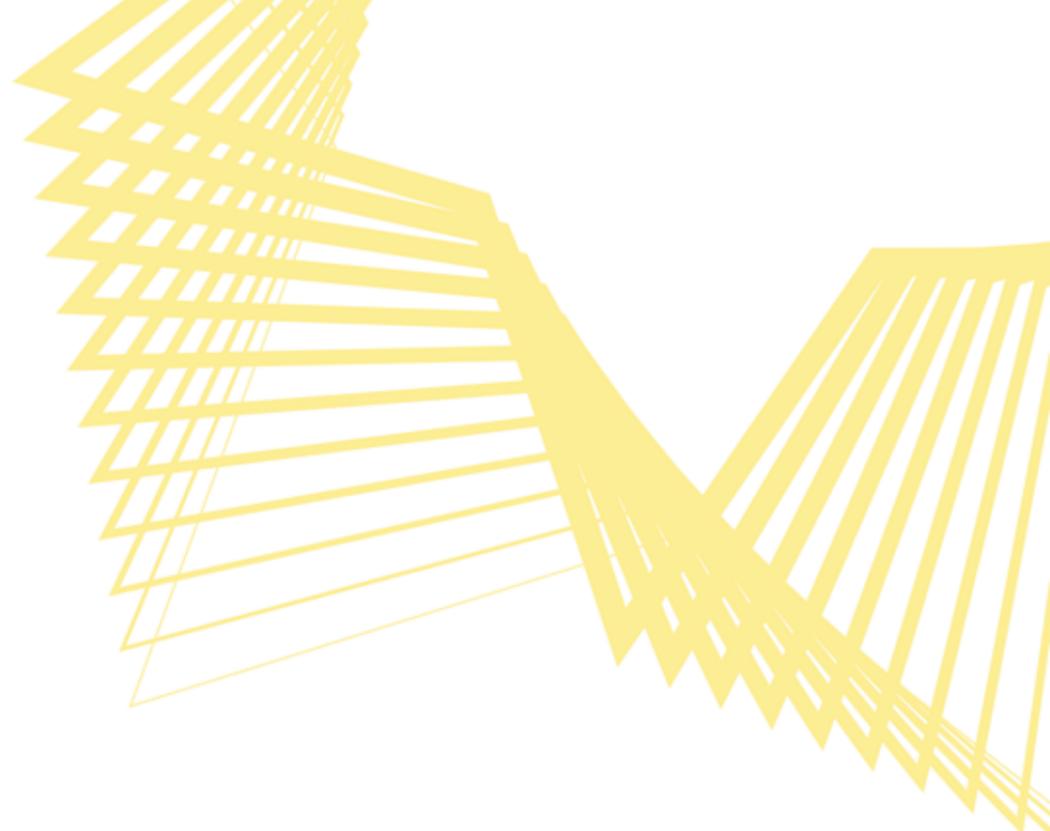


The Charter of Fundamental Rights of the EU

“in action”



BEST PRACTICES HANDBOOK

Training and Experience Exchange on Fundamental Rights



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1. PRESENTATION OF THE PROJECT

The project The Charter of Fundamental Rights of the European Union “in action” (CFR “in action” project), funded by Directorate-General for Justice of the European Commission, is coordinated by the Permanent Observatory of Justice of the Centre for Social Studies of the University of Coimbra and developed in partnership with the Institute of Human Rights of Catalonia (Spain), the University of Utrecht (The Netherlands) and the University of Szczecin (Poland). In order to strengthen the protection of fundamental rights in the European area and improve the tools available for the different judicial actors, the project The Charter of Fundamental Rights “in action” seeks to implement a comprehensive training programme for judges, prosecutors and lawyers focused on instruments for protecting fundamental rights in European law, namely the Charter of Fundamental Rights of the European Union. The project had the participation of 25 judges, 25 prosecutors, 25 lawyers and 25 judges who acted as trainers from each partner country and included classroom training, e-learning, national workshops, international exchange of good practices, national seminars and a final conference. In addition to the training programme, the development of a Training Manual to support the organisation of future training activities, a Handbook of Best Practices and a web platform with relevant information, seeks to encourage judicial actors to share experiences.

The main goal of this Handbook is to serve as a practical guide for judges, prosecutors and lawyers on the importance of training and experience exchange (nationally and internationally, and between different legal professions) on fundamental rights, as a result of the experience gathered during the CFR “in action” project implementation, namely the training sessions and the Experience Exchange Workshops (EEW) in Utrecht (the Netherlands) and in Szczecin (Poland). At the end of this handbook, there is a list of further reading and online resources on the subject, for any further development needed. These resources may be of interest to those seeking additional information on the application of the Charter.

National judges, prosecutors and lawyers are regularly faced with the application of fundamental rights in their daily work on issues such as racism, data protection, rights of the defendants in criminal proceedings, migration, violence against women, freedom of expression, and access to justice, among others. To solve the challenges that these cases present, they have to mobilise not only national law pertaining to fundamental rights (namely,

their Constitution), but also, in some cases, instruments that protect fundamental rights at a European level, such as the Charter of Fundamental Rights of the European Union. In fact, due to the frequent juxtaposition of rights between different instruments on the protection of fundamental rights (the most important being the national Constitutions, the European Convention on Human Rights and the Charter), it is important to clarify not only the scope of application of the Charter, but also the content of the rights protected, so that it lives up to its potential as an instrument that guarantees effective fundamental rights protection. The aim of CFR “in action” project was to promote and disseminate knowledge on the content, application and importance of the Charter and ensure that this instrument was correctly applied by judicial actors.

Appropriate and uniform application of the Charter has the potential to guarantee effective protection of fundamental rights within the European Union. However, this potential will not be realised if the legal professionals who apply the Charter – judges, prosecutors and lawyers – lack knowledge and awareness of the Charter rights and principles. According to FRA (2018: 46), “evidence suggests that judiciaries and administrations make only rather limited use of the Charter at national level” and it appears that hardly any policies aim to promote the Charter, although Member States are obliged to promote its application in accordance with their respective powers (Article 51 of the Charter). As such, “where the Charter is referred to in the legislative process or by the judiciary, its use often remains superficial” (2018: 46). In fact, in the case-law analysis carried out during the CFR “in action” project implementation, we observed some cases where the Charter should have been invoked and legal professionals did not invoke it, and others in which the Charter was not applicable and the legal professionals still invoked this instrument¹.

According to our research, the majority of best practices handbooks on fundamental rights do not specifically stress the importance of experience exchange on fundamental rights, from which it can be concluded that there is little reflection on the subject². The majority of literature on the Charter concerns the implementation of specific rights and principles, but

¹ See topic 2.3.

² On the contrary, there is more reflection on the relevance of training on fundamental rights, with various materials available. See, for example, European Commission, 2014; European Judicial Training Network, 2016; European Commission, 2015b.

not the importance of these exchanges. There is a clear predominance of official sources from the European Union³, originating from different projects on the Charter. Even so, we were able to find relevant materials, which will be featured throughout this handbook, particularly in the further reading section.

2. THE IMPORTANCE OF JUDICIAL TRAINING AND EXPERIENCE EXCHANGE

2.1. TRAINING ON FUNDAMENTAL RIGHTS AS A CORE SUBJECT OF PUBLIC POLICIES

The need for training on the Charter of Fundamental Rights is a consensual problem commonly recognised in the literature. Despite the evidence that legal professionals are more aware of CFR impacts, European Commission reports (2011, 2015, 2018) recognise the concern about the lack of knowledge on the application of the CFR by judicial actors and the need to increase awareness of the Charter and to support training for legal professionals on the subject. This statement is reinforced by two pieces of evidence: (a) legal professionals are still learning to assess the role of the CFR; and (b) the lack of knowledge about the scope of the Charter risks not applying its provisions in cases in which they could or should. In fact, one of the European Commission’s strategies to improve judicial training⁴ was to ensure that half of all legal practitioners in the EU (approximately 700,000 practitioners) were trained on EU law or on the national law of another Member State by 2020 (European Commission, 2018b: 2). When it comes to training, there appears to be an understanding that the quality of the services provided increases with the training of the different legal practitioners, which resulted in the slight improvement of the training offered on the Charter and in the achievement of the European Commission’s goal ahead of time (FRA, 2017: 51; European Commission, 2018b: 17). However, considerable differences still remain in terms of participation in training (across

³ See, for example, the following FRA handbooks on the protection of fundamental rights: “Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level”; “Handbook on European data protection law”; “Handbook on European non-discrimination law”; “Handbook on European law relating to access to justice”; “Handbook on European law relating to the rights of the child”; “Guardianship for children deprived of parental care”; “Handbook on European data protection law”; “Handbook on European law relating to asylum, borders and immigration”; and “Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union”. These handbooks can be accessed in <http://fra.europa.eu/en/publications-and-resources>.

⁴ For more information on the European judicial training policy, see https://e-justice.europa.eu/content_the_european_judicial_training_policy-121-en.do.

Member States and the various legal professions) and better, more targeted training to answer real needs is still a priority (European Commission, 2018b: 2).

On the other hand, according to the EU Agency for Fundamental Rights (FRA), the implementation of the Charter is not very significant in many European countries, which justifies the need for training and demonstrates the importance of a better awareness of the CFR. Some studies note that the importance of the CFR impact on national jurisdiction and legal practice is not completely clear (Di Federico, 2011; Peers, *et al.* 2014; Sarmiento, 2013) and is confronted with different judicial cultures and practices in each Member State.

In addition, FRA also states that, in the last few years, hardly any relevant public policies have been dedicated to promoting the application of the Charter, and the majority of Charter-related policy measures were only peripherally related to this instrument, even though the Member States are obliged to promote its application in accordance with Article 51 of the Charter (2017: 50). In fact, the training policy for judicial actors only has visibility in the media discourse on justice as a topic in its own right very sporadically, even though it is an issue that is widely reflected in several studies on the performance evaluation of the judicial system and is a recurring theme for both internal and external actors in that system when talking about justice (Gomes, 2018). We must highlight the importance of reforming the training policy of judicial actors as a condition for improving the efficiency of courts and the quality of justice (Gomes, 2018)⁵. As such, public policies should recognise the importance of and promote training on fundamental rights. Indeed, there are barely any examples of Member States analysing how the Charter is being used in legal practice (2017: 50).

With the project *The Charter of Fundamental Rights of the European Union “in action”*, we provided an extensive training programme for judges, prosecutors and lawyers, that focused on the application of the Charter, and has contributed to knowledge about the legal framework of fundamental rights and to sharing experiences and good practices. Thus, according to the experience gathered during the CFR “in action” project, which has reached

⁵ For example, in Portugal, the programme of the XXI Constitutional Government (2015-2019) only highlights the importance of specialised training. Cf. <https://www.portugal.gov.pt/ficheiros-geral/programa-do-governo-pdf.aspx>.

more than 400 judicial actors from the four partner countries, it is crucial for European institutions to keep funding and encouraging this type of projects.

Through a judicial actor survey (judges, prosecutors and lawyers), aimed at understanding their training needs on the Charter, the CFR “in action” team was able to identify some challenges. One of the cross-sectional challenges in the partner countries is the lack of judicial training on the application of the Charter of Fundamental Rights of the EU. At national level, it is important for Universities, Bar Associations and Judicial Training Schools to adapt their curriculums in order to reflect the significance of fundamental rights, with specific classes and training sessions focusing on the application of European Union instruments for the protection of fundamental rights, namely the Charter. In addition, active enrolment in judicial networks, as well as participation in experience exchange activities should be encouraged and valued by the Judicial Training Schools and training programmes in general. The inclusion of issues related to the promotion and protection of fundamental rights should be a priority for training schools and networks of judicial actors themselves. With this in mind, it is also highly recommended to continue support for linking together training activities carried out by different institutions (European Commission, FRA, EJTN, universities, among others).

In Portugal, only 13% of the respondents attended training on the Charter, which in most cases had a duration equal or inferior to two days and was of a more general nature, focusing on the Charter in general, its scope, principles and grounds, the case law of the CJEU and references for a preliminary ruling. In addition, 60% of the respondents stated that they did not attend training on the Charter due to the lack of training offered on the topic. Similar results were obtained in Spain. The majority of judges and lawyers had never received any training on the Charter (69% and 63%, respectively), the main reason being the lack of training offered. The previous training sessions on the Charter attended by the respondents focused on a diversity of topics, both of a more general nature and on the relationship of the Charter with specific areas of law and rights. In Poland, most of the respondents never attended training on the Charter (58.33%) and the training of those who attended generally lasted one or two days and focused on a variety of topics. The main reason for the lack of participation of the respondents on training has been the lack of relevant programmes on the Charter (71.43%), which may also be motivated by the decisions of the authorities responsible for the training, and the quantity of their administrative duties. Finally, in the Netherlands, the

majority of the respondents (67.14%) never attended training on the Charter, the main reason being the lack of suitable training programmes. The respondents that did attend training on the CFR only attended a few days of training (3 days or less), and those training sessions were often general courses on EU law where the Charter was only briefly covered, even though some respondents participated in training programmes that dealt with specific topics on the Charter. For this reason, we can conclude that there is a training deficit on the Charter in all partner countries.

As such, the proactive role of judicial actors is essential to the application of the Charter and the enforcement of fundamental rights. One of the best ways for judges, prosecutors and lawyers to better apply the Charter is to stay updated. With the ongoing changes in society constantly reflected in law, legal actors must stay informed and adjust to new developments. Due to the value attributed to the protection of fundamental rights, legal actors must become more aware of its significance, making it a learning priority. One important way to stay updated is to research current case law of the CJEU on the application of the Charter. This allows legal actors to ensure that they are applying the Charter correctly and in accordance with the most recent CJEU interpretation. Another way is to attend more training courses on the Charter, particularly on the areas they feel they have more difficulties in, or their areas of expertise⁶. However, a proactive role for legal actors can only be successful if they have access to training sessions, training materials and know how to use digital tools in order to search the most recent CJEU case law.

Important tools are currently being developed by the innovative CharterClick! project⁷. The main goal of this project is to create a toolkit that will assist victims of fundamental rights violations, lawyers, national judges, ombudspersons, equal opportunities bodies and other national human rights institutions in determining if a specific claim falls within the scope of

⁶ See, for example, the EJTN-FRA course on the “Applicability and Effect of the EU Charter on Fundamental Rights in National Proceedings” available in <http://www.ejtn.eu/About-us/Projects--Programmes/Human-Rights-and-Fundamental-Freedoms/HFR-2018/Applicability-and-effect-of-the-EU-charter-on-Fundamental-Rights-in-National-Proceedings-HFR201803/>.

⁷ “Don’t knock on the wrong door: CharterClick! A user-friendly tool to detect violations falling within the scope of the EU Charter of Fundamental Rights”.

application of the Charter⁸. In particular, the project team will develop the following resources: an admissibility checklist, aimed at detecting cases falling inside or outside the scope of the Charter; a database containing a selection of cases drawn from the case law of the Union and national courts, and from the practice of national human rights bodies which will complement the checklist; a document containing *Practical Guidelines on the application of the Charter*; and a document on *Best Practices* for those representing victims of breaches of fundamental rights as regards the identification of claims falling within the scope of the Charter⁹. Although it is still being implemented, and currently it only provides a draft version of the toolkit, when the project is complete, its final version will be freely available on the web platform.

2.2. THE IMPORTANCE OF EXPERIENCE EXCHANGE

According to the CFR “in action” project experience, the development of opportunities to gather and exchange information at national and international levels, and promote the knowledge and reflection of judicial actors on the Charter, should be regarded as an important priority in judicial training. In fact, the judicial actors that participated in the training programme stated that they found several benefits in having a space where they could come together and exchange experiences and best practices, explore the various issues facing the justice system and learn from the experience of other professionals.

According to the results of a survey carried out as part of a study undertaken for the European Parliament (Cougland *et al.*, 2011: 10)¹⁰, 22% of judges and prosecutors who responded had participated in judicial exchanges. Of these, 56% described them as very useful and a further 35% described them as useful to some extent. The same survey found that 90% of the respondents would appreciate measures to promote more contact with judges and/or

⁸ Cf. <http://charterclick.ittig.cnr.it:3000/> (last accessed on 23 October 2018) and <https://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/CharterClick/Charterclick> (last accessed on 23 October 2018).

⁹ Cf. <https://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/CharterClick/Charterclick> (last accessed on 23 October 2018).

¹⁰ This survey was carried out as part of a study compiled for the European Parliament by the Academy of European Law (ERA) in conjunction with the European Judicial Training Network (EJTN).

prosecutors from other Member States, with 57% supporting more joint training, 55% supporting more exchanges and 48% expressing interest in an online database or directory¹¹.

As pointed out by Dallara and Piana (2016: 41) “over the past decade networks of judges, prosecutors and legal professions have [...] spread increasingly across Europe”. These networks allow judges around the world to talk to each other, exchange opinions and even negotiate with one another over the outcome of specific cases (Dallara & Piana, 2016). In fact, “what circulates among these networks is not just references to judicial decisions [...], but more generally opinions, best practices and reports related to shared values and elements of rhetoric, judicial procedural standards and models of professional excellence” (Dallara & Piana, 2016: 42).

The European Judicial Training Network (EJTN) is a perfect example. This association is an important platform for the training and exchange of knowledge among the European judiciary, contributing significantly to the reinforcement of the European legal area (European Parliament, 2017: 17). Within the scope of activities promoted by the EJTN, we would like to emphasize their Exchange Programme for Judicial Authorities.

Cross-border exchanges allow professionals who come from different Member States and encounter the same professional challenges to work together and understand the law and the practical aspects of applying EU law in other Member States (European Commission, 2015a: 12). The exchanges promoted by the EJTN focus on building mutual trust among legal actors, as well as developing their knowledge of national legal systems and European and human rights law (European Parliament, 2017: 17). This promotes direct contacts and the exchange of views and experiences between judges, prosecutors and trainers from different EU Member States (European Parliament, 2017: 21).

According to the European Parliament, the impact of judicial exchanges is not limited to those who had the opportunity to go on an exchange. In fact, exchanges also benefit the “tutors” and, likewise, Exchange Programme participants share their experience with their colleagues when back in their own countries. Further, “one should consider the multiplying effect of

¹¹ The survey received over 6,000 responses from judges and prosecutors, representing 5% of all judges and prosecutors in the EU. For a detailed analysis of the survey methodology, see Coughland et al., 2011: 17-19.

group exchanges where there is a constant dialogue between colleagues from different countries” (European Parliament, 2017: 23). Most importantly, because of the exchange, the beneficiaries feel they belong to a common judicial culture. They can exchange views and experiences with legal actors from other European Union Member States, conduct in-depth comparisons on how their legal systems work in practice, reflect on their own practice, get useful contacts, and so on. All of these are crucial to fostering mutual trust and understanding (European Parliament, 2017: 23).

In line with the best practices identified by the European Commission (2014: 47), the development of training experiences that bring together different professionals (judicial and non-judicial) and involve multidisciplinary approaches “has proven itself to be very successful, as it is valuable for every target group of participants to be able to see the process from another profession’s viewpoint” and “allows all the players within (and outside) the judicial community to develop an understanding and a higher level of awareness of the justice administration as a whole”. Likewise, the exchange of experiences among judicial actors also plays an important role in training.

Setting up forums, such as workshops or online platforms, at regional, national or international level, for the exchange of experiences and expertise among judicial actors ensures the effective protection of fundamental rights. Through the exchange of ideas, best practices, different viewpoints, practical issues, reflections, challenges, failures, jurisprudence and case studies, participants are able to learn from the experience of other legal actors and/or other countries, and therefore enrich their own judicial system.

As such, Member States and judicial training institutions must promote cooperation among judicial actors and the exchange of experiences and best practices, recognising the enriching effect of those exchanges. According to FRA, the EU and Member States should encourage the exchange of information and experiences between judges, bar associations and administrations within the Member States, but also across national borders (FRA, 2018: 46).

2.3. THE HETEROGENEITY OF CHARTER APPLICATION REINFORCES THE IMPORTANCE OF JUDICIAL TRAINING AND EXPERIENCE EXCHANGE

Training programmes and experience exchanges on the enforcement of fundamental rights and the application of the Charter are particularly relevant due to insufficient training in this field, but also in view of the heterogeneity in applying this instrument, both at the national level and between the different countries. In order to reinforce the correct implementation of the Charter, we must be aware of this heterogeneity and, therefore, the experience exchange workshops played a prominent role during the implementation of the CFR “in action” project. To identify the main challenges involved in applying the Charter in the four partner countries, we relied on information gathered through two main methods: 1) the mapping of national and CJEU case law in the application of the Charter; and 2) the implementation of a judicial actors survey (judges, prosecutors and lawyers) aimed at understanding their training needs regarding the Charter.

Although not representative of the whole judiciary, and thus merely illustrative, the data sample collected through the survey allowed us to draw some important conclusions. As already mentioned, one of the cross-sectional challenges in partner countries is the lack of judicial training on the application of the Charter of Fundamental Rights of the EU. In fact, most of the challenges emerge from the lack of training of judicial actors on the content, application and importance of the Charter and could easily be avoided with more training and more information, such as training materials.

On the other hand, national case law analysis¹² shows that in Portugal, in most cases, national courts do not apply the Charter. Usually, the Charter is invoked or mentioned in the decisions only as a non-decisive “ornament” to contextualise them, next to other sources of fundamental rights (namely the ECHR and the Constitution). This means that there is rarely a specific enforcement decision using the rights and principles of the Charter. The references to this instrument are mostly used to provide a comprehensive framework of the fundamental rights in question. For example, in Portugal, in the 75 cases where the Charter was mentioned,

¹² The researchers entered the term “Charter of Fundamental Rights of the European Union” in the publicly available database. The reviewed cases have been restricted to those that were dealt with by highest courts (supreme courts or constitutional courts). Next to that, only rulings within the period of 1 January 2015 until 31 December 2017 were analyzed.

it was only directly applied and considered in 13. In addition, according to the survey results, 72.5% of the respondents never applied or worked on cases in which the application of the Charter was raised. On the contrary, judicial actors seem to be less apprehensive of the application of other instruments on the protection of fundamental rights such as the ECHR¹³. Along these lines, a few judicial actors question the importance of the Charter and the necessity of resorting to such instrument in their decisions, arguing that adequate protection of fundamental rights can be achieved by other sources such as national Constitutions and the ECHR. However, we must bear in mind that the protection of fundamental rights in the EU also depends on its assimilation, mainly by the judicial actors of Member States, and that according to the inter-constitutionality framework it is not enough to solve conflicts of fundamental rights in the light of the national constitution, because the problem concerns all citizens of the Union, who may benefit from a higher level of protection through a binding precedent from the CJEU (Silveira, 2014).

This was not the case in all partner countries. In fact, in the Netherlands, the status change of the Charter from legally non-binding to a binding instrument in 2009 resulted in a massive increase in cases where the Charter is invoked or mentioned¹⁴. In addition, in almost half of the cases analysed the Charter is mentioned on its own and, therefore, it is not invoked together with the ECHR. This has to do with the fact that some of the most commonly invoked Charter provisions do not have an equivalent in the ECHR (for example, Articles 8, 21 and 24 of the Charter) and that some Charter provisions have a bigger scope than the equivalent ECHR provisions (for example, especially in migration law, Article 47 of the Charter). As such, the case law analysis of the Charter in the Netherlands does not show that the Charter is mainly mentioned or invoked as a non-decisive ornament. The rights of the Charter are directly invoked and used in decisions.

¹³ This could be due to the fact that the ECHR entered into force in 1950, providing enough time for judicial actors to acquaint themselves with its content, and that there is extensive case law from the ECtHR, allowing for a better application of said instrument. In fact, although the Charter was proclaimed in 2000, it only became part of the primary law of the EU with the adoption of the Treaty of Lisbon, on 1 December 2009. The relatively short time span since the entry into force of this instrument could explain the difficulties felt by judicial actors.

¹⁴ The number of cases where the Charter was mentioned increased almost exponentially from 2001-2011, but this development has not carried on. Nonetheless, every year there is still an increase in cases where the Charter is mentioned compared to the previous year (2014: 192; 2015: 214; 2016: 238; 2017: 269).

Another challenge faced in most partner countries was the lack of knowledge of the scope of application of the Charter. According to Article 51 of the Charter, the provisions of the Charter are addressed to the institutions and bodies of the Union (with due regard for the principle of subsidiarity) and to Member States “only when they implement Union law”. According to FRA (2018: 39), CJEU case law interprets this expression widely, meaning “acting within the scope of EU law”. However, the limits of the scope of EU law are not always easy to define and this is reflected on the application of the Charter by national courts. For example, in Portugal, we were able to identify some cases, mainly preliminary ruling requests, where the Charter was wrongly invoked since, according to national courts, there was no implementation of Union law¹⁵. In the limited number of cases where the Charter is invoked as an instrument for the protection of fundamental rights, we therefore find several situations that expose a lack of knowledge among judicial actors regarding its scope of application. This reveals significant inexperience regarding Union law and makes us question the existence of (several) other cases in which they do not invoke the Charter when they could (or should). In addition, according to the survey results, it appears that legal professionals have difficulties in establishing the competence of national courts for the application of the Charter, in upholding the rights guaranteed by the Charter against a national law or legal practice and in the relationship of the Charter with existing systems of fundamental rights protection.

Another shortcoming we were able to identify was the limited use by national courts of the preliminary ruling mechanism of the CJEU. As is well known, the role of this procedural tool is to ensure uniformity of interpretation or to verify the validity of European Union law. The CJEU’s jurisprudence can play an important role in the effective implementation of the Charter. In fact, its impact goes beyond specific cases, since it has an influence in the Charter process of interpretation and application by the different national actors.

¹⁵ For example, in the case no. 01210/13 of the Supreme Administrative Court, the claimant, a private legal entity, argued for the violation of several rights of the Charter, including Articles 16 (freedom to conduct a business) and 17 (right to property), claiming the direct applicability of European Union laws. However, the court did not apply the Charter – according to the Supreme Administrative Court, the payment of an advertising tax concerns the application of Portuguese law and not European law. The same lack of knowledge on the scope of application of the Charter can be found, for example, in case no. 29101/14.9TTLSB.L2.S1 of the Supreme Court of Justice. After several Charter articles were invoked, the court concluded that the case fell outside the scope of application of the Charter – the approval of State Budget is part of the competence attributed to States by national law and thus does not concern the application of Union law.

According to results collected from the survey¹⁶, 87.7% of the Portuguese respondent judges, 87.53% of the Spanish judges, 63.64% of the Polish judges and 80.49% of the Dutch judges stated that they had never raised any question to the CJEU on the Charter. In addition, in cases where national courts did resort to the preliminary ruling mechanism, the CJEU stated frequently that it had no jurisdiction to rule on the questions referred for preliminary ruling by Portuguese courts. According to CJEU case law analysis¹⁷, from January 2010 to December 2016 the CJEU refused to hear the reference for a preliminary ruling in at least four cases (C-128/12, C-264/12, C-258/13 and C-665/13) on the grounds of Article 51 of the Charter. These cases have a similar and recurrent reasoning to support the refusal by the CJEU summarised by the expression: the case did not contain any specific element enabling the view to be taken that the law in question sought to implement EU law. The case law analysis also shows the same difficulty in cases from Poland (C-50/16, C-282/14 and C-28/14) and Spain (C-198/13, C-265/13, C-117/14, C-380/15, C-395/15, C-532/15 e 538/15).

It seems clear that there is a misperception of Portuguese courts, and perhaps of the courts of other countries, about the scope of CJEU that could be explained by the lack of Member State familiarity with European institutions.

¹⁶ The survey included a question addressed only to judges on the referral of questions to the CJEU, especially on the Charter.

¹⁷ This information was gathered through the analysis of CJEU decisions from January 2010 to December 2016. The delimitation of the study universe and the definition of a significant sample of cases was extremely difficult, mainly because the majority of CJEU decisions refer to the Charter while providing a framework of European law. On consulting the search form available on the CJEU web page (<https://curia.europa.eu>) we opted to research the case law available according to two criteria: the subject-matter criteria (which allows us to search by subject) and the systematic classification scheme criteria (which allows us to search using the classification scheme of the Case-law Digest, which is a systematic collection of the summaries of judgments and orders published in the European Court Reports and the European Court Reports-Staff Cases). Using the subject-matter criteria, we selected the following options: “fundamental rights” and “Charter of Fundamental Rights”. Using the systematic classification scheme criteria we selected the following options: “1. the legal order of the European Union”, “1.04 Fundamental rights” and “01.04.02 Charter of Fundamental Rights of the European Union”. A separate search of the two criteria produced a set of relevant decisions on the application of the Charter. After individual analysis and consultation of the text of the decisions, we were able to select a sample of 161 cases.

3. BEST PRACTICES IN JUDICIAL TRAINING FOCUSING ON FUNDAMENTAL RIGHTS

3.1. MAKING TRAINING ATTRACTIVE: ADJUSTING TRAINING PROGRAMMES TO THE CONTEXT

In the CFR “in action” project, we used a variety of training needs assessment methods: 1) a survey addressed to judges, prosecutors and lawyers, through which these legal professionals specified topics needing to be covered by the training, before designing the training programme (paper and/or online); 2) informal meetings with key actors; and 3) evaluation forms/questionnaires to be answered after each one of the training sessions, including requests for suggestions of topics to be included in future training actions and training organisation items to be improved. As was done during this project implementation, it is important to combine several methods in order to obtain the best results possible and eliminate possible shortcomings.

Even though not representative of the experiences and opinions of all judicial actors due to the restricted universe of responses¹⁸, the survey still allowed us to draw some important conclusions on the training needs of the different judicial actors (including the suggestion of specific topics to include in the training sessions within the project) and their familiarity with or distance from the application of the Charter.

When questioned about their experience with the application of the Charter, the majority of legal actors stated that they had never applied or worked in cases in which the application of the Charter was raised – 72.5% of the respondents in Portugal; 56% and 62% of the judges and prosecutors, respectively, in Spain; and 52.86% of the respondents in the Netherlands. The rare application of the Charter by national courts is also evident in the case law analysis conducted by the CFR “in action” team in Portugal¹⁹. The respondents were also questioned on whether, having applied the Charter or questioned its applicability, they identified problems in interpreting and applying its standards and what the main difficulties were. There are some differences in each country. In Portugal, the responses were predominantly negative

¹⁸ In Portugal there was a total of 253 responses (from 1 February to 30 March 2017), in Spain there were 485 responses (from 1 February to 6 March 2017), in Poland 24 (from 19 February to 19 March 2017) and in the Netherlands 70 responses.

¹⁹ As already mentioned, in the 75 cases where the Charter was mentioned, it was only directly applied and considered in 13.

– 67.2%. For those who responded positively, the main difficulties were divided between: 1) when and how to uphold the rights guaranteed by the Charter against a national law or legal practice; 2) how to guarantee the rights provided for in the Charter in practice. Thus, for the majority of legal actors, the main difficulties do not pertain to the interpretation of the Charter provisions, but the conditions for its specific application²⁰. In Spain, 67% of lawyers, 10% of prosecutors and 46% of judges said that they had difficulties with the interpretation and application of the Charter. The matters that caused more difficulties are very similar among the different judicial actors – the majority of difficulties arise from the interrelation between the CFR and other systems of protecting existing fundamental rights, the guarantee of the rights protected by the Charter and their effects in practice, the interpretation and application of the Charter in general and the powers for applying the CFR at national level through national courts. In Poland, only one person answered, underlining the difficulty in applying rights concerning economic freedom. Finally, in the Netherlands 63.64% of the respondents had difficulties in applying the Charter. The matters that caused the most difficulties were the scope of the Charter, Charter rights and their effects in practice, the correlation of the Charter with existing systems of Fundamental Rights protection, the competence of national courts for application of the Charter and the upholding of rights guaranteed by the Charter against a national law or legal practice.

With respect to the topics considered most relevant to training on the Charter of Fundamental Rights, there were some slight differences in each country. In Portugal, we can highlight the following: documental sources on the CFR, limitations and conflicts among rights and the EU's legal instruments of support for the implementation of the Charter. In Spain, the respondents wanted training to cover the following matters: rights and principles guaranteed by the Charter; the scope of application of the Charter; the competence of national courts to apply the Charter at national level; the applicability of the Charter at national level; the relationship between the Charter and other systems for the protection of fundamental rights; and when and how to defend the rights guaranteed by the Charter against national law or national

²⁰ The few cases where judicial actors admitted having constraints in the interpretation of Charter provisions concerned the following rights: right to freedom of expression and press; right to a fair trial; right to property; right to good governance; criminal investigations (illegal police actions), detention and coercive measures; criminal procedure provisions; and the compatibility of the right to reputation and the right to freedom of expression.

practice. In the Netherlands, respondents would like to receive information on the following topics: the scope of the Charter; horizontal effect; ex officio application; and the relation of the Charter to the ECHR. Most of the respondents also indicated that courses where the application of the Charter in a specific field of law is dealt with are welcome.

During the CFR “in action” project implementation, recognising the importance of regularly reviewing and updating training programmes to match the new training needs of the target group, the CFR team and the trainers were able to adapt the programme and the contents of the training over time, in accordance with the information gathered in the evaluation questionnaires. Moreover, the participation of trainees in the forum set up on the online platform allowed for the compilation of questions and topics to be answered or prepared by trainers in future training sessions.

A general analysis of the results of the training needs assessment illustrates different situations in the four countries. In Spain, there was evidence of a higher quality training offer on the Charter, even though it was not accessible to all the different legal practitioners²¹. This justified, for example, the extension of the training sessions for judges. Moreover, in the case of the judges who act as trainers, the training programme was organised with the Judicial School, which considered more appropriate to adapt the training to an e-learning format, with a dual objective: 1) to facilitate the follow-up of the participants, which usually have limited available time; 2) and to increase the handling of these trainees with e-learning training and, in this way, extend it to other judges. In the Netherlands and Poland, the availability of legal actors to attend training was very limited, which led to some difficulties in achieving a greater number of participants. As such, in Poland it was necessary to make training attractive to legal practitioners by focusing on the discussion of a huge amount of case law. In Portugal, there is little training on the Charter, particularly on the application of this instrument. The sample of cases analysed allows us to conclude, on the one hand, that the references to the Charter in the decisions of Portuguese supreme courts are minimal and, on the other hand, that in the majority of cases where the Charter is mentioned it is deemed not applicable.

²¹ This can be seen, for example, in the sample of judicial actors that responded to the survey in Spain, since the main reason for not having training on the Charter was the lack of an adequate training offer.

3.2. THE TRAINING PROGRAMME AND THE METHODOLOGIES

The cooperation of judicial institutions

The cooperation of judicial institutions, such as the High Council of the Judiciary, the Judicial Training Schools, the Prosecutor General’s Office and the Bar Association, is fundamental for developing the training programme, particularly for the selection of the target group of trainees and for the implementation of the training programme, insofar as they, for example, may be responsible for granting leave to judicial actors in order for them to attend the training sessions. The articulation with judicial institutions may be enhanced and they can partake in drawing up the training programme and even help with publicising training activities.

The importance of developing a cohesive training programme instead of separate training sessions

The development of a cohesive training programme has several advantages compared to separate training sessions. A consistent training programme allows us to provide sustained and extensive knowledge on the Charter of Fundamental Rights, focusing on multiple aspects, namely its scope of application, the case law of the CJEU, the rights and principles of the CFR and its impact on specific areas of law. In addition, it has the advantage of providing sufficient time for individual study, critical reflection and consolidation of knowledge, which is hard to achieve in separate training sessions, and of maintaining a solid group of trainees that acquire knowledge and reflect on the same subject for an extended time. Finally, a cohesive training programme also makes it possible to continuously update participants’ training needs.

The multidisciplinary expertise of trainers

Apart from trainers that have high technical expertise, recognised intellectual, professional and scientific merit and advanced training experience on the Charter, the CFR “in action” team also selected trainers with multidisciplinary expertise in areas such as law and sociology, in order to bring together different perspectives. The selection should be made in order to include different trainer profiles – academics and legal professionals, national and international experts and, if possible, trainers with experience in international courts.

The diversity of target groups

Another best practice in judicial training identified by the CFR “in action” team, specifically in Portugal, is the implementation of both joint training sessions (with different legal actors, including judges, lawyers and prosecutors) and individual training sessions (specific to each professional body), in order to promote the exchange of experiences between participants of the same professional body and of different professions. However, this might not be the case in all countries, and therefore it is important to know the specific context and identify the situations in which this practice can be beneficial. In fact, the implementation of training sessions with different legal professionals could also have the contrary effect. For example, in the Netherlands, the presence of some legal actors inhibited others from sharing experiences and engaging in discussions with the trainer and other legal actors.

The combination of different training formats

In order to achieve the best results, the CFR team opted to use e-learning (one for each professional body) as a complementary method of classroom training to further develop the knowledge acquired by the trainees. The combination of different training formats has several advantages, particularly in adjusting training to participants’ availability without disrupting their daily work. In addition, the e-learning training allowed enough time for the participants to read, reflect, consolidate knowledge, do practical exercises and participate in the debates that the trainers initiated.

The use of interactive platforms

One of the tools available on the e-learning platform was a forum, which allowed for the exchange of experiences, good practices and materials and for the compilation of questions and topics to be answered or prepared by trainers in future training sessions. This forum will remain open after the end of the project, functioning as a space for the reflection on and dissemination of the Charter.

Training methodologies

In the experience of the CFR “in action” project, training programmes should implement both a theoretical and practical approach to the training topics (with a particular emphasis on the practical aspects of training) and use active participation methods. The CFR team recognised

the importance of expository lectures, followed by a discussion (6 hours), especially in the initial phase of the training programme. However, the following training sessions had a more interactive methodology, which allowed trainees to actively participate, and encouraged debate on the application of the CFR and the importance of fundamental rights, particularly through the discussion of case law. Since the participants already have advanced training in law, they wish to discuss specific situations and explore their day-to-day difficulties in implementing the CFR and the protection of fundamental rights.

4. BEST PRACTICES IN EXPERIENCE EXCHANGE AMONG JUDICIAL ACTORS ON FUNDAMENTAL RIGHTS

One of the main goals of the CFR “in action” project was the exchange of knowledge and best practices among judicial actors. As described before, the heterogeneity of the Charter application in the different countries, but also nationally in each partner country, justified the option to include two Experience Exchange Workshops in this project, in the Netherlands and Poland. Throughout these workshops, it was possible to bring together legal actors from the four partner countries and enable them to share values, exchange experiences and discuss different perspectives on the content, application and relevance of the Charter. This exchange was achieved namely by sharing and discussing national case law on the application of the Charter and by understanding how this instrument is being mobilised by national courts and the CJEU.

Nonetheless, we can also identify another occasion that encouraged the exchange of experiences among judicial actors at the national level, namely in Portugal – the joint training sessions implemented at an early stage of the training programme. The decision to carry out joint training sessions in the beginning of the training programme was a pedagogical one. In fact, the results of the survey showed the need for the implementation, at an early stage, of a common core curriculum aimed at all participants, since the vast majority of respondents did not have any experience in the application of the Charter or any training in the subject. Therefore, the CFR team decided to promote one training session aimed at all judicial actors and focused on general training on the subject. Even though it was not its main goal, this

common training session also ended up providing opportunities for networking and the exchange of experiences between different legal actors.

The CFR “in action” project held two Experience Exchange Workshops (EEW) that took place in Utrecht, the Netherlands (29 January 2018), and in Szczecin, Poland (18 May 2018). Each workshop lasted 8 hours (1 day) and was attended by 17 and 16 participants, respectively, selected among the training course participants (judges, prosecutors and lawyers) from the different partner countries. Moreover, two keynote speakers with relevant knowledge and experience on the implementation of the Charter were also invited to each workshop.

The EEW’s main goal was to create spaces for discussion, providing an opportunity for multilateral interactions between legal practitioners and facilitating the exchange of knowledge, challenges and best practices on the scope and specific application of the Charter. These workshops also enabled a better understanding of the complexity and specificity of the legal framework and practices of fundamental rights, strengthening cross-border cooperation between legal actors and developing a common legal culture.

The participants from each partner country brought one case – they were thus required to tune and agree on cases beforehand. Each case was presented and discussed. Participants could choose who would present it and how they would do this. In the presentation, the facts of the case, the central question and the court’s decision had to be made clear. They could end the presentation with a question for the other participants. Participants were able to bring national cases or CJEU cases. They could choose for themselves, as long as the cases were relevant and interesting in relation to the central themes. For a fruitful discussion, the cases chosen were to be sent to all participants in advance. All cases (or at least a summary) were translated into English. The discussion focused on the central themes of the day: 1) the social, political and legal challenges to the implementation of the Charter of Fundamental Rights, including an analysis of the interaction between the Charter and other fundamental rights instruments; and 2) the personal scope of the Charter.

The workshops were presented in English in an attempt to achieve better development of language skills, since cross-border training activities should use a common language

understood by a wide range of the target group or provide high-quality interpretation to remove linguistic barriers to participation (European Commission, 2015a: 13).

Stimulate cross-border experience exchanges

Another way for judges, prosecutors and lawyers to stay updated and thereby better apply the Charter is to keep on participating in cross-border experience exchanges. Training developed with only national participants is insufficient. The Charter is a *European* fundamental rights instrument. Therefore, it is not only important to get to know the application of the Charter by the courts of one Member State, but also to get to know the application of the Charter in other Member States. In this way, it will be easier to understand the decisions of the CJEU on the Charter, since the CJEU sometimes takes national applications and circumstances into consideration in its decisions.

Selection of participants

When selecting the participants, we must favour legal professionals with an in-depth knowledge of the application of the Charter and key actors able to increase awareness of the issue among other judicial actors, such as the judges who act as trainers. In addition, the number of participants should be balanced in order to be sufficient to encourage discussion and bring different perspectives, but not too many, otherwise it could create barriers to the exchange. Finally, the participants must be able to speak and understand English, in order for them to actively participate in the exchanges.

The stimulation of individual reflection

One of the best practices identified during the CFR “in action” project implementation was encouraging individual reflection among judicial actors. That is, in addition to the discussions held during the training sessions, the trainees were invited to reflect on the implementation of the Charter and the protection of fundamental rights in two main ways. First, following the first sessions of classroom training, the trainers suggested some questions for the trainees to think about (through the e-learning platform) be discussed later in the classroom sessions. Second, the trainees selected to participate in the Experience Exchange Workshops were invited to present a text on the case law review presented and discussed in those workshops.

Thus, bearing in mind the importance of the case law analysis done by the judicial actors in the Experience Exchange Workshops in Portugal, the team members considered it appropriate to publish the analysis presented and discussed by the Portuguese judicial actors in those workshops in one of the *CFR Newsletters*. This was a way of disseminating the discussions held in those experience exchanges to all Portuguese participants in the CFR “in action” project training programme, and reach the widest possible number of legal professionals.

The discussion period

Another best practice identified by the CFR team is to provide plenty of time for discussion, to meet the expectations of the participants and make their participation in the exchanges worthwhile. To this end, the CFR team made sure that the initial opportunity to contextualise the exchange was brief, leaving more space for discussion.

The importance of informal moments

Participants must be aware that the exchange of experiences and good practices may happen not only in the training sessions, but also during the informal moments, namely those of a social nature. A substantial number of exchanges happen during these moments, as a result of different interactions between the legal actors.

The importance of case law analysis and sending the cases in advance

The selection of national case law is extremely important in order to understand how the Charter is being effectively mobilised by the courts of different Member States. In addition, it is extremely important that the cases for discussion are available to the participants in advance, in order for them to read them thoroughly and prepare for the discussions.

The main challenges

One of the main challenges identified in the EEWs was the language barrier. As previously mentioned, the workshops were presented in English, in order to use a common language understood by the majority of respondents. However, this created additional difficulties. For example, some trainees, despite fulfilling all the other necessary requirements, wished to

participate in the EEWs but couldn't, because they didn't speak English fluently and required simultaneous translation.

Another challenge was the lack of availability of the judicial actors to participate in the workshops. The majority did not consider that their participation would bring added value to their career. As such, it is important that public policies promote these initiatives. For example, in Portugal, the Centre for Judicial Studies values the participation of their teaching staff in this type of exchanges. This should be a general practice in order to increase the participation of legal professionals. Finally, the high workloads of the judicial actors were also an obstacle to their availability to participate in international exchanges of experiences and good practices. For example, in Spain, an additional difficulty in participating in the EEW was the political context in Catalonia during those months, which was complicated and generated much uncertainty in the work agendas of the judicial professionals.

4.1. THE EEW DISCUSSIONS

The texts presented in annex were drawn up by the judicial actors who participated in the EEW and served as support for the presentation and discussion of relevant case law on the Charter of Fundamental Rights of the European Union in those workshops. During the presentations, the facts of the case, the central question and the court's decision were made clear and the participants ended by raising a question for discussion. The discussion focused on the central themes of the day, namely, the social, political and legal challenges to the implementation of the Charter of Fundamental Rights, including an analysis focusing on the iteration between Charter and other fundamental rights instruments.

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ANNEX - THE EEW DISCUSSIONS

Case of Sindicato dos Bancários do Norte, Sindicato dos Bancários do Centro, Sindicato dos Bancários do Sul e Ilhas, e Luís Miguel Rodrigues Teixeira de Melo v. BPN - Banco Português de Negócios, S.A. – C-128/12

Diogo Ravara, Judge, Portugal

1. The Case in Portuguese Courts

The case emerges from a preliminary ruling request presented by the Porto Labour Court Portugal, in the context of two joint cases opposing three regional trade unions representing workers in the banking sector (claimants of case a) and a worker represented by one of them (claimant of case b), to a state-owned bank (defendant in both cases).

2. Relevant facts of the case:

BPN Bank was nationalised in November 2008.

In order to reduce public expenditures, the Annual Budget Law for the year 2011 ([Law 55-A/2010²²](#)) included several norms imposing salary cuts, which applied not only to civil servants, but also to state-owned companies, including the ones subject to private labour law. Those cuts were set forth in Art. 19 of the same law.

BPN complied with those norms and consequently reduced the salaries of its employees, including the fourth claimant, Mr. Luís de Melo.

3. The Case in the Porto Labour Court and the reference for a preliminary ruling

On 21 September 2011, ruling on a case where the conformity to the aforementioned norms was challenged (*in abstracto*), the Portuguese Constitutional Court decided that they did not violate the principle of equality and non-discrimination laid down in Article 13 of the Portuguese Constitution²³. Nevertheless, the Porto Labour Court, in a decision dated 22 December 2011, decided that the same norms violated the *principle of equality and non-discrimination* enshrined in EU Law.

Considering that there were serious reasons to believe that Art. 19 of the Budget Law was not in conformity with EU law, and in order to rule on such case, the Porto Labour Court referred the case to the Court of Justice of the European Union (CJEU).

4. The Court's Assessment

The Court noted that according to Articles 53(2) and 93 (a) of its Rules of Procedure, following a previous opinion of the Advocate General, it may decide to reject the case.

The Court also noted that in the context of a preliminary ruling procedure it can only interpret EU Law (Art. 267 of the [Treaty on the Functioning of the European Union²⁴](#)), and stressed the fact that

²² Which we will refer to as ABL.

²³ [Judgment of the Portuguese Constitutional Court no. 396/2011.](#)

²⁴ TFEU.

according to Article 51(1) of the [Charter of Fundamental Rights of the EU](#)²⁵ “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, the Court found that although the Porto Labour Court expressed serious doubts regarding the conformity of the State Annual Budget Law for the year 2011 with several principles and aims enshrined in the Treaties, the reference for a preliminary ruling did not contain any specific element allowing the Court to conclude that the aforementioned budget law aims to apply EU Law.

5. The Court’s decision

The Court of Justice of the European Union clearly lacks jurisdiction with regard to the request for a preliminary ruling from the Porto Labour Court²⁶ (Portugal), made by decision of 6 January 2012.

6. The court’s reasoning in the context of its case law

In order to understand the Court’s reasoning in this case, it is important to determine the exact meaning of the expression “EU law” in the context of Article 51(2) of the CFREU. Generally speaking, one can perhaps argue that according to the case law of the Court, it does not necessarily take an actual legislative act to cover this concept: it suffices that national legislation covers topics included in the range of application of EU law or have some kind of link with it. That may occur when Member States:

- a) Apply the Treaties, principles of EU law, or Regulations;
- b) Transpose Directives, or legislate in order to implement principles of EU law;
- c) Exercise the possibility of derogation of EU law;
- d) Exercise the right to use sovereignty clauses;
- e) Approve and apply domestic law in areas covered by EU law
- f) Apply domestic law that infringes the Principle of Effectiveness of EU law

However, the Court has consistently argued that it is up to National Courts to establish whether the MS is or is not applying EU law. This explains the importance of a clear identification of which “EU Law” is at stake in the context of the case discussed in domestic courts. National courts must, therefore, pay special attention to the fulfilment of this requisite in the case, and *play safe*, by stating it very clearly, preferably including this reference in the phrasing of the questions submitted to the ECJ.

7. A critical overview of ECJ’s reasoning: Towards an alternative path

With all due respect to the Court’s decision on the case in question, the assertion that the “*the reference for a preliminary ruling did not contain any specific element allowing the Court to conclude that the aforementioned budget law aims to apply EU Law*” is, at the very least, highly debatable.

In fact, in the decision issued by the Porto Labour Court containing the request for a preliminary ruling this court states (and I quote) “BPN Bank presented its defence (...), maintaining, among other arguments, that, in fulfilling its obligations arising from Article 104 of the Treaty of the European Economic Community²⁷, and also from the Pact for Stability and Growth (regulations CE [1466/97](#) and [1467/97](#)²⁸), the Portuguese State assumed special responsibilities towards meeting the goals set forth

²⁵ CFREU.

²⁶ Porto Labour Court.

²⁷ TEC.

²⁸ These Regulations were revised during the year 2011, by Regulations [1175/2011](#) and [1171/2011](#).

in the Programme for Stability and Growth for the years 2010-2013, and in order to reverse the situation of excessive deficit (...) the Annual Budget Law of the State for the Year 2011 (...) contains several practical measures in order to reduce the level of public expenses (...)” (end of quotation). The same court decision also links these goals to the norms of the aforementioned Art. 19 of the same budget law.

Although it may be true that the Portuguese Court could have clarified that Art. 104 TEC corresponds now to Art. 126 TFEU, it is also true that it could have invoked Art. 162(7) of the same treaty, which foresees the possibility for the Council to, in cases of excessive deficit of a Member State, issue recommendations for the same MS in order to “bring that situation to an end within a given period”. It should also be recalled that in the present case such a decision was actually issued on the 2 December 2009. One could honestly argue that the request for a preliminary ruling did actually contain enough references to several sources of EU law that were envisaged as motives for the Portuguese Parliament to approve the norms contained in Art. 19 of the annual budget law for the year 2011.

Furthermore, with all due respect for the ECJ, one could also argue that the Court was not very accurate in identifying the exact norms of the CFREU involved in this case. In fact, paragraph 1 of the reasoning of the Court’s decision reads: “The subject of the request for a preliminary ruling on the interpretation of Art. 47 of the Charter of Fundamental Rights of the European Union”. However, this provision refers to the right to an effective remedy and to a fair trial, whereas that article is never mentioned in any of the six questions submitted by the Portuguese Court and has no clear link with any of them. One can easily infer that: question no. 2 refers to the *principle of/right to non-discrimination*, which is the subject of Art. 21 of the CFREU and points directly to the *principle of/right to equality*, set forth in Art. 20; questions nos. 3 and 4 expressly mention Art. 31 CFREU which consecrates the *right to fair and just working conditions*.

In the light of these considerations, it would probably not be too unfair to conclude that the Court had enough grounds to accept the request for a preliminary ruling.

On the other hand, given the fact that in several other cases in which legal provisions establishing salary cuts aimed at specific classes of workers, the Court also rejected the request for a preliminary ruling on the same grounds – the reference for a preliminary ruling did not contain any specific element allowing the Court to conclude that national law aims to apply EU law (Cases of Corpul National al Polistilor and Cozman, [C-434/11](#), [C-134/12](#), and [C-166/12](#)) – it seems fair to assume that the same court is not very open to examining cases related to austerity measures. Even so, one has to recognise that in order to rule in such cases in the light of the CFREU, any court has to overcome two major obstacles:

First: Salaries and collective action are still considered outside the limits of the attributions of the EU. In fact, although Art. 153(1) (a) and (f) TFEU foresees the possibility for the Union to intervene in the fields of “working conditions”, and “representation and collective defence of the interests of workers and employers, including co-determination”, Art. 153(5) clearly determines that “pay, the right of association, the right to strike, or the right to impose lock-outs” are not included in such attributions.

Second: Although it is nowadays undisputed that the principles of equality and non-discrimination must be considered as general principles of EU Law (see Arts. 8, 10, 18, TEU, and 153 (1)/(i) TFEU), not all grounds for discrimination are included in the so-called Equality Directives ([Directive 0/43/EC](#); [2000/78/EC](#), and [Directive 2006/54/EU](#)).

Once those obstacles are somehow overcome, one can also invoke the doctrine established in cases like Hogan and others ([C398/11](#)), in which the Court stated that economic difficulties met by a Member State cannot justify lowering the standards of protection of fundamental rights set forth by EU law²⁹.

²⁹ “the economic situation of the Member State concerned does not constitute an exceptional situation capable of justifying a lower level of protection of the interests of employees”.

8. The Porto Labour Court’s judgment

The Portuguese Labour Court established a clear link between the Budget Law for the year 2011 and EU law, concluding that the conditions set forth in Art. 51 of the CFREU for the application of its provisions were met. Then, the Porto Labour Court found that a provision such as Art. 19 of the ABL 2011 infringes the rights:

- to equality and non-discrimination set forth in Art. 20 and 21 of the CFREU
- to fair and just working conditions – Art. 31 (1) of the CFREU
- to collective bargaining and action – Art. 28 of the CFREU

The same court stressed the fact that the limitations imposed by Art. 19 ABL did not preserve the essence of the aforementioned rights - Art. 52(2).

Therefore, the LCO refused to apply Art. 19 of the ABL 2011 and considered that the salary cut set forth in that provision could not apply to the case. Consequently, the Court decided that the Defendant had to pay the Claimant a sum corresponding to the difference between the wages paid, and the ones that should have been paid (disregarding salary cuts).

In cases when the Judicial Courts refuse to apply certain legal provisions, on the grounds that they violate constitutional norms or principles, the Portuguese constitution, and the Rules of Procedure of the Constitutional Court impose a mandatory appeal, to be presented by the Public Prosecutor.

Subsequently, such an appeal was presented, and the Constitutional Court decided that Art. 19 of the ABL 2011 is not contrary to the Constitution, and therefore concluded that OLC had to reform its decision according to such ruling ([Decision 240/2015](#) and [judgment 415/2015](#)).

In the sequence of these rulings from the Constitutional Court, the Porto Labour Court reformed its decision and so the claims presented by the trade unions were considered totally inadmissible, whereas the claims presented by Mr. Melo were considered partially inadmissible.

9. To conclude: The role of National Courts in the Context of a Multilevel System of Protection of Fundamental Rights

This case clearly illustrates the difficulties of applying the CFREU and emphasizes the fact that if the subject of the protection of fundamental rights is social rights, those difficulties grow exponentially.

It also demonstrates that in matters related to fundamental rights, European countries benefit from a multi-level system of protection where domestic law, both ordinary and constitutional, coexist with supra-national sources of law, like EU Law, including the Treaties, the CFREU, and EU secondary Law, but also other international sources of law like the ECHR and the ESC.

It is also important to stress that in most cases in which these different sources of law are invoked, the possible relations between them are not so much those of prevalence or supremacy, but rather the simple application of the source(s) of law that offers the highest level of protection – see Art. 53 CFREU, art. 53 ECHR, and Art. G ESC .

Finally, law practitioners must pay special attention to the principle of conforming interpretation, from which derives the need to interpret national law in the light of those supra-national binding sources. Furthermore, the possibility of combining these different sources of Law is of utmost importance, since they tend to complement one another.

In the context of this complex legal system, the task of law practitioners is far from easy. Information is crucial. In my opinion, the most precious tool is the ability to combine information in order to achieve balanced results in each particular case we deal with. That is surely an immense task. In any case, Human Rights are never easy...

Case of 25 retired workers v. “Metropolitano de Lisboa, EP” (a state’s public business sector) –

Proc. N.º 2901/14.9TTLSB

Presentation: Sílvia Gil Saraiva, Judge, Trainer at the Centre for Judicial Studies, Portugal

I - Summary of the dispute:

In order to reduce public expenditure, the Annual Budget Law for the year 2014 (Law no. 83-C/2013, of 31/12) included a norm (Art. 75) aimed at the state’s public business sector, imposing a temporary cessation of payment of retirement supplements to workers, whether retired or still in active employment, when a state public business sector had posted negative net results in the last three fiscal years.

The case ran its terms in the Labour Court of Lisbon, in which the applicant’s claim was dismissed as totally unfounded. The claimants appealed to the higher court – “Tribunal da Relação de Lisboa” –, which upheld the decision handed down by the Labour Court of Lisbon. Some of the claimants still not in agreement with the outcome appealed this time to the Portuguese Supreme Court of Justice.

II - Relevant facts of the case:

- 1) In question was the temporary cessation of payment of retirement supplements to the claimants (former workers of the defendant) by virtue of Article 75 of the Annual Budget Law for 2014.
- 2) These claimants, who had reached retirement and their families, had been receiving from the defendant significant amounts as retirement supplements, on average close to €1,000.00 (with differences between each of the 25 claimants – from about €400.00 to €1,500.00).
- 3) In the last three financial years of 2011, 2012 and 2013, the defendant posted net negative results.

III - The case in the Portuguese Supreme Court of Justice (Ac. do STJ de 16.11.2017, in www.dgsi.pt):

It should be noted that the non-compliance of Art. 75 of the Annual Budget Law for 2014 (Law no. 83-C/2013, of 31/12) with the Constitution of the Portuguese Republic (CRP) was questioned several times, in abstract and specific terms. The Portuguese Constitutional Court decided each time that it did not violate the principle of equality and non-discrimination enshrined in Art. 13 of the Constitution of the Portuguese Republic. Nevertheless, the claimants continued to insist on appealing to the Portuguese Supreme Court of Justice for breach of the Constitution of the Portuguese Republic, both in that regard and as violation of the right of collective bargaining.

In the appeal to the Supreme Court of Justice, the claimants also argued that the Annual Budget Law for 2014 was not limited to domestic affairs, but also applied to EU Law, and therefore the National Courts must respect the fundamental rights proclaimed in the Charter of Fundamental Rights of the European Union. Consequently, they asked the Supreme Court of Justice to make a reference for a preliminary ruling to the Court of Justice of the European Union (CJEU), requesting it to report on the compatibility of Art. 75 of the Annual Budget Law for 2014, with Art. 2 of the Treaty on European Union – dignity of the human person; and Arts. 20 - Equality before Law; 21 - Non-discrimination; 28 - Right to negotiate and collective action; 31 - Fair and just working conditions; and Art. 52(1) and (4) – Scope and interpretation of rights and principles – all of them in the Charter of Fundamental Rights of the European Union.

IV – The Court’s Assessment:

First of all, the Supreme Court considered that there was no violation of the Portuguese Constitution. With regard to the legal effectiveness of the Charter of Fundamental Rights of the European Union they found that it derives from Art. 51 of the Charter. In accordance with the paragraph 1 of that

article, the Charter addressed first 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 stressed that the principle of subsidiarity is embodied in Art. 5 of the Treaty on European Union and falls within the delimitation of powers between Member States, in the areas of competing competences.

The Supreme Court of Justice held that the fact that in preparing budgets Member States comply with the economic policies defined by the European Union does not transform the approval of the Annual Budget Law into acts framed by EU Law, or that it can be considered that such approval is an application of that EU Law. The court drew attention to the decision of the Court of Justice of the European Union in case C/128/12 (this is the case presented by my colleague Diogo Ravara in the previous workshop held in Utrecht), emphasizing its importance.

According to Art. 51 of the Charter, the Charter is addressed to the MS when they are applying EU law, which is why this provision is not fulfilled with a simple implementation of «*economic and financial measures*» in the context of EU Law. It requires the measures in question to be based on the application of European secondary legislation, or fall within the competence of the Union.

Since the measures whose compatibility is discussed with the Charter are derived from domestic law and despite the fact that those measures derive from the economic and financial guidelines of the Union or fulfil commitments of this nature assumed by the state, its insertion in the Annual Budget Law does not include application of EU Law for the purpose of Art. 51(1) of the Charter.

They also consider that there is no violation of Art. 2 of the Treaty on European Union – respect for the dignity of the human person.

V – Decision issued by the Supreme Court of Justice:

The Supreme Court of Justice rejected the need for a reference for a preliminary ruling to the Court of Justice of the European Union. The Case Law of the European Court of Justice made three exceptions to the obligation to make a reference for a preliminary ruling: 1) the “lack of relevance of the issue raised in the case”; 2) “the existence of interpretation already provided by the Court of Justice of the European Union”; 3) and the “full clarity of the rule in question”.

The Court concluded that in the present case there was no need for a reference for a preliminary ruling, stating the occurrence of two exceptions to the rule of obligation to the preliminary ruling: the first one because the norms within the Charter of Fundamental Rights of the EU were inapplicable to this case, and the second one because the measures applied by the defendant, in execution for the Annual Budget Law for 2014, did not reach the fundamental core of human dignity assumed in Art. 2 of the Treaty on European Union as one of the foundations of State legal order.

VI – Critical analysis of the reasoning applied by the Supreme Court of Justice to dismiss the obligation for a preliminary ruling:

In my opinion, the arguments behind the decision of the Supreme Court of Justice are debatable, when it argues for the inapplicability of EU Law at the time of the approval by the Portuguese State of the Annual Budget Law for 2014.

As is known, the financial assistance was based on Reg. (EU) no. 407/2010 of 11 May, which disciplined the European Union’s terms of intervention in Portugal, under which, as a counterpart to financial support, the Portuguese State undertook to implement a series of measures to balance the public accounts. On the other hand, under the terms of Article 3(1)(c) of the Treaty on the Functioning of the EU, the Union has exclusive competence in the field of monetary policy for Member States whose currency is the euro. Moreover, under the terms of Art. 126 of the Treaty, if the Council decides that an excessive deficit exists, it can adopt without undue delay, on the recommendation of the

Committee, recommendations addressed to the Member State concerned, so that it brings the situation to an end within a given period.

It is therefore logical to assume that previous to the preparation and approval of the Annual Budget Law, EU Member States seek to avoid excessive government deficits – in that sense, Art. 126(1) of the Treaty on the Functioning of the EU is referred.

Furthermore, on the preparation of the 2014 Annual budget the Portuguese State must obey the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, under the terms of Law no. 37/2013, of 14 June (which transposed Council Directive no. 2011/85/EU, of 8 November – establishing detailed rules for national budgets, so that the governments of the European Union (EU) respect the requirements of Economic and Monetary Union and do not have excessive deficits). Nevertheless, according to Art. 16 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, it is declared that it is an international Treaty outside the legal framework of the European Union. However, it is certain that under Art. 2(1) of this same Treaty, such a Treaty must be interpreted by contracting parties in accordance with the Treaties on which the European Union is founded, as well as with Union Law.

As we know, Art. 6(1) of the Treaty of the European Union (Treaty of Lisbon signed in Lisbon, 13 December 2007, in force since 01.12.2009) proclaimed that the Union recognises the rights, freedom and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted in Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

Therefore, we can accept that the interpretation given to the Article 75 of the Annual Budget Law for 2014, by virtue of the aforementioned Art. 2(1) of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, conveys a reading of it in accordance with the Treaties on which the European Union is founded, and with EU Law.

Unquestionably, under the terms of Art. 6(1) of the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union is EU Law and has the same legal value as the Treaties. One might wonder if the scope of application of Article 51(1) of the Charter of Fundamental Rights of the European Union is at least assured in terms of interpretation.

In addition, we must stress that the Portuguese budgetary framework Law (Law no. 37/2013, of 14 June) transposes the above mentioned Directive no. 2011/85/EU into national Law. Therefore, when approving the Annual Budget Law for 2014 it is fair to assume that the Portuguese State is implementing Union Law – within the scope of Art. 51(1) of the Charter.

VII – Conclusions:

With all due respect, the reference for a preliminary ruling to the Court of Justice of the European Union, under Art. 267 of the Treaty on the Functioning of the European Union, requested by the Claimants, should have been granted.

It would have been interesting to have had the chance to find out if the Court of Justice of the European Union, on the basis of this current legal framework (such as the transposing of the above mentioned Directive into national domestic order), maintained the decision of lacking competence for the request to a preliminary ruling, in the same manner previously given on the case C-128/12.

In our opinion, the Court of Justice of the European Union would have increased difficulties in stating that there was no specific evidence to suggest that the Annual Budget Law for 2014 intended to apply EU Law.

However, and as my colleague Diogo Ravara pointed out in his presentation at the previous workshop in Utrecht: *“(...) given the fact that in several other cases in which legal provisions establishing salary cuts aiming at specific classes of workers the court also rejected the request for a preliminary ruling on the same grounds – the reference for a preliminary ruling did not contain any specific element*

allowing the court to conclude that national law aims to apply EU Law (Cases of *Corpul National and Polistilor and Cozman* – C-434/11; C-134/12, and C-166/12) – it seems fair to assume that the same court is not very open to examining cases related to austerity measures”.

Finally, this case illustrates the difficulty felt in the area of fundamental rights in linking together and combining this complex multi-level system of protection (domestic Law of the Member States with EU Law, and international law), in which different legal norms are invoked, and not always coincident.

There was also the difficulty felt by the national Courts in establishing the scope of the Charter: Under what circumstances the Charter provisions would apply? With regard to the Member States, they would be bound by Charter provisions only when they apply “EU Law”, however, the task of identifying what falls within this scope or not, is not always simple or unambiguous.

Taking into account that the protection of fundamental rights incorporated into the Charter depends on whether the specific situation falls or not within the scope of EU Law, perhaps, the solution to the problem derives from Art. 51 of the Charter itself: the scope of EU Law is the scope of its power, as referred to in Arts. 2 and 3 of the Treaty on the Functioning of the EU.

Therefore, provided that the Union has competence in a given area, for example in the fields of consumption, environment, energy, the internal market, or monetary policy for the Member States whose currency is the euro, etc., we can reasonably expect that the standard of fundamental rights applicable to specific situations (in such cases) is that of the European Union – (as referred to by Alessandra Silveira, “Do âmbito de Aplicação da Carta dos Direitos Fundamentais da União Europeia: Recai ou não recai? – Eis a questão”, in *Julgaz* no. 22, 2014).

The Charter of Fundamental Rights of The EU “in action”

Sandra dos Reis Luís, Judge, Portugal

Introduction

The presentation focuses on the rights of persons with disabilities, which falls within the broader scope of the right to material, cultural and legal equality.

Non-discrimination on the grounds of disability is a topic that is not often debated and needs reflection and awareness. It is necessary for society to deal with people with disabilities, integrating them into social, cultural and professional life, besides legally and actively promoting their well-being. Assuming disabled people are important in a pluralistic society implies the creation of inclusion mechanisms that allow them to participate actively and effectively in community life, so that they cease to live reduced and confined behind the walls and doors of their homes and institutions.

Sources of Law

Treaties and conventions, in general, as well as the constitutions of each Member State are the source of fundamental rights.

The European Union is a legal order in its own right and is a source of law. The European Union is bound by, but not limited to, the Charter of Fundamental Rights of the European Union.

It is also linked to international instruments, such as the United Nations Convention on the Rights of Persons with Disabilities, ratified by the European Union itself³⁰ and signed by the 27 countries that comprise it (having been ratified by 16 countries), which defines disability in Article 1.

³⁰Decision 2010/48. The provisions of the CRPD are thus, from the time of its entry into force, an integral part of the European Legal Order (see, to that effect, Case 181/73 Haegeman (1974) ECR 449, p. 5).

On the other hand, the European Convention on Human Rights is a reference to the protection of fundamental rights in Europe and is linked to the Charter - Article 52. The European Convention on Human Rights (ECHR) has taken on what some call a "compromise solution"³¹, ascribing the protection of fundamental rights to the interaction between the EU and the Member States, while ensuring the autonomy of the EU legal order. It refers to the principle of non-discrimination in Article 14. No express reference is made to disability discrimination, although non-discrimination based on disability is guaranteed by that norm inserted in the ECHR³².

In the Charter of Fundamental Rights of the European Union the principle of non-discrimination appears in Articles 21 and 26. The former makes explicit reference to non-discrimination of persons with disabilities; the latter explicitly recognises that persons with disabilities must benefit from measures that ensure their independence, social occupation and integration, and their active participation in the life of the community. Article 21(1) draws on Articles 13 and 14 of the ECHR. In so far as it coincides with Article 14 of the ECHR, it shall apply in accordance with the latter.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) aims to ensure that persons with disabilities can exercise their rights on an equal basis with all other citizens. It advocates a rights model, which aims to ensure the full and equal enjoyment of all human rights of persons with disabilities and promises respect for their inherent dignity and right to life (as set out in the preamble, point (a), in Articles 3(a)(10) of the CRPD). It focuses on equal opportunities, non-discrimination based on disability and participation in society. It requires the authorities to guarantee rights and not restrict them. Portugal ratified the CRPD in 2009 (simultaneously with the Optional Protocol). The CRPD has direct application.

In the management of conflicts between fundamental rights rules, Article 53 of the Charter includes a solution based on the principle of the highest level of protection, which rules out the possibility for a Member State not to apply or respect European legal acts which comply with the Charter, for not respecting or diverging from the rights guaranteed by domestic law, even if it is Constitutional Law.

The plurality of sources mentioned above goes hand in hand with the plurality of Courts with competence to assess violations of fundamental rights within the European framework.

According to Article 267 of the Treaty on the Functioning of the European Union, it is possible for national courts to use the preliminary reference mechanism to resolve interpretative doubts, but it is also possible for individuals to invoke fundamental rights protected by the European Union when the measure (European or national) includes the material scope of the Union. Under the terms of the Charter, the institutions and bodies of the European Union are addressed in the Charter, the principle of subsidiarity and the Member States are applied only where they apply to EU law. In situations where fundamental rights are protected both by the Charter and the Convention, the ECJ maintains a dialogue with the ECHR case-law on the matter. With regard to the protection of people with disabilities, we must also consider Directive 2000/43/CE and Directive 2000/78/CE, which deal with the fight against discrimination and not only for people with disabilities.

The Court of Justice of the European Union started by defending and applying a narrow concept of disability, with the case [Chacón Navas](#) (the Court distinguished between illness or 'sickness' and

³¹ Koen Lenaerts and José António Gutierrez-Fons, "The Place of the Charter in the EU Constitutional Edifice", in the EU Charter of Fundamental Rights, cited by Sophie Perez Fernandes, "A Protecção dos Direitos Fundamentais pelo Direito da União Europeia – Da Carta aos Estados, O Enigma da Esfinge", digital version, available at <https://repositorium.sdum.uminho.pt>, consulted on the 12 May 2018, p. 5.

³² Case Glor v. Switzerland (ECHR, Application no. 13444/04. Decision: 30.04.2009).

disability), but has evolved, especially after the CRPD's ratification, as will be seen in the summary of the joint cases of Ring and Skouboe Werge.

The Case:

THE COURT OF JUSTICE OF THE EUROPEAN UNION

Joined cases of [Ring and Skouboe Werge](#)

Cases C-335/11 and C-337/11 – CJEU – Second Chamber

(Decision: 11.04.2013)

(Requests for a preliminary ruling under Article 267 TFEU)

The facts involved:

1. Two women were dismissed from employment when they returned to work following a period of sick leave. Ms. J. Ring was dismissed after sick leave due to constant lumbar pain, which could not be treated. Ms. L. Skouboe Werge took a sick leave due to whiplash injuries she received in a road traffic accident.
2. The reasons provided by the employers for both dismissals were that the applicants could no longer carry out full-time employment due to illness.
3. The employers argued that such dismissals are provided for under Danish law, if the employee had received her salary during the periods of illness for a total of 120 days during any period of 12 consecutive months.
4. The trade union HK, acting on behalf of the two applicants in the main proceedings, brought proceedings against their employers in the Sjø-og Handelsret (Maritime and Commercial Court), seeking compensation on the basis of the Anti-Discrimination Law.

The Court's assessment

1. The Court interpreted 'disability' in the Framework Directive to reflect Article 1 of the CRPD as stated above – which provides an inclusive, non-exhaustive list of impairments, which when combined with societal barriers, can constitute disability.
2. It follows from the above considerations that the concept of 'disability' in Directive 2000/78 must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments, which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. The nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by that concept.
3. Thus, with respect to Directive 2000/78, that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers.
4. In accordance with Article 5 of that directive, the accommodation persons with disabilities are entitled to must be reasonable.
5. Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his/her salary being paid for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive.

6. A worker with a disability is more exposed to the risk of applying the shortened notice period laid down in Paragraph 5(2) of the FL than a worker without a disability.
7. The Court also held that a reduction in working hours would fall within the type of reasonable accommodation to disabled people prescribed by the [Employment Equality Directive](#), but acknowledged that it fell to the national court to determine whether such a reduction would constitute a disproportionate burden for the employer.
8. The Court also held that this could constitute indirect discrimination on the ground of disability. In order to justify such indirect discrimination, the Court found that the national court would have to consider whether Danish law pursued a legitimate aim, and was proportionate to that aim.

"This ruling is particularly significant in so far as it affirms that the CRPD takes precedence over EU secondary law, and that such laws must be interpreted, as far as possible, in a manner that conforms with the CRPD"³³.

"The Court of Justice of the European Union handed down its decision in the joined cases of *Ring and Skouboe Werge*. This ruling is particularly significant as it represents the first decision on the definition of disability under the [Framework Directive on Employment 2000/78](#) since the EU concluded the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2010. In essence, the Court moved away from the restrictive definition it adopted in *Chacón Navas*³⁴, and instead interpreted the Framework Directive in the light of Article 1 CRPD"³⁵.

Conclusion

The (re)definition referred to above has a very significant meaning, first of all, in respect to the principle of equality before the law, as referred to in Article 20 of the CFREU. This new vision provides an analysis of the principle of equality in close correlation with the principle of non-discrimination, which is stated in Article 21 of the Charter.

Although an arbitrary differentiation is prohibited, there is a need for differentiation, in the treatment of what is unequal, under penalty of inequality.

Persons, in particular those subject to discrimination of any kind, must have effective and accessible means of protection against the violation of their rights – Article 47 of the Charter.

Judges and Courts have a key role to play in monitoring equality and non-discrimination (and in the broader sense in the implementation of human rights). This monitoring is carried out by the national courts and at the level of the European Union by the Court of Justice of the European Union.

In order to bring the rules of domestic law into conformity with the rules of international law, the National Courts of each Member State must vertically verify the laws and conventions ratified by the respective State in order to ensure compliance with the international commitments entered into – in the case of non-discrimination and integration of people with disabilities, the CRPD and the CFREU are of particular relevance.

³³ [Eilionoir Flynn](#), Posted in [Fundamental rights](#) Tagged with [Cases C-335/11 and C-337/11 Ring and Skouboe Werge](#).

³⁴ The Court of Justice of the European Union in the judgment in question characterised a person with a disability as having "a limitation resulting, in particular, from physical, mental or psychological handicaps which make it difficult for them to participate ... in their professional life for a long period ". It has decided that the prohibition of discrimination based on disability does not cover diseases.

³⁵ [Eilionoir Flynn](#), Posted in [Fundamental rights](#) Tagged with [Cases C-335/11 and C-337/11 Ring and Skouboe Werge](#).

In order to carry out this exercise in controlling conventionality, it is of the utmost importance that Judges, Prosecutors and Lawyers cultivate and broaden their knowledge of international human rights law. The project “The Charter of Fundamental Rights in Action” has played an important role in the training of Judges, Prosecutors and Lawyers on human rights and allowed its participants to deepen their capacities to maintain an open dialogue between national and international normative instruments, to promote better understanding and compatibility. The contribution of such knowledge in the field of human rights enables an effective defence of those who appeal to the Courts.

In the specific area of rights and integration of people with disabilities, the Charter strengthened concepts (compared to the ECHR) and, in the wake of the CRPD, placed the rights of persons with impairment at the level of equality rights and not of mere solidarity.

The solution advocated results from the long path taken, along with the conceptual evolution of disability models and from the adoption of the current model, which places a person with some type of disability as a subject of rights, as a central figure and not merely an object, devoid of social skills. For this reason, and by imposition of international instruments, the regulations on adult accompaniment, created by Law no. 49/2018, of 14 August, which will eliminate existing substitution regimes, will enter into force in Portugal in a few months and amend nineteen statutes, among them the Civil Code, the Code of Civil Procedure, the General Labour Law on Public Functions, the Mental Health Law and the Medically Assisted Procreation Law.

In the light of international law and the CFREU, existing civilian standards were not in line with directly binding international standards. Portugal did not reflect in its domestic legislation the equality between persons with and without disabilities, enshrined in Article 13 of the Constitution of the Portuguese Republic, and it was considered inevitable and urgent to stop this situation of inequality and imbalance and apply effective conditions to defend the non-discrimination of persons with disabilities, establishing them as subjects of rights and not mere objects.

In proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary.

The courts are increasingly called upon to decide on fundamental rights and play a preponderant role in defending the rights of persons with disabilities. Strengthening the independence of the judiciary and, consequently, the Democratic Rule of Law is essential in the defence of those rights and dignity of the human being.

Digital evidence

Ana Marques Proença, Judge, Portugal

In 2016, Lisbon Criminal Court – Almada analysed the admissibility of digital evidence.

The case regards a police officer who was stabbed and hit by a crowd at a multicultural fair, in a public place, when on duty. An unidentified person filmed the moment when the officer was lying down, unconscious, on the floor, being kicked by several people, and the video was published anonymously on www.youtube.com.

The investigation placed the defendants at the crime scene because of the video – combined with other testimonies and evidence such as confiscation of clothes – and at the public hearing the defendant claimed the inadmissibility of that digital evidence saying that:

- i) People shown on the video hadn't allowed the recording of their images and there was no judicial authorisation for the recording. Therefore, the recording violated their right to their image and their privacy.
- ii) The collection of that evidence did not follow the procedures applicable under Law 5/2002, of 11 January, that proclaims the measures to be taken when facing organised crime.

With these questions, the court had to decide whether private life had been violated, by using an anonymous video as evidence without previously obtaining the agent's authorisation.

At this point, it is important to emphasize that respect for private and family life is stated in Article 7 of the Charter of Fundamental Rights of the European Union (CFREU), which establishes “*Everyone has the right to respect for his or her private and family life, home and communications*”.

The Court of Justice didn't have the opportunity to state, in detail, the meaning of private life, according to European Law and on the applicability of Article 7. However, in the case decided in Almada that we are now discussing, the court considered that Article 7 hadn't been violated, as the events occurred in a public place. People were not recorded in private, but while attending a public party, when hitting an unconscious police officer.

The fundamental right to privacy and protection of image is not breached if someone is committing a crime in a public place, voluntarily in front of everyone and in a context in which it is reasonable to expect that someone will take photos or make videos. By acting in such a manner it has to be understood that the perpetrator is waiving his/her right to privacy.

Even if, by any chance, it is considered that the right to a person's image has been violated, the right to life and to the integrity of the person (Articles 2 and 3 of CFREU) shall prevail over the right to a person's image.

One of the other aspects that the court had to analyse was the fact that the author of the video was unknown. Would that make the film intrinsically unreliable?

The point was that the authenticity of the video had not been questioned. In fact, all the witnesses have described the facts according to the video and have recognised themselves appearing in the images.

It was undisputable that the videos and photos showed the events which occurred on the relevant date and place. So, the fact that the origin of the evidence was not known became irrelevant because the parties accepted that the images captured in the videos and photos were authentic and related to the events.

As the authenticity of the video was not questioned, it was a matter of credibility and not admissibility of the evidence.

Finally, the court had to consider if it was necessary to obtain a judicial authorisation to record the images.

First, there was no violation of procedural provisions when obtaining the evidence, as Law no. 5/2002, of 11 January is not applicable. In fact, it is not reasonable to impose a judicial order, prior to the recording, if facts have been committed in a public place. Again, we repeat our main point: when committing a crime in a public place, the defendant is waiving his/her right to privacy³⁶.

In conclusion, the court found the digital evidence admissible, authentic, precise and complete and therefore it gave it credibility.

³⁶ European Commission of Human Rights Opinion in the case Friedl vs. Austria, (1995), available in [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57917#{"itemid":\["001-57917"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57917#{)

The EU Charter and the ‘non bis in idem’-principle in two criminal cases from the Netherlands³⁷

Juriaan Simonis, Senior researcher at the Bureau for Criminal law Research of the Netherlands
Public Prosecution Service

1. The growing importance of EU law in national criminal law

Even though EU law has been playing a part in Dutch criminal law for decades now, public prosecutors have tended to regard it as a niche, something only specialists should acquaint themselves with. Indeed for a long time the impact of EU law was only felt in the enforcement of legislation in the economic sphere (fishing, environment, and transport regulations). The Framework decision that paved the way for the European arrest warrant (EAW) made EU law relevant to a wider range of criminal offences, but even then the actual application of the EAW-legislation was a matter for those prosecutors (and their staff) who specialised in surrender and other instruments of mutual legal assistance. To put it bluntly: one could be a successful public prosecutor without ever having to take a look at EU law or a decision of the European Court of Justice.

However, it is becoming steadily more difficult for prosecutors to remain in a position of ‘splendid isolation’. An important cause is the implementation of a series of directives ensuing from the so-called Stockholm Programme intended to strengthen the rights of individuals in criminal proceedings. Some examples are Directive 2010/64 on the right to interpretation and translation and Directive 2013/48 on the right of access to a lawyer. Because the rights that are stipulated in the Directives and the national legislation implementing the directives apply in all criminal cases, the effect is that every criminal case in the Netherlands has at the procedural level – at least in theory – some EU law-component. Case law shows that defence lawyers are increasingly using that as an opportunity to introduce defences that are (partly) based on EU law.

2. The advent of the EU Charter

In the slipstream of this steady flow of EU law into the Netherlands’ national criminal law domain, the EU Charter is gaining a (for the time being tentative) foothold as well.

The combination of the growing importance of EU law in the criminal law sphere and the entry into force of the Lisbon Treaty has made the EU Charter a potentially relevant source of law in almost every criminal case. This does not mean that many prosecutors in the Netherlands are aware of that development, let alone that they are familiar with the content of the relevant articles of the Charter.

There are two main reasons for this: the first is that there is a considerable overlap between the relevant Charter rights and the corresponding rights in the European Convention on Human Rights (ECHR). Because the latter is more familiar for prosecutors, judges and defence lawyers and because there is a considerable body of case law of the ECtHR, debates on fundamental rights or any fundamental rights issue in criminal law cases tend to be argued on the basis of the ECHR and ECtHR-case law, rather than the EU charter.

³⁷ Please note the following is an adaption of a presentation given at the CFR Experience Exchange Workshop in Szczecin, Poland, on 18 May 2018. Because of the oral origin the following text is not as carefully reasoned as it would have been had the same subject been discussed in an academic article. Moreover, references are sparse. For those readers who would like to know more about the subject, I recommend a recent article by Van Kempen and Bemelmans in the *New Journal of European Criminal Law*. In that article, one can find all the nuances, references and cool reasoning that may be lacking in the present text.

In addition to this, the EU Charter often does not apply to the issue at hand. According to Art. 51(1), the first sentence 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.

To give an example: because of Directive 2013/48 on the right of access to a lawyer, the EU Charter applies to any ordinary Netherlands criminal case, but only in so far as the rights safeguarded in the Directive are at stake. For other elements of the criminal trial, such as the definition of criminal intent or the acceptability of hearsay evidence, there is no EU-law being implemented and therefore the Charter does not apply.

The cumulative effect of these facts is that the EU Charter is indeed mentioned more often in pleadings by defence lawyers, but mostly only as an illustration to an argument that is otherwise based entirely on the ECHR or the Netherlands constitution.

However, there are some areas in which the EU Charter might become an important source of fundamental rights in the Dutch criminal law, because the Charter grants wider rights than the ECHR or because ECJ case law is more directly applicable to a particular case.

3. The *ne bis in idem*-principle

Below I shall concentrate on one of these areas, namely the principle of *ne bis in idem* (also known as ‘*non bis in idem*’ or the defence of ‘double jeopardy’). The principle can be found in Art. 50 of the Charter:

Article 50 - Right not to be tried or punished twice in criminal proceedings for the same criminal offence

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

As we will see later on, the scope of this article is much wider than one might infer from its actual wording. I will now take a look at two (more or less) recent decisions of the Netherlands Supreme Court (‘Hoge Raad’) on the application of this principle and in which Art. 50 of the Charter played a role in the deliberations of the Court. The first case concerns the reach of the principle on the national level, the second case is transnational.

4. The Alcolock-case

First the national case, which concerned the combination of an administrative measure and a criminal prosecution.

The *ne bis in idem* principle is codified in Dutch penal law, mainly but not exclusively, in Art. 68 of the Penal Code. In essence, the legal provisions stipulate that:

The main rule (in the Criminal Code and the Code of Criminal Procedure):

No prosecution is allowed if there is

- a previous final conviction by a Dutch criminal court for the same criminal act,

- the public prosecution service has dealt with the case by imposing a fine or a community service order,
- the public prosecution service has dismissed the case or
- an administrative fine has been imposed.

In the so-called ‘Alcolock’-case³⁸ the Supreme Court had to decide whether the public prosecution service could follow someone for drunk driving after the offender had already been obliged to participate in the Alcolock-programme. In fact, the (administrative) Bureau for Road Safety had given the person the choice either to participate in the programme or to lose their driving license for five years. Participating in the programme would mean that the driver got a specially marked licence that enabled him to drive only in cars that were equipped with an Alcolock (a device that prevents the engine from starting when a breath test shows that the driver is under the influence). All costs for the programme, approximately 5,000 euros, would be borne by the offender. The measure was part of a nationwide programme for the more serious cases of drunk driving. The defence invoked Art. 50 of the Charter, arguing that the Alcolock programme was in its effect so punitive that it should be regarded as ‘criminal proceedings’ in the sense of Art. 50 of the Charter. It is important to note that national legislation did not stand in the way of a criminal prosecution. That would only have been the case if the Bureau for Road Safety had imposed an administrative fine, instead of ordering the Alcolock-measure. Nor did the *non bis in idem*-article of the ECHR apply (Art.(4) 7th Protocol), because the Netherlands has not ratified that Protocol.

The advocate-general (whose role is similar to that of the advocate-general in ECJ cases) had argued that the case concerned the application of EU law, because of EU-legislation on road safety and driving licenses. In that case, Art. 50 of the Charter would also apply (because of Art. 51 of the Charter). The Supreme Court did not agree with this. It held that the case did not concern the application of EU law. However, the Court performed something of a legal hat-trick to prevent injustice. The Court observed that in this specific case, the administrative and the criminal sanction are very similar (a financial sanction and or a suspension of one’s licence). Moreover, the aims of both measures are basically the same (promoting road safety). Invoking Art. 50 of the Charter, the Court found that the principles of natural law dictate that it would be unfair to allow a criminal prosecution. In other words, even though the Court did not apply Art. 50 of the Charter formally, it used it as a guiding principle.

5. Waste paper for Saudi Arabia

The second case I want to highlight did not concern administrative sanctions, but a combination of two criminal procedures, one in Scotland and one in the Netherlands.

The case at hand concerned the export of waste paper in containers from Scotland through the Netherlands to Saudi Arabia.

This transport was apparently in violation of both Scottish and Dutch legislation based on the EU waste shipments regulation³⁹. In Scotland the case had been dealt with by SEPA, the Scottish Environmental Protection Agency, by issuing a ‘final warning’ to the firm with regard to this particular shipment. The Netherlands Prosecution Service found it nevertheless in the general interest that the company was charged in the Netherlands.

³⁸ Supreme Court, 3 March 2015, ECLI:NL:HR:2015:434.

³⁹ Regulation 1013/2006.

The defence invoked Art. 50 of the Charter (and Art. 54 of the Schengen Implementation agreement (CISA)), claiming that because of the Scottish final warning the case had been definitively decided.

According to national law, a decision by a foreign prosecution service only stands in the way of prosecution in NL, if that decision is conditional and the conditions have been fulfilled (e.g. a financial settlement).

The Supreme Court reviewed the decision to prosecute against Art. 50 of the Charter (thus implicitly accepting that the Charter was applicable).⁴⁰ The Court referred to case law of the ECJ (“It follows that a provision such as Article 54 CISA must be regarded as respecting the essence of the *ne bis in idem* principle enshrined in Article 50 of the Charter”).⁴¹

Its reasoning shows that the Court accepts on the basis of ECJ-case law on Art. 54 CISA and Art. 50 Charter that a definitive decision of a foreign public prosecutor to dismiss a case may bar prosecution.

However, the Supreme Court observed that SEPA is apparently not the authority in Scotland that can definitively terminate a prosecution according to Scottish national law – that would be the Procurator Fiscal.

Therefore Art. 50 Charter and Art. 54 CISA were violated by a prosecution. The prosecution was allowed.

What is interesting about this case is that the outcome would have been different if the decision to dismiss the case with a warning had been taken by the Scottish Prosecutor, the Procurator Fiscal. In that case, the ECJ-case law on Art. 54 CISA and Art. 50 of the Charter would have dictated that the Dutch prosecution would not have been allowed. However, according to Dutch national law the prosecution would not have been a problem: the *ne bis in idem*-rule only applies when a foreign prosecutor has decided to dismiss the case conditionally and conditions have been fulfilled. In other words, in that case the Charter would have granted the defendant more protection against prosecution in the Netherlands than national law would have.

6. Conclusion

The two Supreme Court-decisions I have discussed illustrate that Art. 50 of the Charter may not yet be a rule of law on which the outcome of Dutch ‘*ne bis in idem*’-cases hinges. At the same time, the reasoning of the Court in both cases shows that the Charter is certainly becoming influential in a legal domain it has long been absent from, and that is national criminal law.

In case 596/14

Ana de Diego Porras vs Ministerio de Defensa

Joaquín Brage, Rosa M. García, David Querol, Aida Pérez, Ingrid Serra, Spain

1. Questions referred for a preliminary ruling

The TSJ de Madrid (High Court of Justice of Madrid) decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

⁴⁰ Supreme Court 31 October 2017, ECLI:NL:HR:2796.

⁴¹ ECJ 27 May 2014, C-129/14, *Spasic*.

1 - Is the compensation due on termination of a temporary employment contract covered by the employment conditions to which clause 4 (1) of the framework agreement refers?

2 - If such compensation is covered by those employment conditions, must workers with an employment contract or relationship entered into directly between an employer and a worker, where the end of the employment contract or relationship is determined by objective conditions, such as reaching a specific date, completing a specific task or service, or the occurrence of a specific event, receive, on termination of the contract, the same compensation as that to which a comparable permanent worker is entitled when his/her contract is terminated on objective grounds?

3 - If a temporary worker is entitled to receive the same compensation as a permanent worker on termination of the contract on objective grounds, must Article 49.1(c) of the Workers' Statute be regarded as having correctly transposed Directive 1999/70 or is it discriminatory and contrary to that Directive, in that it undermines its purpose and its effectiveness?

4 - If there are no objective grounds for excluding temporary replacement workers from the entitlement to receive compensation on termination of a temporary contract, is the distinction which the Workers' Statute establishes between the employment conditions of those workers discriminatory, compared not only with the conditions of permanent workers but also with those of other temporary workers?

2. Facts

1 - Ms. Diego Porras was employed since 2003, under several temporary replacement contracts as a secretary in various sub-directorates of the Ministry of Defence. The last temporary replacement contract was concluded in 2005 in order to replace Ms. Mayoral Fernández, who was on full time exemption from her professional duties in order to carry out a trade union mandate.

2 - In 2012, Ms. Diego Porras was summoned to sign the termination of her employment contract to allow the reinstatement of Ms. Mayoral Fernández, whose exemption from normal duties had been revoked due to measures to ensure budgetary stability.

3 - She brought proceedings before the Juzgado de lo Social nº 1 of Madrid (Labour Court no. 1 Madrid, Spain) but her action was dismissed.

4 - She appealed before the TSJ de Madrid (High Court of Justice of Madrid) considering that in Spanish law there is a difference of treatment between permanent workers and fixed-terms workers, insofar as the compensation paid in the event of legal termination of the employment contract is 20 days' salary for each year of service for the former, but only 12 days' salary for each year of service for the latter. This inequality is even more marked with regard to workers employed under a temporary replacement contract, in respect of whom national legislation does not provide for any compensation when that contract is terminated legally.

3. Legal context

EU Law: Clause 4 Directive 1999/70

Definitions: clause 3.1: “Fixed-term worker” means a person having an employment contract or relationship entered into directly between and employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event”; clause 4.1 Principle of non-discrimination: in respect to employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.

Spanish law: Arts 15, 53.1.b9 and 49.1.c Consolidated text of the Workers' Statute adopted by Royal Legislative Decree 1/95 and RD 2720/98.

4. Considerations of the question referred

1. - Clause 4.1 of the framework agreement must be interpreted as meaning that the concept of “employment conditions” covers the compensation that the employer must pay to an employee on account of the termination of his/her fixed-term employment contract.

2. - Clause 4 of the framework agreement must be interpreted as precluding national legislation, such as that issued in the main proceedings, which refuses to provide for any compensation for termination of a contract of employment to a worker employed under a temporary replacement contract, while allowing such compensation to be granted, inter alia, to comparable permanent workers. The mere fact that the worker has carried out his/her work, on the basis of a temporary replacement employment contract cannot constitute an objective ground justifying the refusal to grant such compensation to the worker.

5. Fundamental rights involved

Art. 20 CDFUE.- Equality before the law

Art. 21 CDFUE .- Non discrimination

6. Impact on national case law

STSJ Cataluña 31 July 2017, STSJ Madrid 15 March 2017, SSTS País Vasco 12, 19 September 2017, 15, 22 November 2016, STSJ Canarias 23 January 2017, STS Asturias 20 June 2017, STSJ Andalucía 5 July 2017, STSJ Extremadura 21 March 2017 among others.

7. Other preliminary rulings based on Diego Porras case

- Montero Mateos (Case 677/16 pending)

- Diego Porras II (Case C 619/17 pending) heard by a Labour Court from Madrid

- Grupo Norte Facility (Case C 574-16 pending) heard by TSJ Galicia

- Rodriguez Otero (Case 212/17 pending) heard by TSJ Galicia

- TS (High Court Auto of 25 October 2017 (rec 3970/16) see also Decision the President of TJUE of 20 December 2017 pending

8. Opinion of Advocate General Ms. Kokott in January 2018 (request from a preliminary ruling from Labour Court no. 2 Terrassa Spain)

- Clause 4.1 of the Framework Agreements refers not to working conditions but to employment conditions, that is to say that the rules applicable to a worker or the benefits claimed by him/her are linked to his/her employment relationship with his/her employer.

- The positions of fixed-term workers and permanent workers are not comparable.

- In accordance with Art 267 TFUE, the Court of Justice has jurisdiction to give preliminary rulings on the interpretation of EU law.

- The Framework Agreement is indeed applicable only to workers on fixed-term employment contracts. Under that provision, the Framework applies to workers who have an employment contract or employment relationship as defined in law, agreements or practice in each Member State.

- Comparability of situations must be examined to ascertain who is in a less favourable position in a comparable situation. Clause 4 of the Framework Agreement prohibits discrimination against fixed-term workers in relation to comparable permanent workers, but does not prescribe equal treatment between non-comparable fixed-term workers and permanent workers.

- Budgetary considerations cannot in themselves serve as a justification for discrimination, even though they may otherwise underlie a Member State's choice of social policy decisions and influence the scope of those decisions.

**Google Spain and Google Inc. Vs. Agencia Espanola de Protección de Datos and Mario Costeja
González (C-131/12)**

Nuria Martínez Barona, David Querol Sánchez, Spain

Legal framework

The Charter of Fundamental Rights of the European Union:

Article 7: Respect for private and family life

Article 8: Protection of personal data

The preliminary ruling

1. Territorial scope
2. Material scope
3. The scope of the data subject’s rights

The decision

1. It is possible to apply the Spanish Data Protection legislation, transposing Directive 95/46, and the Directive itself, in the circumstances of the case. Google Inc. and Google Spain should be treated as a single economic unit.
2. A search engine operator like Google is to be considered as performing, through its search, an activity of both data processing and data controlling under the Data Protection Directive. Data subjects may exercise their right of erasure against the search engine without that name or information having to be erased beforehand or simultaneously from the web pages that published the information.
3. The right to erasure enables the data subject to require the operator of a search engine to remove his/her personal data from the list of results, on the grounds that that information may be prejudicial to him/her or that s/he wishes it to be “forgotten” after a certain time, even when it is lawful and accurate.

The decision

- Google Spain and Google Inc. must delete the personal data of the individual.
- The initial processing of the data by La Vanguardia was legitimate. However, the time elapsed (16 years) made this information irrelevant for pursuing the original aim.
- The right of access to information is preserved thanks to the ability to access this information in the original source. In this case, the balancing test was clearly in favour of the right to privacy and personal data.

The impact

1. In the Judgments of the National Courts: lack of a pattern in the resolution of cases.
2. In the EU Legislation: 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: *Article 17* Right to erasure (‘right to be forgotten’).

Judgment of The District Court in Szczecin vs Department of Labour and Social Security of 16

September 2015, Ref. No. Act VI U 511/15

Appeal: Sa in Szczecin Iii 901/15 Of Aua 2016/07/05

Pasquale Policastro, Poland

**Judgment of the District Court in Szczecin VI Department of Labour and Social Security of 16
September**

2015, ref. No. Act VI U 511/15

Appeal: SA in Szczecin III 901/15 of AUA 2016/07/05

Note: The right to good administration, namely the Charter used for extracting meaning from Constitution and national law. This judgment is an example of a line of judgements of Polish ordinary courts. This line has been developed from the labour and social security ordinary courts. It concerns the right of good administration contained in the Charter. In this respect, we shall also recall the achievements of the adjudication of Polish administrative courts. This line of judgement has been developed largely in Szczecin. It makes use of the right to a good administration as an element in helping to strengthen the constitutional principle of legality, according to which public authorities operate on the basis of and within the limitations of the law (Art. 7 Konst. RP). Although this principle is not mentioned in the judgment in question, the decision refers to Art. 2 of Polish Constitution, according to which "The Republic of Poland is a democratic state ruled by law (and values)⁴², implementing the principles of social justice." This principle has since its adoption (29 December 1989) gained the role of creator of other constitutional principles, amongst which are the prohibition on imposing legal burdens on individuals having a retroactive character, the requirement of the respect by the legislator of the confidence of the citizen in the State and the law posed by it, and the principle of the equal distribution, both subjective and objective of public burdens in a situation characterised by the need to reduce public expenditure.

The principle of "democratic state of law" has therefore in the Polish constitutional order the systemic nature of a "link" between all other constitutional and legal principles. In this judgment, the use of this principle, together with Article 41 CFR EU, strengthens the systemic connection between the Polish Constitution and European Union law. This connection is visible in the use of the European Code of Good Administrative Behaviour, enacted by the European Parliament, a statement of the European Ombudsman and a fragment of a decision of the Supreme Administrative Court.

Even though the principle of legality of the action of the organs of public power has not been mentioned in this case, this principle takes on a deeper meaning when seen from the perspective of the principle of the democratic state following the fair and just rule of law.

In the judgment we are commenting on, there is however no reference to whether the object of the case, seen from the perspective of the application of the Charter, falls into the competence of the

⁴² With this, we aim to translate the meaning of “państwo prawne”, as a state based upon the rule of law and values. Indeed the concept of państwo prawne seems to evolve in a direction closer to “justice” also in the sense of “just trial”. See Instytut Języka Polskiego, Polskiej Akademii Nauk, National Corpus of Polish, “Państwo prawne” <http://nkjp.pl/poliqarp/nkjp300/query/2/>.

Union. The *judge meriti* merely emphasized that the Charter of Fundamental Rights was adopted by Poland with some reservations, but that the matter of Art. 41 is not covered by such reservations. Polish reservations about the Charter of Fundamental Rights are contained in Protocol 30 of the Lisbon Treaty, according to which the Charter may not be used to establish the non-compliance of Polish laws, and administrative actions and practices. The rights enshrined in the Charter may be claimed only when such rights are included in Polish law. Furthermore, if the Charter refers to national laws and practices, it will only be used within their recognition in national law. Polish reservations about the Charter are also contained in Declaration No. 61, according to which the Charter "does not affect the rights of Member States in the sphere of public morality, family law, the protection of human dignity and respect for human physical and moral integrity." However, Declaration No. 62 marks a slight reverse, according to which Poland, which is linked to the social achievements of the movement of "Solidarity", "fully respects such rights confirmed in the Charter of Fundamental Rights of the European Union" included in Chapter IV. However, the judgment we are introducing does not mention Art. 34 of the Charter on social security. As we can see, the EU Charter of Fundamental Rights is here applied for the extraction of meaning from the Constitution and the national case law. This does not mean in any way that the Charter contains, for Polish adjudicators, only linguistic directives for the understanding and interpretation of national law of statutory rank.

Parties and personal application of the Charter: on one side we have a physical person, who demands the respect of his/her rights regarding a public institution. The Charter of Fundamental Rights is used in support of her rights.

The dispute

With the decision of 8 May 2015 No. (...), the Social Insurance Department in S. refused to MB the remission of debts resulting from the social insurance contributions (...). MB did not fulfil the conditions for redemption, because she did not pay the charges that are not subject to redemption within the prescribed time limit.

MB appealed against that decision, seeking its repeal or amendment. MB said that in the previous decision the pension institution did not mention in the sums that it could not be redeemed (...). She also denied that the pension agency delivered any attachment to the decision, in which such costs had been specified (...).

MB conducted non-agricultural economic activities, however she resigned. (...) On her account by the pension institution (ZUS) there were still debts (...) The District Court in Szczecin changed the contested decision.

Legal basis

In accordance with the provision of Art. 1 paragraph 1 of the Act of 9 November 2012 on the remission of debts arising from unpaid contributions (...) unpaid insurance premiums are freed from charges for the period from 1 January 1999 until 28 February 2009.

What is also relevant in this case is that (...) the law considered explicitly (...) provides two distinct proceedings conducted by the social insurance institution, which end with a substantive decision, namely the procedure for determining the conditions for remission and the procedure for remission of the costs of enforcement.

The provision of Article 1(8) of the remission Act provides that the social insurance institution issues a decision on remission, after the repayment of the sums which may not be remitted.

Factual-legal form of the case (Tatbestand)

The repayment of non-remittal sums in this case did not take place. However, the refusal of the pension institution to remit the debts could not be considered correct. A decision on the matter was not preceded by a decision, which in a lawful manner sets out all the conditions of redemption, which thus the appellant did not fulfil.

Legal argument of the particular case

The administrative decision did not include any decision that determined the conditions of redemption. In this situation, the decision did not contain a necessary element (...) and this deprived them of the possibility of challenging the decision in this regard. In the evaluations of the court, it cannot be recognised in any way that the conditions of redemption have been determined by the pension institution in a written document accompanying the decision (...) and that this determination could be binding. The administrative decision, against which a legal suit may be brought before an ordinary court or a complaint to the administrative court, should include instructions on the admissibility of a legal action or complaint. Neither the provisions of the Code of Administrative Procedure nor any other rules applicable to the matters covered by the remission law made the authority of the pension institution shift part of the mandatory content of the decision to some separate writing with a different title than administrative “decision”.

The argument associated with the Charter of Fundamental Rights

(...) it should be recalled that, in accordance with Art. 87. 1 of the Constitution of the Republic of Poland, sources of universally binding law of the Polish Republic: the Constitution, the statutes, ratified international agreements and regulations. [*Ratified international agreements prevail, according with the Constitution, upon statutes P.P.*]. One of the international agreements ratified by Poland is the Treaty of Lisbon. An integral part of the Treaty is the Charter of Fundamental Rights of the European Union, which - by ratifying the Lisbon Treaty has also been incorporated into the Polish legal system, although with reservations. These reservations, however, do not apply to the provision of Article 41 of the Charter, introducing - as one of the fundamental rights of EU citizens - the right to good administration. The said article introduces among others: the right for everyone to have access to the files of his/her case and the obligation of the administration to justify its decisions.

A similar assumption is also based on the European Code of Good Administrative Behaviour adopted by the European Parliament in 2001. This act is not binding, however, and can and should play a role in the interpretation of other binding legal regulations including, for example, the lining of the contents of Art. 7 of the Polish Code of Administrative Procedure (k.p.a.), according to which "during the proceedings public authorities uphold the rule of law, of its own motion or at the request of the parties, shall take all steps necessary to thoroughly clarify the facts and to settle the matter, as regards the public interest and the legitimate interests of citizens." The Supreme Administrative Court repeatedly interpreted such Art. 7 k.p.a., ordering the public authorities (which include the social insurance institution) the positive settlement of a “just” cause of the citizen if it does not interfere with the public interest and does not exceed the authority deriving from its powers and resources (see. e.g. Judgment Supreme Administrative Court of 28 April 2003, file no. II SA 2486/01). Indeed, only this understanding of this provision fully correlates with the content of the hierarchically superior Art. 2 of the Constitution, which states that the Republic of Poland is a democratic state ruled by law that implements the principles of social justice. In the introduction of the 2013 European Ombudsman's brochure (...) (...), one can read: "The challenge for all institutions, including the Ombudsman, is to instil into all employees, regardless of their seniority, position, and experience the **culture of supplying**

services, which means more than just compliance with the law. It requires that each officer has a certain level of self-reflection and the search for the best way to actively implement the principles of good administration every day, and not only avoid the mistakes of maladministration." In the evaluation of the court hearing the present case, this way of thinking should be the guide for any person interpreting the provisions of law and the demarcation between the obligations of each citizen and the duties of officials of institutions engaged in resolving their specific individual cases. So one cannot specifically endorse a situation in which the institutions of the state (in this case, the pension institution) flip entirely certain activities on the citizen, even though - they could make the necessary arrangements with a minimum effort. Relating this to the realities of the present case, it must be considered that the effect of the pension institution was contrary to the rules described above as "good administration" not only because it broke the rules (in terms of the content of the decision), but also because it created a situation that implies plunging into a kind of trap that prevents the use of the benefits remission bill.

The Court of Appeal

The Court of Appeal in principle agrees with the findings of the court of first instance and adopts them as their own.

Case law of the same line

Apart from the above analysis of this judgment, one may recognise an approach to interpret the Charter which is applied in the same way in other judgments, without being challenged on appeal.