foreign Nationals in the sense of the first theory in a way

[777] For a commentary, see T Boková, 'Klučkova novela před soudy: přednost EÚLP nebo čl. 95 odst. 2 Úst?' (2019) 25 *Soudní rozhledy* 74.
[778] Czech Constitutional Court, Pl. ÚS 41/17, 27 November 2018. See the Dissenting Opinion of Judges Suchánek and Sládeček, who considered the annulation of the contested provisions by the majority of the Constitutional Court to be superfluous, given that the NSS already decided to disapply the contested provisions. See also Concurring Opinion of Judge Zemánek, who thought the Constitutional Court should not have excluded the EU Charter from its review and should have directly applied it.
[779] NSS, 8 Azs 158/2020-22, 27 October 2020.

resulting in no judicial review, the provision would have to be set aside on account of running afoul of EU law, specifically of Article 15 of the Returns Directive and Articles 6 and 47 of the EU Charter.[780] Here, the EU-law (and the Charter) based argument effectively served to choose between two interpretations of national law (stronger indirect effect of, inter alia, the Charter), even though the NSS did not frame the argument as a case of EU-consistent interpretation.

D. H. v Ministry of the Interior concerned an analogous procedural provision in § 46a(9) of the Asylum Act, but the context of the case was different: it concerned not a restriction of judicial review in the first instance, but 'only' a restriction of second-instance cassation review before the NSS. While some NSS chambers held that neither the Czech Charter nor the ECHR guaranteed the right to second-instance judicial review,[781] the Tenth Chamber had doubts about the compatibility of § 46a(9) of the Asylum Act with EU law and referred a Charter-based question for a preliminary ruling:

> Does the interpretation of Article 9 of Directive 2013/33/EU … in conjunction with Articles 6 and 47 of the [Charter] preclude national legislation which does not allow the [NSS] to review a judicial decision concerning detention of a foreign national after the foreign national has been released from detention?[782]

Before the CJEU had a chance to have its say on the matter, the NSS withdrew the reference after the Czech Constitutional Court had annulled as unconstitutional the contested provisions of the Asylum Act and Act on the Residence of Foreign Nationals.[783] Advocate-General Sharpston did manage to deliver an opinion in the case. In it, she analysed the principle of effectiveness (as invited to do so by the NSS in its order for reference) and concluded that the contested provision was contrary to EU law also insofar as it concerned second-instance proceedings.[784] It would have been useful to have a CJEU judgment too, given the disagreement within the NSS over the interpretation of the relevant EU law, including the Charter. Whilst some chambers followed the Tenth Chamber and stayed the

[780] Ibid. para 19.
[781] NSS, 3 Azs 153/2017-29, 31 October 2017.
[782] NSS, 10 Azs 252/2017-43, 23 November 2017. Case C-704/17 *D. H. v Ministerstvo vnitra*. It is not without interest that the President of the Chamber was Professor Z Kühn, who has written extrajudicially on the national application of EU law.
[783] Czech Constitutional Court, Pl. ÚS 41/17, 27 November 2018.
[784] Opinion of AG Sharpston in Case C-704/17 *D. H. v Ministerstvo vnitra*, EU:C:2019:85. For a NSS's reaction to it, albeit in another context, see NSS, 5 Azs 90/2018-37, 6 September 2019, para 21.

proceedings waiting for the CJEU's decision,[785] arguably open to having recourse to direct effect of the Charter, other chambers disagreed with the legal assessment of the Tenth Chamber and saw no violation of EU law, which led them to discontinue the proceedings.[786]

Access to judicial review was at the core of another case that saw the Charter at its strongest, this time in the context of long-term visas. There was an important difference, though: the Charter's added value as against other fundamental rights standards was not only procedural but also substantive. In *M .K. v Appeal Commission on the Residence of Foreign Nationals*, the applicant was refused a long-term student visa and challenged the refusal before administrative courts.[787] The Municipal Court in Prague dismissed his action based on § 171(a) of the Act on the Residence of Foreign Nationals, which excludes from judicial review a decision to refuse a visa unless the case concerns a visa of an EU citizen's family member.[788] In his cassation complaint, the applicant challenged the compatibility of this provision with the Charter. He claimed that he met the conditions for admission to the territory of the Czech Republic in Council Directive 2004/114/EC and that he had a right to challenge the refusal to issue a visa before a court, arguing that Article 47 of the Charter offered a higher level of protection than Article 36(2) of the Czech Charter of Fundamental Rights and Freedoms.[789] The NSS's reasoning followed a three-step logic.

First, the Court verified whether the case was governed by Union law within the meaning of Article 51(1) of the Charter. Even though the conditions for issuing long-term visas (visas issued for a period exceeding three months) are not as such subject to EU-wide regulation and are therefore a matter for the Member States, under Czech law, a long-term visa is coterminous with a residence permit within the meaning of Directive 2004/114/EC allowing third-country nationals to stay for the purpose of studies. This meant that the case at hand was within the scope of EU law.[790]

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[785] See eg NSS, 5 Azs 258/2018-14, 28 August 2018; NSS, 4 Azs 185/2017-28, 7 December 2017; NSS, 9 Azs 100/2018-24, 16 August 2018. In some of the proceedings continued after the Czech Constitutional Court annulled the limitation, the NSS did annul the contested act, which it would not have been able to do were the procedural limitation to apply: see eg NSS, 9 Azs 167/2018-72, 4 April 2019.
[786] NSS, 3 Azs 361/2017-28, 7 March 2018, para 21; and citing that case eg NSS, 6 Azs 138/2018-16, 30 May 2018; and NSS, 7 Azs 439/2018-26, 15 November 2018.
[787] NSS, 6 Azs 253/2016-49, 4 January 2018.
[788] MC in Prague, 9 A 226/2015-27, 30 August 2016.
[789] NSS, 6 Azs 253/2016-49, paras 8–9. Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12.
[790] Ibid. para 35.

Secondly, in the subsequent substantive analysis, the NSS relied on several CJEU judgments interpreting the provisions of the Schengen Borders Code due to the obvious parallels between long-term and short-term visas. It concluded that while Directive 2004/114/EC did not directly grant a right to a long-term visa, the applicant had a right to have his application for a student residence permit – and therefore, considering how the Czech rules are set up, also for a long-term student visa – fairly and properly processed.[791] This right implies that the applicant must also have the right to an effective remedy before a tribunal under Article 47 of the Charter.[792]

Thirdly, applying this finding to the case at hand, the NSS relied on the direct effect of Article 47 Charter, which it established rather curiously with reference to *Kücükdeveci*, where the CJEU held that the general principle of EU law prohibiting all discrimination on the grounds of age was directly effective.[793] The NSS immediately followed this reference by stating that:

> The present case has to do with the principle of effective judicial protection, a general principle of Union law, and it is possible to clearly identify in Article 47 of the Charter a right to an effective remedy before a tribunal, which means that it is equally possible to regard this Article as having direct effect.[794]

Bringing the reasoning to its inevitable conclusion, the NSS held that § 171(a) of the Act on the Residence of Foreign Nationals was inapplicable in the case at hand for being 'contrary to EU law, namely Directive 2004/114/EC read together with Article 47(1) of the Charter'.[795] Again, the NSS justified the recourse to exclusionary direct effect by reference to a judgment of the Czech Constitutional Court and its own judgment in *N. L. v Regional Police Directorate in Prague* discussed right above.[796] In contrast to the latter judgment, the NSS did not need to justify why it did not refer the matter to the Constitutional Court because it had already done so in another case (which was outside the scope of EU law) in 2011,[797] and the Constitutional Court did not find the provision to be contrary to the Czech Charter.[798] The EU-law element in *M .K. v Appeal Commission on the Residence of Foreign Nationals* therefore made it possible to reach a different solution, with the result that the Charter offered

[791] Ibid. para 43.
[792] Ibid.
[793] Ibid. para 44.
[794] Ibid.
[795] Ibid. at para 45.
[796] Ibid.
[797] NSS, 1 As 85/2010-84, 20 April 2011.
[798] Czech Constitutional Court, Pl. ÚS 23/11, 24 April 2012.

a higher level of protection than the Czech Charter, as interpreted by the Constitutional Court. The NSS made no mention of the ECHR or the Czech Charter in its reasoning, and it is quite telling that it used the abbreviation 'the Charter' to refer to the EU Charter, not the Czech Charter as it would normally do. Just as in *N. L. v Regional Police Directorate in Prague*, the NSS relied on the combination of a Charter provision and a provision of a directive, but when looking at the reasoning as a whole, the Charter was without a doubt the leading argument.

In *N. A. K. v Ministry of Foreign Affairs*, the NSS grappled with the same provision contained in § 171(a) of the Act on the Residence of Foreign Nationals, but this time in the context of short-term visas issued under the Visa Code.[799] There, the applicant, a Pakistani national, was refused a short-term visa by the Czech Embassy in Islamabad, a decision which was confirmed on appeal by the Ministry of Foreign Affairs. In a scenario similar to *M. K. v Appeal Commission on the Residence of Foreign Nationals*, the applicant brought the case to the NSS after the Municipal Court in Prague dismissed his action based on § 171(a) of the Act on the Residence of Foreign Nationals.[800] Similar scenario, similar argumentative progression: i) Article 32(3) of the Visa Code grants the right to appeal against a visa refusal; ii) when applying the Visa Code, the Member States must take into account Article 47 of the Charter; iii) the CJEU interpreted the latter provision as requiring 'the possibility to bring the case concerning a final decision refusing a visa before a court';[801] iv) excluding judicial review of the decision of the Ministry of Foreign Affairs 'is therefore incompatible with Article 32(3) of the Visa Code read together with Article 47 of the [Charter]';[802] the court has an obligation to set aside a national provision which is 'incompatible with European Union law to the detriment of the applicant'.[803]

All three of these direct effect cases are methodologically robust in that the Charter's applicability is always explicitly assessed, and the disapplication of the given national provision is painstakingly substantiated, even though, in the last case, the reasoning was remarkably matter-of-fact. It is notable that in all of them, Article 47 of the Charter was employed alongside the relevant secondary-law provision on procedural guarantees. In the first case, *N. L. v Regional Police Directorate in Prague*, the right to review by a tribunal

[799] NSS, 10 Azs 112/2018-50, 18 September 2019. See also similar cases NSS, 9 Azs 115/2018-39, 26 September 2019; and NSS, 5 Azs 283/2018-28, 9 October 2019.
[800] MC in Prague, 11 A 38/2017-44, 19 March 2018.
[801] Case C-403/16 *El Hassani*, EU:C:2017:960, para 41.
[802] NSS, 10 Azs 112/2018-50, paras 11–13.
[803] Ibid. para 14.

was explicitly contained in the secondary-law provision,[804] but the NSS arguably felt the need to also rely on the Charter (and the ECHR) as it was privileging the EU-law route instead of the constitutional route. The combined direct effect of Article 47 of the Charter and the corresponding EU secondary legislation is an established method of case solving which has been relied on by the CJEU itself.[805]

In contrast, the secondary legislation in the other two cases did not expressly require that the appeal mechanism be of judicial nature. Interestingly, AG Bobek in *El Hassani* – which the NSS cited in both judgments – guarded against reading the requirement of judicial review into Article 32(3) of the Visa Code by interpreting it 'in the light of' Article 47 of the Charter.[806] In *M. K. v Appeal Commission on the Residence of Foreign Nationals* and *N. A. K. v Ministry of Foreign Affairs*, it was therefore the direct effect of the Charter itself – and not the direct effect of a secondary-law provision interpreted in light of the Charter – that determined the outcome of the case, albeit that the Charter was applied in parallel with that secondary law provision.

3.1.3 Outside the scope of EU law: On comparative arguments and ornaments

On a few occasions, the Charter appeared in the reasoning of the NSS as a comparative (non-mandatory) cross-citation.[807] Before the Charter gained legal force, a comparative reference to the Charter was the only permissible one. In the post-Lisbon era, given that a citation of the Charter can only be non-mandatory in cases where national courts are under no obligation to give effect to the Charter, a reference to the Charter can be described as comparative only in those cases before national courts which do not fall under the formal scope of application of the Charter as defined in its Article 51(1), that is, outside the classic EU-law regime characterised by primacy and direct effect.

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[804] See Article 15(2) and (3) Directive 2008/115/EC.

[805] See eg Case C-556/17 *Torubarov*, EU:C:2019:626, para 78. See also NSS, 5 Azs 105/2018-46, 31 January 2020, para 84, where the NSS made an interesting *obiter* reference to the potential direct effect of Article 47 of the Charter and Article 46(3) of Directive 2013/32/EU in the *Torubarov* scenario.

[806] Opinion of AG Bobek in Case C-403/16 *El Hassani*, EU:C:2017:659, paras 113–116.

[807] On comparative reasoning generally, see eg M Bobek, *Comparative reasoning in European supreme courts* (OUP 2013); and D Canale, 'Comparative Reasoning in Legal Adjudication' (2015) 28 *Canadian Journal of Law and Jurisprudence* 5. The result can be a sort of 'spill-over' effect: see more generally A Johnston "'Spillovers' from EU Law into National Law: (Un)intended Consequences for Private Law Relationships" in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Bloomsbury 2013) 357 at 358: 'spillover effects concern the impact of EU law by virtue merely of its *presence* within the national legal system, requiring the rules and structures of that national system to react to EU law, albeit in areas not (intended to be) covered by EU law itself'.

A comparative argument featuring the Charter found its way into the reasoning of the NSS in January 2005 in *Stavmat – Spring v Ministry of the Environment*, the historically first reference to the Charter by the NSS.[808] This was a purely procedural case that concerned the scope of a power of attorney. The applicant was fined by the Czech Environmental Inspectorate for breaching his obligations under the Waste Act 1997. The fine was revoked on appeal by the Ministry of the Environment, which remitted the case to the Inspectorate for new consideration. The Inspectorate then adopted a new decision with a new case number, and the applicant appealed against that new decision. The Ministry of the Environment – without any prior invitation to complete the application – held the appeal inadmissible since the original power of attorney granted by the applicant was not valid in the proceedings concerning the Inspectorate's new decision. The NSS was asked to review the lawfulness of the inadmissibility decision.

The NSS's judgment pursued two lines of argument. The Court began with a firm statement of principle. Although under the Code of Administrative Procedure, administrative authorities do not have a specific obligation to invite a party to add a missing power of attorney to the case file, this obligation can be deduced from the general rule in Article 2(3) of the Code of Administrative Procedure, under which the 'administrative authorities must provide the citizens and the organizations with guidance and help in order not to prejudice their rights due to the lack of knowledge of law'.[809] To further substantiate the existence of such an obligation, the NSS referred to the constitutional principle that 'public administration is a service for the public', to the 'principle of the right to good administration' in the 1999 Public Defender of Rights Act, and to the EU Charter:

> In this context, it is appropriate to also mention Article 41 of the [Charter], which contains the right to good administration, i.e., the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. This Charter cannot be […] applied directly but can be used to demonstrate that this legal principle represents a common value of all Member States of the European Union, including the Czech Republic.[810]

[808] NSS, 7 A 79/2002-66, 13 January 2005.
[809] Ibid para 11. English translation of the provision taken from www.indprop.gov.sk/swift_data/source/pdf/legislation/pravo_6771.pdf.
[810] Ibid. para 12. For other examples of a comparative cross-reference to Article 41 of the Charter, see NSS, 2 As 73/2007-47, 5 September 2008, para 7; and NSS, 9 As 8/2007-89, 25 April 2007, para 20.

According to the NSS, the Ministry of the Environment's treatment of the application violated these principles. Nevertheless, it was not this first line of argument that led the Court to invalidate the contested decision. In the second part of the reasoning, the NSS held that the original power of attorney was valid throughout the administrative proceedings, notwithstanding the change of case number in the second first-instance decision.

It is noteworthy that the NSS did not need to develop the first line of reasoning to deal with the case successfully. It would be able to rely – as it did in a previous analogous case[811] – solely on § 2(3) of the Code of Administrative Procedure without referring to the Constitution and to the right to good administration. Nevertheless, the NSS chose to see the issue through the prism of the principle of good administration and saw the Charter as an authoritative expression of that principle and a common value to which the Czech Republic was committed. While the Court's reasoning indicates its openness to EU law and to comparative reasoning, it is problematic on two counts. First, Article 41 of the Charter is only addressed to institutions and bodies of the Union, not the Member States, which makes it uncertain whether the Member States as drafters of the Charter saw the principle of good administration as a common value to be upheld in all national administrative procedures. A cautious approach corresponds to the suggestion made by one scholar that the intention behind limiting Article 41's applicability to Union institutions was to 'reassure Member States that they [would] not have to take into account the principle of good administration in […] national administrative procedures'.[812] Secondly, the comparative argument adds little in the way of persuasive power since the formulation of 'fair handling of affaires' can be interpreted to mean almost anything and can therefore support virtually any interpretation of procedural rules favourable to the parties. This is incidentally one of the reasons why Article 41 is a provision popular with litigants.[813]

A slightly more elaborate use of the Charter in a comparative analysis by the NSS happened in *J. K. v National Security Agency*.[814] In this case, the applicant challenged a

[811] NSS, 5 A 41/2001-28, 19 December 2003, para 4. The Court only stated, 'for the sake of completeness', that 'the administrative authority has an analogous obligation under § 19(3) of the [Code of Administrative Procedure 1967] in cases of removing the deficiencies of the submission itself'.
[812] J Dutheil de la Rochère, 'The EU Charter of Fundamental Rights, Not Binding but Influential: The Example of Good Administration' in A Arnull, P Eeckhout and T Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (OUP 2008) 157 at 170. The author was Deputy Representative of the French Government in the Convention which drafted the Charter.
[813] See eg RC in Brno, 29 Af 67/2018-55, 7 April 2020, paras 7 and 39 (argument of the applicant; declaration of non-violation instead of a declaration of non-applicability).
[814] NSS, 6 As 111/2018-44, 16 January 2019.

decision of the National Security Agency by which that Agency revoked his security clearance due to the security risk he posed. The reasons for revocation were contained in a classified file to which the applicant did not have access, which according to the applicant constituted a violation of his procedural rights. The NSS was therefore called – not for the first time – to perform a balancing exercise between individual procedural rights and national security, clearly outside the scope of EU law. The NSS held that the restrictions stemmed from the specific nature of the security vetting procedure and were considered legitimate and generally proportionate in the case law of the ECHR and the Czech Constitutional Court provided that they are counterbalanced by the procedures conducted by judicial authorities.[815] The NSS first referred to the ECtHR's judgment in *Regner v the Czech Republic*, which concerned essentially the same facts.[816] Before the NSS summarised its own established case law and the case law of the Constitutional Court, it briefly pointed out that the same balancing approach exists under EU law:

> Analogous requirements for counterbalancing procedural restrictions also arise from the case law of the Court of Justice of the EU, for example, from the Grand Chamber judgment of 4 June 2013, C-300/11 in Case ZZ v Secretary of State for the Home Department, which concerns the application of the freedom of movement and residence within the territory of EU Member States, but its conclusions regarding the requirements for compensating for the restrictions on the party's rights under Article 47 of the [Charter] *are applicable by analogy outside the scope of application of EU law*. Also, according to the Court of Justice of the EU, judicial review must be carried out 'in a procedure which strikes an appropriate balance between the requirements flowing from State security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to that which is strictly necessary … [and] [i]n particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision […] is based…' (paras 64 and 65 of the judgment).[817]

Compared to *Stavmat – Spring v Ministry of the Environment*, the comparative argument in *J. K. v National Security Agency* was more elaborate: it contained a reference to a specific CJEU judgment which interpreted the substance of Article 47 of the Charter. The slight randomness of the NSS's choice to refer to free movement law in an intelligence services case can be explained by the fact that the CJEU judgment was cited by the ECtHR in *Regner*

[815] Ibid. para 27.
[816] Application No 35289/11, Merits and Just Satisfaction, 19 September 2017.
[817] Ibid. para 29 (emphasis added). The NSS also cited Case C-300/11 *ZZ* (without an express reference to the Charter) in a later intelligence case: see NSS, 9 Azs 81/2019-33, 29 March 2019, para 21.

v the Czech Republic.[818] There we have a good example of what some have described as the 'circulation of principles' in the interpretative reasoning of courts.[819] The added value of the comparative argument lies in the emphasis on the 'essence of the grounds' that has to be communicated to the person concerned. This element, which the NSS chose to highlight in the quote of the CJEU's reasoning, was essential for the NSS's conclusion that the restriction of J. K.'s procedural rights was justified. The recourse to international and European documents to provide more substance to the Court's reasoning can be explained by the fact that this was a classic hard case that opposed two fundamental values.[820]

In *District Chamber of Commerce in Ústí nad Labem v Office for the Protection of Competition*, Article 47 of the Charter was mentioned – together with Article 6 of the ECHR and CJEU and ECtHR case law – in the context of limiting judicial review to arguments of fact and law introduced by the applicant within a specified period.[821] In the comparative section of the judgment, the NSS recalled that such limitation is accepted both by the ECtHR and by Union Courts, quoting the CJEU's decision in *KME Germany AG and Others*. There, the CJEU held that when an applicant challenges a Commission decision, he or she must 'identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded'.[822]

The Charter made a passing appearance in a similarly significant case of *Oderˇ Agrar k. s. v Appellate Financial Directorate*, which gave the NSS the opportunity to reconsider its previous case law on whether tax penalties are of criminal nature.[823] In this case, the applicant challenged a decision by which the Financial Directorate increased the applicant's liability to corporate income tax and ordered it to pay a tax penalty under the legal provisions applicable to the facts. These provisions were subsequently amended: the tax penalty rate concerned was reduced from 5% to 1%, and there are now provisions for limiting the severity of sanctions. The applicant argued on the basis of an established principle of criminal law that where the new provisions provided for a lighter penalty, that penalty should be applied.

[818] Application No 35289/11, Merits and Just Satisfaction, 19 September 2017, para 71.
[819] See D Simon, 'Repenser le raisonnement interprétatif: autonomie ou circulation des principes, des méthodes et des techniques, dans les rapports de systèmes' in B Bonnet (ed), *Traité des rapports entre ordres juridiques* (LGDJ 2016) 605.
[820] The controversy surrounding the balancing exercise is well illustrated, inter alia, by the fact that the Grand Chamber in *Regner v Czech Republic* held there was no violation by a majority of 10 to 7.
[821] NSS, 10 As 156/2018-110, 18 February 2020.
[822] Case C-272/09 P *KME Germany and Others v Commission*, EU:C:2011:810.
[823] NSS, 4 Afs 210/2014.

Once again, the NSS was confronted with the question of whether the tax penalty was criminal in nature.[824] Contrary to previous case law, the Fourth Chamber opined that it was. In its assessment, it extensively cited the case law of the ECtHR and before applying it to the case at hand, it observed that:

> This case law of the [ECtHR] was explicitly endorsed by the Court of Justice of the EU in [Case C-617/10 *Fransson*], where it dealt with a reference for a preliminary ruling from a Swedish court regarding the applicability of Article 50 of the [Charter] to the imposition of a tax surcharge for a failure to duly submit a tax return. The Court of Justice explicitly admitted that such a case could potentially be subject to guarantees under Article 50 and could involve a criminal sanction. It referred to its previous case law in which it accepted the criteria established by the [ECtHR] for identifying the proceedings that can be classified as a criminal charge within the meaning of Article 6 paragraph 1 of the Convention (see especially [Case C-489/10 *Bonda*]).[825]

The NSS's Extended Chamber agreed with the Fourth Chamber that the imposition of tax penalty involved the determination of a 'criminal charge' within the meaning of Article 6 of the Convention.[826] There was no mention of the Charter or the CJEU's case law. Comparative recourse to EU law in the Fourth Chamber's decision was, however, appropriate as the given provisions on tax penalties are equally applicable in cases both outside and inside the scope of EU law.

When evaluating references to the Charter outside the scope of EU law, a line should be drawn between a comparative argument and a simple reference to a certain fundamental right being included in the Charter. To illustrate this point, let us look at the reference to the Charter in *P. M. v Havířov Municipal Office*, in which the applicant challenged a refusal to authorise a notified public assembly.[827] The NSS first cited Article 19 of the Czech Charter of Fundamental Rights and Freedoms, which guarantees the freedom of assembly, and briefly defined its rationale and conditions for restricting it. It then referred to the corresponding provisions of the Universal Declaration of Human Rights, the ECHR, the International Covenant on Civil and Political Rights and, finally, the EU Charter:

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[824] The NSS previously considered that the tax penalty is not an administrative sanction but a lump compensation for the harm incurred by the state: see eg NSS, 1 Afs 1/2011-82, 28 April 2011.
[825] NSS, 4 Afs 210/2014-28, 19 February 2015, para 39. The NSS also referred to criteria for the assessment identified in the Opinion of AG Kokott in Case C-489/10 *Bonda*, EU:C:2011:845.
[826] NSS, 4 Afs 210/2014-57, 24 November 2015. For a discussion, see M Karfíková and Z Karfík, 'Penalty under the tax procedure code (in the context of the case law of the supreme administrative court)' in L Etel and M Popławski, *Tax codes concepts in the countries of Central and Eastern Europe* (Temida 2 2016) 297.
[827] NSS, 6 As 126/2013-30, 17 July 2014.

> Lastly, the EU Charter, too, contains in Article 12(1) the right of everyone to freedom of peaceful assembly.[828]

Consider also a local tax case *B. A. v South Moravian Regional Authority*, in which the NSS referred to the notion of 'the best interests of the child' contained in Article 3(1) of the Convention on the Rights of the Child and continued:

> An analogous provision is contained in Article 24 paragraph 2 of the Charter of Fundamental Rights of the European Union ('In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.').[829]

In these cases, the Charter citation is merely ornamental and typically appears alongside other fundamental rights instruments, that is, *ad abundantiam*, 'for the sake of completeness'.[830] While it could be argued with regard to *B. A. v South Moravian Regional Authority* that the NSS considered it useful to refer to the 'best interests of the child' principle in the Charter because that principle does not explicitly appear in the Czech Charter or the ECHR, the reference in *P. M. v Havířov Municipal Office* does appear to be superfluous.

Such ornamental references to the existence of a certain provision in a certain fundamental rights catalogue are not real comparative arguments. Since they have no ascertainable influence on the outcome of the case, they are not problematic from the 'competence creep' point of view. Such a reference could, however, create or add to the confusion about the scope of the Charter.[831] In the case of fully-fledged comparative arguments from which it is clear that the Charter is not being applied by virtue of its normative force, but for its persuasive value, the risk of confusion about the Charter's scope is low. In contrast, when courts refer to the Charter in a purely ornamental way, the risk of unnecessary confusion is real.

3.2 The practice of Czech regional courts

Czech regional courts have, for the most part, followed the NSS's approach as regards the legal effects given to the Charter in the reasoning, relying on NSS precedents (Section 3.2.1). In other cases, regional courts have acted alone and applied the Charter in ways like those identified in the NSS case law and did so competently (Section 3.2.2).

[828] Ibid. para 11. See also NSS, 6 As 125/2013-50, 30 October 2014, which contained an identical paragraph including an identical reference to the Charter (para 10).
[829] NSS, 1 As 116/2014-29, 12 November 2014.
[830] For another such case, see NSS, 3 As 115/2019-37, 15 June 2021, para 19.
[831] See Section I.3.2.1.

Nevertheless, a handful of decisions suffer from methodological shortcomings in terms of misusing the notion of equivalent protection.

3.2.1 Regional courts in the interpretative shadow of the *Nejvyšší správní soud*?

The overwhelming majority of judgments containing a reference to the Charter are Dublin transfer cases, in which the courts cite Article 3(2) of the Dublin III Regulation and perform the assessment under that provision, be it in the transfer decision itself or in a prior decision on pre-transfer detention under the provisions of the Act on the Residence of Foreign Nationals. As in the NSS case law, the Charter's role is not remarkable here for its abstract interpretive contribution to the court's reasoning; rather, it provides a framework within which the court conducts the factual assessment of the potential barriers to a Dublin transfer.[832] Given that regional courts' Dublin decisions are frequently challenged in cassation proceedings, this area of law is characterised by a high degree of interpretative direction coming from the NSS.[833]

The preceding observation is not limited to Dublin cases but has a general validity. Where first-instance regional courts refer to the Charter, they often do so following the lead of the NSS, either in the same case in which multiple administrative proceedings were initiated in a factually similar case[834] or in a case in which a rule already interpreted by the NSS is to be applied. Rather than coming up with their own Charter-based argumentation, regional courts generally apply the interpretative solutions reached by the NSS.

In this way, regional courts had recourse to exclusionary direct effect of the Charter where the NSS had previously done so. For instance, regional courts fully followed the NSS

[832] See eg RC in Brno, 33 A 75/2016-39, 14 July 2016 (annulled by NSS, 6 Azs 198/2016-24, 27 September 2016; insufficient assessment, in the detention decision, of the realistic prospect of transfer to Hungary); RC in České Budějovice, 55 Az 2/2018-26, 29 November 2018 (no systemic deficiencies in Poland); RC in Hradec Králové, 28 Az 4/2018-34, 6 April 2018 (no systemic deficiencies in Germany; cassation complaint rejected by the NSS); RC in Ostrava, 61 Az 10/2016-21, 20 May 2016 (annulled by NSS, 3 Azs 128/2016-45, 29 May 2018: insufficient Article 3(2) assessment of the Regional Court regarding asylum conditions in Hungary); and RC in Plzeň, 60 Az 30/2019-39, 8 July 2019 (no systemic deficiencies in Poland). For a very comprehensive Article 3(2) assessment regarding Italy, see RC in Hradec Králové, 43 Az 5/2018-103, 7 May 2018.

[833] See eg cases where regional courts followed the NSS's case law making pre-transfer detention conditional on a realistic prospect that the transfer can take place: RC in Prague, 44 A 19/2016-28, 14 November 2016 (quoting NSS, 10 Azs 256/2015-55, 6 May 2016, para 20); RC in Prague, 44 A 41/2017-19, 24 October 2017, para 16 (quoting NSS, 10 Azs 101/2017-28, 6 June 2017); RC in Brno, 41 A 60/2020-31, 11 November 2020, para 29, quoting several NSS precedents. See also RC in Ústí nad Labem, 41 A 1/2016-44, 29 June 2016 (applying the rule in NSS, 1 Azs 248/2014-27, 25 February 2015, that a Dublin transfer decision must contain an explicit assessment of whether the transfer to the Member State responsible is compatible with the rule in Article 3(2)); and RC in Brno, 33 Az 60/2019-44, 14 February 2020 (failure to conduct an individualised assessment under Article 4 of the Charter, failure to order a psychological assessment of the applicant).

[834] RC in České Budějovice, 54 A 8/2018-36, 18 July 2018 (re-detention of an asylum seeker under the Act on the Residence of Foreign Nationals).

by invoking the Charter (together with the applicable Directive) to disapply § 172(6) of the Act on the Residence of Foreign Nationals, which limited judicial review of detention decisions to cases where the person was still physically detained.[835]

More frequently, regional courts borrow (explicitly or implicitly) parts of the NSS reasoning containing references to the Charter that were categorised above under the heading of indirect effect. The piece of NSS reasoning most popular with regional courts is the panoramic reference – widespread in the NSS's case law– to the right to private and family life as a limit to the fact-finding investigatory powers of administrative authorities in residence cases.[836] We have also found many panoramic references laying out the fundamental rights background in deprivation liberty cases (mainly pre-removal detention),[837] residence cases with a private or family life element,[838] data protection cases[839] but also in other areas.[840] A stronger, non-panoramic indirect effect of the Charter (together with the relevant Directive) first recognised by the NSS in relation to the gift tax imposed

[835] RC in Prague, 45 A 1/2018-37, 19 February 2018, para 14; RC in Hradec Králové, 29 A 3/2018-30, para 15; and RC in Ústí nad Labem, 42 A 22/2018-36, 4 October 2018, para 15. See NSS, 6 Azs 320/2017-20, 29 November 2017. See also RC in Hradec Králové (Pardubice), 61 A 5/2021-23, 17 May 2021 (applying NSS, 1 Azs 146/2019-23, 28 August 2019).

[836] See NSS, 6 As 30/2013-42, 25 September 2013, para 25: '[t]he possibility for an administrative authority to ascertain [facts related to conditions of private and family life] through investigation is very restricted, for they constitute the applicant's private sphere protected by the fundamental right to respect for private and family life within the meaning of Article 8 of the [ECHR], Article 10(2) of the [Czech Charter] and – when applied to a situation within the scope of Union regulation – Article 7 of [the Charter]'. This reasoning was borrowed for example in MC in Prague, 9 A 118/2011-39, 24 September 2014; RC in Brno, 31 A 143/2017-36, 14 February 2018, para 19; and Regional Court in Prague, 44 A 32/2016-23, 1 February 2017.

[837] See eg RC in Hradec Králové, 43 A 3/2018-31, 20 March 2018, para 15; RC in Ostrava, 62 Az 49/2019-32, 8 January 2020, para 13; and RC in Ústí nad Labem, 78 A 15/2017-43, 9 June 2017. See also RC in Ústí nad Labem, 41 Az 4/2016-16, 19 February 2016 (quoting NSS, 5 Azs 13/2013-30, 17 September 2013).

[838] RC in Brno, 30 A 76/2015-51, 22 June 2017, para 21; RC in České Budějovice, 51 A 57/2017-40, 16 July 2018, para 49; RC in Hradec Králové (Pardubice), 52 A 103/2014-47, 19 December 2014; RC in Brno, 30 A 261/2017-46, 30 October 2019, para 40 (best interests of the child); MC in Prague, 4 A 35/2016-52, 19 May 2016 (impossibility of expulsion if it would result in a disproportionate interference with the right to private and family life); and RC in Brno, 30 A 24/2019-72, 25 March 2021, para 30 (best interest of the child).

[839] RC in Hradec Králové (Pardubice), 52 A 10/2019-58, 4 July 2019, para 19; and RC in Prague, 43 A 89/2018-57, 30 May 2019, para 19.

[840] MC in Prague, 8 A 191/2014-74, 17 March 2015, p. 6 (consumer law, discrimination of children); and RC in Brno, 63 A 2/2017-28, 15 June 2017, para 20 (assembly act). See also RC in Hradec Králové, 32A 1/2015-37, 7 October 2015 (a reference in a Dublin transfer case to the obligation to respect the best interests of the child as laid down in the Convention on the Rights of the Child and the EU Charter; the reference was likely modelled on a similar reference made by the NSS in an entirely different context of local tax in NSS, 1 As 116/2014-29, 12 November 2014, para 43). See also cases in which regional courts adopted the approach of the Czech Constitutional Court and the CJEU: MC in Prague, 14 A 81/201-56, 17 September 2018, para 23 (quote of the Czech Constitutional Court's judgment concerning the recognition of professional qualifications; II. ÚS 443/16, 25 October 2016); MC in Prague, 11 Ad 4/2017-41, 24 April 2018, paras 16–17 (application of the solution reached in Case C-104/13 *Olainfarm*, EU:C:2014:2316; interpretation of Directive 2001/03/EC in the light of Article 47 of the Charter); and RC in Ústí nad Labem (Liberec), 59 A 47/2014-120 (Case C-562/12 *Liivimaa Lihaveis*, EU:C:2014:2229).

upon the free-of-charge acquisition of greenhouse gas emission allowances[841] was then also recognised by regional courts.[842] In fact, in some cases, the regional courts' judgments were nothing more than direct quotes of the NSS's reasoning.[843] The same interpretative influence regarding an indirect effect of the Charter was apparent in a case concerning the right to an annual period of paid leave.[844]

A good illustration of the relationship between the NSS and regional courts as regards Charter-based reasoning – with its highs and lows – is *V. V. Q. v Appeal Commission on the Residence of Foreign Nationals*. The *Regional Court in České Budějovice* dealt with a complex immigration case of Mr V. V. Q., a Vietnamese national, who challenged a decision by which his application for temporary residence – based on his status of a family member of an EU national – was rejected on the ground that he circumvented the Act on the Residence of Foreign Nationals in order to fraudulently obtain a temporary residence permit.[845] The Court had no doubt that the applicant's behaviour was correctly qualified as fraudulent. However, after a detailed assessment of the factual circumstances concerning the applicant and his family, the Court annulled the contested decision on the basis that the administration insufficiently considered the impact of the residence permit refusal on the applicant's private and family life. The Court's exemplary consideration of the fundamental rights dimension of the case can be explained quite easily: it had already heard a different case concerning Mr V. V. Q. and failed to consider the family life implications, which led to its judgment being set aside by the NSS.[846] This time around, therefore, the Regional Court was careful to follow the interpretative line drawn by the NSS, relying heavily on the NSS's reasoning. Interestingly, the Regional Court quoted extensively from NSS case law and introduced the Family Reunification Directive as an additional argument. The Court highlighted that the NSS in *M. S. v Appeal Commission on the Residence of Foreign Nationals*[847] referred to the CJEU case law, according to which Article 4(1) of the Family Reunification Directive goes beyond the ECHR and the EU Charter in obliging the Member

[841] See Section II.3.1.1.2.
[842] RC in Brno, 31Af 51/2012-448, 26 October 2015, paras 14–15; RC in Hradec Králové (Pardubice), 52 Af 35/2013-94, 26 October 2015; and RC in Plzeň, 30Af 3/2014-57, 31 July 2015.
[843] See eg RC in Ostrava, 22 Af 39/2014-63, 13 August 2015.
[844] RC in Ústí nad Labem, 15 Af 131/2017-37, 21 April 2020, para 45 (applying NSS, 1 Afs 429/2018-41, 10 December 2019).
[845] RC in České Budějovice, 51 A 57/2017-40, 16 July 2018. See also RC in České Budějovice, 51 A 35/2017-34, 15 May 2018 (same applicant, same argument).
[846] RC in České Budějovice, 10 A 115/2014-40, 20 April 2015; and NSS, 6 Azs 96/2015-30, 25 August 2015.
[847] NSS, 7 As 152/2012-51, 29 August 2013.

States to allow family reunification in some cases without any margin of appreciation.[848] The problem is that the NSS in that judgment erroneously applied the Family Reunification Directive – without any explanation – to a case concerning a family member of an EU national, that is, to a situation outside the scope of that Directive.[849] The Regional Court's assessment of the fundamental rights element – even if the Charter's role was virtually non-existent – was thus, in principle, completely faithful to the NSS case law, including its shortcomings. This demonstrates that the role of the NSS, and other apex courts, in providing interpretative Charter-related guidance to lower courts comes with a great deal of responsibility.

A slightly different constellation arose regarding the limitation of judicial review in the context of short-term visas under the Visa Code. Here, it was first the Regional Court in Prague (before the NSS had its say on the matter) that invoked the Charter to set aside § 171(a) of the Act on the Residence of Foreigners, which excluded judicial review of a refusal to grant a short-term visa.[850] The Regional Court relied principally on C-403/16 *El Hassani*, in which the CJEU held that Article 32(3) of the Visa Code required the Member States to provide for a judicial appeal procedure against decisions refusing visas:[851]

> When issuing visas, the authorities of the Czech Republic apply European Union law, namely the Visa Code […]. Article 32(3) of the Visa Code grants the right to appeal to applicants who have been refused a visa. The content of this right was defined in [Case C-403/16 *El Hassani*]. […] Excluding judicial review of the decision on a new appraisal of the grounds for refusing a visa is contrary to Article 32(3) of the Visa Code in conjunction with Article 47 of the [Charter]. In a situation where the Court were to apply a provision of national law which excludes the decision from judicial review, and is therefore contrary to European Union law to the detriment of the applicant, the Court has an obligation to disregard that legal rule and not apply it (see [NSS, 29 November 2017, 6 Azs 320/2017-20, paras 68–72, and NSS, 4 January 2018, 6 Azs 253/2016-49, esp. para 45]).[852]

From the substantive point of view, the CJEU's judgment was the legal authority for relying on the exclusionary combined direct effect of the Visa Code and the Charter. From the

[848] RC in České Budějovice, 51 A 57/2017-40, para 49.
[849] See supra n 607.
[850] RC in Prague, 45 A 102/2016-23, 23 April 2018.
[851] EU:C:2017:960. The CJEU also read Article 32(3) of the Visa Code 'in the light of Article 47 of the Charter' (para 42).
[852] RC in Prague, 45 A 102/2016-23, para 15. See also for the same reasoning, RC in Prague, 45 A 105/2016-23, 26 April 2018, para 12. See also MC in Prague, 5 A 34/2017-27, 30 January 2019, para 22 (quoting from the judgment of the RC in Prague in 45 A 102/2016-23).

methodological point of view, the recourse to such direct effect was justified with reference to NSS judgments, in which the NSS relied on the exclusionary direct effect of Article 47 of the Charter (together with the relevant provision of EU secondary law) in the context of judicial review of detention decisions and decision on long-term residence. Other Regional Courts followed suit,[853] and the NSS later adopted the same reasoning.[854] It is not surprising that regional courts will seek to rely on NSS precedents in the extraordinary scenario of activating the exclusionary direct effect of the Charter.

3.2.2 Regional courts stepping out of the NSS's interpretative shadow

We found a handful of cases in which regional courts referred to the Charter in a way which cannot be directly traced to NSS case law. Unsurprisingly, these references can be neatly assigned under one of the categories identified in the discussion of the NSS case law.

Thus, we found panoramic references to the fundamental rights background, including the Charter.[855]

A stronger indirect effect of the Charter occurred in *SOLUS v Office for Personal Data Protection*, in which the Municipal Court in Prague relied on the Charter in support of rejecting the applicant's argument that processing, as such, of personal data without the consent of the data subject does not constitute an interference in the private life:

> Mention must also be made of Article 8(1) of the [Charter], which applies in the present case since Union rules on personal data protection are applied. This Article guarantees everyone the right to the protection of personal data. In [Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*], the [CJEU] clearly stated that the right to the protection of personal data 'is closely connected with the right to respect of private life' (paragraph 47 of the judgment).[856]

A very strong indirect effect of the Charter was employed in a judgment of the Regional Court in Prague in *N. K. v Regional Police Directorate of the Central Bohemia*

[853] MC in Prague, 5 A 203/2017-29, 29 June 2020, para 23.
[854] NSS, 10 Azs 112/2018-50, 18 September 2019. See text accompanying nn 799–803.
[855] RC in Brno, 29 A 4/2015-70, 21 December 2016, para 44 (reference to the right to property; a servitude imposed on the basis of the Road Act); RC in Brno, 31 A 107/2016-61, para 14 (reference to the freedom of thought, conscience and religion; compulsory vaccination); RC in Brno, 29 A 69/2014-74, 11 October 2016, para 27 (the RC annulled a decision by which the administration refused to enter the surname of the applicant, his wife and their son in its original form containing a letter 'a' with tilde (ã) into the marriages registry and the birth registry; Article 7 of the Charter was mentioned in a quote of Case C-438/14 *Bogendorff von Wolffersdorff*, EU:C:2016:401); and MC in Prague, 5 A 44/2021-48, 16 April 2021, para 40.
[856] MC in Prague, 10A 72/2013-86, 8 March 2017; confirmed in NSS, 2 As 107/2017-72, see Section II.3.1.1.3.

Region,[857] which can be seen as a new addition to the long saga concerning the undue limitations of judicial review in detention cases. Let us recall that both the NSS and the Czech Constitutional Court were previously confronted with a rule of the Act on the Residence of Foreign Nationals that obliged all courts to discontinue proceedings challenging a detention decision upon the release of the applicant – a detained foreign national. The NSS relied on the direct effect of the Charter and the Returns Directive 2008/115/EC to set aside this rule, and the Constitutional Court later struck down the rule as unconstitutional.[858] To address this issue, the Act on the Residence of Foreign Nationals was amended; under § 125(6) second sentence, the notification of a new detention decision or a decision on the prolongation of detention has the effect of rescinding the existing detention decision. In procedural terms, an action against the initial, then rescinded detention decision would have to be rejected, given that the contested decision no longer existed. The Regional Court in Prague drew on, and built on, the previous NSS and Constitutional Court case law concerning the original rules and held that such rejection would be contrary to the right to effective and rapid judicial protection:

> The Court concluded that the rescindment of the contested decision pursuant to § 125(6) second sentence of the Act on the Residence of Foreign Nationals does not constitute a ground for rejecting the action under § 46(1)(a) of the Code of Administrative Procedure. Only such interpretation of the relationship of those provisions conforms to the Constitution (Article 36 of the [Czech] Charter and Article 5(4) of the [ECHR]) and to EU law (Article 47 of the EU Charter and Article 9(3) [Directive 2013/33/EU]).[859]

There, the Regional Court used the co-applicable fundamental rights standards to the fullest: a strong combined indirect effect of the Charter and the 'judicial-review' provision of the Reception Conditions Directive 2013/33/EU, coupled with a recourse to Constitution-consistent (and ECHR-consistent) interpretation.

A comparative cross-citation of the Charter appeared in *M- SILNICE and Others v Office for the Protection of Competition*, where the Regional Court in Brno referred to the Charter in the context of the prohibition of the so-called fishing expeditions in Union competition proceedings:

[857] RC in Prague, 53 A 20/2019-55, 14 January 2020.
[858] See Section II.3.1.2.5.
[859] RC in Prague, 53 A 20/2019-55, para 14. This solution was then quoted in: 45 A 20/2019-33, 21 January 2020, para 13.

> The basis of the prohibition of conducting fishing expeditions lies not only in the […] right of effective defence, but also – and most importantly – the right to respect for private life, home and communications. On the European level, these rights are enshrined in the [ECHR] (Article 8), which is primarily part of the Council of Europe system of human rights protection, but also enters significantly into European Union law, mainly via the Charter of Fundamental Rights of the European Union, in which those rights are also explicitly contained (Article 7).[860]

Interestingly, the NSS explicitly approved such spill-over from Union to national competition law, stating that the fundamental rights protection objectives of national and Union procedural law in this field are clearly 'identical'.[861]

In *I. M. v Regional Authority of the Moravian-Silesian Region*, the Charter had a prominent place in a reference for a preliminary ruling made by the Regional Court in Ostrava.[862] The case concerned the provisions of an Act transposing Article 4 of Directive 2003/59/EC on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers.[863] Under Article 4 of the Directive, drivers holding a driving licence as regards one of the enumerated groups shall be exempted from the requirement to obtain an initial qualification. Under the stricter Czech transposing legislation, before the driving activity in question may be carried out, periodic training of 35 hours must be completed by persons exempted under Article 4 of the Directive. The Regional Court considered the stricter rule to be compliant with the Directive's aim but remarked that there was a competing argument consisting in the legitimate expectations of drivers and their freedom to choose an occupation under Article 15 of the Charter.[864] The CJEU agreed that the Directive did not preclude the Member States from imposing stricter requirements, that is, from requiring the drivers referred to in Article 4 of Directive 2003/59/EC to fulfil additional conditions.[865] As for the Charter, the CJEU found no violation of its Article 15 since the conditions for restricting fundamental rights laid down in Article 52(2) of the Charter were met.[866] This engagement with the Charter in the context of the preliminary ruling procedure is a perfect example of how certain regional courts (judges) are willing and

[860] RC in Brno, 30 Af 29/2016-262, 29 May 2017.
[861] NSS, 3 As 157/2017-222, 20 February 2019, para 50.
[862] RC in Ostrava, 22 A 20/2013-34, 16 July 2015.
[863] Directive 2003/59/EC of the European Parliament and of the Council of 15 July 2003 on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers, amending Council Regulation (EEC) No 3820/85 and Council Directive 91/439/EEC and repealing Council Directive 76/914/EEC [2003] OJ L 226/4.
[864] RC in Ostrava, 22 A 20/2013-34, para 18.
[865] Case C-447/15 *Muladi*, EU:C:2016:533, para 40.
[866] Ibid. para 51.

ready to assume their Union mandate. It can also be taken as an illustration of how important the role of the parties is in laying out the EU-law dimension of the case.

A significant role of the Charter (and the ECHR) in terms of indirect effect occurred in an immigration case concerning a Nigerian national who had a Czech partner and a Czech son and who was denied a residence permit.[867] The administration found that the applicant provided false information about his immigration history within the territory of the EU and his identity, thereby fraudulently circumventing the immigration law within the meaning of § 87e(1)(d) of the Act on the Residence of Foreign Nationals. The administration did not conduct a proportionality assessment of the decision's impact on the applicant under § 174a of the Act on the Residence of Foreign Nationals, given that this was not required in the proceedings in question. After justifying the relevance of EU law in the case,[868] the Regional Court took issue with the authorities' omission to assess the proportionality of the measure from the point of view of its impact on the applicant's family life. The court noted that the Act on the Residence of Foreign Nationals did not expressly provide for such an assessment in cases such as the applicant's. However,

> A non-issuance of a residence permit can also, by reason of its impact (for example, an existential threat to the foreign national and his or her family), in certain circumstances constitute, by itself, such an interference with the private and family life of the foreign national that it amounts to a disproportionate interference with the rights under Article 7 of the [EU] Charter and Article 8 of the [ECHR] […]. Therefore, the obligation to assess the proportionality of the impact on family and private life in some cases follows directly from Article 7 of the Charter and Article 8 of the [ECHR].
>
> […]
>
> Where a statute does not expressly provide for an obligation to assess proportionality under § 174a of the Act on the Residence of Foreign Nationals, proportionality must nevertheless be assessed in those individual cases where it can be presumed, on the basis of sufficiently concrete and individualised arguable claims made in good time by the foreign national, that there is a danger of a potential disproportionate interference with the right of the foreign nationals to private and family life under Article 7 of the [EU] Charter and Article 8 of the [ECHR].[869]

This is a clear case of a strong indirect effect through which the applicability of a national provision was extended to cover situations which were not expressly provided for, on the

[867] RC in Prague, 54 A 11/2018-54, 10 July 2020.
[868] Ibid. paras 26 and 36.
[869] Ibid. paras 37 and 38. See also RC in Prague, 52 A 12/2019- 49, 8 June 2020, para 28.

basis of obligations directly arising from Article 7 of the Charter (referred to in the first place) and Article 8 of the ECHR. The methodological correctness of the Regional Court's judgment is testified by the fact that the equivalence of the two provisions was confirmed by CJEU case law. Notably, the indirect effect of the Charter was not mediated by an indirect effect of EU secondary law, even though the Court also referred to, in other places in its judgment, to Article 35 of the Free Movement Directive 2004/38/EC.

In contrast with the judgments analysed above in which regional courts applied the equivalence principle competently, we have found several decisions where equivalence-based reasoning was methodologically dubious. Consider, for example, the judgment of the Regional Court in České Budějovice in a case belonging to the cluster of solar levy cases.[870] Faced with the applicant's plea that the solar levy was contrary to, inter alia, Articles 16, 17, 21 and 52(1) of the Charter, the Regional Court relied on the following argument:

> As to the applicant's references to international treaties, the Court […] points to the [judgment of the Constitutional Court in Pl. ÚS 17/11], which considered fundamental freedoms, the protection of property, the prohibition of discrimination, the freedom to conduct a business and the interpretation of legal rules also with regard to international treaties binding for the Czech Republic. […] From the point of view of international treaties binding for the Czech Republic, the Constitutional Court did not find that the act concerned would be contrary to the fundamental principles of a state based on democracy and the rule of law. Simply put, the Constitutional Court did not find the contested rules to be contrary to the international treaties cited by the applicant.[871]

The Regional Court clearly went too far with its simplification efforts, relying on the *non sequitur* that the compatibility with the Constitution and international treaties automatically equals compatibility with the Charter. While the Constitutional Court's decision dealt with ECHR-based pleas, it contained nothing on the Charter.[872]

On cassation, the NSS admitted that the Regional Court's reasoning was unsatisfactory in that it did not specifically address the Charter-based plea. According to the NSS, the Regional Court should have set out the reasons why it considered the contested

[870] Analysed at length in Section I.3.2.2.
[871] RC in České Budějovice, 10 Af 614/2012-44, 13 March 2013. For the same reasoning see eg RC in České Budějovice, 10 Af 553/2012-69, 30 January 2013. See also RC in Ústí nad Labem, 15 Af 436/2012-60, 18 February 2015; and RC in Ústí nad Labem, 15 Af 4/2014-47, 27 April 2016; RC in Brno, 30 Af 100/2013-81, 8 October 2015.
[872] Pl. ÚS 17/11, 15 May 2012, paras 2, 19 and 43.

national rules to be consistent with the Charter.[873] However, the NSS did not see this problem as serious enough to annul the Regional Court's judgment. In support of this generous attitude, the NSS had recourse to the analytical framework of equivalent protection:

> In relation to the alleged conflict with the [Charter] and the Treaty on European Union, which are part of Union law, the [NSS] notes, first, that the Constitutional court interprets the constitutional law taking into account the principles arising from Union law; [the Constitutional Court] cannot completely disregard the impact of Union law on the creation, application and interpretation of national law, in areas in which the creation, effects and purpose of legal provisions are directly linked to Union law […]. Furthermore, the [NSS] recalls that according to Article 52(3) of the [Charter], in so far as the [Charter] contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same (as far as values are concerned) as those laid down by the [ECHR]. Therefore, in regular cases, the protection of rights and freedoms guaranteed by the Czech constitutional order and the protection of identical rights and freedoms contained in the Charter is, in principle, equivalent.[874]

In an unexpected turn of events, the ECHR was used as an intermediary to establish the equivalence between the Czech Constitution and the ECHR. The problem is that Article 52(2) of the Charter is only relevant, as is clear from its wording, insofar as the ECHR contains rights that correspond to Charter rights. The list of corresponding rights is given in the Explanations to the Charter; Articles 16 (freedom to conduct a business) and 21 (non-discrimination) of the Charter are not on that list. This makes the NSS's attempt to absolve the Regional Court's problematic reasoning less convincing. In fact, what made it possible for the NSS to employ such a sweeping equivalence approach was that the applicant did not present any serious arguments in support of his Charter-based claims, as the NSS noted in its decision.[875] The NSS's non-formalistic approach is striking compared to some French judgments that quashed lower courts' decisions for failing to address a Charter-based plea.[876]

Some subsequent decisions of regional courts relied on the NSS's reasoning quoted above with the effect of stretching the equivalence reasoning beyond its limits, dismissing Charter-based pleas (or pleas based on general principles of EU law) on the sole ground that the Constitutional Court already reviewed the contested provisions and found no violation. For example, in February 2018, the Municipal Court in Prague referred to the equivalence

[873] NSS, 1 Afs 17/2013-43, 11 July 2013, paras 27 *in fine* and 28.
[874] Ibid. at para 27.
[875] Ibid. at para 28 *in fine*.
[876] See text accompanying nn 980–982.

framework of the NSS (copying the passage cited above) and took it a step further by removing the careful wording of the NSS that used the 'in principle' formula:

> The protection of the rights to property, the principle of equality and the corresponding prohibition of discrimination, the principle of legal certainty, the principle of proportionality and the right to the right to engage in enterprise which are guaranteed by the Treaty on the EU and the [Charter] have undoubtedly the same sense, scope and meaning and enjoy the same protection as the identical fundamental rights and freedoms guaranteed by the constitutional order of the Czech Republic. Besides, the applicant has not produced any proof to the contrary (a proof to the contrary certainly cannot reside in her extremely general and, moreover, purely hypothetical claim that it can never be excluded that what is found to be compatible with EU rules is not compatible with the constitutional rules of the Czech Republic, and vice versa).[877]

This sweeping approach based on all-encompassing equivalence has no support in any of the provisions governing the relationship between the Charter and national constitutions. There is no general doctrine of equivalent protection between the Czech Constitution and the Charter in the way suggested by the Municipal Court. It should be said that from the material point of view, the Charter could not have made a difference, but not because its guarantees are substantively equivalent to the Czech guarantees, but rather because the Charter was not applicable. It is unfortunate that the Municipal Court did not dismiss the Charter-based argument on this ground, which would be equally (if not more) efficient and formally correct. The defendant, the Appellate Financial Directorate, even explicitly argued that the Charter was inapplicable, referring to Article 51(1) of the Charter and to NSS case law.[878]

In subsequent disconcerting developments, regional courts employed the NSS's equivalence framework with the effect of completely sidestepping the review of national legislation against the Charter – on the ground that the legislation was already held to be consistent with the Constitution by the Constitutional Court – in cases other than those related to the solar levy.[879] Admittedly, what makes this approach somewhat more defendable is the fact that the applicants in those cases likely did not submit specific Charter-based arguments which would necessitate a Charter-specific treatment different from the constitutional treatment. The best way to prevent courts from misusing the equivalence framework is the procedural activity of litigants who need to make their Charter-based

[877] MC in Prague, 9 Af 14/2014-58, 27 February 2018, para 24 (see also paras 17–33).
[878] Ibid. para 17. The defendant also argued, as a second point, on the basis of the equivalence principle (ibid.).
[879] MC in Prague, 8 Af 24/2016- 90, 30 March 2020, paras 72 and 73.

claims distinct from the constitutional ones. As we have seen, this is not what applicants tend to do: they mostly make sweeping panoramic claims.

4. THE ROLE OF THE CHARTER IN THE REASONING OF FRENCH ADMINISTRATIVE COURTS

This section will look at the Charter's role in the reasoning of the French supreme administrative court, the CE (Section 4.1). It will then analyse the decisions of lower administrative courts. Given that the decisions of first-instance *tribunaux administratifs* are generally not published, it will focus on the case law of *cours administratives d'appel* (Section 4.2). For a brief description of the French system of administrative justice, we refer the reader to the remarks made in Section I.2.4.1.

4.1 The practice of the *Conseil d'État*

Anyone familiar with the reasoning style of the CE, which has historically tended to be authoritative rather than explicative, will expect less variety and more self-restraint when it comes to making references to the Charter. It is true that for the most part, the context in which the Charter is cited is that of explicit Charter-based review, where the CE responds to an applicant's submission that a national or EU rule is contrary to the Charter. Nevertheless, the Charter's role in the reasoning varies significantly, depending on its argumentative weight relative to other fundamental rights instruments and legal rules.

Before we go through all those configurations, we need to mention that quantitatively speaking, most Charter references in CE decisions are those contained in the so-called 'visas', that is, in the introductory part of the CE's decisions containing a list of normative sources that the CE took into account.[880] The legal value of such references is not quite clear. Traditionally, the 'visas' only contain the legal bases upon which the decision is founded:[881] the inclusion of a legal instrument in the 'visas' normally means that the court formally applied that instrument.[882] However, in judicial practice, the CE refers to the Charter in the 'visas' as a way to dispose of a Charter-based plea without discussing it in the text of the decision. In cases with absolutely no link to EU law, the Charter reference in the 'visas' will

[880] See eg CE, 360759, 11 April 2014; and CE, 393589, 9 March 2016. Rarely, specific Charter articles are sometimes referred to: see eg CE, 234073, 19 March 2013 (Article 41; within the scope: Natura 2000).
[881] Ritleng, 'Jurisprudence administrative française intéressant le droit communautaire', supra n 269, para 1.
[882] S Robin-Olivier, 'European Legal Method from a French Perspective. The Magic of Combination: Uses and Abuses of the Globalisation of Sources by European Courts' in UB Neergaard, R Nielsen and L Roseberry (eds), *European Legal Method: Paradoxes and Revitalisation* (DJØF 2011) 307 at 315.

be nothing more than an ornament echoing a Charter-based plea of the applicant.[883] There are also other contexts in which the Charter reference tends to be inconsequential. Very often, a Charter reference only appears in a section summarising the applicant's pleas,[884] in quotes of EU secondary law[885] (particularly quotes of Article 3(2) of the Dublin III Regulation[886]) or quotes of CJEU judgments.[887] As uninteresting as these references are from the material point of view, it is important to know they exist, if only because they are so omnipresent in the case law.

The ensuing discussion will start with decisions in which the Charter's role is insignificant owing to the lack of explicit analysis as well as the indiscriminate co-application of multiple fundamental rights instruments (Section 4.1.1). It will then deal with decisions which cite the Charter but whose reasoning is primarily based on EU secondary legislation (Section 4.1.2). Cases of stronger Charter-consistent interpretation of EU secondary law (indirect effect) are analysed next (Section 4.1.3). Then we look at cases in which the Charter was used as an autonomous standard of review without the intermediary of EU secondary law (Section 4.1.4.). A separate section will discuss cases in which the Charter also acted essentially autonomously but in the specific context of constitutionality review/conventionality review (Section 4.1.5). The final section will turn to Charter-based references for a preliminary ruling (Section 4.1.6).

4.1.1 Panoramic and tandem declarations of non-violation

The CE frequently makes a panoramic declaration of non-violation in response to applicants' panoramic claims which include the Charter alongside other instruments, all within a single statement. As discussed in Section I.4.2.3, the CE is not particularly attentive to the question of whether the Charter is applicable or not. We saw that the CE often uses the technique of dismissing the Charter-based claim 'in any event', which allows it to elude

[883] See eg CE, 424610, 18 March 2019 (the Charter mentioned in the 'visas' in a case concerning an interdiction imposed on the applicant to pursue a professional activity as a physiotherapist, that is, in a case without any EU-law link whatsoever, as observed by the public rapporteur). In other cases, the reference could be taken as a recognition that the case is inherently a fundamental rights case or at least that it has a strong fundamental rights element, but this will be impossible to confirm. See eg CE, 406313, 18 March 2019; CE, 434376, 6 November 2019, paras 11–19 (both in the area of data protection); and CE, 430050, 24 May 2019 (detention in Dublin transfer cases). For a discussion on references to CJEU judgments in the 'visas', see M Gautier, 'Le Conseil d'Etat met ses pas dans ceux de la Cour de justice' (2015) *AJDA* 1116.
[884] See eg CE 343170, 29 June 2011; CE, 357877, 2 April 2012; CE, 363110, 10 October 2012; CE, 372622, 12 November 2013 (a request for interim measures rejected for lack of urgency); CE, 399922, 19 July 2017, para 15; and CE, 426879, 14 January 2019 (pleas). See also CE, 256138,18 April 2003.
[885] See eg CE, 374234, 27 March 2015, para 1.
[886] See eg CE, 385661, 24 November 2014, para 3.
[887] See eg CE, 444937, 13 October 2020, paras 6–7.

the question of the Charter's applicability but also contributes to blurring the distinction between non-applicability and non-violation. Any reference to the Charter within such panoramic declarations tends to be inconsequential from the substantive point of view.

Often, when dismissing a plea in law, the CE first sets out the reasons why it considers the plea unfounded – usually by describing the nature, purpose and general scheme (and, where appropriate, the built-in fundamental rights guarantees) of the contested rules – without reference to concrete fundamental rights provisions. Only then it states that given those considerations, the contested rules do not violate the invoked fundamental rights provisions, usually taken as a group.[888] In such cases, the CE often refers to the ECHR and the Charter in tandem.[889]

At times, the CE develops the core of the reasoning under one of the provisions invoked by the applicant and then directly extends the outcome of that reasoning to the other provisions invoked. In this way, the plea would first be dismissed with regard to the first point of reference, usually the ECHR or the 1789 Declaration, and the Charter-based plea would then be dismissed 'on the same grounds'.[890] Similarly, the CE will conduct a proportionality review in all its individual steps and then make a collective declaration that the contested measures do not constitute a disproportionate interference with the fundamental rights guaranteed by the different instruments.[891]

For example, in *Société Eveler*, the CE held, in a section dealing with the applicant's plea that the contested provisions of the Energy Code were contrary to Article 16 of the Charter, that this plea had to be dismissed 'on the same grounds' on which the CE previously

[888] See eg CE, 406424, 16 August 2018, paras 1–4 (OQTF, panoramic); CE, 423815, 15 June 2020, para 6 (review of the employment of certain surveillance techniques); CE, 416674, 22 October 2018, para 7; CE, 420964, para 1; CE, 417652, 1 April 2019, para 8 (employee representation in small enterprises); and CE, 418543, 15 July 2020, paras 6–8.

[889] CE, 386532, 30 December 2015, para 3 (asylum, Article 6 ECHR and Article 47 of the Charter); CE, 423815, 15 June 2020, para 6 (outside of scope; review of the employment of certain surveillance techniques); CE, 409606, 23 March 2018, paras 5–7 (VAT); CE, 419804, 21 November 2018, para 5 (outside the scope: non-renewal of a *contract d'occupation du domaine public*); and CE, 433069, 16 October 2019, para 13 (data protection, Articles 7 and 8 of the Charter; Article 8 ECHR).

[890] See eg CE, 388134, 12 February 2016 (data retention, within the scope of EU law). See also Opinion of Public Rapporteur O Henrard in CE, 387796, 20 June 2016, at 8: 'Si nous nous en tenons donc au principe général de non discrimination posé au 1 de l'article 21, son respect nous semble devoir être apprécié selon les mêmes critères de légitimité et de proportionnalité que l'article 14 de la CEDH.' The inverse scenario is possible: in *Fédération des fabricants de cigares et la société Coprova*, the ECHR's provisions were merely quoted, and the CE's analysis concentrated on the CJEU's case law, relying on the equivalence of the two instruments under Article 52(3) of the Charter: CE, 401536, 10 May 2017. This was a decision which referred a question for a preliminary ruling, so it is hardly surprising that the Convention was effectively side-lined.

[891] CE, 380091, 15 April 2016, para 14 (see also para 18 referring to the 'principle of proportionality guaranteed by Article 52 of the [Charter]', reflecting the applicant's plea).

dismissed the plea made by the same applicant alleging that the contested provisions were contrary to the freedom to conduct a business guaranteed by the Constitution.[892] A similar technique was used in a data protection case in which the applicants challenged Decree No 2016-1460 authorising the establishment of a database of personal data with regard to passports and national identity cards.[893] The CE first reviewed the contested Decree against Article 8 of the ECHR, Article 16 of the Convention on the Rights of the Child and Article 1 of the 1978 Act on information technology, data files and civil liberties. Interestingly, the CE did not conduct its analysis under each of these provisions separately, but rather under a general principle which it deduced from all these provisions:

> It follows from all these provisions that the interference with the exercise of the right of everyone to respect for their private life by collecting, storing and processing nominative personal information by a public authority can only be legally authorised if it meets legitimate objectives and if the choice, collection and processing of the data are adequate and proportionate to such objectives.[894]

In paragraphs 12 to 17, the CE argued that the contested Decree was compatible with this general principle (that is, with the three provisions mentioned above). When it came to the plea alleging a breach of Articles 7 and 8 of the Charter, the CE held that the plea had to be, in any event, dismissed 'on the grounds stated in paragraphs 12 to 17'.[895]

Similarly, in *Bouygues Télécom (Sté) Société française du radiotéléphone (SFR)*, the applicants complained that the rules on the preliminary authorisation for the exploitation of 5G technology violated, inter alia, Article 1 of Protocol 1 and Article 14 of the ECHR, and Articles 16 and 21 of the Charter.[896] The CE first assessed the proportionality of the contested rules under the ECHR (paragraphs 11 to 18 of the judgment). As to the alleged violation of the Charter, the CE continued:

> It results from what was stated in paras 11 to 18 that the restrictions of these liberties, justified by overriding reasons of general interest, apply in a non-discriminatory manner, are suitable for

[892] CE, 411454, 28 September 2018, para 7. The decision referred to was CE, 411454, 28 July 2017. For a comment, see L Clément-Wilz, F Martucci and C Mayeur-Carpentier, 'Droit de l'Union européenne et droit administratif français' (2019) *RFDA* 149.
[893] CE, 404996, 18 October 2018.
[894] Ibid. para 11.
[895] Ibid. para 19. See also CE, 416674, 22 October 2018, para 7.
[896] CE, 442120, 8 April 2021.

> achieving the objective that they pursue and do not exceed what is necessary to achieve it. Therefore, the pleas in law alleging the infringements of these provisions must be dismissed.[897]

From the CE's response to the Charter-based argument, which appears to have been invoked separately from the ECHR and the CE treated it as such, it would seem that the CE considered there was complete equivalence not only between the substantive protection offered by the provisions concerned, but also between the methodological frameworks for the limitation of rights.

Notably, EU law is not necessarily marginalised as a result of such treatment. An illustration is a case in which the CE assessed the French rules on early retirement and pension credit which in practice benefited mainly female civil servants and were thus indirectly discriminatory based on sex.[898] There, the CE analysed the case primarily under Article 157 of the TFEU, which enshrines the principle of equal pay for male and female workers. The CE took account of the CJEU's judgment in *Leone* – where the CJEU qualified the rules in question as indirectly discriminatory[899] – but held that the rules could be objectively justified by a legitimate social policy aim.[900] The finding that Article 157 of the TFEU was not violated was then extended, 'on the same grounds', to Articles 21 and 23 of the Charter, Directive 2006/54/EC[901] and Article 14 of the ECHR read together with Article 1 of the Additional Protocol.[902] The approach that consists in putting Article 157 of the TFEU first sits well with Article 52(2) of the Charter, under which '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'. Clearly, Article 157 of the TFEU is *lex specialis* to Articles 21 and 23 of the Charter.

Two basic types of declaration of non-violation can be distinguished in the case law, which call for a different judicial treatment and a different depth of analysis. The first type covers instances where the contested measure does not even enter the protective scope of the Charter rights invoked, that is, where the contested measure is not capable – by its nature or

[897] Ibid. para 21.
[898] CE, 369368, 30 December 2015.
[899] Case C-173/13 *Leone*, EU:C:2014:2090.
[900] CE, 369368, para 10.
[901] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.
[902] CE, 369368, para 11.

content – of interfering with the Charter rights in question.[903] The second type concerns cases where the contested measure does interfere with the fundamental right invoked but is justified under the rules for the limitation of rights. In this context, the CE will often use the formula that the contested provisions do not 'disproportionately' (or 'excessively') undermine the Charter right invoked.[904] Nevertheless, the CE's reasoning in panoramic or tandem declarations of non-violation tends to be formulaic in both these scenarios.

4.1.2 The Charter in the fundamental rights background, usually upstaged by EU secondary legislation

In contrast to the previous category where the Charter was treated in one bulk with other fundamental rights provisions, there are cases in which the Charter is treated as a separate standard but stays in the shadow cast either by specific and more detailed EU secondary legislation or a more established fundamental rights catalogue, like the ECHR.

In the first type of cases, where the aspect in question is governed by EU secondary legislation, the core of the CE's reasoning will relate to that legislation: if the CE dismisses an alleged breach by a national measure of that secondary legislation, it will then dismiss the Charter-based plea 'on the same grounds', either explicitly or implicitly. This happened, for example, when several refugee associations challenged the French provisions under which applicants for international protection only received a financial allowance if they accepted the accommodation offered by the authorities.[905] The CE analysed the relevant articles of the Reception Conditions Directive 2013/33/EU[906] and observed that the Directive did not preclude the French provisions in question. The CE took this to mean that the applicants could not validly argue that the contested provisions were contrary to the objectives of that Directive *or to Articles 1 and 18 of the Charter*.[907] A similar constellation occurred in a case concerning a Decree on working time, periods of rest and leave, where it was the Working Time Directive[908] that was the primary point of reference, and the plea alleging a breach of

[903] See eg CE, 424752, 30 April 2019, para 8 (the fundamental rights 'cannot be successfully relied on'); CE, 440285, 12 May 2020, paras 11–12; and CE, 388321, 6 January 2017, para 6. See also the discussion of the *en tout état de cause* argument in Section I.4.2.3.
[904] See eg CE, 423815, 15 June 2020, para 6 (review of the employment of certain surveillance techniques; outside the scope); and CE, 433069, 16 October 2019, para 13 (data protection).
[905] CE, 394819, 23 December 2016.
[906] 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 [2013] OJ L 180/96.
[907] CE, 394819, para 10.
[908] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

Article 31 of the Charter (fair and just working conditions) was then dismissed without any discussion.[909] Notably, EU secondary legislation is actually one of the sources of the fundamental right in Article 31(2) of the Charter, as is made clear in the Explanations to the Charter.[910]

In another case, the applicants challenged provisions setting down a statutory age limit of 57 years for working as an air traffic controller.[911] The CE's conventionality assessment was based solely on the anti-discrimination Directive 2000/78/EC, and the Charter was only mentioned in the 'visas'.[912] This contrasts with a previous case concerning the same issue in the context of gas and electricity industry workers, where the CE referred to Articles 21(1) and 52(1) of the Charter in the text of the reasoning. But even there, the assessment was made within the scheme laid down by the Directive, and the Charter does not seem to have had any added value. In both cases, the age limit at issue was found compatible with EU law.[913] These two approaches illustrate an important point: when fundamental rights guarantees are specified in EU secondary law,[914] the references to the Charter are typically ornamental, and there is no established method as to when they should be made.

Another example of where the Charter review was secondary to the review performed within the specific framework of a piece of secondary legislation was a data protection case in which the primary reference point was the General Data Protection Regulation (GDPR).[915] The CE dismissed the plea alleging a breach of the GDPR and then briskly dismissed the Charter-based plea on the same grounds.[916] In another case, the CE dealt with data

[909] CE, 406987, 21 February 2018, paras 8–10.
[910] G Kalflèche, 'Application du droit de l'Union par les juridictions administratives (février – septembre 2014)' (2014) *Europe* nov. ch. 4.
[911] CE, 362785, 4 April 2014.
[912] Interestingly, the (admittedly quite long) list of 'visas' also contains a reference to a CJEU judgment (Case C-229/08 *Wolf*, EU:C:2010:3), which has not been standard practice. See also Gautier, 'Le Conseil d'Etat met ses pas dans ceux de la Cour de justice', supra n 883. The public rapporteur only mentioned the Charter once in connection with the Directive: see Opinion of Public Rapporteur G Pellissier in CE, 362785, 4 April 2014.
[913] Cf. CAA Marseille, 10MA04633, 17 July 2012; and CAA Marseille, 13MA02133, 27 May 2014. For a comment, see A Bouveresse, 'Chronique Jurisprudence administrative française intéressant le droit de l'Union – Abaissement de la limite d'âge dans la fonction publique au regard du principe d'égalité de traitement' (2014) *RTD Eur.* 952-18; A Bretonneau and J Lessi, 'Limite d'âge des contrôleurs aériens et droit de l'Union: autorisation de vol' (2014) *AJDA* 1029.
[914] Such as the right to the protection of personal data enshrined in Article 8 of the Charter, but implemented in the GDPR: see eg CE, 434376, 6 November 2019, paras 11–19 (the pleas alleging breach of the right to the protection of personal data assessed exclusively under the GDPR, the Charter cited in the 'visas').
[915] 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) [2016] OJ L 119/1.
[916] CE, 424216, 19 July 2019, para 28.

protection-based pleas with reference solely to the 1978 Act on information technology, data files and civil liberties and the GDPR, only to conclude in the final paragraph, in a truly panoramic manner, that:

> It follows from the foregoing that the applicants are not justified in maintaining that the provisions of the contested Decree relating to the automated processing of personal data disregard the requirement to protect the best interests of the child, the right to respect of privacy protected by Article 2 of the 1789 Declaration and by Article 8 of the [ECHR] and the right to the protection of personal data, which derives from the right to respect of privacy and is also protected by Article 8 of the [Charter].[917]

In the CE's decision, the reference to the Charter only appeared in the 'visas'. The Charter could well have been given a more prominent role in the reasoning.

In *Ligue des droits de l'homme and Others* – a data protection case in which the applicants challenged the creation of a database of persons detained in penal or medical institutions – the CE cited the Charter as part of the fundamental rights background of the case, most likely on the applicants' initiative.[918] In an introduction to the assessment of the plea alleging a breach of the right to respect for private life, the CE quoted Article 8 of the ECHR and Article 7 of the Charter; the assessment itself was done exclusively by reference to specific data protection rules, particularly the 1978 Act on information technology, data files and civil liberties.[919]

The CE relied more directly on a CJEU judgment in a cluster of data protection cases concerning the 'right to be forgotten', which it issued after the CJEU replied to its request for a preliminary ruling in *GC and Others*.[920] In these thirteen cases, the applicants challenged decisions of the French Data Protection Authority (CNIL) refusing their application to order Google to remove links to web pages from the lists of results following a search of their names. The broader interest of these decisions is that the CE set out, in a pedagogical style uncharacteristic for its decisions, practical methodological guidance on

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[917] CE, 428478, 5 February 2020, para 26. See also CE, 399922, 27 March 2020, in which the CE annulled a decision of the CNIL requiring Google to carry out de-referencing in the framework of the 'right to be forgotten' on all versions of its search engine, i.e., for all its domain names. The CE relied on the CJEU's preliminary ruling issued in the same case, in which the Court refused to extend the territorial scope of the right to de-referencing and held that the operator is only required to carry out the de-referencing on the versions of its search engine corresponding to all the Member States (C-507/17 *Google*, EU:C:2019:772). The CE only mentioned the Charter in the 'visas'.
[918] CE, 352473, 11 April 2014.
[919] Ibid. paras 5–8.
[920] Case C-136/17 *GC and Others*, EU:C:2019:773.

how requests for de-referencing should be handled for different categories of personal data and how conflicting fundamental rights should be reconciled depending on the category in question.[921] The Charter's presence in the fundamental rights background of the Data Protection Directive 95/46/CE and the GDPR was apparent from several references to it in the CJEU's reasoning, as quoted by the CE at some length.[922]

An interesting interplay between the Charter and EU secondary law in the area of data protection happened in another case, where the public rapporteur mobilised the Charter in a dispute between the CNIL and Google concerning the right to de-referencing, under which a person can request that a search engine operator removes from search results those results linked to that person's name and surname.[923] As is well known, this right was established by the CJEU in *Google Spain* on the basis of Directive 95/46/EC[924] (repealed by the GDPR) and is now guaranteed by Article 17 of the GDPR. The issue was whether the search engine must carry out the de-referencing on all versions of its search engine (that is, globally), or only on the versions corresponding to the EU Member States. One argument against the global solution was that Directive 95/46/EC, from which the CJEU derived the right to de-referencing, only applied to data processing conducted at least partially in the territory of the Member States. The CNIL's counterargument, for which the public rapporteur found some sympathy, was that the CJEU's judgment in *Google Spain* is based on the logic that the Directive merely provides an organisational framework that implements the Charter guarantees.[925] The Charter does not guarantee a superficial right for a person to not see that their personal data is being processed; it guarantees a material right to demand that all Internet users, whoever they are, cannot find that data by typing their name. Hence the necessity for the de-referencing to be global. The public rapporteur agreed that the CJEU's generous approach in *Google Spain* stemmed from the fact that 'the purpose of

[921] For a good overview, see C Crichton, 'Appréciation d'une demande de déréférencement selon le Conseil d'État', *Dalloz actualité*, 24 December 2019. For interactions between the CJEU and ECtHR standards in the CE decisions, see M Cottereau, 'Le droit au déréférencement: L'articulation des jurisprudences des cours européennes par le Conseil d'Etat' (2020) *AJDA* 1115.
[922] CE, 405464, 6 December 2019, paras 10–11; CE, 401258, 6 December 2019, paras 10–11; CE, 395335, 6 December 2019, paras 9–10 and 14; CE, 403868, 6 December 2019, paras 9–10; CE, 429154, 6 December 2019, paras 11–12; CE, 393769, 6 December 2019, para 9; CE, 409212, 6 December 2019, paras 8–9 and 13; and CE, 405910, 6 December 2019, paras 7–8.
[923] Opinion of Public Rapporteur A Bretonneau in CE, 399922, 19 July 2017. Case C-131/12 *Google Spain*, EU:C:2014:317.
[924] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.
[925] Opinion of Public Rapporteur A Bretonneau in CE, 399922, 19 July 2017, at 10.

[Directive 95/46/EC] was to maximise the protection granted by the Charter'.[926] These arguments were ultimately unsuccessful as the CJEU, in a preliminary ruling made on the CE's request in the same case, rejected the global approach.[927]

Back at the CE, the public rapporteur made an interesting observation, prompted by the ultimate arguments of the CNIL, as to the consequences to be inferred from the CJEU's judgment.[928] The public rapporteur began by quoting in full a passage from the CJEU's judgment in Case *Google*.

> While […] EU law does not currently require that the de-referencing granted concern all versions of the search engine in question, it also does not prohibit such a practice. Accordingly, a supervisory or judicial authority of a Member State remains competent to weigh up, in the light of national standards of protection of fundamental rights (see, to that effect, judgments of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 29, and of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, paragraph 60), a data subject′s right to privacy and the protection of personal data concerning him or her, on the one hand, and the right to freedom of information, on the other, and, after weighing those rights against each other, to order, where appropriate, the operator of that search engine to carry out a de-referencing concerning all versions of that search engine.[929]

Expanding on this passage, which he described as a 'subsidiary competence clause', the public rapporteur explained the mechanism of Article 53 of the Charter: in areas not fully determined by EU law, the Member States can adopt or maintain a higher standard of fundamental rights protection on condition that the primacy, unity and effectiveness of EU law are not thereby compromised.[930] As the CJEU specified in the passage cited above, this must be done using the same balancing mechanism as that required by the Charter. The public rapporteur correctly pointed out that the corresponding limitations of the rights guaranteed in Articles 11 and 16 of the Charter would have to be weighed against the right to de-referencing. To finish his analysis, he pointed out that the subsidiary competence clause could be brought to action only by the legislator, not the courts.[931]

In the CE's decision, the Charter took second place to EU secondary law. The Charter was only mentioned in the 'visas'. The CE noted that the national provisions which the CNIL

[926] Ibid.
[927] CE, 399922, 19 July 2017. Case C-507/17 *Google*, EU:C:2019:772.
[928] Opinion of Public Rapporteur A Lallet in CE, 399922, 27 March 2020.
[929] Case C-507/17 *Google*, EU:C:2019:772, para 72.
[930] Opinion of Public Rapporteur A Lallet in CE, 399922, 27 March 2020, at 7–8.
[931] Ibid. at 8.

used as a legal basis for its decisions implemented Articles 12(b) and 14(a) of Directive 95/46/EC, from which the right to dereferencing was derived.[932] Those national provisions therefore had to be interpreted in the light of these EU provisions (now replaced by Article 17 of the GDPR). As for the possibility recognised by the CJEU for national protection to go beyond EU law, the CE held there was no legislative provision to that effect. It added that if such a national legal basis existed, its application would require weighing up a data subject's right to privacy and the protection of personal data, on the one hand, and the right to freedom of information, on the other, which the CNIL had not done.[933] The outcome of the cased thus fully remained within the confines of EU secondary law.

In *Cherence*, which was discussed in Section I.4.2.2 in the context of Article 51 assessments,[934] the CE referred to Article 21(1) of the Charter (prohibition of discrimination) for the purposes of interpreting the anti-discrimination Directive 2000/78/EC.[935] In that case, the applicant contested two Decrees fixing age limits at which employment contracts of workers in the gas and electricity industry expire at between 65 to 67, depending, progressively, on the date of birth. The CE first cited Article 52(1) of the Charter, which sets out the conditions for the limitation of rights, and then Article 6 of Directive 2000/78/EC, according to which the Member States may provide that differences of treatment on the grounds of age shall not constitute discrimination, if 'they are objectively and reasonably justified by a legitimate aim […] and if the means of achieving that aim are appropriate and necessary'. The CE used the scheme of Article 6 to structure its conventionality assessment, considering (i) whether the aim of the contested Decree is legitimate and objectively and reasonably justifies the difference of treatment, and (ii) whether the measure laying down that difference of treatment is appropriate and necessary (the proportionality test).[936] The Charter did not have any other role than being in the background of this assessment. It is notable, however, that the Charter acted autonomously in that it was not merely one of many fundamental rights instruments cited in a row. Also, within the assessment under Article 6 of the Directive, the CE cited two CJEU judgments dealing with the same legal issue, one of which referred to Article 21(1) of the Charter as part of the foundational background of

[932] CE, 399922, 27 March 2020.
[933] Ibid. para 10.
[934] See Section I.4.2.2.
[935] CE, 352393, 13 March 2013.
[936] Ibid. paras 8 and 9, respectively. For more on the question of age limits in the French context, see Opinion of Public Rapporteur G Alberton in CE, 351183, 22 May 2013, available in: G Alberton, 'De la conventionnalité des limites d'âge dans la fonction publique française' (2013) *AJDA* at 1815.

the Directive.[937] Nevertheless, the anti-discrimination directive remained the primary reference point.

A few years later, the CE dealt with the same legal issue in the context of the age limit for exercising certain regulated legal professions.[938] There, the Charter's placement into the fundamental rights background was more explicit. The CE cited Article 6 of the anti-discrimination Directive 2000/78/EC and continued:

> It follows from these provisions, as interpreted by the [CJEU] in the light of the principles set out in the [Charter], that these legitimate objectives include, taking into account the margin of appreciation available to the Member States in the field of social policy, the national policy of promoting access to employment through a better distribution of employment between the generations and the promotion of access by young people to a profession.[939]

Just as in *Cherence*, however, it was the anti-discrimination Directive that was at the core of the CE's reasoning.

4.1.3 Stronger indirect effect of the Charter

In a handful of cases, the CE relied on a stronger indirect effect of the Charter when interpreting EU secondary law – the primary point of reference. An example is a case concerning a transfer of an applicant and her husband and son to Norway under the Dublin III Regulation.[940] In the urgent procedure, the applicant invoked, inter alia, Article 17 of the Regulation, which contains the so-called discretionary clause allowing a Member State to examine an application for international protection even if such examination is not its responsibility under the criteria laid down in the Regulation. The applicant argued that the transfer would interfere with her right to respect for family life since her son would have to stay in France as he suffered from a congenital heart defect. Even though the CE's reasoning largely centred on the Dublin III Regulation, the Charter was mentioned twice: first, in a quote of Recital 14 of the Regulation, which emphasises that 'in accordance with the [ECHR] and with the [Charter], respect for family life should be a primary consideration of Member States when applying this Regulation'; second, in a description of the CJEU

[937] Case C-447/09 *Prigge and Others*, EU:C:2011:573, para 38. The other CJEU case (decided pre-Lisbon) was Case C-411/05 *Palacios de la Villa*, EU:C:2007:604. See also Opinion of Rapporteur Public G Pellissier in CE, 383836, 25 January 2016. The public rapporteur conducted the analysis within the framework of the Directive; as for the Charter, he only remarked that the Directive concretises the general principle of Union law of non-discrimination on the grounds of age, which is now enshrined in Article 21 of the Charter.
[938] CE, 400675, 18 May 2018, para 20. See also para 22. The CE followed the approach of the public rapporteur.
[939] Ibid. para 20.
[940] CE, 416192, 5 December 2017.

judgment in *C. K. and Others*, in which the CJEU interpreted Article 17 of the Dublin III Regulation in the light of Article 4 of the Charter as regards applicants with a particularly serious illness whose transfer would entail a risk of inhuman and degrading treatment.[941] Although the application was dismissed for lack of urgency, the CE instructed the administration to examine the matter in the light of the above-mentioned Charter-consistent interpretation of the Dublin III Regulation. If the state of health of the applicant's son does not allow for him to be legally transferred or if the Norwegian authorities do not give assurances that he will be treated immediately after the transfer, the administration must use the discretionary clause in Article 17 of the Regulation.[942] It should be said, however, that attempts to prevent a Dublin transfer on health grounds are generally unsuccessful.[943]

In *One Voice and Ligue pour la protection des oiseaux*,[944] the CE dealt with an application of an animal protection association, which contested an Order authorising the use of glue traps for capturing certain types of birds. The association argued, inter alia, that the Order violated Article 9 of the Wild Birds Directive 2009/147/EC.[945] In response to this plea, the CE recalled that the pre-existing broadly equivalent French rules had been declared compatible by the CJEU with the previous Birds Directive 79/409/EEC, which was codified in (and therefore also broadly equivalent to) Directive 2009/147/EC now in force.[946] However, the CE was in doubt whether this legal assessment would still stand in the present legal context:

> However, with regard to the provisions of Article 9 of the [Birds Directive], in its recent judgment in [C-557/15 *Commission v Malta*, EU:C:2018:477], concerning the legislation adopted by a Member State relating to another traditional hunting method, *which was delivered after the entry into force of Article 3 of the TEU and Article 37 of the Charter* […], the Court of Justice held that that legislation did not satisfy the condition that a method of capture must be selective in order to be able to derogate from Article 8 of the Directive, relying on the existence of 'by-catch' without specifying the extent of such by-catch […][947]

[941] Ibid. paras 3–4; Case C-578/16 PPU, EU:C:2017:127, para 96.
[942] Ibid. para 6.
[943] See eg CE, 424743, 15 October 2018 (application dismissed as the prefect appropriately took account of the applicant's health condition in relation to his transfer to Portugal); CE, 424974, 31 October 2018.
[944] CE, 425519, 29 November 2019.
[945] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2009] OJ L 20/7.
[946] Case 252/85 *Commission v France*, EU:C:1988:202; Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979] OJ L 103/1.
[947] CE, 425519, 29 November 2019, para 17 (translation taken from the CJEU's English translation of the preliminary reference). See also para 20.

Given these doubts about the interpretation to be given to the Wild Birds Directive, the CE referred the case to the CJEU, suggesting that the current fundamental rights background might have prompted a certain evolution of the CJEU case law towards a more animal-rights friendly interpretation of secondary law. Interestingly, the CJEU in *Commission v Malta* referred neither to Article 3 of the TEU nor Article 37 of the Charter; it was Advocate General Sharpston in her Opinion in that case who highlighted the importance of both provisions (introduced by the Treaty of Lisbon) for the interpretation of secondary law.[948] It is likely that this is where the CE found inspiration for using the Charter in this way.[949] The CJEU's judgment took the direction anticipated by the CE. The CJEU read Article 9 of the Wild Birds Directive in the light of, inter alia, Article 3 of the TEU and Article 37 of the Charter and held that it precludes national legislation which authorises a method of capture leading to by-catch where that by-catch, even in small quantities and for a limited period, is likely to cause harm other than negligible harm to the non-target species captured.[950]

A case of indirect effect where the Charter argument was very impactful, to the point of determining the outcome of the case, was *GAEC Jeanningros*.[951] This was a case about judicial review of composite administrative procedures involving Member State authorities and the Commission in the field of protection of geographical indications and designations of origin for agricultural products and foodstuffs. The applicant, GAEC Jeanningros, sought annulation of a Decree approving a minor amendment of the product specification for the 'Comté' PDO[952] with a view to submitting that product specification to the EU Commission for approval (the amendment consisted in a prohibition of using robotic milkers in the production of milk used to make Comté). The Decree was issued within the regulatory scheme established by Article 53 of Regulation (EU) No 1151/2012, Article 6 of Commission Delegated Regulation (EU) No 664/2014 and Article 10 of Commission Implementing Regulation (EU) No 668/2014.[953] While proceedings before the CE on this

[948] Opinion of AG Sharpston in Case C-557/15 *European Commission v Republic of Malta*, EU:C:2017:613, para 44: 'Following the entry into force of the Treaty of Lisbon on 1 December 2009, the principle of "a high level of protection and improvement of the quality of the environment" set out in Article 3(3) TEU has become a guiding objective of EU law. The same principle is also enshrined in Article 37 of the Charter which — again, following the entry into force of the Treaty of Lisbon — forms part of EU primary law and is to be regarded as an interpretative tool of secondary law' (footnotes omitted).
[949] The public rapporteur in this case, L Dutheillet de Lamothe, referred to Case C-557/15 in his Opinion.
[950] Case C-900/19 *One Voice and Ligue pour la protection des oiseaux*, EU:C:2021:211.
[951] CE, 415751, 14 November 2018.
[952] Protected designation of origin.
[953] Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs [2012] OJ L 343/1; Commission Delegated Regulation

application were pending, the EU Commission issued its approval in accordance with the same regulatory scheme. Under the CE's settled case law, the Commission's approval would normally mean that the application against the contested Decree becomes devoid of purpose. This would, of course, lead to its dismissal without examining the merits. However, the CE doubted whether that case law is compatible with EU law, particularly with Article 47 of the Charter (right to an effective remedy). It felt it necessary to make a reference for a preliminary ruling.[954]

The CJEU recalled that the regulatory scheme in question was a case of composite administrative procedure involving a division of powers between the Member State and the Commission.[955] Within this system of division of powers, 'the decision to register a name as a PDO could be made by the Commission only if the Member State concerned had submitted to it an application for that purpose, and that such an application could be made only if that Member State had checked that the application was justified'.[956] The Commission only has limited, if any, discretion in this matter.[957] The CJEU thus held that if the CE dismissed the application concerning the lawfulness of the contested Decree as being devoid of purpose on the ground that the Commission has approved the PDO amendment, this 'would compromise the effective judicial protection that [the CE] is required to provide in respect of such applications for amendments'.[958] The regulatory scheme in question, 'read in conjunction with Article 47 of the [Charter]', requires that national judicial review be available. The CE fully followed the CJEU's Charter-based decision.[959]

4.1.4 Charter as an autonomous standard of review

The most prominent use of the Charter in the CE's reasoning happens where the Charter acts as an autonomous standard of review without being overshadowed by EU secondary legislation or other fundamental rights instruments.

(EU) No 664/2014 of 18 December 2013 supplementing Regulation (EU) No 1151/2012 of the European Parliament and of the Council with regard to the establishment of the Union symbols for protected designations of origin, protected geographical indications and traditional specialities guaranteed and with regard to certain rules on sourcing, certain procedural rules and certain additional transitional rules [2014] OJ L 179/17; Commission Implementing Regulation (EU) No 668/2014 of 13 June 2014 laying down rules for the application of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs [2014] OJ L 179/36.

[954] CE, 415751, 14 November 2018.

[955] Case C-785/18 GAEC *Jeanningros*, EU:C:2020:46, paras 23–24.

[956] Ibid. para 24.

[957] Ibid. para 25.

[958] Ibid. para 37.

[959] CE, 415751, 31 December 2020.

Let us start with *Halifa*, where the CE reviewed the national provisions under which a third-country national did not have the opportunity to submit observations against a decision imposing an obligation on him to leave the territory (OQTF) taken together with, and as a direct result of, a decision rejecting his application for a residence permit.[960] A remark on the context and chronology is due. Unlike two first-instance courts that referred the question to the CJEU for a preliminary ruling,[961] the CE did not address the CJEU directly but nevertheless based its analysis on its case law. Mr Domino, the public rapporteur in *Halifa*, advised against waiting for the CJEU's judgment given that previous case law was 'sufficiently clear' and easily transposable to the case in hand.[962] On the well-argued recommendation of the public rapporteur, the CE selected a few passages from the CJEU's judgment in *M. G.*, which also concerned the Returns Directive: the drafters of the Directive did not specify whether, and under what conditions, the Member States needed to ensure the right to be heard of third-country nationals; that right is one of the rights of the defence, which are enshrined in the Charter; it is for the Member States, in the exercise of their procedural autonomy, to determine the conditions under which illegally-staying third-country nationals have the right to be heard.[963] Against this background, the CE based its reasoning on the indissociable link between the two decisions in question – that is, the OQTF decision and the decision rejecting a residence permit application: the former decision is taken concomitantly with the latter, and the obligation to leave the French territory is a necessary consequence of the rejection of the residence application.[964] For this reason,

> the right to be heard does not imply that the administration is obliged to give the person concerned the opportunity to comment specifically on the decision obliging him or her to leave French territory, as long as he or she was able to be heard before the decision refusing to issue a residence permit was taken.[965]

The CE thus found no violation of Article 41 of the Charter. As discussed above at some length in the context of applicability assessments, the national rules should have been reviewed against the right to good administration enshrined as a general principle of Union law, rather than against Article 41 of the Charter, which only applies to EU institutions.[966]

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[960] CE, 370515, 4 June 2014.
[961] See supra n 293.
[962] Opinion of Public Rapporteur X Domino in CE, 370515 supra n 294.
[963] CE, 370515, para 6. See Case C-383/13 PPU *G. and R.*, EU:C:2013:533, paras 31–32 and 37.
[964] CE, 370515, para 7.
[965] Ibid. For the same reasoning, see CE, 375373, 19 January 2015.
[966] See Section I.4.2.2.

As for the substantive assessment, it is debatable whether the CJEU's remarks on the scheme of the Returns Directive 2008/115/EC provided a sufficient basis for the CE's assessment in the case at hand. In this connection, Ritleng commented that if the CE decided not to refer a question for a preliminary ruling, it should have at least waited for the CJEU's judgment in the proceedings initiated by the TA of Melun concerning the same legal issue.[967] In the end, in *Mukarubega*, the CJEU adopted the same solution as the CE.[968] Interestingly, in the course of its reasoning, the CJEU referred on eight occasions to its previous judgment in *G. and R.*: a further validation of the approach chosen by the CE (and the public rapporteur).

We discussed above that the CE aligned its approach with that of the CJEU concerning the non-applicability of Article 41 of the Charter in national proceedings in a case in which it adopted a similar reasoning to *Halifa*, but in a different context: the right to be heard of the third-country national in proceedings concerning the re-examination of a previously rejected asylum application.[969] The CE approved the interpretation of the Cour nationale du droit d'asile under which there is no violation of the right to be heard where the applicant does not adduce any new evidence and has an opportunity to submit his or her arguments in writing, even if there is no hearing.[970]

In an EU law-dominated case concerning a French scheme giving exclusive rights to manage off-course betting on horseracing to a single operator, the CE admitted that the scheme restricted the freedom of establishment and the freedom to provide services, but it held that the restriction was justified by overriding reasons of public interest.[971] As for the applicant's plea that the scheme was contrary to the principle of non-discrimination under Article 21 of the Charter because it prescribed different rules for online and offline bets, the CE held that 'the two types of bets constitute different situations that justify, with regard to the public order and public health, different regulatory regimes'.[972] Even though it is

[967] D Ritleng, 'Chronique Jurisprudence administrative française intéressant le droit de l'Union – Les garanties procédurales et formelles entourant l'adoption d'une OQTF émise concomitamment à un refus de titre de séjour' (2014) *RTD Eur.* at 952-11. Ritleng referred to CJEU judgment in Case C-277/11 *M. M.*, EU:C:2012:744, in which the CJEU held that if national legislation provides for two separate procedures for examining applications for refugee status and applications for subsidiary protection, 'the fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection' (para 95).
[968] C-166/13, EU:C:2014:2336. For a comment on this case, see D Simon, 'Droit d'être entendu' (2015) *Europe* jan.
[969] CE, 381171, 9 November 2015. See text accompanying n 306.
[970] Ibid. para 9.
[971] CE, 385934, 9 December 2016. See on this question Case C-212/08 *Zeturf*, EU:C:2011:437, to which the CE referred para 6.
[972] CE, 385934, para 15.

doubtful that Article 21 is an appropriate framework to conduct this type of analysis (Article 20 appears more pertinent), this segment shows that where the applicant presents a separate and duly substantiated Charter-based argument, the CE will deal with that argument separately.

In a recent case before the CE, the material scope of Article 47 of the Charter was at the centre of the reasoning. This was a rare case of meaningful engagement with the Charter and CJEU case law. It concerned additional VAT assessments issued to a French company, SCI Péronne, on the ground that it had been involved in a false invoicing scheme.[973] To establish those additional VAT assessments, the tax authority made use of documents gathered in criminal proceedings conducted against the company. The company contested the tax assessments before administrative courts, arguing, inter alia, that the tax authority violated its right to a fair trial under Article 47 of the Charter by not communicating to the company all documents in the criminal file to which it had access. On appeal against the first-instance decision, the CAA of Douai dismissed the plea based on a purely textual reading of Article 47 of the Charter: this provision only applies to proceedings before a court, not an administrative authority.[974]

On cassation, the CE corrected this assessment and found Article 47 applicable, following the solution suggested by the public rapporteur and relying heavily on CJEU case law.[975] The CE quoted a passage from *Europese Gemeenschap*, in which the CJEU recalled that 'the principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, *the rights of the defence*, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented'.[976] The CE then quoted a passage from another judgment interpreting the rights of the defence in the context of administrative tax proceedings: 'a breach of the right of access to the file during the administrative procedure is not remedied by the mere fact that

[973] CE, 429487, 21 September 2020.
[974] CAA Douai, 16DA01934, 5 February 2019, para 4.
[975] Opinion of Public Rapporteur L Cytermann in CE, 429487, 21 September 2020. The public rapporteur drew attention a 'zone of uncertainty' as to which documents are covered by the right of access to the file according to national and CJEU case law, respectively. According to the CJEU, the right concerns (i) documents that serve as a basis for the tax decision and (ii) other documents that may be helpful in the exercise of the rights of the defence. The CE case law interpreting the relevant procedural provision (Article L76 B of the livre des procédures fiscales) covers what appears to be a more limited group of those documents that the tax administration *actually relies on* ('*utilise effectivement*') in order to issue additional VAT assessments. While the case in hand could be disposed of without confronting these two lines of case law, this confrontation may be necessary in the future.
[976] Case C-199/11 *Europese Gemeenschap*, EU:C:2012:684, para 48 (emphasis added).

access to the file was made possible during the judicial proceedings relating to an action in which annulment of the contested decision is sought';[977] while the principle of respect for the rights of the defence, in an administrative tax procedure, does not impose on the tax authorities a general obligation to provide unrestricted access to the file which it holds, it does require that the taxable person has the opportunity to have communicated, upon request, the information and documents in the administrative file that were taken into consideration by those authorities when adopting their decision. This includes documents which do not serve as a direct basis for the decision but may be helpful in the exercise of the rights of the defence, in particular exculpatory evidence that those authorities may have collected.[978] Applying Article 47 of the Charter, as interpreted by the CJEU, to the facts of the case, the CE concluded that SCI Péronne's rights of the defence were not violated. Having been given a list of documents issued in the criminal proceedings and relied upon by the tax administration, the company only requested access to several invoices, which were subsequently communicated to it by the tax authority. Therefore, the right of access to the file was upheld to the extent that it had been exercised, resulting in no violation of Article 47 of the Charter.[979]

As observed by the public rapporteur, who provided the CE with sound EU-law advice, the CE's normal approach is to dismiss claims based on Article 47 of the Charter together with those based on Articles 6(1) and 13 of the ECHR, without recognising Article 47 of the Charter as having an autonomous material scope. In the case at hand, the tax proceedings in question were covered neither by the civil or the criminal limb of Article 6 of the ECHR and were therefore outside the scope of the ECHR. The circumstances of the case thus made it necessary to rely primarily on the Charter. This was taken for granted by both the CAA of Douai and the CE given that neither of these courts addressed the issue of whether the Charter was applicable.

In one decision, the Charter-based plea was successful, and it was the Charter that had a decisive impact on the outcome of the case. The applicants started interim proceedings to obtain the suspension of decisions to transfer them to Italy as the Member State responsible for examining their application for international protection.[980] After having their application rejected by the TA of Pau, the applicants appealed to the CE, arguing that the

[977] Case C-189/18 *Glencore Agriculture Hungary*, EU:C:2019:861, para 52.
[978] Ibid. paras 54 and 56.
[979] CE, 429487, 21 September 2020, paras 2 and 4.
[980] CE, 421565, 26 June 2018.

first-instance court failed to respond to their plea alleging that the transfer exposed one of them to the risk of inhuman and degrading treatment within the meaning of Article 4 of the Charter due to high-risk pregnancy. The CE agreed that the first-instance court 'did not respond to this plea, which, by virtue of Article 51 of the Charter, was operative in relation to the implementation by the French authorities of the [Dublin III Regulation]'.[981] After judging the application admissible and verifying that the applicant's pregnancy was high-risk, the CE suspended the execution of the contested decisions, which had to be viewed as 'capable of causing a serious and manifestly unlawful interference with the right [of the applicants] to a normal family life'.[982]

In several cases, the CE's reasoning leading to a declaration of non-violation was substantially based on solutions reached by the CJEU. For instance, in a case concerning the French permanent contraindication to blood donations where a man has had homosexual relations in the twelve months prior to the donation,[983] the CE followed (expressly and fully) the reasoning of the CJEU in *Geoffrey Léger*.[984] This jurisprudential alignment can be explained by the fact that in *Geoffrey Léger*, the CJEU assessed previous French legislation which provided for a permanent contraindication for men who have had homosexual relations. Moreover, the CJEU case turned on the non-discrimination provision in Article 21(1) of the Charter, which was also one of the pleas raised by the applicants before the CE.[985] Recourse to CJEU case law to support an argument that such and such fundamental right was not violated is not uncommon. Sometimes, the CE cites a concrete case,[986] at other times, it just makes a general reference to 'the case law of the CJEU'.[987]

In *Ordre des avocats de Paris*, the applicant challenged the rules of the General Tax Code under which only clients who are taxable persons can deduct input value-added tax for the supply of legal services.[988] The applicant argued that in making that distinction between taxable and non-taxable persons, the rules violated the general principle of equality under Article 20 of the Charter and the principle of equality of arms under Article 47 of the Charter.

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[981] Ibid. para 3.
[982] Ibid. para 8.
[983] CE, 400580, 28 December 2017.
[984] Case C-528/13 *Geoffrey Léger*, EU:C:2015:288.
[985] For a discussion of this interpretative alignment, see T Escach-Dubourg, 'La légalité de l'encadrement du don de sang des hommes homosexuels' (2018) *AJDA* 1281.
[986] CE, 418394, 12 July 2019, para 10 (Article 16 of the Charter); CE, 445555, 29 October 2020, para 10 (Article 1 of the Charter); and CE, 425941, 13 November 2020 (Article 16 of the Charter; the same reference was in the Opinion of the public rapporteur).
[987] CE, 408258, 30 January 2019, para 21.
[988] CE, 386143.

As proceedings were pending before the CJEU concerning Belgian rules to the same effect, the CE decided to stay the proceedings and wait for the CJEU's answer.[989] In the subsequent decision on the merits, the CE fully adopted the solution reached by the CJEU; in fact, to reject the Charter-based plea, the CE found it sufficient to merely quote a passage from the CJEU's judgment.[990]

In the field of data retention litigation, the CE reviewed a Decree on the access of certain public bodies to communications data against Articles 7, 8 and 11 of the Charter.[991] It based its reasoning on the following considerations: (i) the access to the collected data pursues a public interest, (ii) the rules in question only concern communications data, not the content of messages, (iii) the obligation to retain the data for one year is set out in precise and binding rules, and (iv) the access to concrete communications by concrete public bodies is subject to procedural guarantees. As a result, in a decision issued in February 2016, the CE found no violation of the Charter.[992] Some asked whether the solution reached by the CE was compatible with subsequent CJEU case law on data retention, particularly the judgment in *Tele2 Sverige*. There, the CJEU held that the Privacy and Electronic Communications Directive 2002/58/EC,[993] read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, precluded 'national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication'.[994] Although the French data retention rules were modified in 2015 following an increased terrorist threat, the questions about their EU-compatibility remained relevant.[995] The CE was confronted with the issue again in two cases in which the applicants challenged several administrative measures regarding, inter alia, the general and indiscriminate retention of traffic and location data by providers of electronic communications services and the use of such data by the

[989] CE, 386143, 9 December 2015.
[990] CE, 386143, 23 November 2016.
[991] CE, 388134, 12 February 2016.
[992] Ibid. paras 5–10. For a comment, see O Henrard, 'Accès aux données de connexion, blocage et déréférencement des sites: l'administration pourra agir sans recourir au juge' (2016) *Dalloz IP/IT* 313.
[993] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201/37.
[994] Case C-203/15 *Tele2 Sverige*, EU:C:2016:970, see J-M Sauvé, 'L'autorité du droit de l'Union européenne – Le point de vue d'un juge français' in W Heusel and J-P Rageade (eds), *The Authority of EU Law: Do We Still Believe in It?* (Springer 2019) 61 at 66. See also WJ Maxwell, 'Systematic Government Access to Private-Sector Data in France' in FH Cate and JX Dempsey (eds), *Bulk Collection: Systematic Government Access to Private-Sector Data* (OUP 2017) 49.
[995] Loi n° 2015-912 du 24 juill. 2015 relative au renseignement, JO n° 0171 du 26 juill. 2015 p. 12735.

security services.[996] In an attempt to make the CJEU temper its unyielding approach in *Tele2 Sverige*, the CE referred both cases for a preliminary ruling, inviting the CJEU to reconsider that approach 'against the background of serious and persistent threats to national security, and in particular the terrorist threat'.[997] In addition to two isolated CJEU's holdings,[998] the CE relied principally on Article 4(2) of the TEU, under which 'national security remains the sole responsibility of each Member State'. According to the CE, the data retention rules in question could be justified by the right to security under Article 6 of the Charter and by national security requirements.[999] The Opinion of Advocate-General Campos Sánchez-Bordona strongly suggested that the CE's attempt would not meet with a favourable reception by the CJEU,[1000] and this was indeed the case.[1001] That said, the CE avoided issuing an *ultra vires* judgment, instead opting to follow the CJEU ruling and interpret it as much as possible in a way consistent with the Constitution.[1002] In this widely commented judgment, the CE pronounced a violation of several provisions, but the Charter was never explicitly mentioned as a legal basis. Instead, the CE referred to EU secondary law or to 'EU law' in general.[1003]

The declaration of non-violation in *Les Entreprises du médicament and Others* – which concerned the utilisation of an authorised medicinal product for therapeutic purposes not covered by the marketing authorisation – is interesting because the CE used a formulation that suggests it is aware of the different nature of Charter rights and Charter principles.[1004] The applicants argued, inter alia, that the national rules containing recommendations concerning such use of medicinal products violated Article 35 of the Charter, which provides that '… A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities'. According to

[996] CE, 393099, 26 July 2018 (see Case C-512/18 *French Data Network and Others*); and CE, 394922, 26 July 2018 (Case C-511/18 *La Quadrature du Net and Others*). On these two cases, see Clément-Wilz, Martucci and Mayeur-Carpentier, supra n 892.
[997] Ibid. (quote from the question No 1 in C-511/18).
[998] CE, 393099, 26 July 2018 para 10; and CE, 394922, 26 July 2018, at para 24.
[999] For a critical analysis of those arguments, see A Bouveresse, 'Chronique Jurisprudence administrative française intéressant le droit de l'UE – La protection des données personnelles inconciliable avec la sécurité intérieure' (2019) *RTD Eur*. 541.
[1000] Opinion of AG Campos Sánchez-Bordona in Joined Cases C-511/18 a C-512/18 *La Quadrature du Net and Others*, EU:C:2020:6. For a detailed analysis of the two CE references, see F-X Bréchot, 'Conservation des données de connexion: la CJUE invitée à reconsidérer sa jurisprudence' (2018) *AJDA* 2027.
[1001] Case C-511/18 *La Quadrature du Net and Others*, EU:C:2020:791.
[1002] CE, 393099, 21 April 2021. See B Brunessen and J Sirinelli, 'Le Conseil d'État et la conservation des données de connexion: la quadrature du cercle' (2021) *Dalloz IP/IT* 408; and L Azoulai and D Ritleng, '"L'État, c'est moi". Le Conseil d'État, la sécurité et la conservation des données' (2021) *RTD Eur.* 349.
[1003] See paras 45,46, 74 and 77.
[1004] CE, 387890, 29 June 2016.

the CE, the recommendations contained in the contested provisions did not aim at encouraging the utilisation of medicinal products for purposes not covered by the market authorisation procedure but rather at providing doctors with better information and ensuring better follow-up of patients. For this reason, the rules did not 'disregard the objective of ensuring a high level of human health protection recognised by Articles 168 of the [TFEU] and 35 of the [Charter]'.[1005] It is notable that the CE reviewed the contested national rules against Article 35 of the Charter without acknowledging the conditions for the justiciability of Charter principles set out in Article 52(5) of the Charter. It is also notable that in a different context in the same decision, the CE referred to Article 35 to justify an interference with the freedom to conduct a business (Article 16 of the Charter). This use corresponds to the objective role that Charter principles can have.[1006]

In *SMISP*, the applicants argued that the rules in a *circulaire* concerning on-call duty[1007] were contrary to the European Social Charter, the EU Charter and the Working Time Directive 2003/88/EC.[1008] The CE emphasised that employees on on-call duty are not obliged to stay at their workplace but are free to engage in any activity they like. Therefore, since the periods of on-call duty 'do not affect' the determination of periods of daily and weekly rest, the *circulaire* could not be considered contrary to Article 2 of the European Social Charter, Article 31 of the EU Charter or the Working Time Directive.[1009]

In the cases analysed above – and in other cases in which the Charter was treated as a separate standard[1010] – the depth of the Charter analysis was proportional to how the applicants formulated the Charter-based pleas.

[1005] Ibid. para 17. For a comment, see J Peigné, 'Le dispositif des recommandations temporaires d'utilisation (RTU) validé par le Conseil d'État' (2016) *RDSS* 746. See also CE, 392459, 24 February 2017, paras 22–24. The CE used the same formulation as the public rapporteur: Opinion of Public Rapporteur J Lessi in CE, 387890, 388228, 388353, 29 June 2016.

[1006] For the same remark, see Nivard, 'Les conditions d'application de la Charte des droits fondamentaux', supra n 69 at 72.

[1007] *Astreinte*, that is, the obligation of an employee to be on call and available to carry out his or her duties, without however being permanently and immediately at the employer's disposal in a designated place.

[1008] CE, 354635, 12 December 2012.

[1009] Ibid. There was no assessment of whether the Charter was applicable. The legal situation in question here fell within the scope of the Charter via the Working Time Directive. After all, at the time of the CE's decision, the legal regime of on-call duty had already been addressed in the CJEU's case law. See Case C-151/02 *Jaeger*, EU:C:2003:437, para 65. For a concise summary, see Case C-518/15 *Matzak*, EU:C:2018:82, para 60. See also CE, 397992, 30 December 2016, para 4 (declaration of non-violation, no applicability assessment, within the scope of the Working Time Directive).

[1010] CE, 397560, 8 November 2017, para 6; CE, 392989, 19 June 2016, para 20 (concerning measures taken to implement Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives

4.1.5 Reviews of constitutionality and conventionality

A confident engagement with the Charter as a separate standard of review took place in several decisions in which both the conventionality and constitutionality review were performed (the discussion in this section will be limited to *a posteriori* review). These cases deserve a separate treatment on account of the specific issues that arise when different co-applicable fundamental rights standards interact. A brief description is necessary of how the two types of review work.

Let us start with the constitutionality review. Article 66-1 of the French Constitution provides that '[i]f, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the *Conseil constitutionnel*, which shall rule within a determined period'. This mechanism is known as the Priority Constitutional Question (*question prioritaire de constitutionnalité*, QPC). Under well-established case law, the *Conseil constitutionnel* is not competent to review the compatibility of a legislative provision with international or Union law.[1011] A special set of rules applies to the constitutionality review of national laws implementing EU directives. Where the contested legislative provisions merely draw the necessary consequences from unconditional and precise provisions of a directive, they are not reviewable by the *Conseil constitutionnel*.[1012] Such provisions are only reviewable in the exceptional case of being contrary to a rule or principle inherent to France's constitutional identity.[1013]

The conventionality review – that is, checking whether national legislative and other legal provisions conform to international and EU law obligations – is reserved to ordinary courts.[1014] As for EU law, the conventionality review operates within the limits established by EU law.[1015] When a litigant alleges that an act violates the Constitution and EU law (that

79/117/EEC and 91/414/EEC [2009] OJ L 309/1); CE, 404792, 28 December 2018, paras 8–11 (Articles 20 and 21 of the Charter); CE, 430008, 15 May 2019, paras 1 and 4–5 (the applicants argued that the deadline of registration in the electoral roll for EP elections did not take account of the situation of UK citizens residing in France in the context of the extension of the 2-year period under Article 50 TEU); CE, 431143, 31 January 2020, para 15 (compatibility with the Charter of the minimum threshold of 5% of votes cast); and CE, 438696, 21 February 2020.

[1011] Conseil constitutionnel, 2010-605 DC, 12 May 2010. This is in line with the traditional case law dating back to 1975: Conseil constitutionnel, 74-54 DC, 15 January 1975 (*IVG*).

[1012] Conseil constitutionnel, 2004-496 DC, 10 June 2004.

[1013] Conseil constitutionnel, 2006-540 DC, 27 July 2006. For a discussion, see eg C Haguenau-Moizard, 'Les conditions du contrôle de constitutionnalité du droit dérivé' (2015) *AJDA* 2035.

[1014] CE, 108243, 20 October 1989 (*Nicolo*); Cour de cassation, ch. mixte, 24 May 1975 (*Jacques Vabre*).

[1015] See Section II.2.

is, where both the conventionality and constitutionality reviews are activated), the procedural rules governing the QPC and references for a CJEU preliminary ruling must be interpreted in the light of the CJEU's judgment in *Melki and Abdeli*.[1016] Beyond those EU-wide requirements, the CE has developed further rules governing the conventionality review of Decrees (*décrets*) containing provisions that merely draw the necessary consequences from unconditional and precise provisions of an EU directive. Under the *Arcelor* line of case law,[1017] if a litigant argues that such a Decree is contrary to the Constitution, the court must verify whether there is a rule or general principle of EU law that guarantees – considering its nature and scope as currently interpreted by the CJEU – that the invoked constitutional rule or principle is effectively respected. Where this is the case, the CE will review the transposed directive against the equivalent EU-law rule or principle; when there is a doubt about the validity of the directive, the CE will make a reference for a preliminary ruling. If there is no such equivalent rule (a typical example would be the French constitutional principle of *laicité*), the CE will review the contested Decree directly against the Constitution.[1018] When it comes to interpreting the equivalence requirement, it is not necessary for the protections to be identical.[1019] Importantly, however, the requirement of equivalence (and its assessment) extends to the whole framework for the limitation of rights, that is, to the conditions under which the fundamental right in question can be limited.[1020]

Let us have a look at how these two types of review played out in the context of applying the Charter. In a case concerning the rules on deprivation of French nationality

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[1016] Joined Cases C-188/10 and C-189/10 *Melki and Abdeli*, EU:C:2010:363. For the complex relationship between the QPC rules and EU-law requirements, see eg D Simon, 'Conventionnalité et constitutionnalité' (2011/2) *Pouvoirs* 19; Sirinelli, *La transformation du droit administratif par le droit de l'Union européenne*, supra n 214 at 365–384; H Labayle and R Mehdi, 'Question Préjudicielle et Question Prioritaire – Dédale Au Conseil d'État' (2016) *RFDA* 1003; C Grewe, 'Contrôle de constitutionnalité et contrôle de conventionalité: à la recherche d'une frontière introuvable' (2014) *Revue française de droit constitutionnel* 961; C Vocanson, *Le Conseil d'Etat français et le renvoi préjudiciel devant la Cour de justice de l'Union Européenne* (Dalloz-Sirey 2014) at 253–300; and V Kirsey and H Portelli, 'Droits fondamentaux: du bon usage de la guerre des juges par le justiciable' (2010) *La Semaine Juridique Edition Générale* 1468.

[1017] CE, 287110, 8 February 2007 (*Arcelor*). See P Cassia, 'Principe constitutionnel d'égalité: renvoi à la CJCE pour difficulté sérieuse' (2007/12) *La Semaine Juridique Edition Générale* 65; D Simon, 'La jurisprudence récente du Conseil d'État: le grand ralliement à l'Europe des juges ?' (2007/3) *Europe* 9; and F Brunet, 'La norme-reflet – réflexions sur les rapports spéculaires entre normes juridiques' (2017) *RFDA* 85.

[1018] Of course, this Solange type solution does not sit well with the principles of primacy and autonomy of EU law, since it amounts to a constitutional review of the transposed EU directive in question. See eg See O Dubos and C Laurent-Boutot, 'Le rôle du juge de droit commun dans l'application du droit externe: la composition des ordres juridiques' in B Bonnet (ed), *Traité des rapports entre ordres juridiques* (Lextenso 2016) 741 at 761.

[1019] See eg Opinion of Public Rapporteur X Domino in CE, 394686, 30 January 2017, available in X Domino, 'La protection de la confidentialité des demandes d'asile, l'Europe et la Constitution – Une triangulaire délicate' (2017) *AJDA* 821 (concerning Articles 8 and 18 of the Charter).

[1020] CE, 418394, 12 July 2019, para 10.

following a criminal conviction for acts of terrorism, the reviews of conventionality (including the compatibility with the Charter) and constitutionality had the opportunity to interact in interesting but entirely predictable ways. Before the CE, a French–Moroccan, who was deprived of French nationality following a criminal conviction for terrorism, invoked both the unconventionality and unconstitutionality of the rules in question. The CE – on the applicant's request – referred a QPC to the *Conseil constitutionnel*.[1021] The *Conseil constitutionnel* held that the rules at issue did not violate the principle of equality as protected by Article 8 of the 1789 Declaration.[1022] As for the applicant's request to submit a reference for a CJEU preliminary ruling, the *Conseil constitutionnel* – predictably, following its classic case law – rejected the request on the ground that

> a plea based on the incompatibility of a legislative provision with France's international and European commitments cannot be regarded as a plea of unconstitutionality; consequently, it is not for the *Conseil constitutionnel*, seized under Article 61-1 of the Constitution, to examine the compatibility of the contested provisions with the Treaties or European Union law; the examination of such a plea and the transmission of such questions for a preliminary ruling fall within the jurisdiction of administrative and ordinary… courts[1023]

Back at the CE, it was necessary to deal with the Charter-based argument. The CE first quoted Articles 20 and 21 of the Charter and Article 20 of the TFEU,[1024] and then referred to the CJEU's judgment in *Rottman*, which specified the criteria under which a withdrawal of nationality resulting in deprivation of EU citizenship is allowed under EU law.[1025] The CE applied those criteria – which were essentially individual steps to be taken within the proportionality review – to the contested French rules, concluding that those rules were not incompatible with EU law requirements.[1026] It is true that since the conventionality and constitutionality reviews both have different purposes, the finding of conformity with the Constitution in no way predetermines the finding of conformity with the Charter.[1027]

[1021] CE, 383664, 31 October 2014.
[1022] Conseil constitutionnel, 2014-439 QPC, 23 January 2015. For a comment, see P Lagarde, 'Terrorisme: la sanction de la déchéance de nationalité est conforme à la Constitution' (2015) *Revue critique de droit international privé* at 115. See also F Dieu, 'Le contentieux de la déchéance de nationalité devant le Conseil d'État' (2016) *Constitutions* 404.
[1023] Ibid. paras 6–9.
[1024] 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.'
[1025] Case C-135/08, *Rottmann*, EU:C:2010:104. On the applicability of the Charter in this case, see Dubout, Simon and Xenou, 'France', supra n 283 at 338. See also C-221/17 *Tjebbes and Others*, EU:C:2019:189.
[1026] CE, 383664, 11 May 2015.
[1027] See P Chatelet, *Le contrôle des mesures nationales d'application du droit de l'Union européenne: bilan et perspectives à partir du cas français* (Faculté Droit & Sciences sociales, Université de Poitiers 2015) at 216.

Nevertheless, if we compare the reasoning of the *Conseil constitutionnel* with that of the CE, both bodies relied on the same grounds to support the finding of compatibility with the respective standards of review, such as the limited temporal and material scope of the rules in question, the fact that the withdrawal of nationality could not give rise to statelessness, or the particular gravity of the acts of terrorism. Thus, despite the two types of review being formally separate, they were materially convergent and arguably even mutually reinforcing.

In another case, the applicant activated both the conventionality and constitutionality review to contest an Order fixing the periods during which migratory birds and waterfowl may not be hunted. The contested provisions were enacted to transpose Council Directive 79/409/EEC on the conservation of wild birds.[1028]

Regarding the constitutionality review, the argument was that the limitation laid down in the contested Order constituted a disproportionate interference with the right to hunt, which is part of the right to property guaranteed by Article 2 of the 1789 Declaration. The CE rejected the applicant's request to submit a QPC, relying on the established rule that unless a rule or principle inherent in the French constitutional identity is called into question (that is, unless the Charter right is not such as to guarantee that the materially equivalent principle of the French Constitution is effectively respected[1029]), the *Conseil constitutionnel* does not have the competence to review whether legislative provisions which merely draw the necessary consequences from unconditional and precise provisions of an [EU] directive (which they were in that case) are in conformity with the rights and liberties guaranteed by the Constitution.[1030]

As for the conventionality review, the CE – again completely in line with established principles – recalled that when a plea alleging a breach of the Charter by an EU directive is submitted before an administrative court, it is for that court to examine if the directive conforms to the Charter: if there is no serious doubt regarding the validity of the directive, the court can dismiss the plea;[1031] in the opposite case, it has to refer the issue for a CJEU

[1028] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979] OJ L 103/1.
[1029] See eg CE, 418394, 12 July 2019, para 9.
[1030] CE, 390154, 8 July 2015, para 4. See eg Opinion of Public Rapporteur G Odinet in CE, 435812, 435813, 29 July 2020 ('le principe de respect de la dignité humaine et la prohibition de l'esclavage qui en découle ne peuvent être regardés comme inhérents à l'identité constitutionnelle de la France – ils sont garantis par les cinq premiers articles de la Charte des droits fondamentaux.').
[1031] For an illustration of such a dismissal in case of no doubt whatsoever, see, CE, 356490, 4 March 2013, para 9 (Directive 2005/85/EC). For the same reasoning, see CE, 375474, 10 October 2014, paras 9–10; and CE, 432873, 15 October 2020, para 22.

preliminary ruling.[1032] After recalling the Directive's objective and general scheme, the CE held that none of the submissions pointed to the fact that the directive would be disproportionate or unjustified under Article 17 of the Charter.

In a later case concerning the Long-Term Residence Directive 2003/109/EC,[1033] the CE had an opportunity to set out in detail the principles of conventionality review in such cases.[1034] After recalling the established framework regarding the assessment of validity of EU directives specified above, it went on to point out the equally established principles governing the review of transposition measures against fundamental rights: when the applicant alleges that the transposition measure itself violates 'a fundamental right guaranteed by the [ECHR] and therefore forming part of Union law as a general principle, or with a right guaranteed by the [Charter]', the administrative judge first needs to ascertain whether the transposition measure constitutes 'an exact transposition' of the directive's provisions. If this is the case, the plea alleging a breach of a fundamental right by a transposition measure must be assessed within the framework used to assess the transposed directive itself.[1035] By exact transposition, the CE means such transposition that is limited to what is necessary to ensure correct transposition of the directive in question.

The case concerned a third-country national who lodged an application to acquire the long-term resident status. Under Article 5(1)(a) of the Long-Term Residence Directive (transposed into Article L. 314-8 of the CESEDA), a person can acquire the long-term resident status only if he or she has stable and regular resources which are sufficient to maintain himself or herself and the members of his or her family, without recourse to the social assistance system of the Member State concerned. The applicant argued that the condition of sufficient resources was indirectly discriminatory vis-à-vis handicapped persons since social benefits cannot be considered as sufficient resources. Given that the contested French provisions were fully necessitated by the Long-Term Residence Directive, the CE assessed whether the Directive's provisions were compatible with Articles 21 and 26 of the Charter. It opined that the refusal to grant the long-term residence status did not prevent granting residence status on another legal ground. Moreover, according to the CE, the condition laid down in Article 5(1)(a) of the Directive is justified by a legitimate

[1032] CE, 390154, 9 November 2015, para 4.
[1033] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44.
[1034] CE, 387796, 20 June 2016.
[1035] Ibid. para 3. See also CE, 383333, 20 June 2016, para 4.

objective to only grant long-term residence to financially independent persons, and it is necessary and proportionate to achieve that objective.[1036] No reason, therefore, to refer the case to the CJEU for a preliminary ruling concerning the Directive's validity.[1037] It is worth noting that in 2016 the French legislator exonerated from fulfilling the said condition those persons who get a disability allowance under the Social Security Code.[1038]

In general, where the contested national provisions were fully necessitated by an EU directive, and the applicant argues that these provisions violate fundamental rights, the CE will refashion the plea into a plea alleging a breach by the EU directive of those fundamental rights as protected in the Charter.[1039] If the applicant alleges both a violation by the transposition measures of the Constitution and a violation by the directive of the Charter, the CE only deals with the Charter claim, after verifying that the Charter right is of such scope as to guarantee that the substantively equivalent principle of the French Constitution is effectively respected.[1040] Applicants can, of course, attack the directive directly and argue that it is invalid due to being contrary to the Charter. If the question of validity does not present a particular difficulty that would make it necessary to ask the CJEU for a preliminary ruling, the CE can dismiss the invalidity plea directly.[1041]

In *La Cimade*, it was an EU regulation that the CE assessed against the Charter.[1042] Once again, the constitutionality and conventionality reviews were both activated; the former was, however, performed less transparently than in the case of EU directives. The applicants challenged a provision of a Decree modifying the CESEDA which stipulated that 'if [the foreign national] is at least 14 years of age, fingerprints of all his fingers are taken,

[1036] CE, 387796, para 10. The fact that Article 26 of the Charter contains a principle was not discussed. See Madelaine, 'L'application de la Charte des droits fondamentaux de l'UE par les juridictions nationales', supra n 15. See also to the same effect CAA Bordeaux, 15BX02285, 19 January 2016, para 11.
[1037] See also CE, 397611, 26 January 2018, paras 9–13, in which the CE found there were no doubts about the validity of Article 40 of 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 [2013] OJ L 180/60.
[1038] Article L314-8 para 2, as modified by Law n° 2016-274 of 7 March 2016, Article 22 (with effect from 1 November 2016).
[1039] See eg CE, 408805, 18 July 2018, paras 7–12. See also CE, 418394, 12 July 2019, where the applicants alleged both a violation by the transposition measures of the constitution and a violation by the directive of the Charter (para 9).
[1040] CE, 418394, 12 July 2019, para 9.
[1041] See eg CE, 416088, 6 May 2019, paras 5–8 (the applicants argued that Article 8(3)(d) of 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 [2013] OJ L 180/96, which lays down one of the grounds of detention of the applicant for international protection, was contrary to Article 6 of the Charter and Article 5 of the ECHR). See also CE, 415947, 6 November 2019, para 9; and CE, 431143, 31 January 2020.
[1042] CE, 394686, 30 January 2017.

in conformity with the Eurodac Regulation (EU) No 603/2013 of 26 June 2013'.[1043] The provision merely reproduced an identical provision in the directly applicable Regulation.[1044] According to the applicants, the said provision violated Articles 8 and 18 of the Charter and – on the constitutionality front – the constitutional principle of confidentiality of information concerning the asylum applicant in that Articles 19 and 20 of the Regulation permit access of law enforcement authorities to the Eurodac database for the purposes of the fight against terrorist and other serious criminal offences.[1045]

The conventionality review was performed in an unremarkable fashion. The CE first quoted Articles 8 and 18 of the Charter and enumerated the conditions for the limitation of rights under Article 52(1) of the Charter. It then recalled that the fight against terrorism and serious crime was recognised by the CJEU as an objective of EU general interest, and it highlighted the existence of criteria for accessing the data as well as the guarantee enshrined in the Regulation that the data can only be accessed in view of the said general interest. On this basis, it was not necessary to refer the case for a preliminary ruling on the Regulation's validity as it was clear that the contested provisions did not violate the Charter.[1046]

The constitutionality review was more interesting. The public rapporteur, Xavier Domino, recommended that the CE expressly transposes the *Arcelor* logic, formulated in the context of reviewing national acts transposing EU directives, to the review of national acts implementing EU regulations. He invited the CE to no longer evade this issue by means of an *en tout état de cause* argument.[1047] Within that logic, if there is a rule or principle of EU law which guarantees the effectivity (the observance) of the invoked constitutional rule or principle, the administrative judge only reviews the contested implementing provisions against the said rule or principle of EU law, that is, it only conducts a conventionality review. Only if the invoked constitutional rule or principle does not have any equivalent in EU law that would guarantee its observance (that is, if it is necessary to protect the French

[1043] Article 17 of Décret n° 2015-1166 du 21 septembre 2015 pris pour l'application de la loi n° 2015-925 du 29 juillet 2015 relative à la réforme du droit d'asile.
[1044] Article 9(1) of Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L 180/1.
[1045] Opinion of Public Rapporteur X Domino in CE, 394686, supra n 1019.
[1046] CE, 394686, para 14–16.
[1047] Opinion of Public Rapporteur X Domino in CE, 394686, supra n 1019.

constitutional identity), the implementing provisions can be reviewed against the French Constitution. The CE held:

> Given the nature and scope of Article 18 of the [Charter], this article guarantees the effectiveness of respect for the right of asylum, a principle of constitutional value (*principe de valeur constitutionnelle*); it therefore follows, *in any event*, from what has been said in the previous paragraph that the regulatory authority was able to rely on Regulation (EU) No 603/2013 without disregarding the principle of constitutional value of respect for the right of asylum.[1048]

Despite the public rapporteur's invitation, the CE left open the question of whether the *Arcelor* logic should be transposed to the context of reviewing national measures that implement EU regulations.[1049]

4.1.6 References for a preliminary ruling with the Charter at their core

The Charter (mostly together with the ECHR) has served as an impetus for making a couple of references for a preliminary ruling on the validity of EU secondary legislation.

In *Fédération des fabricants de cigares et la société Coprova*, the CE's assessment of the validity of the Tobacco Products Directive 2014/40/EU led to the conclusion that there was serious doubt about the compatibility of Article 13 of that Directive (tobacco labelling and packaging) with several Charter provisions.[1050] Hence, the CE – after substituting the Constitution-based plea by a Charter-based one, in line with the principles for reviewing transposition measures outlined above – made a reference for a preliminary ruling.[1051] In the order for reference, the CE showed a confident engagement with the Charter, quoting the relevant articles and the conditions for their limitation as interpreted by the CJEU. The CE conducted a detailed (at least by its own standards) proportionality assessment of the limitations of the freedom to conduct a business (Article 16), the right to property (Article 17) and the freedom of expression and information (Article 11). While considering that Article 13 of the Directive pursued an objective of general interest, the CE had doubts about

[1048] CE, 394686, para 17.
[1049] For a comment, see D Ritleng, 'Chronique Jurisprudence administrative française intéressant le droit de l'Union européenne – De l'extension de la jurisprudence Arcelor au cas de contestation par voie d'exception de la constitutionnalité d'un règlement de l'Union' (2017) *RTD Eur.* 799.
[1050] CE, 401536, 10 May 2017.
[1051] Case C-288/17 *Fédération des fabricants de cigares and Others*, EU:C:2018:767 (removed from the register as reference for a preliminary ruling withdrawn). See also CE, 411717, 26 July 2018.

the necessity of the limitation. However, the CJEU did not have an opportunity to issue a judgment since the CE withdrew the reference.[1052]

A similar scenario occurred in *Neptune Distribution*, in which the CE assessed EU legislation prohibiting mineral water bottles from containing certain claims about low sodium content.[1053] The CE was persuaded by the applicant's contention that the case raised a 'serious difficulty' as to the compatibility of the Directive, read together with an EU regulation, with several fundamental rights, namely freedom of expression and information (Article 11(1) of the Charter and Article 10 of the ECHR) and freedom to conduct a business (Article 16 of the Charter). As for the source of that difficulty, the EU legislation did not distinguish between sodium bicarbonate and sodium chloride, even though the harmful effects of sodium bicarbonate were not, according to the CE, sufficiently proven. Due to this indiscriminate nature of the labelling restriction, the CE had doubts about its 'necessity and proportionality'.[1054] The CE made the reference for a preliminary ruling at the suggestion of the public rapporteur, who found that CJEU case law did not provide an answer.[1055] The CJEU conducted a full proportionality assessment of the restriction of Articles 11(1) and 16 of the Charter, having regard also to Article 10 of the ECHR, 'which applies […] to the circulation by an entrepreneur of commercial information, in particular in the form of an advertising slogan'.[1056] The CJEU found the EU rules compliant with the Charter, drawing, inter alia, on the broad discretion of the EU legislator in the field and on the precautionary principle, which can justify interference with fundamental rights in case of insufficiency, inconclusiveness or imprecision of scientific results.[1057] The CE fully followed the CJEU's guidance in the decision on the merits.[1058]

We will close the discussion of the CE's case law with another reference for a preliminary ruling in which the Charter was – again – at the centre of the reasoning and was the primary reason for seeking CJEU guidance. In *Conseil national des barreaux and Others*,[1059] three bar associations contested the validity of Article 8ab(5) of Council

[1052] Case C-517/18 *Fédération des fabricants de cigares*, EU:C:2019:780.
[1053] CE, 351618, 26 March 2014.
[1054] Ibid. para 13.
[1055] Opinion of Public Rapporteur C Legras in CE, 351618, 26 March 2014. The public rapporteur also observed that EU legislation could be reviewed against the Charter even if such legislation pre-dates the Charter.
[1056] Case C-157/14 *Neptune Distribution*, EU:C:2015:823, paras 63–86 (the quote in para 64).
[1057] Ibid. paras 79–83.
[1058] CE, 351618, 15 February 2016, paras 7–8. For a comment and further context, see E Dubout, 'Le Conseil d'État, juge constitutionnel européen' (2020) *RFDA* 297.
[1059] CE, 448486, 25 June 2021. See C-398/21 *Conseil national des barreaux and Others* (pending).

Directive 2011/16/EU on administrative cooperation in the field of taxation.[1060] This Directive lays down the rules and procedures under which the Member States exchange information relevant to the administration and enforcement of the domestic tax laws. Article 8ab of the Directive lays down the obligation for the Member States to require intermediaries (that is, any person that designs, markets, organises or makes available for implementation or manages the implementation of a cross-border arrangement that contains at least one of the hallmarks set out in Annex IV of the Directive[1061]) to file information within their knowledge, possession or control on cross-border arrangements with the competent authorities. Article 8ab(5) provides that each Member State *may* take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. When they do so, the Member States shall take the necessary measures to require those intermediaries to notify, without delay, any other intermediary of whom they are aware of their reporting obligation. The CE was in doubt whether the said provision did not infringe (1) the right to a fair hearing guaranteed by Article 47 of the Charter and Article 6 of the ECHR in that it did not exclude, in principle, lawyers participating in judicial proceedings from the scope of intermediaries who must supply the information necessary for reporting a cross-border tax arrangement or who must notify another intermediary of that obligation, and (2) the rights in respect of correspondence and private life guaranteed by Article 7 of the Charter and Article 8 of the ECHR in that it did not exclude, in principle, lawyers assessing their client's legal situation from the scope of intermediaries who have those same obligations. The CE cited Article 52(3) of the Charter, and it referred to leading CJEU and ECtHR case law on legal professional privilege (*Ordre des barreaux francophones et germanophone and Others v Conseil des ministres* and *Michaud v France*).[1062] In relation to the interference with the rights in respect of correspondence and private life, the CE raised a doubt as to whether that interference was justified by an objective of general interest (the Directive seemed to be pursuing not an objective of combating tax evasion and avoidance, but merely the objective of monitoring 'potentially aggressive tax arrangements').[1063] Moreover, the CE doubted whether the

[1060] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1, as amended.
[1061] Article 3(21) and Article 3(19) of the Directive.
[1062] CE, 448486, 25 June 2021, paras 13–14 and 16. *Michaud v France*, Application No 12323/11, Merits and Just Satisfaction, 6 December 2012.
[1063] Ibid. para 18.

interference could be considered proportionate, referring to the ECtHR's statements in *Michaud v France*.[1064] The request for a preliminary ruling was duly reasoned and essentially based on the Charter and the ECHR. It is true that each reference to the Charter was coupled with a reference to the ECHR, and a substantial part of the reasoning regarding the protection of lawyers' correspondence was based on ECtHR's case law. Nevertheless, the CE took care to point to the equivalence of the provisions cited within the meaning of Article 52(3) of the Charter. The Explanations to the Charter confirm that the relevant provisions are indeed considered equivalent in meaning and – for Article 7 of the Charter and Article 8 of the ECHR – in scope. From the formal point of view, however, if the CJEU were to declare the Directive invalid, it would do so based on the Charter, with the ECHR only providing interpretative guidance. Notwithstanding this observation, when looking at the degree of engagement with the Charter, this reference for a preliminary ruling stands in sharp contrast to decisions analysed in Section II.4.1.1, in which the Charter was little more than an ornament. The discussion would not be complete without noting that it was the applicants who took the initiative and introduced the issue of Charter compatibility into the proceedings. Not surprisingly, and just as with panoramic and ornamental references analysed in Section II.4.1.1, the applicants' initiative is the leading factor determining the CE's engagement with the Charter – and its impact on the solution of the case.

4.2 The practice of French lower administrative courts

Sadly, the discussion of how French lower administrative courts have relied on the Charter will be limited to the case law of appellate administrative courts, given that first-instance decisions of administrative tribunals are not systematically published. We will first look at cases in which the CAAs conducted a Charter-based review in response to an express plea by the litigant, including both cases in which the Charter was the primary point of reference and cases in which it competed for that status with other fundamental rights catalogues (Section 4.2.1). Next, the discussion will turn to the few decisions in which the CAAs relied on Charter-consistent interpretation (Section 4.2.2). Like the CE, the CAAs have also employed the Charter when asked to review the legality of EU legislation (Section 4.2.3). A specific category of Charter references, not really present in the CE's case law, concerns the Charter-based review in Dublin transfer cases (Section 4.2.4). Frequent but

[1064] Ibid. para 19.

uninteresting Charter cross-references are those made in the 'visas'[1065] or within the summary of the applicant's arguments.[1066]

4.2.1 Charter-based review: Varying degrees of intensity

In quantitative terms, most of the Charter-related case law of CAAs concerns the right to be heard (Article 41 of the Charter and the corresponding general principle of EU law) in proceedings which lead to a decision imposing an obligation on a third-country national to leave the territory (OQTF) as a direct result of a decision rejecting his or her residence permit application.[1067] Except for a few exceptional cases, the applicants' arguments going in this direction are invariably rejected on the same grounds that the CE adopted in *Halifa*.[1068] References to the relevant CJEU case law to underpin the courts' reasoning are not infrequent.[1069]

In one case, the applicant successfully argued that his right to be heard was violated in the procedure leading to a decision obliging him to leave the French territory.[1070] Significantly, however, the facts of the case differed from the usual scenario where a decision rejecting asylum is taken concomitantly with a decision imposing an obligation to leave the French territory. Here, the applicant was refused asylum in 2010, and the decision obliging

[1065] CAA Paris, 11PA05336, 22 November 2012; CAA Paris, 12PA04396, 11 April 2013; CAA Paris, 13PA01505, 29 April 2014; CAA Paris, 14PA02602, 16 February 2015; CAA Paris, 15PA04134, 14 December 2016; CAA Paris, 17PA00903, 15 May 2018; CAA Paris, 18PA03988, 13 May 2020; CAA Nantes, 14NT01141, 12 December 2014; CAA Nantes, 20NT00794, 17 July 2020; and CAA Nancy, 16NC00940, 9 February 2017.
[1066] CAA Paris, 13PA02848, 22 May 2014; CAA Paris, 12PA04150, 9 October 2014; CAA Paris, 13PA04131, 27 November 2014; CAA Paris, 14PA03930, 13 February 2015; CAA Paris, 14PA01754, 5 March 2015; CAA Paris, 15PA01139, 8 October 2015; CAA Paris, 16PA00783, 7 July 2016; CAA Paris, 17PA00607, 12 July 2017; CAA Paris, 18PA01307, 4 October 2018; CAA Versailles, 13VE03286, 3 June 2014; CAA Nantes, 13NT01435, 24 April 2014; and CAA Nancy, 15NC00929, 28 January 2016.
[1067] In the context of the OQTF, other Charter articles were invoked: see eg CAA Paris, 16PA00056, 3 May 2016, para 7 (Article 19); CAA Paris, 16PA01731, 24 May 2017, para 10 (Article 19); and CAA Paris, 17PA00126, 12 December 2017, paras 2–3 (Article 47 of the Charter).
[1068] CAA Paris, 14PA01785, 18 September 2014, para 7; CAA Paris, 13PA04210, 18 September 2014; CAA Paris, 14PA00641, 27 January 2015; CAA Paris, 14PA02574, 27 March 2015, paras 5–8; CAA Paris, 14PA03665, 16 July 2015, paras 3–8; CAA Versailles, 13VE03793, 2 October 2014; and CAA Versailles, 17VE00510, 24 October 2017, para 11.
[1069] A reference to CJEU case law without a specific case reference: CAA Paris, 13PA02922, 6 June 2014, para 5; CAA Versailles, 13VE02287, 13 March 2014, paras 11 and 13; a reference to Case C-383/13 PPU *G. and R.*, EU:C:2013:533: CAA Paris, 14PA00026, 18 September 2014, paras 9–11; CAA Paris, 14PA02608, 2 February 2015, para 7; CAA Paris, 14PA00331, 12 February 2015, para 11; CAA Paris, 14PA03510, 11 June 2015, para 7; CAA Paris, 14PA01237, 19 October 2015, para 8; CAA Versailles, 14VE02107, 23 September 2014, para 13; reference to *Mukarubega*: CAA Paris, 14PA02931, 4 February 2015, para 7; CAA Versailles, 14VE01359, 4 December 2014, para 4; reference to *Mukarubega* and *Boudjlida*: CAA Paris, 15PA01493, 15 February 2016, para 6; CAA Paris, 16PA00155, 8 July 2016, para 8; CAA Paris, 17PA01480, 25 January 2018, para 8 ; CAA Paris, 18PA04064, 7 November 2019, para 8; CAA Versailles, 14VE03284, 31 December 2015, para 8; and CAA Versailles, 18VE01225, 28 May 2020.
[1070] CAA Paris, 19PA03637, 16 June 2020.

him to leave the territory was only taken in March 2019. The CAA of Paris quoted Article 41 of the Charter, Article 51 of the Charter, and it continued:

> The right to be heard falls under the rights of the defence which are among the fundamental rights forming an integral part of the legal order of the European Union and are enshrined in the [Charter].[1071]

It set out the basic tenets of its previous case law as to the extent of the right to be heard in similar cases.[1072] It then held that because several years had passed since the applicant had been heard in the original asylum proceedings, the applicant had a right to put forth his arguments related to his stay in France that were relevant for the decision obliging him to leave the French territory.[1073] Therefore, 'the applicant [could] justifiably maintain that he has been deprived of his right to be heard, as it is laid down in the provisions cited above'.[1074] The problem with the Court's reasoning – as analysed above to some detail[1075] – is that it applied Article 41 of the Charter (here inapplicable) and not the (here applicable) general principle of Union law of the right to be heard. That said, the judgment is significant in that it is one of the rare cases where a court annulled an administrative decision on the (sole) basis of it interfering with EU fundamental rights.

In at least two other cases, CAAs annulled the contested decision on the ground that the applicant had not had the opportunity to make his or her positions known, resulting in a violation of the right to be heard. The CAA of Nancy annulled an OQTF decision concerning an Algerian national taken following a gendarmerie interview on alleged drug trafficking offences committed by the person concerned. The CAA held that

> The minutes of the hearing of the person concerned […] show that the applicant was not informed of the possibility that a measure of deportation from French territory may be issued following the hearing. The contested decision thus disregards the right to be heard, as stated in Article 41(2) of the [Charter] and for this reason, it must be annulled.[1076]

[1071] Ibid. paras 3–4.
[1072] Ibid. para 4.
[1073] Ibid. para 5.
[1074] Ibid. para 6.
[1075] See Section I.4.2.1.
[1076] CAA Nancy, 18NC02769, 23 April 2019, para 3. See also CAA Nancy, 12NC01705, 9 December 2013, in which the CAA annulled a decision on detention for the purpose of removal. The CAA held that 'when the administrative authority decides to impose administrative detention on a foreign national, it must, […] *under the general principle of European Union law resulting from the aforementioned Article 41(2)* [of the Charter], inform the person concerned of the decision it plans to take against him so that he is able to spontaneously present his written or oral observations'. The Court concluded that '*the adversarial procedure provided for by*

The CAA of Paris annulled an OQTF decision concerning a Moroccan national on the grounds that he did not have *any* opportunity to give his point of view on the contested decision, which constituted a 'violation of his right to be heard'. Unlike the CAA of Nantes, where (the inapplicable) Article 41 of the Charter was the sole basis of the court's decision, the CAA of Paris pronounced a violation of the 'principle of the right to be heard', which 'is one of the rights of the defence featuring in many fundamental rights that constitute an integral part of the [EU] legal order and enshrined in the [Charter]'.[1077] It appears that the applicant explicitly relied on the EU general principle.[1078]

In one case before the CAA of Nantes, the applicant successfully invoked a violation of his right to be heard before a decision had been taken imposing on him the obligation to leave the territory.[1079] Again, the facts of the case differed significantly from the usual scenario in which Article 41 has been invoked. Here, the applicant was summoned by the border police in connection with a suspected social welfare fraud. During the interview, the administration gave no indication of the possibility to issue a decision obliging the applicant to leave the territory; therefore, the applicant was deprived of the opportunity to present his observations in relation to that decision. According to the Court, 'contrary to what the [TA of Caen] ruled, the contested Order thus violated the right to be heard, as it is set out in Article 41(2) of the [Charter], and must therefore be annulled'.[1080] Elsewhere in its decision, the CAA of Nantes dealt with the fact that Article 41 of the Charter only applies to the EU institutions but the corresponding general principle of EU law applies at the national level.[1081] Admittedly, however, the declaration of violation was not clear on that point.

In several cases, the Article 41 plea was successful, and the applicant obtained annulation of the first-instance decision, but this was purely on formal grounds. In 2014 and 2015, the CAA of Marseille annulled the decision of the TA of Montpellier, which

Article 41(2)(a) of the [Charter] has been infringed, and on this ground, the decision to place [applicant] in administrative detention is thus unlawful'. See also M Wiernasz, 'Charte des droits fondamentaux de l'Union européenne et contentieux des étrangers' (2014) *AJDA* 42. The CE on cassation annulled the judgment of the CAA of Nancy of 9 December 2013, holding that the right to be heard 'does not entail that the administration has an obligation to give the applicant an opportunity to present his observation specifically […] in relation to the decision placing him in detention for the purposes of executing the expulsion order': CE, 375423, 5 June 2015, paras 5 and 6, relying on Case C-166/13 *Mukarubega*, EU:C:2014:2336.

[1077] CAA Paris, 18PA02758, 21 July 2020, para 3.

[1078] Ibid. para 3, first sentence.

[1079] CAA Nantes, 18NT03532, 19 July 2019.

[1080] Ibid. para 6.

[1081] Ibid. para 4.

incorrectly dismissed the applicant's Article 41 plea as inoperative.[1082] In one case before the CAA of Paris, Mr Ignacio B, a Paraguayan national, challenged a decision obliging him to leave the French territory, arguing that he was not given an opportunity to be heard before the decision was taken, in violation of Article 41 of the Charter.[1083] On appeal, the CAA of Paris annulled the judgment of the TA of Paris on the ground that the tribunal omitted to respond to the Charter-based plea: it did not deal with it explicitly, nor could it be considered that the tribunal rejected it implicitly, given that the Charter was not listed in the 'visas'.[1084] On the merits, the CAA of Paris correctly rejected the applicant's Charter-based plea, recalling that the applicability of Article 41 of the Charter is limited to Union institutions.[1085] In one case, the first-instance judgment was annulled on the ground that the court dismissed a Charter-based plea as 'manifestly unfounded' without any further explanation.[1086]

Besides Article 41 of the Charter in the context of OQTFs, Charter references are commonplace in another area where clone cases are dominant: the Dublin litigation. Given the specific nature of the Charter-based review in this area, this case law is analysed in a separate section.[1087] In other areas of law, declarations of non-violation of the Charter are common, usually without dedicated Charter-based reasoning. For example, in a case concerning the legality of the obligation to wear a seatbelt laid down in the Traffic Code (that is, a situation clearly outside the scope of EU law), the CAA of Paris quoted Articles 20 (equality) and 49(3) (proportionality of sanctions) of the Charter and then ruled that the principles of equality and proportionality of sanctions (without a reference to a concrete provision) were not, in any event, violated.[1088] Many of these declarations concerned Article 7 of the Charter.[1089] Other Charter provisions were also – unsuccessfully –

[1082] CAA Marseille, 13MA04275, 26 May 2014; CAA Marseille, 13MA04790, 4 December 2014; CAA Marseille, 13MA05031, 23 December 2014; CAA Marseille, 13MA05032, 23 December 2014; and CAA Marseille, 14MA04555, 1 October 2015.
[1083] CAA Paris, 12PA02064, 7 December 2012.
[1084] Ibid. paras 2–3. The same thing happened in CAA Paris, 14PA03025, 20 February 2015, para 2. See also CAA Nantes, 15NT03350, 18 January 2017, para 4.
[1085] Ibid. paras 6–7.
[1086] CAA Bordeaux, 20BX01374, 20BX01375, 10 December 2020, para 2.
[1087] See Section II.4.2.4.
[1088] CAA Paris, 13PA04512, 27 June 2014.
[1089] CAA Paris, 15PA03285, 9 June 2016 (family member of an economically inactive EU citizen; within the scope of EU law); CAA Paris, 16PA02603, 2 November 2016 (a Kosovar applying for temporary residence 'vie privée et familiale', whose wife, also from Kosovo, was residing in France illegally; outside the scope of EU law); CAA Paris, 17PA00634, 11 October 2017, para 6–7 (together with Article 8 of the ECHR; no applicability assessment; within the scope); CAA Versailles, 13VE02395, 21 January 2014, paras 7–10 (together with Article 24 of the Charter); CAA Versailles, 15VE03192, para 6; and CAA Nantes, 13NT03034, 13 June 2014, para 6.

invoked.[1090] Similarly uninteresting but not infrequent are Charter-based pleas dismissed on the ground that they are not sufficiently substantiated.[1091] More interesting are the rare cases where a CAA relies explicitly on CJEU case law when making a declaration of non-violation, which can signify a higher level of engagement with the material standard of the Charter.[1092]

Some of the patterns identified in the CE's case law are apparent in the case law of the CAAs as well. Panoramic declarations of non-violation, without particular attention to the question of the Charter's applicability, are common. When the applicant invokes a Charter right or principle that is covered by a specific and more detailed provision of EU secondary law, the CAAs – just as the CE – will often deal with the case in the framework of the relevant secondary legislation and then merely extend the solution to the Charter. For example, the CAA of Paris held in an age-discrimination case that the compulsory retirement age of 65 years for the employees of *Banque de France* was not contrary to Directive 200/78/EC since it was not shown that the pursued aim was illegitimate. The Court continued that 'for the same reason, the plea alleging a violation of the general principle of Community law of non-discrimination by age stemming from Article 21 of the [Charter] must be rejected'.[1093] In another case in which both Article 21 of the Charter and Directive 2000/78/EC were invoked, the CAA of Versailles quoted Article 21 of the Charter but conducted the analysis solely with reference to secondary EU law.[1094]

We also found cases in which the Charter-based plea was dismissed on the same grounds as the ECHR-based plea.[1095] This may be done with an explicit reference to Article 52(3) of the Charter.[1096] Another possible scenario is that the court first sets out the invoked

[1090] CAA Nantes, 15NT00740, 1 March 2016, para 5 (Article 9); CAA Nantes, 15NT00005, 1 July 2016, para 7 (Article 24); CAA Marseille, 09MA03635, 12 May 2011 (Article 24); and CAA Marseille, 14MA05172, 20 June 2016, para 9 (Article 9).
[1091] CAA Paris, 09PA00906, 19 January 2011; CAA Paris, 14PA00641, 27 January 2015, para 13; CAA Paris, 14PA02999, 5 May 2015; CAA Paris, 15PA02931, 30 September 2016; CAA Paris, 17PA00401, 21 December 2017; CAA Paris, 17PA03781, 6 December 2018; CAA Versailles, 14VE01043, 9 June 2015, para 10; and CAA Versailles, 13VE03734, 30 March 2017.
[1092] CAA Versailles, 18VE02707, 10 November 2020, para 13; and CAA Douai, 16DA01934, 5 February 2019, para 9.
[1093] CAA Paris, 14PA03161, 13 November 2015. For the same reasoning, see CAA Nantes, 14NT00755, 5 April 2016, para 11.
[1094] CAA Versailles, 15VE00016, 24 May 2016. For the same approach, see CAA Nantes, 14NT03333, 2 November 2016.
[1095] CAA Douai, 17DA01431, 8 February 2018, para 8; CAA Paris, 14PA03295, 19 February 2015, paras 16–19; and CAA Marseille, 15MA00216, 19 May 2015, para 9.
[1096] CAA Marseille, 15MA00216, 19 May 2015 (the CAA referred to Article 51 by mistake, but cited the wording of Article 52(3)).

provisions – quoting the provisions of the Charter and the ECHR and pointing to their equivalence with reference to Article 52(3) of the Charter – and then dismisses them together by a single argument.[1097]

To conclude this section, a case in which the Charter interacted with the Constitution. A short introduction is due concerning its context. When a person makes an application for international protection, he or she has the right to remain in France until the OFPRA[1098] takes a decision on the application. If the applicant appeals that decision, he or she can stay in France until the appeal is dealt with (Article L. 743-1 of the CESEDA). However, there are exceptions to this rule set down in Article L. 743-2 of the CESEDA. The applicant loses the right to remain in the territory, inter alia, when his or her application is rejected on the ground that he or she comes from a State considered to be a safe country of origin; that the application is inadmissible; or that his or her presence on the territory represents a serious threat to public order, public security or national security.[1099] This regime was challenged as being contrary to the right to an effective remedy and the right to asylum.

The *Conseil constitutionnel* considered the regime to be compatible with the Constitution, relying on two arguments: first, the right to make an appeal against the OFPRA's decision as such is unaffected; secondly, a special procedure is in place whereby the applicant can request that the execution of the OQTF decision be suspended pending appeal.[1100] The CE followed the approach of the *Conseil constitutionnel*.[1101]

The CAA of Bordeaux was later faced with the same issue in a case in which the applicant invoked Article 18 of the Charter (right to asylum) and Article 13 of the ECHR (right to an effective remedy).[1102] In a judgment of 6 July 2020, the CAA of Bordeaux referred to the decision of the *Conseil constitutionnel* mentioned above and quoted the

[1097] For such a case, see eg CAA Paris, 15PA01468, 6 April 2017, paras 18 and 23.
[1098] *Office français de protection des réfugiés et apatrides*.
[1099] These decisions are made in the accelerated procedure under Article L732-2 of the CESEDA. The accelerated procedure and the lack of right to remain in the territory were litigated before. See CE, 371316, 23 August 2013, para 5; CE, 371315, 23 August 2013, para 5; and CE, 371318, 23 August 2013, para 5. See also CAA Nantes, 11NT00352, 19 December 2011; CAA Nantes, 11NT01738, 31 May 2012; CAA Nantes, 13NT01602, 10 April 2014, para 8; CAA Marseille, 13MA00940, 7 July 2015; CAA Marseille, 14MA00062, 13 July 2015; and CAA Bordeaux, 20BX00570, 20BX00571, 2 July 2020. For a critical analysis of the accelerated procedure also from the point of view of EU law, see C Pouly, 'La force des préjugés: regard critique sur les procédures accélérées' (2015) *Cahiers de la recherche sur les droits fondamentaux* 65. For an illustration of a weaker standard of review which is characteristic for interim proceedings, see CE, 400683, 11 July 2016, para 5. On this point, see also CAA Paris, 12PA04618, 20 December 2013, para 11.
[1100] Conseil constitutionnel, 2018-770 DC, 6 September 2018, paras 31–34. No provision of the Charter was involved.
[1101] CE, 432740, 2 October 2019, para 5.
[1102] CAA of Bordeaux, 20BX00517, 6 July 2020.

reasoning summarised above: the contested regime was not contrary to the right to an effective remedy, the right to asylum, or any other constitutional requirement. The CAA continued that:

> Consequently, the pleas alleging that the application of Article L. 743-2 of the [CESEDA] disregards the right to asylum under Article 18 of the [Charter] and the right to an effective remedy guaranteed by Article 13 of the [ECHR], must be, in any event, dismissed.[1103]

Here, the conclusion based on the Constitution was simply extended to the Charter and the ECHR, with the strong implication that the standards are equivalent. It is interesting to note that in a later judgment concerning the same issue, the CAA of Bordeaux relied on the same two arguments in order to dismiss a claim based on Article 47 and Article 13 of the ECHR, but this time the decision of *Conseil constitutionnel* was only referred to in the 'visas'.[1104] In three other judgments from the same period, the reasoning was the same without any mention whatsoever of the *Conseil constitutionnel*'s decision.[1105] Clearly, the implicit reliance on equivalence reasoning has not been systematic.

4.2.2 Indirect effect of the Charter

Decisions in which the CAAs rely on the indirect effect of the Charter in their reasoning are much less frequent but much more interesting as to the degree of engagement with the Charter.

The CAA of Paris referred to the Charter alongside the ECHR in a decision concerning Article 19(4) of the Dublin II Regulation.[1106] This provision stated that where the Dublin transfer (that is, the transfer from the Member State in which an application for asylum was lodged to the responsible Member State) does not take place within six months of acceptance of the take-charge request or of the decision on an appeal or review,

> responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

[1103] Ibid. para 7. For the same reasoning, see CAA Bordeaux, 20BX01346, 20BX01347, 8 December 2020.
[1104] CAA Bordeaux, 19BX03853, 12 March 2020, para 9.
[1105] CAA Bordeaux, 20BX01892, 24 September 2020, para 6; CAA Bordeaux, 20BX00031, 3 November 2020, para 11; and CAA Bordeaux, 19BX04820, 30 November 2020, para 9.
[1106] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

The issue was whether the applicant must be informed of the prolongation of the time limit to one year or eighteen months and whether such prolongation is to be considered as a decision adversely affecting the person concerned and, thus, subject to judicial review. Faced with this question, the CAA of Paris replied in the affirmative, confirming the contested judgment of the TA of Paris.[1107] The CAA of Paris relied on the following arguments. First, the prolongation means that the applicant is unable to make an asylum application in France and obtain temporary residence for that purpose. Secondly, it also means that the French authorities can – at any time – place the applicant in administrative detention and transfer him to another Member State or a third country, even if such a Member State or third country has systemic difficulties in investigating and processing asylum applications. If not subject to an effective remedy in France, such a transfer may compromise the right to an effective remedy in the said Member State or third country within the meaning of Article 13 of the ECHR and Article 47 of the Charter. For these reasons, the prolongation decision, which affects the exercise of a fundamental right defined by the 1951 Geneva Convention and by several EU directives, must be regarded as a decision adversely affecting the applicant and, consequently, as subject to review.[1108] Since the Dublin II Regulation did not contain precise provisions on the nature and effects of the prolongation decisions, the approach of the CAA of Paris can be viewed as a case of Charter-compliant interpretation of EU secondary legislation. Admittedly, however, the Charter was not given a prominent place in the Court's reasoning.

It is noteworthy that when the CE was faced with the same question a few months later, it arrived at the opposite conclusion, holding that the prolongation is merely a continuation of the initial transfer decision.[1109] According to the CE, the competent authority is only obliged to inform the applicant of the possibility and conditions of prolongation in the initial decision; if, after the prolongation, the initial decision serves as a basis for subsequent administrative detention, the detention decision must then contain information about the existence, date and reasons for the prolongation.[1110] The CE did not follow the proposition of the public rapporteur, who argued in the opposite sense, citing the above-mentioned judgment of the CAA of Paris.[1111] The solution of the CE created a significant

[1107] CAA Paris, 13PA04220, 18 November 2014.
[1108] Ibid. para 6.
[1109] CE, 391375, 21 November 2015, para 3.
[1110] Ibid.
[1111] Opinion of Public Rapporteur G Pellissier in CE, 391375, 21 November 2015.

gap in legal protection in cases where the applicant was not detained and was not, therefore, able to challenge the reasons for the prolongation.[1112] Nevertheless, subsequent legal developments have remedied this. In October 2017, the CJEU held with reference to Article 47 of the Charter in *Shiri* that 'the applicant must have an effective and rapid remedy available to him which enables him to rely on the expiry of the six-month period as defined in Article 29(1) and (2) of [the Dublin III Regulation[1113]] that occurred after the transfer decision was adopted'.[1114] The CE took account of the CJEU's interpretation in a later decision without referring to any fundamental rights instruments.[1115]

The CAA of Bordeaux relied quite extensively on Charter-consistent interpretation in a case on administrative detention of asylum seekers.[1116] The case concerned an Algerian national who had been ordered to leave the French territory and placed in administrative detention. He then made an asylum application, but his detention was maintained under Article L. 556-1 of the CESEDA, which permits the detention to be maintained if the competent authority considers, *based on objective criteria*, that the applicant made an asylum application solely to frustrate the enforcement of the return decision. The applicant argued that this provision was contrary to the Reception Conditions Directive 2013/33/EU in that it did not define the objective criteria to be used to assess whether the application is spurious.

The CAA of Bordeaux referred to Article 8(3)(d) of the Directive, which allows detention in the case of spurious applications.[1117] The CAA then quoted the operative part of the CJEU's judgment in *Arslan*, in which the CJEU held that the Reception Conditions Directive does not preclude an applicant for international protection from being kept in detention where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the

[1112] For a discussion and other details, see C Pouly, 'Étranger: contentieux de l'asile', in *Répertoire de contentieux administratif* (Dalloz 2019), paras 87–91.
[1113] This provision corresponds to Article 19 of the Dublin II Regulation.
[1114] Case C-201/16 *Shiri*, EU:C:2017:805, para 44.
[1115] CE, 416403, 19 November 2018.
[1116] CAA Bordeaux, 17BX02699, 14 December 2017.
[1117] 'An applicant may be detained only: […] (d) when he or she is detained subject to a return procedure under Directive 2008/115/EC […], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate o*n the basis of objective criteria*, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision' (emphasis added).

person concerned from permanently evading his return.[1118] The CAA of Bordeaux continued as follows:

> The detention of an applicant for international protection constitutes a serious interference with his right to liberty and is, therefore, subject to compliance, as recalled notably in the decision of the [CJEU] in C-528/15 of 15 March 2017[[1119]], with strict safeguards under Article 6 of the [Charter] and Article 5 of the [ECHR], namely the presence of a legal basis, clarity, predictability, accessibility of the law and protection against arbitrariness. The provisions of Article 8(3)(d) of the Directive must also be interpreted in the light of these requirements.[1120]

The CAA of Bordeaux found that Article 8(3)(d) of Directive 2013/33, 'interpreted in particular in the light of the requirements [recalled above, including the Charter and the ECHR]', defines the conditions under which detention can be maintained, but it does not oblige the Member States (neither explicitly nor implicitly) to enumerate in their legislation all the objective criteria that are subject to judicial review.[1121] The Court concluded that Article 556-1 of the CESEDA was compatible with the Directive read in the light of the Charter and the ECHR.[1122] Here, the CAA was explicit about the Charter being given indirect effect. Notably, the Charter was not (unlike the ECHR) cited in the 'visas', which could arguably signify that the applicant did not invoke it. If this were the case, the judgment would be unique in that the Court applied the Charter of its own motion. Such reading of the judgment is corroborated by the fact that the CAA relied heavily on two CJEU judgements, one of which applied the Charter. It so happens that both these cases were Czech preliminary rulings.

Sometimes, when it seems that the Charter is given indirect effect, it is not so. In a decision of December 2019, the CAA of Paris dealt with a challenge to the maximum age limit for practising the profession of notary, which was set by the applicable rules to be 70 years of age. The applicant invoked, inter alia, the anti-discrimination Directive 2000/78/EC, as 'interpreted in light of the principles laid down in the [Charter]'.[1123] The CAA of Paris cited Article 21(1) (non-discrimination) and Article 52 of the Charter (limitation of rights), and Article 6(1) of the Directive, which allows for differences of treatment on the grounds of age if they are objectively and reasonably justified by a legitimate aim and if the means

[1118] Case C-534/11 *Arslan*, EU:C:2013:343.
[1119] Case C-528/15 *Al Chodor and Others*, EU:C:2017:213.
[1120] CAA Bordeaux, 17BX02699, para 10.
[1121] Ibid. para 11.
[1122] Ibid. For the same reasoning, see CAA Bordeaux, 17BX02978, 28 December 2017, paras 5–9.
[1123] CAA Paris, 18PA03632, 2 December 2019. See also CAA Paris, 18PA01083, 31 July 2020, para 8.

of achieving that aim are appropriate and necessary. The Court held that the age limit was justified under those provisions interpreted 'in the light of' the Charter. Here, rather than giving the Charter a true indirect effect, the CAA of Paris simply modelled its answer to the applicant's plea in such a way as to precisely reflect that plea.

4.2.3 Legality review of EU legislation and the preliminary ruling procedure

In 2015, doubts about the legality of Council Regulation (EU) No 961/2010 on restrictive measures against Iran led the CAA of Paris to make a request for a preliminary ruling.[1124] Specifically, Article 17 of the Regulation contained a derogation under which the Member States could authorise the release of certain frozen funds when several conditions were met. One of those conditions was that the funds were the subject of a judicial, administrative or arbitral lien established *before* the date on which the person concerned was put on the sanctions list [Article 17(a)].[1125] The case before the CAA of Paris was introduced by two American companies which had a financial claim against an Iranian bank, 'Sepah'. Their claim had been recognised as valid in a judgment of the CAA of Paris issued on 26 April 2007.[1126] However, the Iranian bank was included in the EU sanctions list on 20 April 2007, that is, *after* that judgment was handed down. Following the implicit refusal of the Ministry of the Economy and Finance to de-freeze the funds, the CAA had to examine whether Article 17(a) of the Regulation was compatible with Article 17 of the Charter and Article 1 of Protocol No 1 to the ECHR,[1127] and with Article 47 of the Charter and Article 6 of the ECHR[1128] insofar as it prevented the release of frozen funds where the relevant judicial decision was issued *after* the inclusion of a person on the list.

The CAA of Paris began by recalling the CE's case law on the legality review of EU secondary law.[1129] It first stated that the freezing of the funds and the implicit decision of the Ministry of the Economy and Finance interfered with the right of the two companies to use their property.[1130] 'However,' it continued, 'the right to property cannot be understood as an absolute prerogative' and it is legitimate to provide for certain restrictions on the exercise of that right, provided that

[1124] CAA Paris, 13PA04865, 22 June 2015. Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 [2010] OJ L 281/1.
[1125] Article 17(a) of the Regulation.
[1126] CAA Paris, 13PA04865, 22 June 2015, para 5.
[1127] Right to property.
[1128] Right to an effective remedy and to a fair trial; in this context, the right to have a court decision executed.
[1129] CAA Paris, 13PA04865, 22 June 2015, para 11.
[1130] Ibid. para 14.

> those restrictions effectively meet objectives of general interest of the Union and do not constitute, in relation to the objective pursued, a disproportionate and intolerable interference, undermining the very substance of the rights guaranteed.[1131]

The Court then recognised that the restrictive measures in question pursued a legitimate aim of the utmost importance consisting in safeguarding peace and international security that justifies the interference with Article 17 of the Charter and Article 1 of Protocol No 1 to the ECHR.[1132] However, the Court found that there was 'a serious doubt' as to the proportionality of that interference with the right to property of the two companies coupled with the inexecution of the judicial decision that found in favour of the two banks.[1133] This was especially the case because the claims of the two companies were in fact indemnities that the Iranian bank was ordered to pay to the two companies as a result of the fraud it committed against them. Even though the CAA of Paris did not explicitly apply the framework for the limitation of rights under Article 52(1) of the Charter – most probably because the Court's analysis concerned both the Charter and the ECHR – the Court's approach was in accordance with this framework.[1134]

The CAA of Paris thus asked the CJEU to assess the validity of Regulation (EU) No 961/2010 considering the 'serious doubt' as to its proportionality. However, since the Iranian bank in question was subsequently removed from the list in the Regulation, the CJEU issued a reasoned order in which it held there was no need to adjudicate on the request on account of the bank's delisting.[1135]

4.2.4 The routine review: Dublin cases

A substantial number of Charter references were made in the context of Dublin litigation: applicants frequently invoke Article 3(2) of the Dublin III Regulation, which prohibits a transfer to a Member State when there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for

[1131] Ibid. para 15.
[1132] Ibid. paras 15–16.
[1133] Ibid. para 17.
[1134] For a discussion on the Court's 'implicit' use of the proportionality test in this case, see J Sorin, 'Gel des avoirs dans le cadre de la lutte contre le financement du programme nucléaire iranien' (2015) *AJDA* 2083.
[1135] Case C-319/15 *Overseas Financial and Oaktree Finance* EU:C:2016:268. The CAA of Paris subsequently did the same: CAA Paris, 13PA04865, 21 October 2016. See also CAA Paris, 18PA00195, 12 November 2020, para 4, in which the CAA of Paris found no reason to doubt about the legality of the VAT Directive, rejecting the applicant's plea that the Directive violated the principle of equal treatment under Article 20 of the Charter, in that the reduced VAT rate applied to printed periodicals, not publications in electronic form. For the same reasoning, see CAA Paris, 18PA02396, 12 November 2020, para 9.

applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter. In most cases, the applicants have been unsuccessful.

The court will typically answer these claims by concluding that there are no grounds for believing that the applicants would be exposed to the risk of inhuman or degrading treatment. Sometimes the court makes a factual assessment – usually very cursory – of the situation in the Member State concerned.[1136] For example, in May 2017, the CAA of Paris rejected the challenge against a transfer decision to Hungary despite the existence of (i) the Commission's letter of formal notice sent to Hungary under Article 258 of the TFEU alleging systematic violation of several dispositions of EU asylum directives and (ii) the existence of a report of the Council of Europe's Commissioner for Human Rights critical of Hungary's reception conditions.[1137] According to the Court, 'these circumstances alone, at this stage of the said proceedings, cannot suffice to establish that […] there were substantial grounds for believing that there were systemic flaws in Hungary' within the meaning of Article 3(2) of the Dublin III Regulation.[1138] Reading some of the judgments issued in this context, one has an impression that the courts put a disproportionate emphasis on the fact that the Member State concerned is a party to the ECHR or the 1951 Geneva Convention (in other words, on the general presumption of fundamental rights compliance of the given Member State)[1139] and dismisses a little too readily various reports pointing to systemic deficiencies in the Member State in question.[1140] What is positive is that the court will typically at least enumerate the documents invoked; however, there have been decisions lacking in this respect, to the point of being untenable in terms of the duty to provide reasons.[1141]

[1136] CAA Paris, 16PA00904, 30 December 2016, paras 13–15 (Bulgaria) (mention of UNHCR recommendations and additional EU financial and organisational support received by Bulgaria; from April 2014 the UNHCR no longer advises to suspend all transfers to Bulgaria); CAA Paris, 17PA03174, 9 May 2018, para 10 (Bulgaria); CAA Versailles, 16VE03127, 1 March 2018, para 6; and CAA Nantes, 15NT03704, 19 July 2016, para 12.
[1137] CAA Paris, 16PA00620, 3 May 2017, paras 5–7.
[1138] Ibid. para 7.
[1139] See eg CAA Paris, 16PA00371, 29 June 2017, para 15; and CAA Paris, 17PA01103, para 6.
[1140] CAA Paris, 16PA00602, 30 May 2017, para 8 (Hungary); CAA Paris, 17PA03819, 6 July 2018, paras 9–10; CAA Paris, 17PA02942, 10 January 2019, para 7; CAA Versailles, 17VE00142, 14 November 2017, para 4; and CAA Versailles, 17VE01351, 11 January 2018, para 12.
[1141] See the criticism in Opinion of Public Rapporteur A Errera in CAA Versailles, 16VE02239, 28 June 2017, available in A Errera, 'Les défaillances du système d'asile hongrois font-elles obstacle au transfert d'un demandeur d'asile?' (2017) *AJDA* 2089.

Often, the court will reject the plea on the ground that it is unsubstantiated[1142] or that the applicant does not develop 'any serious argument';[1143] as a result, the general presumption of compliance with fundamental rights cannot be rebutted based on the evidence brought to the court.[1144] In rejecting the applicant's claims, the court will sometimes emphasise that the administrative authority duly considered the applicant's individual situation.[1145] The court will sometimes add that systemic flaws are not apparent from publicly available documents concerning reception conditions and the treatment of asylum claims in a given country.[1146] It would appear from those statements that the court examines the existence of systemic flaws of its own motion. In most cases, however, the application is rejected on the ground that the applicant did not prove that such flaws exist. Such an approach does not sit well with Article 3(2) of the Dublin III Regulation and with CJEU and ECtHR case law.[1147]

Another contentious area of the reasoning stems from the procedural rule that underlies the French annulment proceedings: the Court reviews the legality of the contested decision at the time it was taken.[1148] However, an unconditional application of this principle in Dublin transfer proceedings appears to be incompatible with CJEU case law.[1149]

[1142] CAA Paris, 16PA01180, 26 January 2017, para 15; CAA Paris, 16PA01733, 22 June 2017, paras 15–16; CAA Paris, 16PA01116, 29 September 2017, para 18; CAA Paris 16PA00371, 29 June 2017, para 15; CAA Paris, 17PA01995, 29 December 2017, paras 8–11 (Bulgary); CAA Paris, 17PA02000, 29 December 2017, para 15; CAA Paris, 17PA02685, 15 May 2018, paras 10–11; and CAA Paris, 17PA02536, 6 February 2019, paras 11 and 12.

[1143] CAA Paris, 16PA01734, 6 April 2017, para 12 (Italy); and CAA Paris, 16PA01745, 6 April 2017, para 12 (Bulgaria).

[1144] CAA Paris, 17PA00876, 21 December 2017, para 12 (Italy); CAA Paris, 18PA01959, 20 December 2018, para 19; CAA Paris, 18PA00394, 19 February 2019, paras 15–16; CAA Versailles, 17VE00460, 20 June 2017; CAA Versailles, 16VE01575, 10 October 2017; CAA Versailles, 18VE03689, 17 September 2019; CAA Nantes, 17NT00723, 16 March 2018, para 7; and CAA Nantes, 18NT02117, 3 December 2019.

[1145] CAA Paris, 17PA01137, 21 December 2017, para 11.

[1146] CAA Paris, 17PA01919, 2 February 2018, para 12; CAA Paris, 17PA01719, 24 April 2018, para 15.

[1147] See eg CAA Lyon, 15LY03569, 31 May 2015, para 17. For more on how this decision places too high a burden of proof on the applicants, see C Palluel, 'Règlement Dublin: le système d'asile hongrois ne connaît pas de défaillances systémiques' (2016/3) *Revue de jurisprudence ALYODA, Association lyonnaise de droit administratif*. Cf. Joined Cases C-411/10 and C-493/10 *N. S. and Others*, EU:C:2011:865, para 94; *M. S. S. v Belgium and Greece*, Application No 30696/09, Merits and Just Satisfaction, 21 January 2011, para 352, in the context of Dublin transfers from Belgium to Greece: '… the [ECtHR] considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception'.

[1148] For an illustration, see eg CAA Versailles, 19VE00755; and CAA Versailles, 19VE01863, 3 October 2019, para 4.

[1149] Case C-578/16 PPU *C. K. and Others*, EU:C:2017:127, paras 75, 84 and 90; and *M. S. S. v Belgium and Greece*, Application No 30696/09, Merits and Just Satisfaction, 21 January 2011, paras 347–349.

From the way the courts reject the applicant's arguments against the transfer, it emerged quite soon in the case law that they are aware of the distinction between (i) systemic flaws resulting in a risk of inhuman or degrading treatment and (ii) individual situation of a concrete applicant resulting in a personal risk of inhuman or degrading treatment.[1150] This was demonstrated, for example, in June 2018, when the CAA of Paris confirmed a judgment of the TA of Paris, in which the latter court annulled a decision to transfer the applicant to Bulgaria.[1151] In this case, the applicant, an Afghan national, managed to prove that he was previously exposed to inhuman and degrading treatment when in detention in Bulgaria. His personal possessions were confiscated, and he suffered severe injuries caused by a stun baton. Taking account of these facts, the CAA of Paris held:

> Without it being necessary to examine the plea alleging that there are serious grounds for believing that there are systemic failings in the asylum procedure and in the reception conditions of applicants in Bulgaria, the transfer of Mr A... to that country is likely to entail a risk that he will again be subjected to inhuman and degrading treatment.[1152]

To reach this conclusion, the CAA of Paris quoted a passage from the CJEU's judgment in *C. K.*, in which the CJEU clarified that Article 3(2) of the Dublin III Regulation also covers a real and proven risk of inhuman or degrading treatment which does not result from systemic deficiencies.[1153] The same reasoning was employed in two decisions of October 2018, which concerned Afghan asylum seekers who claimed to have previously suffered inhuman and degrading treatment in a Bulgarian detention facility.[1154] Again in 2019, two decisions of this kind were issued. In one case, an Afghan national claimed having been robbed, insulted and beaten by police officers, kept at a police station for 24 hours and only given a piece of bread, then transferred to a camp and kept in a cell for 21 days together with about 20 people, little food and without ever being able to leave.[1155] In the other case, the applicant claimed having been kept in a cell without a light or a window for 15 and subsequently 5 days and beaten on several occasions by police officers, which resulted in

[1150] See eg CAA Paris, 17PA02140, 29 December 2017, para 2; CAA Paris, 17PA02218, 7 June 2018, para 9; CAA Versailles, 17VE00797, 23 November 2017, para 6; CAA Versailles, 16VE01958, 11 January 2018, para 6; and CAA Nantes, 16NT03491, 20 October 2017, para 5.
[1151] CAA Paris, 18PA00145, 28 June 2018.
[1152] Ibid. para 3.
[1153] Case C-578/16 PPU *C. K. and Others*, EU:C:2017:127.
[1154] CAA Paris, 18PA00478, 18 October 2018, paras 2–3; and CAA Paris, 18PA00491, 18 October 2018, paras 2–3.
[1155] CAA Paris, 18PA03282,13 May 2019, para 3.

significant scarring.[1156] Afghan nationals contesting a transfer to Bulgaria were successful in other courts.[1157]

While it is laudable that the courts do not apply Article 3(2) of the Dublin III Regulation only in the context of systemic flaws, there is something disturbing about the approach of the CAA of Paris. Given its reluctance to accept the existence of systemic flaws entailing the risk of inhuman or degrading treatment, the applicants have only had a chance to successfully challenge the transfer if they had previously been subject to inhuman or degrading treatment in the Member State concerned. And only if they could prove this by producing medical reports.[1158] However, this is not what was supposed to be covered by the real and proven risk of inhuman or degrading treatment stemming from the applicant's personal situation. In the CJEU's *C. K.* judgment, it was the applicant's particularly serious illness that could expose him to inhuman or degrading treatment post-transfer.[1159] In contrast, in the Bulgarian cases in question, the only factor that individualised the applicants was the fact that they were previously subject to inhuman and degrading treatment. Significantly, they did not fall victim to such treatment due to their unique personal situation that would distinguish them from other potential victims of such treatment. In the absence of such previous inhuman or degrading treatment, applicants have been unsuccessful.[1160]

In this connection, contrary to what some CAAs implied,[1161] the applicant is not required to prove the existence of systemic deficiencies by corroborating it with his or her own experience. Another aspect which shows that some CAAs somewhat missed the point about 'systemic flaws' is their dismissal of documents and reports 'of purely general nature' as valid proofs of systemic flaws. It is precisely the reports of general nature that can point

[1156] CAA Paris, 19PA01135, 25 June 2019, paras 2–3.
[1157] CAA Nantes, 18NT00254, 19 October 2018, para 5.
[1158] See eg CAA Paris, 20PA00574, 10 July 2020, paras 5–6.
[1159] Case C-578/16 PPU *C. K. and Others*, EU:C:2017:127.
[1160] See eg CAA Paris, 19PA00676, 24 October 2019; CAA Paris 19PA03046, 22 May 2020; and CAA Paris, 20PA00573, 10 July 2020.
[1161] See eg CAA Versailles, 17VE01031, 16 November 2017, para 8; and CAA Nantes, 19NT01103, 17 December 2019, para 9: 'leurs allégations ne sont appuyées par aucun élément précis et concordant sur leur situation personnelle'.

to the existence of systemic flaws.[1162] This approach has unfortunately persisted in the case law.[1163]

There are cases where CAAs did not agree with the lower court's conclusion that the real and proven risk within the meaning of Article 3(2) of the Dublin III Regulation has been established.[1164] The credibility assessment of applicants' claims is decisive. When it comes to the assessment of the existence of systemic flaws, the CAA of Paris annulled a judgment of the TA of Paris, in which the latter court found substantial grounds for believing that there were systemic flaws in the asylum procedure and the reception conditions in Bulgaria, resulting in a risk of inhuman or degrading treatment.[1165] On appeal, the CAA of Paris held that the first-instance court was wrong to recognise the existence of systemic flaws in Bulgaria. The infringement proceedings initiated by the Commission against Bulgaria, the general reports concerning Bulgaria published by the UNHCR and non-governmental organisations and the applicant's own statements were not sufficient to prove the existence of such systemic flaws.[1166] The same difference of view with the same result occurred in several other cases with regard to Bulgaria[1167] and other Member States.[1168] Notably, in one of these cases, the CAA of Paris explicitly cited the grounds on which the lower-instance court reached the opposite conclusion: the TA of Paris had regard to publicly and freely available documents, in particular decisions of the Bulgarian Supreme Administrative Court and a 2018 report of the European Council on Refugees and Exiles (ECRE), according to which Afghan nationals did not benefit from a personalised assessment of their asylum claims in Bulgaria, and the way these claims were treated could lead to applicants being sent to Afghanistan, exposing them to a risk of inhuman or degrading treatment.[1169] However, the appellate court was not persuaded by these arguments. Firstly, according to the Court,

[1162] For the same critique, see Opinion of Public Rapporteur A Errera in CAA Versailles, 16VE02239, 28 June 2017, supra n 1141; and Opinion of Public Rapporteur F-X Bréchot in CAA Nantes, 17NT02328, 21 September 2018, available in F-X Bréchot, 'Transferts Dublin: non vers la Hongrie, oui sous réserve vers l'Italie' (2018) *AJDA* at 2254. See Case C-578/16 PPU *C. K. and Others*, EU:C:2017:127, paras 90–91; and *M. S. S. v Belgium and Greece*, Application No 30696/09, Merits and Just Satisfaction, 21 January 2011, paras 347–350.
[1163] See eg CAA Douai, 19DA00169, 9 May 2019, para 10.
[1164] See eg CAA Paris, 18PA01061, 20 September 2018, paras 5–6; and CAA Paris, 18PA02713, 27 November 2018, paras 2–3.
[1165] CAA Paris, 19PA02176, 12 November 2019. For a similar scenario concerning Bulgaria, see CAA Nantes, 17NT03080, 15 October 2018, para 4.
[1166] CAA Paris, 19PA02176, para 5.
[1167] CAA Paris, 20PA00172, 16 June 2020, paras 10–13; and CAA Paris, 20PA00246, 16 June 2020, paras 10–13.
[1168] CAA Versailles, 19VE00316, 18 June 2019, paras 3–4 (Italy).
[1169] CAA Paris, 20PA00174, 16 June 2020, para 5.

leaving aside the fact that the authenticity of the citation of Bulgarian case law referred to by the applicant cannot be verified, 'the existence of systemic flaws cannot be proven by general considerations concerning the approaches in the case law of Bulgarian courts'.[1170] Secondly, the ECRE report did not prove the existence of systemic flaws either: it was not demonstrated that the report could be used to assess how asylum applications were handled in Bulgaria at the time when the contested transfer decision was taken.[1171] Therefore,

> in the absence of serious and proven grounds suggesting that there are systemic deficiencies in the asylum procedure and the reception conditions of applicants in Bulgaria, the police prefect is justified in maintaining that the TA of Paris wrongly annulled the contested Decree on the grounds that it infringed the provisions of Article 3 of the [ECHR].[1172]

Such a difference of opinion also arose concerning the applicant's claim that upon transfer to the Member State concerned, where his asylum application had already been rejected, he would be automatically returned to the country of origin, where he risked falling victim to inhuman or degrading treatment.[1173]

There has also been some divergence in how different CAAs have approached the matter. While most of them have never recognised the existence of systemic difficulties in Hungary, some were prepared to do so. On 27 September 2016, the CAA of Bordeaux, following the proposal by the public rapporteur,[1174] held that the applicant

> has sufficiently established that, on the date of the contested Order [4 January 2016], there were serious and proven grounds for believing that, in the event of his being handed over to the Hungarian authorities, he would not benefit from an examination of his asylum application in conditions that comply with the guarantees required by respect for the right of asylum, and would thus risk being subjected to treatment contrary to Article 4 of the [Charter].[1175]

The Court relied on a Resolution of the European Parliament of 16 December 2015 describing the critical situation of asylum seekers in Hungary, the fact that the Commission

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[1170] Ibid. para 6.
[1171] Ibid.
[1172] Ibid. For other examples, see CAA Nantes, 18NT00625, 19 November 2018; CAA Nantes, 17NT03582, 26 December 2018; CAA Nantes, 19NT00679, 21 June 2019, para 7; and CAA Nantes, 18NT02646, 24 June 2019.
[1173] CAA Versailles, 18VE03650, 14 March 2019, paras 3–4 (Belgium); CAA Versailles, 18VE03651, 14 March 2019, paras 3–4 (Germany); CAA Versailles, 19VE00300, 18 June 2019; and CAA Versailles, 19VE02145, 7 November 2019 (Germany).
[1174] Opinion of Public Rapporteur G de la Taille in CAA of Bordeaux, 16BX00997, 27 September 2016, available in G de la Taille, 'Crise des migrants : lorsqu'un transfert "Dublin" viole le droit d'asile' (2016) *AJDA* 2332.
[1175] CAA Bordeaux, 16BX00997, 27 September 2016, para 4. The first-instance Court rejected the application.

started infringement proceedings against Hungary for the failure of that Member State to comply with EU asylum law (in particular, the Procedures Directive 2013/32/EU) and a Communiqué of the Council of Europe of 13 January 2016 reporting on the detention of asylum seekers in Hungary without real access to effective remedies.[1176]

On 19 October 2016, the CAA of Nantes confirmed the judgment of the TA of Rennes on identical grounds and with reference to the same documents to which the CAA of Bordeaux had referred.[1177] Both the CAA of Bordeaux[1178] and the CAA of Nantes[1179] adopted the same solution in later decisions.

In contrast, on 28 June 2017, the CAA of Versailles annulled the first-instance judgment,[1180] which held that there were systemic flaws in Hungary, relying on the same reports and documents as the CAA of Bordeaux and the CAA of Nantes. It did so against the advice of the public rapporteur.[1181] After dismissing the probative value of each of the reports and documents concerned (such a transparent approach deserves praise), the Court concluded that the arguments submitted by the applicant were not such as to give rise to serious doubts that there were systemic flaws in the Hungarian asylum procedure which would be capable of rebutting the presumption of compliance with fundamental rights.[1182]

Health-based arguments against the transfer are almost always unsuccessful on the facts.[1183] In July 2015, the TA of Lyon annulled a transfer to Lithuania of a Tajik national

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[1176] Ibid.

[1177] CAA Nantes, 16NT00271, 19 October 2016, para 4 (the contested decision was taken on 15 December 2015). The CAA of Nancy reached the same conclusion in one decision (16NC02477-16NC02478, 30 March 2017), but refused to recognise the existence of systemic flaws in Hungary in subsequent decisions: see eg CAA Nancy, 16NC02309, 28 September 2017; and CAA Nancy, 16NC02729, 30 November 2017.

[1178] 16BX02843, 15 December 2016 (contested decision made on 23 June 2016).

[1179] CAA Nantes, 15NT03322, 7 December 2016, para 4; CAA Nantes, 15NT03386, 7 December 2016, para 3; CAA Nantes, 15NT03848, 10 January 2017, para 4 (contested decision made in November 2015); CAA Nantes, 16NT00639, 10 January 2017, para 4 (contested decision made in November 2015); CAA Nantes, 16NT01478, 10 May 2017, para 4 (contested decision taken in December 2015); CAA Nantes, 16NT01559, 10 May 2017, para 4 (contested decision taken in April 2016); CAA Nantes, 16NT03326, 21 June 2017, para 4 (contested decision taken in June 2016); CAA Nantes, 17NT00120, 10 November 2017, para 5 (contested decision taken in December 2016); CAA Nantes, 17NT02328, 21 September 2018 (following the Opinion of Public Rapporteur F-X Bréchot, supra n 1162); and CAA Nantes, 17NT03127, 19 October 2018, para 4–7.

[1180] CAA Versailles, 16VE02239, 28 June 2017, paras 5–7.

[1181] Opinion of Public Rapporteur A Errera in CAA Versailles, 16VE02239, 28 June 2017, supra n 1141.

[1182] CAA Versailles, 16VE02239, para 7.

[1183] See eg CAA Paris, 16PA00602, 30 May 2017, para 8; CAA Paris, 16PA01116, 29 September 2017, para 18; CAA Paris, 17PA02140, 29 December 2017; CAA Paris, 17PA03943, 14 June 2018, para 10; CAA Paris, 18PA00665, 27 September 2018, para 11; CAA Paris, 17PA03186, 6 February 2019; CAA Paris, 19PA01654, 3 October 2019, paras 6–7; CAA Paris, 19PA02171, 24 October 2019, para 15; CAA Paris, 19PA01598, 2 December 2019, paras 9–10; CAA Paris, 19PA01548, 16 July 2020, para 20; CAA Versailles, 17VE00695, 22 June 2017; CAA Nantes, 17NT02901, 23 February 2018, para 9; CAA Nantes, 17NT02296, 1 October 2018; and CAA Bordeaux, 19BX02408, 12 November 2019.

suffering from a chronic kidney disease in an advanced stage. The first-instance court held that since the Lithuanian authorities were not informed of the applicant's disease in a way that would allow for his medical care to continue, the decision violated Article 35 of the Charter.[1184] On appeal, the CAA of Lyon quashed the first-instance judgment, finding no violation of the Charter. According to that Court, the Dublin III Regulation contains a specific procedure applicable to cases such as this, under which the Member State to which the applicant is to be transferred is informed, after the transfer decision but prior to the transfer, of the applicant's state of health so that medical care can be continued in that Member State.[1185]

In a decision of 22 December 2017, the CAA of Nantes found in favour of an applicant who contested a transfer decision to Italy on health grounds.[1186] The Court was satisfied that the individual circumstances of the applicant and her two children (who all suffered from a serious respiratory disease) prevented a transfer to Italy, relying on medical reports but also on the fact that given the lack of communication on the part of Italian authorities, there was no certitude that the applicant's needs would be adequately taken care of in Italy.[1187] The Court explicitly referred to the CJEU's judgment in *C. K*. In a later judgment, the CAA of Nantes annulled the contested transfer decision on the ground that the administrative authority had not taken into account the individual circumstances of the applicant, who had AIDS.[1188] The same Court followed the same approach in a case concerning a Sierra-Leonian national, whose transfer to Italy was excluded on health

[1184] CAA Lyon, 15LY02783, 26 January 2016, paras 4–5. Under Article 35 of the Charter: 'Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices.'
[1185] Ibid. para 6. For a similar scenario, see CAA Paris, 17PA02139, 29 December 2017, in which the CAA of Paris annulled a judgment of the TA of Paris, in which the latter court struck down a transfer decision on the ground that the applicant was operated on in the Lariboisière hospital and that it would be impossible to continue treatment in Italy 'due to the difficulties that asylum seekers face in this country'. On appeal, the CAA of Paris found that the applicant did not 'establish that he would not be able to benefit from appropriate medical follow-up if transferred to Italy' (para 3).
[1186] CAA Nantes, 17NT02239, 22 December 2017, para 3.
[1187] Ibid. For a decision where a serious health condition of the child of the applicants prevented a transfer to Poland: CAA Nantes, 19NT03819, 17 January 2020.
[1188] CAA Nantes, 17NT02057, 18 June 2018, paras 4–5. The case was also interesting given that the applicant did not invoke those circumstances in the administrative proceedings. As the CCA de Nantes explained, even though a decision's legality is assessed with reference to the date on which it was taken, it is for the court to take into account the justifications brought before it as long as they prove the facts that predate the contested decision, even if these elements had not been brought to the attention of the administration before it issued its decision. For another successful applicant, see CAA Nantes, 17NT02584, 18 June 2018, para 4.

grounds.[1189] In March 2019, the CAA of Nantes annulled the decision concerning a transfer of two Somali nationals and their 3,5-month-year-old child, relying heavily on the ECtHR's judgment in *Tarakhel*.[1190] The ECtHR held, as cited by the CAA, that '[w]hile the structure and overall situation of the reception arrangements in Italy cannot […] in themselves act as a bar to all removals of asylum seekers to that country', 'the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, cannot be dismissed as unfounded'; the 'requirement of "special protection" of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and extreme vulnerability'.[1191] Applying this reasoning to the facts of the case, the CAA of Nantes held that since the Italian authorities had not provided any assurance that the specific needs of the applicants would be take care of, the Dublin transfer could not take place.[1192]

It was already noted in the section analysing the Czech Dublin cases[1193] that the Charter's role in the reasoning is specific in that the cases mostly turn on the facts. Nevertheless, it is here that the Charter is most present in the case of CAAs and where it has sometimes determined the outcome of the case.

5. EVALUATION: DIVERSE PICTURE, COMMON PATTERNS

5.1 Introduction

The empirical analysis revealed a significant variation in the use of the Charter in the reasoning of Czech and French administrative courts; the engagement with the Charter in individual cases differs in intensity, focus and motivation. The impact of the Charter on the outcome of the case goes from decisive through significant to inexistent. Section 5.2 pulls together the evidence to identify common patterns in Czech and French case law and create a typology of legal effects of the Charter. When evaluating the Charter's role in the reasoning, it is crucial to concentrate on whether it is given effect alone or as part of a multi-

[1189] CAA Nantes, 18NT01287, 21 September 2018. Interestingly, the CAA cited general NGO reports to demonstrate that due to the increased migration flows, the Italian authorities 'could not adequately provide vulnerable people with the support, care or medical follow-up required by their specific condition' (para 4). The court followed Opinion of Public Rapporteur F-X Bréchot, supra n 1162.
[1190] CAA Nantes, 18NT01006 and 18NT00957, 29 March 2019; *Tarakhel v Switzerland*, Application No 29217/12, Merits and Just Satisfaction, 4 November 2014.
[1191] *Tarakhel v. Switzerland*, paras 115 and 119.
[1192] CAA Nantes, 18NT00957, 29 March 2019, para 5.
[1193] Section II.3.1.2.3.

layered normative scheme. Given the broad substantive equivalence between the Charter and other fundamental rights catalogues, there have been rich interactions (of varying intensity) between the Charter, the ECHR and national constitutions. We have also seen that it is common for the Charter to interact with EU secondary law containing fundamental rights guarantees. An analysis of those interactions is essential for understanding how national judges employ the Charter and what the added value of the Charter may be in national proceedings. Sections 5.3 and 5.4 focus each on the respective set of interactions.

In appropriate places, the following sections synthesise national courts' approaches to the Charter's horizontal provisions. It can be noted at the outset that the provision with the most impact is Article 52(3) of the Charter, concerning the equivalence between the Charter and the ECHR (see Section 5.3 below). The difference between rights and principles within the meaning of Article 52(5) is not significantly reflected in Czech and French administrative case law. The same goes for Article 53 of the Charter.[1194] Article 52(1) of the Charter has been deployed in only a minimal way and usually alongside analogous balancing provisions in other fundamental rights instruments. The NSS has cited the rule in Article 52(1) on a few occasions when setting out the applicable rules but has not used it as the primary framework within which the proportionality assessment would be conducted step by step.[1195] The CE will sometimes point out that a certain fundamental right is not absolute and can be limited provided that the limitations meet objectives of general interest pursued by the Union and do not appear manifestly excessive in relation to the aim pursued.[1196] This is an implicit reference to Article 52(1), but rarely is the proportionality test applied in detail. The CE demonstrated, however, that it is perfectly capable of performing the proportionality test when necessary.[1197] An explicit reference was present in 'model decisions' which were references for a preliminary ruling.[1198] Neither Czech nor French courts have discussed the

[1194] The French constitutionnel exceptionally made a reference for a preliminary ruling in a case which turned on the question of whether EU law precluded stricter national fundamental rights protection in relation to national rules transposing the European arrest warrant framework decision. This was a pure Article 53 case, even though the Conseil constitutionnel did not cite that provision, nor the Charter. It referred to Article 6 TEU, however, which can be taken as an implicit reference to the Charter. For a comment, see Dubout, Simon and Xenou, 'France', supra n 283 at 350.
[1195] See eg NSS, 2 As 107/2017-72, 19 April 2018, para 42; NSS, 1 Azs 412/2017-47, 7 February 2019, para 23; and NSS, 1 Azs 146/2019-23, 28 August 2019, para 14.
[1196] CE, 387890, 29 June 2016, para 19; and CE, 418394, 12 July 2019.
[1197] CE, 401536, 10 May 2017. See also CE, 394686, 30 January 2017, para 16 (the public rapporteur recommended the CE to base its reasoning on Article 52(1) of the Charter, citing CJEU case law: see Opinion of Public Rapporteur X Domino, supra n 1019.
[1198] Madelaine, 'L'application de la Charte des droits fondamentaux de l'UE par les juridictions nationales', supra n 15.

'essence' of rights within the meaning of Article 52(1), which seems to be in line with the EU trend.[1199]

5.2 Typology of legal effects

A discussion of the level of engagement with the Charter in judges' reasoning needs to be preceded by a short remark on the reasoning style of Czech and French courts. French administrative courts keep their Charter-based interpretation to the absolute minimum, the minimum being determined by the litigants. The French technique of syllogistic reasoning makes for brief, matter-of-fact decisions whose content is limited to what is strictly necessary for the decision to make logical sense.[1200] Judicial decisions, especially on the appellate and cassation level, are short and not particularly discursive or dialogic: they do not discuss alternative solutions, rarely refer to past judicial decisions and generally do not engage in in-depth interpretative analysis.[1201] CJEU decisions are not frequently cited.[1202] The decisions must be read together with highly authoritative academic case notes, which contextualise and explain the decisions. Crucially, the opinions of public rapporteurs are more discursive and more likely to include serious Charter-based reasoning.[1203] However, they are not systematically published.

In contrast, the reasoning of Czech administrative courts, including the NSS, is dialogical and discursive: 'The nature of reasoning is quite often substantive; it is openly accepted that the law has more than just one possible meaning'; the NSS 'tries to legitimize its reasoning by a sincere attempt to persuade those reading the judgment'.[1204] This provides a fertile ground for a more substantial treatment of the Charter and sophisticated Charter-centred reasoning. The practice of French administrative courts, including the CE, is less rich and diverse as to the different legal effects that the Charter may be given. This makes it

[1199] Comparatively speaking, the 'essence' does not seem to be of much importance in national case law: see M Brkan and Š Imamović, 'Article 52: Twenty-Eight Shades of Interpretation' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 421 at 430–431.
[1200] See eg V Couronne, 'Consistent Interpretation in France: Revealing the Duality of the Judicial System' in ChNK Franklin (ed), *The Effectiveness and Application of EU and EEA Law in National Courts* (Intersentia 2018) 149.
[1201] M Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2004) at 27–61, esp. 30, 31 and 33. Public rapporteurs do cite CJEU case law. Also, references to CJEU case law seem to be becoming more frequent and are very common in references for a preliminary ruling.
[1202] S Laulom, 'Le droit de l'Union européenne' in P Deumier (ed), *Le raisonnement juridique: recherche sur les travaux préparatoires des arrêts* (Dalloz 2013) 187.
[1203] See B Bonnet, 'La place de la CEDH' in P Deumier (ed), *Le raisonnement juridique: recherche sur les travaux préparatoires des arrêts* (Dalloz 2013) 156 at 157–158.
[1204] Z Kühn, 'The Quality of Justice and of Judicial Reasoning in the Czech Republic', supra n 441 at 184.

even more necessary to read French decisions together with the more discursive Opinion of the public rapporteur in the cases concerned, where those are available.

When evaluating the performance of national courts in terms of giving effect to the Charter, it is important to take into account the broader operative context of EU-law application in general.[1205] For example, French administrative courts, including the CE, have a long tradition of employing EU-consistent interpretation to resolve normative conflicts.[1206] We have discussed how these courts preferred EU-consistent interpretation to setting aside national law, given that the former is the less intrusive method, even if the EU-consistent interpretation sometimes effectively entailed rewriting national law.[1207] Thus, if we were to conclude that, for example, the CE did not rely on Charter-consistent interpretation, it is difficult to posit that this is due to principled reluctance or a lack of Charter knowledge. It may very well be that Charter-consistent interpretation simply was not needed to reach a Charter-consistent outcome.

A specific factor to consider is whether the courts raise (or are allowed to raise) a Charter-based argument of their own motion. The French position is very clear: it is settled case law dating to a decision in *SA Morgane* that administrative courts do not raise EU law of their own motion; EU law, including the Charter, is not considered to be a *moyen d'ordre public*.[1208] This strict attitude is demonstrated by one judgment in which the CE held that the CAA of Bordeaux was not under an obligation to substitute the plea based on the (inapplicable) Article 41 of the Charter with a plea based on the equivalent (and applicable) general principle of EU law.[1209] The only exception concerns cases in which the court substitutes, of its own motion, a Constitution-based plea into a Charter-based plea when litigants invoke the Constitution against national transposition measures.[1210]

As for Czech administrative courts, the approach is less categorical. The case law of the NSS established that courts must raise *ex officio* such violations of constitutional rights

[1205] B Genevois, 'L'application du droit communautaire par le Conseil d'État' (2009) *RFDA* 201; and M Guyomar, 'Le juge administratif et le droit européen' in J-B Auby (ed), *L'influence du droit européen sur les catégories juridiques du droit public* (Dalloz 2010) 89.
[1206] Couronne, 'France', supra n 1199 at 156–157 and 162.
[1207] Ibid. at 167–168 and 172–173.
[1208] CE, *SA Morgane*, 90995, 11 January 1991; Sirinelli, *La transformation du droit administratif par le droit de l'Union européenne*, supra n 214 at 358–365; Vocanson, *Le Conseil d'Etat français et le renvoi préjudiciel devant la Cour de justice de l'Union Européenne*, supra n 1016 at 41–51; and CAA Lyon, 14LY01420, 9 June 2015, para 2.
[1209] CE, 373101, 11 February 2015, para 3.
[1210] CE, 401536, 10 May 2017, para 10.

as the principle of retroactivity *in favorem* under Article 40(6) of the Czech Charter and the violation of the *ne bis in idem* principle pursuant to Article 40(5) of the Czech Charter.[1211] The Regional Court in Brno applied that case law also to the right to liberty in case of a gross and obvious irregularity of a detention decision.[1212] As a result of this case law, under the EU principle of equivalence, the *ex officio* application must also apply to Articles 6, 49 and 50 of the EU Charter. It appears, however, that the obligation to apply fundamental rights *ex officio* is not a general one.

Both the Czech and French approaches seem to be in line with the CJEU's highly deferential requirements on the *ex officio* application of EU law. However, let us not forget the important rule that Member State courts cannot rely on an interpretation of an act of secondary law which would conflict with the fundamental rights protected by the Union legal order.[1213] This means that once the parties relevantly invoke EU primary or secondary law, national courts must give effect to the Charter to the extent required by the said rule.

With these procedural limits in mind, the courts' engagement with the Charter will largely depend on pleadings.[1214] It seems that in France, the parties' initiative and the way they formulate Charter-based pleas determines the courts' approaches much more than in the Czech Republic. The discursive style of reasoning of Czech courts favours the Charter's utilisation beyond the arguments of the applicants.

The empirical data gathered and analysed in Part II of the thesis allows us to construct a typology of modes of engagement with the Charter. A disclaimer is necessary to the effect that national courts (but the CJEU as well[1215]) are not always clear about what kind of effects they are conferring on the Charter and the extent to which the Charter serves as a legal basis for the chosen solution. The aim here is not to create juridically discrete categories but to illustrate the variety of legal effects that national courts confer on the Charter.

[1211] NSS, 2 As 9/2008-75, 13 June 2008; and NSS, 6 As 44/2008-142, 4 March 2009.
[1212] RC in Brno, 41 A 59/2020-27, 5 November 2020, para 37.
[1213] See eg Case C-101/01 *Lindqvist*, EU:C:2003:596, para 87; and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others*, EU:C:2007:383, para 28.
[1214] This is true of the CJEU and the ECtHR as well: see eg Rosas, 'Five Years of Charter Case Law', supra n 55 at 15.
[1215] The CJEU will often use formulas such as 'interpret in the light of' or will attribute a 'special significance' to a certain source of law, like the ECHR: see V Champeil-Desplats, 'Réflexions sur les portées respectives de la Convention européenne des droits de l'homme et de la Charte des droits fondamentaux de l'Union européenne' in B Bonnet and C Laurent-Boutot (eds), *Traité des rapports entre ordres juridiques* (Lextenso 2016) 1145 at 1148.

1. The most unexciting category comprises various descriptive and incidental Charter references that are not worthy of the term 'giving effect to the Charter'. Courts often refer to the Charter when summarising parties' pleas in law or describing the case history; a Charter reference can also appear purely accidentally, such as in direct quotes of CJEU case law.[1216]

2. The courts will often limit themselves to stating, in a plain and purely descriptive manner, that a certain right is contained in the Charter, with no traceable connection of such a statement to the *ratio decidendi*. They will often make an expository outline of the relevant fundamental rights provisions, which may take the form of a panoramic chain of materially equivalent fundamental rights provisions, including the Charter. Czech courts often copy-paste such outlines in decisions concerning the same matter. French courts often make an unaccompanied reference to the Charter in the 'visas', without citing a specific provision or referring to the Charter in the text of the decision.

This type of the Charter's use is usually put under the heading of ornamental and marginal references and dismissed as having no added value. However, such a categorical criticism does not fully take account of the diverse reality of judicial decision-making. Even where a judge makes just a bare, isolated reference to the Charter as a contextual element, there is nothing wrong with providing an expository overview of the applicable law, including the fundamental rights rationale of the applicable EU secondary legislation or the implementing national provisions.[1217] In addition, it is at least arguable that any reference to the Charter, be it in a purely descriptive and panoramic manner, plays the role of highlighting the overriding importance of upholding a certain rule or value and gives a *pro-liberate* feel to the reasoning, which may have an implicit impact on the decision as a whole. A descriptive Charter reference may subsequently serve as an 'implicit point of reference' for the interpretation of the applicable EU and national law.[1218] Also, it is essential to pay close attention to the CJEU case law cited in the national decision under evaluation. For example, a judgment might only contain a bare, isolated reference to the Charter, but it might also

[1216] See Section II.3.1.

[1217] NSS, 8 Azs 18/2016-52, 7 June 2016, para 10 (general outline of the principle of mutual trust in the Dublin transfer framework). In some cases, this happens even if the case is outside the scope of Union law, which can create confusion about the Charter's scope of application: NSS, 13 Kss 12/2013-78, 18 June 2014; NSS, 4 As 7/2012-82, 20 December 2013; NSS, 5 As 73/2010-71, 11 March 2011; and NSS, 3 As 28/2018-49, 15 April 2020.

[1218] C Stravilatis and C Papastylianos, 'Greece' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 381 at 417–418; and Petrov, 'Vnitrostátní soudy a způsoby argumentace judikaturou ESLP', supra n 24 at 176.

extensively refer to CJEU Charter-infused case law interpreting the applicable secondary law.[1219]

The widespread use of those references is also a measure of the extent to which the Charter permeates the daily decision-making of ordinary courts, demonstrating an increasing level of internalisation of the Charter in a domestic setting.[1220] Lastly, many Charter references of this kind can be explained by prosaic contextual factors. For instance, French courts are obliged to explicitly respond to a Charter-based plea, at least in the 'visas' section of their decisions, to ensure their decision is lawful.[1221] At any rate, it is good to remember that the presence and the form of the Charter reference are heavily predetermined by how the parties plead the case.

3. When courts primarily rely on the indirect effect of an EU secondary law provision to interpret national law, they will sometimes secondarily refer to the Charter as the underlying source of the relevant fundamental rights guarantees. In such cases of consistent interpretation, the provision of secondary law is the main reference point, which is, in turn, interpreted consistently with the Charter. Depending on how the reasoning is worded, the Charter's role can be complementary, confirmatory, legitimising or reinforcing. The exact role can be hard to determine, especially if the court only says that it interprets a particular provision 'in the light of the Charter'. In this category of cases, the reasoning could easily hold without the Charter reference.

4. The courts have relied on a stronger indirect effect of the Charter with an ascertainable impact on the *ratio decidendi* where the solution of the case required going beyond EU secondary law provisions. This can take the form of clarifying the scope or content of a secondary law provision,[1222] interpreting an EU normative scheme in a way ensuring effective judicial protection,[1223] choosing a Charter-compliant interpretation of a national provision over a non-compliant one;[1224] interpreting national rules on *locus standi*

[1219] For an example of such a case, see NSS, 2 Azs 60/2017-48, 28 April 2017, paras 17–19. This was a reference to Article 47 of the Charter (Right to an effective remedy and to a fair trial) as the fundamental rights rationale (background) of Article 46(1) of the Procedural Directive 2013/32/EU, which stipulates that 'Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal […]'. The NSS cited three CJEU judgments interpreting this fundamental right.
[1220] For the same argument made in the context of the national judicial treatment of the ECHR, see K Šipulová, 'Introduction' in D Kosař et al., *Domestic Judicial Treatment of European Court of Human Rights Case Law: Beyond Compliance* (Routledge 2020) 1 at 9.
[1221] See text accompanying nn 980–982.
[1222] See eg CE, 416192, 5 December 2017; and CE, 425519, 29 November 2019, para 17.
[1223] CE, 415751, 14 November 2018; and CAA Paris, 13PA04220, 18 November 2014.
[1224] NSS, 8 Azs 158/2020-22, 27 October 2020.

to extend judicial protection to someone that does not have standing by virtue of an explicit provision (gap-filling);[1225] or extending the scope of a national provision to cover situations not expressly provided for.[1226]

5. Where the courts' reasoning is specifically targeted at assessing whether the juridical solution contained in the contested administrative or court decision is compatible or not with the Charter (Charter-based review), the reasoning will often finish with a simple declaration of violation or non-violation, without explicitly relying on the direct or indirect effect of the Charter.[1227] It is important to mention that an overwhelming majority of Charter references in French case law can be subsumed under this category. This should not be taken to mean that this category is homogenous, given that the reasoning that precedes a declaration of (non-)violation varies both in depth and focus.[1228] The depth will depend, inter alia, on whether the court stops at finding no interference with a fundamental right or continues to examine whether an existing interference is justified and proportional; and on whether a Charter-based claim can be dealt with summarily or an analysis of CJEU case law is needed. The focus refers to the respective role of the Charter and other fundamental rights instruments within the court's review.

6. Similar to the preceding category is reasoning specifically targeted at assessing whether a rule of EU secondary law is compatible with the Charter. This type of Charter use is much more frequent in French case law. Of course, if the court has doubts about the validity of an EU secondary law provision, the obligatory outcome of the Charter use under this category is a reference for a preliminary ruling.

7. The courts have relied on the exclusionary direct effect of the Charter to set aside national provisions which conflict with it.[1229] Where the NSS did so, it relied invariably on the direct effect of 'the Charter and a provision of secondary law' or 'a provision of secondary law read together with the Charter'. Importantly, this does not necessarily mean

[1225] NSS, 7 As 310/2018-47, 13 January 2020, para 40.
[1226] RC in Prague, 54 A 11/2018-54, 10 July 2020.
[1227] Where a court makes a declaration of violation, annuls the contested decision and remits the matter to the authority/court which took that decision, it is then for that authority/court to employ direct or indirect effect of the Charter, if needed.
[1228] See Section II.4.2.1.
[1229] See Section II.3.1.2.5. The effectiveness of the Charter's direct effect manifested itself in other Member States as well, like the UK (Lady Arden and T Tridimas, 'Limited But Not Inconsequential: The Application of the Charter by the Courts of England and Wales' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 331 at 338–339) or Hungary (Jeney, 'The Scope of the EU Charter and its Application by the Hungarian Courts', supra n 125).

that the Charter reference was non-essential, given that in some of the cases discussed under this category, the fundamental rights standard enshrined by the Charter was absent in the secondary law provision concerned.

8. A category distinct from the previous ones regroups cases of non-mandatory interpretative references to the Charter in cases that are outside its scope. The Charter has been used as a 'source of inspiration' to add persuasive value to the reasoning in such cases, highlight or reinforce a particular point or complement, and reinforce or legitimise a particular juridical solution. While Czech administrative courts have employed the Charter in this manner, French courts do not use this method of interpretation.[1230]

The Charter is a legitimate and particularly attractive source of comparative arguments for national judges: it is a consolidated expression of core European values. Its Preamble expressly refers to *indivisible*, *universal* and *common* values, including human dignity, freedom, equality and solidarity.[1231] It further states that the Charter *reaffirms* the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the ECHR, the Social Charters adopted by the Union and by the Council of Europe and the case law of the CJEU and the ECtHR.[1232] A good account of this broader significance of the Charter was given before the Charter's entry into force by Advocate General Léger in Case C-353/99 P:

> … the nature of the rights set down in the [Charter] precludes it from being regarded as a mere list of purely moral principles without any consequences. It should be noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection. The Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States.[1233]

Similarly, in a nod to the search for European consensus, one of the ECtHR's preferred methods of interpreting human rights provisions, Advocate General Mischo stated in one of

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[1230] The same remark was made regarding Greek courts, which employ a style similar to the French one: Stravilatis and Papastylianos, 'Greece', supra n 1218 at 416. This is not true, however, of the opinions of public rapporteurs: see Laulom, 'Le droit de l'Union européenne', supra n 1202 at 194–196; and AL Quinio, *Recherche sur la circulation des solutions juridiques* (Fondation Varenne 2011) at 101–104. See eg Opinion of Government Commissioner F Lamy in CE, 239575, 28 June 2002; Opinion of Government Commissioner P Fombeur, in CE, 229163, 28 February 2001.

[1231] Recital 2 of the Preamble.

[1232] Recital 5 of the Preamble.

[1233] Opinion of AG Léger in Case C-353/99 P *Council v Hautala*, EU:C:2001:392, para 80. See also ECtHR, *Bayatyan v Armenia*, Application No 23459/03, Merits and Just Satisfaction, para 106.

his Opinions that the Charter 'constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the [Union] legal order'.[1234] We find arguments to the same effect in decisions of national constitutional courts too.[1235] National courts have used the Charter as a systematic 'standard for interpretation of the level of protection of human rights granted by the Constitution in accordance with the idea of the common European axiology',[1236] with the Charter being ascribed a hermeneutical value.[1237] As for administrative courts, the NSS in the pre-Lisbon era mentioned the Charter's 'significance', 'undeniable authority' or 'undeniable academic and methodical importance' despite its provisions lacking binding force at the time.[1238] Of course, the Charter's symbolic and political importance as a common expression of shared values is the same whether or not a particular legal issue is within the scope of the Charter.

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This is a good place to say that some of the above uses of the Charter are more frequent than others. Generally, the descriptive, expository, background references are much more frequent than cases of serious substantive application of the Charter. Importantly, however, as shown above, descriptive, expository and background references are not always devoid of value. It also needs to be stressed that the only reason courts make this kind of reference will often be that the parties invoke the Charter in a case which does not necessitate a substantive application of the Charter.

It is also true that a large proportion of Charter references are those made in repetitive, 'clone' cases concerning the same legal issue. This leads to frequent auto-citations resulting

[1234] Opinion of AG Mischo in Case C-20/00 *Booker Aquaculture and Hydro Seafood*, EU:C:2001:469, para 126.
[1235] Belgian Constitutional Court, Judgment No 10/2008, 23 January 2008, para B.2.2: 'En ce que la Charte affirme l'existence de valeurs communes de l'[UE] qui se retrouvent également pour l'essentiel dans des dispositions de la Constitution, la Cour peut la prendre en considération dans son examen'.
[1236] Półtorak, 'Poland', supra n 456 at 575.
[1237] A Aguilar Calahorro and S Pinon, 'Espagne' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 277 at 294; for the French Conseil constitutionnel, see A Roblot-Troizier, 'La France' in E Dubout and S Touzé (eds), *Les droits fondamentaux: charnières entre ordres et systèmes juridiques* (Pedone 2010) 234 at 243 and 244.
[1238] NSS, 8 Afs 30/2005-58, 31 October 2006; NSS, 8 Afs 27/2005-88, 18 September 2007; and NSS, 2 As 20/2008-73, 22 July 2008.

in a 'snowball effect', when courts refer to their previous case law, sometimes by means of direct quotes, sometimes by simply copy-pasting parts of the reasoning.[1239]

In the Czech Republic, there is a high repetition rate in Dublin transfer cases and other areas of asylum and immigration law, such as the detention of foreign nationals. The practice of French CCAs, insofar as the Charter is concerned, is dominated by two types of clone cases: litigation concerning the right to be heard in proceedings related to the obligation to leave the French territory and Dublin transfer litigation. Thus, hundreds of appellate decisions contain an essentially identical passage with a reference to the Charter, such as a citation of Article 3(2) of the Dublin III Regulation. The repetitive nature of the Charter reference does not itself reduce its value: it adds to the overall evidence of the general effectiveness of Charter rights in national proceedings.

There is a fair number of cases in which the Charter was a prominent part of the main line of reasoning and even formed the basis of the judicial decision. A few times, Charter-based reasoning led to a reference for a preliminary ruling, which mainly happened in France. Then there are Czech cases in which the Charter was used to disapply conflicting national rules as the most effective means to remedy a legal situation in violation of EU law and the national constitution. Some decisions extensively relied on Charter-related case law of the CJEU, which is a good indicator of the Charter's impact on the solution of the case.[1240] Both Czech and French courts relied on a strong indirect effect of the Charter in several cases. Admittedly, the French reasoning in the indirect effect cases is less detailed and polished, but this is explained by the drafting style of French judges. Lastly, in a handful of Czech decisions, the Charter has been employed as the leading comparative argument.

The preceding remarks make it necessary to nuance the hypothesis of the research, which was that 'As for the Charter's role in courts' reasoning, it is mostly limited to a simple ornament or at best a non-necessary supporting argument without a substantial impact on the solution of the case'. It is true that descriptive, expository and background references to the Charter are statistically predominant, but they should not be automatically dismissed as irrelevant and without any value. Furthermore, the national judicial practice is significantly richer than the hypothesis suggested. The research has shown that the courts are capable of applying the Charter in diverse ways, using all the standard methods of application of EU

[1239] See also L Vyhnánek, 'A Holistic View of the Czech Constitutional Court Approach to the ECtHR's Case Law on the Importance of Individual Justices' (2017) *Heidelberg Journal of International Law* 715.
[1240] Section II.3.1.2.5.

law, including EU-consistent interpretation and direct effect. It must be admitted, however, that the Charter case law is much more diverse in the Czech Republic than in France: French courts appear to be much more constrained by the pleadings and do not go beyond what is necessary to make a declaration of non-violation. The formulaic reasoning of French CCAs and the CE is not conducive to sophisticated Charter-based argumentation.

The findings made above are provisional, given that they need to be put into the context of the multi-level protection of fundamental rights. This theme is analysed next.

5.3 The Charter in the context of multi-level protection of fundamental rights

The dedicated EU rules on how the Charter is meant to interact with other fundamental rights catalogues – contained in Articles 52(3) and 53 of the Charter – were analysed in Section II.2.4. These rules coexist with a separate set of national and international rules that govern how national judges must give effect to national constitutions and the ECHR. Therefore, before evaluating the legal effects of the Charter in relation to the ECHR and the Czech and French constitutions, a couple of remarks are due on the operational context of the Charter, the ECHR and national constitutional catalogues in proceedings before Czech and French administrative courts.

In the Czech Republic, the Charter has the status of an international treaty under Article 10a of the Czech Constitution, although this view is not universally accepted.[1241] According to the Czech Constitutional Court, direct applicability and primacy of the Charter does not follow from any provision of the Constitution but from the doctrine of EU law itself, as it has emerged in the CJEU case law.[1242] The ECHR has the status of an international treaty under Article 10 of the Constitution, under which '[p]romulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply'.[1243] Given their supra-legislative value, ordinary

[1241] See Czech Constitutional Court, Pl. ÚS 50/04, 8 March 2006, available in English at: www.usoud.cz/en/decisions/2006-03-08-pl-us-50-04-sugar-quotas-iii. For more on the Charter's constitutional status, see Blisa, Molek and Šipulová, 'Czech Republic and Slovakia', supra 25 at 132–134.
[1242] Pl. ÚS 50/04, ibid.
[1243] Translation available at: public.psp.cz/en/docs/laws/constitution.html. Pursuant to Article 95(1) of the Constitution, 'In making their decisions, judges are bound by statutes and treaties which form a part of the legal order; they are authorized to judge whether enactments other than statutes are in conformity with statutes or with such treaties.'

courts can disapply statutes and infra-legislative provisions when they conflict with international treaties under Article 10. When it comes to the ECHR, however, the situation is complicated by the fact that under controversial case law of the Constitutional Court, the ECHR and other international treaties on human rights are an integral part of the 'bloc of constitutionality', which means that, in terms of the Constitutional Court's case law, ordinary courts must refer any case of alleged incompatibility of a statute with the ECHR to the Constitutional Court. This means that reliance on the direct effect of the Charter has the advantage of being able to set aside the conflicting national rule without a reference to the Constitutional Court. However, some Czech ordinary courts, including the NSS, do not fully adhere to the Constitutional Court's line of case law and feel competent to disapply national rules for their conflict with the ECHR.[1244] Under this reading, which we find compelling, national judges can rely on Charter-consistent interpretation and direct effect of the Charter under the same constitutional conditions which apply to the consistent interpretation or disapplication of national rules on the authority of the ECHR.

In France, the Charter has the status of international law under Article 55 of the Constitution;[1245] it has supra-legislative but not supra-constitutional value.[1246] The ECHR has the same legal status. Thus, it can serve as a legal basis for ordinary courts to rely on consistent interpretation or disapply national law under the same conditions as apply under the EU *Simmenthal* doctrine.[1247]

Neither in the Czech Republic nor France is the Charter part of the 'constitutional order' (Czech Republic) or 'bloc de constitutionalité' (France) that serves as the reference

[1244] Petrov, 'Vnitrostátní soudy a způsoby argumentace judikaturou ESLP', supra n 24 at 177–178.
[1245] Article 55 of the French Constitution: 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.'
[1246] See L Burgorgue-Larsen, 'The EU Charter before the French Parliament and Courts: Between (Great) Disillusion and (Little) Hope' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 159 at 165–166; Conseil constitutionnel, n° 74-54 DC, 15 January 1975; and Magnon X, 'Le juge constitutionnel et le droit européen' in J-B Auby (ed), *L'influence du droit européen sur les catégories juridiques du droit public* (Dalloz 2010) 63. See also Dubout, Simon and Xenou, 'France', supra n 283 at 327–329. According to the authors, the status is still ambiguous and under a different interpretation, the Charter comes under Article 88-1, which is specifically about the EU: 'The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen by virtue of the treaties which established them to exercise some of their powers in common. It shall participate in the European Union in the conditions provided for by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed on 13 December 2007.'
[1247] G Martinico, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 *European Journal of International Law* 401 at 413.

framework for constitutional review.[1248] This means that the situation is less complex than in countries in which some Charter provisions are on a par with the national constitution, like in Austria and some other Member States.[1249]

The combination of legal sources of fundamental rights is a pervasive phenomenon which is probably the most characteristic feature of the Charter's national application in all Member States.[1250] This is not surprising, given that the catalogues are frequently co-applicable and are broadly equivalent in that they contain essentially the same fundamental rights in similarly worded provisions.[1251] It has been reported that in some Member States, the Charter is rarely invoked in isolation, as an autonomous ground.[1252] The instances where the Charter is part of a composite standard of review are more frequent than instances where it is used autonomously.[1253] The ECHR–Charter tandem seems to be prevalent in Member State practice.[1254] It is necessary to distinguish between different modalities of how the sources interact within the reasoning and, more specifically, within the *ratio decidendi*. This distinction is important because the Charter may be present in the reasoning, but the legal

[1248] Conseil constitutionnel, 2010-605 DC, 12 May 2010, paras 10–16.
[1249] In a significant 2012 judgment, the Austrian Constitutional Court reversed its previous approach and held that Charter rights that are 'similar in wording and purpose' to rights guaranteed by the Austrian Constitution form part of the standard of review in the proceedings on constitutional complaints. For an overview of the Austrian case law, see M Klamert, 'The implementation and application of the Charter of Fundamental Rights of the EU in Austria' (2018) LXIV *Acta Universitatis Carolinae Iuridica* 89. For the precariousness of the Austrian approach, see S Kieber and R Klaushofer, 'The Austrian Constitutional Court Post Case-Law After the Landmark Decision on Charter of Fundamental Rights of the European Union' (2017) 23 *European Public Law* 221. On Germany and Italy and on the pros and cons of including the Charter in constitutional review, see C Rauchegger, 'National Constitutional Courts as Guardians of the Charter: A Comparative Appraisal of the German Federal Constitutional Court's Right to Be Forgotten Judgments' (2020) 22 *Cambridge Yearbook of European Legal Studies* 258. See also M de Visser, 'Juggling Centralized Constitutional Review and EU Primacy in the Domestic Enforcement of the Charter: *A*.v. *B.*' (2015) 52 *Common Market Law Review* 1309; and Hofbauer and Binder, 'Austria', supra n 457 at 108–112.
[1250] Półtorak, 'Poland', supra n 456 at 583.
[1251] Fundamental rights are a paradigmatic example of what has been called "Multi-sourced Equivalent Norms", a concept developed to study normative parallelism in international (non-human rights) law: see T Broude and Y Shany (eds), *Multi-sourced Equivalent Norms in International Law* (Hart 2011).
[1252] Madelaine, 'L'application de la Charte des droits fondamentaux de l'UE par les juridictions nationales', supra n 15; and Aastresses, 'Belgique', supra n 455 at 173.
[1253] For examples of the Charter being used as part of a composite standard of review, see Stravilatis and Papastylianos, 'Greece', supra n 1218 at 412. For a criticism when this is done outside the scope of EU law, Aastresses, 'Belgique', supra n 455 at 159. For examples of autonomous application, see M Belov and M Fartunova, 'Bulgaria' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 177 at 195.
[1254] Ndior, 'Suède', supra n 479 at 666; and FRA, 'Challenges and opportunities for the implementation of the Charter of Fundamental Rights', supra n 37 at 43. See also M Claes, M de Visser and M de Werd, 'Operationalizing the European Mandate of National Courts: Insights from the Netherlands' in B de Witte and others (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar 2016) 105 at 105 fn 2.

basis for, say, annulling the contested measure, can limit itself to the national constitution and/or the ECHR.

With this disclaimer in mind, the gathered empirical data allowed us to put together the following systematisation of the modalities of the Charter's interactions with other sources of fundamental rights.

1. The Charter is the sole legal basis for a particular juridical solution without a reference to any other fundamental rights instruments.[1255] This has happened notably with regard to its Article 47,[1256] Article 8[1257] or Article 41 (even though it is only applicable to EU bodies).[1258] The Charter is usually used as an autonomous source also where French courts conduct a fundamental rights review of EU secondary legislation.[1259]

2. The Charter is the leading source, constituting the primary formal basis of the reasoning, but interpreted in the light of the ECHR, typically via Article 52(3) of the Charter.[1260]

3. A combined parallel reference to the Charter alongside the national constitution and/or the ECHR within a single statement and in support of a single argument or an interpretative solution, with each of the instruments having *prima facie* equal weight.[1261]

4. The Charter (and CJEU case law) is embedded into the global reasoning 'naturally' alongside other sources of law without being treated separately from the ECHR (ECtHR case law) and/or the national constitutional law. The references to equivalent fundamental rights are merged within one all-encompassing reasoning regarding a fundamental right or a particular aspect of its interpretation, with alternating, mutually reinforcing references to all the relevant sources and case law within a single line of reasoning, leading to a global solution based equally on all the sources.[1262] Within such a reasoning, the equivalence

[1255] See eg NSS, 7 As 310/2018-47, para 40; or CE, 385934, 9 December 2016; and cases cited in n 1043.
[1256] See eg CE, 429487, 21 September 2020.
[1257] MC in Prague, 10 A 72/2013-86, 8 March 2017.
[1258] See eg CE, 370515, 4 June 2014.
[1259] See eg CE, 387796, 20 June 2016; and Sections II.4.1.6 and II.4.2.3.
[1260] NSS, 1 Azs 412/2017-47, 7 February 2019; or NSS, 1 Azs 146/2019-23, 28 August 2019, para 26; and NSS, 6 Azs 320/2017-20, 29 November 2017.
[1261] See eg NSS, 9 As 140/2016-46, 8 December 2016, para 42; RC in Prague, 54 A 11/2018- 54, 10 July 2020; CAA Bordeaux, 17BX02699, 14 December 2017, para 10; CAA Paris, 13PA04865, 22 June 2015. For this type of reference, see Stravilatis and Papastylianos, 'Greece', supra n 1218 at 421; German Bundesgerichtshof, I ZR 59/13, 2 April 2015, paras 53–63; Lagrange and Thevenot-Werner, 'Allemagne', supra n 481 at 68–69.
[1262] See eg NSS, 1 As 186/2017-46, 26 April 2018; or NSS, 5 Azs 53/2016-26, 11 August 2016; RC in Prague, 53 A 20/2019-55, 14 January 2020. For a similar observation on the role of the ECtHR in the reasoning in travaux préparatoires, see Bonnet, 'La place de la CEDH', supra n 1203 at 159.

between the Charter and the ECHR is sometimes explicitly recognised with reference to Article 52(3) of the Charter.[1263]

5. A different in form, but very similar in substance, is the approach that treats the Charter, the ECHR and national law within one global, coherent reasoning but in separate steps (in separate reasoning blocks), without there necessarily being a hierarchy between the sub-groups.[1264] Here, the Charter and other catalogues are addressed separately and consecutively, possibly following their separate invocation by the litigants.[1265]

6. Then there are cases of explicit marginalisation of the Charter, where courts pursue their analysis solely based on the national constitution and/or the ECHR, and the only mention of the Charter is the recognition of its equivalence with the ECHR.[1266]

7. The reasoning is based primarily on national law and/or the ECHR, and the undeveloped Charter reference is only added on the margins of the reasoning, for example, in the expository panoramic reference setting out the applicable legal framework.[1267]

8. Sometimes, courts reach a conclusion based on one fundamental rights instrument which they then simply extend to other instruments. In this context, Czech courts have at times relied on an unwarranted assumption of absolute general equivalence.[1268] French courts have often conducted the reasoning under the national constitution and/or the ECHR and then dealt with the Charter-based plea 'on the same grounds',[1269] even where a proportionality assessment was made.[1270]

[1263] NSS, 5 Azs 13/2013-30, 17 September 2013; NSS, 1 Azs 246/2019-31, 21 October 2019; and CE, 448486, 25 June 2021.
[1264] See eg NSS, 2 As 107/2017/72, 19 April 2018 (comparison of proportinoality tests in different systems); and NSS, 8 As 55/2012-62, 22 October 2014, paras 47–86 (with a higher degree of separation of different tests); and Bonnet, 'La place de la CEDH', supra n 1203 at 164–165.
[1265] Stravilatis and Papastylianos, 'Greece', supra n 1218 at 421.
[1266] See eg NSS, 9 As 111/2012-34, 1 November 2012; and NSS, 6 As 146/2013-44, 2 April 2014. See also Hofbauer and Binder, 'Austria', supra n 457 at 122 (the Constitutional Court concluded in an *ERT*-type case within the scope of the Charter that Article 21(2) of the Charter was 'structurally similar' to Article 7(1) of the Austrian Federal Constitutional Law and Article 14 ECHR, and this similarity was sufficient for those provisions to constitute the primary standard of review, with the Charter review being superfluous); and Stoppioni, 'Italie', supra n 459 at 506.
[1267] See eg Section II.3.1.1.1.
[1268] RC in Brno, 31 Af 81/2016-86, 3 July 2018, para 34 (Article 40(6) of the Czech Charter and Article 49(1) of the EU Charter); see cases discussed in text accompanying nn 870–879.
[1269] See eg CE, 404996, 18 October 2018, para 19; CAA of Bordeaux, 20BX00517, 6 July 2020; and cases cited supra n 1095.
[1270] See eg CE, 442120, 8 April 2021, para 21. See also a Slovenian example of a conflated national and Charter proportionality assessment: S Bardutzky et al., 'Slovenia' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 623 at 646.

The last-mentioned constellation corresponds to the perception on the part of some practitioners and judges that given the substantive equivalence of the Charter, national constitutions and the ECHR, a Charter argument will mostly be superfluous.[1271] However, there is no basis for such a sweeping equivalence-based approach. We have already demonstrated that even in areas in which Article 52(3) applies, national courts must be careful when putting into operation the equivalence framework.[1272] In areas not covered by Article 52(3), points of divergence between the catalogues will inevitably emerge on specific issues. Identical wording of nominally equivalent provisions does not necessarily translate into the identity of scope and meaning.[1273] First, since we are talking about open-textured, generally worded provisions, differences will likely only emerge in the case law. Also, different solutions can stem from the fact that some systems allow for more limitations of one fundamental right to the benefit of another, even though the content of the rights involved is equivalent in all the systems concerned.[1274] As well as considering the equivalence of the provisions laying down individual fundamental rights, we must therefore consider the equivalence of the normative frameworks for limiting the exercise of those rights. Equivalence pertains not only to the substantive scope of protection but also to methodology.[1275] Analyses of the convergence/divergence ratios for particular fundamental rights are countless.[1276] Different constellations may arise. A national standard may be

[1271] Kalaitzaki and Laulhe Shaelou, 'Cyprus', supra n 455 at 259; Półtorak, 'Poland', supra n 456 at 583; FRA, *Ten years on: Unlocking the Charter's full potential* (EU Publications Office 2020) at 3; and Van Meerbeeck, 'Le point de vue du juge du fond', supra n 456.

[1272] See text accompanying nn 556–560.

[1273] Champeil-Desplats, 'Réflexions sur les portées respectives de la Convention européenne des droits de l'homme et de la Charte des droits fondamentaux de l'Union européenne', supra n 1215 at 1154.

[1274] M Safjan, 'Les dilemmes de l'application de standards plus élevés de protection des droits fondamentaux sous le prisme de l'identité constitutionnelle' in A Tizzano (ed), *La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003-2015): liber amicorum Vassilios Skouris* (Bruylant 2015) 545 at 551.

[1275] See J Callewaert, 'Vingt ans de coexistence entre la Charte et la Convention européenne des droits de l'homme: Un bilan mitigé' (2021) *Cahiers de droit européen* 169 at 173–179.

[1276] For an early comparison of the equivalence between the Charter and national constitutions of several Member States, see the contributions in *Revue européenne de droit public* 2002, 14(1). For an analysis of the material added value of the Charter compared to the French *status quo* in the first half of the 2000s, see the individual chapters in L Burgorgue-Larsen, *La France face à la Charte des droits fondamentaux de l'Union européenne* (Bruylant 2005). For some examples of divergence, see L Besselink, 'The Protection of Fundamental Rights Post Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions: General Report' in J Laffranque (ed), *Reports of the XXV FIDE Congress Tallinn 2012. Vol. 1. The protection of fundamental rights post-Lisbon: The interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and national constitutions* (Tartu University Press 2012) 134; Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter', supra n 35 at 1208; and Bailleux, 'Article 52-2', supra n 512 at 1299–1303.

higher than the EU standard.[1277] The EU standard may be higher than the ECHR standard.[1278] Admittedly, these points of divergence might be of relatively short duration: they might cease to exist – or at least significantly diminish – as soon as the various mechanisms of convergence (normative, procedural and informal ones) come into action.[1279] Each of the systems concerned mandates interpretative alignment.[1280] A substantial degree of alignment also exists between the methodological frameworks for limiting the exercise of fundamental rights.[1281] Nevertheless, the risk of divergence can never be completely eliminated. With all this in mind, recourse to equivalence-based reasoning should not be purely formulaic but must be made with the knowledge of the complexities of multi-level fundamental rights protection.

The research has shown that while there are several patterns in the case law as to the interaction of the co-applicable fundamental rights instruments, there is no established method as to the relative weight and formal role given to each fundamental rights instrument in the courts' reasoning. The use of Article 52(3) of the Charter as a bi-directional tool illustrates this well: the courts have relied on this provision to give the Charter preference as the legal basis interpreted in the light of the ECHR, but also to marginalise the Charter completely to the benefit of the ECHR.

The ECHR is often given preference, which may be for various reasons, starting with the judges' greater familiarity with the ECHR and the 'natural tendency of litigants and of courts to follow established patterns of legal orientation and argumentation'.[1282] Also, in some areas, the ECtHR's case law is particularly developed. The high intensity of

[1277] See eg Spaventa, 'The interpretation of Article 51 of the EU Charter of Fundamental Rights: The dilemma of stricter or broader application of the Charter to national measures', supra n 77; and Hofbauer and Binder, 'Austria', supra n 457 at 117 (data protection; national standard higher than that of the Charter and the ECHR).
[1278] Opinion of AG Pikamäe in C-924/19 PPU et C-925/19 PPU, EU:C:2020:294; and NSS, 5 Afs 104/2016-31, 17 July 2018.
[1279] See eg D Ritleng, 'De quelques difficultés suscitées par la concurrence des standards de protection des droits fondamentaux en Europe' in A Iliopoulou-Penot and L Xenou (eds), *La charte des droits fondamentaux, source de renouveau constitutionnel européen?* (Bruylant 2020) 31 at 48; and Ritleng, 'Les constitutions nationales et la Charte des droits fondamentaux de l'Union européenne', supra n 573 at 491–500.
[1280] As Fontanelli puts it, '[t]he substantive equivalence between these three sources is enhanced and guaranteed by the multiple obligation of consistent interpretation': Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights', supra n 75 at 239.
[1281] Bardutzky et al., 'Slovenia', supra n 1270 at 647 (the Slovenian Administrative Court 'clarified that the strict test of proportionality developed by the Constitutional Court for the purpose of determining the legality of measures depriving an asylum seeker of his liberty corresponds, in essence, to the proportionality test provided for under Art. 52 Charter'). For a conflated analysis of the limitation of rights under the ECHR and the Charter by the UK Supreme Court, see *The Rugby Football Union (Respondent) v Consolidated Information Services Limited (Formerly Viagogo Limited) (In Liquidation) (Appellant)*, 21 November 2012, [2012] UKSC 55, para 44.
[1282] Stravilatis and Papastylianos, 'Greece', supra n 1218 at 415.

engagement with the ECHR does not necessarily mean that the Charter has no role. In fact, the Charter sometimes allows importing the ECtHR's case law into the reasoning in cases where the relevant ECHR provisions are not applicable, but the Charter provisions are.[1283] It is well-known that Article 6 of the ECHR is limited to civil rights and obligations or criminal charges: it does not generally apply to judicial review in administrative cases. The equivalent Article 47 of the Charter contains no such limitation and is applicable in tax matters, as well as in cases concerning foreign nationals.[1284] The right to *ne bis in idem* in Article 50 of the Charter is broader than the corresponding right in Article 4 of Protocol No 7 to the ECHR, as the Charter prohibition applies to charges and punishments 'in the Union', while Article 4 of Protocol No 7 only applies to double jeopardy 'under the jurisdiction of the same state'.[1285] The Austrian Constitutional Court spoke about indirectly 'importing' the ECHR standard in such contexts.[1286] The importation of the ECHR via Article 52(3) of the Charter is particularly useful in areas where the ECtHR's case law is much more developed than the CJEU's one, for example, when it comes to the right to property.[1287]

Several factors favour the application of the Charter as opposed to the ECHR or national constitutions. On rare occasions, judges were explicit about their motivation to give precedence to the Charter route, relying on its procedural advantages compared to constitutionally-protected fundamental rights[1288] or its quality as the sole applicable

[1283] See eg Austrian Verfassungsgerichtshof, U466/11 et al., 14 March 2012, paras 7.2–7.5 (right to a public hearing); T Ojanen, 'Finland' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 305 at 314–315 (right to a public hearing in a subsidiary protection case).
[1284] See van Bockel and Wattel, 'New Wine into Old Wineskins', supra n 75.
[1285] See Stravilatis and Papastylianos, 'Greece', supra n 1218 at 403.
[1286] Hofbauer and Binder, 'Austria', supra n n 457 at 122. The Belgian Constitutional Court was also explicit about importing the ECHR via general principles of *national* law: 'Il n'est pas nécessaire de déterminer en l'espèce si l'article 6.1 de la Convention européenne des droits de l'homme est applicable, puisque les exigences qu'il contient en matière d'indépendance et d'impartialité du juge valent comme principes généraux du droit. En conséquence, la Cour tient compte de la jurisprudence de la Cour européenne des droits de l'homme en la matière': SV Drooghenbroeck and F Belleflamme, 'V. 2. Le droit international et européen des droits de l'homme comme "source matérielle" de principes généraux du droit' in S van Drooghenbroeck (ed), *Le droit international et européen des droits de l'homme devant le juge national* (Primento 2014) 160 at 164–165.
[1287] A Berkes, 'Hungary' in L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of fundamental rights as apprehended by judges in Europe* (Pedone 2017) 425 at 451–453 (the relatively greater familiarity of the Hungarian judges with the ECHR leads to the fact that ECtHR case law is relied on more often even in cases where CJEU case law exists, such as cases on family reunification).
[1288] NSS, 6 Azs 320/2017-20, 29 November 2017, para 72. See A Torres Pérez, 'The Challenges for Constitutional Courts as Guardians of Fundamental Rights in the European Union' in P Popelier, A Mazmanyan and W Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 49 at 53–56.

fundamental rights instrument to the exclusion of the ECHR.[1289] Some Charter provisions have no equivalent in some national constitutions or the ECHR.[1290] Some rights are more clearly worded in the Charter than in outdated national constitutions; hence, the Charter can play an important gap-filling function, where the ECHR could not do the same job.[1291] Also, when dealing with an issue governed by several equivalent provisions, there may be rich case law specifically on that issue in the EU system, but not in the other systems, which is another possible manifestation of the potential added value of the Charter.[1292] The CJEU's case law on data protection and the right to be forgotten comes to mind in this connection, with the CJEU being the leader in this field.

And then, there is the Charter's role in cases where the standard of fundamental rights protection has been harmonised at the level of EU secondary legislation, without any margin of appreciation left to the Member States (and Member State courts) in that specific respect. In such a scenario, the Charter is *the sole legal basis* on which judicial solutions can be adopted, pre-empting national sources of fundamental rights from being applied, with the ECHR only included to interpret the Charter.[1293] The German Constitutional Court adopted a very clear position that is completely in line with the *Melloni* line of case law and with the systemic characteristics of EU law (of course, with the Solange reservations):

> Regarding the application of legal provisions that are fully harmonised under EU law, the relevant standard of review does not derive from German fundamental rights, but *solely from EU fundamental rights*; this follows from the precedence of application of EU law […]. The possibilities of review reserved by the Federal Constitutional Court in the event of a general erosion of such protection remain unaffected […].[1294]

[1289] Opinion of Public Rapporteur L Cytermann in CE, 429487, 21 September 2020: in a case concerning the principle of effective judicial protection in administrative e proceedings, to which Article 6 of the ECHR does not apply, the public rapporteur pointed to the need to apply Article 47 of the Charter autonomously.
[1290] See eg the proportionality between penalties and criminal offences in Hungary: see Berkes, 'Hungary', supra n 1287 at 462.
[1291] For an early analysis of the Charter's potential impacts and possibilities in French law, see the contributions in L Burgorgue-Larsen (ed), *La France face à la Charte des droits fondamentaux de l'Union européenne* (Bruylant 2005).
[1292] See eg NSS, 5 Afs 104/2016-31, 17 July 2018.
[1293] See Section II.2.4.
[1294] Order of 6 November 2019, 1 BvR 276/17 (*Recht auf Vergessen II*), para 42. For a discussion, see K Lenaerts, 'La Charte dans l'ordre juridique de l'Union européenne' (2021) *Cahiers droit européen* 29. Also, the Austrian Supreme Court held in one decision that 'within the scope of application of the Charter, the fundamental rights examination must occur only in the light of the Charter': Hofbauer and Binder, 'Austria', supra n 457 at 106. This approach was, however, criticised and did not reappear in later judgments.

The same position should be adopted by Czech and French courts, regardless of how the obligation to apply the Charter *ex officio* is constructed in the national systems.[1295] These considerations are, for the moment, absent from the case law of Czech and French administrative courts.

In some decisions, different textual manifestations of a particular fundamental right become secondary; these textual manifestations are treated as equivalent.[1296] In some of these decisions, there is a tendency to dissociate the fundamental rights concerned from their equivalent/analogous textual manifestations in various sources of law and apply it as one 'dematerialised' notion.[1297] A mere general reference to the existence of a certain fundamental right – with a weaker attachment to the instruments in which it is enshrined and without any detailed argumentation – occurred, for instance, in *J. M.* v *Appeal Commission on the Residence of Foreign Nationals*. There, the NSS decided to grant suspensive effect to a decision which would oblige the applicant to leave the country, and it did so with reference to the family life of the applicant as an important value that needs to be protected, 'as is clear from various international documents relating to fundamental rights (especially from Article 7 of the [Charter] and Article 8(1) of the [ECHR])'.[1298] We saw that the CE sometimes first sets out why a particular fundamental rights plea is unfounded without a reference to a specific provision and then makes a declaration of non-violation of all the provisions invoked, taken as a group.[1299]

This practice has been described and theorised in the context of the case law of the Belgian Constitutional Court, which works with the notion of analogous fundamental rights constituting an 'ensemble indissociable':

> When a provision of a convention binding on Belgium has a *scope analogous* to one or more of the aforementioned constitutional provisions, the guarantees enshrined in the provision of the convention constitute an inseparable whole (*ensemble indissociable*) together with the guarantees contained in the constitutional provisions concerned.[1300]

[1295] Madelaine, 'L'application de la Charte des droits fondamentaux de l'UE par les juridictions nationales', supra n 15: 'Dans la quasi-totalité des contentieux entrant dans le champ d'application du droit de l'UE, il ne peut donc y avoir "préemption" de la Charte sur la Convention EDH que si la première de ces sources a bien été soulevée par les requérants'.
[1296] NSS, 1 As 79/2016-43, 9 March 2017, para 39; NSS, 5 Azs 53/2016-26, 11 August 2016.
[1297] Rosoux, 'Les droits fondamentaux, au cœur de la pluralité des sources et de la pluralité des juges', supra n 679.
[1298] NSS, 6 As 30/2013-34, 10 May 2013, para 13. See also NSS, 1 As 79/2016-43, 9 March 2017, para 39.
[1299] See eg CE, 433867, 12 July 2021.
[1300] 136/2004, 22 July 2004, B.5.3 (emphasis added).

This technique allows the Court to integrate the case law of the ECtHR and the CJEU into the Belgian Constitution and merge all these sources into a coherent whole.[1301] Textual manifestations of the fundamental rights, considered analogous, lose their importance vis-à-vis the dematerialised and all-encompassing notion of the fundamental right concerned. This is decidedly an attractive concept, and it seemingly simplifies things for national judges. That said, relying on this notion can give rise to tensions stemming from the ultimate interpretative authority of each apex court and the jurisdictional rules in force in the Member State. The dematerialisation obscures the reasoning as to which source of fundamental rights was the legal basis for the solution of the case.

It is tempting to see the practice of combination as an aspect of the globalisation of law or as a manifestation of a common ground of understanding or *patrimoine constitutionnel commun*, whereby judges look away from textual manifestations of each fundamental right in favour of a common universal substantive reading of that right.[1302] Certainly, a significant reason which explains the pervasiveness of combination of legal sources is that a combined reading of the provisions is mandated by the obligations of consistent interpretation, whether stemming from explicit legal provisions like that in Article 52(3) of the Charter or more general obligations of sincere cooperation of the institutional actors from different legal systems.

However, when reading the grouped references to equivalent sources in the reasoning of Czech and French administrative courts, we should be careful about attributing principled importance to such references. They may simply reflect a pragmatic drafting choice[1303] based on how the case was pleaded by the applicants or how the contested decision was reasoned.[1304] A reference to the Charter might only be there to ensure that the Charter-based plea is addressed, without which the court's decision would be unlawful. The CE often gives a single answer to two pleas, the Charter and the ECHR one.[1305] According to another theory, the combination of legal bases is so prevalent because of the uncertainty of how the Charter, the ECHR and national constitutions are meant to interact.[1306] Although the mixing of sources can give rise to uncertainty as to which fundamental rights provision actually

[1301] Aastresses, 'Belgique', supra n 455 at 142–143.
[1302] Simon, 'Repenser le raisonnement interprétatif', supra n 819 at 616 and the references therein.
[1303] For a similar remark in the context of general principles of EU law, see Xenou, *Les principes généraux du droit de l'Union européenne et la jurisprudence administrative française*, supra n 30 at 247.
[1304] S Robin-Olivier, 'European Legal Method from a French Perspective', supra n 882 at 308 and 315.
[1305] Dubout, Simon and Xenou, 'France', supra n 283 at 348.
[1306] Bardutzky et al., 'Slovenia', supra n 1270.

'applied',[1307] it is to an extent inevitable, given that courts are, in principle, bound by the invoked pleas and that litigants usually make sweeping references without making a substantial difference between the sources.

The research confirmed the hypothesis that 'the Charter is mostly not used as an autonomous instrument and is cited alongside the more established fundamental rights catalogues, such as the ECHR or the national constitution'. However, we tried to show that there is a large variety of ways in which the sources interact, that the Charter is far from being systematically marginalised, and that the choice of relative emphasis on the fundamental rights instruments concerned does not necessarily result from a principled choice of national judges.

5.4 The Charter guarantees competing with EU secondary law

Even where the Charter is autonomous from other fundamental rights catalogues, it often operates in the context of specific fundamental rights guarantees laid down in EU secondary law. Many secondary law acts or their provisions give expression or implement Charter rights, laying down concrete guarantees for the beneficiaries concerned.[1308] Many EU directives and regulations contain a provision concerning the right to effective judicial protection (judicial review) in matters within the scope of that act.[1309] Some fundamental rights, their scope and limits, have been subject to detailed implementing provisions in secondary law, like the right of EU citizens to free movement.[1310] The EU secondary law can 'supersede' the Charter's rules on the limitation of rights under Article 52(1).[1311] Some Charter provisions were even directly modelled on EU secondary legislation, as is made clear by the Explanations to several Charter provisions.[1312] For example, Article 31(2) of the Charter (the right to limitation of maximum working hours, to daily and weekly rest periods

[1307] This issue is not new and is not limited to the Charter; for example, in the *FNSEA* judgment, when the CE applied the principle of equality, it was not clear whether this was a general principle of EC law or of French administrative law: see Dubouis, 'Sur l'application des principes généraux du droit communautaire en droit français (1)', supra n 451.
[1308] Eg Article 15(4) of Directive 2008/115/EC (Article 6 of the Charter); Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12 (see Recital 2; Article 17 of Directive 2003/86/EC and Article 7 of the Charter: RC in Prague, 54 A 62/2019-64, 16 April 2021, para 18).
[1309] See eg Article 9(3) of Directive 2013/33/EU; and Article 15(3) of Directive 2008/115/EC.
[1310] See eg CAA Marseille, 13MA04752, 29 September 2015.
[1311] See eg Article 7(f) of Directive 95/46/EC (NSS, 2 As 107/2017-72, 19 April 2018).
[1312] This of course creates a rather curious set-up, whereby the ('constitutional') Charter provisions are interpreted in light of secondary law provisions, when in fact it should be the other way round. For the same observation and for a pertinent remark that the relationship between the Charter and secondary law (unlike its relationship with various other legal sources) is omitted from the general provisions in Article 52 of the Charter, see Bailleux, 'Article 52-2', supra n 512 at 1291–1292.

and to an annual period of paid leave) is based, inter alia, on Council Directive 93/104/EC concerning certain aspects of the organization of working time.[1313] The whole purpose of certain EU secondary law acts is to lay down provisions giving expression to fundamental rights, such as Directive 2012/13/EU on the right to information in criminal proceedings[1314] or Directive 2013/48/EU 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.[1315] As the CJEU stated, 'it is clear from the recitals of those directives that they are based […] on the rights set out in, inter alia, in Articles 6, 47 and 48 of the Charter and seek to promote those rights with regard to suspects or accused persons in criminal proceedings'.[1316] In all these scenarios, where the protection of fundamental rights is integrated into the relevant piece of secondary law, the added value of the Charter may be limited from the material point of view. Therefore, national judges may find it sufficient to rely on the relevant provisions of EU secondary legislation (and possibly also on the CJEU case law interpreting it in the light of the Charter) without cross-referring to the Charter. After all, the CJEU employs this approach as well.[1317]

One decision of the NSS which contains no mention of any fundamental rights instruments illustrates this well. The case concerned a detained third-country national who tried to appeal against an expulsion decision taken against him but was unable to do so in due time owing to the absence of legal counselling.[1318] The appeal was considered out of time by the administration, which was confirmed by the first-instance court. The NSS

[1313] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time [1993] OJ L 307/18. See also Articles 8, 11, 23, 27, 30, 31, 32, 33, 34 and 42 of the Charter. This is made clear by the Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17. See also eg Case C-78/11 *ANGED*, EU:C:2012:372, para 16. In this connection, it should be noted that this approach is not unique to the Charter: it is also how some general principles of Community/Union have emerged in the CJEU's case law 'by way of induction, abstraction and generalization, starting from provisions already included in the EU legal system, thereby underlining their transversal nature': see Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights*, supra n 30 at 34.

[1314] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1.

[1315] 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 [2013] OJ L 294/1.

[1316] Case C-467/18 *Rayonna prokuratura Lom*, EU:C:2019:765, para 37.

[1317] See Safjan, Düsterhaus and Guérin, 'La Charte des droits fondamentaux de l'Union européenne et les ordres juridiques nationaux', supra n 114. See eg Case C-414/16 *Egenberger*, EU:C:2018:257, para 81; and Case C-161/18 *Villar Láiz*, EU:C:2019:382.

[1318] NSS, 4 Azs 122/2015-23, 30 June 2015. For a discussion of this case, see Moraru and Renaudière, 'European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive – Pre-Removal Detention', supra n 713 at 34–35.

annulled the decisions based on Article 13(3) of the Returns Directive 2008/115/EC, which provides that '[t]he third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance'.[1319] It will be remembered that under Article 47 of the Charter, '[e]veryone shall have the possibility of being advised, defended and represented'. This provision could very well have been used to bolster the Court's argument, given that this was a pure fundamental rights case. Such a reference was, however, not necessary to solve the case.[1320]

Where the Charter *is* used in scenarios such as those described in this section, its role in the reasoning varies. The Charter reference can be limited to highlighting the fundamental rights rationale underlying the EU secondary act in question or its provision, without any ascertainable substantive impact on the reasoning.[1321] The Charter can also be used as a confirmatory argument in support of a particular interpretation of the given EU secondary act.[1322] In one case that resulted in a preliminary ruling reference, the Charter made a difference by being relied on to reinterpret the provisions of the Wild Birds Directive 2009/147/EC.[1323] French courts have tended to dismiss pleas primarily with reference to the applicable secondary legislation (be it the Reception Conditions Directive 2013/33/EC, the Working Time Directive 2003/88/EC or the anti-discrimination Directive 2000/78/EC) and then dismiss the Charter-based plea 'on the same grounds'.[1324] The Charter and the applicable EU secondary legislation are sometimes used as a joint legal basis. In one notable case, where the NSS disapplied a national procedural provision on the joint legal basis of Article 15 of the Returns Directive 2008/115/EC *and* Articles 6 and 47 of Charter, the Court relied on alternating, mutually reinforcing references to the Directive and the Charter (read together with the ECHR).[1325] In two other cases, the NSS disapplied a national provision for

[1319] 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 [2008] OJ L 348/98.
[1320] On the French side, see eg CE (référé), 386029, 9 December 2014, applying the Free Movement Directive 2004/38 in a residence case concerning a Cameroonian mother and her EU-citizen (Spanish) child. For a commentary, see Gautier, 'Le Conseil d'Etat met ses pas dans ceux de la Cour de justice', supra n 883. See also NSS, 2 Azs 84/2018-31, 21 February 2019, para 13, decided purely based on EU secondary law.
[1321] See eg NSS, 9 Azs 166/2020-27, 21 October 2020; and cases cited in nn 935–939. See also Nivard, 'Les conditions d'application de la Charte des droits fondamentaux', supra n 28 at 72–74. See also J Cavallini, 'L'invocabilité des principes de la charte des droits fondamentaux de l'Union européenne' (2014) *La Semaine Juridique Sociale* 1232.
[1322] See eg NSS, 4 Azs 230/2016-54, para 24.
[1323] CE, 425519, 29 November 2019.
[1324] See cases cited in nn 905–917 and 1093–1094.
[1325] NSS, 6 Azs 320/2017-20, 29 November 2017.

being contrary to Directive 2004/114/EC *read together with* Article 47(1) of the Charter[1326] and another national provision for being incompatible with Article 32(3) of the Visa Code *read together with* Article 47 of the Charter. As discussed, in both these cases, it was the Charter that was the actual material source of the fundamental guarantees concerned.[1327] However, in other cases, the question of whether the court will rely on the direct effect of the relevant directive alone or a combined direct effect of the directive and the Charter does not have much practical importance. Thus, in *T. V. T. v Foreign Police Directorate*, the NSS disapplied § 174a(3) of the Act on the Residence of Foreign Nationals (which excluded a proportionality review of decisions ordering a person to leave the territory), relying on the exclusionary direct effect of the Returns Directive 2008/115/EC.[1328] In another case, the NSS referred to *T. V. T. v Foreign Police Directorate*, but did not limit its arguments to Directive 2008/115/EC:

> In the present case concerning the refusal of an application for temporary residence made by a family member of an EU national, it suffices to recall that the application of § 174a(3) of the Act on the Residence of Foreign Nationals would be – besides the Union rules cited above (see also Article 7 of the [Charter] and the judgment of the CJEU Grand Chamber of 26 March 2019 in C-129/18 *SM*, EU:C:2019:248) – *mainly* in direct contradiction with Article 8 of the [ECHR] and Article 3 of the Convention on the Rights of the Child …; this provision must therefore be held inapplicable in the present case.[1329]

It is evident that the choice of the legal basis for setting aside the problematic provision of the Act did not matter much for the result of the case.

However, this does not mean that the Charter must be completely outshined by secondary law in such situations of normative overlap. One advantage of a combined effect of the Charter and EU directives giving expression to Charter rights or principles, which is not relevant in administrative law, is the possibility of horizontal direct effect (excluded for EU directives).[1330] The Charter could also be useful in a scenario where the effects of EU

[1326] NSS, 6 Azs 253/2016-49, 4 January 2018.
[1327] See Section II.3.1.2.5.
[1328] NSS, 8 Azs 290/2018-27, 19 December 2018, paras 13–15. 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 [2008] OJ L 348/98. Article 5 of the Directive states that '[w]hen implementing this Directive, Member States shall take due account of: (a) the best interests of the child; (b) family life'. See also NSS, 10 Azs 127/2018-30, 20 September 2018, where the NSS referred to Article 8 of the ECHR regarding the same issue.
[1329] NSS, 5 Azs 383/2019-40, 14 February 2020, para 37 (emphasis added).
[1330] Case C-414/16 *Egenberger*, EU:C:2018:257; and Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, EU:C:2018:874. See E Muir, 'La plus-value de la charte: à la croisée de plusieurs systèmes juridiques' (2021) *Cahiers de droit européen* 55.

directives are limited under national law in a way contrary to CJEU case law: in France, the CE initially (and for a long time) refused to recognise the substitutive direct effect of EU directives[1331] until it made a U-turn on that point.[1332] In addition to such remedial added value, Charter provisions could serve as a vehicle for generalising solutions existing under individual pieces of secondary law or importing solutions existing in ECHR case law. In addition, the Charter remains a reference norm for assessing the validity of secondary legislation (for example, if the restrictions allowed by that legislation go beyond what is allowed by the Charter). The Charter can provide protection going beyond EU secondary law, even where that law provides for a large set of guarantees.[1333] For example, the CJEU held in *M* that where a Member State revokes, ends or refuses to grant or renew the status granted to a refugee under Article 14(4) and (5) of the Qualification Directive 2011/95/EU, a third-country national cannot be expelled if it would expose him or her to the risk of torture or inhumane or degrading treatment or punishment; this protection is not explicitly provided for in Directive 2011/95/EU, but derives directly from Articles 4 and 19(2) of the Charter.[1334] Likewise, in *Mukarubega*, the CJEU recalled that

> although the authors of [Returns Directive] thus intended to provide a detailed framework for the safeguards granted to the third-country nationals concerned as regards return decisions, entry-ban decisions and decisions on removal, they did not, however, specify whether, and under what conditions, observance of the right to be heard of those third-country nationals was to be ensured, nor did they specify the consequences of an infringement of that right
>
> […]
>
> observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement […].[1335]

There is some evidence that national courts are aware that the Charter guarantees may go beyond those in EU secondary law.[1336] That said, we have not identified many cases where the level of protection under the Charter and EU secondary legislation was a distinct issue.

[1331] J-L Sauron, *L'application du droit de l'union européenne en France* (2nd ed, La Documentation Française 2000).
[1332] CE, 298348, 30 October 2009. See R Mehdi, 'French Supreme Courts and European Union Law: Between Historical Compromise and Accepted Loyalty' (2011) 48 *Common Market Law Review* 439.
[1333] Compare Article 3(2) of the Dublin III Regulation and Case C-578/16 PPU *C. K. and Others*, EU:C:2017:127. For the same remark, see Cariat, 'Article 53', supra n 565 at 1325. See also Opinion of AG Szpunar in C-49/14 *Finanmadrid EFC*, EU:C:2015:746, para 90.
[1334] Joined Cases C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra* and *X. and X. v Commissaire général aux réfugiés et aux apatrides*, EU:C:2019:403, para 110.
[1335] Case C-166/13 *Mukarubega*, EU:C:2014:2336, paras 41 and 49.
[1336] See eg NSS, 5 Azs 2/2013-26, 29 May 2014, para 29.

To conclude, the data has pointed to the importance of considering how fundamental rights are integrated into EU secondary law. It appears common for national courts to reach Charter-compliant solutions solely based on EU secondary law containing express fundamental rights guarantees. Although the Charter can add value in the scenarios identified above, the Charter standard will often be superseded by more specific fundamental rights guarantees contained in EU secondary acts. In most cases, it will not be of any practical significance whether or not the national judge relies on a provision of EU secondary law *and* a Charter provision as a joint legal basis. Even though we identified several patterns in the Czech and French case law, no coherent method has emerged on how the two levels of fundamental rights provisions (should) interact. It is arguable that the exact form of the court's reasoning will largely depend on how the case is pleaded, on the tenor of the relevant CJEU case law and on pragmatic considerations. Judges may feel that where secondary law guarantees are laid down in some detail, the reasoning will do without any Charter-based reinforcing. There will be cases where the Charter is not referred to at all but where EU fundamental rights guaranteed by secondary legislation are at the core of the court's reasoning.[1337] It is important to bear this in mind when assessing the implementation of EU fundamental rights in proceedings before national courts: these rights are present in a larger portion of the case law than it would seem from the number of decisions containing a Charter reference.

6. CONCLUSION

We saw in Part II of the thesis that the challenges that national judges face on account of the multi-source, multi-level fundamental rights framework in which they operate are immense. We tried to show that the EU rules on the justiciability of the Charter's provisions and on its interactions with the ECHR and national constitutions are complex. Compared to the Charter's applicability under Article 51, these operational rules are rarely discussed by national judges; only very occasionally do they give rise to a distinct issue which needs to be tackled explicitly. When it comes to the role of the Charter within the reasoning and its interaction with other legal sources, the national courts' practice is diverse and appears to lack a real method. Although we identified several recurring patterns in the courts' treatment of the Charter under each of the themes discussed, we warned against attributing principled importance to the way the Charter is used. In fact, in Part II, the same higher-level patterns

[1337] See eg CE, 343248, 28 November 2011; and CE, 372426, 27 March 2015 (Anti-Discrimination Directive).

emerged as did in Part I: the role of parties' submissions and the importance of pragmatic considerations. If a judge can reach a solution based on a single rule among several co-applicable rules (the Charter, the ECHR, EU secondary legislation), it will not be their primary concern to define the interrelationship of those rules. The main preoccupation is to solve a case.

One of the principal research findings is that the Charter's use largely depends on the content of EU secondary legislation applicable to the case at hand. This area of interaction has received much less attention than the popular topic of the Charter's relationship with other fundamental rights catalogues. It is nevertheless crucial in describing and explaining how national courts (under)apply the Charter. We have demonstrated that if EU secondary legislation contains specific fundamental rights guarantees (which is more of a rule than an exception), the Charter's operational context changes significantly. Even though the Charter will have added value in some of these scenarios, it will more often than not stay in the shadow of secondary law guarantees. Provisions of EU secondary law containing fundamental rights guarantees can completely 'supersede' Charter provisions to the point of the Charter being absent from the reasoning. This has led us to conclude that the reach of EU fundamental rights on the national level will be far greater than it would appear judging from the number of references to the Charter.

General Conclusion

In this thesis, we set out to examine how Czech and French administrative courts give effect to the EU Charter of Fundamental Rights. We have found that in both countries, there is a developing Charter-based case law with emerging patterns in the courts' treatment of the Charter under each of the three themes studied: the Charter's applicability, its legal effects in the reasoning and its interactions with other legal rules. The research has shown that under each of those themes, the case law is largely guided by pragmatism, practicality and focus on outcomes, but also by the need to uphold the Charter's standard of protection. The courts naturally search for the easiest method to solve a case in a way that complies with applicable law and their procedural obligations towards the parties. For assessing the applicability of the Charter to the case at hand, this often means that 'substance precedes form', with judges skipping the thorny issue of applicability and dealing instead with the merits of the Charter-based claim. For the Charter's role in the reasoning and its impact on the solution of the case, this means that judges will not pronounce themselves on difficult issues of accommodating different co-applicable legal instruments unless the case raises a distinct issue in that regard. The pragmatism goes hand in hand with the lack of a stabilised method for dealing with Charter-based claims. It has also resulted in formal shortcomings which could cause confusion about whether the Charter was applicable but had no impact on Charter compliance. Encouragingly, when Czech and French courts assess the applicability of the Charter as a distinct issue, they do so within the bounds established by the CJEU case law. We have seen that the courts generally manage to make sense of that case law despite its complexity and the occasional loose end.

The results-oriented approach described above is possible because when national courts deal with fundamental rights issues, they have some flexibility in choosing from several co-applicable legal instruments. Crucially, these include not only various fundamental rights catalogues but also EU secondary law acts. The treatment of the Charter in the courts' reasoning is heavily determined by its perceived general equivalence with the ECHR and national constitutional catalogues. We have seen that judges frequently use equivalence-based reasoning, be it implicitly or explicitly. Although such reasoning can result in a mutually reinforcing effect of the co-applicable instruments, it is often used purely pragmatically: to introduce a single reference framework by choosing one of the instruments

over the others. At the same time, there is a clear trend of simultaneously relying on multiple co-applicable legal instruments rather than using the Charter autonomously. We pointed to the lack of method for the combination of legal bases, the dangers of relying on equivalence-based reasoning without sufficient justification and the factors which influence judges' choices when laying out the grounds for their decisions.

The limits of judicial pragmatism described above are determined by the pleadings of the parties and their procedural activity. We have seen that the way they make their Charter-based pleas will have a decisive impact on how the courts use the Charter in their reasoning. Detailed submissions regarding the Charter's applicability will likely result in a detailed applicability assessment. In the same vein, a panoramic plea will likely meet with a panoramic treatment. The litigants' offhand attitude to the Charter will necessarily spill over to the case law, resulting in what some have considered to be a disappointing track record of the Charter. We have tried to show that it is essential to consider the litigants' decisive role before criticising the courts for how little or how superficially they rely on the Charter in their reasoning.

One of the major takeaways of the research is the overriding importance of EU secondary legislation in national Charter-related case law. EU regulations and directives that contain fundamental rights guarantees severely reduce the Charter's potential to bring added value to the reasoning. In such cases, the judges will primarily work with EU legislation and the CJEU case law interpreting it, with the Charter being on the margins or completely absent. More research is needed on those interactions.

Our research was not designed to identify decisions which apply fundamental rights guaranteed in EU secondary law or those enshrined in the ECHR or national constitutions without referring to the Charter. That said, we have come across several such decisions, and it is likely that the reach of EU fundamental rights on the national level is greater than it would appear from the corpus of decisions containing a Charter reference. In contrast, we have found several decisions in which the Charter could or should have been cited or should have had a more prominent role relative to the ECHR. For example, we saw from some cassation decisions of the NSS that lower courts did not apply the Charter where they could (should) have done. It is likely that this is a more widespread phenomenon. We were aware of those limitations when designing the research, and we did not set out to capture and analyse such cases. We did not aim to compare the empirical evidence to a predefined policy-

based idea of what the role of the Charter should be in national proceedings and in what proportion of national case law the Charter should be present. To get a more complete view of how the Charter is doing at the national level, more research needs to be done on decisions in which the Charter is not cited.

That said, it is clear from our research that the Charter has not caused a revolution in the case law of Czech and French administrative courts. The cases in which the Charter had a decisive impact on the solution of the case are not numerous. As explained above, it is not the primary concern of national judges to maximise the Charter's national reach and substantively rely on it in every single case in which it is potentially invokable. This may have led to the Charter being sidelined in the reasoning from the formal point of view. However, we have not identified a decision which would violate the material standard guaranteed by the Charter. And this despite the fact that some of the CJEU case law on how to apply the Charter still needs more development. Moreover, the research has proven that the Charter can have an important or even decisive impact on the outcome of the case. We have seen in some of the Czech cases that the Charter has demonstrably brought a higher standard of protection to the benefit of the litigants. The imposing mass of superficial and seemingly banal Charter references in no way detracts from the realised potential of the Charter in those few cases in which it added value. We have also tried to show that even such banal references have their place in judicial decision-making and should not be automatically discounted as worthless. The research has demonstrated that the Charter-based case law of Czech and French administrative courts is more diverse and developed than the existing empirical studies would suggest. The diversity is explained by the multitude of case-specific factors influencing the choices of national judges and the corresponding lack of a judicial method for dealing with the Charter. Practicality and pragmatism are some of the unifying factors, but so is the pursuit of material compliance with fundamental rights, including the Charter.

Résumé de thèse

INTRODUCTION

Chargé d'assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union européenne, le juge national est tenu de donner plein effet à la Charte des droits fondamentaux de l'Union européenne (ci-après la « Charte »). Dans l'accomplissement de cette tâche, il opère dans un contexte juridique complexe, que l'on désigne généralement par « la protection multi-niveaux des droits fondamentaux ». Ledit contexte est caractérisé par l'applicabilité concurrente des ordres juridiques, qui se chevauchent. Au regard des enjeux constitutionnels qui en découlent, l'on ne s'étonnera pas que les travaux de recherche sur la mise en œuvre nationale de la Charte aient longtemps été dominés par des questions relatives aux conflits de normes juridiques, telles que la relation entre la Charte et les constitutions nationales ou encore la relation entre la Cour de justice de l'Union européenne (ci-après la « CJUE ») et le juge constitutionnel. La mise en œuvre quotidienne de la Charte par le juge ordinaire reste un sujet relativement peu étudié, même si quelques études récentes ont abordé cette problématique. Rassembler et analyser des données empiriques sur l'utilisation de la Charte par le juge ordinaire relève pourtant de l'essentiel, ne serait-ce que pour évaluer la manière dont les juridictions nationales se conforment à leurs obligations découlant de la Charte. Au-delà d'une telle évaluation de conformité, une étude de la jurisprudence des juridictions ordinaires est susceptible d'enrichir, et même d'orienter, les débats doctrinaux sur les questions d'ordre constitutionnel évoquées ci-dessus.

Cette thèse vise à combler ce manque de connaissances empiriques en dressant un état des lieux complet du traitement de la Charte par le juge administratif tchèque et français. Elle s'articule autour de trois axes de réflexion. Tout d'abord, il s'agit de s'interroger sur la manière dont les juges prennent en compte l'applicabilité matérielle limitée de la Charte, telle que prévue par son article 51. Ensuite, le rôle de la Charte dans les raisonnements juridiques et l'influence de celle-ci sur les solutions des litiges font l'objet d'une étude approfondie. Enfin, l'analyse porte sur les interactions, dans la jurisprudence des juridictions

administratives, entre la Charte et d'autres règles de droit, qu'il s'agisse du droit dérivé de l'Union, de la Convention européenne des droits de l'homme (ci-après la « CEDH ») ou des règles constitutionnelles internes. L'idée est de rassembler toutes les décisions citant la Charte, puis de les présenter sous forme d'études de cas et de les évaluer selon les trois perspectives mentionnées. L'évaluation se fait sous deux angles complémentaires. D'une part, et sans surprise, elle examine dans quelle mesure les juridictions nationales se conforment aux obligations découlant de la Charte, ainsi qu'à d'autres exigences qui s'imposent en vertu des droits européen et national. D'autre part, de manière plus originale, cette évaluation identifie et explique les manières dont les juges nationaux traitent la Charte, dans le but d'établir, pour chacun des trois thèmes, une typologie nuancée des effets juridiques de la Charte au niveau national. Ainsi, les données empiriques rassemblées seront analysées et systématisées à l'aide d'une approche inductive : les différents types de traitement de la Charte seront regroupés en catégories représentant les grandes tendances dans la jurisprudence. Plus concrètement, il s'agit de systématiser les modes d'utilisation de la Charte selon (i) la présence ou non d'appréciations de l'applicabilité de la Charte et la qualité de ces appréciations en termes de forme et de fond ; (ii) l'intensité du rôle de la Charte dans le raisonnement du juge à l'égard de la solution du litige, en dépassant les catégories classiques d'effets direct et indirect; et (iii) l'autonomie ou non de la Charte dans le raisonnement et les modes d'interaction de celle-ci avec d'autres sources de droit.

Élaborée sur la base des recherches empiriques existantes, l'hypothèse à vérifier est la suivante : de manière récurrente, les juges nationaux ne respectent pas l'applicabilité matérielle limitée de la Charte, traitant cette dernière comme cataloguant les droits fondamentaux d'applicabilité générale, d'une manière analogue à la CEDH et aux dispositions nationales. Quant au rôle de la Charte dans le raisonnement du juge, celui-ci est le plus souvent limité à une simple référence ou, tout au mieux, à un argument complémentaire, sans aucun impact sur la solution du litige. En ce qui concerne l'autorité de la Charte par rapport à d'autres sources formelles de droits fondamentaux, les juges n'utilisent la Charte qu'aux côtés de textes de droits fondamentaux plus établis, tels que la CEDH ou les catalogues constitutionnelles, et non pas de manière autonome.

On soulignera que notre étude porte sur le raisonnement juridictionnel et la nature des références à la Charte au sein de ce raisonnement. En revanche, elle n'apporte pas d'analyse statistique des références à la Charte, et pas non plus une étude sociojuridique des

facteurs influençant les choix méthodologiques des juges nationaux dans le cadre de la mise en œuvre de la Charte, même si elle aborde de tels aspects lorsque le contexte l'exige.

La thèse comporte deux parties, l'une portant sur l'*applicabilité* de la Charte, l'autre sur son *application*. Il est apparu comme préférable de se concentrer sur chacun de ces thèmes de manière exhaustive, en discutant de ses aspects normatifs, empiriques et analytiques en un seul bloc. Les deux parties de la thèse sont symétriques dans leur structure et suivent la logique de la confrontation entre les exigences normatives et la réalité sur le terrain national. Étant donné les spécificités du traitement juridictionnel de la Charte dans les deux pays étudiés, la catégorisation des effets juridiques de la Charte au sens exposé ci-dessus se fera dans un cadre analytique spécifique à chaque pays, avec une évaluation finale commune pour les deux États membres.

Les développements qui suivent sont structurés en deux parties, qui correspondent aux deux parties de la thèse. Il importe de souligner que l'intérêt principal de notre étude réside dans les analyses détaillées et contextualisées des décisions dans lesquelles la Charte était au cœur du raisonnement, sachant que le présent résumé ne peut pas en rendre pleinement compte.

PARTIE I

La première partie de la thèse s'ouvre par une analyse de la notion de « mise en œuvre » visée à l'article 51, paragraphe 1, de la Charte, telle qu'interprétée par la jurisprudence de la CJUE, abondante en la matière. Cette jurisprudence est analysée strictement du point de vue du juge national et dans la mesure nécessaire à établir les critères pour évaluer la conformité de la jurisprudence administrative tchèque et française avec le droit de l'Union.

Il s'agit d'abord d'évoquer la célèbre formule de l'arrêt *Fransson* de la CJUE, selon laquelle « l'applicabilité du droit de l'Union implique celle des droits fondamentaux garantis par la Charte » (*Section 2.2*). Autrement dit, s'il existe au moins une règle du droit de l'Union autre qu'une disposition de la Charte qui s'applique à une situation juridique, la Charte y est applicable aussi. Nous soutenons que cette formule appelée « d'équivalence » est conceptuellement problématique en ce qu'elle met sur un pied d'égalité, aux fins de détermination de l'applicabilité de la Charte, les actes nationaux mettant en œuvre le droit de l'Union au sens de l'article 51, paragraphe 1, de la Charte, d'un côté, et les actes nationaux relevant du champ d'application du droit de l'Union, de l'autre. Or, il peut y avoir des actes des États membres ne mettant pas en œuvre le droit de l'Union au sens de cette disposition et n'entrant donc pas dans le champ d'application de la Charte, qui peuvent néanmoins relever du champ d'application du droit de l'Union. Par exemple, les actes nationaux qui dépassent les dispositions d'une directive d'harmonisation minimale (dans le cas d'une surtransposition d'une directive par un État membre) ne relèvent pas du champ d'application de la Charte, mais peuvent pourtant relever du droit de l'Union, dans l'hypothèse dans laquelle ils seraient incompatibles avec une disposition du droit de l'Union *autre que* la Charte, telle qu'une disposition du Traité directement applicable. Dans un tel scénario de violation par l'État membre du droit de l'Union, la disposition nationale contraire n'est pas soumise, en tant que telle, à l'application de la Charte puisque cette disposition nationale ne met pas en œuvre le droit de l'Union. En réalité, ce qui est soumis à l'application de la Charte dans un tel cas, c'est l'application de la disposition d'effet direct du droit de l'Union, qui a été enfreinte par la disposition nationale. En effet, lorsque le juge national applique directement une disposition du droit de l'Union pour écarter l'application d'une réglementation nationale incompatible, il met en œuvre cette disposition au sens de l'article 51, paragraphe 1, de la Charte. Il doit donc

respecter tous les droits et principes garantis par la Charte qui peuvent être pertinents dans ce cas de figure (comme le droit à un recours effectif et à un tribunal impartial, visé à l'article 47 de la Charte). Toutefois, cela ne signifie pas que la réglementation nationale incompatible concernée puisse, en tant que telle, être considérée comme mettant en œuvre le droit de l'Union et – sur cette base – être pleinement soumise à la Charte. Ainsi, les termes « acte national mettant en œuvre le droit de l'Union » et « acte national relevant du droit de l'Union » ne se recoupent pas complètement. Pour cette raison, la formule d'équivalence de *Fransson* devrait être lue à la lumière des observations faites ci-dessus.

Par ailleurs, la formule *Fransson*, en raison de son caractère hautement abstrait, ne peut constituer qu'un point de départ pour le juge national. Son apparente simplicité contraste fortement avec la variété de cas de figure qui peuvent se présenter dans les affaires soumises aux juridictions administratives. En effet, il faut se référer aux orientations générales établies par la CJUE sur le degré nécessaire de connexité entre, d'une part, la règle du droit de l'Union susceptible de « déclencher » l'application de la Charte et, d'autre part, le litige devant le juge. Pourtant, ces orientations ne représentent pas non plus un cadre méthodologique complet qui permettrait, à lui seul, au juge national de trancher la question de l'applicabilité de la Charte avec une certitude absolue (*Section 2.2*). Il y a donc bien un intérêt d'établir une typologie la plus compréhensive possible des scénarios dans lesquels la Charte trouve à s'appliquer (*Section 2.3*).

Cette approche analytique va démontrer les difficultés auxquelles se heurtent les juges nationaux lorsqu'ils sont appelés à décider si un litige entre ou non dans le champ d'application de la Charte. Ces difficultés sont dues à la complexité de l'ordre juridique de l'Union et à la complexité de la jurisprudence de la CJUE (*Section 2.4*).

Arrêtons-nous sur les défis découlant de la nature même du droit de l'Union, qui se manifestent notamment dans les scénarios où le cadre réglementaire de l'Union interagit avec les choix discrétionnaires des États membres. Par exemple, dans les affaires jointes *N. S. et autres* (C-411/10 et C-493/10), la CJUE a été invitée à interpréter la clause dérogatoire inscrite à l'article 3, paragraphe 2, du règlement (CE) n° 343/2003 (le « règlement Dublin II »), qui permettait à un État membre d'examiner une demande d'asile s'il le souhaitait, même si cet examen ne lui incombait pas en vertu des critères fixés dans le règlement (clause dite de souveraineté). Le problème juridique qui se posait était le suivant : un État membre reste-t-il dans le champ d'application du droit de l'Union lorsqu'il fait le choix discrétionnaire

d'examiner une demande d'asile ? La CJUE considéra que le droit de l'Union était bien applicable au litige, car « le pouvoir d'appréciation conféré aux États membres par l'article 3, paragraphe 2, du règlement [Dublin II] fait partie des mécanismes de détermination de l'État membre responsable d'une demande d'asile prévus par ledit règlement et, dès lors, ne constitue qu'un élément du système européen commun d'asile » (point 68 de l'arrêt).

La situation est différente lorsqu'il s'agit du choix discrétionnaire de l'État membre de surtransposer une directive d'harmonisation minimale. Dans les affaires jointes *TSN et AKT* (C-609/17 et C-610/17), la CJUE a été interrogée sur l'applicabilité de la Charte aux règles finlandaises qui allaient au-delà de l'article 7, paragraphe 1, de la directive 2003/88/CE concernant certains aspects de l'aménagement du temps de travail, selon lequel « tout travailleur bénéficie d'un congé annuel payé d'au moins quatre semaines ». En vertu des règles finlandaises, les travailleurs avaient droit à un congé annuel payé dont la durée était supérieure à la durée prévue par la directive, à savoir sept semaines dans l'affaire *TSN* et cinq semaines dans l'affaire *AKT*. La directive est fondée sur une harmonisation minimale, comme le reflète l'article 15, intitulé « Dispositions plus favorables ». La CJUE a estimé que les actes des États membres allant au-delà des obligations minimales fixées par la directive « relèvent de l'exercice de la compétence retenue des États membres, sans être réglementés par ladite directive ni relever du champ d'application de cette dernière » (point 52 de l'arrêt). En les adoptant, les États membres ne mettent pas en œuvre une obligation spécifique du droit de l'Union. Par conséquent, de telles mesures nationales ne constituent pas une « mise en œuvre » du droit de l'Union au sens de l'article 51, paragraphe 1, de la Charte et ne relèvent dès lors pas du champ d'application de la Charte.

Alors que dans l'affaire *N. S. et autres*, le règlement Dublin II a *conféré* aux États membres *une faculté* de légiférer en vertu du droit de l'Union, dans l'affaire *TSN et ATK*, la directive sur l'aménagement du temps de travail a simplement *reconnu le pouvoir* qu'ont les États membres de prévoir dans le droit national des dispositions plus favorables, en dehors du cadre réglementaire établi par cette directive (point 48 de l'arrêt *TSN et ATK*). Il y a donc une distinction importante à faire entre, d'une part, les clauses de reconnaissance de la compétence retenue des États membres (« *power-recognising clauses* ») et, d'autre part, les clauses d'attribution de pouvoir réglementaire en vertu du droit de l'Union (« *power-granting clauses* »). Pour rendre les choses encore plus complexes, la Charte peut, dans au moins deux cas de figure, toujours s'appliquer aux dispositions nationales qui résultent d'une surtransposition par l'État membre d'une directive (c'est-à-dire aux dispositions nationales

adoptées conformément à une clause « de reconnaissance » au sens expliqué ci-dessus). Premièrement, la Charte est applicable lorsque la clause d'harmonisation minimale figurant dans une directive est assortie d'une obligation spécifique qui vise à garantir que les mesures nationales allant au-delà des prescriptions minimales soient conformes à la Charte ou aux principes généraux du droit de l'Union (voir, par exemple, l'article 4, paragraphe 1, de la directive 2010/13/UE sur les services de médias audiovisuels ainsi que le considérant 41 de cette directive). Si la clause d'harmonisation minimale est assortie d'une telle obligation, les États membres, lorsqu'ils adoptent des mesures nationales dépassant les obligations minimales, mettent en œuvre une obligation découlant du droit de l'Union ; dès lors, ils mettent en œuvre le droit de l'Union au sens de l'article 51, paragraphe 1, de la Charte. Deuxièmement, la Charte peut s'appliquer lorsque des mesures nationales dépassant les obligations minimales constituent une entrave à l'exercice des libertés fondamentales reconnues par le Traité et que ces mesures peuvent s'analyser comme une instrumentalisation, par l'État membre, d'une dérogation permise par le droit de l'Union. Selon la jurisprudence *ERT* (C-260/89), une telle utilisation d'une dérogation permise par le droit de l'Union relève de la mise en œuvre du droit de l'Union au sens de l'article 51, paragraphe 1, de la Charte.

Dans le cadre de l'évaluation de la jurisprudence des juridictions nationales, il est évidemment important de déterminer si les difficultés rencontrées par les juges nationaux au cours d'un litige sont dues à la complexité intrinsèque de l'ordre juridique de l'Union, au manque d'instructions claires de la part de la CJUE, ou bien à la réticence ou, au pire, à l'incapacité des juges nationaux à remplir leur mandat de juges de droit commun du droit de l'Union.

La *Section 3* fait état de la diversité des approches dans la jurisprudence des juridictions administratives tchèques quant à l'évaluation de l'applicabilité de la Charte. Nous démontrons qu'en dépit de certaines hésitations méthodologiques, liées notamment au manque de distinction claire entre la non-applicabilité de la Charte et la non-violation de celle-ci (*Section 3.2.1*), la Cour administrative suprême tchèque (*Nejvyšší správní soud*, ci-après la « NSS ») s'est avérée capable d'effectuer des appréciations d'applicabilité correctes et de plus en plus structurées (*Section 3.2.2*).

Il est intéressant de noter que la NSS semble disposée à appliquer la Charte dans des litiges régis par des dispositions nationales par lesquelles le législateur tchèque a étendu, lors

de la transposition en droit interne des dispositions d'une directive, le traitement prévu par la directive aux situations similaires purement internes. Par exemple, le législateur a ainsi choisi d'étendre aux membres de la famille des ressortissants tchèques le bénéfice des règles de l'Union applicables aux membres de la famille des citoyens de l'Union résidant sur le territoire de la République tchèque ; et ce afin d'éviter les discriminations à rebours. Dans ce contexte, la NSS a interprété, dans un litige purement interne, les dispositions de la loi sur le séjour des ressortissants étrangers à la lumière de la directive 2004/38/CE et de la Charte (6 As 30/2013-42 et 4 Azs 230/2016-54). Cette approche nous paraît critiquable. Il est certes vrai que selon la jurisprudence, la CJUE est compétente pour statuer à titre préjudiciel sur des litiges purement internes dans l'hypothèse où le droit de l'Union s'applique à de tels litiges « par l'intermédiaire de la loi nationale » (C-297/88 et C-197/89 *Dzodzi*, point 42). Cependant, cette jurisprudence ne traite nullement la question de savoir si la Charte devient applicable dans ce genre de litige. En fait, de tels litiges ne relèvent pas de la mise en œuvre de la Charte au sens de son article 51, paragraphe 1, et la Charte ne s'y applique pas non plus « par l'intermédiaire de la loi nationale », en l'absence d'indication exprès à cet effet par le législateur national. Il s'ensuit que les juges ne devraient pas s'appuyer (et ne devraient pas en donner l'impression) sur l'autorité normative de la Charte dans de tels litiges purement internes. Il faut d'ailleurs souligner que les juridictions françaises ont procédé au même constat pour ce qui est des principes généraux du droit de l'Union, en estimant que ces principes n'étaient pas applicables dans le cadre de tels litiges (voir, par exemple, CE, 276848). Notons tout de même que les juges gardent toujours la faculté de se référer à la Charte à titre comparatif.

Notre étude met en avant le fait que les orientations données par la NSS concernant l'applicabilité de la Charte avaient tendance à être suivies par les Cours administratives régionales (*Section 3.3.1*). En outre, certains juges se sont aventurés dans des appréciations d'applicabilité approfondies – et correctes – même sans s'appuyer sur la jurisprudence de la NSS ; cependant, certains problèmes méthodologiques, semblables à ceux présents dans la jurisprudence de la NSS, ont émergé (*Section 3.3.2*).

La même diversité sur le plan de la méthodologie se manifeste dans la jurisprudence des juridictions administratives françaises (*Section 4*). Pour le Conseil d'État, cette diversité est analysée en trois temps. Après l'entrée en vigueur de la Charte, les premières appréciations de l'applicabilité de celle-ci n'ont pris en compte que très graduellement l'article 51 de la Charte et sa terminologie (*Section 4.2.1*). L'applicabilité matérielle de la

Charte a été explorée de manière plus approfondie dans quelques décisions portant sur des affaires complexes, souvent à la suite d'une analyse poussée d'un rapporteur public (*Section 4.2.2*). Néanmoins, un manque de rigueur méthodologique, principalement guidé par un souci de pragmatisme, a parfois conduit à une confusion concernant le champ d'application matériel de la Charte (*Section 4.2.3*).

Une hétérogénéité aux résultats mitigés quant à l'appréciation de l'applicabilité de la Charte est également caractéristique pour la jurisprudence des cours administratives d'appel (*Section 4.3.1*). Une étude des approches variées concernant le champ d'application matériel de l'article 41 de la Charte est riche d'enseignements sur les difficultés méthodologiques rencontrées par les juges des cours d'appel (*Section 4.3.2*).

Avant d'en venir aux conclusions de notre étude sur la manière dont les juges apprécient l'*applicabilité* de la Charte, des considérations supplémentaires s'imposent. En effet, cette évaluation ne devrait pas se limiter à la question de savoir si les juges se conforment ou non à l'article 51 de la Charte.

Il faut d'abord rappeler les exigences générales auxquelles est subordonné le raisonnement juridictionnel. L'obligation de motivation fait partie intégrante du droit à un procès équitable prévu par l'article 47 de la Charte et par l'article 6 de la CEDH. Cette même obligation est imposée par les constitutions et les règles de procédure nationales, même si son étendue exacte, tout comme le style rédactionnel des décisions juridictionnelles, varient inévitablement d'un État membre à l'autre. À titre d'exemple, la NSS est tenue, en vertu d'une disposition législative, d'énoncer son avis juridique de manière claire et concise et de veiller à ce que la motivation de ses décisions soit convaincante. Soulignons que la qualité du raisonnement revêt une importance accrue pour les juridictions suprêmes, dont la tâche consiste à garantir une application uniforme du droit et à fournir des orientations interprétatives aux juridictions inférieures, notamment en rendant des arrêts dits « de principe ». Dans une perspective analogue, les juridictions suprêmes jouent un rôle crucial dans l'intégration du droit de l'Union dans la jurisprudence nationale en tant qu'intermédiaires entre la CJUE et les juridictions inférieures. Ainsi, lorsque les hautes juridictions décident de l'applicabilité de la Charte, elles doivent répondre non seulement aux exigences légales relatives à l'obligation de motivation, mais doivent également s'assurer que leur raisonnement est d'une qualité suffisante pour promouvoir l'application correcte de la Charte par les juridictions inférieures.

Concédons néanmoins qu'il serait déraisonnable de s'attendre à ce que les juges apprécient l'applicabilité de la Charte avec le même degré de rigueur dans chaque affaire dans laquelle la Charte est invoquée. Ce degré doit être adapté aux circonstances spécifiques de chaque litige et doit refléter le rôle global attribué à la Charte dans le raisonnement et surtout dans les moyens des parties. Alors qu'une évaluation sommaire peut suffire dans une affaire dans laquelle la Charte n'est citée que de manière ornementale, en l'absence d'un moyen suffisamment sérieux du requérant, il faut être plus exigeant lorsque, par exemple, le juge s'appuie sur l'effet direct d'une disposition de la Charte pour écarter l'application d'une législation nationale contraire. Si ces éléments peuvent apporter une perspective complémentaire à l'analyse de la jurisprudence, ils ne sont toutefois pertinents que dans la mesure où les dispositions légales relatives à l'obligation de motivation – sur lesquelles il faut toujours insister – sont respectées.

La question peut être posée de savoir dans quelles conditions les juges sont tenus à procéder à une appréciation *explicite* de l'applicabilité de la Charte avant de l'appliquer. Même si une telle appréciation explicite ne semble pas relever d'une obligation juridique stricte et absolue, elle pourrait s'imposer lorsque l'efficacité de la protection de la Charte serait en cause. Rappelons que le Conseil d'État n'est obligé par aucune disposition à justifier de manière explicite qu'un moyen tiré de la Charte est opérant, c'est-à-dire que la Charte a vocation à s'appliquer au cas d'espèce. De même, il ne semble pas exister de règle obligeant les juridictions administratives tchèques à évaluer explicitement l'applicabilité de la Charte avant de lui donner effet, à moins que son applicabilité ne soit contestée par les parties. Il n'est guère douteux que lorsque le juge applique une règle juridique, il confirme implicitement son applicabilité. Toutefois, comme le montre notre étude, ce constat n'équivaut pas à dénier l'intérêt d'effectuer une appréciation explicite de l'applicabilité de la Charte, car les juges se sont souvent référés à la Charte, comme si elle était applicable, dans des litiges ne relevant pas de son champ d'application matériel. Pour encourager plus de rigueur de la part des juges à cet égard, il semble légitime d'exiger qu'ils apprécient explicitement et systématiquement l'applicabilité de la Charte, ne fût-ce que de manière sommaire, dans les décisions qui donnent effet à la Charte, comme le fait, d'ailleurs, la CJUE.

Nous pouvons conclure de ce qui précède qu'une étude de la jurisprudence nationale doit adopter une double perspective. D'une part, il s'agit de s'interroger sur la présence même du raisonnement relatif à l'applicabilité de la Charte et, le cas échéant, sur sa *forme*. D'autre

part, il est question du respect *matériel* par les juges des conditions posées par l'article 51 de la Charte et de la jurisprudence de la CJUE les interprétant.

Nous constatons que la NSS s'est très vite alignée sur la jurisprudence de la CJUE relative à l'article 51 de la Charte, se référant abondamment aux formules et aux orientations générales dégagées par la Cour de Luxembourg. Il faut l'admettre, l'interprétation des règles du droit de l'Union susceptibles de « déclencher » l'application de la Charte a suscité d'importantes difficultés d'interprétation, notamment dans le scénario de dérogation (voir, par exemple, l'arrêt C-311/19 *BONVER WIN*, rendu à la suite d'une question préjudicielle de la NSS sur le champ d'application de l'article 56 TFUE). Pourtant, la NSS s'est montrée capable d'apprécier l'applicabilité de la Charte de manière structurée, argumentée et surtout conforme à la jurisprudence de la CJUE. Nous n'avons pas identifié de décisions dans lesquelles la NSS aurait étendu ou réduit le champ d'application de la Charte en méconnaissance de l'article 51. Quant à la forme, la jurisprudence de la NSS laisse encore à désirer en termes de cohérence et, parfois, de clarté. Outre le manque de distinction conceptuelle, dans plusieurs décisions, entre la non-violation et la non-applicabilité de la Charte, il ne semble y avoir aucune méthode établie pour traiter la question de l'applicabilité de la Charte. La NSS étant une juridiction suprême chargée d'assurer systématiquement la cohérence de la jurisprudence administrative, elle devrait veiller à ce que ses décisions appliquant la Charte soient irréprochables tant sur le fond que sur la forme. Ce constat est d'ailleurs confirmé par notre étude de la jurisprudence des cours régionales administratives, qui ont fait siennes les solutions retenues par la NSS en dépit de leurs défauts sur le plan de la méthodologie.

Quant au Conseil d'État, il a parfois eu du mal, après l'entrée en vigueur de la Charte, à interpréter la notion de « mise en œuvre du droit de l'Union », notion qui, à l'époque, était en attente de clarification. Malgré ces hésitations initiales, le Conseil d'État s'est rapidement rallié à la lecture du champ d'application de la Charte dégagée par la CJUE, démontrant qu'il est parfaitement en mesure de mener une analyse nuancée, et ce malgré les subtilités de l'ordre juridique de l'Union. Toutefois, dans quelques décisions, la solution retenue ne semble pas être conforme à la jurisprudence de la CJUE (voir, par exemple, CE, 352393, examiné à la Section I.4.2:2 de la thèse ; ou CE, 357848). Les conclusions des rapporteurs publics dans certaines affaires témoignent de la rigueur dont il faut parfois faire preuve pour déterminer si la Charte s'applique ou non au cas d'espèce. Même si le Conseil d'État peut

s'appuyer sur sa riche jurisprudence en matière d'appréciation de l'applicabilité des principes généraux du droit de l'Union, cette expertise accumulée n'est pas forcément très utile lorsqu'il s'agit d'apprécier l'applicabilité de la règle du droit de l'Union susceptible de déclencher l'applicabilité de la Charte, ce qui a parfois été l'enjeu principal dans les affaires visées par notre étude.

De manière générale, le raisonnement du Conseil d'État est bref et minimaliste ; par suite, les appréciations de l'applicabilité de la Charte sont généralement peu élaborées, et encore moins discursives. Le Conseil d'État n'expose généralement pas les raisons pour lesquelles il considère la Charte inapplicable. Largement utilisée, la formule « en tout état de cause » permet au Conseil d'État d'éluder la question de l'applicabilité sans que cela n'entraîne un défaut de motivation. En clair, il est souvent plus facile, d'un point de vue analytique, de s'en tenir au fond et de déclarer que la Charte n'a pas été violée plutôt que de décider si elle est applicable. La manifestation la plus frappante de ce pragmatisme est la manière dont le Conseil d'État évoque la Charte au sein d'une référence panoramique englobant plusieurs textes de droits fondamentaux : lorsque ces textes contiennent le même droit, qui a de surcroît une portée analogue, le Conseil d'État se contentera de répondre à la question de savoir si ce droit a été méconnu, l'applicabilité d'un tel ou tel instrument étant considérée comme sans pertinence. Si cette tendance se comprend aisément, il faut signaler que l'utilisation de la formule « en tout état de cause » peut être source de confusion, puisque le Conseil d'État recourt à cette technique dans différents contextes et pas seulement pour exprimer l'idée de l'inapplicabilité de la Charte. De la sorte, la frontière entre la non-applicabilité et la non-violation peut devenir floue.

Quant aux Cours administratives d'appel (ci-après les « CAA »), elles ont rapidement résolu les divergences interprétatives concernant le champ d'application de la Charte. Avant tout, force est de constater que la grande majorité des plus de 7000 arrêts des CAA citant la Charte ont été rendus dans des affaires portant sur les mêmes matières, principalement dans le domaine du droit d'asile et des étrangers. Cela rend ces décisions d'appel moins intéressantes pour notre étude. Néanmoins, l'on notera que les problèmes méthodologiques identifiés dans la jurisprudence du Conseil d'État, tels que la frontière brouillée entre la non-applicabilité et la non-violation, sont également apparus dans la jurisprudence des CAA. Ce qui a posé un problème particulier pour les juges d'appel, c'était le champ d'application personnel de l'article 41 de la Charte, qui s'applique, selon son libellé, aux « institutions, organes et organismes de l'Union ». Bien que la CJUE fût vite revenue sur sa position initiale

exprimée dans l'arrêt C-277/11 *M. M.*, selon laquelle cette disposition aurait été applicable aux États membres, il a fallu attendre bien longtemps avant que les CAA n'intériorisent ce revirement jurisprudentiel. Nous avons là un exemple frappant de la façon dont des reproductions de raisonnements incorrects peuvent perpétuer la confusion sur le champ d'application d'une disposition de la Charte.

En général, les données empiriques recueillies ne permettent pas de valider entièrement l'hypothèse de notre recherche, selon laquelle « les juges nationaux ne respectent pas l'applicabilité matérielle limitée de la Charte, traitant cette dernière comme cataloguant les droits fondamentaux d'applicabilité générale, d'une manière analogue à la CEDH et aux dispositions nationales ». Nous n'avons guère identifié de décisions dans lesquelles les juridictions donneraient effet à la Charte – d'une manière qui aurait un impact quelconque sur la solution du litige – en estimant à tort qu'elle était applicable. Nous n'avons pas non plus trouvé de décision dans laquelle les tribunaux feraient preuve d'une incompréhension globale de la jurisprudence de la CJUE ou d'un manque de respect manifeste envers cette dernière. Excepté quelques décisions remontant pour la plupart aux débuts de la Charte en tant qu'instrument contraignant, les juges se sont montrés conscients de l'applicabilité limitée de la Charte et capables de suivre la jurisprudence de la CJUE, malgré sa grande complexité. Toutefois, comme nous l'avons déjà évoqué, la règle de l'article 51 n'est pas le seul critère à la lumière duquel il faut apprécier le traitement par les juridictions nationales du champ d'application de la Charte, l'autre étant de savoir si les décisions contiennent un passage dédié à l'appréciation de l'applicabilité de la Charte et, le cas échéant, si cette appréciation est correcte sur le plan de la méthodologie. À cet égard, les approches des juges font preuve d'une grande hétérogénéité, sans méthode apparente.

On peut légitimement supposer que cette variété est symptomatique de la principale préoccupation des juges : trancher le litige. Il sera souvent plus facile pour le juge de traiter le moyen tiré de la violation de la Charte sur le fond – le cas échéant au sein d'un raisonnement unique englobant toutes les dispositions analogues de plusieurs textes de droits fondamentaux – que d'évaluer l'applicabilité de celle-ci en vertu de son article 51. De la sorte, le juge peut traiter l'affaire rapidement, en utilisant un raisonnement le plus succinct possible, tout en respectant l'obligation de motiver ses décisions. Cette approche universaliste fonctionne grâce à – et est encouragée par – la large équivalence matérielle entre les textes de droits fondamentaux concernés. En même temps, elle se caractérise par une certaine indifférence concernant la question de savoir si la Charte s'applique ou non, ce

qui pourrait se heurter aux exigences de la sécurité juridique, notamment lorsqu'il s'agit des juridictions suprêmes, acteurs essentiels dans la promotion d'une application nationale pleine et correcte de la Charte. Vu sous cet angle, il apparaît qu'il existe une marge d'amélioration dans le sens d'une plus grande cohérence dans la jurisprudence de la NSS et du Conseil d'État.

Il est important de souligner que si les juges se réfèrent à la Charte en tant qu'un élément parmi d'autres dispositions consacrant le droit fondamental en question (ce que l'on désigne dans la thèse sous le terme de « traitement panoramique »), souvent ils ne font que reprendre la façon dont ces mêmes dispositions ont été invoquées par les parties. Ce constat se concrétise de manière plus récurrente dans la jurisprudence française, que dans celle des juridictions tchèques. Rappelons que la CJUE souligne le rôle des particuliers depuis son arrêt dans l'affaire *Van Gend en Loos* (26/62), selon lequel « la vigilance des particuliers intéressés à la sauvegarde de leurs droits » joue un rôle important pour assurer l'efficacité du droit de l'Union. Compte tenu de l'influence omniprésente des droits fondamentaux dans pratiquement tous les domaines juridiques, de la formulation abstraite des dispositions qui les consacrent, ainsi que de leur interprétation évolutive par les juges, ces droits présentent un énorme potentiel argumentatif pour les parties. Il a d'ailleurs été reporté que dans certains États membres, les plaignants ont réussi à instrumentaliser la Charte dans des affaires ne relevant pas de son champ d'application, et ce en créant des liens artificiels avec le droit de l'Union.

Notre étude montre qu'en règle générale, les parties n'essaient que très rarement de tirer un avantage spécifique de la Charte en tant qu'instrument autonome, et encore moins de l'instrumentaliser en essayant d'étendre son champ d'application. En effet, ils l'invoquent de façon plutôt superficielle, regroupant toutes les dispositions analogues ou équivalentes au sein du même argument ou moyen sans développer une argumentation ciblée, qu'il s'agisse ou non d'un litige relevant du champ d'application de la Charte. En dehors de cette hypothèse « panoramique » dans laquelle les parties invoquent tous les instruments imaginables consacrant tel ou tel droit fondamental, ce sera au moins la CEDH qui accompagnera la référence à la Charte. Ce mode opératoire ne se limite d'ailleurs pas aux plaignants tchèques et français, tant la « combinaison de fondements » semble être un phénomène répandu à l'échelle de l'Union. Ainsi, la manière exacte dont les plaignants invoquent la Charte est le facteur déterminant dans l'élaboration du raisonnement des juges, ce qu'il faut retenir avant de critiquer ces derniers pour leur prétendu manque d'engagement à l'égard de la Charte.

Force est d'observer que la Charte ne deviendra jamais un texte « émancipé » de droits fondamentaux si les plaignants n'apprennent pas à la mettre en valeur. Comme nous l'expliquerons dans la deuxième partie de ce résumé, la Charte est en fait susceptible d'avoir un poids déterminant lorsqu'elle est sérieusement invoquée par les parties.

PARTIE II

Lorsque la Charte s'applique, au sens de son article 51, paragraphe 1, à un litige dont est saisi le juge national, ce dernier doit « assurer, dans le cadre de ses compétences, la protection juridique découlant [des dispositions de la Charte] et […] garantir le plein effet de [celles-ci] » (C-569/16 et C-570/16 *Bauer*, point 91). La partie II de la thèse s'intéresse dans un premier temps à l'ensemble complexe des règles dites « horizontales » qui précisent comment les juridictions nationales doivent donner effet à la Charte. L'analyse met en lumière à la fois les opportunités et les défis que présentent certaines de ces règles.

On notera que la notion de « donner effet » (*give effect*) est ici entendu comme englobant toutes les formules issues de la créativité verbale et conceptuelle des juridictions nationales, couvrant des termes tels que « appliquer », « prendre en compte », « interpréter à la lumière de » ou encore « lire conjointement avec », sachant que l'utilisation de ce vocabulaire varié peut conduire à masquer le rôle réel de la Charte dans le raisonnement, ainsi que l'impact de celle-ci sur la solution du litige. Du point de vue des principaux destinataires de la Charte – les individus – la notion de « donner effet » couvre les différentes manières dont ils peuvent invoquer la Charte et se prévaloir de ses divers effets : substitutif, d'exclusion, interprétatif ou compensatoire.

Est d'abord exposé le contexte normatif dans lequel la Charte fonctionne (*Section 2.1*). Il est notamment rappelé que les juridictions nationales, lorsqu'elles appliquent le droit dérivé de l'Union, doivent veiller à ne pas se fonder sur une interprétation de ce dernier qui entrerait en conflit avec les droits fondamentaux protégés par l'ordre juridique de l'Union (C-101/01 *Lindqvist*, point 87). Cette règle n'est pas sans conséquence quant à la question de savoir dans quelle mesure les juridictions nationales ont l'obligation de soulever d'office les moyens tirés de la Charte. En effet, une fois qu'un point de droit de l'Union est introduit dans le litige (que ce soit par les parties ou en tant que moyen d'ordre public), la Charte doit être, le cas échéant, soulevée d'office par le juge.

La *Section 2.2* s'interroge sur la distinction entre les « droits » et les « principes » au sens de l'article 52, paragraphe 5, de la Charte concernant leur justiciabilité respective. Se pose notamment la question de savoir si un principe, pour être invocable aux fins de

l'interprétation ou du contrôle de la légalité d'un acte qui met en œuvre ce principe, doit d'abord être concrétisé par des dispositions du droit de l'Union ou du droit national. L'avocat général M. Cruz Villalón, dans ses conclusions dans l'affaire *AMS* (C-176/12) opère une distinction entre deux types d'« actes de mise en œuvre » au sens de l'article 52, paragraphe 5, de la Charte. Il existerait une première catégorie, assez retreinte, de « dispositions dont l'on peut dire qu'elles concrétisent de manière essentielle et immédiate le contenu du "principe" ». Une deuxième catégorie, plus large, serait composée d'actes qui ne présentent pas ces caractéristiques, mais qui constituent tout de même des actes « mettant en œuvre » le principe en question. Selon cette lecture, la conformité à la Charte des actes relevant de la deuxième catégorie serait appréciée à la fois au regard du « principe » contenu dans la Charte et des actes concrétisant ce principe de manière essentielle et immédiate (c'est-à-dire des actes relevant de la première catégorie). L'arrêt de la CJUE dans l'affaire *Glatzel* (C-356/12) semble se situer dans la logique de la distinction établie par l'avocat général. L'on peut remarquer que cette interprétation de l'article 52, paragraphe 5 – qui soulève d'ailleurs de sérieuses difficultés quant à l'identification des dispositions concrétisant le contenu d'un principe par opposition à des dispositions qui mettent en œuvre celui-ci sans le concrétiser – reviendrait à réduire considérablement le rôle des principes dans le contrôle juridictionnel. Pour ce qui est du contrôle des actes nationaux dans ce contexte, la CJUE a clairement affirmé dans l'arrêt *Poplawski II* (C-573/17) que « le juge national n'est pas tenu, sur le seul fondement du droit de l'Union, de laisser inappliquée une disposition du droit national incompatible avec une disposition de la [Charte] qui, comme son article 27, est dépourvue d'effet direct » (point 63 de l'arrêt). Au vu de ces éléments, l'on peut s'interroger sur le degré réel de justiciabilité des principes, et partant, sur la valeur ajoutée de ceux-ci.

La *Section 2.3* donne un aperçu des effets juridiques de la Charte tels qu'ils découlent du droit de l'Union, notamment de l'effet direct et indirect des dispositions de celle-ci ; la *Section 2.4* traite de l'interaction de la Charte avec d'autres sources de droit.

Rappelons que l'article 52, paragraphe 3, de la Charte établit une équivalence matérielle, complète ou partielle, entre les droits contenus dans la Charte et les droits correspondants garantis par la CEDH, sans pour autant exclure que la Charte puisse accorder une protection plus étendue. Rappelons également, si besoin en était, que les *Explications relatives à la Charte* contiennent une liste des dispositions de la Charte dont le sens et la portée sont les mêmes que les articles correspondants de la CEDH, ainsi qu'une liste des dispositions de la Charte qui ne correspondent que partiellement à leurs équivalents dans la

CEDH, c'est-à-dire uniquement en ce qui concerne leur sens, la portée des dispositions de la Charte étant plus large.

Lorsqu'ils font référence à ces deux listes, les juges nationaux devraient se garder de tout automatisme et s'appuyer systématiquement sur la jurisprudence de la CJUE, car les prescriptions découlant du droit de l'Union peuvent se révéler plus complexes qu'il n'y paraît et ce pour plusieurs raisons : (i) l'équivalence matérielle des dispositions énumérées n'est que la configuration par défaut, en l'absence d'une réglementation de l'Union ou d'une jurisprudence de la CJUE plus protectrices ; (ii) cette configuration par défaut peut également être écartée lorsque l'équivalence matérielle serait en contradiction avec l'autonomie du droit de l'Union et celle de la CJUE ; (iii) la liste des dispositions équivalentes figurant dans les *Explications* n'est pas nécessairement définitive : peuvent y être ajoutés des droits supplémentaires en fonction de développements juridiques ultérieurs ; (iv) plusieurs droits consacrés par la Charte et ne figurant pas sur la liste sont tout de même protégés de manière analogue par la jurisprudence de la Cour européenne des droits de l'homme (ci-après la « CrEDH ») ; et (v) la pertinence de la CEDH pour l'interprétation des dispositions de la Charte ne se limite pas aux droits équivalents au sens de l'article 52, paragraphe 3, de la Charte. Pour toutes ces raisons, il n'y a pas lieu à étendre automatiquement, en ce qui concerne les droits désignés comme complétement ou partiellement équivalents, toutes les solutions fondées sur la CEDH aux solutions fondées sur la Charte, tout comme il n'y a pas lieu à ne jamais procéder de cette manière en ce qui concerne les droits considérés comme *prima facie* non équivalents, sans tenir compte de toutes les nuances précédemment évoquées.

Il convient de préciser que si la protection matérielle assurée par la CEDH est « importée » dans le droit de l'Union par le biais de l'article 52, paragraphe 3, de la Charte, cela n'implique nullement que la CEDH soit, en vertu du même article, formellement contraignante pour les juges nationaux. Ainsi, aux fins d'évaluer la compatibilité du droit dérivé de l'Union avec les droits fondamentaux, la Charte constitue le seul point de référence pouvant servir de base juridique. Dans des affaires n'impliquant pas une question de validité du droit dérivé, l'approche de la CJUE concernant la place que devraient occuper la Charte et la CEDH dans le cadre d'équivalence établi par l'article 52, paragraphe 3, de la Charte, a jusque-là été assez asymétrique. Certains arrêts mettent l'accent sur l'*autonomie* du droit de l'Union et, par suite, sur le fait que la Charte représente le seul point de référence, la CEDH étant mentionnée, tout au mieux, en guise d'un argument confirmatif. En revanche,

d'autres décisions sont fondées sur l'*équivalence* et prennent la jurisprudence de la CrEDH comme point de départ. Ces asymétries sont susceptibles d'obscurcir les rôles respectifs de la Charte et de la CEDH – toutes les deux contraignantes pour les juges nationaux – dans les affaires qui relèvent du droit de l'Union.

L'article 53 de la Charte, tel qu'il a été interprété par la CJUE notamment dans l'arrêt *Melloni* (C-399/11), pose également des difficultés pour les juges. Même si la jurisprudence de la CJUE visant cette disposition est rarissime, l'on peut affirmer sans trop de risques de se tromper que lorsque le juge national traite d'une affaire relevant du champ d'application du droit de l'Union, il ne peut appliquer des garanties nationales plus strictes en matière de droits fondamentaux qu'après avoir vérifié (s'il y a lieu, en saisissant la CJUE d'un renvoi préjudiciel) que cela ne compromettrait pas la primauté, l'unité et l'effectivité du droit de l'Union. D'après l'interprétation qu'en a fait la jurisprudence, cette condition ne sera jamais remplie si un acte de droit dérivé fixe un niveau uniforme de protection sans permettre aux États membres de s'en écarter dans un sens plus favorable. Lorsque, au contraire, le droit dérivé confère aux États membres une marge d'appréciation concernant le droit concerné, le juge national doit alors vérifier, en regardant au-delà du cadre réglementaire de l'acte de droit dérivé concerné, si l'application de garanties nationales plus strictes en matière de droits fondamentaux ne compromet pas, de manière générale, la primauté, l'unité et l'effectivité du droit de l'Union.

Tout comme c'est le cas pour l'article 51 de la Charte, la mise en œuvre de l'article 53 de celle-ci est tributaire, dans une large mesure, des circonstances de l'espèce ; la jurisprudence de la CJUE visant cette disposition est et sera, inéluctablement, très casuistique. Un défi supplémentaire consiste à savoir quelles situations doivent être considérées comme « entièrement déterminées » par le droit de l'Union au sens de la jurisprudence évoquée au-dessus. La CJUE a précisé qu'une situation n'est pas entièrement déterminée par le droit de l'Union lorsque les dispositions de ce dernier « n'opèrent pas une harmonisation complète » (C-476/17 *Pelham et autres*, points 80 et 81). Toutefois, le degré d'harmonisation (et donc la marge d'appréciation laissée aux États membres) ne ressort pas toujours clairement de l'acte de l'Union concerné. En outre, de même que l'examen de l'applicabilité de la Charte, l'appréciation de la possibilité d'appliquer des règles nationales constitutionnelles plus strictes présuppose que le juge national soit capable d'interpréter et d'appliquer correctement le droit primaire et dérivé de l'Union. Reste encore à savoir si des

considérations relatives à l'identité nationale au titre de l'article 4, paragraphe 2, du Traité sur l'Union européenne peuvent entrer en ligne de compte dans ce contexte.

La jurisprudence de la CJUE concernant l'article 53 de la Charte soulève également la question de savoir dans quelle mesure les juridictions nationales sont obligées, dans une affaire donnée, de *faire effectivement usage* de la Charte comme base juridique au lieu d'autres textes de droits fondamentaux, étant entendu que cette question est différente de celle de l'*applicabilité* de la Charte en vertu de son article 51. Comme nous l'avons vu, dans l'hypothèse où la protection de droits fondamentaux, concernant un point spécifique, a été entièrement harmonisée dans le droit dérivé, sans qu'aucune marge d'appréciation ne soit laissée aux États membres (et aux juridictions nationales) sur ce point, la Charte devrait être la seule base sur laquelle des solutions juridiques peuvent être adoptées. Dans un tel cas, la Charte a une autorité absolue empêchant l'application formelle d'autres sources de droits fondamentaux. Si cela n'exclut pas que le juge puisse se référer également aux dispositions constitutionnelles nationales, une telle référence ne doit pas dissimuler le fait que c'est bien la Charte qui est la seule base juridique appropriée. Plus important encore, il n'est pas exclu non plus de s'appuyer sur la CEDH, pourvu que ce soit fait purement dans le sens matériel, c'est-à-dire pour interpréter la Charte, la seule base juridique.

Dans les affaires où la protection de droits fondamentaux concernant un point spécifique n'a pas été entièrement harmonisée au niveau de l'Union, mais qui relèvent néanmoins du champ d'application de la Charte (C-617/10 *Fransson*, point 29), les juridictions des États membres ont, à l'évidence, l'obligation de veiller à ce que leurs décisions soient compatibles avec la Charte. Il n'est pas par contre tout à fait clair si les juges doivent explicitement se référer à la Charte dans de telles affaires qui soulèvent une question qui touche aux droits fondamentaux, ou bien s'ils peuvent se fonder uniquement sur les normes nationales. D'aucuns ont suggéré que les juges nationaux ne sont pas tenus de faire un usage explicite de la Charte lorsque les normes nationales sont équivalentes à cette dernière ; ils peuvent fonder leur raisonnement sur une norme nationale ou la CEDH, la Charte n'étant citée que pour confirmer, renforcer ou compléter la solution retenue. Nous soutenons néanmoins que la Charte ne devrait pas être complètement exclue du raisonnement dans une affaire qui relève de son champ d'application et soulève une question qui touche aux droits fondamentaux. La Charte devrait en effet être présente dans le raisonnement ne serait-ce que pour énoncer de manière transparente et contrôlable que le niveau minimum de protection garanti par celle-ci a été respecté. Certes, l'autorité de la

Charte dans ce type d'affaire n'est peut-être pas absolue. Toujours est-il que les juridictions nationales sont subordonnées à une obligation générale et systémique d'interpréter les règles d'Union à la lumière de la Charte, et non à la lumière des constitutions nationales. En outre, l'équivalence entre la Charte et les constitutions nationales en termes de protection de droits spécifiques dans des circonstances spécifiques ne peut pas être présumée comme automatique. Dans les affaires comme celles évoquées ici, l'équivalence devrait alors être abordée explicitement et la Charte devrait donc être mise en œuvre pour le moins parallèlement au catalogue national.

Tout compte fait, il ne fait aucun doute que les défis qu'ont à affronter les juges nationaux à l'égard de l'article 52, paragraphe 3, et l'article 53 de la Charte sont tout aussi importants que ceux qui se présentent quant à l'article 51 de celle-ci. Remarquons enfin que contrairement à l'article 51, les règles méthodologiques concernant les interactions de la Charte avec les autres sources juridiques ne sont que très rarement invoquées par le juge national ; ce n'est pas souvent qu'elles donnent lieu à une question distincte qui doit être abordée explicitement par le juge.

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Les *Sections 3* et *4* visent à examiner comment les juridictions administratives tchèques et françaises font usage de la Charte dans leur raisonnement et comment elles la font interagir avec le droit dérivé et/ou des autres textes de droits fondamentaux, en analysant consécutivement la jurisprudence de la NSS (*Section 3.1*), des cours administratives régionales tchèques (*Section 3.2*), du Conseil d'État (*Section 4.1*) et des autres juridictions administratives françaises (*Section 4.2*). Chacune de ces quatre sous-sections se sert d'une typologie différente pour refléter au mieux les modes d'utilisation de la Charte par ces différentes juridictions, sachant que les catégories classiques de l'« effet direct » et de l'« interprétation conforme » ne traduiraient pas pleinement, à elles seules, la variété méthodologique présente au niveau national.

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Après avoir étudié la jurisprudence de la NSS, il nous a semblé le plus approprié, aux fins de notre analyse, de classer les différents modes d'utilisation de la Charte par cette juridiction en deux grandes catégories, sans pour autant affirmer qu'il ne puisse y avoir un certain chevauchement entre celles-ci. Nous avons regroupé au sein de la première catégorie les affaires qui ne sont pas axées sur la conformité du droit national ou du droit dérivé de

l'Union à l'égard de la Charte, mais dans lesquelles la Charte est tout de même présente dans le raisonnement, à des degrés variables (*Section 3.1.1*). Dans les décisions relevant de la deuxième catégorie, la Charte est utilisée – toujours dans diverses configurations et avec une intensité variable – dans le cadre d'un raisonnement visant spécifiquement à vérifier la compatibilité d'une règle de droit avec la Charte (*Section 3.1.2*). Pour compléter notre étude, est également abordée l'utilisation de la Charte en tant qu'argument comparatif en dehors du champ d'application du droit de l'Union (*Section 3.1.3*).

La *Section 3.1.1* traite des types d'effets juridiques de la Charte qui coïncident largement avec la notion d'« interprétation conforme » à la Charte du droit dérivé et du droit national, la place accordée à la Charte dans le raisonnement étant pourtant assez variable. Il peut d'abord s'agir des références à la Charte dans le cadre d'une déclaration générale et purement descriptive selon laquelle tel ou tel droit est inscrit dans les textes de droits fondamentaux, y compris la Charte (*Section 3.1.1.1*). Dans de tels motifs, la Charte n'a clairement pas de valeur ajoutée vérifiable et la référence à celle-ci ne constitue dès lors pas une partie indispensable du raisonnement du juge. La Charte est souvent mentionnée brièvement, en tant qu'élément marginal, bien souvent comme un instrument parmi d'autres en matière de droits fondamentaux, à un tel point que la considérer comme étant « appliquée » serait en réalité un raccourci. Ainsi, la NSS complète parfois une référence à la disposition applicable de la Charte tchèque des droits et libertés fondamentaux en faisant remarquer que le même droit est également inscrit dans la Charte. La référence à la Charte peut également faire partie de la description des droits fondamentaux qui sous-tendent un acte de droit dérivé, sans aucun développement supplémentaire. Enfin, la NSS offre souvent une vue d'ensemble des différentes normes relatives aux droits fondamentaux en assemblant *ad abundantiam* une chaîne de dispositions matériellement équivalentes.

Dans les décisions exposées à la *Section 3.1.1.2*, lesquelles se fondent principalement sur l'effet indirect du droit dérivé, l'apport de la Charte est plus facilement identifiable. Il faut d'abord noter que certains actes de droit dérivé établissent un cadre juridique concret, qui met en œuvre les garanties relatives aux droits fondamentaux. Lorsqu'un droit fondamental est intégré de cette manière dans un texte de droit dérivé, le juge va s'appuyer, aux fins de l'interprétation conforme des dispositions nationales à l'égard du droit de l'Union, directement sur ledit texte de droit dérivé, l'effet indirect de la Charte n'étant que confirmatif et résiduel, d'autant plus que certains actes de droit dérivé ont pour seul objectif de prévoir des dispositions détaillées en matière de droits fondamentaux. Il n'empêche que même dans

ces circonstances, la Charte peut être citée pour faciliter une interprétation *pro-libertés* des dispositions du droit dérivé et renforcer ainsi le raisonnement du juge, comme cela s'est produit dans une affaire concernant le regroupement familial dans laquelle un terme juridique vague (« le risque avéré de violation matérielle de l'ordre public ») devait être appliqué de manière conforme aux droits fondamentaux (NSS, 7 As 6/2012-29).

La *Section 3.1.1.3* met en évidence que l'effet indirect de la Charte n'est pas toujours purement complémentaire, confirmatif ou contextuel. Dans certains cas, l'interprétation conforme à la Charte peut en effet constituer un argument significatif, voire décisif, qui fera pencher le raisonnement de la NSS dans une direction particulière, déterminant alors l'issue de l'affaire. Nous avons constaté que la NSS se réfère à la Charte d'une façon plus significative dans l'hypothèse où le droit dérivé ne va pas assez loin dans le sens de la protection des droits fondamentaux. Bien que de tels cas d'effet indirect plus prononcé soient beaucoup moins fréquents dans la jurisprudence, il ne faut pas y voir une forme de réticence de la part de la NSS. En effet, cette relative rareté s'explique par le fait que les garanties relatives aux droits fondamentaux soient contenues de manière quasiment exhaustive dans le droit dérivé, ce qui réduit considérablement le potentiel normatif de la Charte. En outre, notre analyse démontre que le choix de privilégier dans le raisonnement soit la Charte, soit un acte de droit dérivé, peut relever d'une simple préférence rédactionnelle, sans que le juge y prêt une importance quelconque sur le fond.

La *Section 3.1.2* examine les décisions dans lesquelles l'on trouve des exemples du contrôle explicite et ciblé de la conformité du droit interne à l'égard de la Charte et dans lesquelles le raisonnement de la NSS est spécifiquement adapté pour résoudre cette question. Le thème qui revient tout au long de cet analyse est la façon dont la Charte interagit ou non avec d'autres sources juridiques.

Nous commençons par une analyse des affaires dans lesquelles le juge utilise la Charte comme partie intégrante d'une norme de contrôle hétérogène, aux côtés de dispositions équivalentes provenant d'autres sources juridiques (*Section 3.1.2.1*). Ainsi, la manière « panoramique » dont les parties invoquent les dispositions en matière de droits fondamentaux conduit souvent la NSS à faire une déclaration « globale », concluant à la violation ou à la non-violation de toutes ces dispositions implicitement considérées comme équivalentes ou explicitement décrites comme telles. Les arrêts de la NSS analysés dans cette sous-section se sont appuyés sur l'effet de renforcement mutuel de la Charte, de la

CEDH et parfois également de la Charte tchèque des droits et libertés fondamentaux. Plus précisément, ils se sont appuyés sur l'effet de renforcement mutuel de la jurisprudence interprétant lesdits instruments. Nous avons affaire ici à une interaction substantielle de dispositions distinctes mais équivalentes qui établissent une norme de contrôle hétérogène, dans le cadre d'un raisonnement conclu par une déclaration globale de violation ou de non-violation de cette norme. L'équivalence entre les dispositions qui composent cette norme était soit supposée, soit explicitement reconnue en renvoyant à l'article 52, paragraphe 3, de la Charte. Toutefois, dans les décisions étudiées, la relation entre les différentes sources n'était pas la question juridique centrale que le juge a eue à trancher.

La *Section 3.1.2.2* examine, quant à elle, les décisions dans lesquelles la relation entre les dispositions simultanément applicables et/ou le poids accordé à chacun de ces dispositions était une question de droit centrale. Tel a été le cas, par exemple, lorsque la NSS a explicitement privilégié la Charte,en arguant que celle-ci offre une protection plus étendue que la CEDH concernant l'interdiction d'imposer consécutivement des sanctions administratives et pénales pour une même infraction (*ne bis in idem*). Même dans l'hypothèse dans laquelle la Charte et la CEDH garantissent, en principe, le même niveau de protection, le poids accordé à la Charte dans le raisonnement de la NSS par rapport à la CEDH varie considérablement d'un cas à l'autre. À cet égard, la NSS utilise l'article 52, paragraphe 3, de la Charte comme « outil bidirectionnel », qu'il s'agisse du raisonnement principalement axé sur la Charte ou celui principalement axé sur la CEDH.

La *Section 3.1.2.3* s'intéresse au rôle de la Charte au sein du contentieux « Dublin » dans lequel il s'agit de vérifier si la Charte, en particulier l'article 4 de celle-ci, ne fait pas obstacle à un transfert d'un demandeur d'asile en vertu du règlement (UE) n° 604/2013 (« Dublin III »). Même si ces affaires sont assez spécifiques en ce qu'elles portent essentiellement sur les faits ou sur les exigences procédurales liées à l'établissement et à l'évaluation de tels faits et que peu d'entre elles présentent donc une réelle pertinence pour notre analyse, il s'agit pour autant d'un domaine où la présence de la Charte dans le raisonnement est la plus normalisée, car la plus fréquente.

Dans la jurisprudence de la NSS, contrairement à la jurisprudence des juridictions administratives françaises, la Charte n'est que très rarement utilisée comme point de référence dans le cadre d'un contrôle de légalité du droit dérivé (*Section 3.1.2.3*).

Cependant, nous avons identifié des décisions dans lesquelles la NSS s'est appuyée sur l'effet direct d'exclusion de la Charte en laissant inappliquées des règles nationales contraires au droit de l'Union dans les litiges concernant le droit à un recours juridictionnel effectif (*Section 3.1.2.4*). Dans l'affaire *N. L. c. Direction régionale de la police de Prague*, était en cause l'article 172, paragraphe 6, de la loi n° 326/1999 relative au séjour des étrangers sur le territoire de la République tchèque, selon lequel lorsqu'un étranger placé en rétention était remis en liberté avant le prononcé de la décision du juge sur une requête contestant la décision ordonnant sa détention, le juge devait automatiquement mettre fin à l'instance. La NSS a jugé que cette disposition était inapplicable au motif qu'elle violait l'article 15 de la directive 2008/115/CE relative aux normes et procédures communes applicables dans les États membres au retour des ressortissants de pays tiers en séjour irrégulier, ainsi que les articles 6 et 47 de la Charte, lus conjointement avec l'article 5, paragraphes 4 et 5, de la CEDH, en ce que ladite disposition refusait l'accès au contrôle juridictionnel. Le plaignant avait invoqué la Charte tchèque en parallèle avec la CEDH et avait conclu dans son argumentation à la saisie de la Cour constitutionnelle par le biais d'une question prioritaire de constitutionnalité. Cependant, la NSS a expliqué qu'« en raison de l'obligation d'assurer un contrôle juridictionnel rapide et efficace en matière de détention, [elle] a estimé qu'en l'espèce, il était plus approprié de procéder d'une autre manière », à savoir de laisser inappliquée la disposition en cause en raison de son incompatibilité avec le droit de l'Union. Une autre affaire, *M. K. c. Commission des séjours des étrangers*, concernait une disposition excluant du contrôle juridictionnel des décisions de refus de visa d'étudiant, jugée inapplicable car contraire à la directive 2004/114/CE relative aux conditions d'admission des ressortissants de pays tiers à des fins d'études, d'échange d'élèves, de formation non rémunérée ou de volontariat, lue conjointement avec l'article 47, paragraphe 1, de la Charte. Par opposition à l'arrêt dans l'affaire *N. L.*, la valeur ajoutée de la Charte par rapport à la Charte tchèque ne s'est pas limitée à la dimension procédurale. Considérant le fait que la Cour constitutionnelle avait déjà jugé, dans une affaire qui ne relevait pas du droit de l'Union, que ladite exclusion était compatible avec la Charte tchèque, l'argument tiré de la Charte (et de la directive) a permis de parvenir à un niveau de protection plus élevé que celui garanti par la Constitution nationale.

Il convient de noter que dans les deux cas, l'article 47 de la Charte a été appliqué parallèlement à la disposition de droit dérivé concrétisant les garanties procédurales en question. Quant à l'affaire *N. L.*, même si le droit à un contrôle juridictionnel était

explicitement prévu par une disposition de droit dérivé, la NSS a sans doute ressenti le besoin de s'appuyer également sur la Charte (et la CEDH) afin de justifier d'avoir privilégié l'argument tiré du droit de l'Union et écarté la voie constitutionnelle. En revanche, le droit dérivé en cause dans l'affaire *M. K.* n'exigeait pas expressément que le recours soit de nature juridictionnelle. Par conséquent, c'est l'effet direct de la Charte elle-même – et non l'effet direct d'une disposition de droit dérivé interprétée à la lumière de la Charte – qui a déterminé l'issue de l'affaire.

La *Section 3.1.3* expose les décisions dans lesquelles la Charte est apparue dans le raisonnement en tant qu'argument comparatif, en mettant en relief la différence entre des véritables arguments comparatifs et des simples références à l'existence de telle ou telle disposition dans tel ou tel texte de droits fondamentaux, généralement par souci d'exhaustivité.

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Pour ce qui est des cours administratives régionales tchèques, elles ont, pour la plupart, suivi les approches de la NSS en ce qui concerne les effets juridiques conférés à la Charte dans le raisonnement, soit en s'appuyant explicitement sur les précédents de la NSS (*Section 3.2.1*), soit en proposant des solutions originales, qui peuvent néanmoins être classées dans une des catégories identifiées ci-dessus dans la jurisprudence de la NSS (*Section 3.2.2*). Néanmoins, des problèmes méthodologiques sont apparus dans quelques décisions dans lesquelles les juges ont mal utilisé la notion de protection équivalente, en rejetant les moyens tirés de la Charte au seul motif que la Cour constitutionnelle avait déjà conclu à la constitutionnalité des dispositions nationales contestées, en laissant complètement de côté l'examen de conformité de ces dispositions à la Charte. Cette approche universaliste est relativement périlleuse en ce qu'elle repose sur une idée fausse : la Charte serait par principe équivalente à la Constitution tchèque. Il faut néanmoins admettre que ladite approche pourrait s'expliquer par le fait que les moyens des requérants ne portaient pas spécifiquement sur la Charte. En fait, dans le but d'empêcher les juges d'utiliser de façon trop sommaire le cadre d'équivalence, les plaignants doivent faire en sorte que leurs moyens tirés de la Charte soient suffisamment motivés et distincts des moyens tirés de la Constitution ou de la CEDH.

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Venons-en maintenant à notre étude de la jurisprudence des juridictions administratives françaises. La *Section 4.1* examine le rôle de la Charte dans le raisonnement du Conseil d'État. S'il est vrai que, comparé à la jurisprudence de la NSS, il y a plus de retenue et moins de diversité dans la façon dont la Charte est traitée par le Conseil d'État – ce qui est dû à la relative brévité de ses décisions et à leur style rédactionnel – le rôle de la Charte varie considérablement selon la valeur juridique qui lui est accordée par rapport à d'autres instruments de droits fondamentaux et, plus généralement, à d'autres règles de droit. Dans la plupart des cas, le contexte dans lequel la Charte est citée est pourtant celui d'un contrôle explicite au regard de la Charte, lorsque le Conseil d'État répond au moyen tiré de ce qu'une règle nationale ou de l'Union est contraire à la Charte.

Mettant de côté les références surabondantes à la Charte dans les « visas » (*Section 4.1*), l'étude porte tout d'abord sur les décisions dans lesquelles la référence à la Charte joue un rôle insignifiant en raison de l'absence de toute analyse explicite axée sur la Charte (*Section 4.1.1*). Le Conseil d'État a l'habitude de faire une déclaration panoramique de non-violation, au sein d'un seul et même prononcé, en réponse aux moyens panoramiques des requérants qui mentionnent la Charte aux côtés d'autres instruments. Plus concrètement, le Conseil d'État utilise souvent une technique consistant à rejeter un moyen tiré de la Charte « en tout état de cause », ce qui lui permet d'évacuer la question de l'applicabilité de la Charte, mais contribue également à brouiller la distinction entre la non-applicabilité de la Charte et la non-violation de celle-ci. Il n'est guère besoin de préciser que la référence à la Charte dans de telles déclarations panoramiques tend à être sans conséquence apparente pour la solution du litige. Souvent, lorsqu'il rejette un moyen, le Conseil d'État expose d'abord les raisons pour lesquelles il considère le moyen comme non fondé – généralement en décrivant la nature, la finalité et l'économie générale du régime juridique contesté (y compris, le cas échéant, les garanties relatives aux droits fondamentaux intégrées dans celui-ci) – sans faire référence à des dispositions concrètes des textes en matière de droits fondamentaux. Ce n'est qu'ensuite que le Conseil d'État va déclarer que, compte tenu de ces considérations, les règles nationales contestées ne méconnaissent pas les dispositions concrètes en matière de droits fondamentaux, en énumérant ces dernières sans apporter de précisions supplémentaires. Dans de tels cas, ce sont la CEDH et la Charte qui sont souvent mentionnées en tandem.

Il arrive parfois que le cœur du raisonnement du Conseil d'État soit développé dans le cadre d'une des dispositions invoquées par le requérant et le résultat d'une telle analyse est ensuite simplement étendu aux autres dispositions en matière de droits fondamentaux. Ainsi,

le moyen sera d'abord rejeté en ce qui concerne le premier point de référence, à savoir généralement la CEDH ou la Déclaration de 1789 ; le moyen tiré de la Charte sera ensuite rejeté « pour les mêmes motifs » sans précision supplémentaire. De manière analogue, le Conseil d'État effectuera le contrôle de proportionnalité dans tous ses étapes individuelles et déclarera ensuite, de façon globale, que les mesures contestées ne constituent pas une ingérence disproportionnée dans les droits fondamentaux garantis par les différents instruments.

Dans la *Section 4.1.2*, nous abordons les cas dans lesquels la Charte est traitée comme une norme autonome, mais s'efface néanmoins devant un acte de droit dérivé spécifique et plus détaillé ou devant un texte plus établi de droits fondamentaux, comme la CEDH. Nous démontrons que lorsqu'une certaine question est réglementée par un acte de droit dérivé de l'Union, l'essentiel du raisonnement du Conseil d'État portera sur cet acte ; si le moyen tiré de la violation par une mesure nationale de cet acte est rejeté, le moyen fondé sur la Charte sera rejeté « pour les mêmes motifs », que ce soit explicitement ou implicitement. Les plus rares cas d'interprétation conforme plus substantielle lors de l'interprétation du droit dérivé sont analysés dans la *Section 4.1.3*.

Nous nous intéressons ensuite à des décisions dans lesquelles la Charte a été utilisée comme norme de contrôle autonome sans l'intermédiaire du droit dérivé (*Section 4.1.4*). Est analysée en détail l'affaire *Halifa*, dans laquelle le Conseil d'État était amené à se prononcer sur la conformité à l'article 41 de la Charte des dispositions nationales en vertu desquelles un étranger n'est pas mis à même de présenter ses observations, de façon spécifique, sur l'obligation de quitter le territoire français qui est prise concomitamment et en conséquence du refus de titre de séjour. L'article 47 de la Charte était, quant à lui, au centre du raisonnement du Conseil d'État dans un litige concernant des cotisations supplémentaires de TVA imposées à une société au motif qu'elle avait été impliquée dans un système de fausse facturation, litige dans lequel l'article 6 de la CEDH n'était pas applicable. Il est intéressant de noter que dans plusieurs affaires, le raisonnement du Conseil d'État menant à la déclaration de non-violation de la Charte était essentiellement basé sur les solutions dégagées par la CJUE. Relevons enfin que dans toutes les décisions analysées dans cette sous-section – de même que dans d'autres affaires dans lesquelles la Charte a été traitée comme une norme autonome – la profondeur de l'analyse axée sur la Charte était proportionnelle à la manière dont les requérants avaient étayé leurs moyens.

Une section séparée examine les affaires dans lesquelles la Charte a également agi de manière essentiellement autonome mais dans le contexte spécifique de l'agencement des contrôles de constitutionnalité et de conventionnalité (*Section 4.1.5*).

Enfin, la Charte (le plus souvent conjointement avec la CEDH) a servi d'impulsion au renvoi de plusieurs questions préjudicielles à la CJUE sur la validité des actes de droit dérivé de l'Union (*Section 4.1.6*).

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Pour ce qui est de l'étude de la manière dont les juridictions administratives inférieures s'appuient sur la Charte, elle doit se limiter à la jurisprudence des cours administratives d'appel, compte tenu du fait que les jugements de première instance des tribunaux administratifs ne sont pas systématiquement publiés. Nous examinons d'abord les affaires dans lesquelles les CAA ont effectué un contrôle axé sur la Charte en réponse à un moyen à ce titre, traitant la Charte soit comme principal point de référence, soit comme un élément parmi d'autres en matière de droits fondamentaux (*Section 4.2.1*). Ensuite, l'analyse porte sur les quelques décisions dans lesquelles les CAA ont recouru à l'interprétation conforme du droit national au regard de la Charte (*Section 4.2.2*). Tout comme le Conseil d'État, les CAA ont également utilisé la Charte lorsqu'il leur a été demandé de contrôler la légalité du droit dérivé (*Section 4.2.3*). Une catégorie spécifique de références à la Charte que l'on ne trouve pas dans la jurisprudence du Conseil d'État relève du contentieux « Dublin » (*Section 4.2.4*).

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La *Section 5* vise à dégager, à partir des données empiriques recueillies, une typologie d'utilisation de la Charte au niveau national (*Section 5.2*) et plus spécifiquement des interactions de celle-ci avec d'autres sources juridiques (*Sections 5.3 et 5.4*). Aux endroits appropriés, nous évaluons les approches des juridictions nationales à l'égard des dispositions « horizontales » de la Charte. L'on peut noter d'emblée que la disposition ayant eu un impact le plus significatif est l'article 52, paragraphe 3, de la Charte concernant l'équivalence entre la Charte et la CEDH (*Section 5.3*). La distinction entre les « droits » et les « principes » au sens de l'article 52, paragraphe 5, de la Charte n'a pas, jusqu'à aujourd'hui, trouvé d'écho dans les jurisprudences administratives tchèque et française. Il en va de même pour l'article 53 de la Charte. S'agissant de l'article 52, paragraphe 1, de la Charte, cette disposition n'a été utilisée que de manière minimale et généralement à côté de dispositions analogues figurant

dans d'autres instruments en matière de droits fondamentaux. Bien que la NSS ait cité, à quelques reprises, la règle de l'article 52, paragraphe 1, de la Charte au sein de l'exposé des règles applicables au litige, elle ne l'a pas utilisée en tant que cadre principal pour évaluer la proportionnalité des limitations concernées. Le Conseil d'État, pour sa part, soulignera que lorsqu'un droit fondamental n'est pas absolu, il peut être limité à condition que les limitations répondent à des objectifs d'intérêt général poursuivis par l'Union et n'apparaissent pas manifestement excessives par rapport au but poursuivi. Alors qu'il s'agit là d'une référence implicite à l'article 52, paragraphe 1, de la Charte, le Conseil d'État rarement examine la proportionnalité en suivant en détail, étape par étape, la lettre de cette disposition, sauf peut-être dans les décisions ordonnant un renvoi préjudiciel à la CJUE. Enfin, ni les juges tchèques ni les juges français n'ont repris dans leurs décisions la notion de « contenu essentiel » des droits et libertés au sens de l'article 52, paragraphe 1, de la Charte.

Avant d'exposer la typologie des modes d'utilisation de la Charte que nous proposons, quelques remarques s'imposent.

En premier lieu, il convient de mettre en relief les spécificités du style rédactionnel des décisions juridictionnelles dans les deux États membres étudiés. D'une manière générale, les décisions des juridictions administratives françaises, notamment au niveau des cours d'appel et de cassation, ne sont pas particulièrement discursives ou dialogiques et ne se livrent pas à une analyse interprétative approfondie : elles ne discutent pas de solutions alternatives et font rarement référence à des décisions antérieures. Dès lors, l'utilisation de la Charte dans le raisonnement se limite au strict nécessaire qui est défini par les moyens des requérants. Bien que les conclusions des rapporteurs publics soient plus discursives et plus susceptibles d'inclure un raisonnement sérieux axé sur la Charte, elles ne sont pas systématiquement publiées. En revanche, le raisonnement du juge administratif tchèque, y compris de la NSS, est beaucoup plus dialogique et discursif, ce qui favorise un traitement plus substantiel de la Charte.

En second lieu, une autre question à considérer est celle de savoir si les juges soulèvent (ou sont autorisés à soulever) un argument fondé sur la Charte de leur propre chef. La position française semble être très claire : selon une jurisprudence constante remontant à l'arrêt du Conseil d'État dans l'affaire *SA Morgane*, les juridictions administratives ne soulèvent pas d'office le droit de l'Union, son application n'étant pas considérée comme invocable d'office. Une telle approche stricte est illustrée par un arrêt dans lequel le Conseil

d'État a estimé que la CAA de Bordeaux n'était pas tenue de substituer au moyen tiré de la méconnaissance de l'article 41 de la Charte (une disposition, inapplicable au cas d'espèce, consacrant le droit à une bonne administration) un moyen tiré de la méconnaissance du principe général du droit de l'Union consacrant ce même droit (CE, 373101). Fait figure d'exception à cet égard le remplacement d'office d'un moyen fondé sur la Constitution par un moyen fondé sur la Charte lorsque la Constitution est invoquée à l'encontre des mesures nationales de transposition d'une directive.

Du côté tchèque, l'approche semble être moins catégorique. Selon la jurisprudence de la NSS, est d'ordre public un moyen tiré de la méconnaissance du principe de rétroactivité *in favorem* garanti par l'article 40, paragraphe 6, de la Charte tchèque et du principe de *ne bis in idem* consacré par l'article 40, paragraphe 5, de la même charte. La cour régionale de Brno a appliqué cette jurisprudence également à la méconnaissance du droit à la liberté en cas d'irrégularité flagrante et manifeste d'une décision ordonnant une détention. De toute évidence, en vertu du principe d'équivalence, le relevé d'office doit également s'appliquer aux articles 6, 49 et 50 de la Charte de l'Union. Il apparaît cependant que l'obligation de soulever d'office une méconnaissance des droits fondamentaux n'est pas de portée générale et qu'en dehors de moyens d'ordre public expressément reconnu par la jurisprudence, le juge administratif est strictement lié par les moyens des parties. Toutefois, en toute hypothèse, il a déjà été rappelé que les juges doivent invoquer la Charte de leur propre chef dans la mesure où cela est nécessaire pour assurer que l'interprétation retenue d'un acte de droit dérivé soit conforme à la Charte.

Essentielle, mais pas toujours mise en avant, l'initiative procédurale des parties constitue donc l'élément déterminant dans la mise en œuvre de la Charte par les juridictions administratives tchèques et françaises, même si le style rédactionnel plus dialogique des décisions tchèques laisse un peu plus de place à l'utilisation de la Charte au-delà des arguments des parties.

Enfin, il doit être signalé que les juges nationaux (mais il en va de même pour la CJUE) ne font pas toujours preuve de transparence, au moment de mentionner la Charte dans leurs décisions, quant aux effets juridiques exacts conférés à la Charte et quant à l'impact de celle-ci sur la solution retenue. En ce sens, la typologie des effets juridiques de la Charte que nous proposons repose dans une certaine mesure sur notre propre interprétation des références à la Charte dans les décisions analysées.

1. La catégorie selon nous la moins judicieuse comprend diverses références à la Charte de nature purement descriptive et accessoire qui sont sans la moindre incidence sur le raisonnement, au point que l'on ne peut pas dire que la Charte est « appliquée ». Par exemple, les juges font souvent référence à la Charte en résumant les moyens des parties ou en décrivant les antécédents du litige ; une telle référence peut également apparaître de manière purement accidentelle, par exemple au sein des citations directes du raisonnement de la CJUE.

2. Les juges se contentent souvent de déclarer, de manière purement descriptive, que tel ou tel droit est consacré par la Charte, sans qu'il soit possible d'établir un lien entre une telle déclaration et le *ratio decidendi*. Les juges livrent dans ce cas un exposé des dispositions pertinentes en matière de droits fondamentaux, qui peut prendre la forme d'une chaîne panoramique de dispositions équivalentes, dont les dispositions de la Charte. Les juridictions françaises font souvent une référence non accompagnée à la Charte dans les « visas », sans citer de disposition spécifique et sans se rapporter à la Charte dans le texte même de la décision.

Ce type d'utilisation de la Charte, souvent décrit comme ornemental ou marginal, est généralement considéré comme ne présentant aucune valeur. Pourtant, une telle critique n'est pas toujours justifiée, car elle ne tient pas pleinement compte de la réalité du processus décisionnel. En fait, même si le juge ne se réfère à la Charte qu'en tant qu'élément contextuel, fournir une vue d'ensemble du droit applicable n’est pas forcément préjudiciable, surtout quand il s'agit d'exposer les enjeux en matière de droits fondamentaux qui sous-tendent les actes de droit dérivé applicables au litige. Même dans ce cas de figure, la référence à la Charte, bien que non accompagnée par une argumentation détaillée, a pour effet de souligner l'importance du respect de certaines règles ou valeurs, ce qui peut avoir un impact implicite sur le raisonnement, pris dans son ensemble. De la sorte, une telle référence purement descriptive à la Charte peut servir de « point de référence implicite » pour l'interprétation du droit de l'Union et du droit national. Pour prendre des choses sous un angle différent, l'utilisation très répandue de ce genre de référence à la Charte témoigne aussi d'une certaine imprégnation de la Charte dans la réalité quotidienne des juridictions nationales, démontrant un niveau croissant de l'internalisation de celle-ci par les juges. Enfin, de telles références à la Charte peuvent trouver une explication dans la technique contentieuse. Par exemple, les juridictions françaises sont tenues de répondre explicitement à un moyen tiré de la méconnaissance de la Charte, et pour cela, une simple mention de la Charte dans les

« visas » peut être suffisante. L'on remarquera enfin que les références descriptives et contextuelles à la Charte sont beaucoup plus nombreuses dans la jurisprudence que les autres types d'utilisation de celle-ci.

3. Lorsque le juge s'appuie sur un acte de droit dérivé de l'Union pour assurer une interprétation conforme du droit interne à celui-ci, il se réfère, dans un second temps, à la Charte en tant que source sous-jacente des garanties en matière de droits fondamentaux concrétisées par l'acte de droit dérivé en question. Dans un tel cas d'interprétation conforme, la disposition de droit dérivé sert de principal point de référence, qui est à son tour interprété de manière conforme à la Charte. Selon la formulation exacte retenue dans le raisonnement, le rôle de la Charte peut alors être complémentaire, confirmatif, légitimant ou renforçant. Ce rôle pourrait néanmoins être difficile à déterminer, surtout si le juge se limite à énoncer qu'il a interprété la disposition concernée « à la lumière de la Charte ». Il faut également admettre que dans les décisions relevant de cette catégorie, le raisonnement pourrait bien se passer, du point de vue de la base juridique, de toute référence à la Charte.

4. Les juges ont recouru à l'interprétation conforme du droit interne à la Charte de manière plus prononcée, avec un impact tangible sur le *ratio decidendi*, lorsque la solution du litige nécessitait d'aller au-delà des dispositions du droit dérivé. Par exemple, de telles hypothèses correspondent au besoin de clarification du champ d'application ou du contenu d'une disposition de droit dérivé ; à celui de l'interprétation du cadre réglementaire de l'Union de manière à assurer une protection juridictionnelle effective ; au choix parmi les interprétations possibles d'une disposition nationale de celle qui est conforme à la Charte ; à l'interprétation des règles nationales sur le *locus standi* pour étendre la protection juridictionnelle à une personne qui n'a pas qualité pour agir en vertu du texte exprès de la loi ; ou encore à l'extension du champ d'application d'une disposition nationale pour couvrir des situations non couvertes par celle-ci.

5. Lorsque le raisonnement vise spécifiquement à évaluer si la solution juridique retenue par la décision administrative ou juridictionnelle contestée est conforme ou non à la Charte, un tel raisonnement va souvent se terminer par une simple déclaration de violation ou non-violation, sans s'appuyer explicitement sur l'effet direct ou indirect de la Charte. Il est important de mentionner que l'écrasante majorité des références à la Charte dans la jurisprudence française relève de cette catégorie. Il ne faut pas en déduire pour autant que cette catégorie est homogène, car le raisonnement qui précède la déclaration de violation ou

de non-violation varie à la fois en profondeur et en orientation. La profondeur de l'analyse diffère selon que le tribunal s'arrête à la constatation de l'absence d'ingérence dans un droit fondamental ou qu'il continue à examiner si l'ingérence dans un droit fondamental est justifiée et proportionnelle. Un autre facteur est celui de savoir si le moyen tiré de la Charte peut être traité sommairement ou si une analyse plus ou moins approfondie de la jurisprudence de la CJUE est nécessaire. L'orientation de l'analyse dépendra, quant à elle, du rôle attribué à la Charte comparé aux autres instruments en matière de droits fondamentaux.

6. Le raisonnement est inévitablement axé sur la Charte lorsqu'il s'agit d'apprécier si une règle de droit dérivé de l'Union est en conformité avec les droits fondamentaux. Ce mode d'utilisation de la Charte est beaucoup plus fréquent dans la jurisprudence française. Faut-il le rappeler, si le juge éprouve des doutes concernant la validité d'une disposition de droit de l'Union, la conséquence nécessaire de l'application de la Charte dans ce contexte est de renvoyer une question préjudicielle à la CJUE.

7. Les juges ont la faculté de s'appuyer sur l'effet direct de la Charte pour écarter l'application d'une loi ou d'un acte réglementaire incompatible. Lorsque la NSS a agi ainsi, elle s'est fondée sur une base juridique combinée, à savoir « la Charte *et* une disposition de droit dérivé » ou « une disposition de droit dérivé *lue conjointement avec* la Charte ». À bien y regarder, la Charte constituait toutefois la véritable source des garanties fondamentales concernées, car celles-ci n'étaient pas explicitement contenues dans le droit dérivé en cause.

8. Une catégorie à part entière regroupe les références interprétatives non obligatoires à la Charte dans des affaires qui n'entrent pas dans son champ d'application. La Charte peut ainsi être utilisée comme « source d'inspiration » afin de compléter ou renforcer le raisonnement pour le rendre plus convaincant et ainsi donner plus de légitimité à la solution retenue. La doctrine s'accorde à dire que la Charte est une source légitime et particulièrement attractive pour en tirer des arguments comparatifs : elle est une expression consolidée des valeurs européennes fondamentales, elle-même inspirée de sources constitutionnelles et conventionnelles, que l'on se trouve ou non dans son champ d'application. Si les juridictions administratives tchèques ont utilisé la Charte de cette manière, ce mode opératoire ne s'observe pas dans les décisions du juge administratif français.

Il importe de relever que, au plan quantitatif, une partie substantielle de l'ensemble de références à la Charte que nous avons recueillies dans la jurisprudence figurent dans des décisions répétitives rendues dans des affaires concernant des faits similaires et soulevant

des questions juridiques identiques. Cela conduit à des autocitations fréquentes, par lesquelles les juges se réfèrent explicitement à leurs jurisprudences antérieures ou copient-collent tout simplement les passages du raisonnement déjà élaborés précédemment. En République tchèque, cette pratique est d'usage fréquent dans le contentieux des étrangers, notamment dans les affaires concernant les transferts « Dublin » ou la rétention administrative des étrangers. De même, des centaines d'arrêts des CAA françaises citant la Charte relèvent de deux types d'affaires répétitives : le contentieux relatif au droit d'être entendu dans le cadre d'une procédure liée à l'obligation de quitter le territoire français et le contentieux « Dublin ». Il faut bien constater qu'il s'agit là d'une utilisation de la Charte sans trop d'incidence sur la solution du litige.

Bien que moins nombreux, les arrêts dans lesquels la Charte a occupé une place privilégiée et où celle-ci a même constitué une des bases juridiques pour fonder la solution du litige sont tout de même bien présents dans les jurisprudences tchèque et française. Par exemple, un raisonnement essentiellement fondé sur la Charte a conduit, à quelques reprises, le juge français à poser des questions préjudicielles à la CJUE. Il y a ensuite les décisions tchèques dans lesquelles la Charte a été utilisée de façon à révéler sa valeur juridique : afin de laisser inappliquée une disposition du droit interne contraire. Dans ces cas d'espèce, elle représentait le moyen le plus efficace d'assurer la protection des droits fondamentaux. En outre, beaucoup de décisions s'appuient largement sur la jurisprudence de la CJUE se rapportant à la Charte, ce qui est d'ailleurs un très bon indicateur de la profondeur de l'analyse par le juge national des dispositions de la Charte.

Les remarques qui précèdent nous obligent à nuancer l'hypothèse de la recherche dans le sens suivant : même s'il est vrai que les références purement descriptives et contextuelles à la Charte sont quantitativement prédominantes, elles ne devraient pas être automatiquement rejetées comme non pertinentes ou sans valeur. Ensuite, la pratique décisionnelle au niveau national est nettement plus riche que l'hypothèse le suggère. Notre recherche a démontré que les juges sont effectivement capables d'appliquer la Charte de diverses manières, en faisant appel à toutes les méthodes classiques d'application du droit de l'Union, y compris l'interprétation conforme et l'effet direct. Il faut toutefois admettre que la jurisprudence relative à la Charte diffère beaucoup plus en République tchèque qu'elle ne le fait en France.

La typologie des effets juridiques de la Charte proposée ci-dessus s'inscrit dans un contexte plus large qui est celui de la protection « multi-niveaux » des droits fondamentaux (*Section 5.3*). Lors de l'évaluation du rôle de la Charte dans le raisonnement du juge, il est primordial de s'intéresser à la question de savoir si la Charte a été mise en œuvre de manière autonome ou bien dans le cadre d'un système normatif à plusieurs niveaux. Étant donné la superposition d'instruments juridiques en matière de droits fondamentaux, il n'est pas étonnant qu'il y ait eu, dans les jurisprudences administratives tchèque et française, de riches interactions, bien que d'intensité variable, entre la Charte, la CEDH et la constitution nationale.

On notera d'abord que la Charte ne fait partie ni de l'« ordre constitutionnel » en République tchèque ni du « bloc de constitutionnalité » en France, à savoir l'ensemble des normes de référence sur lesquelles est basé le contrôle de la constitutionalité des lois. Pour cela, l'on peut considérer que la superposition d'instruments juridiques en matière de droits fondamentaux est moins complexe que dans les États membres où les dispositions de la Charte ont été placées, dans la hiérarchie des normes, sur un pied d'égalité avec la constitution nationale, comme c'est le cas en Autriche. Il n'en demeure pas moins que la pluralité des normes juridiques simultanément applicables suscite des difficultés afférentes aux interactions de ces normes. À cet égard, le trait le plus caractéristique de l'application nationale de la Charte en République tchèque et en France, tout comme d'ailleurs dans les autres États membres, est celui de la combinaison des sources juridiques dans le raisonnement du juge. L'omniprésence de cette approche n'est guère surprenante étant donné que les instruments de droits fondamentaux sont souvent applicables simultanément et sont largement équivalents dans le sens où ils contiennent des dispositions consacrant, essentiellement, les mêmes droits. Il convient néanmoins de distinguer entre les différentes modalités d'interaction des sources au sein du raisonnement et, en particulier, au sein du *ratio decidendi*. Les données empiriques recueillies nous ont permis d'élaborer la systématisation suivante des modalités d'interaction de la Charte avec d'autres sources de droits fondamentaux.

1. La Charte peut constituer la seule base juridique pour répondre à un moyen ou pour la résolution de l'affaire tout court, sans se rapporter à d'autres instruments relatifs aux droits fondamentaux. Ce scénario s'est produit notamment en ce qui concerne l'article 8 (protection des données à caractère personnel), l'article 41 (droit à une bonne administration, et ce malgré le fait que cette disposition n'a pas vocation à s'appliquer devant les autorités

nationales) ou l'article 47 de la Charte (droit à un recours effectif et à accéder à un tribunal impartial). De manière générale, la Charte est utilisée en tant que base juridique autonome lorsque le juge administratif est appelé à contrôler la compatibilité d'un acte de droit dérivé avec la Charte.

2. Le juge peut se référer à la Charte en tant que source juridique principale constituant le fondement formel du raisonnement, mais interpréter celle-ci à la lumière de la CEDH, typiquement par le biais de l'article 52, paragraphe 3, de la Charte.

3. Il peut y avoir une référence conjointe à la Charte et à la constitution nationale et/ou à la CEDH dans une même déclaration et à l'appui d'un même argument ou d'une même solution interprétative, chacun des instruments cités ayant *prima facie* le même poids dans le raisonnement.

4. Les renvois aux dispositions de la Charte, et à la jurisprudence de la CJUE s'y rapportant, peuvent être intégrés au sein d'un raisonnement global couvrant également d'autres sources de droit, comme la CEDH (la jurisprudence de la CrEDH) et/ou les règles constitutionnelles nationales. Dans ce cas de figure, les références à des dispositions équivalentes en matière de droits fondamentaux sont fusionnées au sein d'un raisonnement concernant le droit fondamental concerné ou un aspect concret de son interprétation, avec des références alternées, qui se renforcent mutuellement, à toutes les sources juridiques pertinentes, conduisant à une solution globale basée sur toutes les sources prises ensemble. Dans le cadre d'un tel raisonnement, l'équivalence entre la Charte et la CEDH est parfois explicitement reconnue par le juge en référence à l'article 52, paragraphe 3, de la Charte.

5. Le juge peut traiter la Charte, la CEDH et le droit national toujours au sein d'un raisonnement global, mais en étapes séparées, en blocs de raisonnement chacun consacré à une seule source, sans que cela n'implique une hiérarchie quelconque parmi les sources utilisées.

6. Il y a ensuite des cas de marginalisation explicite de la Charte, lorsque les juges poursuivent leur analyse uniquement sur la base de la constitution nationale et/ou de la CEDH, la Charte n'étant mentionnée que pour rappeler son équivalence avec la CEDH ou la constitution.

7. Il arrive également que le raisonnement du juge se fonde principalement sur le droit national et/ou la CEDH, et le renvoi à la Charte, pas ou peu argumenté, n'est ajouté

qu'en marge de l'analyse, par exemple au sein d'une référence panoramique exposant le cadre juridique applicable en matière de droits fondamentaux.

8. Parfois, le juge parvient à une conclusion à l'issu d'une analyse axée sur un des instruments en matière de droits fondamentaux et étend ensuite, sans le justifier, une telle conclusion à d'autres instruments invoqués. Par exemple, les juridictions françaises souvent mènent leur raisonnement au regard de la constitution et/ou de la CEDH, puis écartent le moyen tiré de la méconnaissance de la Charte « pour les mêmes motifs », et ce même lorsqu'il s'agit d'effectuer une évaluation de la proportionnalité de la mesure concernée. Il a déjà été dit que les cours régionales tchèques se sont servies, dans quelques décisions, de la notion d'équivalence de façon trop extensive, en faisant des raccourcis injustifiés dans leur raisonnement. Une telle manque de rigueur méthodologique soulève à l'évidence un problème au regard de l'efficacité de la protection garantie par la Charte dans l'hypothèse dans laquelle elle offre une protection plus étendue que les autres sources.

Ce dernier scénario correspond à la perception de la part de certains praticiens et juges selon laquelle un argument fondé sur la Charte sera souvent superflu étant donné l'équivalence matérielle de celle-ci avec les constitutions nationales et la CEDH. Cependant, rien ne permet de sanctionner une telle approche abusive envers la notion de l'équivalence. Nous avons d'ailleurs démontré que même dans les domaines couverts par l'article 52, paragraphe 3, de la Charte, les juges nationaux doivent être prudents lorsqu'ils font appel à ladite notion. Pour ce qui est des domaines non couverts par l'article 52, paragraphe 3, de la Charte, des points de divergence entre les différents instruments apparaîtront inévitablement sur des questions spécifiques. Par ailleurs, le libellé identique des dispositions nominalement équivalentes ne se traduit pas nécessairement par l'identité de leurs champs d'application ou de leur sens. Tout d'abord, comme il s'agit de dispositions formulées en termes généraux, les différences entre elles ne surviendront qu'à partir des jurisprudences les interprétant. En outre, des solutions différentes peuvent découler du fait que certains systèmes de protection permettent de limiter un certain droit fondamental davantage que d'autres systèmes, même si le contenu de ce droit, tel que consacré dans les différents systèmes, est équivalent. En plus de considérer l'équivalence des dispositions consacrant le droit fondamental en question, il faut en effet se poser également la question de l'équivalence de la méthodologie concernant les limitations possibles faites aux droits. Par conséquent, le recours à un raisonnement fondé sur l'équivalence ne doit pas être

automatique et généralisé, mais doit s'effectuer en tenant compte de toutes les complexités de la protection « multi-niveaux » des droits fondamentaux décrites ci-dessus.

Notre étude a révélé que, bien qu'il semble exister plusieurs modèles récurrents dans la jurisprudence s'agissant des interactions entre les instruments en matière de droits fondamentaux simultanément applicables, il n'y a pas de méthodologie clairement établie quant au poids accordé à chacun de ces instruments dans un contexte donné et quant à l'impact normatif de ceux-ci sur la solution du litige. L'utilisation de l'article 52, paragraphe 3, de la Charte en tant qu'outil « bidirectionnel » illustre bien ce constat : les juges se sont appuyés sur cette disposition soit afin de privilégier la Charte comme base juridique en l'interprétant à la lumière de la CEDH, soit afin de marginaliser complètement la Charte au profit de la CEDH.

Dans ce paysage pluraliste, la CEDH bénéficie souvent d'un statut privilégié, ce qui peut s'expliquer par diverses raisons, à commencer par la relativement plus grande familiarité des juges et des parties avec la CEDH et la jurisprudence de la CrEDH. De plus, cette dernière est plus développée dans certains domaines que la jurisprudence de la CJUE. Le fait que le juge se rapporte principalement à la CEDH dans sa motivation ne signifie pas pour autant que la Charte est nécessairement dépourvue de toute portée normative. En effet, la Charte permet parfois de faire intégrer la jurisprudence de la CrEDH dans les décisions rendues dans des affaires dans lesquelles la CEDH ne s'applique pas, contrairement à la Charte. Il est courant de rappeler, par exemple, que l'article 6 de la CEDH ne s'applique qu'aux droits et obligations de caractère civil et aux accusations en matière pénale, ce qui exclut, en principe, son application dans une grande partie du contentieux administratif. En revanche, l'article 47 de la Charte, dont le sens est le même que l'article 6 de la CEDH, n'est pas soumis à une telle limitation et s'applique dès lors tant dans les affaires fiscales que dans le contentieux des étrangers. Dans le même ordre d'idée, le principe de *non bis in idem*, tel que consacré par l'article 50 de la Charte, est d'une portée plus large que le principe correspondant prévu par l'article 4 du protocole n° 7 à la CEDH, puisque la protection accordée par la Charte s'applique aux infractions pour lesquelles la personne concernée a déjà été acquittée ou condamnée « dans l'Union », tandis que l'article 4 du protocole n° 7 ne couvre que les poursuites dirigées contre la personne « par les juridictions du même État ». La Cour constitutionnelle de l'Autriche a parlé, à cet égard, d'« importation » indirecte des normes consacrées par la CEDH. Bien entendu, une telle importation par le biais de l'article

52, paragraphe 3, de la Charte peut s'avérer particulièrement utile dans les domaines où la jurisprudence de la CrEDH est beaucoup plus développée que celle de la CJUE.

Cela étant dit, plusieurs facteurs peuvent favoriser l'application de la Charte au lieu de la CEDH et de constitutions nationales. Les juges tchèques ont d'ailleurs eux-mêmes explicitement reconnu, à quelques reprises, les avantages de la Charte sur le plan procédural par rapport au mécanisme de Question prioritaire de constitutionalité, ainsi que la portée plus protectrice de certains droits garantis par la Charte, comparé à la CEDH. Par ailleurs, certaines dispositions de la Charte n'ont pas d'équivalent dans des constitutions nationales et/ou dans la CEDH. Certains droits et principes sont formulés plus clairement dans la Charte que dans des constitutions nationales, parfois anciennes ; la Charte peut donc jouer un rôle important pour combler des lacunes, dans les cas où la CEDH ne pourrait pas le faire. En outre, il peut y avoir un intérêt spécifique à tirer des solutions interprétatives de la jurisprudence de la CJEU dans les domaines où la Cour de Luxembourg est devenue un acteur de premier plan. L'on pense notamment à la jurisprudence en matière de protection des données à caractère personnel.

Dans certaines décisions, les juges tchèques et français ont eu tendance à dissocier les droits fondamentaux de leurs énoncés, considérés comme analogues, dans les différentes sources juridiques et à appliquer ces droits comme notions « dématérialisées ». À titre d'exemple, une telle référence globale à un certain droit fondamental – avec un attachement très faible à un instrument juridique précis et sans argumentation détaillée – a été fait dans l'affaire *J. M.* c. *Commission des séjours des étrangers*. En l'espèce, la NSS a décidé de suspendre une décision d'obligation de quitter le territoire tchèque en se référant à la vie familiale du requérant en tant que valeur primordiale, qui doit être protégée, « comme elle ressort de divers documents internationaux relatifs aux droits fondamentaux (notamment de l'article 7 de la [Charte] et de l'article 8, paragraphe 1, de la [CEDH]) » (6 As 30/2013-34, point 13). Du côté français, nous avons vu que le Conseil d'État commence parfois par exposer les raisons pour lesquelles un moyen tiré de la méconnaissance des droits fondamentaux n'est pas fondé, sans faire référence à une disposition spécifique, et déclare ensuite que les dispositions invoquées, prises dans leur ensemble, n'ont pas été violées.

Cette pratique a été décrite et théorisée dans le contexte de la jurisprudence de la Cour constitutionnelle belge, qui utilise la notion d'« ensemble indissociable » des droits fondamentaux analogues. C'est une technique qui permet à la Cour d'intégrer les

jurisprudences de la CEDH et de la CJUE dans la Constitution belge et de fusionner toutes ces sources en un tout cohérent. Les manifestations textuelles des droits fondamentaux perdent leur importance face à la notion dématérialisée et englobante du droit fondamental concerné. Il s'agit là d'un concept attirant qui semble simplifier les choses pour le juge national. Autant commode qu'il soit, le recours à cette notion est susceptible de donner lieu à des tensions avec l'autorité ultime de la CJUE et la CrEDH, car la « dématérialisation » occulte la motivation du juge quant à la source exacte des droits fondamentaux qui a fondé la solution retenue et quant à l'interprétation donnée à chaque source utilisée.

On serait tenté de considérer que la pratique de combinaison des sources trouve son fondement dans la mondialisation (européanisation) du droit et s'inscrit dans l'élaboration du « patrimoine constitutionnel commun », dans le cadre de laquelle les juges se détourneraient des manifestations textuelles des droits fondamentaux en faveur d'une lecture matérielle commune de chaque droit. Il n'est pas douteux qu'une des raisons qui expliquent l'omniprésence de cette technique interprétative est le fait qu'une lecture combinée des dispositions en matière de droits fondamentaux est exigée par les obligations d'interprétation conforme, qu'elles découlent de dispositions explicites, telle que l'article 52, paragraphe 3, de la Charte, ou d'une obligation plus générale de coopération loyale entre les acteurs institutionnels relevant de différents systèmes juridiques.

Toutefois, à la lecture des références rassemblant les différentes sources équivalentes dans le raisonnement du juge administratif tchèque et français, il convient d'être prudent dans l'attribution d'une importance particulière à ce genre de choix rédactionnel ; il se peut très bien qu'il s'agisse tout simplement d'un style de rédaction purement pragmatique, pour ne pas dire irréfléchi. Ainsi, de telles références panoramiques ne peuvent qu'être un reflet fidèle de la manière dont les parties ont formulé leurs moyens ou dont la décision contestée a été motivée.

La recherche empirique nous a permis de confirmer notre hypothèse selon laquelle la Charte n'est généralement pas utilisée en tant qu'instrument autonome mais est plutôt citée à côté des catalogues de droits fondamentaux plus établis, tels que la CEDH ou la constitution nationale. Cependant, nous avons démontré que les interactions entre les sources des droits fondamentaux peuvent prendre des aspects très variés, que la Charte est loin d'être systématiquement marginalisée et que l'importance attribuée dans le raisonnement à un

instrument particulier ne résulte pas nécessairement d'un choix délibéré du juge, mais plutôt de l'activité procédurale des parties.

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Même lorsque la Charte jouit d'une autonomie dans le raisonnement du juge par rapport à d'autres instruments de droits fondamentaux, elle intervient souvent dans le contexte de garanties spécifiques en matière de droits fondamentaux prévues par le droit dérivé (*Section 5.4*). De nombreux actes de droit dérivé mettent en œuvre les droits consacrés par la Charte, en établissant des garanties concrètes pour les bénéficiaires concernés. Ainsi, de nombreux règlements et directives de l'Union contiennent une disposition générale concernant le droit à une protection juridictionnelle effective dans les matières relevant du champ d'application de l'acte en question. En outre, certains droits fondamentaux, leurs portée, contenu et limites, ont fait l'objet de dispositions d'application détaillées dans le droit dérivé, comme c'est le cas pour la liberté de circulation et de séjour visée par l'article 45 de la Charte (directive 2004/38/CE). Par ailleurs, un cadre juridique établi par le droit dérivé a vocation à « remplacer » les règles concernant la limitation des droits découlant de l'article 52, paragraphe 1, de la Charte. De plus, certaines dispositions de la Charte ont même été élaborées directement à partir du droit dérivé, comme l'affirment les *Explications* relatives à plusieurs dispositions de la Charte. Par exemple, l'article 31, paragraphe 2, de la Charte (droit à une limitation de la durée maximale du travail et à des périodes de repos journalier et hebdomadaire, ainsi qu'à une période annuelle de congés payés) est fondé, entre autres, sur la directive 93/104/CE concernant certains aspects de l'aménagement du temps de travail. Certains actes de droit dérivé ont même *pour seul but* de concrétiser les garanties en matière de droits fondamentaux, comme par exemple la directive 2012/13/UE relative au droit à l'information dans le cadre des procédures pénales ou la directive 2013/48/UE relative au droit d'accès à un avocat dans le cadre des procédures pénales et des procédures relatives au mandat d'arrêt européen, au droit d'informer un tiers dès la privation de liberté et au droit des personnes privées de liberté de communiquer avec des tiers et avec les autorités consulaires. Comme l'a déclaré la CJUE, « [i]l ressort […] des considérants de ces directives que celles-ci s'appuient […] sur les droits énoncés notamment aux articles 6, 47 et 48 de la Charte et tendent à promouvoir ces droits à l'égard des suspects ou des personnes poursuivies dans le cadre de procédures pénales » (C-467/18 *Rayonna prokuratura Lom*, point 37).

Dans de telles circonstances, le contexte opérationnel de la Charte change considérablement. En effet, dans tous les cas de figure précédemment évoqués (lorsque la protection des droits fondamentaux est intégrée dans le droit dérivé applicable au litige), la valeur ajoutée de la Charte peut se trouver amoindri ou même disparaître entièrement. De la sorte, le juge national peut considérer suffisant de s'appuyer sur les dispositions pertinentes du droit dérivé (et éventuellement sur la jurisprudence de la CJUE interprétant de telles dispositions à la lumière de la Charte) sans se référer explicitement à la Charte. Le juge parvient alors à une solution conforme à la Charte, mais uniquement sur la base du droit dérivé.

Une décision de la NSS qui ne mentionne aucun instrument relatif aux droits fondamentaux illustre bien cette hypothèse. L'affaire concernait un ressortissant de pays tiers placé en rétention qui a fait appel d'une décision d'expulsion prise à son encontre, mais qui n'a pas pu le faire en temps utile en raison de l'absence de conseil juridique (4 Azs 122/2015-23). Son recours a été considéré comme hors délai par l'administration, ce qui a été confirmé par la cour régionale en première instance. La NSS a annulé ces décisions sur la base de l'article 13, paragraphe 3, de la directive 2008/115/CE relative aux normes et procédures communes applicables dans les États membres au retour des ressortissants de pays tiers en séjour irrégulier, qui prévoit que « [l]e ressortissant concerné d'un pays tiers a la possibilité d'obtenir un conseil juridique, une représentation juridique et, en cas de besoin, une assistance linguistique ». Rappelons qu'en vertu de l'article 47 de la Charte, « [t]oute personne a la possibilité de se faire conseiller, défendre et représenter ». Cette dernière disposition aurait très bien pu être utilisée pour renforcer l'argumentation des juges, d'autant plus qu'il s'agissait du litige entièrement axé sur les droits fondamentaux. Une telle référence n'était cependant pas nécessaire, aux yeux des juges, pour résoudre l'affaire de façon conforme à la Charte.

Lorsque la Charte *est* utilisée dans des scénarios tels que ceux décrits ici, son rôle dans le raisonnement est susceptible de varier. La référence à la Charte peut se limiter à mettre en évidence la logique relative aux droits fondamentaux qui sous-tend l'acte de droit dérivé en question ou une de ses dispositions, sans aucun impact substantiel vérifiable sur le raisonnement. La Charte peut également être utilisée comme un argument confirmatif à l'appui d'une interprétation particulière de l'acte en question. Les juridictions françaises ont eu tendance à rejeter les moyens en se référant, dans un premier temps, au droit dérivé applicable au litige (typiquement la directive 2013/33/UE établissant des normes pour

l'accueil des personnes demandant la protection internationale, la directive 2003/88/CE concernant certains aspects de l'aménagement du temps de travail ou la directive 2000/78/CE portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail), puis à rejeter le moyen tiré de la Charte « pour les mêmes motifs ».

La Charte et le droit dérivé forment parfois une base juridique commune. Dans une affaire notable dans laquelle la NSS a écarté l'application d'une disposition nationale en se fondant sur une base juridique combinée de l'article 15 de la directive 2008/115/CE « Retour » *et* des articles 6 et 47 de la Charte, les juges se sont appuyés sur des références alternées à la directive et à la Charte, lue conjointement avec la CEDH. Dès lors, les dispositions des différents instruments se renforçaient mutuellement. Dans deux autres cas, la NSS a écarté l'application d'une disposition nationale au motif qu'elle était contraire à la directive 2004/114/CE *lue conjointement avec* l'article 47, paragraphe 1, de la Charte ; et une autre disposition nationale au motif qu'elle était incompatible avec l'article 32, paragraphe 3, du code des visas (règlement (CE) Nº 810/2009) *lu conjointement avec* l'article 47 de la Charte. Il faut souligner que dans ces deux cas, c'est la Charte elle-même qui constituait la source matérielle des garanties fondamentales concernées. Toutefois, le choix de se baser sur l'effet direct isolé d'un acte de droit dérivé, au lieu de l'effet direct combiné d'une directive et de la Charte, semble parfois se faire de manière idiosyncratique. Deux arrêts de la NSS le montrent bien. Était en cause dans ces affaires l'article 174a, paragraphe 3, de la loi relative au séjour des étrangers sur le territoire de la République tchèque, qui exclut du contrôle de proportionnalité les décisions d'obligation de quitter le territoire tchèque. Dans l'*affaire T. V. T. c. la Direction de la police des étrangers*, la NSS a écarté l'application de ladite disposition en se fondant sur l'effet direct de la directive 2008/115/CE « Retour » (8 Azs 290/2018-27). Dans un arrêt ultérieur concernant la même question de droit, la NSS ne se contente pas de citer la directive 2008/115/CE, mais se réfère également à l'article 7 de la Charte et – « principalement » – à l'article 8 de la CEDH et l'article 3 de la Convention relative aux droits de l'enfant (5 Azs 383/2019-40). Le choix de la base juridique exacte pour laisser inappliquée la disposition nationale en cause ne revêtait clairement pas une grande importance sur le plan pratique dans ces deux affaires.

Il ne faudrait pas néanmoins conclure de ce qui précède que la Charte sera complètement éclipsée par le droit dérivé dans de telles situations de chevauchement normatif. La Charte présente une utilité évidente dans l'hypothèse où l'invocabilité des directives européennes est limitée au plan national. Rappelons à cet égard que le Conseil

d'État a longtemps refusé de reconnaître l'effet direct de substitution des directives jusqu'à ce qu'il revienne sur cet argumentaire peu compatible avec le droit de l'Union. Outre une telle valeur corrective de la Charte, les dispositions de celle-ci peuvent servir de vecteur à l'extension d'une solution prévue par un acte de droit dérivé à des situations régies par un autre acte de droit dérivé, ou à l'importation des solutions retenues par la jurisprudence de la CrEDH. Plus important encore, la Charte reste la seule norme de référence pour évaluer la validité du droit dérivé au regard des droits fondamentaux. En plus, la Charte peut offrir une protection allant au-delà de celle consacrée par le droit dérivé, comme l'illustre, par exemple, l'arrêt de la CJUE dans les affaires jointes C-391/16, C-77/17 et C-78/17 *M*. Dans cet arrêt, la Cour a estimé que lorsqu'un État membre procède à la révocation ou au refus d'octroi du statut de réfugié au sens de l'article 14, paragraphes 4 et 5, de la directive « Qualification » 2011/95/UE, le ressortissant de pays tiers concerné ne peut faire l'objet d'un refoulement si ce refoulement lui faisait courir le risque que soient violés ses droits fondamentaux consacrés à l'article 4 et à l'article 19, paragraphe 2, de la Charte (point 94 de l'arrêt). Or, une telle protection n'est pas explicitement prévue par la directive 2011/95/UE, mais découle directement des dispositions de la Charte. Notre étude a révélé que le juge administratif est conscient de la valeur ajoutée de la Charte dans de tels scénarios, mais rares sont les décisions qui abordent cette problématique de façon explicite.

En résumé, notre analyse fait apparaître l'importance de prendre en compte comment et dans quelle mesure les droits fondamentaux sont intégrés dans le droit dérivé de l'Union. Bien que la Charte puisse apporter une valeur ajoutée dans certaines hypothèses, ses dispositions seront souvent remplacées, dans la motivation des décisions du juge national, par des garanties fondamentales plus spécifiques élaborées dans les actes de droit dérivé. Alors que nous avons identifié plusieurs approches récurrentes dans les jurisprudences tchèque et française, aucune méthode cohérente n'a émergé en ce qui concerne la manière dont les différents cadres normatifs de l'Union en matière de droits fondamentaux devraient interagir. L'on peut soutenir que, encore une fois, la configuration finale du raisonnement du juge découlera de la manière dont l'affaire est présentée par les parties, de la teneur de la jurisprudence pertinente de la CJUE et d'autres considérations pragmatiques. En extrapolant ces enseignements, l'on constate qu'il y a sans doute un bon nombre de décisions nationales dans lesquelles les droits fondamentaux de l'Union, tels que garantis par le droit dérivé, sont au cœur du raisonnement du juge sans que la Charte n'y soit citée. Il est essentiel de garder cela à l'esprit lors de l'évaluation de la mise en œuvre de la Charte par les juridictions

nationales : les droits fondamentaux tels que contenus dans le droit de l'Union occupent certainement une place plus importante dans la jurisprudence nationale que l'on aurait pensé en se basant sur les seules décisions comprenant une référence explicite à la Charte. Si les interactions entre la Charte et le droit dérivé ont reçu beaucoup moins d'attention dans la doctrine que la relation entre la Charte est d'autres textes de droits fondamentaux, il s'agit pourtant d'une problématique cruciale pour mieux appréhender les enjeux de la mise en œuvre nationale de la Charte.

CONCLUSION

La mise en œuvre de la Charte dans les jurisprudences administratives tchèque et française se fait progressivement, mais il est déjà possible d'identifier des modèles récurrents d'application de la Charte au regard des trois thèmes que nous avons choisi d'étudier, à savoir l'applicabilité de la Charte, ses effets au sein du raisonnement du juge et ses interactions avec d'autres normes juridiques. Trois grandes idées se dégagent de cette jurisprudence : un pragmatisme accru du juge administratif, le rôle primordial des parties au litige et une forte volonté du juge de respecter le niveau matériel de protection garanti par la Charte. Le juge recherche la méthode la plus efficace pour résoudre l'affaire devant lui d'une manière qui soit conforme au droit applicable, ainsi qu'à ses obligations procédurales envers les parties. En ce qui concerne l'appréciation de l'applicabilité de la Charte au cas d'espèce, les juges examinent souvent le moyen tiré de la Charte au fond au lieu de s'interroger sur l'applicabilité, parfois contentieuse, de cette dernière. De façon corrélative, les juges ne se prononceront pas sur les questions complexes de conciliation de différents instruments simultanément applicables en matière de droits fondamentaux, à moins que l'affaire ne soulève une question distincte à cet égard. Un tel pragmatisme va de pair avec l'absence d'une méthode cohérente pour traiter les moyens tirés de la méconnaissance de la Charte. Cette absence de méthode a également donné lieu à des lacunes formelles dans le raisonnement, susceptibles de créer une confusion quant à l'invocabilité de la Charte. Il est néanmoins encourageant de constater que lorsque les juges administratifs tchèques et français se lancent dans l'évaluation explicite de l'applicabilité de la Charte, ils procèdent de manière conforme à la jurisprudence de la CJUE. Nous avons vu que les juges parviennent généralement à s'y retrouver dans cette jurisprudence malgré sa complexité.

Axée sur les résultats, l'approche décrite ci-dessus est rendue possible par le fait que lorsque les juges nationaux traitent de questions relatives aux droits fondamentaux, ils peuvent choisir parmi plusieurs instruments juridiques simultanément applicables. Il est essentiel de souligner que l'on pense ici non seulement à des textes de droits fondamentaux, mais aussi à des actes de droit dérivé de l'Union. La façon dont les juges font l'usage de la Charte dans leur raisonnement est fortement déterminée par l'équivalence matérielle de celle-ci, parfois perçue comme étant absolue, avec la CEDH et les textes constitutionnels nationaux. Nous avons d'ailleurs démontré que les juges utilisent fréquemment un raisonnement fondé sur l'équivalence, que ce soit de manière implicite ou explicite. Bien qu'un tel raisonnement puisse aboutir à un effet de renforcement mutuel des instruments

simultanément applicables, il est souvent utilisé de manière purement pragmatique : pour introduire un cadre de référence unique en choisissant l'un des instruments à l'exclusion des autres. Parallèlement, l'on constate une nette tendance à appliquer de façon conjointe plusieurs instruments juridiques plutôt que d'utiliser la Charte de manière autonome. Nous avons souligné, dans ce contexte, le manque de rigueur méthodologique quant à la combinaison des bases juridiques dans le raisonnement, les désavantages de s'appuyer sur un raisonnement par équivalence sans justification suffisante, ainsi que les facteurs qui ont vocation à influencer les choix des juges lors de la motivation de leurs décisions.

Les limites de ce pragmatisme sont déterminées par l'activité procédurale des parties. Nous avons vu que la manière dont elles présentent leurs moyens fondés sur la Charte aura un impact décisif sur la manière dont les juges utilisent la Charte dans leur raisonnement. Un moyen « panoramique » tiré de la méconnaissance de plusieurs instruments en matière de droits fondamentaux sera fort probablement traité de manière panoramique par le juge. L'attitude désinvolte des parties à l'égard de la Charte se répercutera nécessairement sur la jurisprudence, avec pour résultat ce qu'une partie de la doctrine a appelé un bilan décevant pour la mise en œuvre nationale de la Charte. Nous insistons ici sur la nécessité de tenir compte du rôle déterminant des parties avant de reprocher aux juridictions nationales de ne pas faire un usage sérieux de la Charte.

Sans doute encore plus méconnue est l'importance du droit dérivé de l'Union dans la jurisprudence nationale relative aux droits fondamentaux. Les règlements et directives qui contiennent des garanties spécifiques en matière de droits fondamentaux réduisent fortement, lorsqu'ils sont applicables au cas d'espèce, le potentiel de la Charte à apporter une valeur ajoutée au raisonnement. Dans de tels cas, les juges se réfèreront principalement à la législation de l'Union et à la jurisprudence de la CJUE s'y rapportant, la Charte étant en marge ou complètement absente. La nécessité s'impose de poursuivre les recherches sur ce genre d'interactions. Notre étude n'avait pas été conçue pour identifier les décisions qui mettent en œuvre les droits fondamentaux garantis par le droit dérivé de l'Union sans faire référence à la Charte, ou ceux consacrés par la CEDH ou les constitutions nationales. Malgré cela, nous avons trouvé plusieurs décisions de cette nature, ce qui laisse penser que la portée réelle des droits fondamentaux de l'Union sur le plan national est plus étendue que ce à quoi l'on pourrait s'attendre en se basant sur les seules décisions contenant une référence à la Charte. Dans le sens opposé, nous avons identifié plusieurs décisions dans lesquelles la Charte aurait pu ou dû être citée ou aurait dû jouer un rôle plus important par rapport à la

CEDH. Par exemple, il ressort de certaines décisions de la NSS que les juridictions inférieures n'ont pas appliqué la Charte alors qu'elles auraient pu ou dû le faire. Il est probable qu'il s'agisse là d'un phénomène plus répandu. Nous étions conscients de ces limites lors de la conception de notre recherche ; nous n'avions pas cherché à prendre en compte de tels cas. Cela étant dit, pour obtenir une vue plus complète de la façon dont la Charte est mise en œuvre au niveau national, il faut s'intéresser davantage aux décisions dans lesquelles la Charte n'est pas citée.

Il ressort également de notre étude que la Charte n'a pas provoqué de révolution dans la jurisprudence des juridictions administratives tchèques et françaises. Les cas dans lesquels la Charte a eu un impact décisif sur la solution du litige ne sont pas nombreux. Comme nous l'avons expliqué plus haut, la préoccupation principale des juges nationaux n'est pas de maximiser la portée de la Charte en appliquant cette dernière de manière substantielle chaque fois qu'elle est potentiellement invocable. Une telle approche a conduit, à maintes reprises, à la mise à l'écart de la Charte dans le raisonnement d'un point de vue méthodologique. Cependant, nous n'avons pas identifié de décision qui méconnaitrait le niveau de protection garanti par la Charte, et ce malgré le fait qu'une partie de la jurisprudence de la CJUE interprétant les articles 51 à 53 de la Charte est toujours en attente de clarifications. S'agissant de l'impact matériel de la Charte dans la jurisprudence administrative, nous avons constaté que, dans certaines décisions tchèques, la Charte a manifestement apporté un niveau de protection plus élevé au bénéfice des plaignants. La masse imposante de références superficielles à la Charte dans la jurisprudence n'enlève rien aux potentialités de celle-ci lorsqu'elle est sérieusement invoquée. En outre, comme nous avons tenté de le démontrer, même des références brèves à la Charte ont leur place dans la démarche du juge et il ne faut pas les écarter, par principe, comme étant sans valeur. À partir des décisions que nous avons rassemblées pour notre analyse, l'on peut conclure que, dans les deux pays, la jurisprudence des juridictions administratives portant sur la Charte est plus diverse et plus développée que ne le suggèrent les études réalisées à ce jour. Cette diversité s'explique, d'une part, par la multitude des faits d'espèce qui influencent les choix des juges nationaux, et d'autre part, par l'absence d'une méthode cohérente pour appréhender la Charte. Parmi les thèmes qui traversent cette jurisprudence, l'on retrouve notamment le pragmatisme du juge et le rôle déterminant des parties au litige, mais aussi la volonté du juge de respecter le niveau matériel de protection garanti par la Charte.

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Case C-272/09 P *KME Germany and Others v Commission*, EU:C:2011:810

Joined Cases C-411/10 and C-493/10 *N. S. and Others*, EU:C:2011:865

Case C-78/11 *ANGED*, EU:C:2012:372

Case C-466/11 *Currá and Others*, EU:C:2012:465

Case C-278/12 PPU *Adil*, EU:C:2012:508

Case C-83/11 *Rahman and Others*, EU:C:2012:519

Case C-199/11 *Europese Gemeenschap*, EU:C:2012:684

Case C-40/11 *Iida*, EU:C:2012:691

Case C-277/11 *M. M.*, EU:C:2012:744

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Case C-23/12 *Zakaria*, EU:C:2013:24

Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105

Case C-399/11 *Melloni*, EU:C:2013:107

C-32/11 *Allianz Hungária Biztosító and Others*, EU:C:2013:160

Case C-401/11 *Soukupová*, EU:C:2013:223

Case C-534/11 *Arslan*, EU:C:2013:343

Case C-168/13 PPU *Jeremy F*, EU:C:2013:358

Case C-300/11 *ZZ*, EU:C:2013:363

Case C-14/13 *Cholakova*, EU:C:2013:374

Case C-234/12 *Sky Italia*, EU:C:2013:496

Case C-383/13 PPU *G. and R.*, EU:C:2013:533

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Case C-195/12 *Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne*, EU:C:2013:598

Joined Cases C-488/12 to C-491/12 and C-526/12 *Nagy and Others*, EU:C:2013:703

Case C-176/12 *Association de médiation sociale*, EU:C:2014:2

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Case C-265/13 *Torralbo Marcos*, EU:C:2014:187

Case C-314/12 *UPC Telekabel Wien*, EU:C:2014:192

Case C-390/12 *Pfleger and Others*, EU:C:2014:281

Case C-604/12 *H. N.*, EU:C:2014:302

Case C-131/12 *Google Spain*, EU:C:2014:317

Case C-356/12 *Glatzel*, EU:C:2014:350

Case C-118/13 *Bollacke*, EU:C:2014:1755

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Case C-173/13 *Leone*, EU:C:2014:2090

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Case C-112/13 *A v B*, EU:C:2014:2195

Case C-562/12 *Liivimaa Lihaveis*, EU:C:2014:2229

Case C-104/13 *Olainfarm*, EU:C:2014:2316

Case C-166/13 *Mukarubega*, EU:C:2014:2336

C-148/13 *A and Others*, EU:C:2014:2406

Case C-249/13 *Boudjlida*, EU:C:2014:2431

Case C-562/13 *Abdida*, EU:C:2014:2453

Case C-43/14 *ŠKO-ENERGO*, EU:C:2015:120

Case C-316/13 *Fenoll*, EU:C:2015:200

Joined Cases C-446/12 to C-449/12 *Willems and Others*, EU:C:2015:238

Case C-528/13 *Geoffrey Léger*, EU:C:2015:288

Case C-98/14 *Berlington Hungary and Others*, EU:C:2015:386

Case C-157/14 *Neptune Distribution*, EU:C:2015:823

Case C-419/14 *WebMindLicenses*, EU:C:2015:832

Case C-74/14 *Eturas and Others*, EU:C:2016:42

Case C-601/15 PPU *N.*, EU:C:2016:84

Case C-161/15 *Bensada Benallal*, EU:C:2016:175

Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, EU:C:2016:198

Case C-319/15 *Overseas Financial and Oaktree Finance* EU:C:2016:268

Case C-547/14 *Philip Morris Brands and Others*, EU:C:2016:325

Case C-559/14 *Meroni*, EU:C:2016:349

Case C-438/14 *Bogendorff von Wolffersdorff*, EU:C:2016:401

Case C-63/15 *Ghezelbash*, EU:C:2016:409

Case C-205/1 *Toma*, EU:C:2016:499

Case C-447/15 *Muladi*, EU:C:2016:533

Case C-182/15 *Petruhhin*, EU:C:2016:630

Case C-218/15 *Paoletti and Others*, EU:C:2016:748

Case C-466/15 *Jean-Michel Adrien and Others*, EU:C:2016:749

Case C-582/14 *Breyer*, EU:C:2016:779

Case C-321/16 *Pardue*, EU:C:2016:871

Case C-203/15 *Tele2 Sverige*, EU:C:2016:970

Case C-578/16 PPU, *C. K. and Others*, EU:C:2017:127

Case C-638/16 *X and X*, EU:C:2017:173

Case C-221/17 *Tjebbes and Others*, EU:C:2019:189

Case C-528/15 *Al Chodor and Others*, EU:C:2017:213

Joined Cases C-217/15 and C-350/15 *Orsi*, EU:C:2017:264

Case C-13/16 *Rīgas satiksme*, EU:C:2017:336

Case C-258/14 *Florescu*, EU:C:2017:448

Case C-177/17 *Demarchi Gino*, EU:C:2017:656

Case C-18/16 *K.*, EU:C:2017:680

Case C-215/16 *Elecdey Carcelen*, EU:C:2017:705

Case C-201/16 *Shiri*, EU:C:2017:805

Case C-298/16 *Ispas*, EU:C:2017:843

Case C-42/17 *M.A.S. and M.B.*, EU:C:2017:936

Case C-403/16 *El Hassani*, EU:C:2017:960

Case C-518/15 *Matzak*, EU:C:2018:82

Case C-64/16 *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117

Case C-557/16 *Astellas Pharma GmbH*, EU:C:2018:181

Case C-537/16 *Garlsson Real Estate and Others*, EU:C:2018:193

Case C-524/15 *Menci*, EU:C:2018:197

Case C-414/16 *Egenberger*, EU:C:2018:257

Case C-82/16 *K. A. and Others*, EU:C:2018:308

Case C-612/15 *Kolev and Others*, EU:C:2018:392

Case C-68/17 *IR*, EU:C:2018:696

Case C-288/17 *Fédération des fabricants de cigares and Others*, EU:C:2018:767

Case C-12/17 *Dicu*, EU:C:2018:799

Joined Cases C-569/16 and C-570/16 *Bauer*, EU:C:2018:871

Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, EU:C:2018:874

Case C-310/16 *Dzivev and Others*, EU:C:2019:30

Case C-193/17 *Cresco Investigation*, EU:C:2019:43

Case C-163/17 *Jawo*, EU:C:2019:218

Case C-566/17 *Związek Gmin Zagłębia Miedziowego*, EU:C:2019:390

Joined Cases C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra* and *X. and X. v Commissaire général aux réfugiés et aux apatrides*, EU:C:2019:403

Case C-235/17 *Commission v Hungary (Usufruct Over Agricultural Land)*, EU:C:2019:432

Case C-573/17 *Popławski*, EU:C:2019:530

Case C-619/18 *Commission v Poland*, EU:C:2019:531

Case C-469/17 *Funke Medien NRW*, EU:C:2019:623

Case C-476/17 *Pelham and Others*, EU:C:2019:624

Case C-516/17 *Spiegel Online*, EU:C:2019:625

Case C-556/17 *Torubarov*, EU:C:2019:626

Case C-467/18 *Rayonna prokuratura Lom*, EU:C:2019:765

Case C-507/17 *Google*, EU:C:2019:772

Case C-136/17 *GC and Others*, EU:C:2019:773

Case C-467/19 PPU *QR*, EU:C:2019:776

Case C-517/18 *Fédération des fabricants de cigars*, EU:C:2019:780

Case C-189/18 *Glencore Agriculture Hungary*, EU:C:2019:861

Case C-469/18 *Belgische Staat*, EU:C:2019:895

Joined Cases C-609/17 and C-610/17 *TSN and* AKT, EU:C:2019:981

Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982

Case C-785/18 GAEC *Jeanningros*, EU:C:2020:46

Case C-32/20 *TJ*, EU:C:2020:441

Case C-511/18 *La Quadrature du Net and Others*, EU:C:2020:791

Case C-66/18 *Commission v Hungary (Enseignement supérieur)*, EU:C:2020:792

Case C-311/19 *BONVER WIN*, EU:C:2020:981

Case C-824/18 *A.B. and Others (Nomination des juges à la Cour suprême – Recours)*, EU:C:2021:153

Case C-900/19 *One Voice and Ligue pour la protection des oiseaux*, EU:C:2021:211

Case C-896/19 *Repubblika*, EU:C:2021:311

Opinion of AG Jacobs in Case C-168/91 *Konstantinidis*, EU:C:1992:504

Opinion of AG La Pergola in Case C-299/95 *Kremzow*, EU:C:1997:58

Opinion of AG Léger in Case C-353/99 P *Council v Hautala*, EU:C:2001:392

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Opinion of AG Tizzano in Case C-101/01 *Lindqvist*, EU:C:2002:513

Opinion of AG Maduro in Case C-380/05 *Centro Europa 7*, EU:C:2007:505

Opinion of AG Sharpston in Case C-427/06 *Bartsch*, EU:C:2008:297

Opinion of AG Trstenjak in Case C-101/08 *Audiolux and Others*, EU:C:2009:410

Opinion of AG Kokott in Case C-489/10 *Bonda*, EU:C:2011:845

Opinion of AG Cruz Villalón in Case C-617/10 *Fransson*, EU:C:2012:340

Opinion of AG Cruz Villalón in Case C-176/12 *Association de médiation sociale*, EU:C:2013:491

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Opinion 2/13 *Adhésion de l'Union à la CEDH*, EU:C:2014:2454

Opinion of AG Szpunar in C-49/14 *Finanmadrid EFC*, EU:C:2015:746

Opinion of AG Wathelet in Case C-682/15 *Berlioz Investment Fund*, EU:C:2017:2

Opinion of AG Bobek in Case C-574/15 *Mauro Scialdone*, EU:C:2017:553

Opinion of AG Sharpston in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi*, EU:C:2010:560

Opinion of AG Sharpston in Case C-557/15 *European Commission v Republic of Malta*, EU:C:2017:613

Opinion of AG Bobek in Case C-298/16 *Ispas*, EU:C:2017:650

Opinion of AG Bobek in Case C-403/16 *El Hassani*, EU:C:2017:659

Opinion of AG Campos Sánchez-Bordona in Case C-524/15 *Menci*, EU:C:2017:667

Opinion of AG Sharpston in Case C-704/17 *D. H. v Ministerstvo vnitra*, EU:C:2019:85

Opinion of AG Campos Sánchez-Bordona in Joined Cases C-511/18 a C-512/18 *La Quadrature du Net and Others*, EU:C:2020:6

Opnion of AG Pikamäe in Joined Cases C-924/19 PPU and C-925/19 PPU *Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, EU:C:2020:294

Opinion of AG Bobek in Case C-83/19 *Asociaţia "Forumul Judecătorilor din România"*, EU:C:2020:746